Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Patrick Costello v. The Government of Ireland, Ireland and the Attorney General

On appeal from: [2021] IEHC 600

Judgment delivered on 11 November 2022 **[2022] IESC 44**

Headline

The Supreme Court by a majority of 4-3 (Dunne, Charleton, Baker and Hogan JJ.; O'Donnell C.J., MacMenamin and Power JJ. dissenting) holds that the Constitution of Ireland precludes the Government and Dáil Éireann from ratifying the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") as Irish law now stands.

The Court by majority 6-1 (O'Donnell C.J., MacMenamin, Dunne, Baker, Hogan and Power JJ.; Charleton J. dissenting), also holds that certain amendments of the Arbitration Act, 2010 (as detailed in Part XIII of the judgment of Hogan J.) would, if effected, permit ratification without breaching the Constitution.

Composition of Court

O'Donnell C.J., MacMenamin, Dunne, Charleton, Baker, Hogan and Power JJ.

Judgments

O'Donnell C.J., MacMenamin, Dunne, Charleton, Baker, Hogan and Power JJ.

Background to the Appeal

The EU-Canada Comprehensive Economic Trade Agreement ("CETA") was entered into between Canada and the European Union and its Member States on 30 October, 2016. Certain provisions of CETA have already provisionally entered into force with effect from September, 2017, but the full agreement will not enter into effect until the ratification of CETA by all Member States. It is the proposed ratification of CETA by the Government of Ireland and Dáil Éireann by means of an Article 29.5.2° resolution that forms the subject of these proceedings. To understand the precise nature of this challenge, it is necessary to set out the essence of CETA in addition to some of its more contentious provisions.

CETA is a trade agreement setting the conditions of trade between Canada, and the EU and its Member States in respect of a large number of goods and services. It is, however, the provisions

relating to investor protection and dispute resolution which have been the focus of debate in these proceedings. CETA is an example of an investor-state dispute settlement ("ISDS") treaty. ISDS treaties have become a common feature of international law and practice, in place between nations on both bi-lateral and multi-lateral bases. Broadly defined, under CETA, the Parties agree that "measures" (defined to include legislation, administrative action, and judicial decisions) will not offend against certain principles set out in the Treaty. These principles of equal treatment, non-discrimination, and fair and equitable treatment are to apply to covered investments made within the territory of one of the Parties to the Treaty by investors who are nationals of, or established in, another Party to the Treaty.

In the case of the CETA, the most important of these provisions for these proceedings are set out in Article 8.10 of the Treaty. This provides that a Party breaches the obligation of fair and equitable treatment if a measure constitutes "(a) a denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors such as coercion, duress, and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with [a procedure established under] paragraph 3 of this Article". This procedure allows for a specialist committee to review the content of the obligation to provide fair and equitable treatment and develop recommendations for submission to the CETA Joint Committee, which is in turn empowered to issue binding interpretations of the Treaty obligations. There are further relevant provisions of CETA and recourse should be had to the judgment of Dunne J. for a more thorough explanation of the relevant terms.

CETA also provides for an arbitral process to make determinations in respect of disputes. CETA permits claims to be made by individual investors for compensation in respect of loss suffered by them in circumstances where a measure adopted by a Party is alleged to have breached the provisions of CETA. Chapter 8, Section F of CETA provides for the creation of a standing panel of arbitrators (5 from Canada, 5 from the EU and 5 from third countries, all of whom shall satisfy the standards set for appointment of judges in their respective countries) and a further appellate body staffed by members similarly qualified who are empowered to review the decisions of a CETA Tribunal. This is as opposed to the standard model in ISDS treaties, whereby disputes between foreign investors and host states have been settled by *ad hoc* arbitral tribunals constituted for the specific dispute. Article 8.29 also provides that the Parties to CETA agree to pursue the establishment of a permanent multilateral investment tribunal. Furthermore, Article 8.22(1)(f) and (g) of CETA establishes what is known as a "fork in the road" provision and provides that an investor, prior to commencing proceedings before the CETA Tribunal, must withdraw or discontinue any existing proceedings in domestic or international law and also waive their right to initiate any future claim or proceeding regarding the measure alleged to constitute a breach of CETA.

Under the provisions of Article 8.23, claims under CETA may be submitted under the rules of the United Nations Commission on International Trade Law ("UNCITRAL") Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"); the International Centre for Settlement of Investment Disputes ("ICSID") Convention on the Settlement of Investment

Disputes between States and Nationals of Other States, 1965 ("Washington Convention") or any similar rules. Both Conventions have been ratified by Ireland and awards made in arbitrations under the New York or Washington Conventions are enforceable in Irish law under the provisions of the Arbitration Act, 1980 and 2010, to which the respective Conventions are annexed.

The Constitution envisages that the State may enter into international agreements and Article 29.4.1° confers upon the Government the executive power of the State to do so. However, this power is not without limit, and the appellant in this case contends that the ratification of CETA by the Government is beyond the Article 29.4.1° power unless the matter is first put to the People by way of referendum. The overarching theme of the appellant's arguments concerns the concept of sovereignty. It is contended that CETA is a breach of the internal sovereignty of the State in two principal respects: firstly, the legislative sovereignty and secondly, the juridical sovereignty of the State.

In what may be referred to as the "legislative argument", the appellant contended that the Government is not entitled to accept the "the legal framework established by CETA" without there being a domestic legal framework in place. Article 29.6 of the Constitution provides that no international law shall become part of the domestic law of the State, save as determined by the Oireachtas. The appellant argued that, if the Government were to ratify CETA, this would be effectively allowing CETA to become domestic law without having formally made it so, pursuant to Article 29.6. In addition, the appellant argued that this would also mean that a body of laws made other than in accordance with Article 15.2.1° would determine disputes against the State and be enforceable within the State. This, it was argued, would be unconstitutional, as the sole and exclusive power of making laws is vested in the Oireachtas. Finally, the appellant argued that the ratification of CETA could induce what was termed as a "regulatory chill" on the operation and application of Irish law and policy development. In other words, it was argued that the ability of the CETA Tribunal to make monetary awards against the Irish State may deter the Oireachtas from enacting laws likely to attract such awards. The appellant was particularly concerned about the application of this effect to law and policy in the sphere of environmental regulation. Secondly, in what may be referred to as the "juridical argument", the appellant submitted that the ratification of CETA would fall foul of Article 34 of the Constitution, which provides that justice shall be administered in courts established by law by judges appointed in the manner prescribed by the Constitution. It was contended that, because the CETA Tribunal is given the power to determine a dispute as to whether an act or omission of the State within Ireland breached CETA, and can award monetary damages against the State on that basis which are enforceable within Ireland, the CETA Tribunal is effectively acting as a court but not one established pursuant to Article 34 nor one permitted under Article 37.

The State respondents argued that the CETA agreement is an international treaty which operates at the level of international law and as such, does not constitute the making of law for the State contrary to Article 15. Furthermore, they argued that the determinations of a CETA tribunal would not constitute the administration of justice reserved to courts under Article 34 or bodies constituted under Article 37 of the Constitution. In this regard, the respondents noted a number of international agreements already in existence which permit individual complaints and provide for arbitration and determination by a tribunal, most notably the European Convention on Human Rights which has

significant effects within the State, notwithstanding final determinations made by Irish courts, and does not offend the Constitution. Finally, the respondents argued that the fact that CETA awards are enforceable in Irish law was not a consequence of CETA, but rather the provisions of Irish legislation, such as the Arbitration Act, 2010, which is constitutional, and has not been challenged here.

The High Court (Butler J.) dismissed the appellant's challenge, considering that the provisions of CETA did not amount to a law required by Article 15.2 to be the sole and exclusive domain of the Oireachtas, and the determinations of the CETA Tribunal did not constitute the administration of justice reserved to courts under Article 34, or court-like bodies under Article 37.

Reasons for the Judgment of the Supreme Court

The Supreme Court held:-

(1) (*Unanimously*) the ratification of CETA is not an obligation "necessitated" by membership of the EU for the purposes of Article 29.4.6° of the Constitution and is thus not immune from constitutional challenge;

(2) (Per Dunne, Charleton, Baker and Hogan JJ.) the ratification of CETA would breach Article 34 because it would infringe Irish juridical sovereignty by permitting an international tribunal to make binding decisions enforceable in Irish law;

(3) (Per Charleton, Baker and Hogan JJ.) ratification of CETA would offend Article 5 and the democratic nature of the State by permitting the interpretation and therefore amendment of CETA by the CETA Joint Committee without democratic oversight;

(4) (Per Charleton and Hogan JJ.) ratification of CETA would constitute a breach of the legislative sovereignty of the State (per Hogan J.) by providing for damages awards against the State based on strict liability in respect of laws enacted by the Oireachtas, or (per Charleton J.) by permitting laws to be made for the State otherwise than in accordance with Article 15.2;

(5) (Per O'Donnell C.J., MacMenamin and Power JJ. *dissenting*) ratification of CETA would not infringe the legislative sovereignty of the State (Dunne and Baker JJ. concurring in this respect); and

(6) (Per O'Donnell C.J., MacMenamin and Power JJ. *dissenting*), ratification of the provisions of CETA would not constitute a breach of juridical sovereignty, and (per MacMenamin J. *dissenting*) the challenge to CETA on grounds of an interference with the jurisdiction of courts under Article 34 of the Constitution was premature.

Held further by the Supreme Court:-

(7) (Per O'Donnell C.J., MacMenamin, Dunne, Baker, Hogan and Power JJ.) that the Government and Dáil's ratification of CETA by way of Article 29.5.2° resolution would not offend the Constitution if the provisions for enforcement of awards of the CETA Tribunal under the Arbitration Act, 2010 were amended by the Oireachtas in the manner suggested by Hogan J. in Part XIII of his judgment, although this would be a matter for the Oireachtas;

(8) (Per Charleton J. *dissenting*) that this course was not permissible under the Constitution, as it would contradict the terms of CETA fundamentally and even a protocol to the Treaty enabling this step would be contrary to the Vienna Convention on the Law of Treaties, 1969. This course, furthermore, would not be effective as, on ratification, enforcement of CETA Tribunal awards would become a legal obligation under EU law which would override any domestic legislation.

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case History

29,30,31 March 2022 & 16 June 2022	Oral submissions made before the Court
[2022] IESCDET 1	Supreme Court Determination granting leave
[2021] IEHC 600	Judgment of the High Court **(judgment which was the subject of the appeal to the Supreme Court)**

AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000124
High Court Record No.: 2021/1282 P
[2022] IESC 44

O'Donnell C.J.
MacMenamin J.,
Dunne J.
Charleton J.
Baker J.
Hogan J.
Power J.

Between/

PATRICK COSTELLO

Appellant

AND

THE GOVERNMENT OF IRELAND, IRELAND AND

THE ATTORNEY GENERAL

Respondents

JUDGMENT of Ms. Justice Baker delivered on the 11th day of November, 2022

1. This is a complex and important case, made more difficult by the level of abstraction necessarily involved, as the appeal does not immediately require the application of the law to a set of facts. The questions raised are to a large extent hypothetical and dependent on

the evolution of thinking regarding the Comprehensive Economic and Trade Agreement (CETA).

2. This judgment does not purport to engage in an extensive and detailed analysis of the provisos of CETA, of the legal issues arising, nor of the authorities and literature surrounding the proposed ratification of CETA. I am in the happy position of being able to very gratefully adopt the detailed and eloquent judgments of my colleagues. Rather, I use this opportunity instead to make some observations regarding the issues in the appeal, and to identify my precise answers.

3. I agree with the High Court, and my colleagues in this Court, that the ratification of CETA by Ireland is not "necessitated" by EU membership, and adopt the reasoning of Hogan J. in regard to this ground of appeal.

4. I would allow the appeal on the grounds that CETA is capable of infringing upon judicial sovereignty to an impermissible extent, and I gratefully adopt the reasoning of my colleagues Dunne J. and Hogan J. with regard to that issue.

5. I do not consider that the ratification of CETA is impermissible on account of Article 15 of the Constitution, and I adopt and agree with the analysis of the Chief Justice and Dunne J. regarding this ground of appeal, subject only to the observations I make below at paras 80-85 regarding the power of the Joint Committees to interpret CETA.

6. In my view, the loss of judicial sovereignty is the central issue.

General observations regarding trade agreements

7. The Constitution does not envisage or demand a protectionist or isolationist approach to international relations or to trade. This is clear from the evolved notion of state sovereignty analysed in the judgments of my colleagues. The essence of this sovereignty is the ability and willingness to engage as an equal partner in international affairs, and sovereignty is thus not to be seen as either one-dimensional or a blunt refusal to be influenced

by external actors. It involves an engagement with and openness to other states which can and does impact on domestic policy and thinking.

8. This appeal concerns the limits of that engagement, and whether the ratification of CETA is capable of resulting in consequences that infringe upon the sovereignty of the legislative or judicial organs of state provided for in Bunreacht na hÉireann.

9. The Irish State and the EU enjoy a long and fruitful diplomatic and trade relationship with Canada, the furtherance of which is intended to be beneficial to the domestic and intra-EU economies of the parties to the agreement. This appeal concerns one aspect only of the proposal to ratify CETA, that dealing with the jurisdiction of the arbitral tribunals, and the enforcement of their awards. The balance of CETA, concerning trade, investment and tariffs, has been in operation on a provisional basis since September 2017.

10. The purpose of Chapter Eight of CETA is to afford protection to Canadian investors and those of the Member States from discriminatory or arbitrary expropriation and unequal or inequitable treatment by actions of those states. Such an investor is a party, a natural person or an enterprise that seeks to make, is making or has made an investment in the territory of that state. An investment includes any asset which that investor owns, or controls directly or indirectly, and therefore can include a shareholding or a share in an investment vehicle or fund, which in turn has made such a direct investment.

11. CETA does not envisage a commercial arbitration based on contract where the parties choose to submit to arbitration a dispute regarding their contractual rights and obligations, and where that dispute, wherever and by whomsoever it is resolved, operates within the sphere of private law. The jurisdiction of the CETA Tribunal is different in that it does not arise by reason of an individual contract between an individual investor, the Irish State, Canada, a Member State of the EU, or the EU itself, that each of them will submit a dispute to arbitration. It is intrinsic to the scheme by which a dispute will be resolved by a CETA Tribunal that the covered investor will not be in a contractual relationship with the

state against whom the claim is brought, or at least that such a contract is not a prerequisite to the commencement of the arbitral process, and that jurisdiction does not depend on the privity of contract between the parties to the dispute. Contractual arbitration takes place in a context where the limits of liability and the scope of obligations are confined by agreement and tailored to an agreed objective.

12. The causes of action under CETA are found in Chapter Eight and comprise procedural actions including claims based on manifest arbitrariness, targeted discrimination, abusive treatment but also substantive causes of action which require the making of findings of fact, such as a claim for damages on account of unfair and unequal treatment or for breach of a legitimate expectation.

13. Nothing in CETA will prevent a disappointed investor from mounting a claim in the Irish courts for a remedy arising from the same set of facts that could form the basis of a claim before the CETA Tribunal, should the investor be in a position to establish the elements of the claim that it has been unfairly treated, or was treated in a discriminatory or unjust fashion. Irish domestic remedies are sufficiently robust to meet a claim of an investor who, for example, reasonably expects a particular course of action on account of a representation or promise made at the time the investment was made, or who can show that a domestic state measure is discriminatory, or amounts to an unfair expropriation of its assets. The disappointed investor has a range of remedies available at national level, and a claim by an investor will be heard by an independent and skilled judiciary, and in a legal system which operates in conformity with high principles of the rule of law in a democratic state. The Constitution demands nothing less.

14. By way of example, a claim for damages on account of a breach of a legitimate and binding representation may be maintained in domestic law under the doctrine of legitimate expectation. As a matter of domestic law, a person may maintain a claim for damages who can show that a public body has represented that it would follow a certain practice, from

which a reasonably entertained expectation arose that the public body would act in a particular way in the future, and where it is shown that it would be unjust to permit the public authority to resile from it. This doctrine in Irish law is subject to public policy considerations to avoid the courts tying the hands of the Oireachtas.

15. CETA also makes provision for a claim by a disappointed investor under a general rubric of "legitimate expectation", and the parameters and limitations of the claim are broadly similar to those in Irish law as noted in Article 8.10.4 of CETA:

> "When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a *specific representation* to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied, in deciding to make or maintain the covered investment, but that the Party subsequently frustrated." (emphasis added)

16. Article 8.9.3 of CETA goes on to say;

> "For greater certainty, a Party's decision not to issue, renew or maintain a subsidy:
>
> (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
>
> (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,
>
> does not constitute a breach of the provisions of this Section."

17. The same limitations are not apparent in other international investor protection treaties or agreements. By way of illustration, an International Centre for Settlement of Investment Disputes (ICSID) case, *Cube Infrastructure Fund SICAV and ors v Kingdom of Spain* Case, ICSID Case No. ARB/15/20 (19 February 2019) involved an investor tribunal considering whether Spain had created a legitimate expectation by enacting legislation that created a special regime of benefits and incentives. The tribunal held that there was no need for a direct or specific commitment for a legitimate expectation to arise in a highly regulated

industry. A different decision was reached in *Blusun and ors v Italian Republic,* ICSID Case No. ARB/14/3 (27 December 2016) where a specific commitment was held to be to be necessary.

18. The CETA formulation of "legitimate expectation" is a considered and welcome limitation on the elements of the cause of action.

19. I would observe that, notwithstanding the availability of the CETA dispute resolution mechanism, it is probable that investor claims against the Irish State, or by an Irish investor against Canada, are likely to continue to be prosecuted in domestic courts, on account of their efficiency, their predictability in the application of established, understood and broadly similar legal principles, and because of their relative cost effectiveness. I agree therefore with the Chief Justice that the existence of the CETA Tribunal will not exercise a "gravitational pull" towards the resolution of investor disputes between a Canadian investor and the Irish State, and indeed as is apparent from the *Vattenfall* litigation (*Vattenfall AB and Others v. Federal Republic of Germany (II),* ICSID Case No. ARB/12/12), discussed in more detail below, the resolution of the dispute by arbitration may be less speedy, and potentially more costly, than its process through the Irish Courts.

20. Nonetheless, the constitutional question arising here is the potential that, by providing a different route to a legal remedy, the CETA Tribunals could impermissibly impact upon national sovereignty. While the precise parameters of any likely infringement may be more clearly assessed at the point at which the operation of the CETA Tribunal in an individual dispute comes to be considered, I with respect disagree with my colleague MacMenamin J.'s view that the challenge is premature. Although these issues present in an abstract way, I consider that this Court must here grapple with those issues, as the constitutional role of this Court compels an answer to the ratification question now before us.

The loss of judicial sovereignty?

21. The concern articulated by the present appeal is that proceedings for damages or restitution may be maintained before a CETA Tribunal when an action regarding the same facts is capable of being maintained at the level of domestic courts. It is precisely here that the first difficulty arises with regard to the impact of the creation of CETA Tribunals on domestic judicial sovereignty.

22. It is true, as noted by the trial judge, that the rights and obligations created by CETA operate in international law only, and may not be asserted in domestic courts, but only in the arbitral tribunals established under CETA. CETA principles and rights may not be invoked directly in the domestic legal system of a Member State. This is provided for in Article 30.6;

> "1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.
>
> 2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement."

23. Butler J. expresses this eloquently at para. 154 of the High Court judgment ([2021] IEHC 600):

> "[T]he fact that CETA is expressly framed so as not to have direct effect within the legal systems of the parties and the fact that the CETA Tribunal is separate from and outside the judicial systems of the parties means that disputes arising under CETA which the CETA Tribunal may determine are non-justiciable as a matter of Irish law."

24. It is true too that a claim may not be maintained before a CETA Tribunal unless the investor withdrawals an extant claim in the domestic court, or if no such claim has commenced, waives the entitlement to commence such: Article 8.22.1(f) and (g). But the fact that a claim has concluded before a national court does not, as is discussed below, mean that a CETA claim may not thereafter be maintained by an investor.

25. The circumstances of the *Vattenfall* litigation illustrate this, albeit the claim was made under the Energy Charter Treaty ("ECT"). Legislation passed in the German parliament in 2011 proposed the abandonment of the use of nuclear energy in the country by 2022. The legislation made no provision for compensation to investors. Vattenfall, a Swedish investor in nuclear power plants in Germany, alleged that the operational lifetime of the power plants had been unlawfully abridged, and commenced proceedings in the German domestic courts, and at the same time commenced an investment arbitration against Germany under the ECT. The German Constitutional Court ultimately held that the state was obliged to preserve the legitimate expectation of investors, and further legislation was then enacted which, in turn, required the approval of EU Commission as it potentially infringed state aid rules.

26. The international arbitration claim against Germany under the ECT was for €4.7 billion in compensation on account of the acceleration of the phase-out of nuclear energy. The arbitration was lengthy and, ironically, because it is often perceived or expected that an arbitration will afford an investor a speedier remedy than court proceedings, the arbitration continued for many years until it was ultimately settled.

27. As my colleague Hogan J. noted, the litigation in *Vattenfall* illustrates a matter of deep concern regarding the interplay between an arbitral tribunal and the Court of Justice, but for present purposes the litigation also illustrates a number of factors in international investment litigation: the fact that the same set of circumstances can result in litigation in two fora, an international arbitration and a claim in a domestic court, and the fact that a

legitimate policy decision to phase out nuclear power for considered public health and safety reasons following the Fukushima nuclear disaster exposed the German state to a claim for very large damages by a disappointed investor. The first of these factors is the one I now turn to examine as it concerns judicial autonomy. The second factor relates more to the different question in these proceedings concerning regulatory autonomy or what is sometimes called the risk of legislative "chill".

Choice of jurisdiction is for the investor

28. CETA appears to envisage that, in claims by Canadian investors, the EU will itself be the respondent in most claims before an arbitral tribunal, as the Treaty of Lisbon vested in the EU competence over trade agreements and foreign direct investment. It is apparent that the ratification of CETA is intended to further the desire expressed in Article 207(1) of the TFEU for "uniform principles" in the conduct of this "external action."

29. However, it is clear from the jurisprudence of the CJEU that CETA involves mixed competences or is a mixed agreement. While in practice it might be the case that most claims would be brought directly against the EU, or against Member States and the EU jointly, the fact remains that the investor tribunal under CETA will have the jurisdiction to make awards against the Irish State without the involvement of the EU as a defendant or respondent in those proceedings.

30. CETA envisages an investment arbitration court, the Investment Court System (ICS), which will be staffed with full time adjudicators or judges. The mode of appointment of the arbitrators and the requirements of impartiality and independence have hitherto not been found, or at least has not been common, in investor dispute arbitration under Investor-State Dispute Settlement (ISDS) to date when a separate arbitral tribunal is constituted for each case and that tribunal is not linked to any centralised legal authority. This is a welcome and positive choice, and allays some fears expressed by some academic writers concerning the

make-up of the arbitral bodies. The ICS structure is designed to deal to an extent with the arguments concerning the independence and impartiality of CETA arbitrators.

31. The primary difficulty I apprehend with the CETA Tribunals is that a Canadian investor has a choice of jurisdiction: it may pursue an action in the CJEU, in the Member State, or before the CETA Tribunal. Proceedings which have not concluded in the Member State must be discontinued before a claim may be submitted to CETA, but there is no restriction on the right of an investor who unsuccessfully litigates in Ireland from then submitting a claim to CETA. The dispute then, on the same facts, will come to be adjudicated upon in two different fora and under two different standards with potentially quite different results.

32. If a Canadian investor seeks to resolve a dispute relating to a measure of the Irish State, the framework provided by the CETA dispute resolutions system would allow a dispute to bypass the Irish legal system, and seek relief in regard to that measure which is also within the jurisdiction of the Irish courts.

33. The CJEU in its judgment in *Slowakische Republik v. Achmea BV* C-284/16, EU:C:2018:158), was concerned with this question, which it formulated as one concerning the possible impact on the autonomy of EU law. The Bilateral Investment Treaty ("BIT") dispute resolution mechanism under consideration in this case was competent to give a final and binding interpretation of EU law. The Court ruled that the intra-EU investment agreement (CETA is not one such) was not in conformity with EU law because it could call into question the autonomy of EU law as the tribunal might be called upon to rule on the basis of domestic law or international agreements applicable between Member States, but nonetheless could not make a referral to the CJEU under Article 267 TFEU. The CJEU in *Opinion 1/17* (ECLI:EU:C:2019:341), subsequently confirmed that the investment tribunals under CETA, because they are precluded from interpreting EU law, did not subtract from the autonomy of the CJEU (para. 122).

34. The Court of Justice in *Opinion 1/17* concluded that a claim brought to the CETA Tribunal under CETA rules, laws or principles are not justiciable in the courts of the Member States because a litigant could not invoke those principles, rules, or laws in a domestic court. This is true insofar as it goes, but CETA creates an additional or alternative forum in which that litigation can happen.

35. I agree therefore with Dunne and Hogan JJ. that the vesting in the arbitral tribunal by CETA of jurisdiction to determine investor disputes against the State has the potential to remove from the Irish courts the jurisdiction they currently enjoy to resolve and determine those claims. Whilst the resolution by the CETA Tribunal would involve the application of different laws and principles, the subtraction or removal of jurisdiction arises because the arbitral tribunal will have the power to adjudicate upon state actions that occur within this State and to make findings of breach of obligations by the Irish State arising from the same facts that might ground proceedings in the Irish courts. As I turn now to examine, the possibility of a real, and in my view impermissible, breach of judicial sovereignty arises because the CETA award is "almost automatically" enforceable within the State, so that there may be cases where the award flies in the face of a final decision of the national court, or of a principle fundamental to our laws.

Automatic enforcement

36. It is intrinsic to CETA investor protection that the Member States will recognise and enforce any final awards of the CETA Tribunal. This factor is tied to the fact that CETA arbitral awards against the State will be enforceable in Ireland in a manner correctly described by Butler J. as "almost automatic". The range of available defences is narrow, and enforcement may be denied in a limited range of circumstances such as lack of notice to a relevant party.

37. This factor is critical to an understanding of the place of an arbitral award in the domestic legal order. It is possible by reason of the fact that an award of an arbitral tribunal is automatically enforceable in the Irish courts, that the consequence of an arbitral award could be that the Irish High Court, Court of Appeal or Supreme Court, might be compelled to enforce an arbitral award that ran directly contrary to a finding already made by a court of last resort in Ireland. It is not in my view fanciful to imagine that an investor who fails in an Irish Court to obtain an award of damages on account of an unlawful state action, such as occurred in *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6, [2017] 1 IR 119, might seek and obtain damages before a CETA Tribunal which would then come to be enforced in Ireland. The Irish court hearing an application for enforcement could not in the light of the provisions of CETA and the Arbitration Act 2010, as amended, refuse to enforce the award notwithstanding that in doing so it would contradict a decision of the Irish court on the same facts.

38. The CJEU in *Opinion 1/17* was concerned with one question only, the compatibility of the dispute resolution mechanism in CETA with the autonomy of the EU legal system. It was not concerned with the law or constitutional order of the Member States, nor with the enforceability of the award of such Tribunal, and the fact that a CETA award will be enforceable under the New York Convention or the Washington (ICSID) Convention under the Arbitration Act 2010, is central to the correct understanding of how the CETA award will operate in Irish law.

39. I agree with the High Court (para. 150 of the judgment of Butler J.) that the CETA Tribunal will exercise the function of the administration of justice. However, I depart from her reasoning in that my view is that the ratification of CETA will have the effect of detracting from the jurisdiction of the Irish Courts. I consider that it is the combined effect of the scope and effect of the jurisdiction of the CETA Tribunal and the fact of automatic,

or "almost automatic", enforcement that makes the jurisdiction in a CETA Tribunal problematic.

40. The fact that leave is required to enforce an arbitral award under the Arbitration Acts 2010 does not in itself give the Irish courts power to refuse enforcement save in the very narrow sphere of statutory defences that are available and have been interpreted in a number of cases including that of Kelly J. *Brostrom Tankers AB v Factorias Vulcano SA* [2004] 2 I.R. 91. One cannot in my view read the decision to ratify CETA in isolation from the Act of 2010 and the fact that either the New York or the Washington Conventions is envisaged as the enforcement mechanism. This is not to say that the Act of 2010 is constitutionally frail, because s. 24 and 25 provide no more than a procedural enforcement mechanism. But in its present form, the Act of 2010 does not offer a sufficient safeguard to permit an Irish court hearing an application to refuse enforcement, where to do otherwise would risk the domestic court enforcing an award that conflicts in a material respect with a decision already made in a domestic court of final instance, or with a fundamental principle of our laws. The constitutional structure for which Article 34 provides is not protected in such circumstances.

Domestic law is a matter of fact

41. Thus far, I have concluded that the CETA arbitral provisions are capable of impacting upon the jurisdiction of the Irish Courts in two respects. A further difficulty presents as CETA expressly provides that Canadian law, EU law, and the law of an individual Member States, must be treated *as a matter of fact*, and precludes the CETA Tribunal from interpreting that law or making any determination on the legality of such law. Article 8.31.2 of CETA provides that "the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party", which is understood to mean that it does not engage with the reasoning of the domestic court, the principles behind the impugned statute or common law.

42. In *Opinion 1/17*, the CJEU examined the meaning of Article 8.31.2, finding that in relation to European Union law, "in order to assess whether there is an infringement of [CETA] … the Tribunal will have to confine itself to an examination of EU law as a matter of fact and will not be able to engage in interpretation of points of law." (para. 76). The Court went on to hold that the decision of CETA will, because of Article 30.6, have no direct effect in domestic legal systems, because they "operate within legal orders that are wholly separate" (para. 77).

43. In *Opinion 1/17* at para. 122, the Court held;

> "It follows that the power of interpretation and application conferred on that Tribunal is confined to the provisions of the CETA and that such interpretation or application must be undertaken in accordance with the rules and principles of international law applicable between the Parties."

44. Advocate General Bot's opinion in this case was that the limited scope of review or appeal meant that the Tribunal must interpret the parties' domestic law "as little as possible." (para. 150).

45. But that proposition cannot be said to operate as a universal restriction. While CETA nominally prohibits CETA Tribunals from engaging in interpretation of domestic law, the Court of Justice acknowledged at para. 131:

> "[T]he CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure."

46. It is unclear how this "examination" would work in practice. If an investor challenges a newly-introduced legislative measure, and chooses to bypass the domestic legal process as

permitted under CETA, there will be no "prevailing interpretation" of domestic law available to a CETA Tribunal.

47. The case of *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Decision on Jurisdiction - 14 Apr 1988), acknowledged this lack of clarity when called to resolve a dispute involving an Egyptian measure, stating;

> "As to [Article 8 of Law No. 43 of 1974] itself, the Claimant's contention that this provision of municipal law should be treated as a "fact" is not helpful. The Parties are in fundamental disagreement as to what Article 8 means and the Tribunal therefore must interpret Article 8 and determine its legal effect in relation to the Washington Convention." (para. 58).

48. Thus, if parties to an CETA arbitration are not in agreement as to the meaning of a domestic measure, it will be necessary to resolve this dispute, and this in my view necessarily involves the interpretation of domestic measures. The CJEU in *Opinion 1/17* which held that the power of interpretation was confined to the provisions of CETA did not deal with this separate question of the interpretation of domestic legal provisions when there is no apparent "prevailing interpretation" of domestic law, or where there is disagreement as to what it means.

49. The fact that the meaning of national measures may be contested before a CETA Tribunal is considered in *CETA Investment Law*, edited by Bungenberg and Reinisch. At pages 733-734, the authors explain this difficulty:

> "Considering domestic law as fact suggests that it will be up to the disputing Parties to submit relevant evidence such as domestic case law. Hence, the Tribunal would not be obliged to base its appreciation of domestic law on material beyond the sources provided by the disputing Parties, Consequently, when deciding questions of domestic law, the Tribunal may also take into account the burden of proof which is for the disputing Parties to discharge."

50. The authors note that there may be "exceptional circumstances" in which the Tribunal would have to depart from the interpretation provided by the respondent state, such as where a state puts forward a manifestly incorrect interpretation of its domestic law, but the true difficulty it seems to me is that if there is a contest as to meaning, the tribunal will have to resolve that dispute and itself come to a view as to the meaning of a domestic provision. In turn that meaning informs an award that comes to be enforced in the domestic court, even if the meaning attributed to a domestic legal provision is manifestly wrong.

51. The problem is compounded by the power of the appellate tribunal to review awards on the grounds of "errors in the application or interpretation of applicable law" as well as on grounds of "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law". This will invariably require the appellate tribunal to consider the meaning of a particular provision of domestic law, and to "appreciate" its nuances (Article 8.28.1). That means that the arbitral tribunal and in particular the appellate tribunal, could not be said to be engaged in the exercise of "neutrally" applying domestic law as a matter of fact, particularly in the context of a common law jurisdiction where the understanding and application of the law invariably, and of necessity, requires argument and the distinguishing of different threads in every principle.

52. In his long article, *Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union* (McGill Journal of Dispute Resolution Vol. 7 (2020-2021) No. 4), Leo Butz makes some observations regarding the meaning of the requirement in CETA that national law be considered "as a matter of fact". I agree with his observation that all consideration of law necessarily entails some form of interpretation (at p.115). The meaning or proper interpretation of Irish domestic provisions when these are either contested, or not yet established, is to be gleaned from a reading of case law and judgments, the import of which

is often not possible to discern except in its application to a particular case. *Opinion 1/17* affords little assistance in regard to this more difficult interpretative method.

53. Whilst Article 8.31.2 clarifies that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party" and is consistent with the fact that CETA cannot be directly invoked in the domestic legal systems, and complements the prohibition of parallel domestic court proceedings pursuant to Article 8.22.1(f) and (g), the fact that this interpretative power is one capable of being engaged is a direct encroachment on domestic law and a subtraction of the power currently vested in the Irish courts as the sole interpreter of domestic law, precisely because the CETA award is enforceable irrespective of the correctness of the underlying interpretation of domestic measures.

Risk of discordance

54. Another problem also presents from the decision of the ISCID Tribunal in *Vattenfall*, mentioned above. There, the Tribunal was considering the implications of the CJEU decision in *Achmea* that the BIT investor dispute mechanism was incompatible with EU law. The Tribunal decided that it did have jurisdiction, notwithstanding the view of the CJEU in *Achmea*, holding that the principles of EU law were not applicable to the interpretation and application of the ECT because the applicable law was that of that Treaty itself and Article 25 of ICSID.

55. At paragraph 167 of the Decision on the *Achmea* Issue, ICSID Case No. ARB/12/12 (31 August 2018), the Tribunal said:

> "EU law and the ECJ judgment [in *Achmea*] may not be "taken into account" for the purpose of the so-called harmonious interpretation of Article 26 ECT that would exclude intra-EU investor-State arbitrations."

56. The law of the ECT prevailed, notwithstanding the view of the CJEU that the ECT provisions could not be invoked in an intra-Member State dispute. Butz anticipated this problem and notes the uncertainty regarding what should happen if an investment court bases an award on an erroneous understanding of CJEU case law, or in circumstances where there is not yet an established interpretation of a provision of EU law that is relevant as a matter of fact to the decision of the investment court.

57. The *Vattenfall* ruling shows that the Tribunal considered its jurisdiction to be wholly independent of, and to operate outside, the law of the EU, and wholly in the international sphere, to the effect that the findings of the CJEU could not and did not influence the result of the jurisdictional question.

58. This is a most disquieting result, especially when seen against the backdrop of the almost automatic enforcement in domestic law of a potentially large award by a CETA Tribunal, under an erroneous interpretation of Irish law, and where the Irish courts have not afforded an opportunity to interpret those laws. The net effect is that a CETA Tribunal can make an award that entirely ignores Irish domestic law, save and insofar as it must consider this as a "matter of fact' and where the tribunal itself must resolve any dispute as to the meaning of that "fact" which inherently entails some form of interpretation of domestic law.

Exhaustion of domestic remedies

59. There might be concern that the approach of the majority of this Court regarding the CETA Tribunal might impact on the State's accession to the ECHR and the jurisdiction of the European Court of Human Rights (the "ECtHR"). The decisions of the ECtHR, whilst not enforceable in domestic law, will be, and historically have been, accepted by government and remedies have been afforded to litigants who are successful in the Strasbourg court. The awards bind the State at an international level but not in domestic law.

60. A significant element, which is both procedural and substantive, of the jurisdiction of the ECtHR to hear a complaint against a state is that the litigant has exhausted domestic remedies. No such requirement exists for an applicant before the CETA Tribunal. The requirement to exhaust domestic remedies respects the fundamental role of the national judicial systems (and domestic law) in the operation of the Convention. But the matter goes further than this and the Strasbourg Court is to be seen as being engaged in a dialogue with the national court, and has available the reasoning and detailed treatment of the facts and legal principles underlying the claim. This not only has the effect of crystallising the problem, and discarding any undergrowth of irrelevant or secondary facts, but the Strasbourg Court has the benefit of the assessment, reasoning and arguments of the domestic courts, and will have regard to the reasoning of the domestic court, even if this is only to disagree, or find that for reasons of principle it must depart from that reasoning, or agree only in part. The dialogue between the domestic court and the Court in Strasbourg is a mutual dialogue of reasoning and the mutual respect for the separate sovereignty of the other.

61. The CETA Tribunal will have no such dialogue. It is to treat domestic law as a "matter of fact", which must mean that it does not engage with the reasoning of the domestic court, the principles behind the impugned statute or common law. Law operates within the realm of reasoning and a reasoned discourse is an essential element of its legitimacy.

62. It may seem almost ironic that the feature of the CETA dispute resolution mechanism that led the CJEU to conclude that the sovereignty of the EU legal order would not be impacted by the existence of the dispute resolution mechanism for which CETA provides, is that important feature of the relationship between the ECtHR and the Irish courts which affords respect for sovereignty.

63. The practice of the Strasbourg Court is not to be seen as one of procedure only, and the requirement of the exhaustion of domestic remedies is a substantive element of the jurisprudential basis of that Court's decision making. The Convention in its operation

recognises the sovereignty of domestic courts. The dialogue that exists is seen as fundamental to the system, both because national authorities, including courts, must respect the Convention, but also because the Convention in turn respects national courts and the role of national judges. The principle of subsidiarity is an express principle European Union law but is also embedded in Convention thinking (see paper entitled *Subsidiarity: a two-sided coin?* – Jean-Marc Sauvé, Speech at Seminar to mark the official opening of the ECtHR 30 January 2015).

64. The Court in Strasbourg does have a power to interpret domestic law although it will use that power very sparingly. In *S.A.S. v France* App no. 43835/11 (1 July 2014) the Court observed:

> "national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight" (para. 129).

65. Under the Convention, the national authority must have the fullest opportunity to address a Convention complaint before that complaint can be admitted to the ECtHR. In contrast, the CETA Tribunal has no such principle, no "margin of appreciation" can have an effect on the result, there is neither procedural nor substantive recognition of the reasoning of the domestic court, nor of the reasons behind domestic law.

66. The CETA Tribunal has no dialogue or engagement with the reasoning of the domestic court, or the reasons behind the principles of domestic law in the relevant area.

67. The possibility of different results from domestic courts and a CETA Tribunal resulting from the same dispute, and the resulting tension is troubling, but what is more troubling is the fact that the CETA Tribunal would not engage with the reasoning and principles operating in domestic law, and are not engaged in the type of dialogue envisaged

in the ECtHR where competing interests and a recognition of the sovereignty of national courts affords a more complex approach to sovereignty than the rather blunt system established in CETA.

68. In an article published in 2014, *"Study on Investor States Disputes Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law"* (at pp. 91-92), Hindelang suggests that a more societally acceptable approach might be to require that an investor do exhaust local remedies before proceeding to arbitration, subject to the provision that the "local remedies rule" could be relaxed where an argument can reasonably be made that the domestic system falls short of certain criteria previously specified in an investment instrument.

69. CETA does not *encourage* the use of domestic courts, albeit the potential problem created by parallel claims in domestic and international fora is dealt with in part only by the requirement to waive domestic claims before pursuing arbitration. The absence of such a positive approach to domestic law to my mind means that the sovereignty of domestic courts is not sufficiently acknowledged or recognised in CETA.

Preservation of the Right to Regulate/Chill and Article 15 of the Constitution

70. CETA recognises the right of contracting parties to regulate for legitimate public policy objectives. The text of CETA is an improvement on that found in other international treaties, where no such express reservation is usually found. Any measure in the form of a law, regulation, rule, procedure, decision, administrative action, requirement practice, or any other form of measure by a state actor is one capable of giving rise to a claim by a qualifying investor. In turn, Article 8.9.1 of CETA is an affirmation of this right to regulate by domestic authorities, and this in itself is a recognition of sovereignty and is unconditional. It does not mean that damages are not recoverable by an investor arising from such regulation, but rather

means that the economic interest of the investors are balanced with the sovereign rights of states to regulate.

71. In *Opinion 1/17*, the CJEU was considering *inter alia* whether the fact that the CETA Tribunal will in essence be balancing the business interests of an investor against the public interest in regulation undermines the constitutional framework of the EU (para. 137). The Court was satisfied, in particular because of Article 8.9, that the constitutional framework of the EU was preserved because the investor tribunals could not "call into question the level of protection of public interest determined by the Union following a democratic process" (para. 156). The CJEU went on to say that the tribunals have no jurisdiction "to call into question the choices democratically made" (para. 160), and notwithstanding that the investor tribunal can award damages on account of the taking of those sovereign steps.

72. The CETA Tribunals could award compensation, but they could not direct a state or the EU, to amend, withdraw or not enact legislation. The CJEU considered that the Member State's capacity to operate autonomously was therefore not infringed.

73. Much of the critical literature on CETA has as its focus the risk that an award made by a CETA Tribunal could have a chilling effect on domestic legislation, and concerns are raised as to the real risk that environmental legislative action, especially in the context of climate change and the implementation of Paris Treaty carbon obligations, might be delayed or abandoned. "Chill" in this context is not merely the direct effect on domestic law of an award to a disappointed investor on account of the enactment of the provision. "Chill" can also be anticipatory, as is illustrated by the fact that New Zealand lawmakers are said to have delayed the planned imposition of plain packaging for tobacco products pending the completion of the Philip Morris investor claim against the Australian government (*Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12).

74. The fact that a CETA claim can result in the award of compensation where Irish domestic law would not, for example when no *mala fides* can be shown in the regulatory decision, also can impact on national policy making because the arbitral tribunal has no obligation to consider the reasons for, or the reasonableness of, a domestic measure.

75. Take but one example, a government who propose to enact environmental legislation should be in a position to ascertain the likely risks of a claim arising from a complete ban on the cutting or the using of turf in electricity generating stations. This is a live topic in the context of environmental protection, and a legislature contemplating the enactment of such legislation may feel itself constrained in its decision-making if it is not readily apparent on examination whether there exists a possible risk of a claim by a Canadian investor in a domestic bog which could result in the State being liable to pay compensation as a result of the discontinuation of cutting or the burning of turf. This is precisely what happened following the decision of the Supreme Court of the Netherlands in *The Netherlands v. Urgenda* (ECLI:NL:HR:2019:2007), where German coal suppliers mounted a claim under the ECT against the government of the Netherlands for breach of their legitimate expectation that they could expect to continue to supply coal to Dutch coal burning stations. That claim remains unresolved, but it is a useful illustration of the type of claim that could be brought, and of the possible impact on legislative and executive decision making, or the domestic implementation of EU obligations.

76. A government deciding to close a coal or turf burning power generator, or acting on an EU requirement to do so, may later be faced with an unintended and unanticipated consequence, such as war or financial catastrophe, for which no provision was made in that decision. All decisions involve the closing of certain doors, and choices made which either expressly or implicitly preclude or are capable of precluding other choices.

77. Whist my colleague Hogan J. makes an eloquent argument regarding the potential impact upon legislation of a claim under CETA by a Canadian investor, I consider that the

"chill" effect does not of itself impact upon legislative autonomy. I agree with the Chief Justice and with my colleague Dunne J. that that the risk of a direct or indirect chilling effect on legislation does not make the ratification of CETA impermissible because the power to make legislative choices is not impaired. CETA does not make laws for the State so as to evoke the provisions of Article 15 of the Constitution.

78. The ratification of CETA does not for this reason in my view result in the making of laws for the State nor is there a direct impact upon the powers of the Oireachtas, or indeed of executive decision-making, within its permissible realm.

The Joint Committees

79. The role of the Joint Committees is two-fold: to interpret CETA: Article 26.1.5(c); and the power to "adopt interpretations of the provisions of the Agreement, which shall be binding on" the CETA investor tribunals: see Article 26.1.5(e).

80. The fact that the Joint Committees may provide a binding interpretation of a provision of CETA involves the loss of democratic control over the text of CETA and is troubling for that reason.

81. The power of amendment has been invoked on foot of a recent request by the Federal Government of Germany in regard to the meaning of "fair and equitable" treatment in Article 8.10, which has resulted in a proposal that could, if it were adopted, limit the scope of a challenge to state action to combat climate change and which *inter alia* requires the CETA Tribunal to "take due consideration" of the climate neutrality objectives of the parties to the Paris Agreement, and in a manner that "allows the Parties to pursue their respective climate change mitigation and adaptation measures".

82. The request from the German Federal Government was for a "more precise definition" of the concepts of "indirect expropriation" and "fair and inequitable treatment" of investors. A draft text of a binding interpretation has been agreed between the

Commission and the German Federal Government which is proposed to be submitted to the Member States for agreement. The modified text improves the respect for the sovereignty of the Member States and the EU both in regard to the legislative and judicial functions. For example, the CETA Tribunal may take notice of the existence of a remedy at national law which was not availed of by an investor, and this answers some of my concerns arising from the absence in the current text of a positive encouragement to avail of domestic remedies. Further, the more restrictive scope of the grounds of challenge are capable of addressing the perceived risk of legislative "chill" in climate legislation.

83. The concern is that the interpretative function is one that is in practice capable of altering the text of CETA and the mutual obligations of the parties without any democratic input from the sovereign states, and I agree with my colleague Hogan J. that this has an impermissible impact upon national sovereignty.

84. The fact that the meaning of the text of CETA may be determined by the Joint Committees illustrates the lack of democratic accountability in the ongoing analysis of scope and meaning of the text of the treaty.

85. I do not say that the interpretative powers means that the Joint Committees can make legislation. Rather, the problem I perceive with this broad power of the Joint Committees is that the interpretative function can result in a change to the text. Whilst I agree that the purpose of the establishment of the Joint Committees, as the Chief Justice notes in his judgment, may be to prevent overreach by an arbitral body, and to limit the risk the possibility of inconsistent or unduly expansive interpretations, the powers of the Joint Committees are not constrained in their exercise by this objective. The *realpolitik* of the inter-EU relations may, and almost always would, restrict or limit an overreach, but the potential exists that the interpretations could involve an alteration of the text of the Treaty without full agreement by the Member States, and without domestic oversight.

Possible way forward

86. I have carefully considered the analysis of Hogan J. that proposes the amendment of the Arbitration Act 2010 and I agree with him, and my five other colleagues that a suitable amendment may be, subject to the views of the Government and of Oireachtas, capable of providing a solution to a constitutional challenge. By providing a power in the Irish Courts to review in certain cases a decision of the arbitral tribunal before enforcement, the Irish Courts may be capable of protecting the constitutional identity of the Irish courts.

The questions raised in the appeal

87. I propose therefore the following answers to the questions identified by Dunne J. in her judgment:

1. Is ratification of CETA necessitated by membership of the EU? **No.**
2. (a) Is ratification of CETA incompatible with Article 34 in the basis that it impermissibly withdraws disputes from the jurisdiction of Irish Courts? **No.**

   (b) Is ratification of CETA incompatible with the finality of decisions of the Irish Courts under Article 34? **Yes.**
3. Is ratification of CETA incompatible with the legislative sovereignty of the State under Article15.2? **No.**
4. Is Ratification of CETA incompatible with the democratic nature of the State under Article 5? **Yes.**
5. Would amendment of the Arbitration Acts permit ratification of CETA? **Yes.**

An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
MacMenamin J
Dunne J
Charleton J
Baker J
Hogan J
Power J

Supreme Court appeal number: S:AP:IE:2021:000124
[2022] IESC 44
High Court record number 2021/1282P
[2021] IEHC 600

Between

Patrick Costello
Plaintiff/Appellant

- and -

The Government of Ireland, Ireland and the Attorney General
Defendants/Respondents

Judgment of Mr Justice Peter Charleton delivered on Friday November 11th 2022

1. This dispute fundamentally concerns access to justice, the control of law that will bind the State and the impetus through the setting of fundamental principles to the unpredictable development by inevitable judicial activism into realms that the Irish people have not voted for and over which they will have no control. As such, the European Union-Canada Comprehensive Economic and Trade Agreement, commonly called CETA or otherwise the treaty, whether passed by the Government in exercise of its authority over foreign relations, or, as is here proposed, by an Article 29.5.2° resolution, constitutes a clear disregard of the Constitution. A solution is proposed by the majority of legislative control through amendments to the Arbitration Act 2010, which, it is posited, may give a wide discretion as to the enforcement of CETA tribunal awards to the judiciary. That solution, on the analysis offered here, is insufficient. Further, any such proposal requires a protocol to the CETA treaty which, because of its fundamentally contradictory nature to that text, may not be possible.

2. Since this judgment was written after those of O'Donnell CJ, Dunne, Baker and Hogan JJ, and with the purpose of indicating reasons for dissent from the reasoning of O'Donnell CJ, MacMenamin and Power JJ; concurrence, at least in part, with the analyses offered by Dunne, Baker and Hogan JJ; and dissent from the majority view that legislation may possibly cure the constitutional infirmity of the text and operation of CETA, it is best considered after first reading those judgments.

Operation of CETA

3. Rather than assuming knowledge, and in the light of the complexity and number of the judgments in this case, a simple exposition of what CETA does may help.

4. CETA gives a new and extra-constitutional legal mechanism to Canadian investors in Ireland who feel wronged either by the actions of judges in deciding cases or who feel that legislation passed by the Oireachtas has been unfair to them. The treaty is reciprocal: Irish investors in Canada have the same entitlements through what is effectively a parallel jurisdiction to that of the Canadian law and courts. That legal mechanism is based on broad principles of fairness. If a company registered in Canada purchases an Irish gas field and if development consent and foreshore licences are refused under Irish law, the Canadian investor may claim an unfairness in an Irish court under Irish law, as made or carried forward by the Oireachtas from the pre-1922 law. That would be a direct challenge to the law made in this jurisdiction. By contrast, the mechanism under CETA is an extra-jurisdictional body called a tribunal and those decisions can be appealed to an extra-jurisdictional body called an appeal tribunal. If the Canadian investor takes a court case and that goes against that plaintiff, even on appeal to the Supreme Court, the investor can go to the extra-jurisdictional body and claim unfairness or lack of transparency. The job of the tribunals is to rule on such a claim. Once the ruling is made extra-jurisdictionally, the ruling becomes the same as a private arbitration award and must be enforced in Ireland against Ireland, or perhaps outside of Ireland (if that is possible in international law as against a sovereign state, which is very doubtful). That monetary award, or in exceptional cases a restitutionary award, must be enforced by our High Court.

5. The law applied by the tribunals is set out later on in this judgment. The point about it is that there are in reality no laws, only vague principles. As this judgment states later on, the principles inevitably will become laws. But these will not be laws passed democratically in Ireland but rather through legal development extra-jurisdictionally. One aspect of the vague principles is that the interpretation of what these mean is, under CETA, the job of a body of Canadian and EU appointed experts called the Joint Committee. They interpret and put sinew and muscle onto the bones of principle adopted by the treaty. That law becomes binding: but by no democratic process in which the Irish people participate. Our Constitution requires the people, under God, to be supreme in all decisions and that the Oireachtas has sole law making power; Article 5, Article 6 and Article 15.2.

6. At the moment, a decision of the tribunals must be enforced in the High Court. As this judgment analyses later, there is in reality no discretion to refuse to enforce the award on constitutional grounds. When, or if, the treaty is ratified and brought into law, any such minute ground of refusal will be nullified completely because the treaty will be a

European Union law obligation and hence a necessary part of Ireland's duty of fidelity and cooperation. There is no way out of that, at all.

7. References in this judgment to CETA, to the Joint Committee and to the first-instance tribunal and the appeal tribunal are against this brief background. The two big issues are whether this kind of arrangement could be compatible with the Constitution and whether the solution proposed by the majority might work. The point above as to necessity post-ratification says not. In addition, there are other points as to the law of treaties, protocols and a reservation that fundamentally negates an international agreement.

8. Of course, investments are usually made by private parties with other private parties and sometimes one such private party may be the State. But what is at issue here is who deals with disputes and how laws and decisions can be overturned extra-judicially. The amounts may be small but they may also be enormous. The purchasing power of very rich corporations markedly increased with the net of very low to zero interest rates following on from the financial crisis of 2007 and onwards.

Reason for this dissent

9. Ireland has a legislature. Ireland has a judiciary. Both may make mistakes but neither are unworthy of trust, either by an investor in business from Ireland or from Canada or from any other country. Experience in commercial litigation over many years demonstrates that nationals of Ireland or of any other country are treated equally by the judiciary. Experience of living in this country establishes that the legislature does not engage in abusive legislation against foreign investors.

10. CETA sets up a supra-legislative body through the Joint Committee with unlimited powers of interpretation of a vague set of principles within the treaty. The Joint Committee makes laws. These override the exclusive law-making powers of the Oireachtas. That process is in no way democratic.

11. The CETA tribunal and appeal tribunal may overturn a decision of any Irish or Canadian court on the basis of such elastic concepts as discriminatory or unfair conduct and such concepts may be stretched without limit through ordinary tribunal interpretation or through rulings of the Joint Committee. That is to set up a supra-national legislature and a system of final adjudication by persons appointed as tribunal members which is extra-judicial and above the untainted judicial systems of Canada and Ireland.

12. CETA tribunal awards will be automatically enforceable in the High Court in Ireland and in Canada. In Ireland the discretion, on constitutional grounds, for refusing to enforce what are likely to be gigantic awards is so vanishingly small as to be reduced to nothing. That is, as the law now stands. When the CETA treaty is fully ratified, enforcement of these extra-judicial awards becomes a necessitated obligation of European Union membership and vanishes altogether.

13. The majority posit that a potential solution is the amendment of the 2010 Arbitration Act to expand the grounds for judicial refusal to enforce a CETA award. The grounds for that legislative change cannot override the necessitated obligation of European Union membership. Even if that were legally possible, to have a discretionary ground for refusal

to enforce a CETA tribunal award would operate as a fundamental contradiction of the treaty itself. Even the insertion, at this stage, of a protocol based on the protection of the constitutional tradition of Ireland would be so far reaching as to fundamentally contradict the CETA treaty itself; something impossible under the Vienna Convention on the Law of Treaties (1969).

14. This dissent is now presented in the light of authority of precedent and of legal reasoning.

Canada

15. No legal scholar could entertain opinions of the Canadian legal system other than those consistent with the highest feelings of respect. When it comes to the Canadian judiciary, the universal experience of judges from this jurisdiction who interact with colleagues from that jurisdiction is of admiration for their seriousness of purpose, professionalism and innovatory approach to training and to the management of serious cases. Since justice is a divine concept administered as an ideal through the medium of frail humanity, it can never be said that any legal system is perfect. Indeed, a key marker of excellence in any judicial system is the honest appraisal of where incremental change has possibly led to excessive expense, rules that require reform, the ill-treatment of litigants and witnesses and the need to revise rules and procedures, coupled with an ever-present desire to reform.

How principles develop into laws

16. Since the unqualified direct effect principle in respect of European Union treaties was first developed in Case 26/62 *Van Gend en Loos*, the fundamental legal principles upon which European law is based have been developed by the European courts, emerging through judicial activity over decades in individual cases. These include those of requiring respect in the administration of law for fundamental rights recognised in the legal systems of the Member States (Case 29/69, *Stauder v City of Ulm*), proportionality of action where citizens' entitlements are adversely affected, legal certainty in the construction of laws (developed at the Union level in cases such as Case 98/78 *Racke*), legitimate expectation where unequivocal promises are made that are not contrary to law (recognised as "undeniably part of Community law", per Lenz AG in Joined Cases 63 and 147/84 *Finsider v Commission*; see further Eleanor Sharpston, Legitimate Expectations and Economic Reality (1990) 15(2) EL Rev 103), procedural justice (see the discussion on the right to be heard in Case C-277/11 *MM* at [82]-[87], including the recognition of the right prior to its affirmation in the Charter of Fundamental Rights of the European Union in cases such as Case 374/87 *Orkem v Commission*), the precautionary principle (as seen in cases such as Case C-405/92 *Mondiet*; for further discussion of the development and background to this principle, see Case T-13/99, *Pfizer Animal Health v Council* at [114]-[116]) and the key aim of equality (while this also was explicitly recognised in treaties and legislation, Tesauro AG in Case C-13/94, *P v S and Cornwall County Council* suggested that non-discrimination operated as a general principle of EU law even prior to the introduction of the Treaty of Amsterdam); generally, see Craig and de Búrca, *EU Law: Text, Cases and Materials* (7th edition, Oxford, 2020).

17. These principles already having been identified by judges, as has often happened in the common law system, legislative intervention has gathered these into statutory format. Many of these, consequently, have been given more concrete expression, while leaving

these earlier case decisions untouched, through Chapters I-IV of the Charter of Fundamental Rights of the European Union (7 December 2000). In aiming at a fundamental purpose in the implementation of European Union law, the preamble rises beyond rhetoric in the aims set:

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

18. Chapter VI reaffirms the fundamental principles of justice upon which the European legal order is founded, concepts that had already emerged explicitly or tacitly from the decisions of the European courts. Thus, concepts familiar from Norman times are reiterated in the right not to be tried twice for the same offence (*autrefois acquit)*; the standard before a citizen may be condemned for a crime alleged; the right to a defence (Article 48) and to legal aid (Article 47); legality and proportionality (Article 49); and the preservation of general principles underpinning criminal law (Article 49). Article 47 guarantees all persons within the European Union the right to justice:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

19. While the Charter applies only in the implementation of European law, the very familiarity of the principles evokes norms that are the opposite of novel or strange. On the contrary, these are embedded in the legal systems of all twenty-seven nations that participate in the European project of a shared future through cooperation and through fidelity to those inescapable principles that guarantee justice.

20. Nor should it be forgotten how long such rules were in development, or the zeal of the legitimate struggle for justice, or how court rulings on the grant of rights established a bedrock of genuine law that has only been shaken through takeover by totalitarian and un-dismissible governments. A mark of anti-democratic regimes has been a deceptive adherence to external legalism. In contrast, the European legal order is genuine, is certain and is predictable.

21. Ireland shares those values. It is for scholars to say how such principles derived from European law as equality have influenced the Irish legal order (in that instance, profoundly), but what was once a notable lacuna in our law may now sound more harmoniously with other rights of general European origin which have been reflected in the general principles in the Constitution since 1937 and which have since been developed and applied through the work of the Irish judiciary. It is to that fundamental document that allegiance is sworn by way of solemn declaration by Irish judges, pursuant

to Article 34.6.1°. Into this legal order comes the Comprehensive Economic and Trade Agreement as a voluntary external choice of jurisdiction available to Canadian investors in Ireland that is, at their unfettered choice, set apart from the Irish courts regulated by Articles 34 to 37, as part of our democratic order as established by Articles 5 and 6 and incorporating the principles of nationhood.

Trust

22. Entering a business relationship, as partners to an enterprise, or as joint promoters of a plan, implies a high level of trust among the participants. Few enough such relationships go to the bad, when the perils of failure or external pressure undermine viability, but, even still, the risk of which business people are ever aware is backed up through written agreement as to what is to transpire should goods or services not be delivered, the measurement of damages and, quite often, a choice of law where an international element is present, and the means of ruling as to whether a wrong has been committed; which is usually through a court system or by means of a private arbitration.

23. On an international level, history demonstrates that investment by powerful non-governmental players in countries which suddenly have available enormous sources of wealth, perhaps through the discovery of oil or other minerals, have been advanced through the device of conferring immunity from local law on foreign actors or through the creation of courts specifically designed to bypass national jurisdiction. Concession areas have been in the past created where a foreign power has complete jurisdiction, as if operating within its own national sphere, inside another state's territory. Another model, historically, and an equally unhappy one, has put the nationals of foreign investor states outside the competence of local courts.

24. In modern times, some states, whose national resources are offered for development by outside commercial interests, have been known to set up an internal court on their own territory but staffed by a combination of local and foreign judges applying either a code of commercial law already in existence in another state or commercial law from England or America. The Comprehensive Economic and Trade Agreement follows a different model. An investor can choose, when it is alleged that an investment has gone wrong, to pursue litigation according to national law in Ireland and before the courts established by Articles 34 to 37 of the Constitution, or may decide, instead, to bring a claim before a CETA tribunal or may pursue a claim before the Irish courts, including an appeal to this Court, declared to be the sole court of final appeal under Article 34.5.6°, and then assert a breach of the basic law established by CETA before a CETA tribunal and thus overturn the Irish courts system. It may be wondered as to what is so wrong with the legal order under which Ireland operates and pursuant to which the EU operates that would require the proffering to commercial investors of a system for the administration of justice which is both completely parallel to that operating in any EU Member State and which may override the ruling of an Irish or European national court? An Irish or other EU investor in Canada would have parallel choices.

Principles of CETA law

25. What follows concurs with the judgment of Hogan J in chapter XI of that analysis. While other judgments have analysed the overriding or the parallel nature of the jurisdiction of the CETA tribunals, a feature which undermines a key tenet of national independence involves the making of law through the Joint Committee that interprets

the fundamental principles of investor protection. It is to the Oireachtas that the "sole and exclusive" law making power is reserved by the Constitution under Article 15.2.1°. In the Irish text the emphatic nature of this is even clearer: "Bheirtear don Oireachtas amháin leis seo an t-aon chumhacht chun dlíthe a dhéanamh don Stát". Where is the line drawn that establishes a clear disregard, see *Burke v Minister for Education* [2022] IESC 1, of the Constitution? There is no infringement, certainly, of Article 15.2 for the State, through the treaty, to guarantee equal treatment to foreign and local investors. That guarantee is one of equality and by the treaty providing as follows at Article 8.6.1, no constitutional infirmity is engaged:

> Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

26. Thus, restrictions based on nationality or origin of investment through artificial persons is forbidden under CETA. Ratification of such provisions would be a legitimate exercise by the Government of the power under Article 29.4 of the Constitution. A similar view may be taken as to the vast bulk of the provisions of the treaty. The line of clear disregard is drawn, however, at the establishment of an independent and evolving law and superior judicial tribunals. These are fundamental. A state is established as to independence not just by its defined territory, population, right as to the admission or exclusion of other peoples, ability to conduct foreign relations and exclusivity of policing and military competence; but also by the exercise of law-promulgating competence and by judicial dispute resolution. That is not to say that laws from other countries might not be adopted in aid of cooperation, or that a currency may not be shared, together with the obligations of support that might in consequence arise (*Pringle v Government of Ireland* [2012] IESC 47, [2013] 3 IR 1): but what undermines sovereignty is that the right to make laws is alienated and that the national judiciary may be overruled in an enforceable manner by a foreign tribunal. That is not to rule out international cooperation where the nature of laws or availability of relief for wrongs is subject to review through a political mechanism by an outside tribunal which is not enforceable save through governmental decision.

27. All students of the development of human rights laws will be aware that as straightforward an obligation as that contained in Article 3 of the European Convention on Human Rights, the prohibition against subjecting anyone to torture or to inhuman or degrading treatment or punishment, may become through judicial development an instrument whereby abuse by a teacher in a nationally funded, but not controlled, school may be ascribed to the State; *O'Keeffe v Ireland* (App No 35810/09, 28 January 2014) (2014) 59 EHRR 15. Similarly, within the Constitution what is meant by trial "in due course of law" in Article 38.1 has assumed the status of a founding principle which supports a vast body of case law, all of which, as pointed out by Baker J in the context of the interpretation generally of Irish law, requires detailed interpretation. By that process and at the same time as the duration of the original principle, a simple rule now has a multiple of sub-rules of a definite character and binding effect. Reverting to the Constitution, the issue of whether the fluoridation of water as an aid to dental hygiene might be challenged out of fears of unexpected consequences led to an interpretation that found rights tacitly within the text in consequence of the wording of the Article 40.3

guarantee of the State to respect and vindicate "the personal rights of the citizen" while "in particular" protecting named rights to "life, person, good name, and property". Consequently, unenumerated or implied rights have over decades been found, declared and used in the protection of human rights by the courts; *Ryan v Attorney General* [1965] IR 294 to *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 and see Hugh Gallagher, Environmental Constitutionalism After *Friends of the Irish Environment* (2022) 25 TCLR and, in particular, the discussion on derived rights having a "root of title in the text or structure of the Constitution".

28. A similar development of statement of a principle in a fundamental text spawning multitudes of binding legal rules is rooted in the 9th Amendment of the US Constitution whereby the enumeration of certain rights is "not be construed to deny or disparage others retained by the people" and the 14th Amendment, which provides that no state government may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Over time, and through judicial cultivation, such fundamental principles became the soil from which it takes only one decision to identify a range of enforceable norms; for instance, choice of schooling and privacy (each, in itself, a vast corpus of law).

29. The simplest of principles, once stated as a law, can be expected, due to its utility and to the ingenuity of disputatious reasoning within the adversarial system to which CETA subscribes in the operation of the dispute resolution tribunals and appellate tribunal, to give rise to multiple interactions with other legal norms and, consequently, alter what the prior understanding might have been. Where will this go? Here, the obvious example is the identification of the neighbour principle giving rise to duties not to be negligent. Whereas first stated in the most straightforward of terms by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 as to who to have in mind when acting or not acting, this principle has led to liability for negligent statements where the parties are in a special relationship (*Bates & Moore v Minister for Agriculture, Fisheries and Food* [2018] IESC 5) and to the formulation and revision of basic principles which may now be regarded, almost a century later, as settled; *University College Cork v Electricity Supply Board* [2020] IESC 38. The debate in that litigation over the simple issue of flooding might be reduced to a debate over whether the principle of "do not worsen nature" in constructing and operating a dam might hold where the finding of a duty of care, coupled with a foreseeable risk of damage and conduct by act or omission that is negligent might give rise to liability. Even still, in the modern formulation of responsibility for negligence, considerations of public policy as to the appropriateness of imposing liability for damages might override responsibility in law for careless conduct; *Glencar Exploration plc v Mayo County Council (No.2)* [2001] IESC 64, [2002] 1 IR 84, Keane CJ at 138-139. Nonetheless, considerations of the appropriateness of a public policy component in terms of the chilling effect on decision-making did not lead this court to declare the battlefield outside the legal sphere of civil liability where a commanding officer is found by a judge, outside that situation of utmost stress, to have made a mistake in the direction of soldiers; *Ryan v Ireland* [1989] IR 177. This is not to doubt any decision: rather it is to doubt that the principles laid down in CETA will remain within defined boundaries. That treaty, as will be seen, sets out basic principles but, by inevitable action, leaves the development of them to the CETA judiciary, loosely called, and, even more obviously, to the Joint Committee which has a formal, and binding, duty of interpretation.

30. In *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6, [2017] 1 IR 119 at issue was the extension of liability in negligence into an area where it never before held sway.

Such has been the power of the straightforward principles of negligence that the definitional elements have altered, almost like the manner in which the most frequently used vocabulary in a language becomes inflected from the original rules. A further and obvious danger with negligence became apparent over decades through alternative pleading as to the source of law as between the explicit terms of a contract and negligence or, worse, where settled rules in tort as to liability for misfeasance in public office or even the most self-contained rules such as those in the law of defamation are sought to be displaced; such as replacing liability in publishing an inaccurate statement with an issue as to care. This is the very issue that this Court warned against in *Cromane Seafoods*. That warning cannot be regarded as misplaced since, to take one example, the clear rules as to occupiers' liability existing at common law were overtaken by a tide that proposes that the simple negligence principle can sort all issues of liability for damages.

An example

31. An example of the development of law in this manner arises from the Unfair Dismissals Act 1977. By that legislation, employees have the right not to be dismissed, excepting substantial reasons of lack of competence or qualifications. But from that simple principle a body of case law has arisen in what used to be the tribunal set up under the Act, but with a re-hearing before the Circuit Court, and which is now the Workplace Relations Commission, with no such right to have the case re-heard by an actual judge; see *Zalewski v Workplace Relations Commission* [2021] IESC 24. But the point here is that as regards decisions of the tribunal and its successor, of the Circuit Court, and the High Court, which used to be the final port for re-hearing, there is a body of law developed as to procedures and as to what constitutes a dismissal for lack of competence or qualifications. That is an inevitable growth from the conferral of a simple principle as a rule of law. Generally, see Desmond Ryan, *Redmond on Dismissal Law* (3rd edition, Dublin, 2017). Another example is equality law, based on a germ concept that has established, over time, a body of legal rules; see Bolger, Bruton and Kimber, *Employment Equality Law* (2nd edition, Dublin, 2022).

Fundamental principles as a genesis for concrete law

32. In that context, it is therefore useful to quote what will be the foundational legal principles which, if human nature is not to be bypassed by the operation of the CETA tribunal, will become a corpus of law through individual ruling. So, while the treaty is not to directly affect Irish law, to adopt the analysis of Dunne J on the relevant provisions, nor is it to comment upon or to use our law save as an issue of fact, nonetheless Article 8.5.1 of CETA provides a new system of law. Hence, while the Member States, the European Union and Canada are all to accord in their "territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security", these are specified in language that is not unfamiliar from the basic texts of various national fundamental laws and which are expressed thus in Article 8.10:

> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
> (a) denial of justice in criminal, civil or administrative proceedings;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) manifest arbitrariness;

> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment; or
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
>
> 3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.
>
> 4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
>
> 5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to the physical security of investors and covered investments.
>
> 6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
>
> 7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

33. But, it is not the text that is the issue but the implications of the text. Whoever is to decide what, for instance, may be "manifest arbitrariness" or the implications of an allegation by a Canadian investor that an Irish law, or the application by an Irish court of the common law as to a rule of tort, might amount to a denial of "fair and equitable treatment," this will not ultimately be carried out by the courts established under Article 34 of the Constitution. The CETA tribunals have that power. It is a power vast in its potential. Furthermore, while the development of law through judicial interpretation is grist to the mill of litigation and may amount in due course to policy choices or might in reality be called out by some as judicial law-making, that is not what our fundamental law has signed up to outside the recognised and careful confines of the common law; see the brief discussion in *The People (DPP) v McNamara* [2020] IESC 34 at [24]-[30], [2021] 1 IR 472 at pp 492-497. Perhaps Oliver Wendell Holmes in the Lowell Lecture in Harvard in 1880 on the inner workings of the common law claimed the revelation of some home truths in asserting the following, but what he said about the process of judicial law-making cannot, within limits, be gainsaid:

- The common law changes but it does so in a way that hides what it is doing. The judges making the decision claim that they are just applying rules but in fact the judges are inventing new explanations for existing rules and applying them as the needs of the case require.
- When judges make law, judges make policy. What tort law is about is finding rules that allow businesses to function by requiring only reasonable care in

avoiding injury to workers. The consequences of an accident lie with a plaintiff unless that plaintiff can show a want of ordinary care, in which case the plaintiff recovers damages. But, what is ordinary care? In reality, the judges set the standards and then apply these to other situations.

- While, for so long, people felt that the law was based on morality, since it was first administered in church courts, in reality there was no point in trying to delve into a person's mind. Instead, the law concerned itself with setting external standards. The judges set these and defined them and everyone was expected to come up to that standard. A common standard is that of "the reasonable man". This is a judicial policy standard and a judicial decision.

Ceding control to the Joint Committee

34. It is the ceding of part of our sovereignty to have adjudicators sitting on a tribunal deciding, to use the example cited by Hogan, Dunne and Baker JJ, whether the rule expressed in *Pine Valley Developments Ltd v Minister for Environment* [1987] IR 23 that liability does not arise for an administrative decision beyond the scope of statutory authority unless a recognised tort is also identified, is to effect an alteration to Irish law. The tort to be identified is either negligence or the misfeasance of a public official of office, through malice or the knowing misapplication of a rule. That law would be established in frailty before a general allegation of such a wide principle as unfairness. Yes, something may be ostensibly unfair, but the law can be difficult to comprehend in seeking to establish rules of justice for society generally. Article 8.31.1 of CETA is indicative of the forward-looking and overarching power involved:

> When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

35. The State is not entitled to cede sovereignty beyond the constitutional limits that have been set out by this Court in *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713 and *Pringle*. To cooperate internationally is one thing, but it was made clear in *Crotty* that the State was not entitled to cede sovereignty, distinguishing between such a cession and an agreement to technical changes to an existing agreement, the latter of which would be permissible under Article 29. In *Pringle*, ratification of the European Stability Mechanism Treaty in pursuit of a shared currency was held to not constitute an unconstitutional transfer of sovereignty, further defining the constitutional limits in relation to the cession of sovereignty by the State. In concurring with Dunne, Hogan and Baker JJ, the reality must be affirmed that CETA tribunals are a parallel jurisdiction outside the Constitution and not authorised by Article 29 as a governmental exercise in international relations. Decisions of the CETA tribunals are not necessarily final since Article 8.28 of CETA provides for the appointment of an appellate tribunal whose powers to "modify or reverse the Tribunal's award" mirror those of appellate courts under the Constitution. The grounds for modification or reversal must be based on:

> (a) errors in the application or interpretation of applicable law;
> (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;

(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

Judicial power as a necessary component of legal norms

36. Two further points might usefully be made. Firstly, under Article 34.5.6°: "Ní bheidh dul thar breith na Cúirte Uachtaraí i gcás ar bith" that the judgment of this Court is final and conclusive, or, to literally translate, one cannot go beyond it. In claiming a different logic as to constitutional norms, it is sought to be asserted, by the State in defence of CETA, that being part of the European Convention on Human Rights and thus subject to that Court is a permissible exercise in foreign relations and that consequently a reanalysis by a CETA tribunal of what this Court has decided in dismissing liability under Irish law but finding for a claim for damages within the text of Article 8.5 of the treaty is not going beyond the judgment of the Supreme Court. In that regard, the decision raised in argument of *O'Keeffe v Ireland* is asserted as a parallel to the work of a CETA tribunal. It is correct that this court in *O'Keeffe v Hickey & Ors* [2008] IESC 72, [2009] 2 IR 302 decided that there was no direct or vicarious liability where a male teacher, in a two-teacher national school, abused children in circumstances where there was no indicator, before the parents wrote seeking the input of a well-known advice column in a Sunday newspaper and held a meeting, to the authorities that this person was a menace. As mentioned above, the European Court of Human Rights in reliance on the development of the principle of exhaustion of local remedies away from the text and in the application of Article 3, held otherwise. There is a vital distinction between CETA tribunal rulings and decisions of the European Court of Human Rights. In common with CETA tribunal rulings, certainly, such decisions do not interpret or apply Irish law and do not have the capacity to alter the rulings of judges appointed under Article 34 of the Constitution; in contrast to CETA tribunal rulings, those of the European Court of Human Rights are not made directly effective through the process described by Dunne and Hogan JJ. The acceptance of such rulings amounts to political decisions by the Government. In the political sphere, a scheme of compensation, as in *O'Keeffe*, may be set up and such damages and costs as are assessed in Strasbourg paid. Another marked difference is the non-acceptance of the extraordinary level of costs that litigation in an Irish court entails. Instead, the Strasbourg court sets a level consistent with litigation on the European mainland and which is rationally set. The same applies to the level of damages; again, these tend to conform to European norms. Of course, in any individual case, the Government will accept the rulings from Strasbourg. But the Government responds on the political level. In contrast to CETA, the Government may leave the Council of Europe rather than implement the effects of a decision. CETA tribunal awards are directly effective and are as immutable as commercial arbitration awards. Once CETA is entered into, its effects last for 20 years for existing investments where a party leaves.

37. A second point concerns direct effect and procedure. Article 8.28.7 of CETA provides for the establishment of an appellate tribunal for decisions of the first instance tribunal through a decision of the Joint Committee. Through that decision "administrative and organisational matters regarding the functioning of the Appellate Tribunal" are enabled. While these include logistics as to administrative support and what might be called rules of court there is also a power under sub-paragraph (g) to put in place "any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal." For the purposes of bringing a claim before the tribunal, meaning at first instance, existing domestic or international proceedings must first be discontinued. For such claims, a choice is available to the parties of rules under ICSID or

UNCITRAL or any other rules "on agreement of the disputing parties." Rule 36 of the ICSID Rules, to choose but one of these, provides that it is for the tribunal to "determine the admissibility and probative value of the evidence adduced"; that each "party has the burden of proving the facts relied on to support its claim or defense"; and that the tribunal "may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding." Special applications may be made for discovery of documents based on principles of timeliness, materiality, burden of compliance and the nature of any defence.

38. While it is well-known that most courts in continental Europe do not apply discovery of documents obligations on parties to litigation, Ireland and Canada do, but with a varying degree as to the burden to search and produce through different but related tests. In contrast to an application, as it properly is called, to the European Court of Human Rights, and in marked contrast to the rule under the Convention that national remedies must first be exhausted, litigation before a CETA tribunal may be brought by way of a challenge to the ruling of an Irish court or it may be the exercise by a Canadian investor of the full and original jurisdiction of that body. What is to be done about orders in aid of litigation? That question would arise most acutely where an action is taken against the State on one of a wide range of legal possibilities under Article 8.5 of CETA. It is to be presumed, perhaps, that with the ordinary obligation of candour on the State, and the State's special obligation of cooperation, this will seldom cause any issue. But, where a property, perhaps an ore body, is sold to a third party when a Canadian investor departs from Ireland, by what means would the kind of order made in *Bula Ltd v Tara Mines Ltd* [1987] IR 85, [1988] ILRM 149 of inspection and drilling on a property be made? It is also worth noting that the reasoning of Murphy J in that case can be seen as a classic example of how the power of the courts to control litigation in the interests of seeking a true and just result has enabled a range of orders that infringe on individual rights to be developed. That power in aid of justice had first led to the identification by courts of the discovery procedure and has involved the development of wide-ranging powers. This does not just apply to the State. Third parties, not just the State and the investor, may be involved through the jurisdiction established in *Norwich Pharmacal Company & Ors v Customs and Excise* [1973] UKHL 6, [1974] AC 133. A similar stream of judicial reasoning is displayed in *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779, where, as Lord Denning explained, such an order in preservation and production of documents does not give parties to litigation the right to enter and seize evidence, but while the "Plaintiff must get the Defendant's permission," that "brings pressure on the Defendants to give permission. It does more." That is explained as an order to permit entry, inspection and seizure on the basis of a very strong case, with a risk of serious damage coupled with evidence of an intent to thwart justice. The result is that in failing to give permission, a court order is broken.

39. What must be remembered is this: investments, after all, are made by private parties, not the Canadian government, with other private parties in Ireland, and therefore orders in aid of litigation inevitably must encompass parties other than the Government. CETA, in granting power to the Joint Committee to make rules of court, loosely so called, has a more extensive power than may be noticed on first reading; but which would be apparent to anyone experienced in litigation.

Legislation and legislating

40. The bare nature of the principles which neither the Canadian nor the Irish governments may infringe lead to a second question, the answer to which is found in CETA. The treaty requires interpretation. Interpretations by the Joint Committee are binding. There is no democratic input. There is no limit, even within the treaty, delineating limits beyond which the powers of interpretation cannot to. In Ireland, the Constitution sets the limits of what the Oireachtas can legislate for. The Constitution is, furthermore, the ultimate boundary beyond which legislation cannot go; the final delineator of jurisdiction; see the judgment of Charleton J in *Burke v Minister for Education* [2022] IESC 1 [28].

41. The general principles of fairness, in CETA provisions, contains an imperative to move into a legal format of actual rules whereby a wrong by the Canadian or Irish governments against an investor may be identified and applied. It is all very well to have a treaty which says that a government, Canadian or German or Irish, must act fairly and in consequence the treaty has provisions for interpretation. So, what is involved is not just judicial interpretation in individual cases (like the incremental process of common law reasoning, or at least it so may be hoped), but rather the meeting of the Joint Committee, of persons appointed by the EU and Canada, to interpret the treaty itself: that of course includes the defining, refining and statement in rules of the fundamental principles of law quoted above. Article 26.3 of CETA is initially cast in an enabling format. It provides that the Joint Committee "for the purpose of attaining the objectives of this Agreement" should "have the power to make decisions in respect of all matters when this Agreement so provides." But this is followed by a statement that such decisions of the Joint Committee "shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them. The CETA Joint Committee may also make appropriate recommendations." Under Article 26.1.5(e) the joint committee is to "adopt interpretations of the provisions of this Agreement". These interpretations are "binding on" the tribunal and the appellate tribunal.

42. Hogan J reasons the manner of the operation of the Joint Committee in terms of the amendment of CETA as an infringement of Article 5 of the Constitution, essentially because while Ireland participates in the European Council as to the amendment to the treaty itself, the interpretive power under CETA lacks democratic accountability. Where, after all, may this go? In concurring with that analysis, regard should again be had to the bare nature of the principles set out in CETA at Article 8.10.2. What is the interpretation of the legal rule against arbitrariness? By what means is "a fundamental breach of transparency, in judicial and administrative proceedings" to be given legal life through definite rules? While putting beyond argument that misconduct by a court enables access to the CETA tribunal, thus making it clear that local remedies do not have to be exhausted and the tribunal has both full appellate jurisdiction and original competence, the lack of transparency as to where the decisions will lead becomes also apparent in the vesting of power to legislate outside the constitutional norm in Article 15.2 and Article 6 of the Constitution. Fundamentally, the Joint Committee operates without any boundary. This body makes law. Law for what happens in Ireland. What is the limit of its interpretative power? To what body or to what adjudicative process may appeal be made should Ireland or Canada or Germany or France react with deep dissatisfaction with an interpretation, in essence a law passed by no legislature, which is made by the Joint

Committee and which binds the participating states? There is none. There is no limit. There is no democratic participation. There is no control. There is no appeal.

43. There are perhaps two main ways in which legislation and judicial decision interact. Where the law, for instance, of tort, or the criminal law, takes a turning within the common law sphere of judicial interpretation, legislative intervention may alter that course. An example would be the intervention of several parliaments whereby the defence of provocation reducing murder to manslaughter has been either abolished (as in New Zealand) or has been reduced to statutory elements that do not reflect prior court decisions (as in England & Wales); some of these are mentioned in *McNamara*. Rules as to contract may be similarly altered whereby the nature of what is reasonable may assume statutory definition with respect to such matters as the relationship between a bank and its customers; see SI 27 of 1995, since amended, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, in turn giving effect to Council Directive No 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Another, and most welcome, legislative exercise is towards the consolidation of existing rules within a statutory format. New jurisdictions in the Victorian era adopted much of the model criminal code of Sir James FitzJames Stephen, but this in turn was based on the legal rules adopted through the decisions of judges. The Sale of Goods Act 1893, with precise and detailed rules as to, to take some instances, sale by sample, merchantable quality, rights of the seller, performance, or the implication of terms, fully held sway in this jurisdiction until the Sale of Goods and Supply of Services Act 1980, yet to those cognisant with the pre-1893 decisions of English judges, the majority of the rules would be familiar. Consolidation and codification are tasks for legislatures.

Two powers

44. Two powers are at work under CETA: the tribunals of first instance and of appeal will interpret vague principles to give them life as particular and precise rules; and there can be no doubt that reference back to prior decisions will establish a degree of predictability over time as the elements of an embryonic code; and the Joint Committee will ensure that definite form is put on the principles already stated through interpretation and may come to a point where a consolidating ruling may put the existing rulings and interpretations into a codified form.

45. Over time, no doubt, perhaps decades, the Member States of the European Union will know somewhat more exactly, if not precisely, what rules governments in Canada and the European Union may not infringe or what principles of law may put their actions in peril of the award of damages by the CETA tribunals and judges may know the nature of the transparency demanded in their handling of litigation. All of this is familiar in countries abiding by the rule of law under a written constitution. In reality it is legislating. But that process is under the Constitution a democratic one. Interpretation through judicial power has limits and the presentation of vague principles breaches those limits and removes disputes from the jurisdiction of the Irish courts. Interpretation through the Joint Committee in a manner which binds the CETA tribunals is even more obviously a legislative act which infringes Article 15.2 of the Constitution; see the judgment of Hogan J at [205]-[211].

Necessitated: pre-ratification

46. As of the present, when CETA has not yet been ratified by all Member States of the EU, and brought into force, there is nothing in Article 29.4.6°, whereby "no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State … necessitated by the obligations of membership of the European Union," that makes it automatic that a ruling of the Joint Committee has the force of law as to the conduct of the alternative and supervening jurisdiction of the tribunals or that a tribunal judgment thereby becomes automatically enforceable. Other judgments treat the method of enforcement of the tribunal or the appeal tribunal under ss 24 and 25 of the Arbitration Act 2010 as being subject to a residual discretion. No argument has been advanced which puts enforcement as being beyond doubt in the same way as statutory instruments adopted out of necessity to make European law effective in the jurisdiction, which take on immunity from challenge because of the necessity principle; see *Meagher v Minister for Agriculture* [1994] 1 IR 329, [1994] 1 ILRM 1 and *Maher v Minister for Agriculture and Food* [2001] 2 IR 139, [2001] 2 ILRM 481.

47. While there may be some issue as to the degree to which, for instance, an amendment of the time limits for bringing a summons in respect of the analysis of animal remedies banned under European law, the essence of what the courts were concerned with in the above cases was the duty of sincere cooperation, which first arose through the decisions of the Court of Justice of the European Union, initially in Case C-230/81 *Luxembourg v European Parliament*, and is now under Article 4(3) of the Treaty on European Union, whereby an obligation to have in force a law within the State arises. This may be characterised as an obligation, as in *Lawlor v Minister for Agriculture* [1990] 1 IR 356, or a broader view as to what enables European law to have effective force in the jurisdiction may be taken in the interpretation of what is necessitated within the meaning of Article 29.4.6°. On no view is an unratified treaty which is not yet adopted by the European Union an instrument which imposes an obligation on the State. Hence scrutiny of CETA cannot be bypassed through resort to a claim based on the duty of fidelity of a Member State.

Necessitated: post-ratification

48. But, what of post-ratification? As of the present, experience indicates strongly that enforcement of an arbitral award under s 25 of the Arbitration Act 2010 is as automatic as is possible within the Irish legal system. Hogan J refers to that legislation as having been "conscripted into service" in the enforcement of CETA tribunal awards. Of itself, certainly, that legislation is the most convenient method of enforcing an arbitral award. It does not accord with the case decisions to describe the High Court as having any kind of autonomous discretion; *Micula v Romania* [2020] UKSC 5, [2020] 1 WLR 1033. When a discretion is spoken of as to enforcement of an arbitral award covered by the 2010 Act, what must be taken into account is that a judicial discretion is not a whim or the exercise of a feeling. Rather, every exercise of discretion in law develops into a series of rules whereby if a test is met a ruling will be made one way or the other. The only principles whereby a properly grounded arbitral award might be refused require the party resisting to demonstrate fraud. That would be close to impossible and experience in the High Court on lists concerned with the enforcement of commercial arbitration awards demonstrates the automatic nature of such orders and the dearth of any real defence to a claim where an arbitration was conducted properly and on notice to the losing party.

49. While Hogan J lists, and justifies by reference to case law, other potential grounds apart from fraud, the view taken here is that grounds such as a fundamental

misunderstanding of the factual, or legal basis, are so close to impossible consequent on a properly run arbitration as to shade towards non-existence. It might also be remarked that speculation as to what the grounds for refusal might be risks, in itself, mirroring the mischief which the CETA rule of law, as properly it may be called, has established as the jurisdiction for action of its own tribunals. Hence, it may be wondered as to how a failure of due process before the CETA tribunals could possibly ground the High Court in validly refusing to enforce an award where the issue before the tribunal might possibly have been an assertion under Article 8.10.2 of CETA that our judicial system exhibited a "fundamental breach of due process". Similarly, apart from actual fraud, something which one would expect any competent tribunal to uncover, is not lack of regard to the facts or the law an infirm potential for refusal of an arbitral award where the very arbitration was, in the first place, concerned with a "denial of justice in criminal, civil or administrative proceedings"? If, in this context and as a principle, *per incuriam*, is the ignoring of a prior authority or a mistaken view of the law by the CETA tribunal, this doubles back into the danger already noted of the growth of a parallel and increasingly defined body of CETA law outside of the democratic process. While the refusal of an arbitral award on the basis that it amounts to a contradiction of the judgment of an Irish court may arise as a possibility in respect of commercial arbitration, the very point of CETA in reviewing the level of justice in the courts established under Article 34 is to do just that and precisely that.

50. Returning to the *Meagher*, *Maher* and *Lawlor* cases, it should be remembered that upon ratification, it will be not the principles of Irish law that operate but the duty under CETA to enforce awards. That will be binding on the Irish courts as an integral part of European law. The question may simply be asked as to whether there is an obligation necessitated by EU membership to enforce an award, notwithstanding that the tribunal has overridden a decision of an Irish court, or has been based on the consolidation of multiple tribunal decisions into a code, or has approached the analysis of domestic law on the basis that in itself a rule is a denial of justice? While enforcement is required to be delayed for 120 days once a tribunal has issued an award, to enable "revision or annulment of the award" within the CETA tribunal jurisdiction, Article 8.41 of CETA makes such an award "binding between the disputing parties and in respect of that particular case." Furthermore, it is incompatible both with discretion and with any residual national role for the Irish courts that Ireland as "a disputing party shall recognise and comply with an award without delay." In that regard, in referencing the possibility that "enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award", the prospect might be thought to arise that there might be grounds within the text of CETA enabling such revision. It is clear, however, that any such prospect is overridden by such awards being "governed by the laws concerning the execution of judgments or awards in force where the execution is sought." Such an award is deemed to be a claim "arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention" or "a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention."

51. Hence, the obligation of enforcement of tribunal awards becomes, once CETA is fully ratified, one under European law. The grounds of enforcement-refusal are limited to Article I of the New York Convention or those even more limited grounds under the ICSID Convention, as at present all that can be challenged under ICSID is the authenticity of the award in question. That position post-ratification must be borne in mind when recourse is had to any analysis of what is asserted by the majority of this

Court to be a possible remedy. Since abiding by CETA and in particular enforcing the awards of the CETA tribunal will be an inescapable necessity post-ratification, amending domestic law to make that necessity a matter of discretion cannot work.

Legislative remedy

52. A majority of the Court holds that ratification (and it follows upon ratification by all the EU Member States, incorporation into Irish law) of CETA is not the proper exercise by the Government of its powers to engage in international relations under Article 29.4 of the Constitution. Automatic enforceability of CETA awards, leaving aside the diminution of legislative sovereignty under Article 5 and 28.2, the bypassing of the courts system under Article 34 and the finality of decisions of the Supreme Court under Article 34.5.6°, makes this system part of the "domestic law of the State" under Article 29.6 and this requires that this not be done "save as may be determined by the Oireachtas." A majority of the Court proposes that an amendment to the Arbitration Act 2010 would bring into play a sufficient discretion whereby, were our constitutional order to be offended by either the nature of a CETA tribunal award or by the manner in which a rule of Irish law was elided in favour of a principle based on the vague assertions upon which such tribunals act, or whereby the ruling of the Joint Committee set up a rule of law inimical to national law, that a legislative provision widening judicial discretion in not enforcing such a finding domestically would suffice to give CETA constitutional validity.

53. Since that same majority, of which this analysis is part, holds that there is a clear disregard of the constitutional order, it is posited that a discretion to refuse the enforcement of a CETA tribunal award based on offence to constitutional principles, would cure the defects sufficiently to enable the adoption by the Oireachtas of CETA under Article 29.6 of the Constitution. That is not possible. Accession, on the one hand, including acceptance of the non-existence of defences to enforcement of CETA tribunal awards, and, on the other, to a wide statutory discretion to disagree and to disregard CETA tribunal awards bears the danger of becoming a constitutional οὐροβόρος.

Protocol

54. It is appropriate to also doubt if qualified ratification of an international instrument, reserving by legislation a power to the Irish judiciary to override an award of the CETA tribunal, without the agreed and properly negotiated insertion of a protocol, such as Protocol 21 of the Treaty on European Union, which granted Ireland a "flexible opt-out to any proposals concerning the area of freedom, security and justice", per the Law Reform Commission Discussion Paper on Domestic Implementation of International Obligations LRC 124-2020 at [2.125], modifying its terms in respect of that one signatory that would be necessary, would suffice.

55. That worry arises particularly in light of the requirement under Article 26 of the Vienna Convention on the Law of Treaties (1969), which is under the *pacta sunt servanda* heading, and adopts that ancient principle, requiring that every treaty is binding on parties, thus requiring the State to perform its obligations under CETA, in this instance, in good faith. As a matter of international law, the answer would realistically be predicted to be negative. Any such amendment would seem to run contrary to the express requirement under Article 18 of the VCLT, which provides that a contracting state "is obliged to refrain from acts which would defeat the object and purpose of a treaty". Similarly, Article 19 states that reservations on the part of the State are permissible

provided, per subsection (c), that the reservation is not "incompatible with the object and purpose of the treaty". How would such a solution be compatible?

56. It is also notable that the Law Reform Commission states at [3.167] of the aforementioned discussion paper that the reservations entered by Ireland in respect of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights have been removed over time, thereby "increasing the scope of the State's initial ratifications" and highlighting the limited impact of such restrictions on an international agreement of this kind. Further, the suggested solution is one of adaptation while at the same time qualifying the clear text of the instrument. Within the text of CETA the grounds for refusal of enforcement of a tribunal award are those already existing within the treaty. No other grounds of refusal are possible outside of a protocol within the agreement specifically qualifying the enforcement duty *vis-à-vis* Ireland.

57. Effectively, such an amendment to the 2010 Act would, in respect of CETA tribunal awards only, render the grounds for non-enforcement ones which contradict the terms of the treaty, which requires a level of enforceability that places those awards at the very least on the level of certainty of a commercial arbitration as between non-state actors. That is of course discounting the principle of the automatic application of European law.

Clear disregard

58. Even were this possible, there remain clear affronts to sovereignty. These amount to a clear disregard of the Constitution. Firstly, the power of amendment of CETA by the Joint Committee is not one where Ireland has any chance of democratic participation. Secondly, the interpretative power of the Joint Committee may confidently be predicted to add to, ameliorate, clarify, expand and refine the existing obligations of Member States under CETA. Thereby, what amounts to a denial of justice or due process in judicial proceedings, or a fundamental breach of transparency in judicial or administrative proceedings, or manifest arbitrariness, or abusive treatment of investors, or any unfair or inequitable treatment, may be moved from the chimera of legal ectoplasm into tangible rules.

59. None of these rules will be anything that the people of Ireland or their democratic representatives will have debated and adopted through Article 15.2 and Article 5 of the Constitution. Thirdly, over time, and through the laudable principle of ascribing to consistency, both the tribunals of CETA at first instance and those on appeal will accrue much more than the *acquis communautaire* of the European courts. There, principles were developed from treaties grounded in certainty of law and derived from legislative acts and interpretations that over time displayed fundamental cornerstones that required identification and declaration. Here, under CETA, the process is the opposite. Principles are given. No one knows what they mean. It is up to the Joint Committee to state what the rules are. Where those rules go is a matter for the Joint Committee and for tribunal interpretation. Instead of principles derived from law, we are given aspirations that become law outside the democratic process.

60. Nor should the power of investment capital be underestimated. States are buffeted by the vagaries of markets due to the necessity to sell bonds to borrow. The purchasing power of those forces prior to the economic crisis of 2007 has been vastly amplified due to the economic response at that time of near zero percent interest rates which has

expanded wealth holdings. The nature of what is purchased may amount to great significance in terms of national assets. As Dunne J states, rulings in contradiction of Irish law have consequent chilling effects.

Summary

61. To summarise:

1. Ratification of CETA by the Government is not now necessitated by Article 29.4.6° of the Constitution, or by the obligation of sincere cooperation and fidelity under Article 4(3) of the Treaty on European Union;

2. The powers of interpretation, amounting to the promulgation of law, based on vague principles of justice and the condemnation of arbitrariness ceded both to the CETA tribunal members and, the point assumes even greater force, to the Joint Committee, constitute the diminution of sovereignty which vests in the Oireachtas under Article 15.2 of the Constitution and offends against the guarantee in Article 6 of the Constitution whereby all powers of government derive from and are subject to the Irish people. The powers of interpretation given under CETA to the Joint Committee amount to the ceding of legislative sovereignty. These powers cannot be exercised on any democratic basis. These powers are without defined, or any definable, limit. Interpretations, amounting to the creation of laws, by the CETA Joint Tribunal cannot be appealed to any body, much less, as the Constitution requires, to the ultimate authority of the Irish people.

3. It is not just an alternative to the system of Courts under Article 34 of the Constitution which the tribunal, appellate tribunal and Joint Committee interpretative system sets up, but an actual contradiction of the express terms of the jurisdiction of the Irish courts and in particular the finality of the Supreme Court in terms of domestic law. The Constitution does not authorise or contemplate that there be such an alternative. While Irish law will be a matter of fact for the CETA tribunals, in reality through tribunal decisions a new system of law applying to Canadian investors in Ireland will arise.

4. Enforcement under the New York Convention and through the Arbitration Act 2010 will be automatic in execution of the express terms of CETA.

5. Even were that not the case, and some realistic residual discretion to refuse might remain, perhaps created by legislation as the majority propose, upon ratification by all Member States of the European Union and on bringing CETA into effect, all obligations, and in particular the obligation to enforce a tribunal or appellate CETA tribunal award in domestic law, will become necessitated under Article 29.4 of the Constitution and Article 4(3) of the Treaty on European Union, thereby leaving an Irish court with no discretion but to enforce.

6. The interpretive power of the Joint Committee is not democratic and is one in which the Irish people do not participate. Ceding legislative sovereignty to the unlimited interpretive powers of the Joint Committee is a clear disregard of the Constitution.

7. An amendment to the Arbitration Act 2010, such as is proposed by the majority of the Court, is a contradiction of CETA and in addition to Government decision and legislation, will also require a specific protocol to the treaty as a matter of international law. Even were there to be such a protocol and amended legislation, points 2 to 6 hereof are not overcome. Such a protocol does not seem to be possible, as that proposal fundamentally contradicts the treaty and it is not immediately apparent that such a course would be permissible under the Vienna Convention on the Law of Treaties, 1969, by which Ireland and the European Union are bound.

Ultimate dissent

62. In effect, therefore, this analysis agrees with Dunne, Baker and Hogan JJ that the appeal should be allowed because CETA constitutes a clear disregard of the Constitution. Disagreement arises with those judgments (and in addition with O'Donnell CJ, MacMenamin and Power JJ) insofar as they suggest that such constitutional disregard could be cured by amending the Arbitration Act 2010. That solution, giving judicial discretion to the High Court to refuse to enforce awards of the CETA tribunal is a contradiction of CETA itself; either with or without a protocol introduced into the treaty. Further, even if there was such a protocol, supposing it to be possible under international law, which is firmly to be doubted, refusal to enforce a CETA tribunal award on any grounds as to our constitutional tradition would clash with our European Union obligations and Article 29.4 of the Constitution. This would place such a judicial veto outside legal norms and beyond constitutional scrutiny.

AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000124

O'Donnell C. J.

MacMenamin J.

Dunne J.

Charleton J.

Baker J.

Hogan J.

Power J.

Between/

PATRICK COSTELLO

Appellant

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Ms Justice Elizabeth Dunne, delivered on the 11th day of November, 2022

Introduction

1. This is an appeal from the judgment of the High Court (Butler J.) in which she refused the Plaintiff's claims seeking to prevent the ratification of a trade agreement between Canada and the European Union by the method proposed by the State. An important aspect

of the case will be a consideration of the provisions of Article 29 of the Constitution and whether the agreement can be ratified in this State under the terms of Article 29 or whether it can only be ratified by means of a constitutional amendment following a referendum. It is relevant to bear in mind that while the trade agreement was negotiated between Canada and the European Union, the parties to the agreement are defined therein to include *"the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union"* and Canada. As will be explained shortly, the trade agreement has to be ratified by the Member States and, from an Irish point of view, it follows that for ratification to be legally effective, the method of ratification must be in accordance with the terms of the Constitution.

Background

2. The Comprehensive Economic Trade Agreement ("CETA" herein) was entered into between Canada and the European Union on the 30th October 2016 following a number of years of negotiation. Article 30.7.1 of CETA stipulates that the parties are to approve the agreement *"in accordance with their respective internal requirements and procedures"*. Under Article 30.7.2, CETA will not enter into force until a prescribed date after the parties have exchanged *"written notifications certifying that they have completed their respective internal requirements and procedures"*. Nonetheless, Article 30.7.3 allows CETA to be applied on a provisional basis pending full ratification subject to the parties identifying and notifying one another as to the parts of the agreement intended not to apply provisionally. A number of the articles which are the subject of contention in these proceedings and which are to be found in Sections C, D and F of Chapter 8 are excluded from the provisional application of CETA.

3. On the 28th October 2016, the Council of the European Union adopted Council Decision (EU) 2017/37 which authorised the signing of CETA on behalf of the European Union. On the preceding day, the 27th of October 2016, a number of statements and declarations were entered as statements to the Council minutes, including statement 36 concerning, *inter alia*, "investment protection and the Investment Court System":

> *"All of these provisions having been excluded from the scope of provisional application of CETA, the Commission and the Council confirm that they will not enter into force before the ratification of CETA by all Member States, each in accordance with its own constitutional procedures."*

Statement 36 recognised that CETA and the mechanisms contained therein represented *"a step towards the establishment of a multilateral investment court which will, in the long term, become the body responsible for resolving disputes between investors and States"*. The appellant opposes the coming into force of these provisions and until such time as ratification takes place, they cannot take effect. The agreement is a very substantial document but the parts of the agreement with which the appellant takes issue are to be found in Chapter 8 of the agreement.

4. The appellant is a Teachta Dála, having been elected for the Green Party in the general election in February 2020. The crux of his opposition to CETA is his contention that its terms have the effect of transferring important elements of sovereign power to the institutions created by the agreement. He expressed concern as to the State's ability to legislate in the environmental sphere, given his contention that although CETA does not preclude such legislation, the State could be made liable to a Canadian investor for damages in respect of loss by reason of such legislation. He describes the agreement as having a potentially chilling effect on regulation in this sphere. In particular, the appellant submits

that the rule-making powers of the CETA Joint Committee amount to a power to make laws which will have binding legal effect domestically in Ireland contrary to Article 15.2 of the Constitution. He states that CETA transfers part of the judicial power of the State to the tribunal established under Chapter 8 of the agreement whose function is to resolve investor/State disputes, contrary to Article 34.1 of the Constitution. Chapter 8 also envisages the establishment of a Multilateral Investment Tribunal (MIT) which he likewise contends would be contrary to Article 34.1. Consequently, in the appellant's view, CETA cannot be ratified through any of the mechanisms contained in Article 29 of the Constitution and can only be ratified by way of a constitutional amendment following a referendum under Articles 46 and 47 of the Constitution.

5. The respondents argue that ratification of CETA will not involve the transfer of State sovereignty to institutions created under the agreement. To this end, their central contention is that CETA operates solely in the realm of international law and does not give rise to any domestic legal effects. Accordingly, the respondents disagree that the ratification of the agreement would diminish the exercise of State sovereignty, and they argue that the appropriate mechanism for ratifying CETA is that stipulated by Article 29.5.1° of the Constitution. Without prejudice to that position, the respondents alternatively cite Article 29.4.6° of the Constitution and suggest that ratification of CETA is necessitated by Ireland's membership of the European Union and as such would be in accordance with Article 29.4.6°. The appellant strongly rejects this proposition and says that as the agreement must be ratified by each Member State before it enters into force, ratification cannot be an obligation flowing from EU membership.

Decision of the High Court

6. On 16th September 2021, Butler J. ([2021] IEHC 600) refused the relief sought by Mr. Costello and found that the ratification of CETA should take place in accordance with

Article 29.5.2° of the Constitution. Butler J. comprehensively analysed the relevant provisions of CETA in finding in favour of the respondents. Butler J. found that CETA is an international agreement which, if ratified, will bind the State as a matter of international law only. At paras. 85 and 86 of her judgment, Butler J. posited two reasons for finding that the ratification of CETA will have no impact on the domestic legal system:

> *"Firstly, the terms of CETA itself are designed to ensure that entry into force of CETA will not give it legal effect within the domestic legal systems of the parties. Article 30.6 confirms that the rights created by CETA operate only at the level of international law, precludes the direct invocation of CETA before domestic courts and prohibits the creation by a party of a right of action before its domestic courts against another party on the basis of an alleged breach of CETA. Conversely, Article 8.31 prevents the CETA tribunal from purporting to rule on the validity of a domestic measure or giving any interpretation of a domestic measure that will be binding on the parties. Thus, CETA itself creates a strict demarcation between its effect in international law as between the parties and its lack of legal effect in the domestic legal systems of the parties."*

7. Butler J. also placed emphasis on Article 29.6 of the Constitution, which expressly states that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. To this end, the trial judge relied on the decision in *J.McD v. PL* [2010] 2 I.R. 199 where Murray C.J. discussed the interaction between the European Convention on Human Rights and domestic law, which applied only insofar as had been authorised in the European Convention on Human Rights Act 2003. By analogy, Butler J. held that CETA, although creating rights and obligations at an international level, did not form part of or have direct effect in the domestic legal system, and therefore, any decisions made by the CETA Joint Committee under the agreement have no legal effect in Irish law,

and any such decisions cannot be characterised as laws made for this State in breach of Article 15.2 of the Constitution. Indeed, Article 30.6 of CETA expressly precludes its terms from having direct effect in domestic legal systems and precludes its invocation before the domestic courts.

8. Mr. Costello also argued that CETA involved the ceding of sovereign power. In this regard, reliance was placed on the decision of this Court in *Crotty v An Taoiseach* [1987] I.R. 713. The respondents also relied on *Crotty* and in turn, on the subsequent decision in *Pringle v. Ireland* [2013] 3 I.R. 1 in which the decision in *Crotty* was reconsidered. Having considered those judgments in detail Butler J. opined that *Crotty* cannot be read as simply precluding the entry by the State into international agreements which will curtail the ability of the State to act in a manner contrary to those agreements. She expressed the view that to limit the State's ability to enter into such agreements purely because they may influence how the Government or the Oireachtas may choose to act in the light of such international commitments would restrict rather than protect the State's sovereignty. Thus, she was of the view that to require every such agreement to be put before the people in a referendum would upend rather than uphold the constitutional architecture of Articles 28 and 29 of the Constitution.

9. The appellant described the agreement as a "mixed agreement" under European Union law, because it covers matters, some of which are within the exclusive competence of the European Union, and some of which are shared competences between the European Union and the Member States. Article 2(2) TFEU makes clear how shared competences are to be exercised:

> *"When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their*

competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

10. The appellant accepted that common commercial policy, including trade and foreign investment policy, is an exclusive competence of the European Union stipulated by the Treaty of the Functioning of the European Union and that the bulk of the substantive measures covered by CETA fall within the exclusive competence of the European Union. However, Mr. Costello argued, and the State agrees, that indirect foreign investment is a shared competence that the European Union has not previously exercised competence over and given the wide range of investments covered by CETA, the effect of ratification of CETA will vest in the European Union a new competence, binding Ireland to any future actions taken by the European Union in this area. Thus, Ireland could only continue to exercise its competence in the area of foreign indirect investment to the extent that the EU was not exercising that competence. Of particular concern for Mr. Costello is that ratification has the potential consequence of binding Ireland to the "CETA Project" and to the establishment of a Multilateral Investment Tribunal I. This concern was grounded in Article 8.29 of CETA, which the appellant argued was indicative of an on-going project on behalf of the EU to pursue the establishment of an MIT, which would have the effect that Ireland could no longer object to or withdraw from the proposal to establish an MIT, thus leading to a loss of State sovereignty into the future (see para. 118 of the judgment). Butler J. found that entry into CETA would not comprise a legislative act on the part of the EU sufficient to exclude Member States from the shared competence they currently enjoy in respect of foreign indirect investment. Further, she found that the European Union was not exercising a shared competence by ratifying CETA, as the international agreement was not a legally binding instrument, and having regard to Article 2(2) TFEU, the European Union

can only exercise shared competences through legally binding legislation. Further, the trial judge found that if an MIT was to be established, it could only be done by way of further international agreement requiring further ratification.

11. While Butler J. found that the CETA Tribunal established by Chapter 8 of the agreement could be characterised as administering justice, she went on to hold that the jurisdiction to be exercised by the CETA Tribunal was not the administration of justice as per the principles set out in *McDonald v. Bord na gCon* [1965] I.R. 217, which were recently analysed in the decision of this Court in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. Butler J. found that the disputes which are to be determined by the CETA Tribunal are not justiciable under Irish law even where the Irish State is a party as they will arise and can be determined only as a matter of international law. The jurisdiction to be exercised by the CETA Tribunal exists at the level of international law and does not reduce the power of the Irish courts to administer justice. Hence, it was not the exercise of jurisdiction under Article 34 of the Constitution. In this context, she considered the issue of enforceability of awards and noted the fact that awards that will be made by the CETA Tribunal are not those traditionally characteristic of the Irish Courts nor was the vesting of jurisdiction in the CETA Tribunal a subtraction of jurisdiction from the Irish courts. Ultimately, she concluded that the creation of and conferral of jurisdiction on the CETA Tribunals is not contrary to Article 34.1 of the Constitution.

12. A number of other arguments were raised by Mr. Costello in the High Court, which deserve brief comment. Butler J. held that, if she was incorrect and the CETA Tribunal is administering justice within the meaning of Article 34, then she could only conclude that the constitutional saver contained in Article 37 for the administration of justice by persons who are not judges and bodies which are not courts did not apply to the CETA Tribunals as its jurisdiction is not "limited" for the purposes of Article 37 of the Constitution. The trial

judge also found that CETA could not be said to be "necessitated" by the State's obligations of membership of the European Union, and therefore could not be saved by the provisions of Article 29.4.6° of the Constitution. In respect of Mr. Costello's *locus standi* to pursue the constitutional challenge, Butler J. found that he was entitled to raise hypothetical arguments as to what might happen upon ratification of CETA, and in fact, he could only raise hypothetical arguments where he was challenging the agreement on the basis that the selected ratification was incorrect or inappropriate. As she pointed out, while there might be a better candidate to make the arguments than this candidate, there was a very narrow window within which the proposed ratification of CETA could be challenged and it could work a constitutional injustice were he not allowed to bring the challenge notwithstanding the fact that some of the arguments were necessarily speculative. Butler J. nonetheless held that the appellant was not entitled to argue that CETA would operate contrary to Article 40.1 of the Constitution as it would confer Canadian investors investing in Ireland with greater benefits than indigenous investors, as if this factual situation were to materialise, an Irish investor in that position would be able to bring a complaint before the Irish court.

Leapfrog Appeal to this Court

13. By a Determination delivered on the 11th January 2021, this Court was satisfied that this was an appropriate case in which to grant leave to appeal to the Supreme Court directly from the High Court and considered that it raised important matters of domestic and EU law. The parties are agreed that the following points of Irish law arise in this appeal:

i. Is the Government entitled, by way of international treaty, to accept "the legal framework established by CETA", whose laws are binding within the territory of the State, without that legal framework becoming part of the domestic legal system?

ii. Is the ratification absent a referendum of CETA contrary to Article 15.2.1° of the Constitution?

iii. If CETA is ratified without a referendum, would the CETA Tribunal be engaged in the administration of justice contrary to Article 34 of the Constitution?

iv. If so, can such administration of justice be saved by Article 37 of the Constitution?

v. Did the High Court and the CJEU apply the correct canons of interpretation to their analysis of CETA?

vi. Does the appellant have standing to argue that CETA is contrary to Article 40.1 of the Constitution? If so, is CETA contrary to Article 40.1 if ratified absent a referendum?

vii. Is ratification of CETA necessitated by the obligations of membership of the EU?

Some additional points of EU law will also arise as will be seen later. It will be observed that in the course of the hearing, the issues before the Court crystallised into the following issues:

i. Is ratification of CETA necessitated by the obligations of membership of the EU?

ii. Is CETA a breach of Article 15.2 of the Constitution?

iii. Does the creation of the CETA Tribunal amount to the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the courts in this jurisdiction contrary to Article 34 of the Constitution?

iv. Does the "automatic enforcement" of a CETA Tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 constitute a breach of Article 34 of the Constitution?

v. What is the effect of the interpretative role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution?

vi. Would an amendment of the Arbitration Act 2010 to alter the "automatic enforcement" of a CETA Tribunal award as proposed in the judgment to be

delivered herein by Hogan J. alter the position in relation to the ratification of CETA?

Submissions

Appellant's Submissions

14. The appellant submits that it does not follow that because CETA operates in the sphere of international law, it will only apply at an international level. He argues that ratification of CETA involves a direct usurpation of the sovereignty of the legislative and judicial powers of the State. The appellant submits that the High Court was incorrect in relying on *J.McD v. PL* and drawing an analogy between the ECHR and CETA. While the decisions of the ECtHR operate at a purely international level and cannot be enforced domestically the same cannot be said for the decision of the CETA Tribunal, whose awards will be directly enforceable in Ireland. Further, the appellant criticises the trial judge's findings that disputes would not be subtracted from the jurisdiction of the Irish courts by the ratification of CETA. To this end, the appellant relies on *Opinion 2/15 (Singapore FTA)* ECLI:EU:C:2017:376, which was also relied on by Butler J., where the CJEU stated in the context of the Singapore FTA that Member State ratification was required because it involved removing certain disputes that would otherwise be litigated by the Member State courts. The appellant queries the trial judge's analogy between an investor's ability under CETA to choose to bring proceedings against the State outside of the Irish courts and the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation"). It is submitted that the Brussels Regulation is distinguishable on a number of grounds, firstly, as it explicitly excludes cases based on the liability of the State for acts and omissions in the exercise of state authority and secondly because the Brussels Regulation forms part of national law and

enjoys the protection of Article 29.4.6° of the Constitution. Accordingly, it is argued the legal framework created by CETA trespasses on and usurps the jurisdiction of the Irish courts and the powers of the Oireachtas without becoming part of the domestic legal system, contrary to the fundamental sovereignty asserted by the People through the Constitution.

15. It is the appellant's case that ratification of CETA would be contrary to Article 15.2.1° of the Constitution. It is argued that the trial judge was incorrect to find that CETA could not be classified as "laws for the State" by virtue of the fact the agreement is designed to ensure that its entry into force will not give it legal effect within the domestic legal systems of the parties. The appellant points to Article 8.10 of CETA to this end, which states that the agreement binds Ireland "in its territory", and he argues that Article 15.2.1° prohibits any law that is not created by the Oireachtas or necessitated by membership of the EU having an effect within the State. It is the appellant's case that CETA laws will be directly binding in the State, even though they would exist outside of the domestic legal system. The appellant further submits if that is correct, the trial judge was wrong to compare CETA with the ECHR, as the latter instrument is only legally binding in this State insofar as is permitted by the 2003 Act. In contrast, the appellant says that CETA has the effect of binding the State to the decisions of the CETA Joint Committee on the interpretation of the agreement and the enforceability of awards of the CETA Tribunal. The appellant goes further and submits that providing for CETA laws in legislation would not remedy this breach of Article 15.2.1° as it would amount to an impermissible delegation of legislative power.

16. The appellant argues that the functions of the CETA Tribunal amount to the administration of justice contrary to Article 34.1 of the Constitution. Relying on the principles set out in *McDonald v. Bord na gCon* and further refined by *Zalewski v. Workplace Relations Commission*, the appellant submits that the CETA Tribunal will be resolving disputes concerning property rights in Ireland and awarding compensation for a

breach of those rights, which will be enforceable in the State. It is argued that this is clearly within the ambit of the Irish courts. The appellant disagrees with the finding of the High Court that Article 34 is not contravened if the law applied is not Irish law and submits that there is nothing in Article 34 which allows it to be circumvented in this way, where the wrong is alleged to have occurred within the State. Further, the appellant points out that the Irish courts are frequently required to apply foreign law within this jurisdiction, for example, where a contract is governed under the Regulation (EC) No 593/2008 ("Rome I"). As such, the appellant argues it cannot be the case that the administration of justice as it is conceptualised in *McDonald* and *Zalewski* arises only where Irish law is applied. The appellant submits that the ceding of judicial power affected by CETA is illustrated by the fact that a claim to the CETA Tribunal precludes any claim before the Irish courts. Further, while the appellant accepts that the CETA Tribunal does not have jurisdiction to invalidate provisions of Irish law, it can make a declaration that a provision of Irish law is incompatible with CETA and make an award of damages against the State for loss suffered by an investor on foot of that provision. The appellant argues that this would create a "regulatory chill" and would impact the application of Irish law and policy development. In turn, the appellant argues this directly contradicts the line of authority to be found in cases such as *Glencar Exploration PLC v. Mayo County Council (No 2)* [2002] 1 I.R. 84. The appellant also argues that the trial judge erred in finding that the ratification of CETA would not bind Ireland to supporting the establishment of an MIT and submit that the agreement frames the establishment of an MIT in mandatory terms.

17. The appellant argues that should this Court find that CETA does breach Article 34, it is not saved by Article 37.1 of the Constitution as it does not exercise a "limited" judicial power, and to this end, submits that the CETA Tribunal can award unlimited damages in any claim that falls within the agreement and it is not subject to any form of appeal or judicial

review by the Irish Courts, thus rendering in it incapable of being considered "limited" by reference to Article 37.

18. It is argued that the jurisdiction conferred on the CETA Tribunal has not been appropriately interpreted by the trial judge or the CJEU. The appellant places considerable reliance on the arbitral decision in *Eco-Oro Minerals Corp v Republic of Columbia* ICSID Case No. ARB/16/41 ("Eco-Oro"), which concerned an international free trade agreement between the Republic of Columbia and Canada. That free trade agreement had similar provisions to Section B of Chapter 8 of CETA, which details particular exceptions under which an investor is precluded from recovering for damages from a signatory state if its loss arises from the pursuit of particular measures, for example, measures for the conservation and protection of natural resources and of the environment. In *Opinion 1/17* ECLI:EU:C:2019:341, the CJEU found that the CETA Tribunal would not have the power to impugn public interest measures or award damages in respect of the passing of such measures. The appellant argues that the decision in *Eco-Oro* is in direct conflict with that finding, as the ICSID Tribunal ordered the Republic of Columbia to pay compensation to a Canadian mining company where the State was pursuing public interest measures similar to those found in the general exceptions in Section B Chapter 8 of CETA. The appellant concedes that while it has no binding effect on the CETA Tribunal, the decision in *Eco-Oro* demonstrates that Canada disagrees with the logic subtending *Opinion 1/17*. Thus, the appellant seeks a reference to the CJEU to clarify the uncertainty he says arises regarding the operation of the jurisdiction of the CETA Tribunal and whether that body would in fact have the power to impugn a measure of national law and award compensation to a Canadian investor where domestic measures were being pursued under one of the general exceptions.

19. The appellant argues that the trial judge was incorrect to find that he did not have *locus standi* to pursue the claim that CETA would operate contrary to Article 40.1 of the

Constitution in conferring certain benefits on Canadian investors which Irish investors could not avail of. It is submitted that, as a TD, Mr. Costello has an interest in ensuring that the business of the Dáil is conducted in accordance with the Constitution. Further, the appellant argues that Butler J. erred in finding that an investor could bring a claim in this jurisdiction alleging a breach of Article 40.1, as that would amount to the Irish courts applying an international legal instrument that the trial judge found to have no domestic effect. It should be noted that this argument was not pursued in the course of the oral submissions before this Court.

20. The appellant argues that CETA cannot be necessitated by Ireland's membership of the European Union as it involves the removal of disputes from the courts of Member States, which exceeds the authority of the European Union.

Respondents' Submissions

21. The respondents base their submissions on the provisions of CETA and the jurisprudence of the Supreme Court regarding international trade deals, such as *Pringle v. Government of Ireland*, which held that trade agreements, and institutional adjudicative mechanisms thereunder, do not result in an unconstitutional diminution of sovereignty. They further emphasise that in their submission, the appellant's case is a complaint against the Arbitration Act 2010, the constitutionality of which is not challenged, which may make tribunal decisions enforceable. It is argued that the essence of the appellant's arguments as to the "administration of justice" is that *all* arbitration is unconstitutional. It adds that the CETA Tribunal does not fulfil any of the criteria for the administration of justice.

22. Reference was made to a number of specific provisions of CETA in relation to the Tribunal and other provisions of relevance which are not necessary to refer to in detail at this point.

23. The respondents submit that CETA does not create any "laws for the State" for Art. 15.2.1° purposes, as Article 30.6.1 of CETA expressly states that *"[n]othing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties."* They submit that the appellant's position would collapse the separation between Article 15 and Article 29 of the Constitution, and be inconsistent with this Court's statements in *Pringle*, indicating that trade agreements with binding adjudication mechanisms are constitutionally permissible.

24. In support of this position, the respondents rely on *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, where Fennelly J. stated at page 129:

> *"The Constitution establishes an unmistakable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies."* (emphasis in submissions)

Reference was also made to *Barlow v Minister for Agriculture* [2017] 2 I.R. 440 in this context.

25. The respondents submit that there is no loss of sovereignty arising from CETA and no authority that entering into trade agreements which contain adjudicative functions is

impermissible under the Constitution. On this point, the respondents rely on *Pringle*, and in particular the judgment of O'Donnell J. (as he then was), where he stated at para. 308:

> *"It can be deduced from [Articles 28 and 29 of the Constitution], at a minimum, that the Constitution clearly anticipated the executive power could and would involve the making of binding agreements with other nations, and that Ireland might become involved in disputes which themselves might be resolved by a process involving a binding determination by which Ireland would be obliged to abide."*
> (emphasis in submissions)

It is contended that CETA is such an "agreement" and the Tribunal is such a "process".

26. In response to the appellant's claim that CETA would create a "regulatory chill", the respondents submit that this claim relies on extra rights being provided by CETA to Canadian investors beyond those already enjoyed under Irish law, and such rights are not successfully identified in the appellant's submissions. Furthermore, the argument related to a potential chilling effect is impermissible due to its hypothetical nature, and is not truly a legal argument, but one of political preference that the Court should not engage with. They also submit that, even assuming there would be a chilling effect in the future, that would not justify this Court intervening to prevent a decision which, under the separation of powers, falls to be taken by the Executive.

27. In response to the appellant's submission that Article 8.29 of CETA would mean that Ireland would be bound to support the creation of the MIT, the respondents submit that the only obligation under Article 8.29 is to "pursue" the MIT's establishment, and no new adjudicative jurisdiction can be conferred on the MIT, and that it was held in *Crotty v. An Taoiseach* at page 770 that the establishment of what was effectively a new chamber of the Court of Justice – the then court of first instance – gave rise to no constitutional difficulty,

and therefore if, as the respondents submit, the CETA Tribunal gives rise to no constitutional issue, it is difficult to see what extra constitutional issue the MIT then creates.

28. The respondents submit that as non-citizens can seek to have statutes declared unconstitutional, and companies (the vehicles through which Canadians are likely to invest) can invoke constitutional property rights, the protections CETA confers on Canadian investors in Ireland are no greater than the protections which they enjoy under the law applicable domestically in any event.

29. The respondents contend that under the criteria set out in *McDonald v. Bord na gCon*, the jurisdiction to be exercised by the CETA Tribunal does not have the characteristics of the administration of justice. The first criterion, *"dispute or controversy as to the existence of legal rights or a violation of the law"* does not arise. They note the finding of Butler J. at para. 154 of the High Court judgment;

> *"[t]he Irish Constitution does not and, indeed, could not confer on the Irish Courts' jurisdiction over disputes occurring outside of Ireland and which do not arise under Irish law."*

30. Rather, there must be a justiciable controversy, but it is submitted that disputes under CETA are not justiciable within the meaning of *Lynham v Butler (No 2)* [1933] I.R. 74.

31. The second and third criteria, *"determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty"* and *"final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties"* do not arise as the Tribunal will not determine any rights/liabilities under Irish law, but only determine rights/liabilities under CETA itself.

32. The fourth criterion, *"enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment"* does not arise as Tribunal awards would be dependent on enforcement

from another body, namely the High Court, and as such the enforcement of awards would not be almost automatic, to use the language of O'Donnell J. in *Zalewski v The Workplace Relations Commission* at para. 101.

33. The respondent says that the fifth criterion: *"the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country"* does not arise in this case, as adjudicating on disputes under an international trade agreement has never been characteristic of the courts of this country.

34. Without prejudice to the aforesaid submissions, if it is found that an administration of justice arises, the respondents rely on Article 37.1 of the Constitution for authorisation of the exercise of this power. They contend here that the Tribunal's jurisdiction (Article 8.39.1 of CETA) is limited to monetary damages or property restitution, which is much more limited than the jurisdiction of any Irish courts and it is arguably even more limited than the powers which a mere *ad hoc* arbitrator has.

35. The respondents claim that the appellant lacks standing to advance arguments relating to the rights of or impacts on investors. In any event, no case arises under Article 40.1 as foreign and domestic investors are also not similarly situated for the purpose of the Article 40.1 proviso.

36. If the appeal cannot be dismissed on any of the other grounds above, the respondents contend that CETA is necessitated by EU membership, and that CJEU case-law clearly holds that this includes a duty for Member States to cooperate with the EU in the negotiation, conclusion and implementation of international agreements in areas of shared competence. The respondents rely in part on *Commission v Ireland* Case C-13/00 EU:ECLI:2002:184, which held that, by failing to adhere to the Berne Convention, which had been a condition of signature of the EEA Agreement, Ireland had failed to fulfil its obligations under EU law.

37. The respondents do not agree that a reference to the CJEU is required to clarify the jurisdiction of the CETA Tribunal. It is the respondents' case that the decision in *Eco-Oro* is of no relevance to these proceedings. It is argued that the decision is not binding on either the CJEU or the CETA Tribunal, nor is it persuasive, as it does not involve a matter of EU law or CETA. Notwithstanding this, the respondents say that Mr. Costello has failed to explain how the reasoning adopted in *Eco-Oro* would be incompatible with EU law if it was followed by the CETA Tribunal. The respondent argues that *Opinion 1/17* held that no damages could arise on account of the level of protection of a public interest established by the EU institutions, but that this did not preclude the CETA Tribunal from arbitrating disputes relating to, amongst other areas, environmental matters. It is further submitted that it would be inappropriate at this stage to make a reference to the CJEU on a hypothetical issue as to whether the CJEU had correctly identified the jurisdiction of the CETA Tribunal in *Opinion 1/17* before the CETA Tribunal had departed from it. The respondent also notes that there are a number of foundational differences between the FTA at issue in *Eco-Oro* and CETA, for example, the recitals, *Opinion 1/17* of the CJEU, and the Joint Interpretative Instrument.

Sovereignty

38. At the heart of this case is the concept of sovereignty, and it would be appropriate to make a few comments on this complex subject at this point. The starting point must be the Constitution, put before the People and ratified by them in 1937, replacing the Constitution of 1922. It declared in Article 1 that:

> *"The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions."*

39. That Article was relied on in the decision of this Court in the case of *Byrne v. Ireland* [1972] I.R. 241, in which the argument that the State had an internal sovereignty giving it an immunity from suit was rejected. In the course of his judgment in that case, Budd J. expressed the view:

> *"Article 1 of the Constitution itself underlines that it is the nation, which can only be a reference to the People, which has the sovereign right to choose its form of government; it has in fact done this by the enactment of the Constitution ... Both Articles indicate that it is recognised in the Constitution itself that there is a higher authority than the State, and this again is incompatible with any theory that the State is sovereign as regards internal affairs of government and their exercise through the organs of government."* (see page 296 of his judgment)

40. Earlier, on the same page, Budd J. had made the following observation:

> *"One finds in the enacting portion of the Constitution perhaps the most striking indication that the State is not sovereign in the sense under consideration. We find that it states that:-*
>
> > *"We, the People of Éire, ... do hereby adopt, enact, and give to ourselves this Constitution".*
>
> *This Constitution was passed by the Oireachtas and submitted to the People in a referendum; it was enacted by the People on the 1st July, 1937, and came into operation as and from the 29th December, 1937. It can now only be amended by way of a referendum by a decision of the People. Therefore, the Constitution and its form are the creation of the People and depend upon the will of the People both for its existence and the determination of its form from time to time by way of the referendum provided for by Articles 46 and 47 of the Constitution. The State is, in its turn, recognised by the Constitution. Its powers and obligations are determined*

by it. It is thus to be seen that it is the People who are paramount and not the State. Such a conclusion is inconsistent with any suggestion that the State is sovereign internally. In addition, it would appear to me that there are to be found in the Constitution itself further indications that the powers of the State are limited and confined in a fashion which is inconsistent with the State being of a sovereign nature."

41. Walsh J. in that case referred also to Article 5 of the Constitution, which provides that:

"Ireland is a sovereign, independent, democratic state."

42. Thus, he stated at page 264:

"I think that the learned trial judge misconstrued the intent of Article 5 if he construed it as a constitutional declaration that the State is above the law. Article 1 ... affirms that the Irish nation has the "sovereign right to choose its own form of Government". Our constitutional history, and in particular the events leading up to the enactment of the Constitution, indicate beyond doubt, to my mind, that the declaration as to sovereignty in Article 5 means that the State is not subject to any power of government save those designated by the People in the Constitution itself, and that the State is not amenable to any external authority for its conduct. To hold that the State is immune from suit for wrong because it is a sovereign State is to beg the question."

43. The concept of sovereignty was later considered in the case of *Webb v. Ireland* [1988] I.R. 353, a case concerning the Derrynaflan Hoard, giving rise to a discussion of sovereignty in the context of treasure trove. In his judgment in that case, Walsh J. expressed the view:

"I am satisfied that the People as the sovereign authority having by the Constitution created the State, and by Article 5 declared it to be a sovereign State,

have the right and duty, acting by the State which is the juristic person capable of holding property by virtue of the Constitution, to exercise dominion over all objects forming part of the national heritage whether they be found or not, subject always to the lawful title of a true owner if and when the true owner is discovered and to exercise full rights of ownership when no true owner can be ascertained".

44. The contrast between the decisions in *Byrne* and *Webb* led to the following observation in *Kelly: The Irish Constitution*, (5th Edition, Bloomsbury Professional, 2018) at para. 3.2.43:

"Byrne and Webb are not easily reconciled on the matter of sovereignty. If one understands 'sovereignty' to mean supreme power, then clearly the State is not sovereign internally in the light of Byrne. Unfortunately the resurrection, in a domestic context, of State sovereignty in Webb was unaccompanied by any explanation of the concept, let alone any attempt to accommodate the earlier remarks in Byrne. One senses that it is being used as a type of political magnet to attract to the State powers and privileges which are not explicitly regulated by the Constitution itself, an analogue as it were, to Article 34.3.1° dealing with the jurisdiction of the courts."

45. While there may well be room for discussion as to the concept of sovereignty in an internal context, it is not necessary to dwell on that issue in the context of this case, which, of course, concerns the concept of external sovereignty. Suffice it to say, that even in the context of internal sovereignty, the concept of sovereignty is not, perhaps, as clear cut as it might be.

Crotty v An Taoiseach

46. I now propose to look at the decision of this Court in *Crotty*, and at the way the issue of external sovereignty was considered in that case. By way of background, the then

members of the EU entered into a series of treaties, collectively known as the Single European Act ("the SEA") (for ease of reference, I will refer throughout to "the EU" although it was known by different titles at different times in its history to date). It provided for ratification in accordance with the constitutional requirements of each State. A challenge was brought by Mr. Crotty seeking to prevent the enactment into law of the SEA by means of the European Communities (Amendment) Bill 1986, on the grounds that it would, if enacted, be repugnant to the Constitution. On appeal from the High Court, by which time the Bill had been enacted, it was held by the Supreme Court that certain provisions of the Act amounted to no more than a more specific enumeration of the objectives of the establishing treaties, and that the proposed new Court of First Instance did not extend the primacy of the Court of Justice of the European Communities.

47. However, the Court considered that the ratification of Title III of the SEA was unconstitutional. Title III concerned a separate treaty between the Member States, whereby they agreed to adapt their foreign policy positions to those of the other Member States within a structured framework to be known as European Political Co-operation. The Supreme Court dealt firstly with the arguments as to the constitutionality of the Act of 1986. Consideration was given to Article 29.4.3°. Finlay C.J., delivering the judgment of the Court in this respect, made the following observation at page 769 in relation to a proposal to alter the decision-making capacity of the Council of the European Communities, saying as follows:

> *"The capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was one of the reasons why the Third Amendment to the Constitution was necessary. Sovereignty in this context is the unfettered right to decide: to say yes or no. In regard to proposals coming before the Council which the State might oppose, unanimity is a*

valuable shield. On the other hand, in proposals which the State might support, qualified or simple majority is of significant assistance. ... The Community was thus a developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress both in terms of the number of its Member States and in terms of the mechanics to be used in the achievement of its agreed objectives."

48. He continued, at page 770:

"Having regard to these considerations, it is the opinion of the Court that neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution."

49. Insofar as the establishment of a Court of First Instance was concerned, it was concluded that the establishment of an additional court had not been shown to exceed the constitutional authorisation. He concluded:

"The proposals contained in Articles 18 and 2l of the SEA have not been shown to contain new powers given to the Council which alter the essential character of the Communities. Neither has it been shown that they create a threat to fundamental constitutional rights. Therefore, it is the opinion of the Court that the appeal under this heading also fails."

Accordingly, the challenge to the constitutionality of the Act of 1986 was dismissed.

50. The Court then went on to deal with a consideration of the second leg of the case concerning the challenge to the ratification by the State of Title III of the SEA. A number of judgments were delivered in respect of this issue, resulting in the appeal of Mr. Crotty being allowed in this respect.

51. Finlay C.J., in his dissenting judgment, noted that the matters dealt with in Title III, which were entitled "*European cooperation in the sphere of foreign policy*", did not purport to constitute amendments of, or additions to, any of the treaties establishing the Communities. He was, therefore, of the view that Article 29.4.3° could not apply. Therefore, the relevant provision of the Constitution to be considered was Article 29.6. He expressed the view that the agreements contained in Article 30 of Title III "*are arrived at with the possible ultimate objective of a form of European political union between the Member States of the Communities as an addition to the existing economic union between them. There can be no doubt that if that aim were ever achieved it would constitute an alteration in the essential scope and objectives of the Communities to which Ireland could not agree without an amendment of the Constitution*" (page 771). Thus, he appears to have been of the view that, at that stage, the provisions of Title III did not, in fact, constitute an alteration to the treaties governing the EEC at that stage, such that an amendment of the Constitution was required. Ultimately, he concluded, *inter alia*, that it had not been established by Mr. Crotty that adherence to the terms of the SEA amounted to "*a clear disregard by the Government of the powers and duties conferred on it by the Constitution*."

52. The majority of the Court, Walsh, Henchy and Hederman JJ., came to a different conclusion. Walsh J. in his judgment made a number of observations on sovereignty, which are of interest in the context of this case. First of all, he referred to the Constitution, and observed that it conferred upon the government the Executive power of the State. He continued:

> *"In its external relations it has the power to make treaties, to maintain diplomatic relations with other sovereign States. ... It is the Government alone which negotiates and makes treaties and it is the sole organ of the State in the field of international affairs."* (page 777)

53. He pointed out that the government did not require an Act of the Oireachtas for the purpose of carrying out those functions. But he pointed out that the powers had to be exercised in subordination to the applicable provisions of the Constitution. He added, at page 778, as follows:

> *"The powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. They are implicit in the provisions of Article 5 of the Constitution. The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states."*

He went on to note that the exercise of the power was limited. He then referred to the provisions of Article 28 and Article 29 of the Constitution.

54. The particular concern of Walsh J. was the extent to which the Treaty committed the State to pursuing a policy which had, as one of its objectives, the transformation of the relations of Ireland with the other Member States of the European Communities into a European Union. He commented, at page 781, that:

> *"As was pointed out in the decision of the Court in the first part of this case the essential nature of sovereignty is the right to say yes or to say no. In the present Treaty provisions that right is to be materially qualified."*

55. He then listed a number of matters which he said committed the State and all future governments to do, *inter alia*, to endeavour to formulate and to implement a European foreign policy, to undertake to inform or consult the other Member States on any foreign policy matters of general interest (not just of common interest) so as to ensure that the combined influence of the States is exercised as effectively as possible through co-

ordination, the convergence of their positions and the implementation of joint action. He went on to conclude, at page 783, as follows:

> *"If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies as from time to time to the Government may seem proper, it is not within the power of the Government itself to do so. The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the People the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 "... in final appeal, to decide all questions of national policy, according to the requirements of the common good."*

Therefore, he concluded that the assent of the people was a necessary prerequisite to the ratification of Title III of the Single European Act.

56. Henchy J., in his judgment, made the point, at page 786, having regard to Article 28.2 of the Constitution, that "*in the conduct of the State's external relations, as in the exercise of the executive power in other respects, the Government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution*."

57. He went on to consider the terms of Title III of the SEA and concluded that each ratifying Member State would be bound to surrender part of its sovereignty in the conduct of foreign relations. He said that that was to happen as part of a process designed to formulate and implement a European foreign policy. At page 787 he observed:

> *"Thus, for example, in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under Title III the point of reference is*

required to be the common position determined by Member States. It is to be said that such a common position cannot be reached without Ireland's consent, but Title III is not framed in a manner which would allow Ireland to refuse to reach a common position on the ground of its obligations under the Irish Constitution. There is no provision in the Treaty for a derogation by Ireland where its constitutional obligations so require."

58. He went on to point out that, under Title III, Ireland would be bound to "*take full account*" of the common position of other Member States. He added:

"To be bound by a solemn international treaty to act thus is, in my opinion, inconsistent with the obligation of the Government to conduct its foreign relations according to the common good of the Irish people. In this and in other respects Title III amounts to a diminution of Ireland's sovereignty which is declared in unqualified terms in the Irish Constitution."

59. He added:

"All this means that if Ireland were to ratify the Treaty it would be bound in international law to engage actively in a programme which would trench progressively on Ireland's independence and sovereignty in the conduct of foreign relations. Ireland would therefore become bound to act in a way that would be inconsistent with the Constitution."

In those circumstances, he allowed the appeal of Mr. Crotty.

60. Griffin J. agreed with the judgment of the Chief Justice, and Hederman J. agreed with Walsh and Henchy JJ. In a short concurring judgment, he observed:

"The State's organs cannot contract to exercise in a particular procedure, their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers - not the disposers of them."

As we now know, the SEA was subsequently approved by the People in a referendum.

61. The authors of *Kelly on The Irish Constitution* (5th Edition, Bloomsbury Professional, 208) made the observation, at para. 3.2.46, that:

"The breadth of the majority's reasoning in Crotty is such that it could plausibly be regarded as casting doubt on the State's general treaty making powers."

Pringle v. Ireland

62. However, Crotty was not the last word on the State's external sovereignty, and its treaty making powers. The matter came before the Supreme Court once more in the case of *Pringle v. Government of Ireland & Others* [2013] 3 I.R. 1. I now propose to look at a number of the judgments in that case, insofar as they concern the issue of external sovereignty, and the treaty making powers of the State. The issue in this case related to the European Stability Mechanism ("ESM"), which was established under a treaty by those members of the EU who were also members of the Eurozone. The object of the Treaty was to provide assistance to Member States in financial difficulty, where such support was "*indispensable to safeguard the financial stability of the euro area as a whole and of its Member States*."

63. The European Stability Mechanism Act 2012, ("the 2012 Act"), was enacted in the course of the proceedings for the purpose of implementing the Treaty into Irish law. Without going into all of the detail of the obligations under the Treaty, it required funds to be provided by way of capital and borrowings by the parties to the Treaty for the purpose of providing financial stability. The 2012 Act put a limit on the funds to be paid out of central funds to the ESM, but Ireland's share of the funds to be paid into the authorised capital stock of the ESM was to be in excess of €11,000,000,000, albeit that Ireland's contribution was

not required to be paid immediately, but as and when called upon to do so under the terms of the Treaty.

64. The plaintiff, a member of Dáil Éireann, commenced proceedings challenging the validity of the European Council decision which permitted the amendment of the Treaty on the Functioning of the European Union, to provide for the establishment of the ESM, and challenging the Treaty establishing the ESM itself. The challenge was based on both European law and the Constitution. For the purpose of this discussion, I propose to focus on the constitutional challenge.

65. The High Court had dismissed Mr. Pringle's claim, save that it was indicated that a part of the case should be referred to the Court of Justice of the European Union ("CJEU"). The matter was then appealed to this Court. Three issues were identified, (i) the sovereignty issue, (ii) the preliminary reference issue, and (iii) an issue relating to whether or not this Court should grant an interlocutory injunction, pending the determination of the proceedings restraining the State from ratifying the Treaty establishing the ESM.

66. The argument in relation to sovereignty was to the effect that participation in the Treaty impinged upon the State's budgetary, economic, and fiscal sovereignty in that it entailed an open-ended and irreversible transfer of powers to an autonomous institution that exposed Ireland to a permanent commitment to provide funding and assume liability, without limit, for the debts of other members, on the basis of decisions that may be made regardless of, and in opposition to, Ireland's views, in circumstances where there was no option or procedure for withdrawal from the mechanism. This Court referred a number of questions to the CJEU by its ruling of the 31st July 2012 and found against Mr. Pringle in relation to the sovereignty issue, and the injunction issue. It subsequently gave its reasons in a series of judgments. There was one dissenting judgment on the issues before the Court, (Hardiman J.). Not surprisingly, the majority of the Court, in a number of judgments, considered the

judgment of the Court in *Crotty* and having done so, followed it. In her judgment, Denham C.J. noted that the principles stated in *Crotty v. An Taoiseach* [1987] I.R. 713, were at the core of the appeal in *Pringle*, and further noted that the appellant and the State relied on the majority judgments in that case. At para. 77 of her judgment, Denham C.J. set out a number of principles derived from the decision in *Crotty*, in the following terms:

> *"(i) An important aspect of the sovereignty of the State is the exercise of the fundamental powers of the State by the organs designated in the Constitution of Ireland 1937. Under the Constitution the Government has been given the power to exercise the executive functions of State.*
>
> *(ii) Foreign policy is an important aspect of executive power and is a function of the Government.*
>
> *(iii) It is a routine exercise of executive power for the Government to enter into a treaty, as a matter of foreign policy, for the State.*
>
> *(iv) All treaties involve an element of policy. That is the nature of a treaty.*
>
> *(v) Thus, the Constitution empowers the Government to exercise executive policy, which includes a decision to enter into a treaty as a matter of policy. However, in Crotty v An Taoiseach [1987] I.R. 713 there was a specific aspect of the treaty in issue which took it outside the norm. As was stated in Crotty, the Government may not abdicate its power as the executive organ of the State. If such a decision is required it may be taken only by the people, as the ultimate authority in the State. If a treaty involves a fundamental transformation, such as a ceding of sovereignty, then it would require a mandate of the people.*
>
> *(vi) As Hederman J. pointed out, the organs of State, including the Government, cannot enter into an agreement to subordinate its powers to another. The*

Government may not qualify sovereign power to formulate foreign policy by abdicating such decisions to a foreign institution.

(vii) In the Crotty v An Taoiseach [1987] I.R. 713 case the Court held that Title III of the SEA would bind the State to concede part of its sovereignty in foreign policy by conducting foreign policy in the future, future decisions on foreign policy, without reference to the common good, and that such a step required authorisation by the People through a referendum."

67. Having set out those principles, Denham C.J. then proceeded to consider the terms of the ESM, and whether, having regard to the principles set out in *Crotty*, the ESM Treaty was one that was required to be ratified by the People. As she noted in para. 98 of her judgment:

> *"At issue in Crotty v. An Taoiseach [1987] I.R. 713 was the future conduct of external relations of the State, i.e. the executive power of the sovereign State to decide future external relations. ... Thus, if such a decision is required to be taken to relinquish the powers of an organ of State it must be taken by the people."*

68. In the course of her judgment, she noted that, insofar as there was a decision to potentially increase the liability of Ireland's capital subscription, such a decision required to be made by a unanimous decision of the Board of Governors appointed under the Treaty, and further required certain national procedures to be complied with, including the approval of Dáil Éireann, and an amendment of the 2012 Act. Insofar as receiving financial support, she noted that Ireland could request financial assistance and that, if it applied for such funding, the terms of such funding would be required to be within the constitutional ambit. She noted that "*[t]he Government has a duty to ensure that by its decisions and actions the terms of the Constitution are not infringed*." Therefore, she concluded that neither of the

above functions, i.e., the possibility of increasing the financial liability of Ireland, and the terms that might be applicable to any financial assistance obtained by Ireland, impinged upon the economic or monetary sovereignty of the State. She concluded, at para. 109 of her judgment, as follows:

> *"Thus, in relation to this limb of the appeal, it is clear that the relevant policy was determined by the Irish executive and legislature. The State has not ceded policy making for the future. The State has not ceded power to another institution to enable the creation of policy in the future. Nor has the State ceded to elsewhere the power to increase the State's financial contributions. Consequently, there has been no transfer of sovereignty to any degree which is incompatible with the Constitution. To refer to the analysis by Walsh J. in Crotty v. An Taoiseach [1987] I.R. 713, there has not been an abdication of freedom of action or to bind the State in its freedom of action in its formulation of foreign policy. Nor, in reference to the judgment of Henchy J. in Crotty has there been any attempt by the Government to make a binding commitment to alienate to other States the conduct of foreign relations. Nor has there been any attempt at a fundamental transformation or diminution of sovereignty, such as arose in Crotty. Nor, in reference to the judgment of Hederman J. in Crotty is this an agreement to subordinate or submit the exercise of the powers bestowed by the Constitution to the interests of other States. Rather, it is an election by the Government of a policy in union with other States in pursuit of an identical policy."*

69. She concluded that aspect of her judgment by observing that the role of the Court was only to determine whether powers exercised under the Constitution have been exceeded, and she further added that the Court has no role in relation to the policy itself, which was a matter for the government. (see para. 110 of her judgment)

70. Murray J. agreed with the judgment of Denham C.J. in a brief concurrence, and observed that:

> *"The essence of the distinction between the issues considered in Crotty and those in the present case, as explained fully in the judgments of my colleagues, is that in substance the ESM Treaty is a mechanism for the implementation of policies already determined and freely agreed to and for the achievement of objectives within the defined ambit of those policies. The SEA, on the other hand, was found in Crotty to commit the State to being bound by undetermined policies to be formulated and decided upon in the future by a body or organs other than those of the State. That is the fundamental distinction."*

71. He added that:

> *"The decision to become a party to the ESM Treaty is a constitutionally permissible example, as Hederman J. put it at p. 794 in Crotty, of the State "electing from time to time to pursue its own particular policies in union or in concert with other states in their pursuit of their own similar or even identical policies.""*

72. Hardiman J. in his dissenting judgment also relied on the decision of this Court in *Crotty*. Having referred to certain passages from the judgments of the other members of the Court in *Pringle*, he stated, at page 77, as follows:

> *"At para. 312 of his judgment in this case, O'Donnell J. declares:-*
>
> > *"In my view the words 'abdicate', 'alienate', 'subordinate' and indeed also 'transfer' contain the essence of what was considered impermissible in Crotty v. An Taoiseach [1987] I.R. 713."*
>
> *This seems to me quite consistent with what is said by Clarke J. at para. 425 of his judgment, quoting from Walsh J. in Crotty v. An Taoiseach [1987] I.R. 713, he*

identified the substance of the limitation on the executive power in the relevant area to be one which did not permit the government "to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way …" (per Walsh J. at p. 783). Similarly, he cites Henchy J. for the proposition that Government is not permitted "to alienate in whole or part to other states the conduct of foreign relations" (per Henchy J. at p. 787), nor to "subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other states" (per Hederman J. at p. 794).

Even viewing the phrases quoted above as being exhaustively descriptive of the limitations on executive power in connection with external relations, I would consider, for the reasons given elsewhere in this judgment, that adherence to the ESM Treaty would trespass on those limitations. But I do not consider that those limitations are exhaustively stated in the passages quoted. In the first place, I consider that, to adopt the words of Henchy J. at p. 786 in Crotty v. An Taoiseach [1987] I.R. 713 … " a purely national approach to foreign policy is incompatible with accession to this Treaty". To similar effect is the statement of that learned judge at p. 787 that:

"in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under [the Treaty] the point of reference is required to be the common position determined by the Member States" (emphasis supplied)."

73. He added, at page 77:

"I do not consider that the essence of what is impermissible by virtue of Crotty v. An Taoiseach [1987] I.R. 713 is comprehensibly epitomised in the word of "abdicate", or the other words cited by O'Donnell J. These words, it appears to

me, are firstly not exhaustive of what is impermissible under the regime set out in Crotty v. An Taoiseach; they are also somewhat vague and open to interpretation. Thus, the word "abdicate" is classically used of a monarch resigning his crown, and its other usages are by analogy from that. The judgments in Crotty certainly preclude abdication but also precludes more specific acts such as "to make a binding commitment to alienate in whole or in part to other states the conduct of foreign relations". More, and very significantly "to enter into binding agreements with other States to exercise that power in a particular way, or to refrain from exercising it save by particular procedures". ..."

74. He went on to say that the prohibitions contained in *Crotty* extended not merely to substantive decisions, but to the procedures whereby such a decision could be taken (see para. 209).

75. Hardiman J. then went on to consider in detail the provisions of the ESM Treaty, and the manner by which it was intended to operate and work, and also had regard to the manner in which funding for the ESM Treaty would be provided. He concluded, having done so, that the Treaty involved a change to the fundamental values and procedures enshrined in the Constitution, in that:

"(a) A significant sum of money subscribed by Irish taxpayers would be given "irrevocably and unconditionally" to a body which exists outside the Irish, and the European, legal and constitutional order.

(b) that body would be obliged by its constitution to expend these monies, or monies raised on the basis of them, in the interests of the euro zone or its Member States, as opposed to devoting them, as the Irish Government would have been obliged to do, to the common good of the Irish People."

76. For that reason, he concluded that the ESM Treaty required a referendum amending the Constitution, in order to permit the State to ratify the ESM Treaty on behalf of Ireland.

77. O'Donnell J. in his judgment also recognised the importance of the decision in *Crotty*, for the purpose of determining the issues in *Pringle*, referring specifically to the passage from the judgment of Walsh J., where he opined that:

> *"The essence of sovereignty is the right to say yes or to say no."*

78. That passage, it had been argued, was the essence of the decision in *Crotty*. O'Donnell J., however, cautioned against reliance on a single sentence in the judgment, saying:

> *"A single sentence in a judgment rarely encapsulates the essence of a lengthy judgment, and a judgment of one judge, even one as eminent and influential as Walsh J., is not to be taken, in isolation, as stating the ratio decidendi of a case. There is always a danger of substituting the invocation of a vivid and memorable phrase for the analysis of the substance of a judgment."*

79. He concluded in that respect that the plaintiff's arguments involved a clear misunderstanding and misinterpretation of *Crotty*, and indeed of the Constitution (see page 102, para. 306 of the judgment).

80. Having referred to a number of provisions of the Constitution, he observed at para. 308 as follows:

> *"It can be deduced from these constitutional provisions, at a minimum, that the Constitution clearly anticipated the executive power could and would involve the making of binding agreements with other nations, and that Ireland might become involved in disputes which themselves might be resolved by a process involving a binding determination by which Ireland would be obliged to abide."*

81. Having referred to a number of passages from the judgments of Henchy J., Hederman J., and Walsh J., he observed, at para. 312, as follows:

> *"In my view, the words "abdicate", "alienate", "subordinate" and indeed also "transfer" contain the essence of what was considered impermissible in Crotty v. An Taoiseach [1987] I.R. 713."*

82. He went on to observe, at para. 315, as follows:

> *"The issue which divided the parties in Crotty was whether or not the courts could enforce any limitation on governmental activity in the field of foreign affairs. The issue which divided the court was not whether the creation of a European wide foreign policy would be an alienation of Irish sovereignty, but rather whether such a development had occurred.*
>
> *Second, as Clarke J. points out in his judgment, any agreement made by a country or an individual almost necessarily limits the freedom of the parties. It certainly restrains the party from saying no to what has been agreed. Furthermore, in many cases the entry into an agreement may also create restraints on the freedom to enter into any inconsistent agreement."*

83. He continued:

> *"There is no sense in which Ireland or any other state can remain completely free to say no, once it has entered into any such agreement, alliance, grouping or body. It is the decision to enter into an agreement or alliance which is the exercise of sovereignty."*

84. He went on to add, at para. 317, as follows:

> *"The understanding of Crotty v. An Taoiseach [1987] I.R. 713, contained in the judgments of Denham C.J. and Clarke J., is, I think, fortified by a consideration of*

the underlying concept of sovereignty, and particularly the manner in which such sovereignty is expressed in the Constitution. The concept of sovereignty was traditionally defined as containing not just the positive requirement of a political superior to whom the population was in the habit of obedience, but also, and importantly for present purposes, the negative requirement that such superior owe no obligation of obedience to the dictates of any other body."

85. He added, at para. 318:

"Sovereignty, as being a condition of owing no allegiance or duty of obedience to any other entity, is, in my view, asserted very deliberately by the Constitution and for obvious reasons, once the historical context is recalled. The new polity being established, in essence although not in name a republic, was one that consciously asserted all the attributes of sovereignty. This was a very deliberate contrast with even the expanded dominion status which had existed prior to 1937. The Constitution reflected a fundamental truth as to the source of the sovereignty of the State, namely the People. The legal source of the Constitution was to be the decision of the People rather than a grant by a foreign parliament. The preamble to the Constitution records that it came into being by virtue of the declaration that the People "[d]o hereby adopt, enact, and give to ourselves this Constitution." Accordingly, Article 1 states that "[t]he Irish nation hereby affirms its ... sovereign right to choose its own form of Government. ..." Consistent with this assertion of sovereignty, Article 6 declares that "[a]ll powers of government, legislative, executive and judicial" derive from the People. Among the key attributes of such sovereignty was the right to conduct international relations on an equal basis with other countries and the exclusive exercise by the organs of government of the powers of government."

86. He then considered why it was that the majority considered that the SEA was a "*subordination*" of Irish sovereignty in the case of *Crotty*. He said:

> *"In the first place it is plain that the provision affected the entirety of the foreign policy of the State and not simply one area of agreed cooperation. Once enacted, such foreign policy would no longer be made by the Government alone but would be arrived at under a requirement of convergence with the policy of other member states. Seen in this way it is perhaps easy to see why it was claimed that the executive power of the State in relation to the entirety of its foreign policy was being subordinated, and at least to some extent alienated and transferred, and to that extent abdicated. Ireland would no longer make its own determination of its relationship with other states, to use the language of Article 1 of the Constitution, but would make decisions in the light of an embryonic collective foreign policy into which other countries would necessarily have an input. There would therefore have been, to that degree, a diminution of the sovereignty asserted and established under the Constitution, and effected without the assent of the People."*

87. He took the view, therefore, that the ESM was markedly less significant in its effect than the provisions of the SEA, and was distinct from those provisions. It did not concern Ireland's foreign policy as a whole, but related solely to a decision to invest, along with other Member States, in an institution which could make funds available in accordance with the terms and criteria established by the Treaty to States, including Ireland. He expressed the view that:

> *"The decision to participate in the ESM was in my view an exercise in sovereignty rather than an alienation of it, and was taken by the organ of government to which such decisions are consigned by the Constitution."*

88. He went on to say:

> *"It is no more a breach of Irish sovereignty asserted under the Constitution and defended in Crotty v. An Taoiseach [1987] I.R. 713, than a person who decides to invest a large portion of his or her wealth in a limited company with a defined investment objective could be said to lose his or her status as a citizen."*

89. He made a number of further observations at page 112 of the judgment, in relation to *Crotty*, and it would be helpful to set out in full the comments in that regard:

> *"In my view this approach also demonstrates why it is not possible to read the majority decision in Crotty v. An Taoiseach [1987] I.R. 713 as requiring that individual decisions made by the Government in the field of foreign policy must, if they are to be valid, make provision for future decisions to be made by unanimity or alternatively, accord to Ireland alone a veto over any such future decision. First, it is plain that no such individual decision was in issue in Crotty: on the contrary, the case concerned the requirement to bend Ireland's foreign policy in general towards a common European policy. For the reasons already set out, I do not consider that any such supposed principle could be required by the Constitution, and in my view it is not required by Crotty. There is nothing in Crotty, or indeed in logic, to suggest that the concept of sovereignty contained in the Constitution of Ireland 1937, requires that Ireland, while it may enter into agreements, must insist that it retain the capacity to change its mind. Even if the judgment of Walsh J. in Crotty v. An Taoiseach could be interpreted differently (and for the reasons already set out, I do not accept that that is the case), there is in my view no basis for attributing to that judgment, still less a phrase from it, a position of primacy within the case. The ratio decidendi of a decision made by a collegiate court is in my view to be determined by that proposition, or reason, which decides the particular case*

and on which, it can be said, a majority of the court is agreed. In my view that ratio decidendi is that already set out above, and as addressed in the judgments of Denham C.J. and Clarke J."

90. One of the other points that was raised in that case was that the commitment by Ireland of large funds to be expended by another body outside Ireland was incompatible with the Constitution. In that regard, O'Donnell J. made the point (page 113) that it was commonplace for public funds to be expended by bodies outside the Irish legal order under the guise of overseas aid, specific grants in cases of national emergencies, or subscriptions to international bodies such as the IMF, the World Bank or any other international body. He went on to say:

"...what the Constitution requires is that the decision to subscribe such funds should be taken by the correct organ of government on its own, and not in subordination to any other body. That decision cannot be transferred, alienated or abdicated to another body. The relevant decision however is the decision to subscribe the funds for an identified purpose."

91. He then observed that that decision had been made by the appropriate organ of government, in accordance with the procedures, and accountability, provided for in the Constitution. Accordingly, the approach of O'Donnell J. was to dismiss the appeal on the issue of sovereignty.

92. McKechnie J. in the course of his judgment also considered in detail the decision of this Court in *Crotty v. An Taoiseach*. At para. 354 of his judgment, he noted the description of the conclusions in that case by the other members of the Court in *Pringle*, and adopted what they said. However, he added a few comments of his own, and it seems to me that it would be helpful to refer to those in some detail. He stated:

"(i) Walsh J., in a passage referred to at p.781 of the report, states that the essential nature of sovereignty is the right to say "yes or no". Sovereignty in this context can only mean that as provided for and as intended by the Constitution. It is said by the plaintiff that this right encapsulates the very heart, not only of the majority decision but of sovereignty itself. Without qualification or context I cannot agree with this proposition, either at a particular or general level. Given the extensive observations of the judge on this issue, to take such a phrase and to treat it in isolation, as founding the essence of his decision is, in my view, to misread his judgment. To suggest that the criteria for determining the instant challenge, to the exercise by the Executive of its power to ratify the ESM Treaty, can be determined on such a basis is simply not sustainable. In fairness, I should immediately say, lest I appear to do an injustice to the plaintiff, that his reference to and reliance upon this phrase may have been intended as a shorthand expression of his more general argument under this heading. Therefore, whilst the point has to be addressed, the overall case has to be determined on the entirety of what the majority said, and not simply on this passage;

(ii) reverting to the particular argument for a moment, the reason why I reject the suggested significance of the expression is that in the first place, the judge himself expressly acknowledged that Finlay C.J. was the source of such phrase, when giving the court's judgment on the challenge to the SEA, save for Title III thereof. That remark, as originally made, was entirely appropriate to the context then under discussion by Finlay C.J. At p. 769 of the report the context appears where Finlay C.J. stated:

> *"[t]he capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was*

one of the reasons why the Third Amendment to the Constitution was necessary. Sovereignty in this context is the unfettered right to decide: to say yes or no".

Therefore, having transposed such remark, it is not appropriate to assign or ascribe to it, the determinative importance which has been suggested;

(iii) a much more representative version of the judgment of Walsh J. is to be found at the end of p.780, and on pp. 782 and 783 of the report. What is stated there has been set out in the other judgments delivered and therefore I will not repeat them: everyone is familiar with the key expressions from that and the other majority judgments, such as the impermissibility of "abdicating", "alienating", "surrendering", or "transferring" such powers, save as allowed by the Constitution;

(iv) it is clear from these passages that Walsh J. was very much focusing on the freedom which the Constitution bestowed on the Government in deciding matters of foreign policy. That freedom was to develop, formulate and pursue policy and to change or adjust that policy as occasion required. That freedom to exercise, or not to exercise as the case may be, in a particular way, could not be abridged by the terms of an agreement binding on the Government and reached with a third party country or other entity;

(v) it is true to say that some excerpts from his judgment may be capable of an interpretation consistent only with Ireland having an overriding control, within the terms of any such agreement, being one capable of exercise at all times and on all issues. For the reasons given by O'Donnell and Clarke JJ., I do not agree that such an interpretation is the correct one. In fact, Walsh J. pointed out several

agreements to which Ireland was a signatory, where no such control existed and therefore could not be exerted;

(vi) in addition however, if there should be ambiguity in this regard, the words or expressions in question, must be looked at and measured against the terms of Title III, of the SEA, which were the subject matter of the challenge. Given the scope, breadth, and skeleton nature of the aspirations envisaged by that treaty and the demanded level of cooperation necessary to give effect to them, it is understandable how it could be said that the core constitutional freedom in question, at least in part, was being surrendered. Furthermore, when a comparative analysis is conducted between Title III of the SEA and the provisions of the ESM Treaty, the seismic distinction between both, becomes instantly demonstrable."

93. That, in my view, is a very useful overview of the judgment of Walsh J. in *Crotty*, and its full import.

94. He also considered the views of Henchy J. in *Crotty*, noting that Henchy J. viewed Title III as a vehicle to move foreign policy from a national to a European Community level, and that it constituted a "fundamental transformation" in the relations between participating states. He also referred to the views of Hederman J. (see para. 356).

95. At para. 362, McKechnie J. observed:

"This brief survey of its provisions do not do immediate justice to a comparative analysis with Crotty v. An Taoiseach [1987] I.R. 713. If time and space permitted, the laying out of its terms in full, would immediately convey the disparity between it and Title III of the SEA. In effect the fundamental difference between both is the fact that the ESM Treaty is essentially policy implementing and not policy making.

Therefore, it cannot be said that there is any fundamental transfer of sovereign power to the institution or to the other subscribing states."

He concluded his judgment by rejecting the argument that the State by entering into the ESM Treaty had acted impermissibly in the manner identified in *Crotty v. An Taoiseach*. He expressed the view that when the benefits of the ESM Treaty were accounted for, it could be said that its ratification, in the full knowledge of the commitments undertaken, was in itself an act of sovereign power and not a subjection of it. Accordingly, he too dismissed that aspect of the plaintiff's claim.

96. Clarke J., in the course of his judgment, also carefully analysed the judgments in Crotty. It is unnecessary to repeat at length the passages from that judgment, cited by Clarke J. in his judgment, as many of those passages have been set out above. Clarke J. made the point that, on a narrow reading of some of the passages cited, it might be said that the Court in *Crotty* came to the conclusion that the overall architecture of the Constitution does not permit the government, in exercise of its power to conduct the foreign policy of the State, to enter into binding arrangements with other countries which would have the effect of circumscribing Ireland's freedom of action in the area of foreign policy. However, he took the view that that was not a conclusion that could be found in the judgments of the court in *Crotty*. And if that were the view of the court in *Crotty*, he disagreed with it (see para. 417).

97. He went on to say, at para. 418, as follows:

"The backdrop to Crotty v. An Taoiseach [1987] I.R. 713 is, of course, the constitutional architecture relating to executive power and the conduct of international relations. Article 29.4.1° of the Constitution provides that the executive power of the State "in or in connection with its external relations" is to be in accordance with Article 28, exercised "by or on the authority of the Government". Article 28.2, of course,

provides that the executive power of the State is to be, subject to the provisions of the Constitution, exercised by or on the authority of the Government. Thus, the Constitution is explicit that, in the conduct of the foreign policy of the State, the Government is constrained by the provisions of the Constitution."

98. He went on to give a number of examples of such constitutional constraints, expressly provided in the Constitution. He added (at para. 420) that it was important to note that the Constitution did not require, as a matter of principle, that all international agreements be put to the People for approval through a referendum. He said "*It is only where an international agreement (either indirectly or by design) breaches the terms of the Constitution as it then stands that there is a requirement for an appropriate amendment to be made to the Constitution. The question of whether an international agreement infringes the Constitution is ultimately a matter for the determination of the courts …*".

99. He went on to note that the government is given a very wide discretion as to how to conduct the foreign policy of the State under the Constitution, citing the decision in *Horgan v. Ireland* [2003] 2 I.R. 468. He said, at para. 423:

> *"It would be a strange conclusion indeed if that broad discretion was to mean that the Government could not, as a means of exercising that discretion and, thus, exercising its sovereignty, enter into what must be the most usual way in which sovereign states exercise their sovereignty, i.e. by agreeing with other sovereign states to pursue a specified policy in a specified way."*

100. As he observed, the government, in pursuit of its legitimate policy objectives in relation to foreign policy, as a matter of practicality, would have to do so by entering into bilateral or multilateral treaty arrangements with other countries, with a view to giving effect to such legitimate policy objectives.

101. Referring to the observations of Walsh J. and Henchy J. as to the limitations on a government in entering into binding agreements with other states, where they use the language of abdication and alienation of the State's freedom of action in foreign policy, while Hederman J. spoke of subordinating or submitting the exercise of the powers of the State conferred by the Constitution to the advice or interest of other states (see para. 425) and he went on to say, at para. 426, as follows:

> *"On that basis it seems to me that the overall position is quite clear. The Government enjoys a wide discretion, under Article 29.4, to enter into international treaties subject only to the obligation to obtain the approval of the Dáil, if there is a commitment to financial expenditure, or that of the Oireachtas, if it is considered necessary to change domestic Irish law so as to comply with obligations undertaken by the treaty concerned. The limit on the discretion which the Government holds arises where the relevant treaty involves Ireland in committing itself to undefined policies not specified in the treaty and in circumstances where those policies, which Ireland will be required to support, are to be determined not by the Government but by institutions or bodies specified in the treaty. It is an abdication, alienation or subordination of policy formation and adoption which is not permitted. A transference of the means of implementing a policy agreed by the Government, and specified in the treaty concerned, to an appropriate implementation institution or body may be permitted provided that it does not go so far as to amount, in substance, to an abdication, alienation or subordination of the role of government under the Constitution."*

102. It is worth bearing in mind that the State enters into many treaties with other countries as a matter of fact. The Law Reform Commission has published a draft inventory of international obligations (LRC IP 14-2018) setting out a list of such international obligations

under a variety of headings containing some 1400 entries. They cover a wide range of topics, including civil and commercial matters, culture and education, employment and labour, international trade, technical and scientific co-operation, to name but a few. Key to the power of the government to do so is whether or not, in doing so, the treaty entered into does not "*go so far as to amount, in substance, to an abdication, alienation or subordination of the role of government under the Constitution*".

103. Clarke J. went on to observe, at para. 443, as follows:

> *"There are many circumstances in which both the Government and the Oireachtas may come under significant practical political pressure, either domestically or internationally, to adopt certain measures. That is the way of the world. However, the architecture of the Constitution is concerned with where the final decision lies. The fact that institutions of government may, as a matter of practical politics, from time to time have to make decisions or bend their policies in the direction of the wishes of other countries does not, of itself, breach that model. That constitutional architecture may be interfered with when the institutions of government enter into commitments which amount to an abdication, alienation or subordination of the powers which the Constitution gives to those institutions."*

104. He went on to consider the question of sovereignty further, at para. 458 of his judgment, having considered the details of the ESM Treaty, and he observed as follows:

> *"However, the Constitution is, in many respects, quite specific about the model of sovereignty adopted. Article 15.2 confers on the Oireachtas "the sole and exclusive power" of law making. Article 34.1 requires that justice only be administered in courts established by law by judges appointed under the Constitution itself. As already noted the power of conducting foreign policy is conferred exclusively on*

the Government (Article 29.4.1º) as is the executive power of the State (Article 28.2). The constitutional regime is clear. The judicial, legislative and executive organs of government are given exclusive power in their respective domains. The Constitution does not, by its clear terms, permit those powers to be given away or significantly shared with others. That constitutional restriction does not, of course, mean, for the reasons set out by O'Donnell J. in his judgment in this case, that there may not be an interaction between the way in which those organs of government may operate. However, that interaction is itself specified expressly by the terms of the Constitution."

105. He went on to comment, at para. 460, as follows:

"But in international relations, as in very many other areas of public and private life, freedom to act will often, as a matter of practicality, involve freedom to make commitments which will, to a greater or lesser extent, limit ones freedom of action in the future. Persons are free to enter into lawful contracts. However by so doing the person concerned may restrict their ability to enter into other contracts in the future. It is inherent in certain types of decision that the decision in question will have a reach into the future to a greater or lesser extent. It seems to me to follow that the mere fact that decisions taken now can have such a reach cannot mean, on any proper analysis, that the relevant decision is necessarily taken to amount to an impermissible restriction on freedom to act in the future. If it were to be otherwise, parties, both in the private, public and international spheres would, in truth, be deprived of a significant freedom of action."

106. That seems to me to be an important observation. The fact that an agreement or treaty may have an effect into the future and may indeed limit freedom of action or choice in the

future, is not, *per se*, to take a course of action which is prohibited by the Constitution. He went on to consider and to conclude that the ESM Treaty could be distinguished from the SEA, which was at issue in *Crotty*. As he observed, it did not involve a transference of the power to make policy into the future in any material way to other countries or institutions. Nor did it involve a permanent commitment to a set of policies so far reaching as to amount to an effective transference of sovereignty. Accordingly, on that basis, he did not consider that it was necessary for a referendum in order to ratify the ESM Treaty.

107. What conclusions can be drawn from this detailed consideration of the judgments of this Court in *Crotty* and *Pringle*? It seems to me that a number of observations can be made. First of all, the government, under the Constitution, (Article 28), is authorised to exercise the executive power of the State. Part of the role of the government in that context relates to the conduct of foreign affairs. The government, in the exercise of those powers, is authorised to enter into treaties or agreements with other states or institutions in the course of its conduct of external relations on behalf of the State. The method for doing so depends on the nature of the treaty or agreement at issue. As has been seen, a treaty containing a financial obligation must be approved by the Dáil, (Article 29.5.2° and Article 29.5.1° requires that every international agreement must be laid before the Dáil). What emerges from a consideration of the judgments is that the government cannot give away the powers conferred upon it under the Constitution by entering into an international treaty or agreement with another body. As we have seen from *Crotty* itself, the SEA in that case involved a situation where the government proposed to enter into an agreement which would have the effect of significantly reducing its freedom of operation in the area of foreign policy to an extent that was found to be impermissible. If a treaty or agreement amounts to an abdication, alienation or subordination of the organs of state under the Constitution, then such treaty or agreement must, to be effective, be ratified by an amendment to the Constitution by the

People. As Denham C.J. put it succinctly at para. 98 of her judgment in *Pringle*, if a decision is required to be taken to relinquish the powers of an organ of state, it must be taken by the People.

108. Ireland has signed up to many treaties and joined various international bodies which have created obligations for Ireland and, no doubt, benefits for Ireland, such as our membership of the United Nations and the Council of Europe. Clearly, not every such treaty or agreement entered into by Ireland operates in a way which has the effect that the SEA would have had on the constitutional powers provided for the government in the Constitution in relation to external affairs. The headnote in *Pringle* sums up the position that has to be adhered to by the State in relation to the conduct of external relations. At Headnote 3 it is said:

> *"That, notwithstanding its wide discretion in foreign policy, the Government could not abdicate, alienate, subordinate, or transfer its power to formulate or adopt policy, or habitually act in obedience to the wishes of another body or person. Whether it had done so would depend on the nature of the commitments entered into."*

109. In looking at the cases of *Crotty* and *Pringle*, it is interesting to observe some of the commentary to be found about these two important cases in Kelly, *The Irish Constitution*, referred to previously. At para. 5.3.65, the authors say:

> *"In some respects, the Supreme Court's decision in Pringle v. Government of Ireland has presaged a significant change in direction. While the reasoning and ultimate decision in Crotty remains controversial, it has been nonetheless accepted by successive governments of the day. ... In practice, this means that the ratification of every Treaty change involving any further appreciable transfer of sovereignty or the*

creation of new competences for the Union has required – or at least has been thought to require – a referendum."

110. The authors went on to say that a more nuanced view emerged from the decision in *Pringle v. Government of Ireland*. Having noted the approach of the court in that case, the following observation was made, at para. 5.3.67:

"It is hard to disagree with the conclusion of many observers that the effect of Pringle has been to neutralise at least that part of Crotty which dealt with restrictions on the executive power of the State. One should not, however, deduce from this that the Government now has a free hand, because the other aspect of Crotty – namely, that a proposal to amend an EU Treaty does not enjoy constitutional immunity for the purposes of Article 29.4.6° of the Constitution because it is not (yet) an obligation of EU law – continues to hold sway. There will thus continue to be constitutional objections where an EU Treaty imposes specific obligations on Member States over and above any perceived restrictions on the right to conduct foreign policy. Accordingly, even if the decision in Pringle had been delivered before the dates of both the Lisbon Treaty and the Fiscal & Stability Treaty, it is hard to see how a referendum would still not have been required in both instances. In the case of the Lisbon Treaty, the decision to accord Treaty status to the Charter of Fundamental Rights would probably have required a constitutional amendment, given the uncertain reach and scope of the Charter and the manner in which it might potentially overreach some of the corresponding fundamental rights provisions of the Irish Constitution. The same is true in respect of the Fiscal Treaty: the specific obligations in relation to fiscal discipline and budget deficits would cut across the autonomy of Dáil Éireann in relation to such matters granted by the Constitution."

111. Finally, reference should be made to the submissions filed by the parties in relation to this issue. So far as the appellant is concerned, the position arising from *Crotty* and *Pringle* is that those cases involved questions of whether executive powers were being ceded or used by the government. The point was also made on behalf of the appellant that, insofar as the question of whether CETA laws would be binding on the State, it was observed that there was no provision in the Constitution for international law to evade Article 15.2.1°, simply because the law was made on an international plain. They referred to O'Donnell J.'s judgment in *Pringle*, saying that the Constitution was specifically designed to guard against any law applying within the State, other than those laws made through the powers given by the People to the Oireachtas. By contrast, the submissions on behalf of the respondents deal at more length in relation to the decisions in *Crotty* and *Pringle*, noting that the majority in *Pringle* underscore the wide freedom of the State, and the Executive, on its behalf, to enter into international agreements. Reference was made to para. 308 of the judgment of O'Donnell J., which I have already cited above at para 77.

112. The respondents emphasised that CETA is such an agreement, and the Tribunal envisaged under CETA is such a "process". They take issue with the assertion of the appellant to the effect that "*the creation of rules with binding sanctions for breaches of an international treaty is prohibited by the Constitution*", saying that there is no authority for this, other than a definition to be found in Murdoch's Dictionary in relation to the definition of law, and make the point that that does not support the submission. Finally, they contend that the appellant nowhere explains what elements of sovereignty are supposedly alienated if Canadian investors have a right to damages, should they be able to prove certain losses. They also make the point that there is no analogy between CETA and Title III of the Single European Act, which was at issue in *Crotty*. They emphasise that *Crotty* was, as O'Donnell J. had noted in his judgment (at para. 34) a truly exceptional case. Finally, they refer to a

quotation from Doyle & Hickey, *Constitutional Law: Text, Cases and Materials* (2nd Ed., Clarus Press, 2019) in relation to the judgment in *Pringle*, where the authors say as follows:

> *"The overall effect of Pringle is to leave the government with considerably more freedom of action in the field of foreign policy, particularly in respect of multilateral treaties that establish competences for international institutions, than many people may have thought since Crotty."*

113. It is certainly apparent from academic commentary that there is a view that the judgments in *Pringle* moved some distance from the position taken in *Crotty*. I have to say that it is not entirely clear to me what the extent of the change since *Crotty* exemplified by *Pringle* may be. It is apparent that, in *Crotty*, there was a clear interference with a constitutional power expressly conferred on the State to conduct the external affairs of the State. That authority was diminished significantly as a result of the SEA. In *Pringle*, there was no such obvious diminution of any sovereignty or power of any organ of the State. The ESM Treaty had clear and defined limits, and, as such, did not appear to impinge on matters such as the legislative organ of the State, or the judicial organ of the State. Neither did it involve control over public funds. It required a contribution to the stability fund, albeit of a very large amount, but of a defined amount bearing in mind that further sums could be required from Ireland but any such sums could not be provided without further legislation. To my mind, what was at issue in *Pringle* is somewhat different from that which was at issue in *Crotty*. It is fair to say that *Pringle*, as reflected in the comments of Doyle & Hickey set out above, acknowledges that one of the functions of government is to enter into international agreements and treaties, and that such treaties may create through international institutions obligations binding on the State. That is one of the features of modern international trade and relations.

114. To summarise my views on the distinction between *Crotty* and *Pringle*, I would observe that in 1937, the People of Ireland adopted the Constitution. The historical background to the enactment of Article 29.4.1° of the Constitution which gives the power of the State in relation to external affairs to the Government has been well described in the judgment of O'Donnell J. in one of the passages in *Pringle* to which I have already referred, and it is not necessary for me to repeat what he said there. Suffice it to say, in 1937, the People gave power to conduct external relations to the Government. The SEA at issue in Crotty removed that power from the Government, thus trenching on the power given to the Government by the People. Not surprisingly, the Supreme Court found in *Crotty* that what had been given by the People could only be taken away by the People and could not be taken by the Government entering into the SEA. No such issue arose in *Pringle*. While the ESM Treaty involved the payment of significant funds into the Stability Fund, it was not demonstrated that the ESM Treaty trenched on any specific powers or functions of any organ of the State. It should be borne in mind that Ireland had been a member of the Eurozone since 2002 having previously been a participant in the ESM which had been created to provide currency stability in Europe following a series of treaties, starting with the Maastricht Treaty. However, it is relevant that the ESM Treaty was a continuation of steps in the area of currency stability and it did not in any way interfere with any organ of the State in the exercise of powers conferred by the People in the Constitution. Sums of money could only be provided to the Stability Fund after legislation by the Oireachtas. In the circumstances a referendum was not required to amend the Constitution.

115. The State, in the exercise of its powers under the Constitution, can enter into international agreements. As has been pointed out above, this State has entered into a multiplicity of such agreements. That cannot be a diminution of sovereignty but is, on the contrary, the exercise of sovereignty. Undoubtedly, as Clarke J. pointed out in his judgment

in *Pringle* and referred to above, the entry into such agreements may limit for the future the freedom to act contrary to any such agreement but that is inherent in the nature of such agreements, designed as they are to indicate how a country will act in the future in the circumstances covered by the agreement (see para 460 of his judgment). What one can say at this stage is that a proposed treaty or agreement that restrains or diminishes the exercise by the organs of the State of the powers conferred on them under the Constitution will require a referendum. The academic debate as to the differences in emphasis that may exist as between the decisions of this Court in *Crotty* and *Pringle* is interesting but, ultimately, the question to be determined in this case is whether or not CETA, in respect of the matters contended for by Mr. Costello, particularly in relation to the legislative power of the Oireachtas, and the powers of the Courts in relation to the administration of justice, has the effect of going so far as to require a referendum in order to ratify CETA.

116. For completeness, it would also be helpful to refer to the observations of the trial judge on the distinctions between the treaty at issue in *Crotty* and CETA. At para 97 of her judgment, she said:

> *"At a very basic level it seems to me that there is a significant difference between the type of treaty at issue in Crotty which required the future coordination of foreign-policy and an agreement such as CETA which is a detailed and technical trade agreement. The commitment to joint action within the framework of European Political Cooperation considered in Crotty potentially covered an unlimited range of issues that might arise concerning unspecified third parties in undefined circumstances into the future and would deprive the Irish Government of the right to formulate an independent policy on those issues. In contrast, the scope of CETA and the policies it pursues are clearly set out in CETA itself. The subject matter of CETA cannot be said to be either undefined or unspecified and,*

consequently, the limit on the Government's discretion under Article 29.4 of the Constitution identified by Clarke J has not been exceeded. The plaintiff complains of the rule making powers of the CETA joint committee, but it is clear from CETA that the Joint Committee's function is to be responsible for (Article 26.1.3) and to supervise and facilitate (Article 26.1.4) the "implementation and application" of CETA and it has power to make decisions only for the purpose of "attaining the objectives" of CETA. Thus, insofar as ratification of CETA would commit the State to certain policies and objectives into the future, these policies are neither undefined at present not to be determined by the institutions established by CETA to the exclusion of the parties themselves. Further, as previously noted, the decision making power of the CETA Joint Committee is not self-executing, being subject to the completion by the parties of their internal requirements and procedures."

It is certainly the case that CETA is a detailed and technical trade agreement, far removed from the type of treaty envisaged in *Crotty*. How far that assists in dealing with the issues in this case remains to be seen and whether it trespasses on the powers of the Oireachtas and the functions of the Courts has to be considered.

Some Observations on CETA, Similar Agreements and Relevant Case Law of the CJEU

117. At this point, I propose to look at some relevant case law from elsewhere. At the outset, it would be useful to make a few observations about trade agreements. Bungenberg and Reinisch in their commentary in *CETA Investment Law* (Bloomsbury Professional, 2022) made the observation in their introduction to the commentary as follows:

"With the entry into force of the Treaty of Lisbon, the European Union (EU) has gained new competences in the area of international investment law and politics. Article 207 Treaty on the Functioning of the European Union (TFEU) provides for an external treaty making power in the field of foreign direct investment. Overall,

the inclusion of investment protection in the common commercial policy is seen as a "step forward" from an EU law perspective.

After the entry into force of the Treaty of Lisbon on 1 December 2009, investment protection chapters have become part of the negotiation of new economic agreements with third countries. A negotiating mandate was promptly issued on investment protection for the agreements with Canada, India and Singapore. Until the Court of Justice in the European Union's (CJEU) Singapore Opinion…it was a matter of debate whether the EU had the exclusive competence to negotiate and conclude 'standalone investment agreements' – comparable to international investment agreements (IIAs) that were concluded by the EU Member States 'before' the entry into force of the Treaty of Lisbon on 1 December 2009 – as well as Free Trade Agreements (FTAs) comprising chapters on investment law. In its Singapore Opinion, the CJEU found a fairly clear answer to this question, insisting on the limit of the EU's power to foreign 'direct' investment (FDI) and holding that agreements comprising portfolio investment and disputes settlement fall under the shared powers of the EU and its Member States. The EU – Canada Comprehensive Economic & Trade Agreement (CETA) is an exception to this, as this agreement was already signed before the Singapore Opinion was rendered."

118. As an example of the fact that such agreements are now more common place, the authors noted that investment agreements are currently being negotiated with China and Myanmar, and other negotiations are taking place with India, Libya, Egypt, Jordan, Morocco, Tunisia, Malaysia, and Thailand, which will include investment chapters as part of the larger free trade agreements being negotiated. The authors further note that agreements have been concluded, apart from CETA, with Singapore, as referred to already, Vietnam and Mexico. Thus, one can see that such agreements are becoming part and parcel

of international trade, and taking place on a more frequent basis, on a multilateral basis involving the EU and third-party countries.

119. The questions at issue in respect of CETA and similar trade agreements focus on the provisions of those agreements in respect of investor protection. There is no objection, and it is hard to see how there could be, to trade agreements in general terms. The issues that tend to arise relate to the operation of tribunals created under the trade agreements for the purpose of resolving issues between individual investors and the states in which the trade agreement is operative. For that reason, it would be helpful to refer to some case law in regard to such trade agreements, and, indeed, CETA. A further issue that arises relates to the competence of the EU to enter into such agreements, and whether it can do so without the involvement of the Member States.

120. The first such case I want to mention is a decision of the CJEU, *Opinion 2/15* ECLI:EU:C:2017:376 in relation to the Singapore Free Trade Agreement ("Singapore Opinion"). That Opinion focused on the respective competences of the EU and the Member States. The question at issue was whether the agreement could be signed by the EU alone, or whether it was a "mixed" agreement required to be signed by the EU and the Member States, or whether it was required to be signed by the Member States alone (see para. 31). Specific aspects of the Singapore Agreement were found to come within the exclusive competence of the EU. Having considered the terms of the Agreement at length, the CJEU expressed the view that certain provisions of the Singapore Agreement in Chapter 9 of the Agreement, and Chapter 14, fell within the competence of the Member States. The views of the CJEU on the dispute resolution mechanisms within the Agreement are of particular interest, insofar as they involve disputes between investors and states. The Court opined, at para. 291, as follows:

"291. The claimant investor may indeed decide, pursuant to Article 9.16 of the envisaged agreement, to submit the dispute to arbitration, without that Member State being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 of the agreement.

292. Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States' consent.

293. It follows that approval of Section B of Chapter 9 of the envisaged agreement falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States."

121. It is interesting to observe the sentence in those paragraphs to the effect that the reason why the Member States have to give their consent is because the regime envisaged under the Singapore Agreement "*removes disputes from the jurisdiction of the courts of the member states*". This is a comment to which I will return in due course.

122. It is also relevant to note that, at para. 303 of the Opinion, the Court pointed out that a different position obtained in relation to dispute settlement between the parties, and it noted, at para. 303, that:

"Since that regime relates to disputes between the European Union and the Republic of Singapore, it, unlike the investor-State dispute settlement regime laid down in Section B of Chapter 9 of the envisaged agreement, is not liable to remove disputes from the jurisdiction of the courts of the Member States or of the European Union."

123. Ultimately, the CJEU concluded that certain aspects of the Singapore Agreement were in some respects not within the exclusive competence of the European Union, and those provisions included the provisions of Section A of Chapter 9, insofar as they related to non-direct investment between the European Union and the Republic of Singapore, and the provisions of Section B in relation to investor-State settlement of Chapter 9, and certain other provisions. As they involved a shared competence, it followed that the Agreement had to be signed both by the EU and the Member States.

124. Thus, as one can see, because of the findings of the CJEU in that case, it is clear that, in similar agreements, certain provisions found as a general proposition in such trade agreements, particularly in relation to the area of investor protection and dispute resolution, create a shared competence between the EU and the Member States requiring each state to ratify in accordance with its own national law.

125. The trial judge herein, at para. 177 of her judgment, had regard to the Singapore Opinion and accepted that Ireland had to ratify CETA by reason of the dispute resolution mechanism contained therein. She concluded, at para. 179, as follows:

> *"The subject matter of the entire of CETA falls within the competence of the EU being either a matter of exclusive EU competence (under the common commercial policy) or a matter of shared competence (under free movement of capital). However, the CJEU has held as regards a similar free trade agreement that ratification by Member States was required not just because of the fact that part of the subject matter fell within an area of shared competence, but because of a dispute resolution mechanism contained within that agreement. In those circumstances it is difficult to construe ratification of CETA as something that is "necessitated" by virtue of obligations of membership of the EU for the purposes of Article 29.4.6 of the Constitution."*

126. The respondents disagreed with her conclusions in this regard and sought to argue that the ratification of CETA was necessitated by our membership of the EU (see Article 29.4.6° of the Constitution). This is based on an argument that CETA does not remove disputes from the jurisdiction of the courts of the Member States and does not involve a subtraction of jurisdiction from the Irish courts. CETA provides for the ratification of the Agreement and until this is done, CETA will not be approved (see paras. 144-155 of the respondents written submissions). I cannot see how the respondents' arguments in this regard could be correct. The fact that large parts of the Agreement are within the EU's competence is no answer to the fact that CETA requires to be signed by both the EU and the Member States, given that it contains similar clauses to those at issue in the Singapore Opinion, and is, undoubtedly, a mixed agreement. That being so, it is impossible, in my view, to see how it could be said that the duty of co-operation necessitates the signing of CETA. Each Member State has to ratify CETA, and what is at issue in this case is whether the method proposed by the State is sufficient. Thus, I agree with the trial judge in this regard that ratification of CETA cannot be viewed as something that is "necessitated" by virtue of obligations of membership of the EU. Accordingly, so far as I am concerned, I am satisfied that the question as to whether ratification is necessitated by the obligations of membership of the EU can be answered by saying no.

Opinion 1/17 of the CJEU

127. The second decision of the CJEU to which I wish to refer emanated from a request by Belgium to the CJEU for an opinion regarding CETA itself and asking whether the provisions of Chapter 8 of CETA were compatible with treaties of the European Union, including those dealing with fundamental rights. A number of issues had been raised by Belgium in respect of CETA. The first of those was whether the proposed ISDS (Investor-State Dispute Mechanism) by means of the CETA Tribunal, particularly where the CETA

Tribunal was not enabled to refer a question of EU law to the CJEU, was compatible with the principle of exclusive jurisdiction of the CJEU over the definitive interpretation of EU law. The second issue concerned a question as to the compatibility of the envisaged ISDS mechanism with the general principle of equal treatment, and the requirement of effectiveness, in circumstances where enterprises constituted under Canadian law, and natural persons who were Canadian nationals, could bring a dispute before the CETA Tribunal, whereas enterprises constituted under the law of an EU Member State would not have that possibility, thus raising a question as to whether such a situation was compatible with Article 20 of the Charter in relation to the question of equality before the law, and the requirement under Article 21, to the effect that discrimination on grounds of nationality shall be prohibited. The third issue raised was whether or not the provisions of Chapter 8 of CETA were compatible with the fundamental right of access to an independent tribunal enshrined in Article 47 of the Charter. It was noted in that context that there was no legal aid available in relation to a claim, and further that, under the provisions of CETA, the fees and expenses of members of that tribunal hearing a claim would have to be borne by the parties to the dispute and, in particular, save in exceptional circumstances, should be borne by the unsuccessful party. Belgium contended that the risk of having to bear the entire costs might deter investors with limited resources from lodging a claim. Further reference was made to the method provided within CETA for the remuneration of members of the Tribunal, and therefore an issue of concern was raised in relation to, first of all, the remuneration of members of the Tribunal, and, secondly, in relation to the rules concerning the appointment of the members of the Tribunal, and of the Appellate Tribunal.

128. The next issue in relation to which doubts were raised concerned the conditions for removal of members of the Tribunal, and Appellate Tribunal, which, in accordance with the rules under CETA, provide that removal of a member of those bodies could be made by the

CETA Joint Committee. This was in contrast with the recommendations of the CJEU to the effect that any decision to remove a judge must involve an independent body. The final issue concerned a requirement that members of the Tribunal would have to comply with IBA (International Bar Association) guidelines pending the adoption of a Code of Conduct. It was pointed out that the IBA guidelines were intended for arbiters and not for judges, and therefore an issue was raised in that regard also.

129. A number of points were made by the CJEU, the first of which was that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union was, in principle, compatible with EU law (see para. 106 of the Opinion). It observed that the competence and capacity of the European Union to conclude international agreements necessarily entails the power to submit to the decisions of a court that is "*created or designated by such agreements as regards the interpretation and application of their provisions".* It observed that such an international agreement could affect the powers of the EU, provided, however, that there was no adverse effect on the autonomy of the EU legal order. Therefore, it expressed the view that CETA, insofar as it provided for a process of judicial adjudication of the resolution of disputes by means of the CETA Tribunal and Appellate Tribunal, "*may be compatible with EU law only if it has no adverse effect on the autonomy of the EU legal order*" (para. 108). In the course of its consideration, the CJEU noted that the courts envisaged by CETA were separate from the domestic courts of Canada, the Union, and its Member States, and could not, therefore, be considered to form part of the judicial system of the parties to CETA. The proposed tribunals stood outside the EU legal system. Ultimately, the Court expressed the view that, in order to determine the compatibility of the mechanism provided for under CETA, it was necessary to be satisfied that Section F of Chapter 8 of CETA did not confer on the proposed tribunals any power to interpret or apply EU law, other than the power to

interpret and apply the provisions of the Agreement, having regard to the rules and principles of international law applicable between the parties, and, further, that Section F of Chapter 8 does not confer or structure the powers of the tribunals in such a way that they could issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU national framework (see para. 119).

130. In considering the questions at issue, the CJEU distinguished CETA from the draft agreement in relation to the creation of a unified patent litigation system, which was found to be incompatible with EU law in *Opinion 1/09*. In that context, the Agreement provided that the applicable law included "*directly applicable Community law, in particular Council Regulation … on the Community patent, and national law of the Contracting States implementing Community law …"* As such, it was considered by the CJEU that the court envisaged under that particular agreement could be called upon to interpret not just the terms of the Agreement, but also European Union law, and thus it was concluded that that court "*may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union*". Thus, the CJEU observed, at para. 125, as follows:

> *"Those considerations led to the Court's finding that the conclusion of that draft agreement would have altered the essential character of the powers that the Treaties confer on the EU institutions and on the Member States and that are indispensable to the preservation of the very nature of EU law …"*

131. The CJEU also considered that Section F of Chapter 8 of CETA had to be distinguished from the investment agreement at issue in the case of *Achmea* Case C‑284/16, EU:C:2018:158 on the basis that, as stated in the judgment in that case, "*that agreement established a tribunal that would be called upon to give rulings on disputes that might*

concern the interpretation or application of EU law". I will refer to *Achmea* in more detail shortly in the course of this judgment.

132. Ultimately, the CJEU concluded that the CETA Tribunal had no jurisdiction to interpret the rules of EU law, and the same applied in relation to the Appellate Tribunal. It was concluded that:

> *"Since the CETA Tribunal and Appellate Tribunal stand outside the EU judicial system and since their powers of interpretation are confined to the provisions of the CETA in the light of the rules and principles of international law applicable between the Parties, it is, moreover, consistent that the CETA makes no provision for the prior involvement of the Court that would permit or oblige that Tribunal or Appellate Tribunal to make a reference for a preliminary ruling to the Court."*

133. Thus, the Court concluded that Section F of Chapter 8 did not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law and was limited to the interpretation of the provisions of CETA itself.

134. On the next issue, namely, the effect of CETA on the operation of EU institutions, the CJEU observed, at para. 149, as follows:

> *"If the CETA Tribunal and Appellate Tribunal were to have jurisdiction to issue awards finding that the treatment of a Canadian investor is incompatible with the CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union."*

135. The CJEU accepted that, were such a situation to arise, "*it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously*

within its unique constitutional framework" (see para. 150). However, the CJEU noted that, having regard to the possibility that the envisaged tribunals could declare infringements of the obligations contained in Section C of Chapter 8 of CETA, it was noted that the agreement states that the provisions of Section C "*cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health*", subject only to the requirement that such measures would not be applied in an arbitrary or unjustifiable discriminatory way between the parties. In those circumstances, the Court concluded:

> *"It follows from the foregoing that, in those circumstances, the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152 of the present Opinion and, on that basis, to order the Union to pay damages".*

136. Therefore, the CJEU concluded, at para. 160, as follows:

> *"It is accordingly apparent from all those provisions, contained in the CETA, that, by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement, which are the only sections that can be relied upon in claims before the envisaged tribunals by means of Section F of that Chapter, the Parties have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights".*

Therefore, the ultimate conclusion of the CJEU was that Section F of Chapter 8 did not adversely affect the autonomy of the EU legal order (it should be borne in mind that the issue raised in this respect mirrors an argument made in these proceedings to the effect that CETA and the possibility of an award of damages against a Member State and in this instance, Ireland, could have a chilling effect on legislative proposals). One might raise the question as to what would happen if the CETA Tribunal did, in fact, go further than envisaged by the CJEU in exercising its jurisdiction. What would happen then is not entirely clear. Perhaps one could take the view that the CJEU is somewhat sanguine in this respect, but one does have to accept that it has expressed itself clearly in this regard.

137. The CJEU then considered and rejected concerns raised as to the compatibility of CETA with the principle of equal treatment and with the requirement of effectiveness (see, in particular, paras. 162 to 188 of the Opinion). Insofar as a question had been raised as to the difference between Canadian enterprises and natural persons that invest within the Union, as opposed to enterprises, and natural persons of Member States that invest within the Union, the comment was made that their situation is not comparable. Equally, the Court rejected the suggestion that there was any incompatibility with the requirement of effectiveness in relation to EU competition law.

138. Consideration was then given to the right of access to an independent tribunal. In that regard, it was noted that the tribunals envisaged under CETA would exercise judicial functions (see para. 197). It was noted that the tribunals would be permanent and established by law in the form of Acts approving CETA, adopted by the parties. It was further noted that they would apply, following an adversarial procedure, rules of law, and would be required to exercise their functions autonomously, and to issue decisions that are final and binding (see para. 197). Regard was had to the financial burden that might be imposed on

parties seeking to access the CETA Tribunal. It was noted that provisions of CETA obliged the Joint Committee to "*consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises*". Some concerns were expressed by the CJEU in that regard, but the CJEU noted that:

> *"…Statement No 36 states that 'there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals' and provides, to that end, that the 'adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA … will be expedited so that these additional rules can be adopted as soon as possible' and that, 'irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court'."* (para. 217)

139. The CJEU notes, therefore, that, by means of that statement referred to, the Commission and the Council have given a commitment to implement, rapidly and adequately, Article 8.39.6 and, therefore, to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises. Therefore, the commitment given was seen as being sufficient to ensure that CETA was compatible with the requirement that the tribunals set up thereunder should be accessible. Accordingly, it was concluded, at para. 222:

> *"Taking into consideration this connection that is made, by the Union, between the financial accessibility of those tribunals and the conclusion of the CETA, it must be held that the agreement envisaged is not incompatible, from that perspective, with Article 47 of the Charter."*

140. The question of compatibility with the requirement of independence was also considered. In this regard, it was noted that members of the Tribunal, and the Appellate

Tribunal, would be appointed for a fixed term, and have relevant specific expertise. The Agreement further provides that members will receive a level of remuneration commensurate with the importance of their duties. It was also noted that there was a prohibition on taking instructions from others or being in a position of conflict of interest. Having regard to the provisions contained in CETA as to fees and expenses of the members of the tribunals, the comment was made that "*the fact that those provisions concerning the remuneration of Members of the CETA Tribunal and Appellate Tribunal are intended to evolve cannot be perceived as constituting a threat to the independence of those Tribunals, but conversely permits the gradual establishment of a court composed of Members who will be employed full-time*". It was also observed, at para. 233:

> *"It is neither illegitimate nor unusual, under international law, for provision to be made that the Parties to an international agreement may clarify, as their joint wishes concerning the effect of that agreement develop, the interpretation of that agreement. Such clarification may be introduced by the Parties themselves or by a body set up by the Parties on which they confer a power to adopt decisions that will be binding on them".*

141. It was also noted that, insofar as the independence of the Tribunal was concerned that interpretations of CETA determined by the CETA Joint Committee have no effect on disputes that had been resolved or brought prior to those interpretations (see para. 236). Therefore, it was viewed by the CJEU that the provisions of Article 8.31.3 of CETA could not be interpreted, having regard to Article 47 of the Charter, as permitting the Union to consent to decisions on interpretation of the CETA Joint Committee that would produce effects on the handling of disputes that have been dealt with, or are pending. Accordingly, having regard to all of the issues raised in respect of the issue of independence, the CJEU concluded "*that the agreement envisaged is compatible with the requirement of*

independence" (see para. 244). In the circumstances, the Court concluded that Section F of Chapter 8 of CETA was compatible with EU primary law.

142. It will be apparent, as already mentioned, that some of the issues considered by the CJEU in that *Opinion* reflect some of the concerns raised by the plaintiff in these proceedings. I will deal with the arguments of the appellant in this regard subsequently. However, it is clear, that so far as the CJEU is concerned, Section F of Chapter 8 of CETA is not incompatible with EU law.

Achmea

143. As will have been seen from the discussion above, the CJEU in its Opinion on CETA, distinguished the case of *Slowakische Republik (Slovak Republic) v. Achmea BV*, Case C-284/16 ECLI:EU:2018:158 of the 6 March 2018.

144. The background to this case concerned a bilateral trade agreement between The Netherlands and the Czech and Slovak Republic. It provided for an arbitral tribunal under UNCITRAL rules in the event of a dispute. The Slovak Republic, which emerged subsequently, remained a party to the BIT, and, subsequently, it opened up its sickness insurance market as part of a reform of its health system. Achmea, part of a Dutch insurance group, set up a subsidiary in the Slovak market. Shortly afterwards, the Slovak Republic reversed its policy of liberalisation of its sickness insurance market and prohibited the distribution of profits in relation to sickness insurance. This position was challenged, and subsequently the constitutional court of the Slovak Republic found that the prohibition was contrary to the Constitution, and, as a result, Slovak law was changed to reflect that finding. Achmea contended that the initial legislative change found to be unconstitutional had caused it damage. It brought proceedings by way of arbitration against the Slovak Republic, pursuant to Article 8 of the BIT. Frankfurt in Germany was chosen as the place of arbitration, and thus German law applied to the arbitration proceedings concerned. The

Slovak Republic raised an issue as to the jurisdiction of the arbitral tribunal. It was contended that recourse to an arbitral tribunal as provided for in Article 8(2) of the BIT was incompatible with EU law. That objection was dismissed by the arbitral tribunal. The arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the amount of €22.1 million. The Slovak Republic then brought an action to set aside that arbitral award before the Higher Regional Court of Frankfurt. That court dismissed the action, and the matter was then appealed to the Federal Court of Justice, Germany. That court referred a question for a preliminary ruling under Article 267 of TFEU, in circumstances where, since the accession of the Slovak Republic to the European Union in 2004, the BIT has constituted an agreement between Member States, such that, in the event of conflict, the provisions of EU law takes precedence over the provisions of the BIT. Doubts were raised by the Slovak Republic as to the compatibility of the arbitration clause in Article 8 of the BIT with Articles 18, 267 and 344 TFEU.

145. The CJEU identified the questions being posed by the referring court as whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept. In respect of the question as thus posed, the CJEU had a number of observations to make. First of all, it noted that "*an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the*

interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties."

146. The CJEU went on to say that the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU, and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. The CJEU went on:

> *"EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".*

147. It went on to say that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. It further said that the judicial system, as thus conceived, "*has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties …*".

148. Bearing all of that in mind, the court went on to consider whether the arbitral tribunal at issue in the main proceedings could be viewed as a court or tribunal of a Member State within the meaning of Article 267. It was noted that the arbitral tribunal was not part of the judicial system of the Netherlands or Slovakia. It was thus concluded that a tribunal, such

as that referred to in Article 8 of the BIT, could not be regarded as a "*court or tribunal of a Member State*", within the meaning of Article 267 TFEU, and is therefore not entitled to make a reference to the court for a preliminary ruling.

149. Accordingly, the question had to be asked whether a ruling of such a tribunal was subject to review by a court of a Member State, ensuring that any questions of EU law which the tribunal had to address could be submitted to the CJEU by means of a reference for a preliminary ruling. One of the points made by the CJEU in that case was that, insofar as a preliminary ruling could be requested by a court asked to consider the enforcement of an arbitration award depended on the law applicable to the jurisdiction of the court concerned. As was noted, the arbitral tribunal chosen by Achmea sat in Frankfurt, which made German law applicable to the procedure governing judicial review of the validity of the arbitral award. It was that which enabled judicial review of the arbitral award to be brought before a competent court in Germany. Therefore, it is only if national law permits such judicial review that a national court could, ultimately, and if necessary, be the subject of a reference to the CJEU for a preliminary ruling.

150. The CJEU made an interesting observation then. It noted:

> *"However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law … disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to*

commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.

Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law".

151. The CJEU went on to conclude as follows:

"In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above".

152. Thus, the Court concluded that Article 8 of the BIT had an adverse effect on the autonomy of EU law. In those circumstances, it was concluded that Articles 267 and 344 of the TFEU must be interpreted as precluding a provision in an international agreement

concluded between Member States, such as Article 8 of the agreement at issue here, under which an investor from one of those Member States could, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before a tribunal whose jurisdiction that Member State has undertaken to accept.

153. I think it is important to note in respect of the decision in *Achmea* that the investment treaty at issue in that case was one entered into by two states, one of which was not originally a member of the EU but which became a member subsequently. The principal point is that it was an agreement between Member States. The effect of the agreement was such that a dispute, which could have involved the interpretation of EU law, was agreed by the Member States to be submitted to an arbitral tribunal. That tribunal, of itself, could not refer a question in relation to EU law to the CJEU. In certain Member States, the enforcement of the arbitral award could be subject to a form of judicial review, and, in the event that an issue of EU law arose whereby it was contended that the tribunal had wrongly interpreted EU law, it would appear to follow that, if the Member State in which the award was made permitted such judicial review, then a question could be referred under Article 267. However, because that was not necessarily the case in all Member States, this called into question the concept of sincere co-operation under the treaties, leading to the finding of incompatibility.

154. As will be recalled, the CJEU in its *Opinion 1/17* distinguished CETA from the investment agreement at issue in *Achmea*, given that that agreement established a tribunal that could give rulings on disputes concerning the interpretation or application of EU law. As has been seen, the CJEU, in *Opinion 1/17*, also noted that the BIT Agreement was an agreement between Member States as such. As has been seen, in *Opinion 1/17* the CJEU, at para. 129, observed "*that principle of mutual trust, with respect to, inter alia, compliance*

with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State". The CJEU in that case also emphasised the fact that the CETA Tribunal, whilst it could take into account domestic law of a party, was precluded from interpreting that law, and furthermore noted that CETA expressly provided that there was no jurisdiction to interpret the rules of EU law, other than the provisions of CETA. Thus, the Court in *Opinion 1/17* had concluded that the exclusive jurisdiction of the CJEU to give rulings on the division of power between the Union and its Member States was preserved. At a very simple level, it would appear that the distinction between the two decisions is that the decision in *Achmea* concerned an arbitration tribunal which could give interpretations of the agreement and of EU law, and in giving an interpretation of EU law, was not in a position to avail of the procedure provided for in Article 267, whereas CETA expressly excludes the possibility of the CETA Tribunal from interpreting the rules of EU law. Thus, the CJEU was led to conclude that the CETA Tribunal and its Appellate Tribunal stood outside the EU judicial system, and that being so, and having regard to the limitation on their powers of interpretation, the CJEU was satisfied that the fact that CETA could not make a reference for a preliminary ruling was not inconsistent with that position. It may appear to be difficult to reconcile these two views but what the CJEU has done in *Opinion 1/17* is to make it clear that it considers that CETA operates outside the EU legal system and is precluded from giving rulings as to the interpretation of EU law and therefore the absence of a power to make a preliminary reference is not fatal to CETA. Thus, the CJEU was of the view that CETA did not interfere with the autonomy of EU law.

Opinion 1/19 on the Istanbul Convention

155. Finally, for completeness, I want to refer to the Opinion of Advocate General Hogan in *Opinion 1/19* on the Istanbul Convention. The Convention relates to preventing and

combatting violence against women and domestic violence. The Convention was adopted by the Committee of Ministers of the Council of Europe on the 7th April, 2011 and the Council of the European Union invited the Member States to sign, conclude and implement the Convention. A number of issues arose in relation to that and, ultimately, the opinion of the CJEU was sought. For the purposes of this case, I merely wish to refer to two passages from the Opinion of AG Hogan, dealing with the consequences of a decision by a Member State to "*denounce that Convention*", or withdraw from the Convention. He opined at paras. 224 to 225 as follows:

> *"224. Last, although it is not necessary to do so, I propose to address the situation mentioned during the course of the oral hearing, namely, what might arise if a Member State were to denounce that convention once it had been concluded by the Member States and the Union.*
>
> *225. In those circumstances, although the duty of sincere cooperation would doubtless impose an obligation to inform the Union in advance on the part of the Member State concerned, it cannot go so far as to prevent a Member State from withdrawing from an international agreement. Indeed, the logical and inescapable consequence of the principle of attribution of competences is that a Member State may withdraw from a mixed agreement as long as part of the agreement still falls within the competence of the States, either because the Union has not yet pre-empted all the shared competences, or because certain parts of the agreement fall within the exclusive competence of the Member States. That possibility would not, however, oblige the Union to leave the agreement as well. Here again, in my opinion, it would simply fall to the Council, if necessary, to assess the trade-off between the importance of the agreement in question and the risks generated by its imperfect conclusion by the Union and the Member States."*

156. I mention that passage solely for the purpose of highlighting the effect of denunciation or withdrawal from an agreement. The position may vary from Convention to Convention, or agreement to agreement, depending on the terms of such an agreement, but this is an issue that has been mentioned in the context of CETA which has specific terms as to the effect of a denunciation/withdrawal, assuming that CETA is ultimately ratified by the State, and that subsequently a decision to withdraw was taken. The important point to bear in mind is that, in the opinion of AG Hogan, the duty of sincere co-operation does not go so far as to prevent a Member State from withdrawing from an international agreement.

The issues in these proceedings

157. I now wish to consider the principal arguments raised by the appellant. First of all, the question arises as to the place of CETA, if any, within the domestic legal framework. The appellant contends that CETA purports to have legal effect within the State although the legal framework created by CETA is not part of the domestic legal system. Reference is made by the appellant in this context to "CETA laws", a term with which the respondents take issue. Thus, the status and role of CETA within the State has to be considered. In this respect, it is contended by the appellant that CETA must be transposed into domestic legislation absent which, it is of no effect in this jurisdiction. It cannot operate or have effect in this jurisdiction on an international plain as contended for by the respondents. I then propose to focus on the arguments that CETA cannot be ratified by the means chosen by the government as CETA amounts to a diminution of sovereignty by interfering with the constitutional powers contained in Article 15 of the Constitution and further, that the CETA Tribunal would be engaged in the administration of justice contrary to Article 34 of the Constitution. The latter issue may raise an issue as to the possible application of Article 37 of the Constitution and whether or not the CETA Tribunal's "administration of law" could

be saved by coming under the provisions of Article 37. A further issue that requires to be considered is the question of "regulatory chill".

The role of CETA in Ireland

158. As has previously been described, CETA is a trade agreement between Canada and the European Union. Some of its provisions have already entered into force on a provisional basis. At the heart of the issues in this case are certain provisions of Chapter 8 of CETA, which concern investors in a Member State in what are defined as "covered investments". Chapter 8, as has been mentioned previously, creates protections for investors in Member States. For example, Articles 8.10.1 and 8.10.2 provides as follows:

> *"1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.*
>
> *2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:*
>
> *(a) denial of justice in criminal, civil or administrative proceedings;*
>
> *(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*
>
> *(c) manifest arbitrariness;*
>
> *(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;*
>
> *(e) abusive treatment of investors, such as coercion, duress and harassment; or*

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

159. Article 8.10.3 is also of interest in that it provides as follows:

> *"The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision."*

160. As one can see, therefore, it is possible to expand or vary that which amounts to the obligation of fair and equitable treatment, if the CETA Joint Committee concludes that that is appropriate following a review of the obligation to provide fair and equitable treatment.

161. Article 8.11 requires that, in respect of compensation for losses to covered investments as a result of conflict, natural disasters etc., the investor shall be treated no less favourably than the state's own investors. In a number of other situations, it can be seen from CETA that the measure of fair and equitable treatment requires that the Canadian investor is to be treated no less favourably than the investor of the Member State concerned.

162. There is a further provision which bears mention at this stage, and that is the provision against expropriation of a covered investment, and it is provided that there cannot be expropriations save in specific circumstances and on payment of adequate compensation (see Article 8.12).

163. Procedures are set out in Chapter 8 of CETA for the resolution of disputes between investors and states or with the EU. It is open to the EU to determine that it is the appropriate respondent rather than the Member State (see Article 8.21). A claim can be made by the investor to the Tribunal constituted under Section F of Chapter 8. It is not necessary to set

out the details in relation to the submission of a claim to the Tribunal here. Article 8.27 provides for the constitution of the Tribunal, and Article 8.28 provides for an appellate tribunal. Of note is Article 8.27.2, which provides as follows:

> *"The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries."*

164. A similar provision is contained in Article 8.28 in relation to the Appellate Tribunal. Article 8.29 goes on to provide for the establishment of a Multilateral Investment Tribunal. It provides that, upon establishment of such a multilateral mechanism, the CETA Joint Committee "*shall adopt a decision providing that investment disputes*" will be decided pursuant to that mechanism and will thereafter make appropriate transitional arrangements.

165. I think it is relevant to note that, insofar as the MIT is concerned, it is clearly intended that the parties to CETA will "*pursue*" the establishment of such a tribunal and appellate mechanism for the resolution of investment disputes. However, it has to be said that there is no suggestion that the establishment of such a Multilateral Investment Tribunal is, in any shape or form, imminent. Further, the fact that it is an object to be pursued does not necessarily mean that it will come into being.

166. Of particular importance to the issues in this case are the provisions of Article 8.31, which was the subject of much discussion in the course of the hearing. It provides as follows:

> *"1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.*

2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date."

167. It was noted previously that the CETA Joint Committee could make decisions in relation to the extent of the content of the obligation to provide fair and equitable treatment and, as has just been seen, Article 8.31 also contains a provision to permit the CETA Joint Committee to make decisions as to the interpretation of the agreement.

168. Reference should also be made to Article 8.41 dealing with the enforcement of awards. It provides, *inter alia*, that an award made shall be binding between the disputing parties and that a disputing party shall recognise and comply with an award without delay, subject to certain provisions contained in Article 8.41.3, and further that execution of the award shall be governed by the laws concerning the execution of judgments or awards in force

where the execution is sought. Further provisions of Article 8.41 deem the final award to be an arbitral award for the purposes of Article 1 of the New York Convention, and in certain circumstances it is further provided that a final award shall qualify as an award under the ICSID Convention.

169. Further, Article 26.1 sets out provisions in relation to the CETA Joint Committee. It can, *inter alia*, make decisions as set out in Article 26.3, and consider or agree on amendments as provided for in the course of the agreement (Article 26.1.5(c)). It is further provided that the CETA Joint Committee shall be comprised of representatives of EU and Canada and will be co-chaired by a Canadian Minister for International Trade and the EU Commissioner responsible for trade.

170. For completeness, I should also refer to Article 30.6, which provides as follows:

> *"1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.*
>
> *2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement."*

171. It is contended by the appellant herein that CETA, if ratified, will impose obligations on every organ of the State to provide fair and equitable treatment, not to breach legitimate expectations, to protect the physical security of investments and investors, and not to directly or indirectly expropriate the investments, as each such obligation is defined and understood in international law. It was pointed out that, if it is believed that the State or an organ of the State has breached the rights of the investor in Ireland, thus creating a dispute,

the investor may elect to issue proceedings either in the Irish courts, where Irish and EU law will apply to the dispute, or alternatively in the CETA Tribunal under the terms of CETA. The contention of the appellant is that, if the investor brings its dispute to the CETA Tribunal, the dispute is removed from the jurisdiction of the Irish courts and Irish law will no longer apply to the dispute. It points out that, unlike awards of the European Court of Human Rights, awards of the CETA Tribunal must be recognised and enforced as if they were awards of the Irish courts. Thus, it is contended that by ratifying CETA the government would effectively disregard the separation of powers enshrined in the Constitution, fetter and usurp the power of the Oireachtas to legislate for the State, and transfer to CETA the power to administer justice in respect of disputes arising within the territory of the State. It is contended, therefore, that the government intends to abdicate, alienate, subordinate and dispose of the sovereign powers of the People. At the heart of the appellant's case is the contention that only the Oireachtas may make laws for the State which apply within the territory of the State and only the Irish courts may administer justice in respect of disputes arising within the State. The appellant points out that he does not contend that CETA will form part of the domestic legal system. He then claims that the respondents have not disputed that the CETA laws, as they describe them, will apply within the territory of the State. It should be noted that this observation is challenged by the respondents in their submissions in circumstances where they had previously stated in their submissions before the High Court that CETA does not involve the making of laws applicable within the territory of Ireland. The respondents go on to point out that there is no such thing as "CETA laws", and that the use of this term merely serves to create confusion.

172. The respondents, for their part, maintain that CETA is not part of the domestic legal system, does not have direct effect in our legal system, and only creates rights and

obligations as a matter of international law, as was found by the trial judge at para. 90, where it was stated as follows:

> *"...I accept the argument made on behalf of the defendants that as an international agreement, CETA creates rights and obligations as a matter of international law but does not form part of or have direct effect in our domestic legal system. This is so not solely because of Article 29.6 of the Constitution but also because of the terms of CETA itself. In principle it should follow that entering into CETA is a constitutionally compatible exercise of executive powers as would be its ratification were it to be approved by the Oireachtas under Article 29.5.2 of the Constitution. Consequently, if ratified there would be no breach of Article 15.2.1 of the Constitution because the CETA rules do not apply in the territory of the State or of Article 34 because the CETA Tribunal, if it is administering justice, is doing so only at an international level and is not usurping the jurisdiction of the courts established under the Constitution within Ireland."*

173. I will consider this conclusion further in the course of this judgment.

Does CETA create laws for the State?

174. Article 15.2.1° of the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas, and that no other legislative authority has powers to make laws for the State. The appellant contends that CETA is in breach of Article 15.2, in that it makes laws for the State. Even though it is accepted by the appellant that CETA will not form part of the domestic legal system, and will only apply at an international level, nevertheless it is contended that the CETA Tribunal will determine disputes against the State which are enforceable within the State, in contrast to other treaties which are said to operate solely at an international level and have no domestic effect. In

truth, the appellant places great reliance on the fact that, if an award is made against the State by the CETA Tribunal, it can be enforced within the State. The position under CETA is contrasted with the position that applies to awards made by the European Court of Human Rights. If a person recovers damages against Ireland from the ECtHR, the award is not enforceable here or elsewhere.

175. Reference was made to the decision in the case of *JMcD v. PL* [2010] I.R. 199, where Murray C.J. made a number of observations as to the role of the European Convention on Human Rights. He noted, at para. 27, as follows:

> *"The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the State is not answerable before the national courts for a breach of Convention obligations unless provision is duly made in national law for such liability.*
>
> ...
>
> *[31] The European Court of Human Rights in exercising its jurisdiction to find that a contracting state has breached its obligations under the Convention may, and does, award damages to victims who may also benefit from declarations as to their rights. Even then orders or declarations of the court are not enforceable at national level unless national law makes them so. This is so even though a contracting state may be in breach of its obligations under Article 13 if it fails to ensure that everyone whose rights and freedoms as set out in the Convention have any effective remedy for their breach by the state.*
>
> ...

[35] Thus contracting states may in principle, so far as the effect of the Convention at national level is concerned, ignore the decisions of the court. They do of course have an express obligation under the Convention itself to abide by any judgment of the Court (article 46.1).

...

[36] It is in the context of the foregoing perspective of the Convention that an international instrument binding on states as a matter of international law at international level rather than national level that this court has held, at least prior to the coming into force of the European Convention on Human Rights Act 2003, could not be invoked by an individual as having a normative value or a direct legal effect in Irish law."

176. As Murray C.J. went on to point out, at para. 37, as a result, "*no claim could be made before a court in Ireland for a breach as such of any provision of the Convention. To admit such a claim would have been to treat the Convention as directly applicable in Irish law*." As he pointed out, that remained the position save in respect of a claim against an "*organ of the State*" as defined in s. 3 of the Act, or a claim for a declaration of incompatibility pursuant to s. 5 of that Act.

177. Essentially, the point is made that, even if the obligations to an investor arise under an international agreement, and are not part of the domestic legal system, the awards of CETA will be enforceable in Ireland through the Irish courts, a position which is not the same as the position that arises under the ECHR, as the awards of the ECtHR are not enforceable. In that sense, it is said, that the ECHR is a truly international agreement, but that cannot be said of CETA. It is said that the rights of private citizens and obligations of the State set out under the ECHR, not being enforceable in Ireland, do not attain the status of law.

178. A number of further points were made by the appellant in relation to the removal of disputes from the Irish courts. Essentially, the point made is that the ratification of CETA means that disputes arising within the territory of the State, against the State, will be litigated before the CETA Tribunal instead of the Irish courts, applying CETA provisions rather than Irish law. Therefore, it is contended that CETA trespasses on, and usurps, the jurisdiction of the Irish courts and the powers of the Oireachtas without becoming part of the domestic legal system, contrary to the sovereignty asserted by the People through the Constitution. I propose to deal separately with the issue as to whether or not CETA does, in fact, usurp the jurisdiction of the Irish courts as contended.

179. The respondents for their part point out that CETA expressly provides that the rights created under CETA arise under public international law and cannot be directly invoked in the domestic legal system (see Article 30.6.1 of CETA referred to above). It is said that CETA, a trade agreement, does not create laws for the State. The respondents say that the appellant has confused domestic law with public international law. They also make the point that the appellant has failed to explain how the arguments in this case can explain the views expressed in *Pringle*, as to the entry into various treaties including trade agreements (see, for example, para. 316 of O'Donnell J.'s judgment in that case). The respondents make the case that it is important to consider the use of the phrase "*laws for the State*" in Article 15.2.1°, and what it does not mean. They contend that the manner in which the trial judge dealt with this issue at para. 91 of her judgment as to what "*law*" entails is sufficient to explain what is meant by the phrase "*laws*". In her judgment, Butler J. said:

> *"... it is probably appropriate to note that the arguments made by the plaintiff under Article 15.2 of the Constitution to the effect that the CETA rules constitute "laws" which will have effect in Ireland and that the CETA Joint Committee has a power to make decisions which will have legal effect in Ireland, are fully answered by both the*

above analysis and the observations made at paragraphs 62 and 63 of this judgment. Whilst it has proved surprisingly difficult for academics and philosophers to define exactly what is meant by "law", the legislative context of Article 15 of the Constitution assumes some element of general application and enforceability of the rules to be made by the elected representatives of the People. In that context it is integral to the notion of a "law" that it is directly effective in our legal system and capable of being recognised by our courts. Article 30.6 of CETA precludes its terms from having any direct effect in the domestic legal systems of the parties and precludes its invocation before the courts of the parties. Thus, as neither CETA itself nor any decisions taken by the CETA Joint Committee have legal effect in Ireland they cannot be characterised as "laws for the State" made in breach of the exclusive law-making power of the Oireachtas under Article 15.2."

As I have said, the respondents rely heavily on that passage to support their arguments.

180. Further reliance is placed by the respondents on the observations of O'Donnell J. in the case of *Barlow v. Minister for Agriculture* [2017] 2 I.R. 440, at paras. 35 to 36, where he stated:

"If there is a dispute as to compliance with any treaty, convention, agreement or even arrangement between this State and another country, then that is a matter to be resolved at the level of international law.

In many cases however, the terms of an international agreement, to use the broadest term, may require implementation in domestic law. In a dualist system however, an international agreement may bind the State at the level of international law, but it has no impact within the State unless implemented by domestic legislation. If not implemented or imperfectly implemented, that may mean that the State is in breach of

its obligations at the level of international law, but that does not itself give rise to any duties or liabilities at the level of domestic law."

181. The respondents go on to refer to the precise terms of Article 29.6 of the Constitution. It is argued, relying on that, that as there is no statute passed in relation to CETA, nothing is, or can be, incorporated into domestic law, and the Oireachtas's constitutional function to make laws for the State is not usurped. One of the points made by the respondents is that the appellant in his submissions places particular emphasis on the fact that an award made by a CETA Tribunal would be enforceable in Irish law by virtue of the provisions of the Arbitration Act, 2010. The appellant has distinguished the position under CETA with that which applies in relation to the ECHR which, as has been seen earlier, are not enforceable in the State.

Observations

182. At this stage, it would be helpful to make some general observations. At a general level, it is argued by the respondents that CETA is an international agreement which operates at the level of international law, is not part of the domestic legal system and, therefore, cannot have any impact on Ireland's sovereignty, either by reference to the powers of the State under Article 15.2, or Article 34 of the Constitution. It is not disputed by the appellant that CETA will not form part of the domestic legal system, but it is disputed that it will only apply at an international level. What makes CETA different from other international treaties, according to the appellant, is that an individual investor will be able to enforce an award within the jurisdiction of the State. It is claimed that CETA makes laws for Ireland, insofar as it creates rights and obligations within Ireland. There is no doubt that Article 30.6 of CETA expressly provides that the terms of CETA are precluded from having direct effect in the domestic legal system of the State. However, it is also the case that CETA

provides at Article 8.10 that the State, "*in its territory, shall accord to investors fair and equitable treatment ...*".

183. Does this mean that CETA rules are binding in the State without being incorporated into national law? I think that the answer to this question must be yes, in a general sense. Once Ireland has ratified CETA, it is bound by its terms and a breach of its terms could give rise to an award made by a CETA Tribunal.

184. Does the fact that such an award is enforceable within the State mean that there is a breach of Article 15.2 of the Constitution? The argument of the appellant in this regard is somewhat circular. It is said that because the award would be enforceable within Ireland, CETA is a law applying within the State and thus is, in reality, a part of domestic law, although not made by the Oireachtas. Reliance is placed on Article 29.6 of the Constitution in this regard. Reference was also made to some observations of Clarke J. in *Conway v. Ireland & The Attorney General* [2017] 1 I.R. 53, at para. 8, where it was said:

> *"To allow the Government to change the domestic law of the State by means of an international treaty would, in effect, be to permit the Government to legislate by the backdoor without reference to the Oireachtas."*

185. The point, however, it seems to me, is that CETA rules are not part of the domestic legal system and cannot be invoked before the Irish courts. That they create rights and obligations so far as the State is concerned cannot be in issue. The point is that CETA, *per se*, does not change the domestic law of the State. The fact that enforcement can occur in Ireland by means of the national courts does not, in my view, alter this fact. CETA provides for the method of enforcement by the means set out in Article 8.41, to which reference has been made previously, and which provides for enforcement by reference to the New York Convention and the ICSID Convention, as set out previously. The Arbitration Act, 2010 has provided that the New York Convention and the ICSID Convention, (subject to certain

provisions set out in s. 25 of the 2010 Act), have the force of law in the State. It is the combination of Article 8.41 of CETA and the provisions of the 2010 Act that render awards made by a CETA Tribunal enforceable within the State. Absent the Act of 2010, there would be no mechanism to enable an award of the CETA Tribunal to be enforceable within the State. This position is clearly in contrast with the position that pertains in respect of awards of the ECtHR which are not enforceable within the State.

186. It is evident that both CETA and the ECHR create rights and obligations within the State. While the ECHR is concerned with the protection of human rights, and CETA is concerned with the protection of investors, the difference between the two provisions relied on by the appellant is the lack of enforcement in respect of decisions of the ECtHR as contrasted with the method of enforcement available in respect of CETA awards. The fact that such an award may be enforceable within the State does not, in my view, mean that CETA is making laws for the State and thus trespasses upon the constitutional powers of the Oireachtas.

187. I have discussed at length previously in the context of sovereignty a number of decisions of this Court and, in particular, the decisions in *Crotty* and *Pringle*. I do not propose to reiterate what was said in those cases now. However, as has been seen from the discussion in relation to those cases, they deal extensively with the constitutional power of the Executive to enter into treaties. There are, of course, limits on the exercise of such powers in relation to the applicability of such treaties so far as the domestic law of the State is concerned. As was noted previously, this State has entered into many such treaties. Investment trade agreements have been part of the international business world for many years. In the context of the EU, the possibility of entering into such agreements has been permitted by the Treaty of Lisbon. Each treaty, be it an investment treaty or otherwise, entered into by the State involves some element of give and take. There cannot be benefits

for one party without benefits for the other. Such agreements may create obligations for the State. Disputes may occur, and it is not surprising therefore that mechanisms will be created for the purpose of resolving such disputes. Thus, to give one example, having agreed to sign the ECHR, Ireland has put itself in the position that, if a dispute arises over an alleged breach of the Convention, the party concerned may bring Ireland to the European Court of Human Rights and, if a breach is found, an award can be made. The fact that the award may not be enforceable is neither here nor there. Rights and obligations have been created under the ECHR, just as they will be under CETA. The fact that enforcement can take place within the jurisdiction does not make CETA part of domestic law and, to that extent, I agree with the views of the trial judge as expressed in para. 90 of her judgment in relation to whether or not CETA amounts to a breach of Article 15.2.1°.

The CETA Joint Committee

188. Before leaving the question of whether CETA is a breach of Article 15.2 of the Constitution, I wish to examine a further argument made by the appellant in relation to the role of the CETA Joint Committee. The point was made that, even if CETA in its current terms was not a breach of Article 15.2.1°, the fact that the CETA Joint Committee was, by means of Article 8.10.3, empowered to review the content of the obligation to provide fair and equitable treatment and to make a decision to give effect to recommendations in this regard is said to amount to a breach. It was suggested by the appellant that any such decision must be agreed between Canada and the EU, and the point was made that Ireland would be bound by any such decision. Equally, a complaint was made as to the interpretative role of the Joint Committee, and it was argued that such powers amount to the power to create and amend laws. Finally, reference was made to the terms of Article 8.29 in relation to the creation of a Multilateral Investment Tribunal, and it was contended that the trial judge erred

when she concluded that further consent from Ireland would be required in order to establish the MIT.

189. The respondents in submissions made the point that, insofar as interpretations of the agreement were concerned, Article 8.44.3 provides:

> *"The Committee Services and Investment may, on agreement of the Parties, and after completion of their respective internal requirements and procedures:*
>
> > *(a) recommend to the CETA Joint Committee the adoption of interpretations of this Agreement pursuant to Article 8.31.3;*
> >
> > .....
> >
> > *(d) recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article 8.10.3."*

190. The first point made by the respondents is that it was wrong to suggest that only Canada and the EU, to the exclusion of the Member States, could be involved in making recommendations to the CETA Joint Committee on questions of interpretation and the adoption of further elements of the fair and equitable treatment obligation. This is clearly correct, as the definition of parties in CETA provides that parties mean the European Union or its Member States, on the one hand, or the European Union and its Member States within the respective areas of competence and, on the other hand, Canada. The respondents take issue with the use of the term "*laws*" by the appellant in this context and make the point that any recommendations made in respect of changes to the definition of fair and equitable treatment can only be made on the agreement of the parties. It is said that this does not involve any breach of Article 15.2.1°. So far as the issue in relation to the MIT is concerned, it is pointed out that the obligation under Article 8.29 is "*to pursue*" the MIT's

establishment. Second, it is apparent that no new jurisdiction can be conferred on the MIT, as it can only adjudicate "*investment disputes under this section*". What is provided for by the provision is transitional arrangements in the event that an MIT is established. Thirdly, it is contended that the establishment of the MIT would be, in effect, similar to the establishment of the Court of First Instance in the Court of Justice, as was an issue in *Crotty*, and that no further constitutional issue would be created by the establishment of the MIT, just as no further constitutional difficulty was created by the establishment of the Court of First Instance discussed in *Crotty*. The trial judge rejected the arguments of the appellant in this regard (see para. 91 to 93 of the judgment). At para. 91, the trial judge comments succinctly that:

> *"Thus, as neither CETA itself nor any decisions taken by the CETA Joint Committee have legal effect in Ireland they cannot be characterised as "laws for the State" made in breach of the exclusive law-making power of the Oireachtas under Article 15.2."*

191. For my part, I agree with her conclusions. I am not convinced that the role of the CETA Joint Committee in relation to Article 8.10 or in any other respect such as the adoption of recommendations on interpretation, as provided for in Article 8.44.3 amounts to the making of laws for the State. In each case, any decision can only be made following a recommendation which, in turn, can only be made on the agreement of the parties. I cannot see how any such interpretation of CETA can amount to the making of laws for the State. The job of interpretation of CETA must surely be lodged within the bodies established by CETA itself, including the CETA Tribunal, the Appellate Tribunal, and the Joint Committee, which only acts on recommendations of other committees and on agreement by the parties. It is inevitable that the terms of any agreement such as CETA, in common with any piece of domestic legislation will require interpretation. The job of interpretation is that of the CETA Tribunal in the first instance and thereafter, the Appellate Tribunal. The CETA

Joint Committee has a role, as well, as has been seen, to provide interpretative decisions but only within defined parameters. I fail to see how this can be characterised as creating laws for the State.

192. Insofar as the issue of the MIT is concerned, I note that the obligation contained in Article 8.29 is to pursue the establishment of a Multilateral Investment Tribunal for the resolution of investment disputes and that, once established, investment disputes will be decided in the multilateral mechanism. However, the point is that, as was noted by the trial judge at para. 122 of her judgment, the establishment of an MIT could only be done by way of further international agreement. I agree with her conclusion in that regard, and for that reason the obligation to pursue the establishment of an MIT does not, in and of itself, establish an MIT. In my view, as the learned trial judge observed, that can only be done by way of further international agreement. Thus, in that regard, it seems to me that, once more, the appellant has not established that there is any breach of Article 15.2.1° by reference to the provisions of Article 8.29 of CETA.

193. Therefore, for the reasons I have referred to above, I am not satisfied that CETA is an interference with the sovereignty of Ireland by reference to the provisions of Article 15.2 of the Constitution.

A Breach of Article 34?

194. Article 34.1 of the Constitution provides as follows:

> *"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."*

195. The administration of justice, as understood by Article 34.1, is a concept which has been the subject of much litigation and discussion, starting with the case of *Lynham v. Butler (No. 2)* [1933] I.R. 74, which considered the precursor of Article 34.1, namely, Article 64

of the Irish Free State Constitution of 1922. The concept has been further considered in cases such as *The State (Shanahan) v. Attorney General* [1964] I.R. 239 and, perhaps more notably, in *McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217, a decision which has been the basis of much of the discussion on this subject over the years on what is or is not the administration of justice, culminating in the recent case of *Zalewski v. WRC & Others* [2021] IESC 24.

196. If the CETA Tribunal and the Appellate Tribunal are involved in the administration of justice, as that term is understood in the context of Article 34.1, then it would seem to follow that CETA is a breach of Article 34.1, in that the administration of justice by the CETA Tribunal is not in "*a court established by law by judges appointed in the manner provided by this Constitution."*

197. It would be useful to embark on a discussion of this aspect of the case by setting out the role of the courts from the point of view of the sovereignty of the State. This was described by Kennedy C.J. in *Lynham v. Butler (No. 2)* at page 99 of the judgment, in the following terms:

> *"In the first place, the Judicial Power of the State is, like the Legislative Power and the Executive Power, one of the attributes of sovereignty, and a function of government. ... It is one of the activities of the government of a civilised state by which it fulfils its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over person and property. The controversies which fall to it for determination may be divided into two classes, criminal and civil. In relation to the former class of controversy, the Judicial Power is exercised in determining the guilt or innocence of persons charged with offences against the State itself and in determining the*

punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of the Executive Department of Government to carry into effect. In relation to justiciable controversies of the civil class, the Judicial Power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens and the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in asserting or resisting claims alleged or denied.

It follows from its nature as I have described it that the exercise of the Judicial Power, which is coercive and must frequently act against the will of one of the parties to enforce its decision adverse to that party, requires of necessity that the Judicial Department of Government have compulsive authority over persons as, for instance, it must have authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property."

198. At issue in that case was the status of the Land Commission, and whether or not it was engaged, in the course of its operations, in the administration of justice. Ultimately, it was held that the Land Commission was not engaged in the administration of justice.

199. The straightforward proposition put forward by the appellant is that, in any case where a justiciable dispute arises in Ireland, Article 34 requires that any such dispute must be determined by the Irish courts, and Article 34 must be understood as prohibiting anybody, other than the Irish courts, from administering justice by resolving any such dispute. Relying

on the decision in *Crotty v. An Taoiseach*, the point is made that ceding judicial power to a body outside the State (in that case the European Court) required constitutional authorisation (see para. 770 of the judgment therein). It will be recalled that in that case it was found, *inter alia*, that the possible establishment of a Court of First Instance which would be subject to appeal to the European Court of Justice did not require a further constitutional amendment, given the extent to which judicial power under the Constitution had already been ceded to the CJEU by previous constitutional amendments. Obviously, a question is raised in this case as to what is meant by "the administration of justice". It is the appellant's case that the resolution of disputes by the CETA Tribunal involves the administration of justice as that term is understood in Irish constitutional law, while the respondents disagree with that proposition.

200. Much of the discussion in this context focused on the judgment of this Court in the case of *Zalewski*, referred to above, and the application in that case of the five limbs of the test as to what is or is not the administration of justice as set out in *McDonald v. Bord na gCon*. It will be recalled that in that case Kelly J. in the High Court identified what were described as the "*characteristic features*" of the administration of justice, as follows:

> *"(i) a dispute or controversy as to the existence of legal rights or a violation of the law;*
>
> *(ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;*
>
> *(iii) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;*
>
> *(iv) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;*

(v) the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country."

201. In *Zalewski*, there was no disagreement between the parties to that case that the first three limbs of the test were fulfilled by the WRC. It is contended by the appellant in this case that those three limbs are likewise fulfilled by the CETA Tribunal. O'Donnell J. in his judgment, at para. 94, observed:

"The first, second, and third features are closely related since they identify a dispute about legal rights, its resolution, and determination. The fourth is a logical extension of the third, since the resolution of the dispute must not be dependent upon the agreement of the parties but must be capable of enforcement in cases of refusal of the losing party to comply."

202. He expanded on this at para. 105 of the judgment, where he stated:

"An unsuccessful party who had received an adverse decision from the W.R.C. would, I think, consider themselves in no different a position to a party emerging from the District Court or Circuit Court having lost a case. They would consider that, unless appealed, they would have to comply with the decision, and nearly all would. ... A losing party would know that if they did not comply of their own volition, they could be forced to do so by the power of the State. Most importantly of all, they would know that the legal consequences of their actions had been determined and that, unless appealed, that determination was the definitive decision by a body provided by the State and backed by it and which, as a matter of law, had determined their rights and responsibilities in respect of the matter in dispute. ..."

203. The circumstances of the enforcement mechanism provided for in respect of the WRC allowed a successful party to pursue the losing party by means of an enforcement procedure

provided through the District Court. However, the form of enforcement was one which gave the District Court little or no discretion as to the enforcement of an award of the WRC. The appellant makes the point that the position in relation to the enforcement mechanisms of an award of the CETA Tribunal is that it is enforceable depending on the manner in which the investor brings the case to the CETA Tribunal under either the New York Convention or the Washington Convention, which have been given force of law in Ireland by the Arbitration Act of 2010, as previously noted. In that context, the trial judge observed at para. 149 of her judgment as follows:

> *"Even accepting the potential existence of some limited and undefined grounds upon which a court might refuse to enforce a Washington Convention award, it is difficult to see a substantial difference between the enforcement mechanisms at issue in Zalewski and those under s. 25 of the Arbitration Act, 2010. Logically, if there is a residual discretion vested in the High Court to refuse enforcement of an award under the Washington Convention on constitutional grounds, then the same residual discretion must exist in respect of the enforcement of WRC determinations. Of course, as the application to enforce a WRC determination was made without notice to the party against whom enforcement was sought, there would be nobody before the court to seek the exercise of such discretion. Further, the availability of an appeal to the Labour Court and of judicial review of a WRC determination (as had occurred in Zalewski itself) would no doubt mean that the need to invoke a residual discretion to refuse enforcement on constitutional grounds would almost never arise. However, in terms of the issues under discussion in O'Donnell J.'s judgment, the difference between the two enforcement mechanisms is at best marginal. In both cases, enforcement is almost automatic and the losing party would know that if they did not comply with the award of their own volition, they could be forced to do so by power of the State."*

204. It was on that analysis that the trial judge concluded that the exercise of jurisdiction by the CETA Tribunal does, "*in principle, involve an administration of justice*". She went on to conclude that the award was, for all practical purposes, enforceable (see para. 150). One final issue considered in the context of the question of enforceability was a contrast between the ECtHR and the award that could be made under CETA. It was argued by the appellant that an award from the ECtHR is not enforceable and, as such, does not come within the *McDonald v. Bord na gCon* test as to the administration of justice. The argument made on behalf of the appellant was that the European Court of Human Rights, in making unenforceable awards, does not administer justice at all. I will return to that argument shortly.

205. Essentially, the appellant makes the case that from the point of view of the first four limbs of the test in *McDonald v. Bord na gCon,* the CETA Tribunal and its Appellate Tribunal meet the criteria laid down in the first four limbs of the test.

206. So far as the fifth limb of the test is concerned, the appellant relies on an observation of O'Donnell J. in considering the novelty of a new provision:

> *"I think this feature is best understood in a broader sense and as emphasising the importance of the existing jurisdiction of the courts, and that any provision subtracting from that jurisdiction, or creating a parallel jurisdiction which might render the courts' traditional jurisdiction defunct, is one which should be closely scrutinised by the courts for compatibility with the Constitution. A distinctive feature of the courts system established by the Irish Constitution is that there is no structural distinction between administrative courts and the ordinary courts."*

207. Not surprisingly, the appellant places emphasis on that part of the passage in which O'Donnell J. spoke of provisions creating a parallel jurisdiction that might render the courts'

traditional jurisdiction defunct. It is argued, in that context, that the CETA Tribunal amounts to a parallel jurisdiction, and a clear subtraction from the jurisdiction of the Irish courts.

208. The point is made that a Canadian investor who has a complaint against the State in respect of an alleged interference with his property rights in relation to an investment in Ireland could bring proceedings against the State in the courts of this jurisdiction and could, if appropriate, recover damages here from the courts which would be enforceable in the same way as any other judgment of the courts of this jurisdiction. The appellant makes the point that there is no material difference between the rights protected in Irish law, and the protections conferred on the Canadian investor by CETA. In fairness, it is difficult to disagree with that contention. The point, however, is that, as the appellant has said, the choice of venue for the resolution of any such dispute will be at the election of the investor. It should be noted, in this context, that Article 8.22(1)(f) and (g) require an investor who wishes to submit a claim to the CETA Tribunal to withdraw or discontinue a claim before a court under the domestic law of that state with respect to a measure alleged to constitute a breach referred to in its claim, or if no such proceedings have been commenced, the investor must waive its right to initiate such a claim. No doubt, it would also be possible for the dissatisfied investor to submit a claim to the CETA Tribunal if it was contended that a decision of the Irish courts in proceedings brought by a Canadian investor was in itself a breach of CETA.

209. It is undoubtedly the case, therefore, that there is an identity of purpose between any such proceedings arising from an alleged breach of the investor's property rights, be it proceedings under Irish law in an Irish court, or proceedings before the CETA Tribunal under the rules of CETA. This issue was considered at para. 152, *et sequendi*, by the trial judge where she observed:

"Justiciability is a difficult concept. It refers to the extent to which a dispute is capable of being decided judicially in accordance with law. Consequently, justiciability is not necessarily inherent but can depend on the extent to which the law has intervened to create or to recognise rights and liabilities which may then fall to be adjudicated on in accordance with law. The fact that a dispute is of such a nature that common sense would suggest it should be capable of judicial determination, does not mean that the courts will necessarily have jurisdiction to determine it. Justiciability may have a territorial aspect. A dispute about a contract made under German law between German undertakings, a breach of which occurred in Germany is not justiciable before the Irish courts, not because the dispute itself is inherently non-justiciable but because the law under which it is to be determined is not that applicable to, nor that applied by, the Irish courts."

210. She went on to say, having referred to the full original jurisdiction of the High Court under Article 34.3.1° of the Constitution, as follows:

"However, that jurisdiction although full is not unlimited. The Irish Constitution does not and, indeed, could not confer on the Irish courts jurisdiction over disputes occurring outside of Ireland and which do not arise under Irish law. Thus, the defendants' submission that international law is non-justiciable unless expressly made so by the Oireachtas is, in my view, correct. The disputes to be determined by the CETA Tribunal are non-justiciable, not because they are inherently incapable or unsuited to judicial resolution but because the Irish courts do not have jurisdiction to apply the law to which they are subject. The administration of justice referred to in Article 34.1 of the Constitution and entrusted to the Irish courts is necessarily territorially limited to the resolution in Ireland of disputes under the law created by or under the Constitution. This includes the law as enacted by the Oireachtas or, by virtue of Article 29.4, the EU

institutions and the law carried forward pursuant to Article 50 of the Constitution. It does not include the terms of an international treaty such as CETA which has not been given force of law in the State. My conclusions in this regard are similar to those reached by the CJEU in the Belgian Opinion 1/17. Even though there are significant differences between the EU legal order and the Irish Constitution, the fact that CETA is expressly framed so as not to have direct effect within the legal systems of the parties and the fact that the CETA Tribunal is separate from and outside the judicial systems of the parties means that disputes arising under CETA which the CETA Tribunal may determine are non-justiciable as a matter of Irish law."

211. The appellant contends that this conclusion is not correct. Relying on an observation of Kennedy C.J. in *Lynham*, where he cited with approval the opinion of the United States Supreme Court in *Kansas v. Colorado* [1907] 206 US 46, judicial power "*must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties*". It is said, therefore, that if bodies other than Irish courts were permitted to administer justice in respect of justiciable disputes arising in Ireland, and have their determinations enforced as if they were judgments of the High Court, this would fundamentally undermine the rule of Irish law in Ireland. Further, it is noted by the appellant that the fact that a claim to the CETA Tribunal precludes any claim before the Irish courts is an illustration of the fact that the respective processes occupy the same ground and are both justiciable.

212. The respondents take the view that the provisions of CETA are not captured by the test set out in *McDonald v. Bord na gCon.* In the first place, they make the point that it is not any "*dispute or controversy*" that can satisfy the first limb of the test. They say that there must be a controversy of a justiciable nature, as that term was used in *Lynham v. Butler*. But they say that disputes under CETA are not justiciable within that meaning, because the Irish

courts do not have jurisdiction over disputes which do not arise under Irish law. In this regard, they rely on a comment of the trial judge at para. 152, which is set out above. They point out that the jurisdiction of CETA is limited by Article 8.31, which makes it clear that CETA applies at an international level. It does not create "*legal rights*" under national law. Further, the respondents point out that, according to Article 8.31.2, the Tribunal has no jurisdiction to "*determine the legality of a measure … under the domestic law of a Party*". Reliance is also placed by the respondents on the fact that the decision by an investor to pursue its claim in the CETA Tribunal is a matter of choice. If preferred, the Canadian investor can choose to bring proceedings in the Irish courts. It is pointed out that, in doing so, the Irish courts would not apply the provisions of CETA. Thus, in practical terms, an investor has two options, either to bring proceedings in the Irish courts, or to avail of the possibility of making a claim to the CETA Tribunal. In essence, the respondents say that the first limb of the test set out in *McDonald* is not met, because the legal rights at issue before the CETA Tribunal are those created by CETA and are not the same as those that would apply in domestic law, and further that the Irish courts have no jurisdiction to apply the provisions of CETA in any dispute before the Irish courts.

213. So far as the second and third limbs of *McDonald* are concerned, the respondents reiterate the point that the CETA Tribunal will not determine any rights/liabilities under Irish law, but only under CETA itself. The point is made that the CETA Tribunal could not, and would not, determine any matters of law, but can only make decisions based on the terms of the Agreement. Thus, it is contended that the second and third limbs of CETA are not met.

214. Turning to the fourth limb of the *McDonald* test, relating to enforcement, the respondents emphasise the requirement that an award made by the CETA Tribunal requires an order of the High Court for the purpose of enforcement. They contrast the position in

relation to enforcement of an arbitral award with the role of the District Court in enforcing an award of the WRC, as was considered in the case of *Zalewski*, referred to above. In that case, it was stated, at para. 103, by O'Donnell J. as follows:

> *"The question of enforceability of a decision is, indeed, a significant clue to its legal nature, since a decision which depends for its enforcement on the agreement of the parties, or on the decision of another body (indeed, a court) which can, moreover, decide whether or not to enforce it depending on whether it is, itself, satisfied that the decision is correct is a significant distance from the type of automatic enforceability a litigant achieves when they succeed in court."*

215. Reference was made by the respondents to the provisions of the New York Convention, which provides:

> *"Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> ...
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country."*

216. The question of enforcement under the Washington Convention/ICSID is not so clear cut. Reference was made in that context to the decision in the case of *Micula v. Romania* [2021] W.L.R. 1033, a decision of the UK Supreme Court. It was suggested, arising from the decision of the UK Supreme Court in that case, that, although there may not be an express defence to enforcement as such, that this could be understood from the terms of the Washington Convention. The joint judgment of Lords Lloyd-Jones and Sales noted at para. 73 as follows:

"The fact that the specific qualification of the obligation to enforce an award like a final court judgment relating to state immunity was expressly dealt with in article 55 for the avoidance of doubt indicates that article 54(1) was itself understood to have the effect of allowing the possibility of certain other defences to enforcement if national law recognised them in respect of final judgments of local courts."

Thus, the respondents contend, contrary to the views of the appellant, that enforcement of an arbitral award under CETA would not be "*almost automatic*".

217. There is no doubt that there is a difference between the enforcement of an arbitral award under the New York Convention and an award under ICSID, in terms of the defences available. However, the respondents emphasise the fact that, under the terms of the 2010 Act, leave is required from the High Court before the award can be enforced, and the suggestion is made that the requirement for leave involves the possibility that enforcement would not necessarily be automatic. The argument is made that, if the High Court was called upon to enforce an award under ICSID, which gave rise to a significant constitutional difficulty, the High Court would refuse "*leave*". However, as the respondents accept, it is difficult to envisage how that situation could arise, particularly in the light of the fact that an award from the CETA Tribunal would, in effect, be in respect of monetary relief. Essentially the respondents say that the appellant is wrong to characterise the enforcement process as almost automatic.

218. The respondents then dealt with the fifth limb of the *McDonald* test, which concerned "*the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country*". It is suggested that there is no basis whatsoever upon which this test could be satisfied. The point was made that the adjudication of disputes under an international trade agreement could never have been characteristic of the courts of this country, or indeed, as it is said, of any country, because the enforcement mechanisms under

such trade agreements are intended to be forum neutral. The respondents rely on *Opinion 1/17* where it was said, at para. 200, "*the independence of the envisaged tribunals from the host State and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade that is stated in Article 3(5) TEU and that is pursued by the CETA*."

219. Insofar as the appellant relies on para. 95 of the judgment of O'Donnell J. in *Zalewski*, where he discussed the concept of subtracting from the jurisdiction of the courts, or indeed rendering defunct the Irish courts' jurisdiction, the respondents point out that the CETA Tribunal is prohibited from applying Irish law, other than as a matter of fact; secondly, it only applies CETA , and, thirdly, CETA cannot be applied or invoked by the Irish courts because CETA expressly provides that it is not capable of being invoked in domestic law.

220. In this context, it is interesting to look again at the views of the trial judge as to the question of whether or not the creation of the CETA Tribunal amounts to a subtraction of jurisdiction from the Irish courts. She said as follows at para. 155:

> *"155. Equally, the fact that a Canadian investor may choose to make a claim under CETA rather than to frame a claim under Irish law does not represent a subtraction of jurisdiction from the Irish courts. In the context of international business, litigants will frequently have a choice of jurisdiction in respect of any disputes which arise. Under EU law, these issues are governed by the Brussels Regulation 1215/2012 (also called the Recast Regulation). The fact that a litigant may opt to sue in the jurisdiction of one state in preference to suing in another does not, in my view, mean that there has been a subtraction of jurisdiction from the courts of the state which will not be determining the dispute. I do not accept that Article 30.6 of CETA is either a legal fiction or a stratagem designed to remove CETA and disputes under CETA from the domestic courts, as suggested by the plaintiff. ...*

156. For all of these reasons, in my view, if CETA is ratified, the creation of the CETA Tribunal and the conferral of jurisdiction on it to resolve investment disputes is not an unconstitutional alienation of the judicial power of the State. Although the task to be carried out by the CETA Tribunal can, in principle, be characterised as an administration of justice, it is not the administration of justice under Article 34 of the Constitution as the disputes over which it will have jurisdiction are not justiciable under Irish law even where the State is involved as a party. The jurisdiction to be exercised by the CETA Tribunal exists at the level of international law and, thus, does not reduce the power of the Irish courts to administer justice in the State."

An overview of the arguments in relation to McDonald v. Bord na gCon

221. Broadly speaking, I agree with the conclusion of the trial judge that the work to be carried out by the CETA Tribunal is the administration of justice. I fail to see how it could be described as anything else. Whether or not it can be characterised as the administration of justice within the meaning of Article 34 of the Constitution is another issue, and one which is at the heart of this aspect of the case. If it does come within Article 34 of the Constitution, then I cannot see how CETA could operate in compliance with the terms of the Constitution, without a referendum conferring jurisdiction on the CETA Tribunal.

222. I have to say that I find it somewhat difficult to view this case through the prism of *McDonald*, and the five-limb test set out in that case. The principal decisions in relation to Article 34, and its predecessor, concern domestic law bodies. *Lynham v. Butler* was concerned with the role of the Land Commission, *McDonald* was concerned with the role of Bord na gCon, and *Zalewski* was concerned with the WRC. It is difficult to equate a body such as the CETA Tribunal with a domestic body or tribunal, bearing in mind that the CETA Tribunal is an international body set up under an international treaty. Reference has been made to the power of the State to enter into international treaties previously in the course of

this judgment and to the number of such international treaties to which this State has become a party. In the case of a number of EU treaties, referendums have been necessary to give effect to the terms of the treaties. In some cases, international treaties have been given the force of law in the State, and in the context of this case, we have seen how international agreements, such as the New York Convention and the Washington Convention (ICSID), have been given force of law in the State by the 2010 Act.

223. The questions at issue in this case in relation to the power of the Executive to enter into international agreements, the effect of those international agreements on the sovereignty of the State, why some international treaties can be effective simply by being laid before Dáil Éireann, and why some involve an interference with sovereignty, such that a referendum of the People is required in order to give effect to such a treaty, and whether there are other parallels that can be of assistance in resolving the issues in this case, are all matters of great complexity. Given the complexity of issues in this case, the Court took the unusual course of posing a number of questions for the parties following the initial hearing of the case. Following the written responses to the questions, a further hearing took place to enable the parties to provide further submissions to the Court.

224. I do not propose to set out the questions and answers, or indeed the submissions in detail, but some description of the issues raised is necessary. The first question concerned the role of a bespoke arbitration agreement with a particular investor in similar terms as would apply to an investor under CETA, and whether such a bespoke agreement, assuming it could consider whether Irish law or measures were a breach of the arbitration agreement, and award damages enforceable in Ireland, could be an interference with sovereignty and a breach of Article 34. The respondents saw no particular difficulty with the concept of such a bespoke agreement. The appellant pointed out that any such agreement would be one based on mutual consent, defined by contract, relating to one State party only, and that any such

agreement would be temporally limited and would arise in the context of a private law dispute. This was contrasted with CETA where the investor may unilaterally elect to by-pass the domestic courts in respect of any dispute arising under CETA, and they pointed out that the remedy sought under CETA against the State arise in the realm of public law. They contended that the State by entering into CETA was divesting itself in a generalised and forward-looking manner of what would be its sovereign Article 34 jurisdiction to determine public law disputes in its courts. They pointed out that the Executive cannot by resolution divest the Irish courts of the function and jurisdiction that they enjoy to determine public law disputes and to scrutinise the lawfulness of public measures, including Acts of the Oireachtas. It was accepted that investment issues arising from a contract where the State acts as a private party could be submitted to arbitration.

225. It seems to me that the most telling point made by the appellant in this context is that once CETA is ratified, Ireland is obliged, on a permanent basis, to submit to the jurisdiction of the CETA Tribunal at the option of the investor who has the freedom to decide whether to go down the route of pursuing the State in the Irish courts or submitting a claim to the CETA Tribunal. This is a significant difference between the position of parties acting by mutual consent to resolve a dispute arising from the terms of a specific contract.

226. Given that the objection to CETA was based on basic concepts of sovereignty, the question was posed as to whether the same objection should not arise in every other Member State and the EU itself, and in any other country that enters an investor agreement under a similar system? The respondents agreed that was so and pointed to the absence of any such judgments in Member States or elsewhere as being significant. They referred to the fact that in *Opinion 1/17* it was noted by the CJEU that *"Section F of Chapter 8 .... does not adversely affect the autonomy of the EU legal order".* In response to this question, the appellant made the point that so far as the EU itself is concerned, the CJEU in an Opinion of Advocate

General Kokott in the case of *Republic of Poland v PL Holdings Sarl* Case C-109/20 ECLI:EU:C:2021:321 expressed the view that Member States may not remove disputes relating to the sovereign application of EU law and the EU judicial system. The appellant sought to extrapolate from that statement that similar objections could arise in other Member States in relation to concerns of Member States as to the compatibility of CETA with their constitutional framework. Reference was also made in that context to the fact that the Bundesverfassungsgericht, in dismissing certain complaints directed against the provisional application of CETA, made comments about the CETA Joint Committee, saying as follows:

> *"It may appear doubtful whether the level of democratic legitimation and oversight required under Article 20(1) and (2) is met regarding decisions of the CETA Joint Committee."* (BVerfG, Order of the Second Senate of 9 February 2022 - 2 BvR 1368/16 -, paras. 1-197 at para. 190)

227. Thus, the appellant contends there are question marks over the role of the Joint Committee. It appears that while some concerns have been raised as to the role of the Joint Committee, that issue has not yet been determined in Germany.

228. It should be noted before leaving this issue that the Bundesverfassungsgericht in its judgment on the provisional application of CETA made the observation at para. 191 in relation to the CETA Joint Committee as follows:

> *"Yet these concerns need ultimately not be resolved in the present case. The reservations laid down in declaration no. 18 and statement no. 19 to the Council minutes, which limit the scope of the Council Decision of 29 October 2016 on provisional application, rule out an encroachment on the principle of democracy. Firstly, in declaration no. 18 the European Commission provided assurances that the Commission does not intend to make any proposal under Article 218(9) TFEU with a*

view to amending CETA or with a view to adopting a binding interpretation of CETA during the period of provisional application, at least not before the Federal Constitutional Court has rendered a final decision in this regard. Secondly, it follows from the drafting history and context of statement no. 19 that any position to be taken by the European Union and its Member States within the Joint Committee regarding a decision of said Committee must be adopted by common accord. This means that the consent of the German representative in the Council is required, which rules out the risk that the competences of the CETA committee system or its procedures will encroach on the Basic Law's constitutional identity ... during the stage of provisional application."

229. Obviously, what occurs in the future in relation to CETA and the Joint Committee remains to be seen, but as yet there is no definitive decision in any other European court which has raised a concern as to compatibility with its country's sovereignty.

230. A series of questions were raised in relation to the issue of enforceability.

231. On the question as to whether CETA requires that awards be enforceable in the national legal systems, both sides are in agreement that this is required (see Article 8.41.2). In Ireland, the Act of 2010 will be applicable to the enforcement of an award. As to the possibility of an award being refused enforcement in Irish law under either the New York Convention or the Washington Convention, the respondents expressed the view that, given that awards can only be enforced with leave, the courts have discretion in relation to the enforceability of awards. Both are agreed that in relation to the New York Convention there is a public policy ground for refusal of awards. Further, it is noted that in relation to the Washington Convention both parties are agreed that the only circumstances in which enforcement could be refused are circumstances in which a final judgment would not be enforced if that was provided for by local law. So, for example, the situation that could arise

in a *Greendale* type application would similarly apply to the enforcement of an award under the Washington Convention. The appellant makes the point that, while a public policy exception is envisaged under the New York Convention, Kelly J., in the case of *Bröstrom Tankers AB v. Factorias Vulcano SA* [2004] 2 I.R. 191, noted at para. 28, that s. 9 of the 1980 Act provides a very restricted basis for refusing enforcement of a Convention award. He said at para 30:

> *"I am of the opinion that I would be justified in refusing enforcement only if there was (as is stated in Cheshire and North's Private International Law, 13th ed.):*
>
> > *"Some element of illegality, or that the enforcement of the award would be clearly injurious to public good, or possibly that he enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public."*
> >
> > *31. This case comes nowhere near that position. There is no illegality or even suggestion of illegality nor are there any other elements even remotely demonstrated. I am satisfied that there is no aspect of Irish public policy which could justify a refusal of an enforcement order even assuming that all of the foreign legal questions are decided in favour of the defendant."*

I think it can be safely said that, as a matter of principle, it is clear that the courts in considering whether to grant leave to enforce an arbitral award will not do so on the basis of any issue as to the merits, and will only do so if the award is, in fact, in breach of public policy or an issue of the *Greendale* kind occurs. To that extent, it can be said, as discussed previously, that enforcement is "almost automatic".

232. A further question raised was in respect of enforcement other than in Ireland, and it was pointed out by the appellant that insofar as the public policy defence arises under the New York Convention that it refers to the public policy of the state in which enforcement is

sought. This view was not disputed by the respondents. However, the respondents did raise an issue to the effect that some jurisdictions might raise a public policy issue in relation to foreign sovereign immunity from execution as part of their domestic law.

233. Again, both parties were broadly in agreement that enforcement could be sought in any country which was a party to either the New York Convention or the Washington Convention.

234. A question was raised as to whether or not Ireland would be bound irrevocably and permanently by CETA if ratified by all Member States and binding in the EU? From the point of view of the respondents it was noted that CETA was drafted with full knowledge of EU law, including the duty of sincere co-operation. It was suggested that Member States could denounce the agreement within their areas of competence. For their part, counsel on behalf of the appellant suggested that the duty of sincere co-operation would not permit Ireland to denounce CETA unless the CJEU concluded that its implementation was incompatible with EU law. Even in the event of termination, it was suggested that CETA would be effective pursuant to Article 39.2 for a period of 20 years. I have previously referred to *Opinion 1/19* of Advocate General Hogan in relation to the Istanbul Convention. It appears from that Opinion that it is possible to denounce or withdraw from an agreement. However, as pointed out by the appellant, there is a lengthy run-out period before the obligations under CETA would cease, notwithstanding withdrawal from the agreement.

235. A question was raised as to the extent of the duty of sincere co-operation, assuming that CETA is ratified by all Member States and is in force, as to whether or not the duty of sincere co-operation under Article 4(3) of TEU would impose an obligation on Irish courts to enforce CETA Tribunal determinations and override any residual potential judicial function under national law which might otherwise exist? The State respondents replied no to this question and pointed out that Article 4(3) applies as between the Union and the

Member States, but that the CETA Tribunal, not being an EU entity, does not benefit from Article 4(3). It points out that Article 8.41.4 of CETA provides that execution is governed by the law where execution is sought, recognising that enforcement may be refused. The appellant disagrees with that characterisation of the duty of sincere co-operation, and suggests that post-ratification, EU law, including the duty of sincere co-operation, would require Ireland to enforce CETA Tribunal awards in the manner envisaged by the Washington Convention. It was stated that no residual potential judicial function would arise, other than those that would arise under national law, such as *Greendale* type applications. Whilst the parties have disagreed in relation to the answer to this question, at the end of the day, it is clear from the previous discussion as to enforcement that, whatever about the duty of sincere co-operation, once the agreement is ratified then enforcement can take place within the jurisdiction in accordance with the provisions of the Act of 2010 and that the basis for resisting enforcement under either the New York Convention and/or the Washington Convention/ICSID are extremely limited as previously discussed.

236. An issue was also raised concerning the different outcomes in cases such as *Achmea*, *Micula v. Romania*, *Komstroy LLC v. Republic of Moldova*, all of which involved BITs which were found to be contrary to EU law and how was it that a different outcome was the result in respect of CETA as set out in *Opinion 1/17*? The appellant observed that the case law is difficult to reconcile. Reference is made to what is described as a benevolent reading of CETA by the CJEU to conclude that it did not interfere with EU autonomy. That may be so but it is difficult to predict how the CETA Tribunal will manage its jurisdiction in the future and whether it would go beyond its jurisdiction so as to interfere with EU autonomy. For their part, the respondents make the point that, unlike the agreements in the cases referred to involving BITs, the provisions of Article 8.31.2 of CETA ensure that the CETA Tribunal does not have any role in resolving disputes relating to the

interpretation/application of EU law. I have already, in the course of this judgment, set out in some detail a description of the cases referred to above, and I think it can be seen that that appears to be a critical distinction between the BITs at issue and CETA. It will be recalled, for example, that in *Opinion 1/17*, the CJEU distinguished its Opinion in that case with the investor agreement at issue in the case of *Achmea*, the point being that "*that agreement established a tribunal that would be called upon to give rulings on disputes that might concern the interpretation or application of EU law*" (see the discussion of those cases commencing at para. 117 of this judgment). It seems to me that the critical factor is the express finding by the CJEU in *Opinion 1/17* that a decision of the CETA Tribunal does not interfere with EU autonomy.

237. The question was then asked as to whether Ireland has bound itself to accept as binding upon the State the determinations of other external bodies that do not fall within the Irish courts system; so far as the appellant is concerned, the response was that the only similar treaty to which Ireland is a party is the Energy Charter Treaty ("ECT"). The appellant stated that in the case of *Republic of Moldova v Komstroy LLC* Case C-741/19 ECLI:EU:C:2021:655 the CJEU held that the ECT dispute resolution mechanism breached EU law. It was further pointed out that determinations of the ECT arbitral panels are enforceable pursuant to the Act of 2010. The respondents for their part indicated that a number of external bodies determine international level obligations binding the State. In that context, reference was made to a number of such bodies referred to in the judgment in *Pringle* at paras. 316 and 417. Thus, for example, at para. 316 of the judgment of O'Donnell J. in *Pringle*, reference is made to a number of international bodies to which Ireland has either become a member or has subscribed to in one manner or another. I have referred to this previously in the course of this judgment and it is not necessary to do so again here. Reference was also made by the respondents to the ECT. Finally, the respondents made

reference to decisions of the European Court of Human Rights which have some effects in domestic law by reference to the provisions of the 2003 Act. It was pointed out by the respondents that the Act of 2010 was the only basis upon which CETA determinations might have domestic effect. Undoubtedly, as the respondents say, it is only through the enforcement mechanism provided under the Act of 2010 that an award of the CETA Tribunal could be said to have domestic effect. However, the critical consideration has to be whether an international agreement operates at an international level only or can have domestic effect. Clearly, the enforcement mechanism gives rise to an element of domestic effect.

238. A further question raised concerned the role of the European Court of Human Rights and its jurisdiction. It was asked, on the basis that it is contended that adherence to CETA infringed Article 34.5.6° of the Constitution, why was that not the case in relation to the jurisdiction of the European Court of Human Rights. In that context, the appellant responded by pointing out that the CETA Tribunal would be in a position to make an award to a Canadian investor in respect of a breach of CETA, notwithstanding that that breach was as a result of a valid Irish law, court decision, or lawful administrative action. Any such award would then have to be enforced by the Irish courts and possibly the courts of other jurisdictions. It was pointed out that this contrasts with the position of awards made by the European Court of Human Rights which are not enforceable in the Irish courts or anywhere else. It was observed in the case of *JMcD v. PL*, concerning the ECHR, that orders or declarations of the ECtHR are not enforceable at national level unless national law makes them so, and it was further observed that contracting states may, in principle, so far as the effect of the Convention at national level is concerned, ignore the decisions of the European Court of Human Rights (see paras. 31 to 35 of the judgment of Murray C.J. in that case to which I have referred previously). Accordingly, the appellant observes that compliance is

voluntary unlike the "*almost automatic*" enforcement of CETA determinations, as was pointed out by the trial judge at para. 149 of her judgment.

239. The respondents make the point that the scope of CETA is narrower than that of the ECHR. Murray C.J. in the case of *J.McD v PL*, referred to previously, explained the status of decisions and awards of the ECtHR. Decisions of that Court operate only at an international level and cannot be enforced here or elsewhere. A decision of the ECtHR does not have the effect of overturning a valid Irish law or a decision of the Courts including a final and conclusive decision of the Courts. In the same way, the CETA Tribunal cannot make a decision striking down a valid Irish law or a final decision of the Irish courts. Each body can reach a conclusion that a particular law or decision is not in conformity with either the ECHR or CETA. All that either body can do is to award damages to the aggrieved party.

240. Obviously, as pointed out previously, the enforceability of awards is different as between the two bodies. Does the issue of enforceability mean that a decision of the ECtHR is not a breach of Art. 34.5.6° while a decision of the CETA Tribunal would be in breach of that provision by reason of the power to enforce its award? The question of enforceability is a critical factor in reaching a conclusion that decisions of the ECtHR do not offend the provisions of the Constitution given that those decisions can be said to operate only at an international level. It may well be said that Ireland does not, in practice, refuse to pay awards made by the ECtHR notwithstanding the lack of enforceability of such awards. I am conscious of the fact that Ireland will as a general rule give effect to decisions of the ECtHR. The point is that where the decisions of the ECtHR are concerned, Ireland has a choice in the matter. It could decline to pay an award of the ECtHR and could decline to change any legislation found to be in conflict with the ECHR which, to my mind, explains why the decisions of the ECHR do not offend against the provisions of the Constitution. Presumably, if a decision of the ECtHR resulted in a conflict, for example, with an express provision of

the Constitution, the State might be inclined to disregard the decision. This is very much a hypothetical argument, but it does illustrate the distinction between the two bodies. By contrast, a decision of the CETA Tribunal leading to an award of damages is "almost automatically" enforceable. It is also important to bear in mind a further distinction, namely leading to a view that those decisions operate only at an international level. Of importance, to my mind, is that the ECtHR only becomes engaged with a dispute following the conclusion of proceedings in the domestic legal system. By contrast, the CETA Tribunal can become involved long before domestic remedies have been exhausted albeit with the requirement that no further proceedings take place in the domestic legal system. This does not mean that a Canadian investor could not bring a claim to a CETA Tribunal notwithstanding that proceedings in this jurisdiction had been brought in respect of the dispute concerned and rejected by all the courts in this jurisdiction. All of this leads to the conclusion that there is a significant difference between a decision of the ECtHR and a decision of a CETA Tribunal and the key difference is enforceability.

241. The final questions concern the powers of the CETA Joint Committee. I have previously dealt with this issue in some detail, and I do not think it is necessary to reiterate what has previously been said in this regard. I have set out in some detail the questions that were raised by the Court and the responses thereto in order to assist in the clarification of the issues before this Court. Nevertheless, the key question I have to consider at this point in time is whether or not CETA is a breach of Article 34 of the Constitution. At the outset of the discussion on this aspect of the case, I commenced by setting out the provisions of Article 34.1 of the Constitution. As we have seen, that refers to the administration of justice. The trial judge in this case accepted that the CETA Tribunal would be engaged in the administration of justice but concluded that the administration of justice as that term is understood in Irish constitutional terms did not include the administration of justice by a

body at an international level outside the jurisdiction of the courts and pursuant to an agreement which is not part of the domestic law of the State. That much is so, but is that a complete answer to this appeal?

Conclusions on the Issues under Article 34

242. In this context, I think it would be helpful to refer back to a passage in the judgment of O'Donnell J. in the *Zalewski* case. I have already set out the terms of para. 95 of the judgment of O'Donnell J. in that case where he spoke of any provision that subtracted from the existing jurisdiction of the courts or created a parallel jurisdiction which might render the courts' traditional jurisdiction defunct, as being something that would require careful scrutiny for compatibility with the Constitution. In that context, it is perhaps worth thinking for a moment about what is envisaged by CETA in the event that a Canadian investor has a claim against Ireland. Assuming, on the one hand, that there has been a breach of the fair and equitable treatment requirement contained in CETA, the Canadian investor in those circumstances can submit a claim to the CETA Tribunal, as we have seen. On the other hand, it is also clear that the circumstances that could give rise to such a claim would inevitably also give rise to a claim for damages against the State in the courts of this country. Take one example. Suppose for the sake of argument, that a Canadian investor had invested funds to build and develop a factory producing medicine in Ireland and at some stage the Irish government, for whatever reason, passed a law expropriating the factory and the land the factory was built on. In any such scenario, the investor would have a legitimate claim against the State for compensation. It is clearly envisaged by CETA that an investor could bring proceedings both before the national courts or the CETA Tribunal. As discussed previously, if an investor had commenced or wished to initiate proceedings in the national jurisdiction but went on to submit a claim to the CETA Tribunal, it could not proceed before the CETA Tribunal without terminating the national proceedings. That to me suggests that

what is provided for is a parallel jurisdiction. Admittedly, the claim before the national courts would be made in accordance with national law, whilst the claim before the CETA Tribunal would be made in accordance with the terms of CETA. However, the same facts would give rise to the claim in either jurisdiction and presumably the same damages would be claimed and, if the case is made out, the same damages would be awarded, be it in the national courts or by the CETA Tribunal. An interesting observation was made in the decision in *Komstroy* to which reference was made previously. That judgment of the CJEU concerned the ECT. However, its terms are similar to those at issue here in relation to the resolution of disputes. At para. 59, the CJEU said in its judgment:

> *"However, arbitration proceedings such as those referred to in Article 26 ECT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties concerned, the former derives from a treaty whereby, in accordance with Article 26(3)(a) ECT, Member States agree to remove from the jurisdiction of their own courts and, hence, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law ... disputes which may concern the application or interpretation of that law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration do not apply to arbitration proceedings such as those referred to in Article 26(2)(c) ECT"* (see also para. 292 of the *Singapore Opinion* referred to at para. 120 above and the passage from *Achmea* set out at para. 147 above to like effect).

The Court added in para. 60:

> *"Having regard to all the characteristics of the arbitral tribunal set out in paragraphs 48 to 59 of the present judgment, it must be considered that, if the provisions of Article*

26 ECT allowing such a tribunal to be entrusted with the resolution of the dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Members States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the act that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law (see, by analogy, judgement of 6 March 2018, Achmea, Paragraph 56).”

243. Reliance is placed by the Court for that conclusion on the judgment in *Achmea*, in particular at para. 55. The Court went on in that case to make two further comments, which I think it might be helpful to refer to. At paras. 61 and 62 it was stated as follows:

“It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the EU institutions, including the Court of Justice of the European Union, is not in principle incompatible with EU law. The competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the European Union and its legal order is respected.”

Again, *Achmea*, and paragraph 57 of the judgment in that case is cited as authority for that proposition.

244. The court went on to say:

"However, the exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed."

245. The Court went on to conclude that that would call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU (see para. 63).

246. What is striking about that part of the judgment in *Komstroy* (and the passages from the other judgments to like effect cited previously) is the observation that, by reference to Article 26(3)(a) ECT, Member States agreed to remove from the jurisdiction of their own courts, disputes concerning the application of EU law. The CJEU in that case had concluded that the arbitral tribunal provided for in Article 26(6) ECT was required to interpret and even apply EU law (see para. 50). While that touches on the application of EU law, it is relevant to the question of the removal from the jurisdiction of the Irish courts, disputes concerning not just the application of EU law, but also Irish law. That being so, I find it extremely difficult to see how the ratification of CETA as contemplated by a resolution of the Dáil can withstand constitutional scrutiny. This is an international treaty by which the jurisdiction of the Irish courts to rule on a dispute between an entity operating in Ireland against the Irish State can be removed and, in effect, will be removed from the jurisdiction of the Irish courts. I cannot see how that is permissible. In practical terms, there will be two parallel jurisdictions open to the Canadian investor, either to bring proceedings before the Irish Courts or to submit a claim to the CETA Tribunal. If the latter option is taken, the dispute is removed from the jurisdiction of the Irish courts which would otherwise have had jurisdiction to deal with the matter. What's more, the award of the CETA Tribunal then has

the benefit of almost automatic enforcement in this jurisdiction. In *Crotty*, the issue concerned the removal of the constitutional function of the State in relation to international relations. That was a function conferred on the Executive by the Constitution through the People. Here, the jurisdiction of the courts is removed by an agreement entered into by the Executive whereby the jurisdiction of the courts is cut down. I do not see how this cannot involve a breach of Article 34. Indeed, it is, to my mind, difficult to reconcile the approach of the respondents to the ratification of CETA and the approach to the ratification process in respect of the International Criminal Court. In that instance, a referendum took place precisely because it was understood that ratification of the Rome Statute establishing the International Criminal Court had an impact on Irish sovereignty by allowing someone to be arrested in this jurisdiction and to be put on trial before the International Criminal Court (see in that context the Twenty-Third Referendum on the Constitution and Art. 29.9).

247. Much has been said about the differences between the role of the ECtHR and the CETA Tribunal. It can be said of the ECtHR that it operates on an international plain. Its awards are not enforceable within the jurisdiction while those of CETA are enforceable in the jurisdiction. The fact that a parallel jurisdiction has been created which results in disputes arising in Ireland being dealt with either in the Irish courts or before the CETA Tribunal is a very important factor. However, as explained previously, a party seeking to bring a dispute to the ECtHR must first exhaust domestic remedies while the Canadian investor has no such obligation. Of particular significance is the "almost automatic" enforceability of CETA awards. This is the principal difference between awards of the ECtHR and a CETA Tribunal. This takes a CETA award back from the international plain to the domestic legal system. To my mind, that is why it is necessary to have CETA ratified by the People, given that it cuts down the jurisdiction of the courts and involves the creation of a parallel jurisdiction whose awards are enforceable in this jurisdiction. This would be so even though the claim arose

out of a breach of CETA, which breach was itself a consequence of a valid Irish law, court decision, or lawful administrative action.

Regulatory Chill

248. It may not be strictly speaking necessary to deal with the arguments under this heading. The argument of the appellant in regard to regulatory chill is simply this: if the CETA Tribunal was to find an Irish measure or law incompatible with CETA, it could make an award against the State. As any such award would be enforceable in the State, it could be that the State would be exposed to further claims while the offending measure remained in place. This, it is said, would create a chill on the operation of Irish law and policy.

249. It was further suggested that Ireland would be deterred from fulfilling its obligations in relation to taking environmental measures for fear that they might have detrimental effects on investments, given that in the case of Canadian investors a claim might be brought to the CETA Tribunal if any such measures had a detrimental effect on a Canadian investment.

250. The respondents take issue with this line of argument on the basis that CETA makes it clear that a claim will not arise in respect of measures to achieve legitimate policy objectives. Article 8.9.1 of CETA describes this as including measures relating to the protection of public health, safety, the environment, or public morals, social or consumer protection, or the promotion and protection of cultural diversity. This is also reflected in the preamble to CETA. The point is also made on behalf of the respondents that in order for this argument to succeed the appellant would have to identify extra rights which it is contended CETA gives Canadian investors beyond those already enjoyed under Irish law. This is because it would be difficult to identify whether the chilling effect applied as a result of CETA, or indeed as a result of Irish law or measures or ECHR provisions, or EU law. To my mind, there is some merit in this argument. Insofar as the concept of regulatory chill is concerned, Ireland's freedom to act in certain areas is already curtailed by measures

contained in the Constitution, the European Convention on Human Rights, and indeed EU law. To take one extreme example: say, for the sake of argument, that Ireland introduced a law that said that all property owned by Canadian investors in the State was to be subject to an additional tax over and above the tax paid on property by Irish citizens, or other non-Canadian citizens who owned property in the State. It is inconceivable that the State could introduce such a tax because it would fall foul of the provisions of the Constitution, it would be a form of discrimination that would fall foul of the ECHR and could presumably also give rise to issues under EU law. In such a scenario, the regulatory chill would be created not just by CETA but by domestic law and other international agreements which are applicable in this jurisdiction. How then does one say that it is CETA that is causing such a regulatory chill? In truth, as is stated by the respondents, the argument made by the appellant in this regard is to a large extent hypothetical. It is difficult to imagine a provision or measure of Irish law which would amount to a breach of CETA, giving rise to a claim which would not, of itself, give rise to a claim before the Irish courts, arising out of the same circumstances. The comment was made by the respondents that to put forward an argument on a basis that is hypothetical is not permissible and, in that context, reference was made to a passage from *Irwin v. Deasy* [2010] IESC 35, in which Murray C.J. stated:

> *"The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable."*

251. Reference was also made to a comment made by MacMenamin J. in the case of *Kennedy v. DPP* [2007] IEHC 3, in which he commented to the effect that, in that case, the evidential basis for relief had not been established, such that the court was "*invited to deliver*

a judgment upon a hypothesis or a moot". I agree with those statements in relation to an argument based upon a hypothesis.

252. Further, the point was made that the argument of the appellant in this regard was not so much a legal argument as a political argument, and it was pointed out that there were no legal standards by which this Court could assess whether a chilling effect would ensue.

253. The respondents then made a point based on the concept of the separation of powers, to the effect that, even if there was to be a chilling effect in the future, that would not justify this Court in intervening to prevent a decision which falls to be taken by the Executive. Reference was made to an observation of O'Donnell J. in *Pringle,* at para. 346, as follows:

> *"In the plaintiff's determination to challenge the wisdom and legality of the Government's decision, he appears to give no weight to the fact that it is a decision made by the Government. That is the body to which the Constitution has allocated the task of making such decisions whether trivial, important, wise, or profoundly misguided. Here the court is invited to restrain the exercise of constitutional function by a body authorised to carry out that function, and in respect of which function the Constitution imposes little in the way of express limitation, and contemplates direct accountability to the Dáil and indirectly the People, rather than to the courts. .... Governments are elected to make decisions whether trivial or momentous successful or catastrophic, and for those decisions they are answerable to the Dáil, and through it to the People".*

254. I agree with the observations made by O'Donnell J. in that passage.

255. The respondents also referred to a passage from the judgment of the High Court in which the concept of the chilling effect was considered by comparison with the views of the CJEU in *Opinion 1/17*. It was noted at para. 138 as follows:

"Consequently, it is argued that the potential for monetary awards against the State under CETA might have a chilling effect on the actions of public authorities in order to avoid such actions sounding in damages. However, the CJEU did not accept that the operation of the CETA Tribunal was capable of having such an effect. It emphasised the lack of jurisdiction in the CETA Tribunal to declare any level of protection afforded by the EU to a public interest to be incompatible with CETA as reflected in Article 28.3.2, Article 8.9.1 and Article 8.9.2 of CETA itself. ... Reading these provisions together, the CJEU concluded that the powers of the CETA Tribunal "do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process.""

256. The trial judge concluded that there was a parallel with the domestic legal system of each of the parties (see para. 139).

257. She added:

"It follows, and the CJEU has so concluded, that the mere fact that interests of an investor are adversely affected by measures taken to protect those interests will not amount to a breach of the fair and equitable treatment principle. It is the added element of abusive treatment, manifest arbitrariness, targeted discrimination or some equivalent behaviour on the part of a party that would bring a claim within the scope of Section C or Section D and thus potentially result in liability for party concerned."

258. Thus, it can be seen that she rejected the argument in the terms put forward by the appellant. I agree with her views in that respect.

259. Finally, the respondents made the point that, insofar as the appellant had suggested that the CETA Tribunal might award damages in circumstances beyond those contemplated in *Glencar v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, it is said that it is far from clear

that a different result from *Glencar* would ensue under CETA, and it has not been demonstrated by the appellant how this would occur. It was pointed out that there is a relatively high bar for a breach of CETA provisions to occur, such as, for example, "*manifest arbitrariness*", or "*targeted discrimination*". It is argued on behalf of the respondents that this is more than, for example, acting *ultra vires* or negligently. Given the fact that there are express protections contained in CETA for the various parties to CETA to regulate in the public interest, it is said that this acts as a further constraint on the circumstances in which damages might be awarded. Indeed, that is precisely the point that was made in the passage referred to from the judgment of the High Court herein.

260. It seems to me that one of the difficulties in respect of the arguments of the appellant in the context of regulatory chill is that the appellant has not been able to identify how it is said that CETA goes beyond any other measure or law already in effect in the State that could have the effect of creating regulatory chill. Any laws or measures introduced by the State may be subject to "*regulatory chill*" by measures of domestic law, as I have just said. Apart from the Constitution, the State in introducing laws and measures must also take account of the provisions of the European Convention on Human Rights and EU law. What then is different about CETA?

261. The State will, as a matter of logic, hesitate to pass laws which run the risk of unconstitutionality. In the environmental field, the State will, one presumes, carefully consider the potential effect of a measure on those who may be affected by any such proposed measure. For example, it may be necessary to consider the effect on a particular industry if a decision was taken to prevent the continuation of that industry on environmental grounds. Equally, one presumes, consideration would have to be given to the risk of not taking any such action: in such circumstances, is that not a chilling effect that applies in the context of much legislation? One has to consider and balance the respective rights of those

affected by particular legislation, or indeed the failure to legislate in a particular area. I find it difficult on the basis of the arguments before this Court to say that CETA will give rise to a regulatory chill on the Irish State in taking steps or measures that may be necessary simply because of the potential for a claim to be made by a Canadian investor to the CETA Tribunal. I, therefore, reject the appellant's arguments on the basis of regulatory chill.

***Eco-Oro Minerals Corp v The Republic of Columbia* ICSID Case No. ARB/16/41**

262. I now want to turn to a further argument raised by the appellant in relation to a decision in respect of an award made by ICSID in the case referred to above which is said to have implications for the decision of the CJEU in *Opinion 1/17*. The decision in that arbitration was delivered on the 9th September, 2021 very shortly before the delivery of the judgment by the trial judge in the High Court and obviously was not before the trial judge.

263. It is contended by the appellant that the decision of the ICSID Tribunal in *Eco-Oro* shows that the interpretation by the CJEU of the CETA Tribunal's jurisdiction in *Opinion 1/17* was "*flawed*", and that *Eco-Oro* shows that the terms of CETA are incompatible with EU law. The agreement at issue in *Eco-Oro* was a trade agreement between Columbia and Canada (FTA). It is said that the approach of Canada in the submissions to the ICSID Tribunal demonstrates that it disagrees with the logic subtending *Opinion 1/17*. On that basis it is said that there could not be a binding interpretation of CETA by the CETA Joint Committee consistent with *Opinion 1/17* because, presumably, Canada would not agree with such an approach.

264. Certain aspects of *Opinion 1/17* have been highlighted by the appellant. First of all, it is said that in order to render CETA compatible with EU law the CJEU had to be satisfied that the CETA Tribunal would not have jurisdiction to impugn public interest measures or the power to award damages in respect of same. Otherwise, it is said that this would undermine the capacity of the Union to operate autonomously.

265. It is said that the CJEU concluded that the mere jurisdiction to assess a public interest measure would render CETA incompatible with EU law and reliance is placed on the following passage from *Opinion 1/17* at para. 148:

> *"... the jurisdiction of those tribunals would adversely affect the autonomy of the EU legal order if ... those tribunals might ... call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union ..."*

It was acknowledged by the appellant that the CJEU went on to say at paras. 152 to 153 as follows:

> *"With respect to the jurisdiction of the envisaged tribunals to declare infringements of the obligations contained in Section C of Chapter Eight of the CETA, Article 28.3.2 of that agreement states that the provisions of Section C cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties.*
>
> *153. It follows from the foregoing that in those circumstances, the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152 of the present Opinion and, on that basis, to order the Union to pay damages."*

266. The appellant complains that the analysis of Article 28.3.2 does not address the jurisdiction of the Tribunal nor does it address the Tribunal's power to award damages. It is complained that the CJEU implied these limitations into Article 28.3.2. However, it seems

to me that the CJEU was making it clear that CETA cannot operate to provide damages to an investor who complains of a measure which falls within the general exceptions referred to in Article 28.3.2 save and unless those measures *"constitute a means of arbitrary or unjustifiable discrimination between the parties"*. That, after all, is what CETA is designed to protect the parties from – arbitrary or unjustifiable discrimination in the operation of CETA.

267. The appellant goes further however and argues that the CETA Tribunal can assert jurisdiction to second guess national public interest measures, to assess their legality and to award compensation and contends that this was done in *Eco-Oro*.

268. In dealing with Article 8.9.1-2 the appellant contends that the view of the CJEU to the effect that that provision limits the *"jurisdiction of the envisaged Tribunals to declare infringements of obligations contained in Section D and contends that these provisions do not in fact prevent the CETA Tribunal from having jurisdiction to 'call into question the level of public interest determined by the Union following a democratic process' of a measure or to deem such a measure a breach of Article 8.10 or 8.12."* Thus, it is contended that the CJEU wrongly inferred a restriction on the jurisdiction of the CETA Tribunal where no justification for such an inference existed. Article 8.9.1 and 2 have been referred to previously and I do not propose to repeat those provisions again. However, it does seem to me that it would be appropriate to set out in full the passage which is said by the appellant to be an erroneous interpretation or assumption by the CJEU. It said at paragraph 160 as follows:

> *"It is accordingly apparent from all those provisions, contained in the CETA, that, by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement, which are the only sections that can be relied upon in claims before the envisaged tribunals by means of Section F of that Chapter, the Parties have taken care to ensure*

that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights."

269. It was on that basis that the CJEU concluded that Section F of Chapter 8 did not adversely affect the autonomy of the EU legal order.

270. It now falls to be considered whether or not anything in the decision of the ICSID Tribunal in *Eco-Oro* casts doubt on the decision of the CJEU in *Opinion 1/17*. As mentioned previously the dispute in that case arose out of an FTA between Canada and Columbia. The particular dispute related to measures adopted by Columbia in connection with an ecosystem in an area of Columbia called San Turban, which allegedly deprived Eco Oro of its mining rights under a concession contract for the exploration and exploitation of a deposit of gold, silver and other minerals. It was contended that Columbia had breached its obligations under the FTA by means of *"the unlawful, creeping and indirect expropriation of its investment and by failing to accord Eco Oro's investment the minimum standard of treatment." Eco-Oro* sought compensation for damage caused as a result of Columbia's alleged breaches and violations of the FTA and Columbia sought to have the claim dismissed on the basis that the Tribunal lacked jurisdiction over the dispute and there was no basis of liability accruing to Columbia under the FTA.

271. The appellant in the course of his submissions on this issue has referred to the submissions of Canada furnished to the ICSID Tribunal in the course of the hearing of the dispute between Eco Oro and Columbia. Thus, the following comments were made by the appellant. It was stated that Canada confirmed that the general exceptions to be found in the FTA are repeated in all of Canada's treaties. Perhaps more accurately what was stated was

that the general exceptions contained in paras. 1 – 3 of the FTA were standard in Canada's trade agreements and that the language used was generally similar across Canada's agreements. I do not doubt for a moment that such terms as are comprised in the general exception provisions of CETA and which are to be found in agreements such as the FTA are expressed in similar terms and are understood to have the same general purpose. It was said then by the appellant that Canada did not support the Columbian argument that the general exceptions affected jurisdiction. The appellant contended that Canada submitted that the general exceptions provided that an environmental measure which would otherwise breach investor protection rules, might be saved by the general exceptions, but only if the ICSID Tribunal deemed the measure necessary to achieve the environmental aim. In this context it may be useful to set out para. 16 of the submission of Canada in full. It says:

> *"Importantly, the general exceptions in Article 2201 only apply once there has been a determination of breach of an obligation in the Agreement. In the context of investment obligations, the exception in Article 2201(3) only applies once there has been a determination that there is a breach of a primary obligation in Chapter Eight (Investment) of the Agreement. For the general exception in Article 2201(3) to apply, the measure must (1) not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment; (2) relate to one of the policy objectives set out in paragraphs (a) - (c) (which includes the protection of the environment) and (3) be 'necessary' to achieve these objectives. If the general exception applies, then there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required."*

272. Leaving aside for a moment the fact that this is a submission by Canada as to the interpretation of the FTA in *Eco-Oro*, it is noteworthy that the requirement of necessity is also to be found in Article 28.3.2 of CETA. In other words, the measures at issue must be necessary for the purposes set out in Article 28.3.2. On the basis of the submission referred to by the appellant, it is suggested that the position of Canada in relation to the jurisdiction and powers of the Tribunal to award damages contradicted *Opinion 1/17*. I have to say that I cannot see the force of that argument. Nevertheless, it is necessary to look at the other arguments made by the appellant relying on the decision of ICSID in *Eco-Oro*. It is a principal tenet of the argument put forward by the appellant in this regard that the ICSID Tribunal in that case found that general exemptions did not bar jurisdiction to impugn environmental measures. On the basis that there was such a finding, the majority went on to consider whether or not the environmental measure at issue breached fair and equitable treatment obligations and it is argued that the Tribunal found that the general exceptions provided no bar to compensation, even if an environmental measure was necessary. Directions were then made in relation to the assessment of damages.

273. It must be remembered that what was at issue before ICSID was the question of jurisdiction. Columbia had argued simpliciter that the provisions as to 'general exceptions' meant that ICSID had no jurisdiction to deal with a matter once the impugned measure was one that came under one of the headings including the heading of environmental measures. What the ICSID Tribunal did was to find that the exceptions only apply 'once there has been a determination that there is a breach of a primary obligation in Chapter 8' (see para. 380). That finding does not appear to me to be in conflict with anything to be found in *Opinion 1/17*. It may be useful to refer once more to *Opinion 1/17* and to a number of paragraphs in that Opinion starting at para. 156. Having referred to the particular provisions already referred to it is apparent from reading those provisions together that the discretionary powers

of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process:

> *"157. That is also the purport of Point 3 of Annex 8-A to the CETA, which states that 'for greater certainty, except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations'.*
>
> *158. It must be added that the jurisdiction of the CETA Tribunal to find infringements of the obligation, laid down in Article 8.10 of the CETA, to accord 'fair and equitable treatment' to covered investments is specifically circumscribed, since Article 8.10.2 lists exhaustively the situations in which such a finding can be made.*
>
> *159. In that regard, the Parties have concentrated on, inter alia, situations where there is abusive treatment, manifest arbitrariness and targeted discrimination, which reveals once again, that the required level of protection of a public interest, as established following a democratic process, is not subject to the jurisdiction conferred on the envisaged tribunals to determine where the treatment accorded by a Party to an investor or a covered investment is 'fair and equitable.'"*

274. In other words, for the jurisdiction to be exercised by the CETA Tribunal and result in a finding against a State party or the EU, there has to be *"abusive treatment, manifest arbitrariness and targeted discrimination"* and thus it is clear that the CJEU is not saying that there is no jurisdiction whatsoever but rather, that it is only in those limited circumstances that the jurisdiction to award damages could arise. The appellant has

suggested that any lack of clarity between the decision of the ICSID Tribunal and of the CJEU should be resolved by a reference to the CJEU. I note in passing that while the ICSID Tribunal as a whole rejected the arguments of Columbia on the question of jurisdiction, there was a dissent from one of the panel of the Tribunal, Professor Philippe Sands QC, on the question of whether or not the fair and equitable treatment criterion had been met. He was of the view that it had not been met in that case.

275. I now want to look briefly at the submissions of the respondents on this issue. Leaving aside the point that was made to the effect that the decision of the ICSID Tribunal in that case concerned the question of jurisdiction only and had not resolved any issue as to whether or not compensation would be payable under the FTA in that case the point is made that the decision of the ICSID Tribunal is not binding on anyone nor is it persuasive and did not concern EU law nor CETA but a trade agreement phrased in different terms. It was pointed out that as the authors of *Redfern and Hunter on International Arbitration* (6th Edn., Sweet & Maxwell, 2015) stated:

> *"There is no system of binding precedents in international arbitration – that is, no rule that means that an award on a particular issue, or a particular set of facts, is binding on arbitrate is confronted with similar issues or similar facts. Each award stands on its own."*

The point is made that the assertion that the ICSID Tribunal's decision *"reflects international law"* is not supported by any authority. Thus, the respondents rejected the suggestion that that decision requires the CJEU to revisit *Opinion 1/17* lacks any merit.

276. Having referred to the failure of the jurisdictional argument made by Columbia before the ICSID Tribunal it was said that even if similar reasoning applied to the CETA Tribunal and assuming that the CETA Tribunal had jurisdiction to arbitrate disputes relating to

environmental or other matters, it was contended that the appellant had failed to demonstrate how that would be incompatible with EU Law. It was pointed out that *Opinion 1/17* expressed concern about something quite different, namely a scenario where a breach of CETA might be found to exist on account of *"the level of protection of a public interest established by the EU institutions"*. It was asserted, relying both on the terms of CETA and *Opinion 1/17* that no breach of CETA can ensue on that basis and therefore it is said, no right to damages could arise on that basis. It was further noted that Columbia had not complied with a judgment of its own constitutional court (see para. 820) and that certain conduct *"was arbitrary and disproportionate, and which has inflicted damage on Eco-Oro without serving any apparent purpose."* Thus, it is said that even bearing that in mind the appellant has failed to explain what incompatibility with EU law could arise even if the CETA Tribunal were to adopt similar reasoning.

277. At the risk of repeating what I have already said, I think it is important to bear in mind the observations I have previously made in this context. As I have pointed out the ICSID Tribunal in *Eco-Oro* was first and foremost considering the question of its jurisdiction to deal with the matter under the FTA. It rejected the submission made by Columbia in that regard which I have set out above. That is what it decided. As can be seen, it went on to consider the question of whether or not there was a breach of the obligation of fair and equitable treatment. As noted earlier, the panel was divided on that issue with the majority holding that there had been a breach of that requirement. As I understand the decision of the CJEU in *Opinion 1/17*, the Court's principle concern in that case was not to question the jurisdiction of the CETA Tribunal as such but whether or not the CETA Tribunal *"might, in the course of its examination of the relevant facts, which may include the primary law on the basis of which the contested measure was adopted, weigh the interest constituted by the freedom to conduct business, relied on by the investor bringing the claim, against public*

interests, set out in the EU and FEU Treaty's and in the Charter, relied on by the Union in support of its defence" (see para. 137). That is the context in which the discussion took place as to the role of the CETA Tribunal and its jurisdiction. What is apparent from the terms of *Opinion 1/17* and in particular the discussion to which reference has been made previously in paras. 148 *et seq.* is that the parties are entitled to regulate within their territories for the protection of the matters referred to previously such as public health, the environment and so on. I have already referred to para. 158 which notes the jurisdiction of the CETA Tribunal to find infringements of the obligation of fair and equitable treatment as set out in Article 8.10 but the CJEU also pointed out that the circumstances in which that can be done are specifically circumscribed given that Article 8.10.2 lists exhaustively the situations in which such a finding can be made. For this reason, I accept the submissions of the respondents to the effect that even if one accepted what has been said by the ICSID Tribunal, there is still no clear incompatibility demonstrated by the appellant between the approach of the CJEU and EU law.

278. Reference was also made in the course of the submissions from the respondents to material differences between the FTA at issue in *Eco-Oro* and CETA. It was pointed out that CETA contains additional protections to those contained in the FTA and to that extent refers to Articles 8.9.1 and Article 8.9.2. It is noted for example that the fact that a measure negatively affects an investment or interferes with an investor's expectations does not of itself amount to a breach of an obligation. It was suggested that the reference by the appellant in his submissions to, *inter alia*, para. 830 of *Eco-Oro*, in which it was held that the fact that Columbia could adopt environmental measures did not mean that an investor was not entitled to compensation. However., it was pointed out that Article 8.9.2 of CETA concerns what will not constitute a breach of CETA obligations and therefore it is said that if there is no breach, there can be no right to compensation. Finally, the point was made that *Eco-Oro*

did not decide in general terms that *"general exceptions did not bar jurisdiction to impugn environmental issues"* as contended by the appellant. In any event it was contended by the respondents that *"impugning"* of environmental measures is quite different from the measures breaching CETA.

279. Having considered the arguments of the appellant in this regard, I am satisfied that the decision in *Eco-Oro,* leaving aside the question of its precedential value, does not demonstrate in any way that *Opinion 1/17* requires to be revisited. I cannot see any basis upon which it would be necessary in the circumstances of this case to request a further view on CETA from the CJEU on the issues that have been raised. The position of the CJEU is clear. For that reason, I cannot see any point in seeking a preliminary reference under Article 267 TFEU.

Conclusions

280. It will be recalled that at para. 13 of this judgment I identified the issues to be determined in this case as follows:

i. Is ratification of CETA necessitated by the obligations of membership of the EU?
ii. Is CETA a breach of Article 15. 2 of the Constitution?
iii. Does the creation of the CETA Tribunal amount to the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the courts in this jurisdiction contrary to Article 34 of the Constitution?
iv. Does the "automatic enforcement" of a CETA tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 constitute a breach of Article 34 of the Constitution?

v. What is the effect of the interpretative role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution?

vi. Would an amendment of the Arbitration Act 2010 to alter the "automatic enforcement" of a CETA tribunal award as proposed in the judgment to be delivered herein by Hogan J. alter the position in relation to the ratification of CETA?

For my part, as has been seen, I would the determine the issues as follows:

i. Ratification of CETA is not necessitated by the obligations of membership of the EU.

ii. CETA is not a breach of Article 15.2 of the Constitution.

iii. The creation of the CETA Tribunal is the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the Courts in this jurisdiction. It is this element coupled with the answer to the fourth issue which creates a conflict with Article 34 of the Constitution.

iv. It is the element of "automatic enforcement" of a CETA tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 which to my mind constitutes a breach of Article 34 of the Constitution. As can be seen from my answer to the third issue, it is the combination of a parallel jurisdiction together with "automatic enforcement" in this jurisdiction under the provisions of the Arbitration Act 2010 that gives rise to this breach.

v. Insofar as the Joint Committee is concerned, I am of the view that its role does not amount to a breach of Article 15.2 of the Constitution.

vi. I have had the advantage of reading the judgment of Hogan J. in draft and accept that an amendment of the Arbitration Act 2010 to alter the "automatic

> enforcement" of a CETA tribunal award as proposed in the judgment to be delivered herein by Hogan J. would alter the position in relation to the ratification of CETA. As I have explained previously, it is the creation of a parallel jurisdiction combined with "automatic enforcement" of a CETA tribunal award that has led me to the conclusion that the ratification of CETA would amount to a breach of Article 34. Were the position in relation to automatic enforcement to be altered as envisaged by Hogan J., the position would be different, and in those circumstances, CETA could be ratified without the necessity for a referendum.

For completeness, I should add that I have rejected the arguments of the appellant in relation to regulatory chill. I would therefore allow the appeal on the basis that the ratification of CETA would breach the judicial sovereignty of the State, contrary to Article 34 of the Constitution.

AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No: S:AP:IE:2021:000124

[2022] IESC 44

O'Donnell C.J
MacMenamin J.
Dunne J.
Charleton J.
Baker J.
Hogan J.
Power J.

BETWEEN/

PATRICK COSTELLO

APPELLANT

AND

GOVERNMENT OF IRELAND, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 11th day of November 2022

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Part I: Introduction

Introduction

1. The emergence of investor tribunals is one of the striking developments in international trade law over the last 50 years or so. These tribunals – which nowadays are a common feature of either bi-lateral or multilateral trade agreements – are generally empowered to rule on the question of whether a host country has, by its laws, judicial decisions or executive actions complied with certain standards and requirements specified in the relevant trade agreement itself. A review of tribunal awards involving a range of countries over the last few decades shows that many of the awards relate to matters such as the withdrawal of tax privileges, the nationalisation of industry, far-reaching price controls, environmental regulation or the award or cancellation of government contracts, permissions and licences and the like.

2. The claims themselves are generally brought by large and well-resourced commercial entities. It is not unknown for such investor tribunal awards to be very substantial, sometimes running to hundreds of millions of US dollars and even in a few instances over a billion US dollars. Thus, for example, following the decision of the German Bundestag in August 2011 to phase out nuclear energy power plants, a Swedish state-owned company which had significant shares in two nuclear plants in Germany brought a claim before such a tribunal under the terms of the Energy Charter Treaty for some €4.7 billion in damages. It seems that that claim was ultimately settled in November 2021 for the sum of €1.4 billion following a series of important rulings from that tribunal: see *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12: see "Ballantyne, "Vattenfall saga at an end" *Global Arbitration News*, 12 November 2021.

3. With perhaps one other exception dating from the Energy Charter Treaty (1994), this State has never previously provided for or participated in a treaty allowing for investor tribunals. This is the issue which now squarely arises in this appeal, as the Canada-EU Comprehensive Economic and Trade Agreement ("CETA") provides for such tribunals ("CETA Tribunals"). It is envisaged that the CETA Tribunals will have the power to make binding arbitral awards against Ireland (along with, as the case may be, the European Union, the other 26 Member States of the Union and Canada). In the case of Ireland, these disputes will arise from the application of the general public law of this State.

4. It is important at the outset to be clear regarding what this case is about and what it is not about. It is not about international trade or investment, because these are (and will remain) a fundamental feature of our economy. Ireland's prosperity, living standards and general reputation as a modern, open, outward-looking State all rest on international trade.

5. Nor is it about Canada, one of the other partners to the CETA agreement. One may take judicial notice of the fact that Canada is a trusted partner of Ireland and the European Union and few (if any) countries live up to the ideals of the United Nations Charter better than Canada. The Canadian legal system is rooted fundamentally on the rule of law and its judicial system is widely admired and greatly respected. The appeal is not even about CETA itself, the great bulk of which is wholly unproblematic. Rather the appeal focuses entirely on the role of the special CETA investor tribunals which Chapter 8 of CETA proposes to call into force.

6. CETA was itself laid before Dáil Éireann. It is envisaged that the appropriate resolution approving that Treaty will be submitted to that House (but by that House alone) for approval in accordance with Article 29.5.2 of the Constitution. This is considered to be

constitutionally necessary as adherence to that Treaty involves a charge on public funds. Armed with that (anticipated) Dáil resolution, the Government now proposes to ratify CETA by simple executive act. I should add that, as Dunne J. has already detailed in greater length in her judgment, the bulk of the rest of CETA (i.e., apart in particular from Chapter 8 dealing with investor tribunals) has already been provisionally in force since the 21st September 2017 in the manner permitted by Article 30.7(3) CETA.

7. The ultimate question which now arises is whether this is constitutionally permissible or whether the ratification of an agreement providing for the establishment of a tribunal with a binding jurisdiction to pronounce on State liability arising from the general public law of this State would compromise our juridical sovereignty, contrary to Article 5, Article 34.1 and Article 34.5.6 of the Constitution.

8. One of the reasons why this case is such a difficult one is that the proposed investor tribunals sit somewhere – in perhaps a slightly ill-defined position - between regular international commercial arbitration on the one hand and a permanent international court enjoying a binding and enforceable jurisdiction on the other. In some respects, the tribunals have a sort of chameleon like quality which means that they possess features of both models. And herein lies the difficulty: there is, of course, no constitutional issue with regular international commercial arbitration, whereas the participation by the State in a permanent international court with adjudicatory powers which are binding in national law would quite obviously require a specific constitutional amendment. Perhaps the real issue confronting this Court on this appeal is to ascertain just where precisely in the spectrum between international commercial arbitration on the one hand and a permanent international court with binding adjudicatory powers on the other the investor tribunals envisaged by CETA actually lie. It is the characterization of these

investor tribunals which is difficult and ascertaining just where they lie on this spectrum is a question which remains problematic and elusive.

9. The issues which arise on this appeal accordingly to go to the very heart of our constitutional architecture. All of this means that the present appeal may yet be regarded as among the most important which this Court has been required to hear and determine in its almost 100-year history.

10. Before proceeding further, a few words about the structure of this judgment might be of assistance. Part II of the judgment describes the scope of the appeal and the applicable standard of review. Part III describes in outline the CETA investment tribunals (including their composition and jurisdiction). Part IV addresses the question of whether the ratification of CETA is "necessitated" by the obligations of membership of the European Union for the purposes of Article 29.4.6. (In passing I might here observe that if I were to have concluded that ratification was so necessitated, then this would have been the end of the appeal. Since, however, I am of the view that it is not so necessitated, I then proceed to examine the merits of the constitutional argument).

11. Part V then considers in more detail the jurisdiction of the CETA Tribunals, including the extent to which any award made by a CETA tribunal can be reviewed by a national court (including an Irish court) when it is sought to enforce that award. Part VI discusses the question of whether ratification of CETA would imperil the sovereignty of the State, contrary to Article 5 of the Constitution. Part VII considers the question of legislative sovereignty. Part VIII addresses the issue of judicial sovereignty. Part IX deals with the issues of our accession to the jurisdiction of the European Court of Human Rights. Part X examines specific constitutional provisions giving authority to the State to participate in international agreements providing for the resolution of disputes other than by Arti-

cle 34 courts. Part XI deals with issues of democratic legitimacy arising from the decisions of the CETA Joint Committee. Part XII contains the overall conclusions. Finally, Part XIII deals with the issue of curing the unconstitutionality identified by the majority of the Court.

12. Given that the Court is divided and in view of the fact that there are multiplicity of issues arising in the present case, it might also be convenient at the outset if I were to indicate my general agreement with the lead judgment of Dunne J. for the majority so far as the Article 34.1 issue is concerned. Specifically, I consider that the six principal issues identified by all members of the Court should be answered as follows:

13. **Issue 1**: Is the ratification of CETA "necessitated" by Ireland's obligations of Union law for the purposes of Article 29.4.6 of the Constitution? **Answer**: No, it is not so necessitated.

14. **Issue 2:** Would the ratification of CETA compromise the legislative autonomy of the Oireachtas, contrary to Article 15 of the Constitution? **Answer**: Yes, insofar as CETA provides for a form of strict liability on the part of the State in respect of legislation which is found to be contrary to CETA and insofar as it does not contain a good faith defence in respect of any damages claim which might be brought against the State.

15. **Issue 3:** Would the ratification of CETA subtract from the jurisdiction of the Irish courts, contrary to Article 34.1 of the Constitution? **Answer**: Yes, but the constitutional objection chiefly rests in the fact that a judgment of the CETA Tribunal is made virtually automatically enforceable in the High Court.

16. **Issue 4:** Would the ratification of CETA be contrary to Article 34.1 insofar as enforcement of such judgments of a CETA Tribunal would be almost automatic? **Answer**: Yes, because as matters stand the High Court would have no power to refuse enforcement

even where the award compromised Irish constitutional identity or constitutional values in a fundamental way or where it was inconsistent with the requirements of EU law.

17. **Issue 5:** Would the ratification of CETA be unconstitutional inasmuch as Article 25 CETA allows for the Joint Committee to give interpretative decisions which bind the CETA Tribunals, thus compromising the democracy guarantee in Article 5 of the Constitution? **Answer**: Yes. An interpretative ruling of this kind is really a form of quasi-legislation which in practice amounts to a de facto amendment of CETA. Even though such an interpretative decision might well – and probably would - involve a (potential) charge on public funds in the course of what might well amount to the de facto amendment of an international agreement, there would be no procedure whereby the prior consent of Dáil Éireann could be obtained in the manner required by Article 29.5.2.

18. **Issue 6:** Would it be open in principle to the Government to ratify CETA if the Oireachtas were to amend the Arbitration Acts? **Answer**: While this would be a matter for Government and Oireachtas to consider, it would in principle be open to Oireachtas to cure the unconstitutionality identified in this judgment. It could do this by amending the Arbitration Act 2010 in order to vest the High Court with an express jurisdiction to refuse to give effect to a decision of a CETA Tribunal if:

(a) such an award materially compromised the constitutional identity of the State or fundamental principles of our constitutional order, or

(b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of Fundamental Rights and Freedoms) and to preserve its coherence and integrity.

19. Since Article 5 of the Constitution assumes very considerable importance regarding the resolution of this appeal, it is as well to set out its provisions at this stage:

> "Ireland is a sovereign, independent, democratic state."

20. Article 34.1 of the Constitution further provides:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

21. At the heart of this appeal is whether these particular constitutional guarantees would be compromised by the ratification of CETA. I now propose to consider these issues, starting with a consideration of the scope of the appeal

Part II: Scope of the appeal

Scope of the appeal and the constitutional review by this Court

22. The present proceedings have been brought by the appellant, Patrick Costello, who is a member of the Green Party. He is currently a Dáil Deputy for the constituency of Dublin South Central and in these proceedings he seeks an order restraining the Government from ratifying CETA on the ground that its provisions in respect of investor tribunals are unconstitutional. This claim was ultimately rejected in the High Court in a comprehensive judgment delivered on September 2021 by Butler J.: see *Costello v. Ireland* [2021] IEHC 600, [2021] 2 ILRM 145. It is only proper to state that this is a judgment of remarkable quality from which I have derived the greatest assistance in this most difficult of cases, even if I find myself compelled to arrive at a different result from that of the trial judge.

23. This Court granted the appellant leave to appeal directly to this Court pursuant to Article 35.5.4 of the Constitution: see [2022] IESCDET 1.

24. The nature of the proceedings necessarily requires this Court to assess as best it can the likely impact and possible consequences of CETA (or, perhaps, in strictness, Chapter 8 of CETA) were it to be ratified by this State. In this regard it has to be said that any assessment made by this Court is accordingly to some degree contingent and uncertain,

precisely because by definition it is almost impossible at this juncture to predict precisely how the CETA Tribunal will approach its task in respect of any given claim. I share the concerns expressed by many members of the Court regarding the abstract nature of this claim. Given, however, that CETA will ultimately become an obligation necessitated by membership of the European Union of Article 29.4.6 of the Constitution – and thus immune from any further constitutional scrutiny - were it be ratified by this State and the other 26 Member States and CETA subsequently entered into force, there is no alternative but to consider the constitutionality of what is proposed on this abstract, *ex ante* basis. All of this makes our task even more difficult because it would, for example, have been far easier to consider many of the difficult problems arising in this appeal if this Court had been confronted with a real life CETA Tribunal award based on the facts of a specific, real-life case.

25. In this judgment I endeavour, therefore, to sketch out what the possible implications of such accession might be, conscious, as I am, that any such assessment could not possibly bind or otherwise constrain the CETA Tribunal were it seized of some future case involving this State. In performing this exercise, I propose, therefore, to adhere as closely as possible to the text of CETA itself and in the process to reject any interpretations or consequences of CETA which appear to be unlikely or implausible.

26. A further difficulty is that it is not clear that there will be many – or even any – cases brought against the State under CETA. Yet it would be unrealistic not to suppose that this *could* happen: it is entirely possible that an award *might* be made by a CETA investor tribunal against the State which award *could* then be enforced by the High Court under the provisions of ss. 24 and 25 of the Arbitration Act 2010 ("the 2010 Act") in circumstances which I propose to outline at a later stage in this judgment.

27. This immediately raises the issue of principle of whether accession to such an international agreement would be at variance with either Article 5 and Article 34.1 (legislative and juridical sovereignty) or Article 34.5.6 (the finality of decisions of this Court) of the Constitution. This presents an issue of principle which raises a clear-cut question that essentially admits only of a binary response.

The standard of review, Article 29 and international relations

28. It is true, of course, that the conduct of international relations is committed generally by Article 29 of the Constitution to the executive branch of government. The power to make treaties is a matter in the first instance for the executive as Article 29.5.1 itself makes clear. Diplomacy is generally conducted by and with the governments of other nation states. The conduct of foreign affairs more often yields to the necessities of pragmatism and *Realpolitik* than the dispassionate, principles-based approach which is the lodestar of judging. Matters such as treaty-making, State recognition, diplomacy and the practical realities of policy making and the day-to-day relations with other States are quite obviously committed to the Government to determine. The precepts of international law – to which Article 29 itself makes several references – are, of course, traditionally the concern of nation states rather than individuals.

29. In *Boland v. An Taoiseach* [1974] IR 338 the plaintiff had challenged the constitutionality of the Sunningdale Agreement of 1973 on the ground that the Government had acknowledged the status *de jure* of Northern Ireland as part of the United Kingdom, contrary – or so the argument ran – to the provisions of the (original versions, now replaced) of Article 2 and Article 3 of the Constitution. In his judgment dismissing the claim, FitzGerald C.J. stated ([1974] IR 338 at 362) that the courts had no power to "supervise or interfere" with the exercise by the Government of its executive functions

"unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

30. In his masterly judgment in *Burke v. Minister for Education and Skills* [2022] IESC 1, [2022] 1 ILRM 73 O'Donnell C.J. has explained how the "clear disregard" test had evolved in the intervening years. I could not hope to improve upon this historical analysis and his close and compelling reading of the constitutional text with which I respectfully agree. As the Chief Justice stated (at paragraph 60):

> "It is also arguably consistent with this approach, that where the Constitution calls for a broad-based judgment [by the Government], and does not constrain it by any specific restrictions or standards, that the primary accountability for such action lies under Article 28 with the Dáil, and that this reinforces the analysis of the judicial role as arising only in the cases of clear disregard. These cases illustrate circumstances where the courts have been called on to review the actions of the Government in different spheres, where it is contended the Government has failed to act in accordance with the express or implied mandates of the Constitution, and have held that the court may only interfere in an exercise of power consigned by the Constitution to the Government where there has been clear disregard of such express or implied mandate."

31. Unlike the situation in *Burke*, however, the present appeal does not concern a challenge which directly affects the constitutional rights of individuals as such. It rather concerns the contention that the Government is about to ratify – with the approval of the Dáil – a treaty which abrogates features of our legislative and juridical sovereignty, contrary to Article 5, Article 34.1 and Article 34.5.6 by reason (it is said) of the State's submission to the jurisdiction of the CETA Tribunals.

32. For my part I do not consider it necessary to determine whether this is a case governed by the "clear disregard" test or some other, less demanding test for review. It is sufficient to say that for reasons which I propose now to explain I am of the view that the ratification of CETA would clearly breach specific constitutional boundaries, express or implied, as objectively interpreted and construed by this Court. In other words, even assuming that the "clear disregard" test is the applicable test, I consider that that test is clearly met in the present case.

The appellant's standing

33. There is no issue, of course, regarding the appellant's standing to make this case. Like any other citizen acting *bona fide* he is entitled to come to court to say that the adoption of an international agreement is unconstitutional even if he cannot demonstrate the type of actual or apprehended injury to himself generally envisaged by Henchy J. in *Cahill v. Sutton* [1980] IR 269. This principle was established by this Court in its judgments in *Crotty* and, indeed, *McGimpsey v. Ireland* [1990] 1 IR 110 and such must, if necessary, be regarded as one of the exceptions to the general standing rules envisaged by Henchy J in *Cahill v. Sutton*.

34. In this respect the fact that the appellant is a member of Dáil Eireann is really immaterial to the issue of standing in a case of this kind, any more than it was, for example, for a member of the Seanad in a case concerning Dáil constituencies in *O'Donovan v. Attorney General* [1961] IR 114 or for the plaintiff – who was (and is) a Dáil Deputy - challenging the ESM Treaty in *Pringle v. Government of Ireland* [2012] IESC 47, [2013] 3 IR 1. In all of these cases, membership of the Oireachtas simply served to underscore the bona fides of the respective plaintiffs. The same can equally be said of the present appellant.

35. I mention all of this because at the conclusion of his judgment the Chief Justice notes – perfectly correctly – that the requirement contained in Article 29.5.2 that Dáil Eireann gives its approval prior to the ratification of CETA is itself an important constraint in terms of the conclusion of international agreements by the State. It is also true that the appellant in his capacity as a member of the Dáil would be well placed to contribute to the merits of this debate. As this Court noted in *The State* (*Gilliland) v. Governor of Mountjoy Prison* [1987] IR 201, Article 29.5.2 is an important democratic safeguard inasmuch as international agreements which involve a charge on public funds (save those of a technical or administrative character) must secure the prior approval of the Dáil before the State can be bound by any such agreements.

36. None of this is, however, strictly germane to this appeal. We are not concerned with the *merits* of CETA – since this is a matter for the Government and Dáil (and, indeed, as I shall later explain, the wider Oireachtas) to assess and consider – but rather with the *constitutionality of the proposed method of its ratification*. Despite the fact that he can participate in any debate qua Dáil Deputy in any Dáil debate in respect of the merits of that Agreement he, like any other citizen, also remains free to come to this Court to contend that the ratification of CETA in the manner proposed is unconstitutional. Having been thus seized with this matter our sole task is instead to adjudicate on its legal merits and to address the constitutional issues presented by this appeal.

Part III: The CETA investment tribunals

The composition and jurisdiction of the CETA Tribunal

37. It is next necessary to describe the composition and jurisdiction of the CETA Tribunal. The composition of the CETA Tribunal is provided for in Article 8.27 CETA. Article 8.27(2) CETA envisages that the Tribunal will be a fifteen-member Panel consisting of five members who shall be EU nationals, five Canadians and five shall be nationals of

third countries. Article 27.4 CETA requires that the members be eligible for judicial office or be "jurists of recognised competence." Expertise in public international law is essential and it is desirable that they should have expertise in international trade law and international investment law and the resolution of such disputes.

38. Members are to be appointed for a five-year term, with certain transitional arrangements (Article 8.27(5) CETA). The Tribunal is to sit in divisions, with the three members drawn from the EU, Canada and the third country nationals (Article 8.27(6) CETA). The members are to sit in rotation, with the President of the Tribunal taking steps to ensure that the "composition of the divisions is random and unpredictable" (Article 8.27(7) CETA). The members of the Tribunal are to be paid a monthly retainer fee which is to be determined by the CETA Joint Committee (Article 8.27(12) CETA). They are also to be paid a daily fee corresponding to that payable to members of arbitral panels sitting under the International Centre for Settlements of Investment Disputes Convention ("ICSID") (Article 8.27(14) CETA).

39. Article 8.30(1) CETA further provides that members of the Tribunal shall be independent and may not be affiliated with any government, although the fact that a person "receives remuneration from a government does not in itself make that person ineligible." Article 8.30 then prescribes a set of ethical rules, including provision for recusal and, ultimately, removal of a Tribunal member whose independence is in doubt.

40. In this respect the rules regarding membership of CETA Tribunals addresses many of the traditional concerns voiced in relation to the role of arbitrators in international arbitration law, namely, lack of independence from nominating governments on the one hand and a certain eagerness to please the international investment community on the other. Indeed, at the time of the adoption of CETA, the European Union, its Member States and Canada established a Joint Interpretative Instrument (OJ L 11, p.3), Point

6(f) of which declares that CETA "moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals" which were inspired "by the principles of public judicial systems in the European Union and its Member States and Canada, as well as…international courts such as the International Court of Justice and the European Court of Human Rights."

41. While CETA goes a long distance towards addressing these concerns, the fact remains that as matters stand members of the arbitral tribunals will not be judges and nor will they enjoy the standard guarantees in respect of fixity of tenure and salary which are generally deemed to be essential prerequisites to judicial independence in the western democratic legal tradition. One might also draw attention to the fact that CETA Tribunals will not sit in public, something which as Article 34.1 of the Constitution makes clear, is of the essence of our constitutional order.

42. It is next necessary to address the actual jurisdiction of the CETA Tribunals. Article 8.31 CETA is a very important provision which sets out the jurisdiction of the CETA Tribunals. It provides as follows:

> "1. When rendering its decisions, the Tribunal established under this Section shall apply the Agreement as interpreted under the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
>
> 2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing

interpretation given to the domestic law by the courts or authorities of the Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."

43. To this, Article 8.39 CETA may be added which provides that the Tribunal may award only either damages (plus interest) or restitution of property. Even in the case of restitution, Article 8.39(1)(b) CETA provides that the award shall provide that the respondent state "may pay monetary damages representing the fair market value of the property immediately before the expropriation." Article 30.6(1) CETA provides that CETA does not form part of the domestic law of any of the contracting parties.

44. Article 8.41 CETA deals with the enforcement of awards. Article 8.41(1) CETA provides that an award "shall be binding between the disputing parties and in respect of that particular case." Article 8.41(4) CETA provides that execution of the award shall be governed "by the laws concerning the execution of judgments or awards in force where the execution is sought." Article 8.41(5) CETA provides that such an award is an arbitral award which "is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention." Article 8.41(6) CETA further provides that if a claim has been submitted "pursuant to Article 8.23(2)(a), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention." (Article 8.23(2)(a) CETA allows an investor to submit a claim under the provisions of the ICSID Convention.)

45. Article 28.5(1) CETA, Article 8.28(5) CETA and Article 8.28(7) CETA all make provision for the establishment of the CETA Appellate Tribunal, along with matters relating to the composition, organization and administration of that body. Article 8.39(9)(d) provides that a "final award by the Appellate Tribunal shall be regarded as a final award for the purposes of Article 8.41." Article 8.41(1) CETA provides that an "award issued

pursuant to this Section shall be binding between the disputing parties and in respect of that particular case." Article 8.41(2) CETA states that a "disputing party shall recognise and comply with an award without delay." Article 8.41(4) CETA further provides that execution of the award "shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought."

46. As we shall later see, provision is given for the enforcement of these awards under our domestic law by reason of the operation of ss. 24 and 25 of the 2010 Act. Of course, it is clear from Article 8.41(4) CETA that any CETA Tribunal award against the State would not necessarily have to be enforced here. The application for enforcement could be in any country which is a party to ICSID.

47. Since, in my view, this is a case which is essentially about *sovereignty* rather than the separation of powers *as such* or a possible encroachment into the judicial function *as such*, it is unnecessary for present purposes to revisit any of the Article 34/Article 37 issues which have recently been so comprehensively examined in the various judgments of this Court in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. It is, I think, sufficient to say that, on any view, a CETA Tribunal would be exercising powers corresponding to the judicial powers of the State. As the CJEU observed in the *CETA Opinion 1/17* (*Opinion 1/17*, EU: C:2019: 341) (at paragraph 197), these tribunals "will, in essence, exercise judicial functions", adding that:

> "They will be permanent and they will be established by law in the form of the acts approving the CETA adopted by the Parties. They will apply, following an adversarial procedure, rule of law, will be required to exercise their functions wholly autonomously and will issue decisions that are final and binding."

The duration of CETA

48. It is next necessary to say something about the duration of CETA. Article 30.9(1) CETA permits any party to denounce CETA upon giving 180 days' notice. Article 30.9(2) CETA further provides, however, that, even in that event, the provisions of Chapter 8 dealing with investor tribunals will continue in operation for a further 20 years in respect of investments made prior to that point.

49. The issue of termination is, however, complicated by membership of the European Union. It is clear – and, in any event, the parties to the appeal agree – that *post-ratification* the obligation to adhere to CETA will be one which is "necessitated" by the obligations of membership of the Union for the purposes of Article 29.4.6 of the Constitution. It is, moreover, not entirely clear whether the State could unilaterally withdraw from CETA in those circumstances, not least having regard to our duty of sincere co-operation in Article 4(3) TEU.

50. It is true that in *Wightman* (C 621/18, EU: C: 2018: 999) the CJEU acknowledged not only that the United Kingdom could withdraw from the Union, but also that during the currency of the two year notice period of withdrawal specified in Article 50 TEU it was open to the United Kingdom to revoke that notice of withdrawal by virtue of a further decision to that effect taken in accordance with its own constitutional requirements. That decision turns, however, on the very specific provisions of Article 50 TEU dealing with *withdrawal* from the European Union. The situation with regard to CETA will be quite different, since the issue then would be whether the State could unilaterally exercise a right of withdrawal under CETA in circumstances where, post-ratification and the entry into force of that agreement, adherence to its terms would nonetheless be an obligation of Union membership.

51. While it is not necessary to determine this issue, it is clear that, one way or the other, it would seem that, once ratified, the State will be bound by the provisions of the Treaty for a long time so far as the investor tribunals are concerned.

Part IV: Whether ratification of CETA is "necessitated by the obligations of membership of the European Union" for the purposes of Article 29.4.6

52. Perhaps the first argument which the Court is called upon to address is whether the ratification by the Government of CETA in the exercise of its executive powers under Article 28.2 would itself be immune from constitutional scrutiny by reason of Article 29.4.6. While accepting that the State was under no legal obligation arising from European Union law to ratify CETA, counsel for the State, Ms. Donnelly SC, contended nonetheless that the act of ratification was necessitated by reason of the fact that, once ratified by the Member States and the European Union, there would *then* be a binding obligation on the State to comply with the requirements of CETA. This is undoubtedly true, but it does not mean that ratification of CETA is nonetheless "necessitated by the obligations of membership of the European Union" within the meaning of Article 29.4.6.

53. I propose later in this judgment to explore in detail the two Opinions of the Court of Justice in *Opinion 2/15* ("Singapore")(Opinion 2/15, EU:C: 2017: 376) and *CETA Opinion 1/17* (Opinion 1/17, EU: C:2019: 341) ("the CETA Opinion"). It is sufficient for present purposes simply to record that in both *Singapore* and the *CETA Opinion* the Court of Justice unambiguously held that in the case of "mixed" agreements – such as trade agreements of this nature negotiated by the European Union on behalf of its members – the consent of the individual Member States was required by reason of the fact that "such a regime…removes disputes from the jurisdiction of the courts of the Member States". As it cannot, therefore, be of a "purely ancillary nature", the CJEU held

that the consent of the individual Member States to such a mixed agreement is therefore required: see *Singapore* at paragraph 292.

54. In these circumstances, one can only agree with the conclusions of Butler J. (at paragraph 178 of her judgment, [2021] 2 ILRM 145 at 223) in the High Court that, even on the most generous interpretation of the term "necessitated by the obligations of membership of the European Union", it is difficult to see "how something which, as a matter of EU law, cannot be characterised as ancillary to the competence of the EU to enter into an international agreement can, at the same time, be something which is [also], as a matter of Irish constitutional law" necessitated for this purpose.

55. In these circumstances it is unnecessary to review any of the judicial and other debates which have taken place in the course of the highly complex case-law which has attended the meaning of this phrase. It is, perhaps, sufficient to say that, save for the important decisions of this Court in *Crotty* and *Pringle*, all of these cases from *Lawlor v. Minister for Agriculture* [1990] 1 IR 356 onwards have concerned some feature of EU law which did, at some level, impose an obligation on the State. This is illustrated by *Lawlor* itself where Community law (as it then was) *required* the State to choose as between one of two options regarding the operation of the milk quota regime. The debate in that case was, essentially, whether the election for one or other choice was *itself* a necessitated obligation.

56. The situation in *Crotty* was different since it concerned the decision by this State to ratify the Single European Act ("SEA"). It is clear from the judgment of Finlay C.J. (at 767) that the Court considered that this decision was not "necessitated by the obligations of membership", although, of course, the situation became entirely different once we had ratified and the SEA had subsequently entered into force. At that point, post-ratification, the State was, of course, obliged to comply with the requirements of the

SEA precisely because that series of treaty amendments which were contained in the SEA had then entered into force following its ratification by all of the members of the (then) European Economic Community.

57. In this respect I am not unmindful of the fact that Ms. Donnelly SC contended that in *Crotty* this issue does not appear to have been argued or, at least, argued at any length. In his judgment for the Court Finlay C.J. said (at 767) that it was "clear and was not otherwise contended by the [State] defendants that ratification of the SEA (which has not yet taken place) would not constitute an act 'necessitated by the obligations of membership of the Communities.'"

58. While all of this may be so, I think it is plain that, one way or another, on this point the reasoning of Finlay C.J. in *Crotty* is quite obviously correct. If it were otherwise, it would mean that the act of ratification of a variety of European Union treaties – each of which in their own right might have considerable implications for the sovereignty of the State – would have been "necessitated" in this sense without the possibility of prior judicial scrutiny or, for that matter, the necessity for a referendum.

59. It is, perhaps, at times difficult to avoid the impression from various judicial dicta and the vast literature which attends this debate that, at least in the eyes of some, the issue of necessitated obligations is simply a highly technical and obtuse debate with no real wider significance beyond its resolution in any given case. Yet the issue of the interpretation of Article 29.4.6 is of fundamental importance.

60. So far as Irish law is concerned, the Constitution represents the most fundamental *Grundnorm* ("Bunreacht") of all. It is, after all, the ultimate repository of our sovereignty and democracy. It expresses in a profound way key aspects of our national identity in legal form. Since our accession to the European Economic Community (as it then was) in 1973 and throughout the evolution of that Community into the European Union

from 1973 onwards, Ireland has shared and pooled its sovereignty with other European states for the greater benefit of all in the manner so memorably described by the Court of Justice in *Van Gend en Loos* (Case 26/62, EU:C: 1963: 1). Critically, however, at all relevant stages the Irish People have assented to that sharing and pooling of sovereignty in a series of constitutional amendments from 1972 onwards. If, however, there is to be any further material transfer of that sovereignty, it is essential to our system of constitutional democracy that the further consent of the Irish People is obtained.

61. As Article 5, Article 6 and Article 47 all in their own way demonstrate, this, at any rate, is the theory upon which the Constitution is founded. And herein lies the importance of Article 29.4.6. While it acknowledges the transfer of sovereignty which, for example, was entailed by the ratification of the Treaty of Lisbon (and, for that matter, the other relevant European treaties) and the assumption of the obligations thereby imposed by Union law, it also acts as a check on the further pooling of such sovereignty in a material fashion without the democratic assent of the People.

62. If, as the appellant contends, the ratification by the State of CETA amounts to a *fresh* transfer of sovereignty of a kind not *heretofore* provided for by a specific constitutional amendment or amendments, then Article 29.4.6 cannot avail the State in this appeal. All of this is yet another way of saying that if there is *no existing legal obligation* on the part of the State to ratify CETA arising from our membership of the Union – and it is conceded that there is not – then the ratification of CETA falls to be judged by reference to ordinary constitutional criteria. The fact that CETA *would* enjoy immunity from constitutional scrutiny for the purposes of Article 29.4.6 *if* ratified by the Union and all the Member States is really quite beside the point, because *prior* to such ratification – which, of course, is the position at the moment - there is no such obligation.

63. As it is accepted that there is currently no obligation imposed on the State to ratify CETA arising from our membership of the European Union, I consider that for all of these reasons the act of ratification itself cannot enjoy the constitutional immunity provided for by Article 29.4.6.

64. It is next necessary to examine the jurisdiction of the CETA Tribunals, as it is this issue which is at the heart of the present appeal.

Part V: The jurisdiction of the CETA Tribunals

The jurisdiction of the CETA Tribunals

65. The jurisdiction of the CETA Tribunals is set out in Chapter 8 of CETA. In essence, that jurisdiction enables the Tribunals to review a variety of executive, legislative and judicial measures taken by this State (along, of course, with those of the other 26 Member States, the European Union and Canada itself) by reference to a variety of metrics and indicators, including market access and performance indicators set out in almost 2,000 pages of CETA text. Sections C and D are very important provisions, preventing as they do discriminatory treatment and dealing with the rights of investors and of covered investments.

66. It is, however, the provisions of Article 8.25, Article 8.31, Article 8.39 and Article 8.41 which take centre stage in any assessment of the jurisdiction of the CETA Tribunal. It may be convenient at this point to set out in full the relevant portions of these provisions. They provide as follows:

> "8.25.1. The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this section.
>
> 8.25.2. The consent under paragraph 1 and the submission of a claim to the Tribunal under this Section shall satisfy the requirements of:

(a) Article 25 of the ICSID Convention and Chapter II of Schedule C of the ICSID Additional Facility Rules regarding written consent of the disputing parties; and

(b) Article II of the New York Convention for an agreement in writing."

"8.31.1. When rendering its decisions, the Tribunal established under this Section shall apply the Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

8.31.2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of the Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

8.31.3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date."

"8.39.1. If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination:

(a) Monetary damages and any applicable interest;

(b) Restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined a manner consisted with Article 8.12.

8.39.2. Subject to paragraphs 1 and 5, if a claim is made under Article 8.23.1(b):

(a) An award of monetary damages and any applicable interest shall provide that sum be paid to the locally established enterprise;

(b) An award of restitution of property shall provide that restitution be made to the locally established enterprise;

(c) An award of costs in favour of the investor shall provide that it is to be made to the investor; and

(d) The award shall provide that it is made without prejudice to a right that a person, other than a person which has provided a waiver pursuant to Article 8.22, may have in monetary damages or property awarded under a Party's law.

8.39.3. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.

8.39.4. The Tribunal shall not award punitive damages.

8.39.5. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. If only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

8.39.6. The CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought.

8.39.7. The Tribunal and the disputing parties shall make every effort to ensure the dispute settlement process is carried out in a timely manner. The Tribunal shall issue its final award within 24 months of the date the claim is submitted pursuant to Article 8.23. If the Tribunal requires additional time to issue its final award, it shall provide the disputing parties the reasons for the delay…..

8.41.1. An award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case.

8.41.2. Subject to paragraph 3, a disputing party shall recognize and comply with an award without delay.

8.41.3. A disputing party shall not seek enforcement of a final award until:

(a) In the case of a final award issued under the ICSID Convention:

i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

ii. Enforcement of the award has been stayed and revision or annulment proceedings have been completed;

(b) In the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any others applicable pursuant to Article 8.23.2(d):

i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or

ii. Enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

8.41.4. Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought.

8.41.5. A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

8.41.6. For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention."

66. Provision is also made for an appeal by either party to a CETA Appeal Tribunal: see Article 8.28 CETA.

67. While it is clear from the provisions of Chapter 8 that the CETA Tribunals are empowered to review features of the general public law of the State, Article 8.31(2) CETA makes it clear nevertheless that the Tribunal does not have jurisdiction "to determine the legality of a measure, alleged to constitute a breach of the Agreement, under the domestic law of a Party." Article 30.6(1) CETA further states that the agreement itself cannot be "directly invoked in the domestic legal systems of the Parties."

68. The jurisdiction of the CETA Tribunals is instead confined simply to the award of damages (plus interest) or (in certain circumstances) the restitution of property: see Article 8.39(1) CETA. These awards are then made enforceable as if they were either "arbitral awards" for the purposes of Article 1 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") or a "final award" for the purposes of Chapter IV, Section 6 of the ICSID Convention 1966. It is worth noting that both the New York Convention and the ICSID Convention have the force of law in the State: see generally 2010 Act, s. 24(1) and s. 25(3) respectively.

69. What, then, is the practical effect of these provisions? It means that the State has given a unilateral consent to the CETA Tribunal to hear claims for damages (and, perhaps, in some limited instances, restitution of property or its equivalent in monetary terms) brought by investors in respect of what, for present purposes, amounts almost to perpetuity: see Article 8.25 CETA. This consent is, however, quite different from that which is given in specific commercial arbitration proceedings where the consent is contractual in nature. In that situation the consent represents the free contractual wishes of the parties and is one which (normally, at least) is specific to an identifiable and identified

claim from an identified or at least identifiable party. *Both* parties are also free to submit the claim to arbitration and each defendant (including State parties) may counter-claim. Such claims, moreover, relates essentially to the private law of the State in that they are generally fundamentally contractual in nature.

70. The striking difference between the two forms of arbitration was memorably expressed by Paulsson, "Arbitration without Privity" (1995) 10 *ICSID Rev – Foreign Investment Law Journal* 232:

> "It is commonplace to say of arbitration that it is consensual. A claimant initiates arbitration because it has agreed with the defendant that any dispute between them will be thus resolved. Either party can commence proceedings as a claimant: once an arbitration has started, the defendant may raise a counterclaim. This is the arbitration world as we know it today. Hundreds of thousands of international contracts adhere to this basic framework, more or less dependable in individual cases. But explorers have set out to discover a new territory for international arbitration. They have already landed on a few islands, and they have prepared maps showing a vast continent beyond. This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned: the defendant could not have initiated the arbitration, nor is it certain of being able to bring a counterclaim."

71. By contrast, the consent here derives from a multi-lateral treaty provision in which the state parties have agreed to vest jurisdiction in the CETA Tribunals to make damages awards in respect of the general public law of each state (and, as the case may be, the European Union): see, by analogy, the comments of the Court of Justice to this effect in *Achmea* (C-284/16, EU:C: 2018: 158) at paragraphs 55 and 56 and in *European Food*

SA (Case C-638/19P, EU: C: 2022: 50) at paragraph 144. Unlike the ordinary arbitration case, this jurisdiction exists *only* for the benefit of the disappointed or aggrieved investor: this jurisdiction cannot be invoked by the State itself.

72. These awards are then made enforceable in our domestic law by virtue of Article 8.41 CETA and, by extension, ss. 24 and 25 of the 2010 Act. Following a detailed examination of these provisions, in the High Court Butler J. concluded (at paragraph 149 of her judgment, [2021] 2 ILRM 145 at 211), that "enforcement is almost automatic and the losing party would know that if they did not comply with the award of their own volition, they could be forced to do so by power of the State." This analysis was strongly disputed by counsel for the State parties in this appeal.

73. Given the central importance of this issue, it is convenient that we should turn to it now. It is worth saying, of course, that the grounds of review of any tribunal award under the New York Convention are possibly wider than under the ICSID Convention in that, for example, the former provides that the enforcing court may decline to do so if it is incompatible with the public policy of that State, whereas this is *not* true of ICSID. The fact remains, of course, that Article 8.23(2) CETA expressly allows an investor claimant the right to elect to have the award enforced under ICSID. Since in practice one must assume that most successful investors would follow this course of action, the scope of review under ICSID therefore assumes considerable importance.

Review by a national court under the ICSID Convention

74. The extent to which an arbitral award made under the ICSID Convention can be reviewed or examined by a national court has been the subject of extensive analysis in the exceptionally thorough joint judgment of Lord Lloyd-Jones and Lord Sales for the UK Supreme Court in *Micula v. Romania* [2020] UKSC 5, [2020] 1 WLR 1033. Here

a claim was brought by Swedish investors against Romania under a Sweden/Romania bi-lateral investment treaty which provided for an arbitral tribunal operating under ICSID arbitration rules. The Swedish claimants maintained that Romania had wrongfully withdrawn certain tax advantages which they had been promised but which had then been withdrawn after Romania's accession to the European Union in 2007. The arbitral tribunal found in the claimant's favour. The claimants then sought to have the award registered and enforced in the United Kingdom, along with a variety of other jurisdictions apart from Romania.

75. Parallel with all of this, the European Commission had conducted an investigation into the entire affair. It concluded that the tax advantages in question had amounted to an unlawful State aid for the purposes of Article 107(1) TFEU. It directed Romania not to pay the award. Romania (supported by the Commission) then applied to the English High Court for an order staying both registration and enforcement of the award pending a separate challenge brought by the claimants before the General Court of the European Union seeking to have the Commission's decision set aside.

76. Following a series of appeals, the matter ultimately came before the UK Supreme Court where that Court ultimately lifted the stay upon registration and enforcement. For our purposes, what is significant is that while the UK Supreme Court took the view that while the true scope and meaning of Article 54 of ICSID could only authoritatively be determined by the International Court of Justice, at the same time that Court considered a domestic court was nonetheless entitled to consider and rule upon the effect of a multilateral treaty such as ICSID insofar as it bore on the issues before them. The judgment of the UK Supreme Court simply serves to illustrate the very narrowness of the review which is open to any court called upon to enforce an arbitral award of this nature.

77. In their joint judgment, Lord Lloyd-Jones and Lord Sales took the view that the scheme of ICSID was such that once the authenticity of an award had been established, a domestic court could not re-examine such an award on its merits. They continued ([2022] 1 WLR 1033 at 1055):

> "It is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The position is stated in this way by Professor Schreuer in his commentary on Article 54(1): "The system of review under the Convention is self-contained and does not permit any external review. This principle also extends to the stage of recognition and enforcement of ICSID awards. A domestic court or authority before which recognition and enforcement is sought is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. This is in contrast to non-ICSID awards, including Additional Facility awards, which may be reviewed under domestic law and applicable treaties. In particular, the New York Convention gives a detailed list of grounds on which recognition and enforcement may be refused …" (Christoph H Schreuer, *The ICSID Convention: A Commentary*, 2nd ed (2009), p 1139, para 81). "The Convention's drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review

the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general. The observance of international law is the task of the arbitral tribunal in application of article 42 of the Convention subject to a possible control by an ad hoc committee … Nor would there be any room for the application of the Act of State doctrine in connection with the recognition and enforcement of an ICSID award …" (Schreuer, pp 1140-1141, para 85). "

78. They continued by stating ([2020] 1 WLR 1033 at 1055-1056):

"Contracting States may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the Convention itself (Articles 50-52). Nor may they do so on grounds based on any general doctrine of *ordre public*, since in the drafting process the decision was taken not to follow the model of the New York Convention. However, although it is recognised that this is the general position under the Convention, it is arguable that Article 54(1), by framing the relevant obligation as to enforcement as an obligation to treat an award under the Convention as if it were a final judgment of a local court, allows certain other defences to enforcement which are available in local law in relation to such a final judgment to be raised."

79. Lord Lloyd-Jones and Lord Sales then conducted a close and detailed examination of the drafting history of Article 54 ICSID (and certain other articles) before concluding ([2020] 1 WLR 1033 at 1058-1059):

> "However, in light of the wording of Articles 54(1) and 55 and the *travaux préparatoires* reviewed above, it is arguable that there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under Articles 50 to 52 of the Convention."

80. In an Irish context, these exceptional defences would probably include an allegation that the judgment was procured by fraud (see, *e.g.*, *Waite v. House of Spring Gardens Ltd*., High Court, 26 June 1985; *Desmond v. Moriarty* [2018] IESC 34) or where there had been such a fundamental understanding as to key facts (*The People (Director of Public Prosecutions) v. McKevitt* [2009] IESC 29; *Re McInerney Homes Ltd.* [2011] IESC 34) or where the decision had been given *per incuriam* (*Abbeydrive Developments Ltd. v. Kildare County Council (No.2)* [2010] IESC 8, [2010] 2 IR 397) or a fundamental failure of due process (see, *e.g., Re Greendale Properties Ltd. (No.3)* [2000] 2 IR 514; *LP v. MP* [2001] IESC 76, [2002] 1 IR 219; *Desmond v. Moriarty* [2018] IESC 34). As this Court observed in *Walsh v. Minister for Justice* [2019] IESC 15, [2020] 1 IR 488, the set aside jurisdiction remains quite exceptional.

81. If these defences are available in principle in order to impeach the validity of a domestic judgment which is otherwise final and conclusive, then, in the light of *Micula* and the language of Article 54(1) of ICSID, the same is probably true in respect of an arbitral award given under ICSID.

82. It is unnecessary to be definitive on this question: it is sufficient to say that even if such defences are in theory currently available – or, as Butler J. put it (at paragraph 149, [2021] 2 ILRM 145 at 150), even accepting "the potential existence of some limited

and undefined grounds" of defence - they would by definition be confined to wholly exceptional and unusual situations. Here the wording of s. 25(5) of the 2010 Act is of some relevance:

> "The pecuniary obligations imposed by an [ICSID] award shall, by leave of the High Court, be enforceable in the same manner as a judgment or order of the High Court to the same effect and, where leave is so given, judgment may be entered for the amount due or, as the case may be, the balance outstanding on the award."

83. While some emphasis was placed by Ms. Donnelly SC on the leave requirement imposed by the section, for my part I think that as matters currently stand it is really in the nature of a decorous formality. It certainly does not empower the High Court to review the substance of the award or anything of the kind. The truth of the matter is that, assuming the procedural formalities have been complied with and in the absence of some highly unusual defence such as fraud, the High Court currently enjoys no real discretion in the matter and has little option but to give effect to the award.

84. Of course, as the Chief Justice has noted in his judgment, no one has previously sought to find fault with the Arbitration Act 2010 as a thing in itself, still less contend that s. 25 of the 2010 Act was unconstitutional. The issue is rather that, in the context of CETA, the 2010 Act has, so to speak, been conscripted into service as a means of giving effect to the awards of CETA Tribunals: in this respect the Act serves as a sort of makeshift pontoon bridge by which a CETA Tribunal award is enabled to cross that legal Rubicon from the realm of international law into an enforceable judgment recognised as such by our own legal system on a more or less automatic basis.

85. This would appear to be true even if the CETA Tribunal were to deliver a judgment which was inconsistent with an earlier judgment given by an Irish court. This is a

ground upon which to refuse recognition and enforcement of a foreign judgment under our own rules of private international law: see generally, Binchy, *The Irish Conflicts of Law* (Dublin, 1987) at Chapter 33. It is also a ground for refusal of recognition under the Brussels system: see, e.g., Article 45(1)(c) of the Brussels Regulation No. 1215/2012 (recast). Yet even such a fundamental rule of non-recognition would not seem to be available to resist the enforcement of a CETA award under the ICSID Convention.

86. A further complication might also arise were an Irish court to contemplate a refusal to recognise a CETA award post-ratification. Under those circumstances compliance with CETA would then be a "necessitated obligation" of Union membership for the purposes of Article 29.4.6 of the Constitution. There would be at least a question mark as to whether an Irish court could properly refuse to recognise a CETA award by reference to some domestic *ordre public*-style considerations having regard to the duty of sincere co-operation contained in Article 4(3) TEU which would then be imposed on an Irish court. These agreements are, after all, an "integral part of EU law and may therefore be the subject of references for a preliminary ruling": *CETA Opinion* at paragraph 117 and see generally *Republic of Moldova* (C-741/19, EU: C: 2021: 655) at paragraphs 33 and 50.

87. An investor claimant has, moreover, the option of bringing enforcement proceedings in any country that is a party to the ICSID Convention: see Article 8.23(2) CETA and Article 8.41 CETA. It would not necessarily follow that even these (limited) defences would be available to the State in those circumstances.

88. One way or another, I consider that Butler J. was correct when she described (at paragraph 149, [2021] 2 ILRM 145 at 211) the enforcement of a CETA award as "almost

automatic" and the losing party "would know that if they did not comply with the award of their own volition, they could be forced to do so by power of the State."

Part VI: Whether ratification of CETA would imperil the sovereignty of the State, contrary to Article 5 of the Constitution

The jurisdiction of CETA tribunals to interpret the domestic law of the State

89. At the heart of the appellant's objections to the entire system of the CETA Tribunals is that any awards made against the State are likely to have an inhibiting effect on the Oireachtas in terms of the formulation of legislative policy. In the modern environment where all the Member States of the Union (including the State itself) have committed themselves to the Paris Agreement of 2015 and the necessity to begin the difficult process of decarbonising the economy, it may be supposed that such claims – were they, indeed, ever to arise – would in all likelihood be directed at legislative and other steps taken directly or indirectly to end our reliance on fossil fuels or, at least, broadly similar claims of that nature. In essence, the question is whether there is any real likelihood that a CETA Tribunal might award damages where a new regulatory measure aimed, for example, at curbing carbon emissions, had the effect of rendering an existing business uneconomic and, if it did, whether such an award might effectively jeopardise the legislative or judicial sovereignty of this State, contrary to Article 5 of the Constitution.

90. Before examining this question, a related and equally important issue to be considered in the context of the jurisdiction of the CETA Tribunals is the question of whether a CETA Tribunal may be required to interpret the domestic law of the State. Article 8.31(2) CETA provides that a CETA Tribunal "may consider, as appropriate, the domestic law of a Party as a matter of fact." It further provides that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that party."

91. This is of fundamental importance because, as I propose to explain, if a CETA Tribunal does find that the State has breached its obligations under CETA, the CETA Tribunal has the power to make awards of monetary damages which have almost automatic effect in our own domestic law. As we have seen, the power of the High Court to review an arbitral award is likely to be limited to exceptional and unusual circumstances and certainly as things stand does not extend to a review on the merits. All of this means that if the CETA Tribunal could be said to interpret the domestic law of the State – even if only as a matter of fact and, again, even if only in a way which does not bind the national courts - and the CETA Tribunal does so erroneously, the State would have no recourse.

92. This question of whether arbitral tribunals interpret the law of contracting parties has been central to much of the CJEU's jurisprudence on international agreements which establish tribunals empowered to hear disputes on matters bearing upon EU law. The CJEU has, indeed, considered many of the sovereignty and judicial autonomy arguments which attend the present case. I suggest, therefore, that it might be of assistance first to examine the CJEU's position on this matter.

The jurisprudence of the Court of Justice in respect of legislative autonomy

93. For decades, the CJEU has demonstrated a large degree of solicitude in respect of its own jurisdiction and it generally seems unenamoured of any proposals which involve the ceding to other bodies powers which may conflict generally with those of the EU institutions and with its own jurisdiction in particular. Here it is perhaps not necessary to look any further than the Court's judgment in *Opinion 2/13* (Opinion 2/13, EU:C: 2014: 2454) dealing with the accession of the Union to the European Court of Human Rights in which the Court found that such accession would be contrary to the autonomy of Union law. In this and in other similar cases, the CJEU's principal concern has been

that such bodies would undermine the autonomy of the EU legal order and in turn the full effectiveness of EU law. One way that the CJEU has considered arbitral tribunals capable of doing just that is if those tribunals are required to interpret or apply EU law in a manner which would undermine the exclusive jurisdiction of the CJEU to adjudicate finally on such matters.

94. This concern is perhaps best reflected in the CJEU decision in *Achmea* (C-284/16, EU:C: 2018: 158). *Achmea* concerned a bilateral investment treaty ("BIT") which was agreed between the Netherlands and Slovakia in 1992. The BIT established an investor state dispute settlement procedure which granted exclusive jurisdiction to an arbitral tribunal to determine disputes arising in respect of investors of one state viz-a-viz the actions of the other state.

95. The proceedings in *Achmea* arose after Slovakia reversed its policy of liberalisation of the medical insurance market which had allowed national operators and those from other Member States to offer private sickness insurance services in Slovakia. Achmea, an undertaking belonging to a Dutch insurance group, had entered the medical insurance market in Slovakia following this liberalisation and stood to lose millions of euros as a result of the Slovak Government's policy reversal. Achmea accordingly brought arbitration proceedings against Slovakia pursuant to the investor state dispute settlement mechanism contained in Article 8 of the BIT. Achmea chose Frankfurt as the place of arbitration and therefore German law applied to the proceedings. (There are shades here of the long-running litigation brought by the British insurer, BUPA, in the wake of its decision to exit the Irish market following the triggering by the Minister for Health and Children of the risk equalization scheme in 2005. I propose to return to this point later in this judgment).

96. During the arbitration proceedings Slovakia raised an objection of lack of jurisdiction of the arbitral tribunal and contended that the BIT was incompatible with EU law. By an arbitral award dated 7th December 2012, the arbitral tribunal dismissed this objection and ordered Slovakia to pay Achmea damages in the amount of EUR 22.1 million. Slovakia then appealed on a point of law by which it sought to have that award set aside before the German courts. This appeal ultimately made its way before the Bundesgerichtshof (the German Federal Court of Justice) and that court made a preliminary reference to the CJEU.

97. In his Opinion dated 19 September 2017 Advocate General Wathelet considered the investor state dispute settlement mechanism established by the BIT to be compatible with EU law and with the allocation of powers fixed by the EU and FEU Treaties and the autonomy of the EU legal systems. In its judgment dated 6th March 2018 the CJEU, however, disagreed.

98. One of the reasons offered by the CJEU for its conclusion turned on the question of whether the arbitral tribunal established under the BIT may be required to resolve disputes which would be liable to relate to the interpretation or application of EU law. In answer to this question the CJEU considered that, even if the arbitral tribunal established under the BIT could be said to be called upon only to rule on possible infringements of the BIT, "the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties": see paragraph 40 of *Achmea*. It followed from this that the arbitral tribunal would necessarily be called upon to interpret and apply EU law because EU law – by reason of the doctrines of primacy and direct effect – forms part of the law in force in every Member State. In other words, the arbitral tribunal established by the BIT would be required to

interpret and apply EU law given EU law forms part of the *corpus juris* in force in both the Netherlands and in Slovakia. The CJEU concluded that the arbitral tribunal was therefore liable to negate the powers of the CJEU and the effectiveness of EU law.

CETA Opinion 1/17

99. The CJEU seems, however, to have taken a somewhat different approach to its reasoning in *CETA Opinion* 1/17 in respect of accession by the Union to CETA itself. In *CETA Opinion* 1/17 the Belgian State – as part of an agreement to resolve a domestic political dispute in Belgium involving the regional Walloon Parliament – made several challenges to the validity of CETA under EU law before the CJEU. Belgium's principal objection was that CETA did not respect the exclusive jurisdiction of the CJEU and therefore could not ensure the autonomy of the EU legal order.

100. In particular, the Belgium State contended that the CETA tribunal established under the agreement would be compelled to interpret EU law in a manner similar, in terms of practical effect, to that described in respect of the BIT by the CJEU in *Achmea*. Belgium considered that, notwithstanding the demarcation of the jurisdiction of the CETA tribunal made in Article 8.31 of CETA, the CETA tribunal would be required to examine whether measures adopted by the EU were contrary to CETA in order to determine whether that measure is inconsistent with the EU's obligations under CETA. Belgium noted that CETA tribunals will not necessarily be able to rely on an interpretation of the EU measure provided by the CJEU and thus may in some circumstances be required to determine the correct construction of primary and secondary EU law. This, Belgium argued, would be incompatible with the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law.

101. The CJEU, however, rejected this argument. The CJEU pointed to several provisions in CETA in order to distinguish it from the BIT at issue in *Achmea*. The CJEU recalled, first, that, as provided in Article 8.31(2) of CETA, the CETA Tribunal will not have jurisdiction "to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party." The CJEU therefore ruled that the CETA Tribunals will be confined to applying the provisions of CETA and not domestic or EU law. The CJEU further noted that, pursuant to Article 8.31(2) of CETA, "in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party *as a matter of fact*" (emphasis added) and further states that, "in doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party", adding that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party" (see paragraph 130 of *CETA Opinion* 1/17).

102. The CJEU considered that the fact that the CETA tribunal was confined to examining EU law "as a matter of fact" was critical because this would leave the interpretation of EU law to EU courts. The CJEU explicitly acknowledged that there would be circumstances where the CETA tribunals may have to examine primary and secondary EU law. It considered, however, that this would not threaten exclusive jurisdiction of the CJEU because, first, the CETA tribunals would be bound to apply EU law in a manner consistent with the CJEU's jurisprudence and, second, no judgment of the CETA tribunals would bind an EU court. The CJEU thus concluded that the CETA tribunals would be sufficiently isolated from the EU legal system to protect the autonomy of EU law.

103. The CJEU then acknowledged (at paragraphs 148-150) that if there were circumstances where:

"…..the jurisdiction of those tribunals would adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market, rather than confine itself to determining whether the treatment of an investor or a covered investment is vitiated by a defect mentioned in Section C or D of Chapter Eight of the CETA.

If the CETA Tribunal and Appellate Tribunal were to have jurisdiction to issue awards finding that the treatment of a Canadian investor is incompatible with the CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union.

If the Union were to enter into an international agreement capable of having the consequence that the Union — or a Member State in the course of implementing EU law — has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework."

104. The CJEU then went on to consider this general question. It noted (at paragraph 152) that Article 28.3.2 CETA restricted the jurisdiction of those Tribunals:

> "With respect to the jurisdiction of the envisaged tribunals to declare infringements of the obligations contained in Section C of Chapter Eight of the CETA, Article 28.3.2 of that agreement states that the provisions of Section C cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties."

105. The CJEU then continued (at paragraphs 153-161) that these restrictions were sufficient to protect the autonomy of the EU judicial system:

> "It follows from the foregoing that, in those circumstances, the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152 of the present Opinion and, on that basis, to order the Union to pay damages.
>
> In the same way, as regards the jurisdiction of the envisaged tribunals to declare infringements of obligations contained in Section D of Chapter Eight of the CETA, Article 8.9.1 of that agreement states explicitly that Parties have the right 'to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals,

social or consumer protection or the promotion and protection of cultural diversity'. Further, Article 8.9.2 of that agreement provides that 'for greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section'.

Moreover, Point 1(d) and Point 2 of the Joint Interpretative Instrument provide that the CETA 'will … not lower [the standards and regulations of each Party] related to food safety, product safety, consumer protection, health, environment or labour protection', that 'imported goods, service suppliers and investors must continue to respect domestic requirements, including rules and regulations', and that the CETA 'preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest'.

It is apparent from reading those provisions together that the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process.

That is also the purport of Point 3 of Annex 8-A to the CETA, which states that 'for greater certainty, except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations'.

It must be added that the jurisdiction of the CETA Tribunal to find infringements of the obligation, laid down in Article 8.10 of the CETA, to accord 'fair and equitable treatment' to covered investments is specifically circumscribed, since Article 8.10.2 lists exhaustively the situations in which such a finding can be made.

In that regard, the Parties have concentrated on, inter alia, situations where there is abusive treatment, manifest arbitrariness and targeted discrimination, which reveals, once again, that the required level of protection of a public interest, as established following a democratic process, is not subject to the jurisdiction conferred on the envisaged tribunals to determine whether treatment accorded by a Party to an investor or a covered investment is 'fair and equitable'.

It is accordingly apparent from all those provisions, contained in the CETA, that, by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement, which are the only sections that can be relied upon in claims before the envisaged tribunals by means of Section F of that Chapter, the Parties have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.

In the light of the foregoing, it must be concluded that Section F of Chapter Eight of the CETA does not adversely affect the autonomy of the EU legal order."

106. I should perhaps pause at this point to note that the CJEU's decisions in *Achmea* and *CETA Opinion 1/17* – and its other decisions relating to the conferral of jurisdiction on other arbitral tribunals – are only binding insofar as they apply *in the EU law context* (see, to this effect, the UK Supreme Court decision in *Micula v. Romania* at paragraph 83). While this Court is, therefore, entitled to consider the CJEU authorities as they apply to the Irish domestic context – and should, indeed, accord very considerable weight to those decisions – it must ultimately form its own independent view in the context of the quite separate questions of Irish constitutional law in respect of whether, first, a CETA Tribunal might be required to interpret the domestic law of the State and, second, whether such might constitute an impermissible transfer of sovereignty under the Constitution. It is important to stress that neither the TEU nor the TFEU contain provisions similar to the Article 5 sovereignty clause or Article 34.1 dealing with the administration of justice or, for that matter, to Article 34.5.6 dealing with the finality of judgments of this Court.

107. For my part I am, indeed, unpersuaded by aspects of the reasoning of the CJEU in *CETA Opinion 1/17* so far as it might be relied on as an authority in the particular and special *sphere of Irish constitutional law*. (The judgment naturally binds this Court so far as the compatibility of CETA with EU law is concerned). The CJEU's reasoning nonetheless invites the following comments in the particular and somewhat different context of Irish constitutional law.

108. First, the CJEU's analysis is predicated on the basis that it is only the *repeated* award of damages by a CETA Tribunal which might impact on the capacity of the Union or a Member State to modify its regulatory legislation. Yet one single large award – or, even, perhaps, the threat of such litigation before CETA – might be enough to dissuade

a Member State to review or change its own legislation. One might here note that Article 8.39(3) CETA provides that in the calculation of damages, the Tribunal "shall also reduce the damages to take account of any restitution of property *or repeal or modification* of the measure." (Emphasis supplied). There is thus here a clear incentive for contracting states to dilute or even repeal regulatory measures when faced with large claims.

109. Second, it seems to me that the Court of Justice takes a rather sanguine view of the jurisdiction of the CETA Tribunals with regard to regulatory legislation. The views of the CJEU will not, of course, bind the CETA Tribunals who will, after all, have sole authority to interpret their own jurisdiction, subject only to a possible judgment of the International Court of Justice. It may be noted that in the *Vattenfall* litigation, an ICSID Tribunal expressly rejected the argument that it lacked jurisdiction to entertain a claim against Germany under the Energy Charter Treaty in the wake of the CJEU's earlier decision in *Achmea,* despite all that the CJEU had said on this very point*: Vattenfall AB v. Federal Republic of Germany: Decision on the* Achmea *issue* ICSID Case No. ARB 12/12, 31 August 2018.

110. In effect, therefore, in *Vattenfall* the ICSID Tribunal did not consider itself bound by the decision of the CJEU in *Achmea*. If an ICSID Tribunal can do this in respect of *Achmea* why, one might ask, should a CETA Tribunal do anything more than pay passing attention to the strictures of the Court of Justice in *Opinion 1/17?* For that matter, if the CETA Tribunal materially disregarded this decision - or some other relevant aspect of EU law - where, one might further ask, could this be the subject of effective review by a national court apart from an appeal to the CETA Appellate Tribunal? The fact that there is no provision for this in the present CETA arrangements seems to me to highlight a significant structural weakness in the very drafting of CETA itself.

111. This very structural weakness highlights the constitutional frailty of what the Government currently proposes to do. Suppose, for example, a CETA Tribunal proceeded to give an award against Ireland where the Tribunal - in the same vein as the ICSID Tribunal's decision in the *Vattenfall* litigation - had expressly disagreed with a key and pertinent decision of the Court of Justice and thereby materially departed from the requirements of EU law. As matters stand it would seem that the High Court would be powerless under the provisions of s. 25 of the 2010 Act to refuse enforcement of such a decision even though this would be manifestly at odds with our duty of sincere cooperation under EU law generally and what one might term the "loyalty" provision of Article 29.4.4 of the Constitution whereby "Ireland affirms its commitment to the European Union." Part of that commitment to the Union involves respecting and upholding the decisions of the Court of Justice in the context of the interpretation and application of EU law.

112. Third, it would also seem quite possible that a situation might arise in which the CETA Tribunal interprets the domestic law of the State – including EU law – and the State would be without recourse if this interpretation was erroneous. Although I naturally accept that the CETA Tribunal is expressly confined by Article 8.31(2) CETA to interpreting the law in force in the State as a matter of fact, one could, I think, easily foresee a situation in which the CETA Tribunal could err in interpreting our law as a matter of fact, particularly on a matter of law that has not previously been adjudicated on in the Irish courts. In these circumstances, neither the State (nor the CJEU for that matter) would have any recourse and, indeed, the State would be obliged to enforce any award made for the reasons I have outlined above.

113. Thus, in sum, it would appear to me that not only would Irish courts be obliged to treat a CETA award as "almost automatic", but Irish courts would also be required to accept

such awards even if they were based upon what the courts considered to be an erroneous interpretation of domestic law (albeit as a matter of fact). It is next necessary to consider the implications of these conclusions. There are clearly implications for both legislative sovereignty and autonomy on the one hand and juridical sovereignty on the other: these are considerations which flow directly from the nature of our constitutional order and are distinct and separate to those questions of EU law examined by the CJEU in *Opinion 1/17*. I propose to consider these matters in turn.

Part VII: The potential implications of CETA for legislative sovereignty

114. There would seem to be two aspects to the issue of whether legislative sovereignty is potentially compromised by reason of adherence to CETA. The first is whether a CETA Tribunal might make an award against the State on the basis that a legislative measure enacted by the Oireachtas breached the CETA principles. The second relates to the fact CETA liability is strict and in no sense dependent on questions of fault.

115. One should say immediately that it seems likely that a CETA Tribunal would at least generally defer to the judgment of a Contacting State in terms of regulatory measures designed to protect important social goals such as public health and the environment. Certainly, in its judgment in the *CETA Opinion 1/17* the CJEU proceeds on the basis that a CETA Tribunal cannot call into question the extent of the public interest considerations underpinning EU regulatory measures: see paragraphs 148 and 149 of the Opinion. The existing specialist literature assumes and predicts that CETA Tribunals will in fact show deference to regulatory judgments made by the Contracting States. As Schacherer observes, "Investment and regulatory measures" in Bungenberg and Reinisch, *CETA Investment Law* (Hart, Beck, Nomos, 2020) at 247:

> "A strong argument for a deferential approach is that a State's decision-making is in principle proximate to its society and is embedded in a specific national context. Public authorities (of a State or of the EU) are better situated to assess the specific societal needs. As far as Canada and the EU are concerned, regulatory measures benefit from democratic legitimacy. And the domestic legislator appears to be in a better position to decide certain trade-offs than investment tribunals. By according policy-makers deference when reviewing their regulatory choices, CETA tribunals can accord the necessary space for safeguarding non-economic public interests."

116. If these assumptions prove to be correct – and there is currently no reason to doubt them – one may assume that awards against this State are likely to be relatively rare, should they happen at all. Many of the individual provisions of CETA - such as, e.g., Article 8.9(1) CETA and Article 8.9(2) CETA - are designed to reinforce the right of the contracting states to achieve legitimate policy objectives.

117. As I have already observed, it is true that the CJEU expressly stated in its *CETA Opinion 1/17* that the CETA Tribunals would have no jurisdiction to make awards which called into question EU measures based on a weighing of legitimate public policy objectives provided that this did not amount to a form of disguised discrimination. As the *Vattenfall* litigation demonstrates it is not altogether clear whether CETA Tribunals will consider themselves bound in this way by the CJEU's comments as to their jurisdictional limits.

118. But even if one assumes that this will be so, the fact remains a CETA Tribunal *could* still make an award in respect in respect of legislative measures otherwise validly enacted by the State. Should this occur, any award of damages will be based on strict

liability and not on considerations of fault. One must also observe that liability will not even be based on considerations of legality under national law. That is significantly different from liability under both national and EU law.

119. So far as Irish national law is concerned, it is clear since the seminal decision of this Court in *Pine Valley Developments Ltd. v. Minister for Environment* [1987] IR 23 that there is in general no liability for a mere ultra vires administrative act unless it also involves the commission of a recognised tort or is actuated by malice or where the public authority knows it does not in fact possess the power which it purports to exercise: see [1987] IR 23 at 36, per Finlay C.J. This was a case where the Minister had wrongfully (albeit in good faith) granted planning permission to the plaintiff company but it ultimately transpired that the permission in question was invalid.

120. This Court ultimately held that there was no liability on the part of the State, the invalidity of the administrative action notwithstanding. The plaintiff company had also contended that all of this amounted to a breach of constitutional rights. While Finlay C.J. was prepared to accept that the invalidation of the planning permission caused the company loss, he drew attention to the fact that the State's obligation in Article 40.3.2 to protect the company's property rights was not absolute and was qualified by considerations of the common good. He then continued (at 38):

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims of compensation where they act bona fide and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would…tend to avoid indecisiveness and delay, which might otherwise be involved."

121. *Pine Valley* was expressly affirmed by this Court in *Glencar Exploration plc v Mayo County Council (No.2)* [2002] 1 IR 84. In his judgment Fennelly J. stated - for the avoidance of any doubt - that he believed ([2002] 1 IR 84 at 150) that "the considered statements of the law made in *Pine Valley* remain the law, despite apparent inconsistency with… *Duff v. Minister for Agriculture* [1997] 2 IR 22… I do not believe that [*Duff*] can have been intended to depart from such an important principle as that laid down in *Pine Valley*." This passage from *Glencar* was, moreover, itself quoted and affirmed in the judgments of both MacMenamin and Charleton JJ. for this Court in *Cromane Seafoods Ltd. v. Minister for Agriculture, Fisheries and Food, Ireland and the Attorney General* [2016] IESC 6, [2017] 1 IR 119. MacMenamin J. also helpfully added that *Duff* was certainly decided on its own facts and that its status as a precedential authority was limited and even doubtful. He also stressed that ([2017] 1 IR 119 at 181 that liability for damage "does not automatically flow from a mistake of law said to have been made by the Minister."

122. This general issue was also considered by Budd J. in *An Blascaod Mór Teo. v. Commissioners of Public Works (No. 4)* [2000] 3 IR 565. Here key sections of certain legislation affecting the Blasket Islands providing for the compulsory expropriation of certain landowners had been found to be unconstitutional as discriminatory and selective and were thus held to be contrary to Article 40.1 by this Court: see *An Blascaod Mór Teo. v. Commissioners of Public Works (No.3)* [2000] 1 IR 6. In the subsequent proceedings Budd J. rejected the argument that a finding of unconstitutionality would sound in damages on a strict liability basis, saying ([2000] 3 IR 565 at 581):

> "In the course of making laws, the legislature frequently has to take into account conflicting individual rights and the exigencies of the common good within a process involving balancing and adjusting the scope of rights. There is therefore

> little justification for a regime of strict liability for infringement of a constitutional right where such rights are competing and in conflict. In such circumstances, "*ubi jus, ibi remedium*" is too simple a formula and strict liability would in many cases be too low and easy a threshold to reach."

123. It is implicit in this analysis that strict liability is essentially inconsistent with the necessary deference and margin of appreciation which must be accorded the Oireachtas when enacting regulatory legislation. This, as we have seen, is the consistent theme which emerges from both the Irish and CJEU case-law on this topic, yet this is precisely what CETA proposes.

124. *An Blascaod Mór* is interesting for another reason. Had the plaintiff been a Canadian investor it would have been entitled to bring such a claim before a CETA Tribunal where the prospects of success would seem to have been high: see the rules regarding targeted discrimination contained in Article 8.10(2)(d) CETA. This is yet another example of where a CETA Tribunal would have jurisdiction to rule on matters internal to this State. Of course, had the plaintiff succeeded and suffered loss and damage, damages would have been awarded by a CETA Tribunal against the State on a *strict liability* basis in respect of the loss caused by this legislation, even though, of course, this form of liability has heretofore been rejected by both our courts and the Court of Justice as inconsistent with the necessary autonomy which national and European legislators should enjoy.

125. Another pertinent example of this kind is supplied by the BUPA litigation to which I have already alluded. Following the decision of the Minister for Health and Children to trigger risk equalization – so that health insurers with an excessive cohort of young and healthy consumers could be required to compensate insurers with a large number of much older and sicker consumers – the British insurance company, BUPA, elected to

exit the Irish health insurance market. This Court later held that the risk equalization scheme was ultra vires the Health Insurance Act 1994 (as amended): see *BUPA Ireland Ltd. v. Minister for Health and Children (No.2)* [2008] IESC 42, [2012] 3 IR 442.

126. In the wake of that decision BUPA then sued the State for the damages which it said was caused by its exit from the market. The claim was ultimately rejected by Cooke J. who, in a characteristically meticulous judgment, concluded that there was no liability as the *Pine Valley* criteria had not been satisfied: see *BUPA Ireland Ltd. v. Minister for Health and Children (No.3)* [2013] IEHC 103, [2014] 2 IR 67. The point here, of course, is that if BUPA had been a Canadian entity, this is precisely the type of case in which it might possibly have succeeded before a CETA Tribunal, as, indeed, had happened in the earlier *Achmea* litigation before a BIT governed by ICSID rules. I mention this simply to show (with respect, once again) that CETA potentially does involve matters internal to this State.

127. As it happens, the CJEU has taken a similar view with regard to liability of the Union under Article 340 FTEU (ex. Article 288 EC). Thus, for example, in *FIAMM and Fedon* (Joined Cases C-120 and 121/06P, EU: C: 2008: 476) two Italian companies contended that they had suffered loss when a WTO Disputes Panel had authorised the US to impose retaliatory tariffs on certain products (namely batteries and spectacle cases) consequent upon a finding that the Union's regime for bananas violated WTO rules.

128. The CJEU ruled that there could be no liability in those circumstances because the Union had not done anything which was actually unlawful *under Union law.* It added nevertheless (at paragraphs 171 and 172 of the judgment) that – in line with established case law –

"As regards, more specifically, liability for legislative activity, the Court moreover pointed out at a very early stage that, although the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy…

The Court has therefore held in particular that, in view of the second paragraph of Article [340 TFEU], the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. The Court has, moreover, stated that the strict approach taken towards the liability of the Community in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial review, *exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests*. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers…" (emphasis supplied).

129. To that extent, therefore, it must be accepted that - at least at a theoretical level - CETA represents a potentially significant extension of the non-contractual liability of the State. Whereas to date both this Court and the Court of Justice have recognised the

desirability of ensuring that neither the State nor (as the case may be, the Union) are exposed to liability in respect of the exercise of legislative functions absent proof of something in the nature of grave and manifest error, this will not necessarily be the case under CETA

130. Here it seems to me that there must be consistency between our general law of State liability and a potential liability under CETA. If, for example, it is accepted that the potential for strict liability in damages under CETA will not compromise our legislative autonomy, then the rule in *Pine Valley* is no longer tenable since, after all, that judgment is premised on the basis that decisive decision-making required that legislators, ministers and administrators enjoy some measure of protection without the threat of a damages award. If, on the other hand, one takes the view that *Pine Valley* is correct, then it would seem to follow that adherence to CETA would necessarily compromise our legislative autonomy in that the State would be exposed to strict liability claims for damages arising from mere legislative non-compliance with CETA, even if the measures in question were not in themselves unconstitutional or otherwise ultra vires or even if the State had acted in perfect good faith by enacting the measure in question.

131. As I already have had occasion to remark at other points in this judgment, part of the difficulty with the present appeal is that it is difficult to anticipate the work of the CETA Tribunals. I am prepared to allow that awards against this State are likely to be at least relatively rare. The fact remains, however, is that they could happen and that the State would thereby be exposed to damages claims on a *strict liability* basis in respect of otherwise *validly* enacted legislative measures. The very fact, however, that this *could* happen is sufficient for constitutional purposes, since to my mind this necessarily compromises the legislative sovereignty of the State. In particular, the absence of a *Pine*

Valley-style good faith protection in respect of legislative measures — heretofore regarded as an essential safeguard for the legislative autonomy of the Oireachtas — is telling.

Part VIII: Whether CETA Tribunals would compromise the juridical sovereignty of the State, contrary to Article 34 of the Constitution

132. The conclusion that the courts would be obliged to treat a CETA award as "almost automatic" gives rise, in my mind, to two potential constitutional objections, one particular and the other general. The particular constitutional objection arises from Article 34.5.6 which provides that the decision of the Supreme Court "shall in all cases be final and conclusive". The general objection is that participation in an international tribunal with power to make binding awards which are enforceable in domestic law is inconsistent with Irish juridical sovereignty as recognised by Article 5 of the Constitution. I now propose to consider each of these objections in turn.

Article 34.5.6 of the Constitution: The Historical Context

133. Article 34.5.6 of the Constitution provides that "The decision of the Supreme Court shall in all cases be final and conclusive."

134. The historical origins of this clause are well known. Article 66 of the Constitution of the Irish Free State had originally provided as follows:

> "The Supreme Court of the Irish Free State (Saorstát Éireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever: Provided that nothing in this Constitution shall impair the right of any

person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

135. The proviso to Article 66 allowed for dissatisfied litigants to petition the Privy Council for leave to appeal from a decision of this Court. One of the reasons for the existence of this right of appeal was, one may suppose, a concern in some quarters that the courts of the newly established Irish Free State might not administer justice with total impartiality, particularly in cases involving the rights of political and religious minorities who retained – or, at least, were perceived to retain - sympathy with the Crown and the pre-1922 British administration: see generally Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin, 2016). The right to petition His Majesty in Council was thus retained.

136. While it is true that the Privy Council granted leave to appeal in only a handful of cases, the very existence of this jurisdiction appears to have been regarded as inconsistent with Irish juridical sovereignty. This right of petition was itself abolished by the Constitution (Amendment No. 22) Act 1933 and the validity of that constitutional amendment was upheld by the Privy Council in *Moore v. Attorney General of the Irish Free State* [1935] IR 472 in a judgment delivered in June 1935. It is perfectly clear from the case-law of the Privy Council up to its abolition that that body exercised a jurisdiction to review aspects of the public law (including constitutional law) of the Irish Free State in the period between 1922 and 1935.

137. This was, moreover, a considerably wider jurisdiction than that which might be exercisable by a CETA Tribunal in that the jurisdiction of the Privy Council was not confined simply to the award of damages. It could - and did - pronounce on a variety of other matters, including the interpretation of aspects of the Anglo-Irish Treaty (*Wigg and Cochrane v. Attorney General of the Irish Free State* [1927] IR 285); the continued

application of the Copyright Act 1911 to the Irish Free State and the interpretation of aspects of the Constitution of the Irish Free State (*Performing Rights Ltd. v. Bray UDC* [1930] AC 397, [1930] IR 509) and even the validity of the Constitution (Amendment No. 22) Act 1933 (*Moore v. Attorney General of the Irish Free State* [1935] IR 472). In all of these cases the appeal to the Privy Council was from an earlier decision of this Court.

138. Regardless of the rights or wrongs of this matter, it seems fairly clear that in 1937 the contemporary understanding was that a decision of this Court was to be final and conclusive and that no other judicial body would have authority to pronounce upon aspects of Irish law in this fashion in a manner which was binding in domestic law. This, indeed, was the very object which, as a matter of history, Article 34.5.6 was designed to achieve. It is clear that Irish Governments of all hues were very exercised by the prospect that a decision of this Court might be questioned in any way by a body such as the Privy Council. Indeed, the Oireachtas legislated to ensure that the decision of that body in *Performing Rights Society* was reversed, and the successful party was prohibited from obtaining any remedies or damages or costs: see ss. 3 and 4 of the Copyright (Preservation) Act 1929. Of course, in Mohr's words, the Government "was less interested in the finer points of copyright and far more concerned about winning another round in its duel with the Privy Council": see *Guardians of the Treaty* at 100.

139. Viewed, therefore, from this historical perspective it is hard to see how the CETA Tribunal would be compatible with Article 34.5.6, at least as this provision was originally understood in 1937, precisely because it *does* have the power to give binding decisions on issues concerning aspects of our public law, which decisions are enforceable under the domestic law of the State. This is true even if that jurisdiction by being confined essentially to an award of damages is more limited than would have been the case in a

Privy Council appeal and even if, as the Chief Justice observes in his judgment, such an award did not have a general *erga omnes* effect. This in itself is not dispositive. The Constitution is, after all, a living Constitution which must be interpreted afresh in the light of our own contemporary experience and requirements, especially where the factual circumstances have changed significantly from 1937: see, *e.g., Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326, [2012] 2 IR 666. This historical understanding is nonetheless relevant.

Article 34.5.6: The Contemporary Understanding

140. There remains the critical question of whether the acceptance by this State of the jurisdiction of the CETA Tribunal would amount to a breach of Article 34.5.6. It is, of course, true that in certain unusual circumstances even an apparently final decision of this Court can be re-opened. As I have already indicated, these cases could include fraud, fundamental misunderstanding or breach of fair procedures.

141. One thing is clear however: the circumstances in which a judgment could be re-opened would have to be exceptional. As Murray J. said in *LP v. MP (Appeal)* [2001] IESC 76, [2002] 1 IR 219 at 230: "…the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice." It is also plain that the decision as to whether an earlier decision of this Court should be re-opened could only be taken *by this Court itself* (of, in the case of alleged fraud, in the High Court if fresh proceedings are commenced) and not by any other entity.

142. Subject, therefore, to this proviso, the critical question is whether the Government could ratify an international treaty which allowed for a form of review of a decision of this Court by an international arbitral tribunal which has then the power to make binding decisions which can be enforced in this State (and, indeed, elsewhere)? Such a decision

would, of course, only be binding *inter partes* and unlike a court ruling it would not have general *erga omnes* effects. Article 30.6(1) CETA further stipulates that such a decision would have no effect on the domestic law of the State.

143. In practice, however, such decisions would tend to acquire their own precedential effects, as previous awards of this kind are regularly cited at least in specialist textbooks on international law and (perhaps especially) international trade law: see Born, *International Commercial Arbitration, Vol. III International Arbitral Awards* (Kluwer, 2020) at 4191-4195. Thus, the experience in practice of the World Trade Organisation dispute resolution procedure is that "disputes brought before the Panel and Appellate Body are not limited to an *inter partes* effect, as every Appellate Body Report may have precedential effect in future cases": Lim, "Dispute Settlement in the World Trade Organisation: Moving Towards an Acknowledgment of *Stare Decisis*" (2018) *Cambridge Law Review* 193 at 197. Indeed, for the purposes of illustrating the effect of CETA, I have found it necessary to refer to many such arbitral awards in the course of this judgment.

144. Perhaps the first thing to note is that it is perfectly clear from the explicit language of CETA itself that in certain circumstances an investor can make a complaint to the CETA Tribunal based on an adverse decision of this Court. This might be in circumstances where it was contended this Court had acted in breach of fair procedures or otherwise denied justice to an investor. Or it might arise where this Court had upheld the constitutionality of a law enacted by the Oireachtas or rejected challenges to the validity of executive or administrative decisions in a manner which prejudiced the investor.

145. It is true that the CETA Tribunal can only award damages (or, perhaps, in some instances, restitution of property or its equivalent in damages) and, unlike the Privy Council prior to 1935, it cannot entertain an appeal *as such*. A CETA Tribunal cannot *as such* rule that a decision of this Court was erroneous. Yet the constitutional incongruousness of the High Court being obliged by the terms of the 2010 Act and the ICSID Convention to give effect to a damages award made by a CETA Tribunal against the State where the subject matter of the complaint was in respect of a decision of this Court is, I suggest, all too obvious.

146. Perhaps all of this may be best examined by way of an example. Article 8.10(2) CETA provides in part as follows:

> "A Party breaches the obligation of fair and equitable treatment…if a measure or series of measures constitutes:
>
> (a) denial of justice in criminal, civil or administrative proceedings,
>
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings…."

147. The denial of justice standard contained in Article 8.10(2)(a) CETA is one which is also found in a range of other parallel investor tribunal arrangements, such as Article 1105 of the North American Free Trade Agreement ("NAFTA"). (NAFTA was superseded in July 2020 by the broadly similar United States – Mexico – Canada Agreement ("USMCA")). It is certainly clear from a series of decisions of NAFTA Tribunals that the standard here is strict and requires something in the nature of a "gross denial of justice" or "manifest arbitrariness" (see *International Thunderbird Gaming Corp. v. Mexico,* UNCITRAL (26 January 2006) (at paragraph 194) or the unjust or arbitrary treatment of an investor (see *SD Meyer v. Canada,* UNCITRAL (Partial Award)(13 November 2000) (at paragraph 263); or "justified concerns as to the judicial propriety

of the outcome" (*Mondev International Ltd. v. United States*, ICSID Award, 11 October 2002)(at paragraph 127). These awards "suggest a high threshold of severity for a verdict of a denial of justice: only the most severe cases will be considered": see Dumberry, "Treatment of investors and covered institutions" in Bungenberg and Reinisch eds., *CETA Investment Law* (Nomos, 2020) at 266.

148. The standard represented by Article 8.10(2)(a) CETA is, accordingly, the most basic of basic standards of international justice. It is difficult to believe that a decision of this Court (or, for that matter, the Court of Appeal) would ever fall below that standard or would even come close to so doing. One can - I hope - discount this as a realistic possibility.

149. There are nevertheless *dicta* to the effect that the NAFTA "denial of justice" standard is breached where the domestic court is guilty of undue delay or where such a court "administer[s] justice in a seriously inadequate way": see *Azinian v. Mexico*, ICSID Award, 1 November 1999 (at paragraph 102). (These comments were, however, pure dicta, because in that case the NAFTA Tribunal expressly rejected any argument that the Mexican courts had behaved in this way).

150. If these principles were, however, to be applied to Article 8.10(2) CETA, then it is certainly perfectly possible that a CETA Tribunal could, for example, hold that an Irish court has been guilty of undue delay. There are already a number of cases in which the European Court of Human Rights has found that Ireland has been in breach of Article 6 ECHR by reason of undue delay in our legal system: see, e.g., *McFarlane v. Ireland* [2010] ECHR 1272 and *Keaney v. Ireland* [2020] ECHR 292. While the position regarding litigation delays has clearly improved significantly in recent years following, for example, the establishment of the Court of Appeal in October 2014, one cannot say

that the possibility that a CETA Tribunal would find against Ireland on this ground is so improbable that this could be discounted as just a remote and speculative possibility.

151. Yet a CETA Tribunal finding that, for example, that this Court had denied the due process rights of an investor contrary to Article 8.10(2)(a) CETA or, for that matter, Article 8.10(2)(b) CETA (and that accordingly it would be appropriate to make a binding award of damages which would be enforceable under domestic law) would in substance amount to a form of collateral attack by an outside judicial-style body in respect of a judgment which Article 34.5.6 of the Constitution declares to be final and unappealable. It would in substance be doing indirectly that which Article 34.5.6 expressly forbids. As this Court observed in *Walsh v. Minister for Justice* [2019] IESC 54, [2020] 1 IR 488 at 559:

> "This case illustrates the important fact that Article 34.5.6 remains relevant at all stages of the proceedings. If it is apparent that an application does not disclose grounds capable of being argued as justifying the exercise of the *In re Greendale Developments Ltd. (No. 3)* jurisdiction, then it would be a breach of the terms of Article 34.5.6, and the object of that provision would be defeated if the court were to entertain such a claim."

152. Much the same can be said in respect of CETA. Since this possibility is expressly provided for in CETA I find myself coerced to the conclusion that the ratification of this agreement would be unconstitutional in its present form as contravening Article 34.5.6. This conclusion is supported by — but is not dependent upon — the historical understanding of this provision.

153. As I propose to explain further with regard to our accession to the jurisdiction of the European Court of Human Rights, it would be otherwise if the decision of the CETA Tribunal were not binding and enforceable in domestic law. The fact that such decisions

are made almost automatically binding and enforceable in this manner is, for me, the decisive consideration: as I have already observed, giving effect to CETA Tribunal awards via the mechanism of s. 25 of the 2010 Act it is the equivalent of a crossing of a legal Rubicon which, in a dualist state such as ours, marks the strict separation between the realm of public international law on the one hand and domestic law on the other.

Would accepting the jurisdiction of the CETA Tribunals amount to a breach of Article 5 of the Constitution?

154. It is clear from the provisions of Article 8.31 CETA (set out above) that a CETA Tribunal cannot *directly* pronounce on the validity of actions of the executive or the Oireachtas or judicial decisions. If a CETA Tribunal were to have been given such a jurisdiction, the conclusion that such would be unconstitutional would be almost beyond dispute. Thus, for example, counsel for the State, Mr. Cush SC, accepted that such a proposal would amount to a circumvention of the provisions of Article 34.3.2 of the Constitution which confines the jurisdiction to declare a law to be unconstitutional to the High Court, the Court of Appeal and to this Court. In any event, the jurisdiction to determine to invalidate or annul decisions taken by the executive or the Oireachtas is a core feature of the juridical sovereignty of this State and, for that matter, that of other states in respect of their own executive, parliamentary and judicial decisions.

155. This is reflected in not only our own rules of private international law but also, for that matter, public international law. Our courts have, for example, consistently held that they have no jurisdiction to pronounce on the actions of the United Kingdom sovereign (including its armed forces) as to do so would represent an unjustified intrusion into the sovereignty of that State: see, *e.g., McElhinney v. Williams* [1995] 3 IR 382*; Adam v.*

Secretary of State for Home Affairs [2001] 1 IR 47; *Short v. Ireland (No. 2)* [2006] 3 IR 297; *Brady v. Choiseul* [2016] IEHC 552, [2016] 2 IR 337.

156. This is well illustrated by the decision of this Court in *Short (No.2)*. Here the plaintiffs sought to bring a claim for damages against British Nuclear Fuels Ltd. in respect of its operation of a nuclear power plant in the UK. In the High Court British Nuclear Fuels argued that the plaintiffs' claim insofar as it related to the granting of licenses and permissions by a foreign government fell outside the jurisdiction of the Irish Courts as the validity of the granting of any such authorisations could not be reviewed here. Peart J. upheld the contention of British Nuclear Fuels in relation to jurisdiction and that decision was upheld by this Court. As Fennelly J explained:([2006] 3 IR 297 at 315):

> "What is at issue is the jurisdiction of an Irish Court to determine the lawfulness or validity, under the law of the United Kingdom, of administrative decisions made in that jurisdiction in accordance with national law and procedures. It seems to me elementary that our courts have no power to review the lawfulness of administrative decisions made by English administrative bodies under English law, any more than the English courts would have corresponding power to pass judgment on Irish administrative decisions. The courts of each country alone have the power to review the legality, within their own frontiers, of decisions of their own government and administration."

157. Fennelly J. continued ([2006] 3 IR 297 at 318-319):

> "I do not believe it to be necessary to lay down any broad principles in order to determine the present case. We are not concerned with sovereign immunity or acts of state. We are concerned with the much simpler and narrower question of whether the courts of one state have jurisdiction to determine the validity of administrative acts of the authorities of another state which are not claimed to

> have any legal effect outside the borders of the latter state… The ultimate question in the present case is whether the courts of one Member State (Ireland) have jurisdiction to determine the lawfulness and validity of administrative procedures and decisions of another Member State (the United Kingdom), where, as is claimed here, those decisions have rendered lawful, by authorising them to be carried out within the boundaries of that other state, activities alleged to cause damage in the first Member State.
>
> I am satisfied that Peart J. was correct to hold that the High Court does not have that jurisdiction… The principle of comity requires that the courts of one state abstain from pronouncing on matters such as the regulatory claims, in respect of which the primary and obvious jurisdiction rests with the courts of another state. In addition, there are practical considerations. Only an English court will be familiar with English law and procedure. It is a matter for English courts, where they are obliged to do so, to interpret national law in the light of Community law. It would be patently absurd for the courts of another Member State to exercise such power. Apart from anything else, there would be a real risk of conflicting decisions, if the same administrative act were to be reviewed according to the laws of two or more Member States."

158. As Kingsmill Moore J. memorably explained in his classic judgment in *Buchanan v. McVey Ltd.* [1954] IR 89, similar concerns explain the traditional rule that one state will not give effect to the penal or taxation laws of another state, save to the extent that such has been modified by international agreement.

159. This is also reflected by general principles of public international law such as the Act of State doctrine whereby (again, absent international agreement) the courts of one state will not, at least generally speaking, inquire into or pronounce upon the validity of the actions *jure imperii* of another state. (If there are exceptions to this rule, they tend to be confined to cases of outrageous violations of human rights, such as the iniquitous laws directed against the Jewish community by the National Socialist regime in Germany between 1933-1945. Even then, it may be a case of one state refusing to *give effect* to the implications of such oppressive laws within its own territories: see, *e.g., Oppenheimer v. Cattermole* [1976] AC 249.)

160. A classic example here is provided by the decision of the US Supreme Court in *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964). This, as it happens, was a case decided at the height of the Cold War and just two years after the Cuban missile crisis. As part of the tit-for-tat retaliation which took place between the US and Cuba following the Castro revolution in December 1959, the Cuban government sought to expropriate property held by US citizens in Cuba. These measures included the seizure of sugar owned by a Cuban company, Compania Azucarera Vertientes-Camaguey de Cuba ("CAV"), which itself was owned by American shareholders. An American commodity broker, Farr, Whitlock & Co., had originally agreed to buy this sugar from CAV, but after it was seized, they bought it directly from the Cuban government. After receiving the sugar however, Farr, Whitlock & Co. did not pay the Cuban government, but it instead paid Mr. Sabbatino, CAV's legal representative in the US. The Cuban government then sued Sabbatino to recover the monies due in respect of the sugar. The case essentially turned on whether the expropriation of the sugar by the Cuban government within Cuba would be regarded by the US courts as lawful.

161. In his judgment for the majority, Harlan J. held (i) that the Cuban State bank had the right to sue in the US courts and (ii) that by virtue of the act of state doctrine in public international law, the US courts had no jurisdiction to rule on the actions of the Castro regime when it expropriated the assets of US companies without compensation following the Communist revolution in 1959. As he put it (376 US at 438):

> "Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

162. The reasoning in *Banco Nacional de Cuba* reflects the traditional concerns regarding State sovereignty in public international law. Putting it more prosaically in an Irish context, the Oireachtas could not, for instance, purport to give our courts the jurisdiction to pronounce on the validity of decisions taken by the Canadian Sovereign within its own jurisdiction. This would clearly represent an extravagant exercise of extra territorial jurisdiction which would not be recognised by the general principles of public international law. Accordingly, any such legislation would be plainly unconstitutional as being contrary to Article 29.8 of the Constitution: see, e.g., *Minister for Justice and Equality v. Pal* [2022] IESC 12, per O'Donnell C.J. (especially at paragraphs 54-58).

163. Although it is perfectly clear from the provisions of Article 8.31(2) CETA that a CETA Tribunal could *not* pronounce *directly* on the validity of the acts (whether judicial, executive or legislative) of the Irish State, the conclusion that it could do so *indirectly* is, I think, inescapable.

164. Consider the following example. Let us suppose that Canadian investors invest heavily in bonds issued by a particular Irish bank. Following a financial crash it transpires that the bank will quickly become insolvent without considerable State financial support which is then injected by the Government into the company. Acting pursuant to legislation enacted by the Oireachtas the Minister for Finance seeks and obtains court orders giving him or her control of the company. As part of the bank resolution process, losses are compulsorily imposed on both senior and subordinated bondholders pursuant to this legislation. Let us further suppose that the constitutionality of this legislation is ultimately upheld by this Court in a case brought by these same investors.

165. Annex 8B of CETA is a special rule dealing with public debt. It provides that no claim can be made in respect of a negotiated public debt restructuring arrangement, save for a claim that this was done in a discriminatory manner contrary to Article 8.6 or Article 8.7 of CETA. All of this seems to imply that *other forms* of compulsory debt restructuring *could* amount to a breach of CETA and such a conclusion is re-enforced by the provisions of Article 8.18 CETA.

166. In these circumstances it is entirely possible that the CETA Tribunal would award compensation to the investors on the basis that the legislation providing for compulsory burden sharing on the part of the bondholders amounted to a measure having an equivalent effect to that of an expropriation, contrary to Article 8.12 and Annex 8A of CETA. If that were to happen, this would in effect be tantamount to saying that this Court's decision on the constitutional question was wrong or in some way unjust. One may assume that in such circumstances the non-Canadian bond holders would be quick to explore ways in which they could be compensated as well.

167. If we take the further example of where a licence or permission of some kind (such as, for example, an exploration licence or a planning permission) is denied to a Canadian

investor. Let us assume that the investor elects to proceed directly to the CETA Tribunal (as it would be entitled to do) and does not challenge the decision (whether by way of judicial review or otherwise) before the Irish courts. If, however, in that example the CETA Tribunal awarded damages to the investor against Ireland this would have to be regarded as a collateral attack on the original decision itself in a manner in which in the case of, say, a planning decision, would amount in substance to a circumvention of, for example, the leave requirement contained in s. 50 of the Planning and Development Act 2000. This is clearly borne out by two recent authorities on this point, one a decision of this Court and the other a decision of the Court of Appeal: see *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 IR 147 and *Express Bus v. National Transport Authority* [2018] IECA 236, [2019] 2 IR 680.

168. In *Shell E & P* the Minister for Communications had made a pipeline consent order pursuant to s. 40 of the Gas Act 1976 and a compulsory acquisition order pursuant to s. 32 of the same Act in respect of plots of land owned by some of the defendants. When the plaintiff company instituted proceedings claiming that the defendants had obstructed its rights of way over the lands in question, the defendants counterclaimed and pleaded that the relevant administrative decisions which had conferred the rights of way were themselves invalid. Clarke J. described these latter claims as ([2013] 1 IR 247, 265): "a challenge to a public law measure designed to underlie a claim for damages rather than a defence to proceedings in which reliance is placed on the measure to maintain a claim against the challenger." He then went on to add ([2013] 1 IR 247, 266) that a "party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings." I took a similar view in *Express Bus* holding that the plaintiff could not simply seek damages

against National Transport Authority without having first sought to challenge the validity of the decision. Just as in *Shell E & P*, the Court of Appeal struck out the claim for damages as amounting in substance to an endeavour to by-pass the time limits contained in Ord. 84 RSC in respect of judicial review proceedings.

169. The real question is whether allowing this form of quasi-appeal to the CETA Tribunal by which the latter body could pronounce indirectly upon the validity of the actions of this State is objectionable from the point of view of the sovereignty provisions of Article 5. It is true that, as this Court put it in *Crotty*, sovereignty means the right to say "yes" or "no". Yet it is equally true that, as O'Donnell J explained in *Pringle v. Ireland* the very exercise of sovereignty also entails having the right to bind the State by means of the treaty-making power vested in the Government by Article 29.5.1. Every treaty by definition binds the State to a particular course of action and it is necessarily implicit in the constitutional scheme of things that the Government can in principle commit the State to a particular course of action in international law by means of such treaties. The State has prospered in the field of international relations by means of entering agreements or treaties which, to one extent or another, involve a sharing or pooling of sovereignty. While this is most obviously true in the case of the European Union (which, admittedly, is dealt with by a separate constitutional regime), it is also a feature of other important international bodies such as the United Nations and the Council of Europe.

170. In one sense, therefore, the decision to ratify CETA amounts to the very exercise of sovereignty as described by O'Donnell J. in *Pringle.* The more specific question in the present case, however, is whether the ratification of an international agreement allowing for the creation of supra-national judicial style tribunals with power to make binding and enforceable awards of damages against the State compromises the juridical sovereignty of the State, contrary to Article 5 of the Constitution.

171. To my mind the entire scheme of the Constitution is that, subject to certain exceptions, the judicial power of the State can be exercised only by persons appointed as judges under the Constitution. It is true that the Constitution allows for certain exceptions to this rule. First, Article 37.1 permits the judicial power to be vested in persons who are not judges in certain limited and non-criminal cases. The unspoken premise, however, of Article 37.1 is that the persons exercising these limited judicial powers will, in one way or another, be part of the Irish administrative apparatus. The whole context and language of this provision ("…duly authorised by law to exercise such functions and powers….") is that the office holder or body in question has been vested with these powers by the Oireachtas and, while independent in the discharge of these powers, is nonetheless ultimately answerable - in the very broadest sense of that term - to the Oireachtas and the Government.

172. It is also true that, as the Chief Justice observes in his judgment, there have been instances of where the Oireachtas has seen fit to give statutory tribunals the power to make binding awards: see, e.g., the Hepatitis C Compensation Tribunal Act 1997. In that particular instance, however, that Tribunal was simply administering an *ex gratia* scheme and it might be argued that it did not involve the administration of justice. But whatever the merits of this approach and regardless of whether it would or would not survive a *Zawelski*-style constitutional challenge, the fact remains that all such bodies remain within the orbit of the High Court and are amenable to judicial control by the courts established under Article 34.1 of the Constitution. This will not be true in respect of the awards of the CETA Tribunal.

173. Second, Article 29.7.2 envisages that judicial powers may be exercised in the context of any cross-border dispute resolution by any institution established under the aegis of

the Belfast Agreement (1998). Third, Article 29.9 allows the State to ratify the Rome Statute of the International Criminal Court.

174. Yet these exceptions simply serve to re-enforce the impression that the judicial power of — and, indeed, in respect of — the State is *otherwise* reserved for judges appointed under the Constitution. This very point was made by Kennedy C.J. in *Lynham v. Butler (No.2)* [1933] IR 74 at 99 when he stated:

> "…the judicial power of the State is, like the legislative power and the executive power, one of the attributes of sovereignty, and a function of government…It is one of the activities of a government of a civillised State by which it fulfills its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over persons and property…."

175. In the present case, the effect of Chapter 8 of CETA is to allow a body composed of persons who are not judges and who are not appointed by or answerable to any of the institutions of the State to exercise judicial powers in respect of the State and, critically, to give judgment which is prima facie binding and enforceable under our own domestic law. In some ways the difference between the majority and the minority in this case really comes down to this point.

176. As I understand the judgment of the Chief Justice, he considers that CETA really remains outside the orbit of our legal system and that it does not seek to duplicate or parallel our own legal system. I agree that there *might* be circumstances where the establishment of such a tribunal with power to make binding awards against the State would be constitutionally unobjectionable. This, however, would be in circumstances

where the disputed events and actions took place *outside the State* and where the tribunal in question essentially replaced or at least supplemented a foreign court which would otherwise have had jurisdiction in the matter.

177. CETA is different in that it involves disputes which directly and immediately concern the public law in this State and (potentially) the administration of justice in this State which have been brought by private individuals and companies. In my view inasmuch as CETA permits *these particular disputes* to be the subject of a binding adjudication by a CETA Tribunal which is prima facie enforceable in this State this is plainly incompatible with the juridical sovereignty of the State. I would therefore hold for this reason that the ratification by the Government of CETA in its present form would infringe Article 5 of the Constitution.

178. It is also not fanciful to suppose that such a ruling from a CETA Tribunal could curtail the State's capacity to legislate in accordance with its own democratic and constitutional framework in a manner which goes beyond the *de minimis* or the purely theoretical. It is possible to envisage similar rulings in a range of areas such as planning control, land zoning, the licensing of mineral resources, taxation or rent control. If such were to occur, then for the reasons I have already sought to explain, this would compromise the essence of the State's legislative sovereignty, contrary to Article 5 of the Constitution.

Part IX: Accession to the European Court of Human Rights and the European Convention of Human Rights Act 2003

179. In some respects, our accession to the jurisdiction of the European Court of Human Rights in 1952 and the enactment much later of the European Convention of Human Rights Act 2003 are, so to speak, to our own legal system what Wagner is to music or Joyce is to literature. In all three cases the pre-existing rules were stretched to their

limits and all three instances represent examples of exceptionalism in their own fields which does not necessarily translate in favour of any successors seeking to emulate them. This is perhaps especially true of the ECHR itself. Created in exceptional circumstances and dedicated to the case of personal liberty and ensuring minimum standards of civilized behavior within the Contracting States, it has long been a favourite of the law and our constitutional order.

180. It is perfectly true that both the Optional Protocol (between 1952 and 1998) and (since the treaty revision in 1998) Article 34 of the European Convention of Human Rights allows an individual to bring a petition to the European Court of Human Rights contending, inter alia, that a decision of this Court amounts to a violation of the ECHR. Some examples – which are by no means comprehensive – include *Norris v. Ireland* (condemning laws on homosexuality); *O'Keeffe v. Ireland* [2014] ECHR 96, (2014) 59 EHRR 15 (no effective remedy for Article 3 violation); *Independent Newspapers v. Ireland* [2017] ECHR 567 (excessive awards in defamation cases); *Keaney v. Ireland* [2020] ECHR 292 (undue delay and lack of effective remedy). In some instances – e.g., *O'Keeffe* and *Independent Newspapers* – the Court has awarded damages.

181. One might fairly ask: what is the difference between the right of petition to the ECtHR on the one hand and the right to bring proceedings before investor tribunals on the other, such that accession to the latter engages fundamental issues in relation to Article 5 and Article 34.5.6, whereas this is not true in respect of the ECHR? To my mind, there is but one essential difference, namely, that, unlike the ECtHR, the investor tribunal decisions have been accorded binding legal status such that their awards are made enforceable in our domestic law.

182. That is *not* the case with regard to decisions of the ECtHR and, indeed, the Oireachtas to date has carefully refrained from according such a status to these decisions. Thus,

for example, s. 4 of the European Convention of Human Rights Act 2003 ("the 2003 Act") merely states our courts must take judicial notice of decisions of the ECtHR and that when "interpreting and applying the Convention provisions", they must take "due account of the principles" laid down by these decisions. The 2003 Act does not state, however, that such decisions of the ECHR have binding legal status in our domestic law. If it did, it would to that extent be unconstitutional because, contrary to the express requirements of Article 5 and Article 34.5.6, it would in substance allow another court – other than this Court – to deliver a final judgment in a dispute between the citizen and the State in a manner which was binding in our domestic law.

183. In passing it may also be noted that this Court has never accorded the status of a binding decision to a judgment of the ECtHR. Thus, for example, in *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan (No. 5)* [1998] 4 IR 343 the High Court had granted an injunction in August 1992 restraining the distribution of certain information in relation to the provision of abortion services. A few months later the ECtHR held that this ban contravened Article 10 ECHR: see *Open Door Counselling Ltd. v. Ireland* (1993) 15 EHRR 244. Around the same time the 14th Amendment of the Constitution Act 1992 took effect, allowing for the distribution of such information.

184. In its judgment delivered in March 1997 a majority of this Court held that the High Court had been correct at the time to grant the injunction, but that the law had been changed in the meantime by the passage of the 14th Amendment so that it would no longer be appropriate to grant such an order. There was, however, no suggestion at all that the judgment of the ECtHR in the meantime in *Open Door Counselling* had had this effect. Indeed, this was accepted by the two dissenting judges, Denham and Keane JJ. Thus, for example, in her judgment Denham J. referred to the ECtHR judgment in *Open Door* and observed that "while that decision is not part of our domestic law, it is

a persuasive analysis of the situation": [1998] 4 IR 343 at 376. Keane J. was likewise of the view that that judgment "is not, of course, in any sense binding on this Court": see [1998] 4 IR 343 at 391.

185. Thus, regardless of the rights and wrongs of the matter under discussion, the key point which emerges for our purposes from *Grogan (No. 5)* is that a decision of the ECtHR does *not* have binding force and effect *so far as the domestic law of this State is concerned*. These decisions are, of course, nevertheless binding at the level of international law and the State has given a solemn political commitment that it will honour and give full effect to them.

186. Narrow as these distinctions may be, they are nonetheless vital ones. It can thus be said that while our accession to the ECtHR (and, for that matter, the 2003 Act) came close to the constitutional boundaries, it did not transgress them, precisely because these judgments have never been given binding status and enforceable effects in our domestic law.

187. That, therefore, is the all essential — if, admittedly, narrow — difference between the ECHR and the CETA investor tribunals.

Part X: Other specific constitutional provisions dealing with the administration of justice by trans-national bodies

188. In this part, I propose to itemise and discuss briefly specific constitutional provisions dealing with the administrative of justice by trans-national bodies or entities. These are admittedly heterogeneous examples: the common theme is that the Constitution (whether as originally enacted or by later specific amendment) has made express provision for such bodies by way of derogation from the general constitutional rule that

the administration of justice is vested in the courts established for the purposes of Article 34 of the Constitution. I propose to start with Article 29.2.

Article 29.2

189. Article 29.2 of the Constitution provides:

> "Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination."

190. This provision clearly reflects the language of Article II of the General Treaty for Renunciation of War as an Instrument of National Policy ("the Kellogg-Briande Pact") of 1928 of which the (then) Irish Free State was one of the original signatories. Both the history and text of Article 29.2 are directed towards international arbitration or judicial determination of *international disputes* as between the State and other states. Article 29.2 is thus concerned with the resolution of issues of public international law. It provides, for example, constitutional authority – if, indeed, such were needed – for our acceptance of the jurisdiction of the International Court of Justice and other forms of judicial determinations of *international disputes at the level of public international law* such as the World Trade Organisation's Dispute Resolution Panel procedures which are designed to resolve inter-State trade disputes. It has, however, no application to a case of this kind which concerns the binding determination of essentially private claims brought by investors before a CETA Tribunal. As Butler J. put it (at paragraph 103 of her judgment) the "international disputes which are to be the subject of international arbitration are between nations and…Article 29.2 is not intended to cover financial claims by commercial entities against the State."

191. One must, of course, acknowledge that there may perhaps be cases where *private* claims brought by *private* parties could be compromised by the State in the interests of the

pacific settlement of an international dispute with another state. In the words of a leading international law scholar, this is an "established international practice reflecting traditional international theory": see Henkin, *Foreign Affairs and the Constitution* (1972) at 262.

192. A good example from international law practice in this regard is provided by the Algiers Agreement of 1981 between the United States of America and the Islamic Republic of Iran. The Algiers Agreement provided for the resolution of the hostage crisis following the unlawful capture of US diplomatic personnel at its embassy in Tehran. The essence of the agreement was that both countries agreed to accept the jurisdiction of the Iran-United States Claims Tribunal which would have the power to make binding adjudications in respect of all claims brought by their respective nationals against the other state. Part of this involved the extinguishment of claims pending before the US courts and their transfer to the Claims Tribunal.

193. In *Dames & Moore v. Regan* 453 US 654 (1981) the US Supreme Court held that the US President could properly exercise the executive power to conclude an agreement of this kind and rejected a challenge to its constitutionality. As Rehnquist J. observed (at 679):

> "Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns. *United States v. Pink* 315 US 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals."

194. For my part, I consider that, in view of the provisions of Article 29.5.2, this State could in principle properly enter into a specific agreement of this kind *as part of the pacific settlement of an international dispute* with another state. This would, I think, be so even

if it involved the renunciation of the jurisdiction of the Irish courts, provided, of course, that the claimants were provided with rights and remedies broadly comparable to those prevailing in our own legal system.

195. One thing, however, is clear: this is *not* the background to the establishment of the CETA Tribunals. These Tribunals will not have been established to resolve inter-State claims in the realm of public international law: they rather concern the resolution of private claims made against the State by private investors. The CETA Tribunals are instead intended to operate in addition to or to supplement the operation of national court systems and, generally speaking, to assuage the concerns of international investors that they might not be treated fairly by either the executive, legislative or judicial branches of the country in which they are investing.

196. In these circumstances, Article 29.5.2 - which, in fairness, was not really relied on by the respondents in the context of this appeal - has no relevance to the establishment of the CETA Tribunals.

Article 29.4.6

197. As I have already observed, Article 29.4.6 gives constitutional immunity to "laws enacted, acts done or measures adopted by the State" which are "necessitated" by the obligations of membership of the European Union. One of those obligations is contained in Article 267 TFEU in that it provides a mechanism whereby national courts can refer a point of European Union law to the CJEU for a binding adjudication. Article 267(3) TFEU imposes a binding obligation on courts of last resort to make a reference, save for special cases such as interlocutory matters or where the issue is *acte clair*: see generally, for example, *Commission v. France* (C-416/17, EU: C; 2018: 811); *Consorzio Italian Management* (C 561/19, EU:C: 2021: 799) and *Randstad Italia SpA* (C-497/20, EU: C: 2021: 799). In some circumstances Member States may be liable in

damages where such a court of last resort improperly fails to make such a reference: see, *e.g., Köbler* (C-224/01, EU: C; 2003/ 513); *Randstad Italia SpA* (C-497/20, EU: C: 2021: 799) and more generally, Varga, *The Effectiveness of the Köbler Liability in the National Courts* (Hart, 2018).

198. There could, I think, be little enough doubt but that the general Article 267 TFEU jurisdiction – involving as it does binding decisions given by the Court of Justice in the course of *inter partes* litigation and which may also involve the disapplication of national law – requires the protection of Article 29.4.6, since it clearly impacts on the exclusive role of the courts in the administration of justice in Article 34.1 and the finality of decisions of this Court (Article 34.5.6).

199. One may immediately observe, of course, that the Article 267 TFEU jurisdiction of the Court of Justice is in some respects broader than that which will be enjoyed by CETA investor tribunals. The CJEU gives binding decisions as to the law of European Union which not only bind the parties and the Irish courts, but which also have *erga omnes* effects. Under the *Simmenthal* doctrine (*Simmenthal SpA* (C-106/77, EU: C: 1978: 49) the Court of Justice can disapply (and thereby effectively nullify) a provision of national law. On the other hand, it should, however, be said that the jurisdiction of the CETA tribunals to award damages against contracting states would appear to be more extensive in practice than that enjoyed by the Court of Justice, since that latter court will only award damages for a breach of EU law where that breach is a "sufficiently serious" one: see*, e.g., Randstad Italia SpA* (C-497/20, EU: C: 2021: 799)(at paragraph 80).

200. No one suggests, of course, that this provision (Article 267 TFEU) is directly relevant to this appeal. Rather, however, it provides another illustration of how provision for

transnational adjudication with binding domestic effects is catered for by means of an existing and specific constitutional amendment within our existing constitutional order.

Article 29.7

201. Article 29.7.2 of the Constitution provides as follows:

> "Any institution established by or under the [Belfast] Agreement may exercise the powers and functions thereby conferred on it in respect of all or any part of the island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution. Any power or function conferred on such institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person or organ of State as aforesaid."

202. Article 29.7 was inserted by the 19th Amendment of the Constitution Act 1998 to allow the State to ratify the Belfast Agreement. The first sentence of Article 29.7.2 is designed to allow any cross-border bodies established under that Agreement to exercise part of the executive power of the State, the provisions of Article 28.2 notwithstanding. The second sentence of Article 29.7.2 provides that where any judicial or judicial-type functions are transferred to these institutions, such powers may lawfully be exercised by them "in addition to or in substitution for any like power or function" conferred on the courts by the Constitution itself.

203. While this is a specific provision designed to deal with a specific issue, it again shows that – just as with Article 29.9. and the International Criminal Court – that all derogation or possible derogations from the juridical sovereignty of the State have heretofore been sanctioned by means of a specific constitutional amendment.

Part XI: The Jurisdiction of the Joint Committees

204. There remains the question of the jurisdiction of the Joint Committees. Article 26.1 CETA provides for a Joint Committee consisting of the European Union and Canada. This Committee is responsible for all questions relating to trade and investment activities between the contracting parties and the implementation and application of CETA: see Article 26(1)(3) CETA. Article 26.3(1) CETA provides that the Joint Committee shall "for the purposes of attaining the objectives of this Agreement, have the power to make decisions in respect of all matters when the Agreement so provides."

205. Article 26.3(2) CETA provides that:

> "The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them. The CETA Joint Committee may also make appropriate recommendations."

206. The most important powers of the Joint Committee include, first, the power to "consider or agree" on amendments to CETA (Article 26.1(5)(e) CETA) and second, the power to "adopt interpretations of the provisions of the Agreement, which shall be binding on" the CETA investor tribunals: see Article 26.1(5)(e) CETA.

207. There are a number of striking features regarding this aspect of CETA. First, no provision is made for any judicial supervision of any decisions of the CETA Joint Committee. Second, their decisions are expressed to be "binding" on the Member States. Some of these decisions under Article 26.1(5)(e) CETA interpreting the provisions of CETA could concern matters such as technical barriers to trade (Chapter 4, CETA), tariffs and trade facilitation (Chapter 5, CETA) or trade subsidies (Chapter 7, CETA). These interpretative decisions would be binding on the CETA Tribunals: see Article 26.3(2) CETA.

208. It is perhaps important to state that the power of amendment of CETA is unproblematic. Article 30.2(1) CETA envisages that the parties may agree to amend the Agreement in accordance with their own "respective internal requirements." In the case of the Protocols and the Annexes to CETA the Joint Committee may also take the initiative in the case of amendment, but here again the approval of the parties in accordance with their own internal requirements is required: see Article 30.2(1) CETA. It is clear from the CJEU's decisions in *Singapore Opinion 2/15* and *CETA Opinion 1/17* that the consent of the Member States in accordance with Article 218(8) TFEU is required in respect of any such amendments insofar as any such amendments affect the jurisdiction of the CETA Tribunals under Chapter 8 of CETA since this concerns a competence of the Member States. This means in turns that in the case of Ireland the amendment would have to be laid before Dáil Éireann and the appropriate consent of that body obtained under Article 29.5.2 of the Constitution.

209. Different considerations apply, however, in the case of the power of interpretation given to the Joint Committees by Article 26.1(5)(e) CETA. These interpretative powers are not really powers of "interpretation" in any true, conventional sense of the term. They are rather a quasi-legislative mechanism where the Joint Committees can oversee and, if necessary, curb or reverse, the actions of the CETA Tribunals by means of an interpretative decision. These interpretative decisions would essentially amend, supplement or otherwise vary the text of CETA in much the same way as a national legislature might reverse the effect of a court decision by an appropriate change in the law. This is made clear by paragraph 6(c) of the *Joint Interpretative Document on CETA between the European Union and Canada* (OJ L 11, 14th January 2017) which provides that:

> "In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions

> that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals."

210. All of this would take place in a context where there is no provision for judicial supervision or oversight in respect of this power of "interpretation." Nor are there any guiding principles contained in CETA itself setting any potential limits to this *soi-disant* power of interpretation. All of this means is that the Joint Committee could effectively take it upon themselves to effect wholescale changes in the text of CETA by means of these "interpretative" rulings. Perhaps many of these rulings would be for the better and might well ensure the CETA Tribunals more faithfully reflected the wishes of the drafters. Yet the fact remains that in this regard the Joint Committee would not be subject to any democratic oversight.

211. Whereas Ireland's consent would be required in respect of actual amendments of CETA, this would *not necessarily* be true in respect of other decisions of the Joint Committee concerning the *interpretation* of CETA. These interpretative decisions would then become binding on the CETA Tribunals as well as, of course, this State.

212. As I have just indicated, what is described as interpretative ruling of this kind would generally amount in substance to an amendment of the text of CETA. There would be no necessary parliamentary input from Ireland before such an interpretative decision was adopted by the Joint Committee and even though such an interpretation would generally involve material changes in substance to the text of an international agreement having a charge on public funds. Specifically, there is no procedure envisaged by these provisions of CETA whereby the consent of Dáil Éireann could be obtained in

respect of what in such circumstances might well amount to such material changes to the text of CETA in the manner required by Article 29.5.2. of the Constitution

213. Article 5 of the Constitution declares that the State is a sovereign and democratic state. Democracy is thus made an indispensable feature of the very constitutional identity of the State and the provisions of Article 15.2.1, Article 16, Article 28.4, Article 29.5.2 and Article 47 are just some of the provisions of the Constitution which give practical effect to this commitment to democratic legitimacy and control. The creation of CETA Joint Committees with these powers to make binding decisions for CETA Tribunals (and, thus, ultimately for the State) by means of these interpretative rulings and in respect of whose activities the State will have no guarantee of being able to exert direct control or influence means that the necessary democratic control pre-supposed by the Constitution simply has not been shown to be present. This is especially so given that, as I have just said, in practice these interpretative rulings would generally amount in substance to an amendment of the text of CETA.

214. All of this is to say that in view of the fact that Chapter 8 of CETA concerns matters which are reserved competences of the Member States, the internal constitutional procedures of this State means that any amendments to such an international agreement must be approved by Dáil Éireann in accordance with Article 29.5.2 of the Constitution where (as here) it involves a charge on public funds. This requirement applies irrespective of whether CETA is expressly amended in accordance with Article 30.2 CETA or indirectly by means of interpretative rulings issued by the Joint Committee.

215. In these circumstances, I find myself obliged to conclude that in this respect the ratification of CETA would also violate the democracy guarantee of Article 5 of the Constitution insofar as (i) Article 26.1(5)(e) CETA permits the Joint Committee to issue interpretative rulings which bind the CETA Tribunals; (ii) these interpretative rulings

amount in substance to material amendments of the text of CETA itself (even if not formally expressed to be such) and (iii) where the parliamentary supervision provided for in such circumstances by Article 29.5.2 of the Constitution is not present.

Part XII: Overall Conclusions

216. There is no doubt but that this appeal presents many complex issues. Once one accepts - as I believe one must - that ratification of CETA is not an obligation which is necessitated by our membership of the European Union for the purposes of Article 29.4.6 of the Constitution, then after this long discussion the essential question really is whether it is open to the State to participate in a treaty which provides for a form of alternative justice system enabling private parties to sue the State for damages in respect of our the application or enforcement of our general public law, which awards are then made binding and enforceable under our domestic law, together with a system of Joint Committees with powers to make binding decisions regarding the interpretation of CETA.

217. At one level, one could adopt a pragmatic stance to this question and say once again that the strong likelihood is that there will ultimately be very few cases of this kind against this State. This appeal, however, ultimately presents a matter of principle and, to adopt the famous words of Alderson B. in *Winterbottom v. Wright* (1842) 10 M. & W. 109 at 155, if we go this one step in order to uphold the constitutionality of CETA investor tribunals, then there is no reason why we should not go another fifty.

218. If this could be done with CETA investor tribunals, there would then be no reason why a similar mechanism could not be adopted at a domestic level by the Oireachtas in large swathes of other areas of the law as well, thus hollowing out the system of justice which is so carefully delineated in Article 34 to Article 38 of the Constitution in a manner which has never previously been contemplated. One may equally say that the Constitution contemplates only one justice system, namely, that provided for in Article 34 *et*

seq. To this extent, the provisions of the Constitution prescribing the separation of powers and providing for the distribution of powers to the various institutions of State are all impliedly closed categories in that they simply contemplate one executive (the Government), one legislature (the Oireachtas) and one system of justice (the courts created under Article 34 of the Constitution). Insofar as the Constitution departs from that model (e.g., allowing for preliminary references to the CJEU under Article 267 TFEU or in relation to the resolution of disputes arising from the operation of cross-border bodies established under the Belfast Agreement or the International Criminal Court or the pooling of executive, legislative and judicial powers with the various institutions of the European Union), it is either only by reason of a specific constitutional amendment allowing this to be done or in the unusual and special context of the pacific settlement of an international disputes under Article 29.2.

219. Just as significantly, the CETA Joint Committees are given significant powers to make binding decisions both for the State and for CETA Tribunals regarding the interpretation of CETA in circumstances where no provision is made for judicial or parliamentary control of such decisions. In these circumstances, there are insufficient checks and balances to ensure that the key constitutional objective of democratic legitimacy – a cornerstone of the Article 5 guarantee - is assured.

Summary of Conclusions

220. In summary, therefore, I would conclude as follows:

221. First, so far as the standard of review is concerned, I do not consider it necessary to determine whether this is a case governed by the "clear disregard" test given that I am of the view that the ratification of CETA would clearly breach specific constitutional boundaries, express or implied, as objectively interpreted and construed by this Court

222. Second, since the Court of Justice has made clear in its *CETA Opinion 1/17* that ratification of CETA requires the consent of each Member State, the ratification by the State of CETA is not a "necessitated obligation" of Union law for the purposes of Article 29.4.6 of the Constitution. This means in turn that the issue in the present appeal reduces itself to whether the ratification of CETA by executive act following Dáil approval for the purposes of Article 29.5.2 would be unconstitutional.

223. Third, it is clear from the terms of the ICSID (Washington) Convention and the judgment of the UK Supreme Court in *Micula* that assuming the procedural formalities have been complied with and in the absence of some highly unusual defence such as fraud, the High Court enjoys no real discretion in the matter and has little option but to give effect to any award of a CETA Tribunal.

224. Fourth, while CETA tribunal awards in respect of this State are likely to be rare, the fact remains, however, is that they could happen. In those circumstances the State would thereby be exposed to damages claims on a *strict liability* basis in respect of otherwise *validly* enacted legislative measures. The very fact, however, that this *could* happen is sufficient for constitutional purposes, since to my mind this necessarily compromises the legislative sovereignty of the State, thereby violating Article 5 of the Constitution. In particular, the absence of a *Pine Valley*-style protection in respect of legislative measures - heretofore regarded as an essential safeguard for the legislative autonomy of the Oireachtas - is telling.

225. Fifth, the effect of CETA is to allow a body composed of persons who are not judges and who are not appointed by or answerable to any of the institutions of the State to exercise judicial powers in respect of the State and, critically, to give judgment which is prima facie binding and enforceable under our own domestic law. In my view this is plainly incompatible with the juridical sovereignty of the State. I would therefore hold

that the ratification by the Government of CETA in its present form would infringe Article 5 of the Constitution read in conjunction with Article 34.1.

226. Sixth, the creation of CETA Joint Committees with the powers to make binding interpretative decisions for the State in respect of important aspects of trade policy and in respect of whose activities the State will have no guarantee of being able to exert direct control or influence means that the necessary democratic control is not present. In these circumstances, the conclusion that the ratification of CETA would also violate the democracy guarantee of Article 5 of the Constitution is inevitable.

227. It follows, therefore, that I would allow the appeal of the plaintiff. I would accordingly grant a declaration to the effect that the ratification by the Government of CETA would be unconstitutional inasmuch as its provision for investor tribunals with powers to make binding and enforceable awards in respect of State liability would compromise our legislative and juridical sovereignty, contrary to Article 5 of the Constitution read in conjunction with Article 15 and Article 34. I would also grant a declaration that ratification of CETA would infringe Article 34.5.6 of the Constitution in that it would purport to allow another court or tribunal to go behind the finality and conclusiveness of a decision of this Court by making a binding award of damages against the State in respect of a decision of this Court.

Part XIII: Curing the unconstitutionality

228. It is clear from all that I have just stated that the Government could not proceed in a constitutionally acceptable manner to ratify CETA *as matters stand.* I emphasise the latter words. There are, however, certain circumstances in which the Government and the Oireachtas could nonetheless give effect to CETA *if* certain legislative changes were to be made. I stress here, of course, that this is entirely a matter for the Government and the Oireachtas. The Government might not, for example, wish to proceed with CETA

in those circumstances or the Oireachtas might not wish to pass the appropriate legislative changes. I am simply indicating what while the ratification of CETA cannot be ratified by Dáil resolution in its present form, it would nevertheless be possible to ratify CETA with the appropriate legislative changes which ensured that the constitutional identity of the State and its sovereignty was thereby safeguarded. I shall now endeavour to explain precisely what I mean.

229. First, under no circumstances could CETA be ratified in its present form *simply* by means of a resolution of Dáil Éireann under Article 29.5.2 of the Constitution because, as I have indicated at various points in this judgment, this method of giving effect to CETA Tribunal decisions amounts in substance to an amendment of s.25 of the 2010 Act. It is important to be clear about this: there is absolutely nothing wrong in s. 25 of the 2010 Act insofar as it generally seeks to give effect to the ICSID and New York Conventions. The difficulty here is that s. 25 of the 2010 Act – designed as it was to give effect to conventional arbitral awards in respect of standard commercial arbitration – has been pressed into service for a different purpose entirely, namely, to give effect on a more or less automatic basis to the decisions of the CETA Tribunal. This amounts in substance to a considerable broadening of the scope and purpose of s. 25 of the 2010 Act for which there has to be the appropriate legislative base in the manner that Article 15.2.1 of the Constitution requires. It would accordingly be necessary that the appropriate legislation - and not simply a Dáil resolution under Article 29.5.2 - modifying or supplementing, for example, s. 25 of the 2010 Act (and perhaps other similar items of legislation as well) be enacted by the Oireachtas as a whole.

230. Second, while such legislation is necessary, this *in itself* would not be sufficient. The Constitution *does not* permit the Government to ratify CETA nor the Oireachtas to enact the appropriate legislation giving effect to that decision *for so long as* the defences

to enforcement of a CETA Tribunal award under the ICSID and the New York Conventions respectively remain as circumscribed as they currently are. The gravamen of the constitutional objection which I have upheld is that, upon ratification of CETA as is currently proposed, the High Court would be virtually powerless to refuse the enforcement of a CETA Tribunal award even where that award is in substance at odds with either our general constitutional identity and fundamental constitutional values on the one hand or our general EU obligations of loyalty to the institutions of Union and upholding the integrity of Union law on the other.

231. In some ways the key to this is the analysis of the ICSID Convention contained in the joint judgment of Lord Lloyd-Jones and Lord Sales for the UK Supreme Court in *Micula v. Romania.* While they noted that the conventional view of the ICSID Convention is that it permits review by a national court only on grounds relating to the authenticity of any award sought to be enforced, they ([2020] 1 WLR 1033 at 1056) also thought it was "arguable" that Article 54(1), by framing the relevant obligation as to enforcement as an obligation to treat an award under the Convention as if it were a final judgment of a local court, allows certain other defences to enforcement which are available in local law in relation to such a final judgment to be raised.

232. In effect, therefore, it is open to the Oireachtas to build on what was said in *Micula* and to spell out in legislative form the defences to the enforcement of such a final judgment of the CETA Tribunal in the manner tacitly contemplated, for example. by Article 54(1) of the ICSID Convention. If, therefore, the range of domestic defences in respect of applications to enforce ICSID (or, for that matter, the New York Convention applications) concerning CETA Tribunal awards currently provided for in the 2010 Act were legislatively broadened in the manner I have just indicated, then in principle ratification of CETA following the enactment of such legislation might lawfully proceed.

233. While not wishing to be prescriptive, it would be necessary at a minimum to move from the present virtually automatic enforcement procedure to a situation where the High Court, when called upon to give effect to a CETA Tribunal award (as distinct from an ordinary commercial arbitration award) under either the ICSID Convention or New York Convention and s. 25 of the 2010 Act, was expressly empowered by that new legislation to refuse to give effect to that award where it considered that:

(a) the award materially compromised the constitutional identity of the State or fundamental principles of our constitutional order, or

(b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of Fundamental Rights and Freedoms) and to preserve its coherence and integrity.

234. Thus, for example, if a CETA Tribunal were in the course of its award to refuse to follow a material decision of the Court of Justice directly on point, then CETA could only be constitutionally ratified in a manner conforming with our general constitutional obligation in Article 29.4.4 to give effect to EU law if the High Court were to be invested with the express power to refuse enforcement of such a CETA Tribunal award on this specific ground.

235. The same naturally holds true where the award materially compromised our own constitutional fundamentals and constitutional identity. While this category is, perhaps, never closed, it would, for example, embrace circumstances where the High Court considered that the CETA award proposed to be enforced was at odds in some material way with the legislative and juridical autonomy of the State.

236. All of this is another way of saying once again that the fundamental constitutional objection to CETA in its current form is that such CETA Tribunal awards are in substance

converted almost automatically into judgments enforceable in this State in circumstances where the High Court has been deprived of its capacity to supervise such awards on the ground that they respect the constitutional identity and values of this State, together with our general duty to uphold the coherence and integrity of EU law. This fundamental constitutional objection would accordingly be cured if the Oireachtas were to amend the 2010 Act so that the High Court were to be expressly invested with this power in respect of the enforcement of decisions of the CETA Tribunal.

237. All of this, however, potentially lies in the future and, to repeat, remains a matter for the Government and the Oireachtas to consider and deliberate. It is sufficient to say that, absent such potential legislative changes, the plaintiff's claim that CETA cannot constitutionally be ratified in its present form must therefore be upheld and his appeal must accordingly be allowed.

THE SUPREME COURT

[RECORD NO.: S:AP:IE:2021:000154]

O'Donnell C.J.
MacMenamin J.
Dunne J.
Charleton J.
Baker J.
Hogan J.
Power J.

BETWEEN:

PATRICK COSTELLO

APPELLANT

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 11th day of November, 2022

CONTENTS

Summary

1. For the reasons set out in this judgment, I would affirm the order of the High Court and would dismiss the appeal.

2. The appellant seeks to assert that the Comprehensive Economic and Trade Agreement ("CETA" or "the Agreement") is repugnant to the Constitution. He does so on two essential grounds. These arise under Article 15.2.1 and Article 34 of the Constitution.

3. This judgment would reject the case that, by reason of "legislative chill", the Agreement offends against Article 15.2.1 of the Constitution. The case made is speculative, and hypothetical, but, additionally, is a question appropriate to be determined by the Oireachtas, rather than the courts.

4. The judgment would also reject the appellant's case that either the text, or probable application of the CETA Tribunal provisions, would offend against Article 34 of the Constitution, by reason of being an "administration of justice" by a tribunal other than the courts established under the Constitution. Again, the case rests on hypothesis. The appellant's case has not been established either by reference to the text of the Agreement, or on the basis of any probable interpretation or application of CETA. The appeal must fail, as the case does not meet the evidential or legal threshold of probability.

5. However, while holding that the case as pleaded as a constitutional challenge cannot succeed, the judgment adds a number of observations agreeing with legislative measures proposed, which would nonetheless be appropriate for the purposes of ratification by the Government and the Oireachtas.

SECTION I – THE PARAMETERS OF THE APPEAL

Introduction

6. In this appeal the Court is asked to consider the constitutionality of the Comprehensive Economic and Trade Agreement entered into between Canada, of the one part, and the European Union and its member states, including Ireland, of the other part. The negotiating parties reached agreement on a text as long ago as 30th October, 2016. Since then, the question of ratification has been under consideration by the member states.

7. The appellant, a Green Party member of Dáil Eireann, contends the Agreement is repugnant to the Constitution of Ireland. His claim failed in the High Court. He has now appealed directly to this Court, in what, by any standards, is a highly complex case, which raises issues which are fundamental to democracy and the rule of law.

Context

8. Four provisions of the Constitution provide the essential reference points for the assessment of constitutionality.

9. First, Article 5 of the Constitution is fundamental to the structure of the State. It provides that Ireland is a sovereign, independent, democratic state.

10. Second, Article 6, equally significantly, states that all powers of government derive under God from the People. Article 6.2 provides, in terms, that the powers of government are exercisable only by, or on the authority of, the organs of State established by this Constitution. What is provided in both Articles are part of the constitutional identity of this State.

11. This appeal focuses on two further fundamentally important Articles which deal with the legislative and judicial organs of government.

12. Therefore, third, Article 15.2.1 deals with legislative power. It states that the sole and exclusive power of making laws for the State is vested in the Oireachtas. It provides that no other legislative authority has power to make laws for the State. The appellant contends the Agreement would impose a "legislative chill" on our national parliament's willingness to legislate in areas he identified in evidence, including those touching on the environment.

13. Fourth, Article 34 of the Constitution deals with judicial power. It states that justice is to be administered in courts established by law, by judges appointed in the manner provided by the Constitution. Furthermore, it provides that the decisions of this Court shall, in all cases, be final and conclusive. The appellant contends that Tribunals which are proposed to be set up under CETA would amount to an "administration of justice" prohibited under the Constitution.

14. The appellant's case is that, if ratified, the Agreement would be void, as it would be repugnant to these Articles of the Constitution. Through counsel, he contends that for ratification, it would be necessary to have a referendum of the People to determine whether to ratify the Agreement, and, if so, the terms under which the Constitution might be amended to accommodate the Agreement.

15. This judgment considers the constitutionality of CETA, having regard to Articles 15 and 34 of the Constitution.

The Constitution and International Law

16. By way of background, it should be said that the Constitution already contains a number of amendments concerning accession to international agreements and EU instruments. These are to be found in Article 29 of the Constitution. These include accession to the European

Atomic Energy Community (Article 29.4.3); the European Union (Article 29.4.4); the Treaty of Lisbon (Article 29.4.5); the Belfast Agreement and institutions created by that agreement (Article 29.7); and accession to the Rome Statute of the International Criminal Court. These amendments were deemed necessary as it considered accession to each would involve questions of sovereignty, specifically the legislative or judicial powers of this State.

17. The extent to which Ireland has acceded to other international treaties and agreements without the necessity for a referendum is not always appreciated. These include membership of the Council of Europe, involving the European Convention on Human Rights in 1950; and membership of the United Nations in 1954. By varying legal routes, this State has acceded to over 1,000 international agreements, sometimes, but not always, concerning trade. (see The Law Reform Commission's Discussion Paper on *Domestic Implementation of International Obligations*, LRC 124-2020).

The Questions Arising

18. When described in an over-simplistic way, it might appear at first sight that the issues for the Court to determine are relatively straightforward. If engaged in a normal adversarial procedure, the Court would examine the CETA text in order to determine whether, as a matter of probability or likelihood, the Agreement did offend against either of those Articles, either on its face or in its likely interpretation.

19. In this appeal, however, that apparently simple question is not so easily answered. What is before this Court is unique in many respects – not least because of a want of certainty as to what exactly the Agreement will finally provide. That is not the fault of the parties. The Court is dealing with an ongoing process.

20. But, here, the Court finds itself having to consider matters of form, substance, and contingency. In legal form, this appeal is a constitutional challenge, based on alleged repugnancy. But the question of legal substance not only involves the Agreement itself, but provisions within it which allow for amendment of terms, and other possible amendments now envisaged. These latter factors raise the problem of contingency. They concern aspects of the Agreement which, the appellant contends, would offend the Constitution if they occurred. But these events have not occurred.

21. In bringing this case, the appellant, understandably in view of his area of interest, focused on the effect which ratification of CETA might have on the ability, or willingness of the Oireachtas to legislate on environmental issues. He apprehends that one of the potential consequences of the Agreement might be that an arbitral award made under CETA, compensating a Canadian investor for legislation curtailing its activities, might expose the State

to large awards in damages awarded by arbitrators appointed under the CETA. Put more specifically, the Article 15 question is whether, if ratified, CETA might deny or inhibit the power of the Oireachtas to be sole legislator for the State?

22. A somewhat similar question is whether the Agreement actually offends against the Article 34 of the Constitution, which rests the administration of justice on the judiciary appointed under the Constitution. As I seek to explain in this judgment, this case is unlike any other constitutional appeal. Even now, it is not based on a complete, concrete, factual background or description as to how the CETA arbitral system *will* operate. This renders the task facing the Court far more difficult. It is, I suggest, one of the reasons for the approaches taken by my colleagues.

23. I will presently consider aspects of the CETA text. But a simple textual analysis would be too narrow. There are good reasons to ask a second question. This is whether, on a fair reading of the text, there may be circumstances where an unconstitutionality may be foreseeable. This second question can be divided into two sub-divisions, asking respectively whether unconstitutionality is probable or merely possible. The third issue is, even if an unconstitutionality is hypothetically possible, but not probable, what steps should be taken to protect the Constitution.

The Task Facing the Court

24. At the outset, it is worthwhile reflecting on the process in which the Court is constrained to engage. Again, it must be emphasised that the term "constrained" does not connote any attribution of blame to the parties. They are not responsible either for the Agreement or events which occurred subsequently. But the Court is asked to provide what, in many respects, is close to an advisory opinion.

25. It is true that the Constitution makes provision for advisory opinions. But, generally, this is in one circumstance only. Article 26 of the Constitution permits the President, after consultation with the Council of State, to refer a Bill to this Court for its opinion as to whether such Bill, or any part thereof, is repugnant to the Constitution. But that jurisdiction is used sparingly. In such a proceeding, the Court must examine a range of hypothetical circumstances of varying probability in determining constitutionality or repugnancy. But ultimately the threshold must be reasonableness and probability. This is a difficult process, made more so by a short timescale, and by the fact that, once a decision as to constitutionality is reached, it is conclusive for all purposes.

26. In such references, the test of repugnancy or invalidity is as to the form and effect the Bill will have if, and when, ratified (*In re Article 26 and the Emergency Powers Bill 1976*

[1977] I.R. 159, at 174, O'Higgins C.J.). But the threshold is not whether some proposal might *conceivably* affect an Article of the Constitution, but whether, on a reasonably objective reading, the particular proposal *actually*, or probably, offends the Constitution.

27. This is not an instance where the Court is asked by the President to provide an advisory opinion as to constitutionality. Here, the first task is to consider the text itself, next, to consider any reasonably foreseeable consequences, and, finally, contingency.

The Text of CETA

28. As set out earlier, the negotiations began in a different international trading environment from now. The entry into force, and provisional application of the Agreement, are both governed by Article 30.7 of the Agreement. This provides that the parties are to approve it in accordance with their respective "internal requirements and procedures". Many parts of CETA are already in operation. But Section 8, which deals with the arbitral Tribunal, is not in effect. Under Article 30.7.2, CETA is not to enter into full force until a prescribed date, after the parties have exchanged written notifications, certifying that they have completed their respective internal requirements and procedures. The question of ratification is one of mixed or shared competence. Thus, as well as ratification by the European Union itself, CETA falls to be approved in accordance with the law and the Constitution of this State, and other member states.

Scope and Range

29. The High Court judgment fully describes the content of the Agreement which runs to over 1,000 pages. Its overarching purpose is to reduce trade barriers between Canada and the EU and its member states. It comprises both text, running to 200 pages, a series of annexes, grouped by reference to chapters of the main agreement, protocols, and reservations. Nearly half of the document (just under 500 pages) is said to involve reservations which, under the terms of the Agreement, may be taken by a party with respect to existing measures that do not conform to CETA provisions.

30. Even such a cursory description of the Agreement gives some idea of the extent of detail involved. It contains provisions relating to a vast range of goods, services, and products, as broad as the export of motor vehicles from Canada into the European Union, and as narrow and precise as trade in fibres of stipulated specifications, types of footwear, agricultural products, fish export and import, and identified types of food products.

31. Some further measure of the detail of the issues can be gauged from the fact that, by the time it reached this Court, it had already been the subject of a comprehensive judgment in the High Court of some 120 pages. But an additional mark of this complexity is the fact that, as a

number of important features had not been fully explored in the first hearing, this Court took the unusual, but not unprecedented, step of again sitting in order to allow the parties to address a considerable number of specific questions put by the Court.

The High Court Judgment

32. The High Court judge, Butler J., helpfully summarised her conclusions on the various strands of the case.

33. First, she held that the appellant had *locus standi* to bring the action. But it followed from the nature of his claim, which sought to prevent the ratification of CETA through the method proposed, that he should be allowed to make arguments, which could be characterised as speculative, as to how CETA would operate if ratified. However, Butler J. concluded that the appellant should not be permitted to make arguments specifically invoking the rights or interests of third parties where it would remain legally possible for those third parties to bring proceedings if they so wished after the ratification of CETA (if that occurred).

34. Second, the judge held that the presumption of constitutionality applied; thus the appellant bore the onus of proof and must clearly establish the unconstitutionality which he alleged in order to succeed in his claim. However, the focus of the appellant's case was not upon the policy choices made by the Government in entering into CETA; rather it was on the procedures through which it proposed to ratify CETA. The resolution of that issue did not attract an additional or higher standard of review.

35. Third, the judge held CETA was an international agreement which, if ratified, would bind the State as a matter of international law. However, she concluded that under its own terms, it would not have direct effect in Ireland, and could not be invoked before the Irish courts. Equally, the CETA Tribunals would not have jurisdiction to declare any provision of Irish law, or any act taken by an Irish authority to be invalid.

36. Fourth, the judge held that, because CETA would operate only at the level of international law, its provisions could not be characterised as laws made for this State in breach of Article 15.2 of the Constitution.

37. Fifth, she concluded the decision-making power of the CETA Joint Committee did not amount to a power to make laws for this State. The decisions so made could not be characterised as laws and, in any event, would also require that the parties conclude their internal requirements and procedures.

38. Sixth, and significantly, the judge held the jurisdiction to be exercised by the CETA Tribunal did have the characteristics of an administration of justice. However, she concluded, this would not be an "administration of justice" under the Irish Constitution, because the

disputes which would be determined by the CETA arbitral Tribunal were not justiciable under Irish law; rather, they would arise, and could be determined only, as matters of international law. Although investors would have a choice of jurisdiction in which to bring their claims, the choice to bring a claim before the CETA Tribunal would not amount to a subtraction of jurisdiction from the Irish Courts. Consequently, the judge concluded, the creation of, and conferral of jurisdiction upon the CETA Tribunals, would not be contrary to Article 34.1 of the Constitution.

39. Seventh, if the foregoing conclusion was not correct, and the CETA Tribunal was administering justice within the meaning of Article 34, then its jurisdiction was not "limited" for the purposes of Article 37.

40. Eighth, the judge held that CETA did not entail an unconstitutional transfer of the State's sovereignty. Consequently, ratification of CETA through Article 29.5.2 of the Constitution was appropriate and permissible. It was a matter for the Dáil as to whether it is politically desirable to do so.

41. Ninth, the judge concluded, the subject matter of the entirety of CETA fell within the competence of the European Union, being either a matter of exclusive EU competence (under the common commercial policy), or a matter of shared competence (under free movement of capital). However, she observed the CJEU had held, as regards a similar free trade agreement, that ratification by member states was required, not just because of the fact that part of the subject matter fell within an area of shared competence, but because of a dispute resolution mechanism contained within that agreement. In those circumstances it was difficult to construe ratification of CETA as something that was "necessitated" by virtue of obligations of membership of the EU for the purposes of Article 29.4.6 of the Constitution.

42. It followed from these conclusions that the High Court judge was of the view that the appellant had not established that ratification of CETA by the Dáil would be clearly unconstitutional. Therefore, upon that basis, she refused the reliefs sought by him.

43. I would here add a comment. In the past, the People of this State have shown themselves well able to deal with complex issues by way of referendum. If there are clear grounds for determining that there may be constitutional repugnancy, that cannot be a deterrent to holding there must be a referendum. But even that very short description of the dense content might provide grounds for reflection, if no more.

The Negotiating Parties to CETA

44. This is a judicial consideration of whether constitutional issues arise in CETA. But it is important not be misunderstood. The negotiating parties have approached this issue in good

faith. Canada, the European Union, and its member states, all enjoy the highest reputation as jurisdictions bound by, and operating under, the rule of law; in the case of Canada, expressed in its Charter and laws, supported by independent courts applying a comprehensive body of influential constitutional jurisprudence, at the apex of which is the Supreme Court of Canada. There is no question of *mala fides*.

45. The Union, too, is bound by the treaties and laws made thereunder, and subject to the Charter of Fundamental Rights. Ireland, as every other member state, is bound by its own constitution, laws and regulations, as well as provisions for the manner in which, on the basis of shared political sovereignty, EU law will take effect within this State. What is in issue in this case are not the *bona fides* of the negotiating parties involved, but, rather, the constitutional effects of what will be entailed by ratification of the Agreement. The issues now become clearer by an outline of the parties' cases.

The Submissions to this Court

The Appellant

46. Counsel for the appellant submitted that the issue of sovereignty lay at the centre of this case. He contended that the Agreement was one which the State and the Executive did not have the capacity to enter without the mandate of the People of Ireland speaking through a referendum. His submission largely focused on Article 34 of the Constitution.

47. Counsel contended that, if ratified, Chapter 8 of the Agreement, a section not yet ratified, would enable Canadian investors to pursue CETA claims against this State through an arbitral Tribunal established under the Agreement. The effect of this, he submitted, would be that, having pursued a CETA claim, such investor would thereby preclude any further litigation of the issues before the courts of this State. The consequences of this were that State liability for legislative measures adopted which might be inimical to Canadian investors would move from a national to an international law plane. The State would become subject to a mandatory external jurisdiction should it fail to regulate or legislate in accordance with CETA.

48. Counsel argued that this "external jurisdiction" was such as would permit substantial awards to be made in favour of Canadian investors against the State; but these awards would be binding and cognisable under rules made and promulgated by ICSID (International Centre for Settlement of Investment Disputes) and UNCITRAL (United Nations Commission on International Trade Law). Counsel submitted that under Chapter 8 of CETA all signatories and organisations within this State would be subject to potential adjudication in respect of their actions and measures.

49. Thus, he submitted the judicial power of the State, under Article 34 of the Constitution, would no longer be the sole repository of the administration of justice, as provided for in the Constitution. Rather, in matters coming within the CETA remit, and at the sole election of a Canadian investor, it would be CETA which would be empowered to make an award, including vesting it with a process with extensive powers of enforcing the claim. The effect of these arrangements would be to create potential liabilities for the State, which could not currently arise. Counsel submitted that the effect of CETA was to abrogate the sovereign immunity of the State, protected under Article 29.3 of the Constitution.

50. Counsel referred the Court to Article 8.22(f) CETA. Under it, if a Canadian investor withdraws legal proceedings concerning a measure alleged to constitute a breach of the Agreement and waived his or her right to compensation in a national court, such investor may thereafter submit a CETA claim, pursue such a claim before an arbitral Tribunal subject to ICSID or UNCITRAL Rules, which claim would become binding in this State under the Arbitration Act, 2010.

51. Under Article 8.25, member states would consent to the settlement of disputes of the CETA Tribunal under what is, effectively, a self-contained code. Counsel submitted that this vested a jurisdiction to determine claims, which might otherwise be brought in Irish courts, in CETA, in circumstances where the consent to jurisdiction by the CETA courts was, in effect, irrevocable, or at least irrevocable for many years. This, it was submitted, constituted an alteration to the substantive law of the State. Counsel argued that, by contrast to a single arbitration agreement, or even a series of them, what was referred to as a "habitual giving effect" to the Treaty would have consequences which, absent a referendum, would constitute a violation of Article 29 of the Constitution.

52. Thus, he contended, this Court had to consider whether a distinction could be made between, on the one hand, a normal commitment to an arbitration, to which the State might be a party, and, on the other hand, one where CETA created a framework which, effectively, "captured" all arbitrations within its remit, and where the State would not have a power of opting out, save after many years, with unknown consequences Adherence to CETA, it was argued, constituted an "*ongoing temporal surrender"* of jurisdiction by comparison to a simple agreement to submit a claim to arbitration. Such a measure would not be capable of remedy by legislation, as a matter of ratification would, by then, not be in compliance with Article 29.4 of the Constitution. It would, rather, be an abdication of sovereignty, rendering the CETA procedures as ones having a status equivalent to the laws of this State.

53. Counsel referred the Court to Article 5, 6.1 and 6.2 of the Constitution, which define the nature of the State, and provide that all powers of government derive from the People, which powers of government are exercisable only by, or on the authority of, the organs of the State, (Executive, Legislative, Judicial), established under the Constitution. He contended that the open-ended nature of the Agreement was inherently constitutionally objectionable. This distinguished it from the factual situation which existed from the Court in *Pringle v. Ireland* [2013] 3 I.R. 1 ("*Pringle*"), which envisaged that there might be a single, or even a number of, individual instances of potential incursions into sovereignty. In this case, it was said that it was not open to the State to ratify the Agreement by passage of a resolution in Dáil Éireann.

54. When the case came before this Court, counsel informed the Court that CETA had reached a preliminary stage of existence, that is, that fifteen Tribunal members had already been identified, but that the Tribunal itself had not been established, and that this would not take place until the entire Agreement was ratified.

An Observation

55. It is not unfair to make a comment here. Reduced to its essentials, this appeal is not only about text, but contingency. Underlying the appellant's case is a question of apprehended threat. It is that CETA has some of the features of a Trojan Horse. While portrayed as a benefit, bringing free trade and economic growth, it is suggested it could carry with it the potential for an enhanced supernational form of trade dispute resolution, which goes further than that to be found in other free trade agreements, and, itself, would become an "administration of justice".

56. Just as a constitution is a living instrument, counsel argues this Agreement, entered into in good faith, might by reason of its own terms, and their application or interpretation, evolve into a "living instrument", which, even if not at present offensive to the Constitution, might, in time, become so, on the occurrence of particular claims or interpretations.

57. The appellant contends that, by creating the potential for large awards of compensation for disappointed investors in CETA arbitral awards, the Agreement might, for example, inhibit the Oireachtas from legislating on an environmental issue, for fear of serious financial consequences to the State. This second concern, of no less significance, is the potential for an infringement of the constitutional protection of the status of the courts, specifically in the area of enforcement of CETA awards. Counsel raised the possibility that an award made by the Tribunal might become a form of administration of justice having an effect *in* this State, although not as a result of an administration of justice by the courts *of* this State.

The Respondent

58. Counsel for the State responded that the appellant had failed to analyse the meaning and ambit of the constitutional provisions, which, he said, would prohibit ratification. The core proposition for the State was that CETA would not form part of the domestic law of the State. Thus, it simply was not possible to conclude that CETA violated Articles 15 or 34 of the Constitution, or any other Article.

59. Counsel referred to Article 30.6 of CETA, which provides that nothing in the Agreement was to be construed as conferring rights or imposing obligations on persons, other than those created by the parties under public international law. The Agreement could not be directly invoked in the domestic legal systems of the parties. He submitted that, when, or if, established, a CETA Tribunal would be applying the Vienna Convention on the Law of Treaties, and other rules and principles of international law (Article 8.31.1), not national law.

60. Counsel contended that under Article 8.31.2, the Tribunal would not have jurisdiction to determine the legality of a measure alleged to constitute a breach of the Agreement under the domestic law of a party. Rather, the Tribunal might consult the domestic law of a party as a matter of fact; and in doing so, the Tribunal would have to follow the prevailing interpretation given to the domestic law by the courts or authorities of that party, and any meaning given to the domestic law by the Tribunal would not be binding upon the courts or authorities of that party.

61. Counsel drew attention to the fact that, under Article 8.22.1 of CETA, it is provided that an investor might only submit a claim pursuant to Article 8.23 if such investor withdraws any proceedings before a tribunal or court under domestic or international law, with respect to a measure alleged to constitute a breach referred to in its claim; and if such investor waived its right to initiate any claim under domestic or international law in any domestic court.

62. As to its effect, counsel referred the Court to the judgment of this Court in *McD v. L* [2010] 2 I.R. 199. There, this Court emphasised that Article 29.6 of the Constitution is imbued with the notion of dualism. It provides that no international agreement is to be part of the domestic law of the State, save as may be determined by the Oireachtas. Thus, in the domestic sphere, national law takes precedence over international law. By contrast, on the international plane, international law will take precedence over national law. Thus, a state cannot generally rely on its constitutional provisions as an excuse for not fulfilling international obligations. But international law can only take effect within the State to the extent permitted by the Oireachtas.

63. Counsel cited passages from *Pringle* to similar effect. It was not disputed that it was intended that a CETA decree could be enforced in this State by virtue of the Arbitration Act, 2010, but that alone did not transgress the law of this State.

Issues Discussed in Legal Argument

64. In the course of submissions, it was suggested that the text of the Agreement would not preclude the possibility that, having brought proceedings in Ireland to a conclusion, an investor might thereafter invoke the CETA jurisdiction. But counsel for the State pointed out that, in such a scenario, the investor would thereafter be invoking the CETA jurisdiction and, therefore, it would not be the same claim, but rather a CETA claim. The Court raised the point as to whether, for a CETA enforcement claim to be rejected in an Irish court, the award would have to be based on a manifest denial of justice.

65. Similarly, if an issue emerged where an investor might invoke CETA claiming a monetary award by an Irish court did not constitute fair compensation, counsel submitted such a scenario would not be offensive to the Constitution, as it would not constitute a subtraction from the jurisdiction of the Irish courts, but rather orders operating in two different spheres of law, one national, the other international. Thus, as a hypothesis, a CETA Tribunal might potentially conclude that a decision of this Court was a denial of justice. But counsel submitted such an eventuality could occur only were there a finding of targeted discrimination, a matter prohibited by CETA.

Areas of Agreement

66. I now deal with some areas of agreement.

67. First, I agree that there is no question that the Agreement is necessitated by membership of the European Union. Ratification is a matter of mixed competence.

68. Second, subject to what is said later, I accept this is a case where, *potentially*, the effect of the Agreement *might* raise a question of creating a charge upon public funds of the State. This means, at minimum, the Agreement must be approved in full by Dáil Éireann (*The State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 201).

69. Third, I approach the case on the basis that the appellant bears the onus of proof. But, having identified these three, one cannot ignore the fact that difficult questions nonetheless remain concerning the task which falls to the Court.

70. There is no doubt that, in bringing this case, the appellant and his legal team performed a substantial public service. This is, pre-eminently, an issue of general public importance. But while argument in this Court, both in the first and second hearing, brought clarity to some issues, it also identified a number of questions which, even now, cannot be said to be fully

determined. This judgment now deals with the fact that further material emerged even after the appeal was heard. Prior to considering the content, it may be useful to consider the principles of justiciability and judicial discretion when there is uncertainty as to facts.

Factual Uncertainty, Justiciability and Discretion

71. At the level of constitutional law principle, there remain areas in this appeal where, despite the detailed argument, are so uncertain that one might almost question whether this case is actually justiciable, in the sense of being apt, appropriate, or capable of determination by a court. A number of factors, both internal to the Agreement, and external to it, which, in normal circumstances, might lead a court to decline jurisdiction, as it is being asked to provide an advisory opinion. (On which, see H. Hogan, *The Decline of Article 26: reforming abstract constitutional review in Ireland*, Irish Jurist, Vol. LXVII, New Series 2022, Round Hall, p.123).

72. Again, speaking at the level of principle, courts operate upon an identified set of facts. When interpreting a document, whether it be a treaty, a piece of legislation, or a contract, a court will have the defined and final text before it. Constitutional law proceeds upon the well-known concept of *maturity*. When an issue is "*mature*", this means that an issue before a court is one which is appropriate for decision by that court. In United States jurisprudence, the term used is that the question is "*ripe*" for legal determination. A case is mature, or "ripe for determination", when the facts are capable of ascertainment.

73. But the doctrine of maturity has a corollary. Courts may decline to determine issues or deliver a judgment on a question which is *premature*, that is, one which, although it might raise a *potential* legal issue, is one where it is by no means certain that such issue will, in the event, actually arise, or is even likely to arise in the future. Such issues are defined as "contingencies", that is, events which may occur, but where it is unclear whether they will, or will not. When faced with prematurity, courts will, generally, refrain from expressing a conclusive view, especially on a hypothetical situation. It is not necessary to look to the United States for illustrations. They are to be found in our own case law. I refer to these other cases not as by any means determinative of the issue in the case but purely as illustrations of points made in legal argument in this appeal regarding the unprecedented "advisory" nature of the task the Court is asked to undertake.

McNally v. Ireland

74. In *McNally v. Ireland* [2011] 4 I.R. 431, the High Court had to deal with an application by a plaintiff seeking to challenge a provision which created a criminal offence for the sale of mass cards, even though he himself was not facing a prosecution. The court took the view that the plaintiff had *locus standi* to take the proceedings as the new offence could have impacted

upon his business of selling pre-signed mass cards. However, the court went on to hold that he did not have *locus standi* to make various arguments based on provisions of Article 44 of the Constitution regarding the wall of separation between Church and State.

75. The court held that the challenge brought by the plaintiff was based upon a series of contentions relating to the penalties which would apply upon conviction on indictment. But, the court concluded, this was premature and could not be determined. First, the offences in question were triable either way. Second, it would be purely speculative to allow the plaintiff to make the argument of disproportionality, as it could neither be assumed that he would face a prosecution, nor that it would be an indictment, nor that, upon conviction, a court would be minded to impose a severe sentence. As these were theoretical or hypothetical questions, the case could not succeed.

Blythe v. Attorney General

76. Much earlier in our legal history, in *Blythe v. Attorney General (No. 2)* [1936] I.R. 549 ("*Blythe*"), the plaintiffs, who had previously formed organisations which had been declared unlawful by the Executive Council of the Irish Free State, apprehending that they might again be prosecuted, sought a declaration that, under the 1922 Constitution, they were entitled to form a new body known as the League of Youth, "a disciplined unarmed association", in place of an earlier organisation, the Young Irelanders Association.

77. The action was based on the then Order XXV, Rule 6, of the then Rules of the Superior Courts, which provided that no action or proceeding should be open to objection on the ground that a merely declaratory judgment or order was sought thereby, and the court might make binding declarations of right whether consequential relief is, or could be, claimed or not. Speaking for the former Supreme Court, Johnston J. held that the fact that every individual was bound by rights and duties did not confer jurisdiction to make a declaration of rights in every case. A declaration must be binding. The Court held that it had no jurisdiction to make a binding declaration, or, even if it had jurisdiction, it would exercise its discretion to dismiss the action because the plaintiffs had not been "attacked". The Government had taken no action whatsoever to suppress the new association. (page 554). (See also *Lennon v. Ganly* [1981] ILRM 84).

U.S. Case Law

78. I refer to case law from other jurisdictions merely by way of illustration of the points just made. The proposition that a court will not, generally, deliver a judgment in relation to a speculative future contingency, is well established elsewhere in the common law world. What is generally needed is a real and substantial controversy admitting of specific relief through a

decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (*Lewis v. Continental Bank Corp*., 494 US 472, 477 [1990]; *North Carolina v. Rice*, 404 US 244, 246 [1971]; *AETNA Life Insurance Co. v. Haworth*, 300 US 227, 241 [1937].) (See, generally, Tribe, *America Constitutional Law*, 3rd Ed., Foundation Press.)

79. In *United States v. Fruehauf*, 365 U.S. 146 (1961), the Supreme Court of the United States refused to give an "*advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faceted situation*" embracing conflicting and demanding interests (p.157).

80. While the appeal before this Court lacked nothing in the clash of "adversary argument"; while the appeal is undoubtedly "multi-faceted", it must be said that through no fault of the parties there remains a distinct "lack of concreteness".

McDonald v. Bord Na gCon and Zalewski v. Workplace Relations Commission

81. The question of hypothesis or contingency can be seen through another prism. This Court has recently had the occasion to consider the features and characteristics of the administration of justice as identified earlier in *McDonald v. Bord na gCon* [1965] I.R. 217, and considered in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. While, in *Zalewski*, a broad interpretation to the five indicia of the administration of justice identified in *McDonald* was held appropriate by the majority, the decision is nonetheless useful when considering those indicia in the context of what the Court is asked to do in this case.

82. The first "*McDonald* criterion" is whether there is a dispute or controversy as to the existence of legal rights or a violation of the law. As in "concreteness", the underlying assumption, however, is that the dispute or controversy is to take place on the basis of *known, fixed facts*. As will soon become apparent, all the facts here are not "known or fixed". The Court is already constrained to deal with areas of hypothesis as to how the Agreement *might*, *potentially*, operate in a manner repugnant to the Constitution. But, as will be seen, the Court was presented with further material indicating that the issues for determination could surely be said to be "set" or fixed.

83. The second *McDonald* criterion is the identification or determination of the rights of parties, or the imposition of liabilities, or the infliction of a penalty. This, too, raises an issue as to what, in this instance, *are* the potential liabilities? It will soon be seen that there are

proposed amendments seem to place considerable limitations on the areas where there might be liabilities. But, as yet, these are only proposals.

84. The third *McDonald* criterion is the *final* determination of legal rights or liabilities, or the imposition of penalties. As it happens, this is a highly relevant consideration which must be considered later. It touches on whether judgments of the courts of this State on an issue might, in effect, be subject to review, or being set to one side by the decision of a CETA Tribunal.

85. Even more material is the fourth criterion, that is, the *enforcement* of rights or liabilities as found, or the imposition of a penalty by the Court, or by the executive power of the State which is called in by the Court to enforce its judgment. The question of the potential enforcement of a hypothetical CETA award running at variance with a judgment of the courts of this State is central.

86. So, too, is the fifth criterion, which is the making of an order by a court which, as a matter of history, is an order characteristic of the courts in this country. The question here is whether the courts in this State could, or should, give what it is suggested might be tantamount to automatic recognition of a final CETA awards. Whether narrowly or broadly, these are helpful indicia on the issue of justiciability. Those identified above pinpoint the profound difficulties facing this Court in reaching a concluded view both on jurisdiction and the exercise of discretion in relation to the Agreement. But the questions of want of definition or concreteness do not end there. One of the most difficult of issues concerns how, and in what circumstances, the operation of CETA Tribunal's rights be subject to review and renegotiation by a Joint Committee. Here, events after the appeal provide an illustration.

Proposals to Interpret CETA

87. At the hearing of the appeal, the court was provided with what the parties understood to be a final text of the Agreement. But even whilst the appeal was pending, it was brought to the attention of the Court that, in fact, further negotiations were taking place. This concerned the preparation of a new text of certain provisions intended to clarify certain aspects within CETA. Neither the parties, nor the Court, were aware of this fact until after the hearing concluded.

88. It is an unsatisfactory situation where a court is asked to deliver a final judgment on the text of the Agreement, the repugnancy of what is challenged, but where parts of the text are still evolving and are not yet agreed. It is still more unsatisfactory when it cannot even be said these new proposed interpretations are actually under negotiation between the parties. Matters have not gone that far. Instead, the proposed *de facto* amendments (by way of interpretative ruling from the Joint Committee under Article 26.1(5)(e) CETA) remain under consideration

by one side, that is, the European Commission and its member states, with the intention that, subject to the views of that side, the proposals may then become part of a renegotiation of an agreement, where the text of the Agreement itself makes provision for a review of its operations, including a review of essential terms which can be defined, or reviewed.

89. The Court received further material from the appellant without objection from the State. Both sides are to be commended for the sensible approach. But why these issues have arisen, now, has not been fully explained by the European Union, or any other body. In fairness, it must be said that many of the amendments appear to arise from the Paris Accord on Climate Change. But, as appears from a recent communication from the European Union, which was brought to the Court's attention after the appeal, such essential terms, including not only "*indirect expropriation*", but also "*fair and equitable treatment of investors*", are apparently now under reconsideration, and will, subject to ratification by the EU member states, be the subject of further negotiations with Canada.

90. Further consideration is also to be given to the capacity of the parties to regulate, and to give judicial decisions in accordance with, their constitutions upon such vital matters such as climate, energy and health. All of these may, potentially, raise questions of a further important term to the Agreement, that is, what is a "*legitimate public objective*", which might provide a defence to an enforcement claim.

91. But the EU communication goes further. It reads that the text should be revised in light of the commitments of the contracting parties under the Paris Agreement. Thus, it is said, an investor should expect that the contracting parties will adopt measures that are designed and applied to combat climate change, or address present or future consequences of climate change measures, of mitigation, adaptation, reparation, compensation, or otherwise. When interpreting the provisions of the Investment Chapter, the Tribunal should take due consideration of the commitments of the parties under the Paris Agreement and their respective climate neutrality objectives.

92. Thus, it is proposed that, subject to agreement, under Chapter 8 the parties are to confirm their understanding that the provisions of that Chapter concerned shall be interpreted and applied by the Tribunal by taking due consideration of the commitments of the parties under the Paris Agreement and their respective climate neutrality objectives, and in a way that allows the parties to pursue their respective climate change mitigation and adaptation policies.

93. It is now proposed that Article 8.39.3 of CETA shall be interpreted for greater certainty in the calculation of monetary damages, to take account of an unreasonable failure by a claimant to act subsequent to the breach of the Treaty, where it could have reduced any

damages arising, or of the unreasonable incurring of expenses by the claimant subsequent to a Treaty breach which results in increasing the size of its claim, or in the contribution to the injury allegedly sustained by that claimant by wilful or negligent action or omission of the investor or any entity in relation to whom reparation is sought.

94. All these are fundamentally important questions. They may affect whether state parties are entitled, and their capacity and willingness, to legislate on such issues. They may affect how and when they may legislate, as they undoubtedly concern the potential adverse consequences of such investor claims, as a result of legislation, if member state parliaments enact provisions which may be detrimental to investor/claimant interests.

95. But the proposals also go to the issue of whether, on an enforcement claim or otherwise, courts in member states may have capacity and jurisdiction to deliver decisions on questions such as climate, energy and health which are now of prime importance to the international community, and which may afford a defence to claim.

96. All these proposals come from the Joint Committee created by CETA, which, it is said, may address matters of interpretation of terms. These negotiations have taken place between the European Commission and the Federal Republic of Germany. A draft position paper has been prepared. But the text of these proposed interpretations is still not fully agreed by the member states. The member states are now called upon to approve the text, in order that they may become the subject of further good-faith negotiations with Canada. The very fact that it is suggested that CETA may be subject to potential interpretations in this way gives rise to concerns as to the extent to which what is presently written, or what may be agreed in the future, may be subject to later, unforeseen, alterations.

97. As outlined, the culmination of these negotiations will be pronounced at the level of a political declaration by the EU, the member states and Canada, which is to have the effect of further defining the terms of the Agreement. (Statement from the European Commission 29th August, 2022, and later, documents made available to the Court on 5th October, 2022 concerning Proposal for a Draft Decision of the CETA Joint Committee with the aim of Interpreting Certain Standards in the Investment Protection Chapter of CETA.) While one can see that many would see such amendments as desirable, none of this material was the subject of legal submissions in this Court. Again, a question arises as to substance and form. Despite all the appearance of form of an adversarial constitutional process, the appeal has inexorably acquired features of an advisory opinion.

98. As it happens, it may well be that the outcome of such negotiations may allay apprehensions expressed by critics of the Agreement. But the very fact that the position is still

so fluid renders it still more difficult for this Court to come to a final judgment. For all the Court is aware, there may be still yet further negotiations on these issues. The concerns raised may be shared by Canada.

A Comparison with Earlier Case Law

Crotty

99. A consideration of earlier relevant authorities provides some illustration by way of contrast to the unprecedented nature of the issue in this appeal. In *Crotty v. An Taoiseach* [1987] I.R. 713, the plaintiff sought a declaration that any purported ratification of the Single European Act would be void, having regard to the provisions of the Constitution. What the Court was invited to consider there was highly illuminating, by contrast to this case. In *Crotty*, the matters before the Court were utterly specific.

100. This Court held that so much of the Single European Act ("SEA"), which was to become law in 1986, was properly within the constitutional licence of Article 29 s.4, sub-s. 3. This authorised the State to accede to a living, dynamic European Community. The proposed changes to qualified voting in the European Council had already been anticipated in the establishing treaties after the transitional period. The Court also held that the allegedly new objectives of the Single European Act brought into Irish law would amount to no more than a specific enumeration of the objectives of the establishing treaties, and that the proposed new Court of First Instance did not in any way extend the primacy of the Court of Justice of the European Communities over the Irish courts, beyond that already authorised by Article 29, s. 4, sub-s. 3 of the Constitution.

101. But, on the issue of Title III, being the treaty whereby Ireland agreed to adopt its foreign policy positions within the framework of European political co-operation, not being part of domestic law incorporated by the Act of 1986, this Court held by a majority that, since Title III of the SEA would bind the State to concede part of its sovereignty in its relations with other states, and to conduct foreign policy without regard to the requirements of the common good, the ratification proposed by the government was impermissible in the absence of authorisation by the Constitution.

102. The contrast with this case is clear. The Court was in a position to deal with the relevant provisions of the SEA, the legal parameters of which, had been identified. But the Court was also in a position to consider, on concrete facts, the circumstances and consequences of Title III SEA, in the light of the actual constitutional repugnancy, rather than something hypothetical.

Pringle

103. By further contrast, in *Pringle*, insofar as material to this case, this Court had to address a decision to enter into the treaty establishing the European Stability Mechanism, which pursued a *clearly defined policy to which the government had agreed*, which specified a stability mechanism of implementation of that policy, and a maximum financial contribution. On that basis, the Court held that this was an exercise in, rather than abdication of, sovereignty. Again, the factual and legal parameters were clearly defined.

104. I add, in *Pringle,* two members of the Court, O'Donnell J. and Murray J., held that a court should be slow to take a step which would effectively amount to a substitution of its decision for that of the Executive, even if only temporary and suspensive in effect. They pointed out that the proper functioning of the constitutional balance required that considerable weight be accorded to the constitutional interest in ensuring that the Government performed its executive functions in a way it considered appropriate, and in a way for which it was accountable to Dáil Éireann, and through it to the People.

105. In both *Crotty* and *Pringle*, this Court was presented with a clear, concrete, set of facts, all of which were clear in their meaning and foreseeable effect. These were justiciable issues in the *McDonald* sense. The Single European Act was clear in its terms. The European Stability Mechanism was clear in its operation and consequences. This is by contrast to the position in this case, where the Joint Committee may meet from time to time to consider potential alterations to CETA.

106. The case, as advanced at present, is different from *Crotty* and *Pringle*. Many, but not all, of the true questions which truly arise are not in relation to the *text* of the agreement, but, rather, how, *possibly*, as opposed to *probably,* that text might be altered or applied. As matters stand, the Court is invited not only to proceed and decide upon the basis of the text, but of contingency.

The Form of Remedy: Declarations

107. This situation also presents difficulty on the form of remedy sought. This point is presaged by the reference to *Blythe* above. Now in this appeal, the appellant seeks a series of *declarations* on repugnancy to the Constitution. This is the gist of the entire case. On a number of occasions, this Court has had the occasion to consider the appropriateness of whether a declaration, in essence an equitable remedy, should be granted. Obviously, a declaration may be granted concerning the constitutionality of identified sections or provisions in legislation, *where the facts and subject matter can be clearly identified.* A declaration may be granted in a

matter of public interest. It is very arguable that the jurisdiction to grant a declaration by a court is less rigorous than at the time of *Blythe*. (See Order 19, Rule 29, RSC 1986.)

108. But for a declaration, the question before a court must be a *real* question, not one which is *theoretical* (*Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438). It is abundantly clear that, in considering whether to grant a declaration, a court should be satisfied that there is good reason for so doing (*Transport Salaried Staffs' Association and Others v. Córas Iompair Éireann* [1965] I.R. 180; *Omega v. Barry*, [2012] IEHC 23).

109. But many of the contingencies in this case are indeed theoretical, which in normal circumstances would speak against the granting of a declaration. It does no injustice to the appellant's case to suggest that, insofar as Article 34 is concerned, the case is based on a theoretical possibility. That is a scenario where the courts of this State were called upon to enforce a CETA award which is not in accordance with public policy of the State, or a prior judgment of the courts of this State that, on the same facts, an investor is not entitled to an award.

110. Such a hypothesis makes many assumptions. It presumes that, for some unspecified reason, CETA arbitrators might set a judgment of this Court to one side, and elect to treat the fact of such a pronouncement as of no significance. It is worth posing the rhetorical question, in what precise circumstances is it suggested that such an eventually "will, actually, occur", as opposed to "might, possibly, arise"? One cannot preclude such a possibility, I concede. The question is whether such a contingency is possible as opposed to probable or evident from the text itself. This goes to the question of whether the appellant has proved his case.

111. This is not a situation where the appellant lacks *locus standi*. What is necessary, rather, is to consider the outlines of the appeal in order to determine whether there is a real justiciable controversy capable of giving rise to an order bearing on the constitutionality of the Agreement. It is, I suggest, far easier to envisage a real situation where an Irish court would simply be called upon to enforce a CETA award which is consistent with the public policy of this State, just as the courts, on occasion, are called on to enforce a foreign arbitration award under the Arbitration Act, 2010. The High Court judge very fairly permitted the appellant to argue on the basis of hypothesis. But she concluded that the appellant had not *proved* his case. I think that is a most important finding, to which I will return later. I am satisfied that, on the basis of the text itself, and the question of probable interpretation or application, the Court can proceed on the basis that the issues are justiciable. But that there is a significant hypothetical aspect to the appeal cannot be forgotten.

SECTION II - ARTICLE 15

112. With this preface in mind, I come now to consider the first of the two main issues before this Court, that is, Article 15 and "legislative chill".

113. But, here, the theoretical basis of the case emerges quite starkly. When, and in what circumstances, might the legislature be inhibited from passing legislation contrary to an investor's interest? This would require much reflection. For the reasons set out earlier, it seems to me that the question arising under Article 15 of the Constitution presents a further real constitutional difficulty.

114. Under Article 29.4.2, the State may avail of any method or procedure used for the purposes of membership of any "*group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern*". At the time of its enactment, this was an oblique reference to both the British Commonwealth and the League of Nations. The provision, in effect, allowed the State to continue to have diplomatic and consular representatives formerly accredited by the British Crown, which continued until 1949 when the Republic of Ireland Act, 1948 came into force. Since 1949, Irish diplomatic and consular representatives are accredited by the President of Ireland acting on the advice of the Government.

115. Articles 29, ss. 1 to 3, set out broad declarations in relation to Ireland's relationship with international law generally. Under Article 29.1, Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. Under Article 29.2, Ireland there affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. Under Article 29.3, Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. But, again, it is relevant to ask, is the Court being invited to consider something actual or theoretical? In my view, it is the latter. This, in itself, would be determinative.

116. But I add, I am not at all convinced that the question of "legislative chill" is one appropriate for legal determination by a court, or, in fact, goes to the constitutional issues truly at stake. This is not in any way to minimise the importance of that issue. It is, rather, a question of constitutional allocation of roles. It is, of course, necessary to make a determination of law on the question of jurisdiction. The Court has *jurisdiction* to determine whether what is before it is a matter upon which it should make a judicial determination. But, both as a constitutional requirement under Article 15 and, were it necessary, as a matter of discretion, I would also

conclude the Court should decline to deal with this aspect of the claim as being constitutionally inappropriate.

117. Whether CETA represents an inhibition on the Oireachtas legislating has not been shown in a concrete way. Whether it *might* be such an inhibition, as well as being hypothetical, is also, very arguably, a political question, that is, a matter appropriate for determination by the Oireachtas itself. Even the description of "legislative chill" raises the issue of jurisdiction and hypothesis. What legislation might be affected? By what standard should the question of legislative chill be measured? The case simply is that, by a consideration of the circumstances and consequences of legislation, perhaps upon an environmental issue, some members of the Oireachtas might feel constrained not to legislate for fear of financial consequence upon the State on foot of a substantial CETA award.

118. The principle of separation of powers and its jurisprudence must be understood in context. It cannot be understood without a consideration of the precise scope of the High Court order under appeal in T.*D. v. Minister for Education* [2001] 4 I.R. 259. (See, Hickey "*Reading TD Down*"; and Kenny "*TD v. Minister for Education, Constitutional Culture, and Constitutional Dark Matter* " (2022), Irish Judicial Studies Journal Vol 6(3)). But it does not require a rigid interpretation of Article 15 to conclude that, at the level relevant to this case, there is a fundamental distinction between the courts permissibly determining whether policies of the Executive, or Oireachtas, were compatible with their legal and constitutional obligations, and, by contrast, a court impermissibly "taking command" of such matters so as to usurp a core constitutional function of another organ of State. Such difficult issues would fall to be determined on a case-by-case basis.

119. It is not, in fact, always possible to draw a bright-line distinction between the powers of the Executive, Oireachtas and the judiciary. In this case, and others, there is the possibility that the actions of one organ of government may affect the activities of another. This appeal is not, however, a situation where the Court must address some vexed issue concerning the rights of an individual who, as a result of government action or inaction, is placed in a position which is fundamentally detrimental to that person's rights. This part of the appeal, rather, deals with whether what can only be seen as a core function of a vital organ of government, that is, the Oireachtas, will, or might, refrain from legislating, in certain areas in the light of CETA. Irrespective of the hypothetical nature of the question, it appears to me that this is also a political question.

120. It is one for the democratically elected members of the Oireachtas to consider, assess and determine. In the truest sense of the word it would appear to be a "political question", upon

which the Court should not express a view. It is a matter, rather, that falls for determination within the domain of deputies elected by the People within their constitutional domain, and the members of the Senate, applying their political judgements as representatives of the People, as to advisability of such legislation and its consequences.

121. A conclusion that this issue lies to be determined in Kildare Street, rather than Inns Quay, does not in any way seek to diminish the political importance or significance of the question. It is, rather, a matter of a court determining a legal question, that question being whether the point which is canvassed is one which does fall properly within the domain of the courts. The focus now turns to Article 34, again necessarily asking the question as to whether the issue of constitutional repugnancy is mature or appropriate for determination.

SECTION III - ARTICLE 34

122. Article 34.1 provides that the administration of justice is committed to courts created under the Constitution. The courts fulfil that mandate by confining themselves to the resolution of actual legal controversies. Here, the case moves from the realm of pure hypothesis. In this appeal, the Court has been presented with some rather more concrete illustrations of the type of arbitral issues that have arisen in relation to the effect of bilateral treaties.

Micula v. Romania

123. I now deal briefly with case law more extensively outlined elsewhere. *Micula v. Romania* [2020] UKSC 5 concerned a claim brought by Swedish investors against Romania under a Sweden/Romania bilateral investment treaty. This provided for an arbitral tribunal operating under ICSID arbitration rules. The Swedish investors maintained that Romania had wrongfully withdrawn certain tax advantages which they had been promised, but which were then withdrawn after Romania's accession to the European Union in 2007. The arbitral tribunal found in the claimants' favour, concluding that the withdrawal of tax incentives constituted a breach of the fair and equitable treatment standard provided for in the Treaty. Romania was ordered to pay €178 million in compensation.

124. The claimants sought to have the award registered and enforced in the United Kingdom, along with a variety of other jurisdictions, apart from Romania. The matter came before the Supreme Court of the United Kingdom. In their joint judgment, Lord Lloyd-Jones and Lord Sales considered the question as to whether the ICSID scheme, under which the agreement was made, was such that, once the authenticity of an award had been established, a domestic court could not re-examine such an award on grounds of national or international public policy, but rather could confine itself only to ascertaining the award's authenticity.

125. The Supreme Court of the United Kingdom held that Article 53(1) of the ICSID Convention provided that awards are binding on parties, and are not subject to an appeal, or to some other legal remedy, except such remedies as provided for under the ICSID Convention. The court held the point was made explicit in Article 54 ICSID. The court went on to compare and contrast the narrow basis for non-enforcement in the case of ICSID awards, by contrast with the New York Convention, where domestic courts have a wider discretion with regard to enforcement.

126. *Micula* presents a somewhat clearer and relatively concrete picture which, at least, allows the Court to grapple with the vexed issue of the near automatic enforceability of an arbitral agreement. It is the type of issue which should afford pause for reflection. One must ask oneself whether such a contingency is probable or merely possible.

127. It is much easier to envisage a "normal" determination of a CETA Tribunal which determines issues which had not been decided by a court of this State. It is significantly more difficult to conceive how the implementation of such an award would raise issues of contrary to Article 34. What arose in *Micula,* does however illustrate some of the possible difficulties that could arise from CETA.

Criticisms

128. One can of course criticise the concept of CETA as well as its text. It can be said that both in the EU and Canada, foreign investors already have extensive protection through the respective legal systems. The Agreement raises questions as to whether it is truly necessary, and whether the proposed artificially isolates trade issues from other questions which could potentially arise in the administration of justice in either Canada, or EU member states. ICSID awards would not merely encompass matters such as workers or consumer rights, or the observance of health and safety standards for workers. The CJEU sought to address these criticisms in Opinion 1/17.

CJEU Jurisprudence

129. The judgments of my colleagues refer to other relevant case law as well as Opinion 1/17. Here, I prefer to focus on two cases alongside the Opinion. They are: *Slowakische Republik v Achmea BV*, Case C-284/16 ("*Achmea*"), where the CJEU found Article 8(2) of the Bilateral Treaty between the Netherlands and the Czech and Slovak Federative Republic were incompatible with Article 267 and 344 TFEU; and *Republic of Moldova v. Komstroy LLC*, Case C-741/19.

***Achmea*, Case C-284/16**

130. The first CJEU case for consideration is *Achmea*. Achmea was a Dutch insurer which had operated in the Slovakian market. Slovakia, in part, reversed measures taken to liberalise its health insurance market. The effect of these measures was to prevent the distribution of profits derived from Achmea's insurance business in Slovakia.

131. Achmea brought arbitration proceedings, the final result of which was to award the claimant, Achmea, €22 million. Slovakia brought proceedings in the German Court seeking to set aside the award as contravening EU law. It submitted that the arbitration lacked jurisdiction, as the arbitration clause contravened Articles 18, 267 and 344 TFEU. The case was eventually referred to the Court of Justice, which found that Article 8(2) of a Bilateral Treaty between the Netherlands and the Czech and Slovak Federative Republic was incompatible with the named TFEU Articles.

132. The court emphasised that an international agreement cannot affect the allocation of powers under the EU Treaties, and the autonomy of the EU legal system. An arbitral tribunal, which had been provided for in the agreement, was neither an EU body, nor a national court, nor a tribunal of a member state, nor a court common to several member states. A determination of such an arbitral tribunal was not subject to review by a court of a member state, to the extent that would allow a reference to the Court of Justice under Article 267. Therefore, such arbitral tribunal, established under the Bilateral Treaty, could not ensure that disputes were solved in a manner that safeguarded the full effectiveness of EU law. The Bilateral Treaty, therefore, violated EU law.

133. It might have been thought that observations of this type might have applied, *a fortiori*, to CETA, but in Opinion 1/17, the CJEU considered otherwise.

The CETA Recitals

134. Prior to consideration of the Opinion, some observations may be useful. In EU law, it is to be expected that any Directive or Regulation will be interpreted having regard to its objectives as set out in Recitals. The Recitals to CETA contain highly important statements of principle. They include that the Agreement seeks to establish clear, transparent, predictable and mutually advantageous rules. It is said to recognise the importance of international security, democracy, human rights, and the rule of law.

135. Importantly, the recitals recognise that the provisions of the Agreement preserve the rights of the parties *to regulate* within their territories, and the parties' flexibility *to achieve legitimate policy objectives* such as public health, safety, environment, public morals, and the promotion and protection of cultural diversity.

136. The Agreement recognises that the provisions to protect investments and investors with respect to their investments are intended to stimulate mutually beneficial business activity, *without undermining the right of the parties to regulate in the public interest within their territories*. The Recitals reaffirm a commitment to promote sustainable development. The Agreement is to be implemented in a manner consistent with the *enforcement of state parties' respective labour and environmental laws*, so as to ensure the level of labour and environmental protection and building upon their international commitments on labour and environmental matters.

137. These Recitals must be taken as containing guidance for the interpretation of the entirety of CETA. Were it to be a situation where a particular CETA award stepped entirely outside these principles, issues would arise in relation to its validity or compliance. Were a CETA Tribunal to make an award which stepped entirely beyond those principles, it would raise significant issues regarding enforcement in a domestic court, and as will now be seen before the CJEU.

Opinion 1/17

138. I turn to Opinion 1/17. Its title must be emphasised. It was an *Opinion*. By contrast to the general position which obtains in this State, the CJEU does have jurisdiction to issue advisory opinions. It has done so on a number of occasions.

139. But the observations of the court bear close comparison with the proposed amendments to the Agreement. Echoing *Achmea*, the court observed that it would not be permissible for the EU to enter into an agreement which had the effect of adversely affecting the autonomy of the EU legal order. The court warned that, if the CETA Tribunal or appellate tribunal were to have jurisdiction to issue awards, which found that the treatment of a Canadian investor was incompatible with CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled to pay damages to a claimant investor, the achievement of that level of protection might have to be abandoned by the Union. This is a very complex finding. In simple terms, it raises questions as to the circumstances in which CETA might not be consistent with the EU treaties.

140. The CJEU's response to CETA was, in my view, more guarded than might be thought. The court observed that the resolution of an issue such as that envisaged would depend upon a close analysis of the arbitral structure, including the appellate body, the method of appointment and choice of arbitrators, and, in particular, the grounds upon which such an arbitral body was entitled to find a breach of the agreement, and the remedies which could be awarded. Then the

court observed that the possibility that such an issue could be consigned to a separate adjudicative body could mean that, at least in theory, the possibility of an outcome with which a national or Union court might disagree, might be enforceable. This was a very important observation. The Opinion requires and deserves slow and careful reading. The provisos contained there are relevant to the potential issues which *might*, not *will*, arise in the future.

141. A number of factors must be borne in mind. These include that the provisions of CETA do not appear intended to provide a first port of call to a disappointed investor. Rather, they are to be understood as provisions of last resort to be availed of when a legal relationship between two states has been fundamentally undermined. Second, the agreement is limited as to categories of parties, investments, and remedies. An investor is entitled to recover only when there is loss, which, at the level of principle, would arise even if measures tantamount to expropriation were challenged in Irish law. On those assumptions, it is difficult, but it is not impossible, to conceive that the existence of such a jurisdiction would impinge on Article 34 considerations.

***Komstroy v. Moldova*, Case C-741/19**

142. A further indication of the "reach" of EU law in the area of bilateral treaties can be gleaned from the decision in *Komstroy*. As explained earlier, in *Achmea*, the CJEU had held that the arbitration clause in a bilateral investment treaty had an adverse effect on the autonomy of EU law. Komstroy was a Ukrainian company. It sued a Moldavian public entity. In *Komstroy*, the Luxembourg court adopted a somewhat similar approach in relation to the Energy Charter Treaty, which was in question in *Komstroy*.

143. The court held that an investment arbitration, made under that treaty, between an EU investor, and an EU host state, was non-compatible with EU law. Adopting the same reasoning as in *Achmea*, having examined the complex procedural background, the court addressed the question of jurisdiction.

144. Contrary to the submissions of a number of state parties, the court held that it had jurisdiction to interpret the treaty, despite the fact that the parties to the case were non-EU member states. It did so upon the basis that the EU itself was a signatory to the Energy Charter Treaty, and to forestall any possible future differences in interpretation. The determination was in order to ensure that there would be legal certainty. The court referred to the fact that the seat of arbitration was Paris, and therefore the law of the forum was French, and therefore EU law. Significantly, *Komstroy* involved two states which were not even members of the European Union. But the CJEU held that the arbitral tribunal, established under the Energy Treaty, was

required to interpret and apply EU law, and therefore the issue was sufficiently connected to the EU legal order for the CJEU to have jurisdiction.

145. As in *Achmea*, the court held that tribunals of the type envisaged in the Energy Charter Treaty were not subject to the same protections for the vindication of EU law through EU courts. Importantly, the court drew a distinction in *Komstroy* between commercial arbitration, on the one hand, and investment arbitration, on the other. It held that commercial arbitration clauses were unexceptionable, in the sense that they were freely and voluntarily entered into by the parties. Per contra, however, investment arbitrations did not have that same status. For the purposes of this judgment, it is sufficient to say that, on the basis of *Achmea* and *Komstroy*, the jurisdiction of the Court in Luxembourg to interpret EU law has a very wide scope indeed.

EU Law in its broader context

146. But it is also fruitful to consider the nature of EU law more generally, especially with regard to foreseeability and remoteness of a potential conflict between CETA and EU law or the law of member states. The decision in *Van Gend en Loos NV v. Netherlands Inland Revenue Administration*, Case 26/62 established that the EU legal order is autonomous from both domestic and international law. In Opinion 1/17, the CJEU considered this question of legal autonomy from two standpoints. First, in an echo of a decision of the Federal German Court in the "*Solange"* case law, the CJEU reaffirmed its jurisprudence according to which international agreements that establish an international dispute settlement body with binding jurisdiction over the EU, are permitted by EU law, *as long as* they do not affect the autonomy of the EU legal order (Opinion 1/17, paras. 106-107). Thus, the arbitral system could not possess a competence to interpret any other provisions of EU law than those of CETA.

147. Second, in Opinion 1/17, the court held that the jurisprudence of an arbitral court system must not prevent EU institutions from operating in accordance with their constitutional framework pursuant to EU law (Opinion 1/17, paras. 109 to 117). This is a very significant statement indeed. It was upon that basis, the court concluded that there was no incompatibility between the arbitral system envisaged under CETA, and the requirements of EU law, albeit a CETA Tribunal would consider the domestic law of a party, including EU law, "as a matter of fact" (Article 8.31). The applicable law clause would also apply to an investment court established under CETA to follow the prevailing interpretation of domestic law by the national courts of the respective party. It provides that the consideration of domestic law by the investment court has no binding effect on national courts and authorities.

148. Again, upon that same basis, that CJEU opined that a CETA arbitral court could apply EU law only as a matter of fact; would be required to follow the interpretation of EU law by

the CJEU; and would not itself render any binding interpretations of EU law. Thus, and importantly, the court found that an investment court's interpretative power would be confined to the provisions of CETA. An investment court would not be entitled to call into question the level of protection of public interest determined by the Union following a democratic process.

149. In the view of the CJEU, no CETA decision could have the effect of impinging upon the autonomy and protections provided for in EU law. In particular, an investment court would have no jurisdiction to declare the level of protection of public interest under EU law as incompatible with CETA's investment protection standards.

150. It is important to note that the Opinion 1/17 ruling was premised upon the proposition that the consideration of EU law as a matter of fact could not lead to any discordance between EU law and that of a CETA investment court. As a consequence, a national court in this State, faced with a question of enforcement of a CETA award might well find itself in a situation where, under Article 267 of the Treaty, it would be constrained to seek a preliminary ruling of the CJEU on any relevant interpretation of EU law. The Treaty on the Function of the European Union requires EU national courts, whose decisions cannot be challenged by a judicial remedy under national law, to bring matters of EU law that are relevant for its final decision before the CJEU for its opinion.

151. It would appear to follow, therefore, that an Irish court, facing a question of EU law relating to the enforcement of an ICSID award, might well be obliged by EU law to halt the enforcement proceedings and request a preliminary ruling under Article 267.

152. Furthermore, the TFEU's Protocol on the Privileges and Immunities of the European Union states that the property assets of the Union are not the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice. (TFEU Protocol No. 7 on the Privileges and Immunities of the European Union, Article 1). (See Butz, *Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union*, Volume 7 (2020-2021) No. 4 McGill Journal of Dispute Resolution). These important observations might well allay a number of apprehensions and concerns regarding the potential effect of the proposed CETA arbitral system.

Enforceability of CETA in this State

153. I turn then to enforceability. I accept that, at the level of hypothesis, this is an area of legitimate concern. In the High Court, Butler J. held that because of its international nature, disputes arising under the terms of CETA could never fall within the exclusive jurisdiction of the courts of any of the parties. Consequently, she held, ratification of CETA, and the consequent submission by the State to the jurisdiction of the CETA Tribunal, did not reflect a

subtraction of jurisdiction from the Irish courts. This was not just because the jurisdictional issue was one which the Irish courts had never exercised, but also because the jurisdiction was one which could neither be created nor conferred by the State alone.

154. Clearly, the Irish Constitution does not, and could not, confer on the Irish courts a jurisdiction over disputes occurring outside the State, and which do not arise under Irish law. The CETA disputes which may, generally, fall to be determined by a tribunal are indeed capable of being characterised as non-justiciable by our courts, not simply because they are inherently incapable or unsuited to judicial resolution within this State, but, rather, and in addition, because the courts would not have jurisdiction to apply the law to which they were subject. Save in the case of identified exceptions, the administration of justice is necessarily territorially limited to the resolution in this State of disputes under the law created by, or under, the Constitution.

155. I would accept, as was stated in Opinion 1/17 CJEU, that CETA was framed so as not to have direct effect within the legal system of the parties, and that a CETA Tribunal was separate from, and outside, the judicial system of the parties. This means that disputes arising under CETA, which a CETA Tribunal might determine, would not, generally, be justiciable as a matter of Irish law.

156. I would also acknowledge that, in the context of international business, litigants would frequently have a choice of jurisdiction, including within the European Union, under Regulation (EU) No 1215/2012 ("Brussels I recast") . Generally, the fact that a litigant might opt to sue in the jurisdiction of one state, in preference to another, would not mean that there has been a subtraction of jurisdiction from the courts of that state which would not be determining the dispute.

157. As pointed out earlier, the appearances are that, now, the negotiating parties are aware of the fact that there are, or may be, questions of definition, and application, in the areas such as climate, energy and health policy, so as to achieve legitimate public objectives, and in the prevention of investor misuse of state dispute settlement mechanisms. The correlation between the recent announcements by the Commission, and what is to be found in the Court of Justice in Opinion 1/17, does not need repetition. The relevance of these features self-evidently also relates to concerns of the appellant in bringing this case.

Contingency

158. But a court must not be naïve. Courts know that there is such a thing as an evolutive, or expanding jurisdiction. That question, in fact, does touch on precisely the type of issue which *might,* potentially*,* cause entirely legitimate constitutional concern, were a court in this State

called upon to give "near automatic enforcement" to a CETA award. Here I choose my words carefully. Arguably, there *might* be the *potential* for a conflict between a CETA award and a prior judgment or decision of this Court, or other courts in this State, on issues, such as climate, energy or health measures aimed at achieving legitimate public objectives, or perhaps in some other category entirely.

Enforcement

159. Speaking then as a hypothesis, and at the level of national law, one cannot deny that there is, at least, some potential for conflict between the powers and duties vested in our courts under the Constitution, and the jurisdiction of a CETA Tribunal. The fact that CETA could be found constitutional at present does not preclude the possibility that a different situation, changed effect, events, attitudes or decision-making, might take place which would give rise to unconstitutionality.

SECTION IV - CONCLUSION

160. Whether this appeal succeeds cannot, however, depend on hypothesis. The appellant's case can only succeed either by showing unconstitutionality on the text or face of the Agreement, or the probability of unconstitutionality. On *balance*, I do not think the various theoretical hypotheses are sufficiently likely so as to provide a basis upon which there should be a referendum.

Observations

161. But this does not entirely conclude the matter. The difficulty facing this Court, and perhaps others, is that, while the text of the Agreement may be unexceptionable from a constitutional point of view, it might contain the potential for conflict between a CETA Tribunal award, and a final decision of the courts in this State. While this may be regarded as hypothetical, or even fanciful, in law, prudent foresight should prevail over regretful hindsight.

162. The question of the enforcement of rights and liabilities by the executive power of the State is fundamental. In general, one can envisage that a CETA arbitral Tribunal will not pose a constitutional difficulty. While it is not likely or probable, however, it is possible to envisage a situation where, being dissatisfied with a final decision of the courts in this State, a Canadian investor might seek to avail of the CETA process, thereafter obtaining an award which runs counter to a final decision of the courts in this State. On one "malign scenario", create a direct challenge to Article 34.6 of the Constitution, which provides for finality.

163. It is not open to a government, or any other body, to amend the Constitution of this State, simply by an international treaty. The Agreement is not necessitated by membership of

the European Union, and, therefore, does not come within Article 29.4 of the Constitution. To permit an amendment of the Constitution *sub silentio* by a treaty would, now and in the future, be to offend against a fundamental feature of the constitutional identity and sovereignty of the State. Were it to be found that some action or actions, or decisions on foot of CETA did offend against fundamental constitutional values or the constitutional identity of the State, such as judicial independence, or the finality of judgments, a court, acting under the Constitution, would have no alternative but to refuse to enforce such an award.

164. What is in question here may be a remote contingency. But, as the case law in *Micula* and *Achmea* illustrates, such issues might arise, albeit rarely. A court should be very slow to allow a situation to crystalise into a clear cause of action in a situation of this type, when a legal matter has, by then, become so "ripe" or mature, that it is also critical; and when there may be an alternative course of action which could forestall such a situation ever arising.

165. There are, of course, powerful reasons for assuming that a CETA Tribunal proceeding could hardly ignore a decision of the courts of this State as to the law of this State, or the CJEU on EU law. The intended composition of the arbitral tribunals, including significant representation from member state parties, would, and should, have the consequence of preventing such a contingency. So, too, the proposed amendments described earlier. But there have been instances in the past where arbitral tribunals have taken a broad view on jurisdiction. Some awards have run into very substantial figures. The question is whether it has been shown this is likely or probable, such as would warrant a declaration of repugnancy? Despite the forceful arguments of counsel, I am not convinced.

166. I do not believe that the answer to such a possibility is that the Government would be responsible to Dáil Éireann under Article 28.4 of the Constitution. Nor is the answer that international agreements to which the State becomes a party should simply be laid before the Dáil. Nor can it be said that such a potential conflict is one of the inevitable consequences of entry into an agreement such as CETA. Were any of these to be so, quite profound constitutional difficulties would arise, as the Treaty entered into without a referendum might, potentially, have the effect of a *de facto* amendment of the Constitution regarding finality of judgments of a court in this State.

167. Were it to be the situation that the provisions of CETA in a given case compelled the payment of prohibitive penalties, in circumstances where, contrary to the concluded view of an Irish court, an arbitral tribunal, or an appeal body, determined that measures adopted in this State were, contrary to CETA, then a question would arise as the power of the Government of this State to give, or to have given, effect to any such agreement, even if it was agreed with

another state party. The treaty power is generally constrained by the Constitution. On occasion, this has led to challenges to the exercise of that power. The enforcement of orders is, unavoidably, part of the exclusive domain of the courts.

168. Were it also to be shown that there was an alienation of sovereignty, without specific constitutional amendment for that purpose, then Article 29.4.6 could not provide an answer. The extent of sovereignty which can be transferred must, ultimately, lie with the People. To paraphrase a decision of the United States Federal Supreme Court, neither a treaty, nor an executive agreement, can confer power on the Oireachtas, or any other branch of government, which would be free from the restraints of the Constitution. (See *Reid v. Covert*, 354 US 1,16 [1957].) In *Pringle*, Clarke J. and O'Donnell J. made observations to similar effect. A treaty could not vest in the Executive or the Oireachtas authority to circumvent the structural limitations set out in the Constitution itself. This does not, of course, mean that there is a limitation on the power of the Executive to enter into treaties not involving a transfer of sovereignty or decision-making power.

169. While *realpolitik* considerations will obviously now arise in the negotiations, it must be understood that states with written constitutions must deal with legal issues on the basis of that constitution, which include rights and duties which were hard-won. Matters going to the constitutional identity of the State cannot be abrogated by a treaty. Legitimacy of action must depend on a democratic mandate for such action.

170. It stands repetition that, in Opinion 1/17, the CJEU held that the principle of autonomy of EU law, and the exclusive jurisdiction of the CJEU, was protected in CETA. The principle of equal treatment before the law and effectiveness was also protected. The Charter of Fundamental Rights guaranteed a right of access to a court, and the right to an independent and impartial tribunal under the Charter. But the court also held that, in considering autonomy, that the CETA Tribunal and the appellate Tribunal would not form part of the judicial system of the parties to the agreement.

171. The fact that this case is unprecedented in Irish courts, and that circumstances are still evolving, leads me to conclude that, while I believe the appeal should be dismissed, there must be an unusual type of response, where the Court is, in all truth, faced with a situation without precedent, and where, had it been shown there was a clear transfer of sovereignty, a referendum could have been the only response under the Constitution.

172. Despite the fact that I believe the appeal should be dismissed, I see force in what my colleagues have to say to the effect that ratification must be dealt with by the Oireachtas in legislation. Such ratification would, in my view, require amendment of the terms of the 2010

Arbitration Act, and the Schedules thereto. In my view, the problem is best seen on the basis of having regard to recent developments as, it is to be hoped, providing a constitutional "floor", rather than a ceiling. The judgment of Hogan J., therefore, while arriving at a different outcome, contains matters with which I respectfully agree, although they do not affect my view of what the outcome of the case as pleaded must be.

173. So long as the protections of the type which are envisaged in the Preamble, and in Opinion 1/17, are in place, and so long as further evolutions in the draft proposals ensure constitutional protection, I think, on balance, this Court may proceed upon that basis.

The Approach of Other Constitutional Courts

174. In October, 2016 the German Federal Constitutional Court found that the committee system under CETA might violate the principle of democracy in the basic law, or, at least, that a violation was not entirely impossible. To avoid any such violation, the German Government committed to three things: (i) it would agree with the provisional application of any part of CETA that might fall outside the exclusive competence of the European Union, such as Chapter Eight; (ii) it would ensure that the decisions of the CETA Joint Committee were of a sufficiently democratic provenance for the duration of the provisional application of the Treaty; and (iii) if it were unable to ensure that the decisions of the Joint Committee were of a sufficiently democratic provenance, it would unilaterally terminate the provisional application of CETA under Article 30.7(3)(c).

175. The democratic basis of the Committee can only be seen as an open question (Heppner, "*A Critical Appraisal of the Investment Courts System proposed by the European Commission"*, Irish Journal of European Law, Vol. 19(1), pp. 38 to 63). No judgment to date addresses the possibility that the ratification of Chapter Eight of CETA by member states might, ultimately, have the effect of moving the competence to deal with foreign indirect investment and investor/state dispute resolution away from member states to the European Union itself. (See Heppner, p. 45.)

176. What cannot be denied is that there is here something of an analogy of the approach earlier adopted by German Constitutional Court in what became known as the *Solange* jurisprudence. (*Internationale Handelsgesellschaft* Case 11/70, ("*Solange I")*). When dealing with the question of the then treaties of the European Union, the German Constitutional Court concluded that, "so long as" the protection of fundamental rights under the treaties was commensurate with that under the German Basic Law, there would be no incompatibility. Applying the same approach, I take the view the Court can proceed on the basis that, "so long

as" the protection of the fundamental rights and constitutional identity are preserved in CETA, there will be no incompatibility.

Article 34

177. Any court will be alive to the criticisms that, in speaking of the scope of Article 34 judicial power, it is engaging in special pleading. Judicial rhetoric on this issue is sometimes regarded with reserve. It is not coincidental that there are other constitutions which, through inheritance and adaptation, share some identity or constitutional "DNA" with ours. The Indian Constitution of 1950 is one such constitution. Courts sometimes resort to quotations from Madison or Jefferson. I refer instead to one of the great framers of the Indian constitution, a man who deserved to be referred to in the same breath as the American framers. Dr. Ambedkar referred to the power of the Indian Supreme Court contained in the constitution of the largest democracy in the world as being "the soul of the constitution, and the very heart of it". To Ambedkar, a member of the Dalit social caste, who were a sometimes described as "Untouchables", the constitutional provision had a particular importance. It provided the means whereby remedies could be provided for rights violations, oppression and discrimination, including those on caste. Article 32 of the Indian Constitution, dealing with the jurisdiction of that Supreme Court, was one, without which the Indian constitution would be nothing but a "nullity". It "made rights real" (Constitutional Assembly Debates, December 9, 1948). I would respectfully adopt the same phraseology with regard to Article 34 of our Constitution.

178. It is true that, now, the administrative State has made provision for many forms of tribunals and decision-making bodies for the assertion of statutory rights and to remedy wrongs. But the position of the judiciary under the Constitution remains integral to the democratic process. By virtue of Article 34, the power of the State is extended to vindicate the rights of individuals, even against the State itself. That power is vested in courts established by law. That system of independence, checks and balances was achieved over centuries. It is essential to the rule of law in a democracy. It cannot be yielded up or diluted. To do so would be to undermine the Constitution itself.

179. This is not to say, however, that the State, by statute or other means, might provide means for the protection of those same values in a particular situation, or other commensurate means. But it is the courts which are, in fact, the ultimate protection. There cannot be two parallel systems for the administration of justice within the State. The exercise of limited functions and powers of a judicial nature under Article 37 would not provide an alternative route.

180. In the High Court, Butler J. concluded that the CETA system satisfied the *McDonald* criteria, but that the issue was saved from constitutional offence by the fact that CETA Tribunals would not be applying Irish law, and that enforcement did not offend the Constitution. There are potentially aspects of CETA that do indeed come close to administration of justice. While there is sometimes an interaction between the actions of the Executive and the courts, no organ of State can trench on the core functions of another organ of Government. This ascription of roles is one of the distinctions between the rule of law in a liberal democracy, and an autocracy. It is fundamental.

181. That the decisions of an independent judiciary applying the Constitution and applying check and balances, can, on occasion, give rise to difficult outcomes for governments is an unavoidable fact. It is one, I would suggest, which is a small price to pay for the benefits of democracy, by contrast to autocracy, or the exercise of centralised and non-democratic power, sometime by one individual or small group.

182. As will be evident, there are some areas where I respectfully differ from my colleagues in the majority. But we all share the same concern for the protection of the Constitution. But, as matters now stand, and in the light of the proposed amendments, I think the risks of a malign scenario is substantially reduced. It would appear the resolution of outstanding future issues will lie within the realm of the Oireachtas, the European Union, of which Ireland is a member, and negotiation among the member states and with Canada. Were there a difficulty or objection in including protective provisions in amending the legislation in question, then a question might surely arise as to why such a difficulty arose. Were it to be the case that the difficulty arose because of an apprehended incompatibility between CETA and what was contained in such intended legislation, then a question would again arise as to the requirement to hold a referendum.

Proposed Order

183. At the outset, I referred to this appeal raising issues of form and substance. The history of the law contains many instances where the procedural form has evolved in order to give effect to the substance of justice. The law is too wise to do otherwise. Despite all the elaborate material and consideration, this case, like all adversarial cases, comes down to one ultimate question. That question is: has the appellant proved his case on facts, evidence or legal principles? If he has not, his case seeking declarations cannot succeed. For the reasons set out in this judgment, I would hold the appellant is not entitled to a declaration. The CETA text does not offend the Constitution. Any probable application of it does not offend the

Constitution. I think the contingencies envisaged are too remote. An adversarial case of this type cannot be decided on remote contingency, or hypothesis. As to form, therefore, I would make an order dismissing the appeal, and uphold the order of the High Court dismissing the claim made by the appellant, that the Agreement, as it stands, is repugnant to Articles 15 and 34 of the Constitution, and that a constitutional referendum is necessary for its ratification.

184. But, turning now to the substance of justice, and the duty owed to the Constitution, I simply make the observation that as long as the constitutional values laid down in 1937 are protected in legislation, then the Agreement can withstand constitutional scrutiny. While I am not persuaded that what is proposed elsewhere in the other judgments of this Court can be made part of an order of this Court, I simply make the observation that what is proposed as amending legislation there does no more than protect fundamental features of the sovereignty of the State. The duty which we owe the Constitution requires we do no less. But it also requires we cannot do otherwise.

The Questions Raised in the Appeal

185. For the reasons set out, subject to the observations contained in this judgment, I propose the following answers to the questions identified by Dunne J. in her judgment:

(1) Is ratification of CETA necessitated by membership of the EU?

No

(2) (a) Is ratification of CETA incompatible with Article 34 on the basis that it impermissibly withdraws disputes from the jurisdiction of the Irish courts?

No

(b) Is ratification of CETA incompatible with the finality of decisions of the Irish courts under Article 4?

No

(3) Is ratification of CETA incompatible with the legislative sovereignty of the State under Article 15.2?

No

(4) Is ratification of CETA incompatible with the democratic nature of the State under Article 5?

No

(5) Would amendment of the Arbitration Acts permit ratification of CETA?

Yes

AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000124

O'Donnell C.J.
MacMenamin J.
Dunne J.
Charleton J.
Baker J.
Hogan J.
Power J.

Between/

PATRICK COSTELLO

Appellant

-and-

THE GOVERNMENT OF IRELAND, IRELAND, AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 11th day of November, 2022.

Contents

I. Introduction

1. This is a case whose novelty is surpassed only by its importance. It requires this Court to consider the extent and nature of the limitations that the Constitution imposes upon the conduct by the State of its external relations, which by Article 29.4.1° is an exercise of executive power, and thus is exercised in accordance with that Article and Article 28.2 by or on the authority of the Government.

2. This is an issue which has come before the Court only rarely in the 85 years since Bunreacht na hÉireann came into force and effectively completed the task, commenced in 1922, of establishing the State as a sovereign, independent and democratic State (Article 5). The appellant says that the execution by the Government of the Comprehensive Economic Trade Agreement ("CETA") and ratification of same by the Dáil pursuant to Article 29.5.2° impermissibly infringes the internal sovereignty of the State. In particular, the appellant contends that execution and ratification infringes the legislative sovereignty of the State established by Article 15.2, providing that the sole and exclusive power of making laws for the State is vested in the Oireachtas. Furthermore, the appellant contends that CETA also infringes the executive sovereignty of the State (Article 26.3) and the juridical sovereignty of the State contemplated by Article 34, which provides that justice shall be administered solely in courts established by legislation enacted by the Oireachtas, other than in cases contemplated by Article 37 (and which in my view does not arise here).

3. Although much of the argument on behalf of the appellant sought to contend that the execution of CETA involved a *direct* breach of the provisions of the Constitution (and moreover, the legislative sovereignty of the State protected by Article 15, the executive sovereignty of the State provided for in Articles 28 and 29, and as already

mentioned, the juridical sovereignty of the State under Article 34, in the sense that it was argued that the provisions of CETA constitute 'law' and the decisions of the CETA Tribunal constitute the administration of justice) it will, I think, become clear that, at least at the level of formal analysis, the provisions of CETA do not infringe either the internal or external sovereignty of the State, whether executive, legislative or judicial. Simply put, the provisions of CETA operate at the level of international law, and while they may have practical effects within this jurisdiction, in any case where they can be said to lead to outcomes which have *legal effect* within the national *legal* order, they do so not by their own force, but rather by the force and effect of Irish law duly enacted in accordance with Article 15. The question, therefore, at least in my view, becomes whether the execution of CETA, in the exercise of the external sovereignty of the State, would, in substance or effect, impermissibly trench upon, cede, transfer, or abdicate the internal sovereignty of the State, whether executive, legislative, or judicial.

4. It is also the case, at least in my view, that the impugned provisions of CETA do not infringe any of the *express* limitations which the Constitution places upon the exercise by the Government of the executive power of the State in relation to external or foreign relations. The issue is, therefore, whether the impugned provisions of CETA contravene limitations which must necessarily be implied upon the conduct by the Government of the external relations of the State.

5. While it will be necessary to discuss these matters in much greater detail, I think it is possible to set out a series of propositions which encapsulate, in my view, the reasons why, on true analysis of the provisions of the agreement and Irish law, that the execution of CETA by the Government and its ratification or approval by the Dáil do not infringe the Constitution, but rather is completely consistent with it:-

(i) The 1937 Constitution brought to conclusion the process, commenced and largely achieved in 1922, of establishing Ireland as a sovereign independent State (Article 5);

(ii) The sovereignty of the State so established has a number of facets: external and internal. The external sovereignty of the State, in the sense of its relationships on the international plane, is expressly, and exclusively, consigned to the Government by Article 29.4;

(iii) What can be described as the internal sovereignty of the State is arranged in accordance with the separation of powers described and recognised, but not itself established, by Article 6 of the Constitution. The internal executive power of the State is exercised by the Government (Article 28.2), the legislative power by the Oireachtas (Article 15.2), and the judicial power by the courts established under Article 34 subject only to Article 37;

(iv) It follows that no other body, whether internal or external, can exercise those powers of government, internal or external, whether executive, legislative, or judicial (again with the exception in the sphere of judicial power of bodies expressly contemplated by Article 37 and which is expressly provided for in the Constitution itself);

(v) The above conclusion follows from an analysis of the Constitution, but is reinforced by an understanding of constitutional history which led, in part, to the framing of the Constitution in the terms which still obtain today;

(vi) It follows from the organisation of the sovereignty of the State, that no organ of the State may usurp the functions or powers of another organ in the field assigned to it;

(vii) However, the separation of powers effected by the Constitution is not hermetically sealed: the branches of government are not entirely independent of each other, and the proper exercise of each organ of government of the powers assigned to it may *affect* the exercise of its powers by another organ of State, within the field of activity assigned to it;

(viii) In particular, the exercise of sovereignty within the State by the organs of government may affect the exercise by the Government of the external sovereignty of the State under Article 29.4;

(ix) By the same token, the exercise by the Government of the external sovereignty of the State, may *affect* the matters occurring within the domestic order: this is established not just by long practice (exemplified by the operation of the European Convention on Human Rights ("ECHR")) but also by precedent (*Pringle v. Government of Ireland and Others* [2012] IESC 47, [2013] 3 I.R. 1 ("*Pringle*"));

(x) The execution of CETA may undoubtedly have *effect* within the domestic sphere, and may also affect the exercise of powers by the other organs of State within areas assigned to them by the Constitution, but is not such as to have the effect of usurping or purporting to alienate the functions assigned to another organ of government;

(xi) It was an objective of the Constitution enacted in 1937 that Ireland would take its place among the family of nations, and be able to participate fully in international affairs;

(xii) If the appellant is correct, the Constitution, as properly interpreted, imposes very significant constraints upon the exercise of the external affairs of the State, and prevents the State, as currently established, from entering into

agreements which are commonplace in the international order, and which many other countries have executed, without it being considered that the execution of such agreements infringes the same sovereignty which Ireland asserts, and which was established as a matter of law by Article 5 of the Constitution;

(xiii) The Constitution does nonetheless impose some limited express restraints on the power of the Government to conduct the external affairs of the State, and further implied constraints derived from the structure of the State established by the Constitution. The Government may not, under guise of conducting the external affairs of the State, usurp, alienate, concede, or purport to exercise functions properly assigned to another branch. The provisions of CETA do not do so.

(xiv) On proper analysis, the appellant's arguments, though framed as support of the Constitutional order established in 1937, would subvert it, and in the field of external affairs create a form of foreign relations by popular vote not contemplated by the Constitution. If upheld by this Court, it would, in my view, amount to an improper interference by the judicial branch in an area the Constitution consigns to the executive branch.

6. The argument in this case has developed very considerably from the basis upon which the proceedings were launched, and even from the case argued in the High Court. A number of different arguments are advanced which have the capacity to distract from the core issues which must be identified and analysed. While it will be necessary to return to these issues in greater detail later in this judgment, I should say that, at this point, I do not consider that it can be said that the execution of CETA by the State is in any way necessitated by the obligations of membership of the

European Union so that it would be immune from constitutional challenge pursuant to the provisions of Article 29.4.6°. CETA, and similar agreements, are determined to be mixed agreements covering an area in which the EU has not yet asserted competence, and which thus requires the assent of the Member States. If this is so, then and notwithstanding the detailed and sophisticated argument presented by Ms. Donnelly SC, I cannot see how it can be said that the exercise of a power which, as a matter of EU law is currently consigned to the Member States, can be said to be required to be exercised in one way because of the obligations of membership of the EU.

7. By the same token, however, I consider that the case cannot be approached on the basis that the character of the agreement changes once executed and ratified by Ireland in accordance with its constitutional requirements. I do not understand how any obligation of EU law, or any obligation of sincere cooperation, could constrain the exercise by Ireland, or any other Member State, of the powers it has in international law to denounce or resile from an international agreement which it had power to enter. However, for reasons which it may be necessary to explain in greater detail, I do not consider that this is in any event a significant point: while the argument on behalf of the appellant – that CETA was one which would bind Ireland in perpetuity – had an understandable rhetorical attraction, it is not a necessary or essential part of the argument in this case. The issue raised by the appellant is one of principle, namely that the entry into force of CETA is an impermissible diminution, dilution or subtraction from sovereignty. If so, it does not matter if that is of limited, extended or indefinite duration. Taking the argument of the appellant at its height, no external or foreign body has the right to exercise executive legislative or judicial

powers for matters that are properly reserved to those organs by the Irish Constitution for a single day.

8. I accept and agree that the historical background to the entry into force of the 1937 Constitution is of some relevance and assistance in this regard. In my view however, that historical background undermines rather than supports the appellant's arguments. I do consider that the claim in this case, being one that the Government in the exercise of the external affairs of the State has breached an implied Constitutional limitation on the exercise of those powers, is one which requires the court to apply the "clear disregard" standard first established in analogous circumstances in the decision in *Boland v. An Taoiseach* [1974] I.R. 338 ("*Boland*"), and recently discussed in *Burke v. The Minister for Education and Skills* [2022] IESC 1, [2022] 1 ILRM 73("*Burke*"). However, I do not consider that the application of that test is decisive, or that it is necessary to rely upon it to uphold the lawfulness of the execution of the CETA agreement as, for reasons I will set out, I do not consider that the execution of the agreement disregards the Constitution, clearly or otherwise.

9. I do not think it has been established in this case that the enforcement of a CETA award under the provisions of the Arbitration Act, 2010, even if the award is made pursuant to the International Centre for Settlement of Investment Disputes' (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Washington Convention") rules, which came into force in 1966 and was ratified by Ireland in 1981, should be treated as automatic or a mere formality. The obligation to seek the leave of an Irish court is not, in my view, a polite fiction, but something of real legal and constitutional significance, and there are grounds upon which such an award may not be enforced. However, and again, I

do not consider that analysis of the enforcement power is central to the validity of the agreement. It must be accepted that CETA would permit a tribunal to make a determination in relation to a provision of Irish legislation, an administrative decision made by a body under the executive power of the State, or a judicial decision, with which an Irish court would disagree. That, in itself, could not be a ground for refusal of enforcement of the award under the Arbitration Act, 2010, and therefore the central issue of sovereignty in this case, must be confronted.

10. I do agree, that as a matter of probability, it is unlikely that an aggrieved Canadian investor would choose to invoke CETA rather than challenge a relevant measure before the Irish courts, and perhaps even more unlikely that the ruling of the CETA Tribunal would attach liability to a measure which would not itself fall foul of the provisions of Irish public law, whether Constitutional law or administrative law more generally. That is not simply because of the high reputation with which the courts of this jurisdiction and those of Canada, for example, tend to enjoy, but also because the grounds upon which a measure may be impugned in domestic law are more expansive than those contemplated as giving rise to potential CETA liability, and the standard to be satisfied is less demanding.

11. But, once again, while the scope of CETA jurisdiction is perhaps relevant in another respect, the limited nature of the jurisdiction and the remoteness of the possibility of its application in respect of Irish measures, does not remove the necessity to address the issue of principle at the core of this case. If the appellant's case is correct, it does not matter if CETA rules are models of clarity and fairness, and if decisions of the CETA Tribunal are modest, cautious and much more limited than those of Irish court. Assuming for these purposes, that in all respects the CETA rules were similar to, or less demanding than the rules of Irish public law, and the CETA Tribunal's

decisions were more limited and cautious than similar decisions being made by Irish courts, the fact remains that the decision is being made by bodies other than the Irish legislative, executive and judicial organs in Irish law. The whole concept of sovereignty means that it is for the Oireachtas as the Irish legislature to make laws applicable in Ireland, for an Irish executive to take administrative decisions, and for Irish courts to administer justice. It is to be hoped, that it is not regularly a feature of the Irish constitutional system that bad, offensive and discriminatory laws are made, offensive administrative decisions are applied, or unjust decisions reached by Irish courts: but, at a fundamental level, that is an attribute of sovereignty; the right to make law includes the right to make bad law. If truly outrageous laws are made by the Oireachtas, or manifestly improper administrative decisions made, the principle of sovereignty means they still have full force and effect unless and until courts, established under Article 34, exercise the jurisdiction granted to the Superior Courts by the Constitution to declare such laws invalid.

12. I think the issues in this case can best be approached by considering if Ireland could, through the executive branch, enter into CETA with Canada alone as a bilateral rather than multilateral treaty (or indeed any similar agreement with any other country). In the light of the answer to that question, it may be necessary to consider if any other aspect of membership of the European Union would lead to a different conclusion. However, the core issue is whether the essential sovereignty of the State established by the 1937 Constitution is infringed, diluted, alienated, or usurped by Ireland, through the organ of the Government, executing any agreement containing provisions such as those contained in CETA. It is necessary, accordingly, to turn to the provisions of CETA and to understand what it does, before addressing the arguments in this case.

II. The Comprehensive Economic Trade Agreement ("CETA")

A. *Background*

13. The relevant provisions of CETA are set out in some detail in the judgment of the High Court, and in the judgments of my colleagues, Dunne and Hogan JJ. delivered today, and it is not necessary to repeat them in detail here. It is, however, important to note that the dispute in this case centres on a relatively small number of provisions in an agreement that is, as it is titled, a comprehensive trade agreement running to more than 2,000 pages and making detailed provisions for the conduct of trade between Canada and the Member States of the EU.

14. A starting point is to recognize that the negotiation of trade agreements and treaties regulating foreign businesses and the supply of foreign goods in domestic markets, and the securing of agreements in relation to the treatment of domestic goods, and businesses in other countries, has been a basic part of the conduct of international relations between states for hundreds of years. There is no doubt, therefore, that the negotiation and execution of a trade agreement is properly the function of the executive, which in Ireland, as in most countries with whom Ireland interacts, is the organ of government charged with the conduct of foreign affairs.

15. It is also important to recognise that it is of the nature of the conduct of international relations and, particularly that conduct regulated by international law and treaties between states, that such issues will, by definition, rarely cross the desk of national courts dealing with national law. This is particularly so in jurisdictions such as Ireland, which adhere to a dualist system, and where, therefore, the execution of an international agreement does not, by that fact alone, become part of the domestic legal system. It is necessary, therefore, to place such an agreement in its proper context, and to seek to understand it against the background of existing agreements

and practices at an international level, and to avoid treating provisions as dubious simply because they are novel and unfamiliar in a domestic setting.

16. There is no doubt that the provisions of agreements such as CETA deserve close scrutiny. At their heart, they amount to an agreement made by Ireland to accept and abide by the determinations made by tribunals outside the Irish legal system, in relation to measures which are part of the public law of Ireland, whether legislative, administrative, or judicial, and to permit such determinations to be made at the suit of individual persons, human or legal. However, as we will see, such agreements are not only a routine aspect of international affairs between many members of the international community and with whom the Constitution contemplated Ireland would engage as an equal sovereign nation but have also been features of a series of agreements that Ireland has entered at international level, and which are contemplated by Irish law. It is particularly important, therefore, that if it is to be said that the ratification and execution of CETA is constitutionally impermissible, that the reasons why this is so are clearly identified and the limits of any resulting principle be closely and precisely defined.

B. ***Preamble and Objectives***

17. The preamble to the agreement gives a good general indication of its contents, purpose and objective. Thus, after reciting the parties to the agreement, it is stated that the parties resolve to:-

> "**FURTHER** strengthen their close economic relationship and build upon their respective rights and obligations under the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation;

CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment;

ESTABLISH clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment;

AND,

. . . .

RECOGNISING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;

RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;

. . .

RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories;

REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;

ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and

principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct;

IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection and building upon their international commitments on labour and environmental matters".

18. This preamble shows that the objectives of the agreement are part of the classic functions of international agreements, that is the promotion of mutually beneficial trade and business activity, and is a development of agreements made by the same parties. Thus, for example, Ireland has been a member of the World Trade Organisation ("WTO") since January, 1995 in common with other members of the European Union and the European Union itself. The WTO is referred to in the first recital. Ireland has also been a member of the General Agreement of Tariffs and Trade ("GATT") since 1967. The preamble also recognises that the development of international trade and economic cooperation depends in part upon international security, democracy, and the protection of human rights and respect for the rule of law, and also expressly recognises that the provision of the agreement is intended to preserve the rights of the parties to regulate within their territories to achieve legitimate policy objectives such as public health, safety, environment, public morals and the promotion and protection of cultural diversity, sustainable development and corporate social responsibility.

19. "Measures" the subject matter of the agreement are defined importantly as:-

> "a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party".

"Party" is itself defined as:-

> ". . . the European Union and its Member States within their respective areas of competence . . . and on the other hand, Canada".

It is clear, therefore, that the subject matter of the agreement is and is explicitly intended to be, the laws, regulations and decisions made by the organs of government in each of the participating parties.

20. The fundamental rule is that established by Article 2.3 which requires each Party to:-

> ". . . accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994. To this end Article III of the GATT 1994 is incorporated into and made part of this Agreement".

That means that a Member State of the European Union must accord treatment no less favourable to directly competitive or substitutable goods from Canada to that which it accords to goods of the Member State and goods from any other Member State of the EU, and *vice versa*. That Article is then subject to exceptions.

C. ***Chapter 8 and the Investment Provisions***

21. Most attention in these proceedings has focused on the provisions of Chapter 8 in relation to investment. Chapter 8 is defined as applying to a "covered investment", which is an investment made in the territory of a Party, which is directly or indirectly owned by an investor of the other Party. Thus, in Irish terms, Chapter 8 would apply to investments made in Canada by Irish investors, or investments made in Ireland by Canadian investors. Investment is defined broadly as including:-

> ". . . every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration

> and other characteristics such as the commitment of capital or other resources".

While that definition is expansive, claims to money are, for example, defined as not including:-

> "(a) . . . claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party.
>
> (b) the domestic financing of such contracts; or
>
> (c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b)."

22. "Investor" includes:-

> ". . . a Party, a natural person, or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party".

Finally, an enterprise is defined as something:- "constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party".

23. Article 8.2 provides that the Chapter applies to measures adopted or maintained by a Party relating to an investor of another Party and/or a covered investment but excludes air services other than repair or maintenance services. The Agreement, while comprehensive within its own scope, is closely defined and subject to defined exceptions. In particular, claims may only be made by investors (as defined) in respect of investments on the grounds set out in the Agreement, which are themselves subject to the limitations and acknowledgements set out.

24. Claims under Article 8 must be submitted in accordance with Article 8.18, and in compliance with the procedures set out in Section F. Importantly, claims in respect

of an obligation set out in Section B (which sets rules for the establishment of investments) are excluded from the scope of Section F, and therefore the dispute resolution procedure establishing the CETA Tribunal. Financial services regulations are dealt with under a separate chapter.

25. Section B, which deals with establishment of investments, and which is excluded from the CETA Tribunal dispute resolution process, provides that a Party shall not adopt or maintain measures which impose limitations on the number of enterprises in a particular field or the total value of transactions or assets involved, or the participation of foreign capital in terms of maximum percentage, or the total number of natural persons that may be employed, or limit the type of legal entity or joint venture through which an enterprise may carry out an economic activity. However, under subsection 2, it is provided that what might be described as general regulatory matters concerning zoning, planning regulations or the ownership of goods and services to ensure fair competition, competition law generally or measures seeking to ensure the conservation and protection of the natural resources and the environment are all consistent with paragraph (i), and would not, therefore, fall foul of the agreement not to adopt or maintain provisions limiting market access. Similarly, under Article 8.5, a Party shall not impose performance requirements in respect of the conduct, operation, and management of any investment, but subparagraph 4 excludes commitments or undertakings enforced by a court, administrative tribunal, or competition authority to remedy a violation of competition laws. This is consistent with the recitals and the general agreement prohibiting discriminatory measures while recognising the right of Parties to make regulations of a general nature in the public interest. The exclusion of Section B from the dispute resolution process illustrates the fact that the dispute resolution process

is directed towards measures causing individual loss rather than more general provisions which, while covered by the agreement, do not give rise to a possible claim by an individual investor.

26. Section C deals with non-discriminatory treatment, and Articles 8.6 and 8.7 contain general obligations to accord to an investor of the other Party treatment no less favourable than the treatment that a Party accords in a like situation to its own investors and their investments, or which it accords to investors of a third country having most favoured nation status. Article 8.8 precludes a requirement that an enterprise of a Party which is also a covered investment shall not be required to appoint management or a board of directors of any particular nationality.

27. The core of this case relates to the investment protection provisions set out in Section D. That provision opens with a reaffirmation of the Party's right to regulate. Thus, it is provided that the parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety and the environment, or public morals, social or consumer protection or the promotion and protection of cultural diversity. For greater certainty it is also provided, that the mere fact that a Party regulates in a manner which negatively effects an investment or interferes with an investor's expectations including its expectations of profits does <u>not</u> amount to a breach of an obligation under the section.

28. Article 8.10 has been set out in the judgment of the High Court and in the judgments already being delivered by my colleagues, but is of such central importance, that it deserves direct quotation rather than paraphrasing. Thus, it is headed "<u>Treatment of investors and of covered investments</u>" and provides:-

"1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief;

(e) abusive treatment of investors, such as coercion, duress, and harassment;

or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article".

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific

representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to the physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.

7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1".

It will be necessary to return to the provisions of Article 8.10 in greater detail in due course.

29. Article 8.11 provides that, where an investor suffers loss due to armed conflict, civil strife, or a state of emergency or even a natural disaster within the territory of a Party, that Party will treat such an investor no less favourably than it treats its own investors or investors of a third country for the purposes of restitution, indemnification, or compensation. Similarly, Article 8.12 provides that a Party shall not "nationalise or expropriate a covered investment either directly or indirectly" except for a public purpose, under due process of law, in a non-discriminatory manner, on payment of prompt, adequate and effective compensation, such compensation being required to provide for the fair market value of the investment, and for interest at a normal commercial rate, and an affected investor should have the right under the law of the

expropriating Party to a prompt review of its claim and the valuation of its investment by a judicial or other independent authority.

30. Article 8.13 provides that transfers relating to a covered investment should be made without restriction or delay, but sub-Article 3 excludes from these measures applying, in an equitable and non-discriminatory way, laws relating to bankruptcy, insolvency, and the protection of the rights of creditors, laws relating to the issuance or trading, dealing in securities, criminal laws providing for criminal or penal offences, financial reporting relating to law enforcement or the satisfaction of judgments. Section E contains reservations or exceptions which are identified in a Schedule to the agreement, which provides that certain existing non-conforming measures maintained either by the European Union, Canada or a national government and identified in the agreement, shall not constitute a breach of Articles 8.4 to 8.8.

D. ***Section F and the Dispute Resolution Process***

31. Section F sets out the dispute resolution process that is limited to claims of a breach of Section C of Chapter 8 (non-discriminatory treatment), and Section D (investment protection) which are set out above, and where the investor claims to have suffered loss or damage as a result of the alleged breach. Such a claim may be submitted only to the extent that the measure challenged relates to an existing business operation of a covered investment and the investor has, as a result, incurred loss, or damage with respect to the covered investment, and excludes investments made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of the process. The tribunal is limited to claims as so defined and cannot decide claims that fall outside the scope of the Article.

32. Under Article 8.22, para. 1(f) and (g), an investor must satisfy certain procedural requirements for the lodgement of a claim, and may only submit a claim if the investor:-

> "(f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and
>
> (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim".

This is what is known as a "Fork in the Road" ("FITR") provision requiring an investor who complains about the content of a measure to choose the remedy they seek, or perhaps more accurately, requires a claimant bringing a claim under CETA, to withdraw and discontinue any proceedings and waive any claim in domestic or international law. This provision has been the subject of debate in the course of these proceedings.

33. Article 8.22 provides that a claim may be submitted under the ICSID Convention and Rules of Procedure for Arbitration Proceedings ("the Washington Convention"), and/or the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, or any other essentially similar rules. Article 8.25 provides that the respondent (being the Party whose measures are challenged) consents to the settlement of the dispute by the tribunal in accordance with the procedures set out in the section. Article 8.27 provides for the constitution of the tribunal and an appellate tribunal.

34. Article 8.29 provides that the parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and when and if such a tribunal

is established, the CETA Joint Committee shall adopt a decision providing that investment disputes will be decided pursuant to that mechanism. These provisions are particularly important in these proceedings as the arbitral awards made under ICSID and UNCITRAL rules are enforceable in Ireland under the provisions of the Arbitration Act, 2010. The appellant contends that this commits the parties to establish, or become bound by, a permanent judicial body with power, it is said, to administer justice.

35. Article 8.31 provides that the tribunal established under the section shall apply the agreement to be interpreted in accordance with the Vienna Convention on the Law of Treaties, 1969, and shall not have jurisdiction to determine:-

> "the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party".

It is also provided that:-

> ". . .for greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party".

These provisions, in conjunction with similar provisions in the agreement, make it clear that, at the level of form at least, it is not within the jurisdiction of the arbitral tribunal to consider the validity of any challenged measure.

36. Article 8.34 permits interim measures of protection. Article 8.38 permits the non-disputing Party to be provided with details of the claim pleadings and submissions and may be permitted to make oral or written submissions regarding the

interpretation of the agreement and the Party may attend the hearing held under the Section. This means that, for example, Canada would be entitled to participate in a dispute between a Canadian investor and Ireland, and *vice versa*.

37. Article 8.39 provides that the nature of the award that a tribunal may make is limited to monetary damages and any applicable interest, and restitution of property in which case the award shall provide for the option of payment of monetary damages representing fair market value for the property at the time immediately before the expropriation. The monetary damages awarded shall not be greater than the loss suffered, and the tribunal is precluded from awarding punitive damages. By Article 8.41, an award is binding between the disputing parties in respect of a particular case, and the disputing Party shall recognise and comply with an award without delay. Sub-article 3 of Article 8.41 provides for the procedure where enforcement of a final award is sought either under the ICSID Convention or the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules and further provides that "[e]xecution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought".

38. It is also necessary to refer to the provisions of Chapters 23 and 24, which in the context of trade and labour and trade and environment respectively, recognise the parties' right to regulate and certain levels of protection. Thus, in the context of the environment it is provided that:-

> "The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies

provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection".

E. ***Analysis of the Domestic Effects of CETA***

39. It is clear that this agreement is a development in the field of international relations which is consistent and intersects with other international agreements containing trade agreements and dispute resolution procedures to which Ireland, in common with any other country, is already a party. The objective it pursues is also central to, and to that extent is an unremarkable aspect of, international agreements: that is, the promotion of beneficial trade between participating countries. For example, CETA is designed to sit alongside Ireland's participation in GATT, which Ireland has been a member of since the mid 1960s. In addition, GATT has its own disputes resolution procedure.

40. The specific provisions relating to investment are also unremarkable. The basic agreement is that each Party agrees not to discriminate against foreign investors, or at least investors of the other Party, and in this instance Canada. Each Party also agrees to treat such investors and investments in the same way as it treats its own investors and investments made by domestic enterprises and individuals, or in the same way with which it treats investments and investors emanating from countries with most favoured nation status in the domestic regime.

41. The agreement also provides that fair and equitable treatment is to be afforded to such investors and covered investments, and for the resolution of disputes in relation to a claim that such an investor or covered investment has not had the benefit of fair and equitable treatment. The standard of fair and equitable treatment is recognisable and normally amounts to matters which would undermine the validity and

lawfulness of a measure as a matter of Irish law, albeit that the Tribunal is limited to the award of damages to an individual investor amounting to compensation for loss suffered. While in the case of expropriation the Tribunal is empowered to award restitution, that award must also provide for the alternative of an award of compensation. In essence, therefore, the Tribunal is limited to awards of compensation to individual investors and is not entitled to make any determination as to general validity of the measure in question.

42. The procedure for the Arbitral Tribunal may include the investor, the Party (in this case Ireland) and the non-disputing Party (in this example, Canada). The Parties' agreement to be bound by the award is capable of enforcement under the New York or Washington Conventions, are therefore enforceable in Irish law, originally by the provisions of the Arbitration Act, 1980 and, now by the provisions of the Arbitration Act, 2010. It is noteworthy, that in respect of any such claim a claimant is required to discontinue legal proceedings whether domestic or international and/or to waive the right to bring any such claim. To that extent, there is, in my view, no question of the Tribunal coming to an outcome inconsistent with the decision of an Irish court in relation to disputes in respect of relevant measures – the FITR provision means that an investor must choose their forum. While the CETA Tribunal is empowered to consider decisions and awards of judicial bodies, it may not reconsider the issue on the merits, and rather is limited to a question of whether there has been a denial of justice in criminal or civil proceedings, or a fundamental breach of due process under Article 8.10(2)(a) or (b).

43. However, there can be little doubt as to the significance of an agreement from the point of view of the national constitutional system. The agreement permits tribunals which are not part of the national legal order to consider the public law of a state,

whether primary or secondary legislation, administrative decisions or other orders, and judicial decisions, and to award compensation for loss, which became capable of enforcement as a matter of national law in any state which adheres to the Washington or New York Conventions. At the level of principle, therefore, such an award may conceivably alter, counter, or neutralise the impact or effect of a domestic provision or other measure, at least as far as the individual investor is concerned, in fact, if not in law.

44. At the same time, the limitations of the system must also be noted. The scheme of dispute resolution can only apply to certain covered investments and investors. In Irish terms, this means that the system is limited to Canadian investors and investments (with some further significant limitations in respect of subject matter). The Tribunal is limited to a monetary award which must be compensatory only and cannot exceed the loss occasioned to an individual investor or investment. The determination does not have the power to alter an impugned provision or affect its validity. As a matter of Irish, Canadian, or indeed European law, a measure found to give rise to an award of compensation under CETA remains applicable to all addressees including the covered investment and/or investor as a matter of national law or applicable Member State law. The function of the scheme is limited to compensation for actual loss occasioned to the investment and/or investor and cannot extend beyond that. The Tribunal must follow the national courts' interpretation of national law and can only have regard to national law as a matter of fact. The threshold for liability is very high. The scheme recognises at a number of points the right of a national government to regulate in the public interest, particularly in protection of employment and the environment or the common good

more generally – even if such regulation causes loss to an investor or in respect of an investment.

45. There is no doubt, however, that even recognising the limits on the jurisdiction, the fact is that public law measures of a sovereign country can be reviewed, and compensation awarded for loss caused by them. That decision can be made by a Tribunal which is not part of the national legal system. These are matters therefore that require close scrutiny. The issue, however, cannot be resolved by any *a priori* superficial judgment: a moment's thought reveals that there are a number of agreements which have similar and indeed more far-reaching scope of application in some respects. To take only one example, much debated in the hearing, the European Convention of Human Rights ("ECHR") is not limited to the citizens of contracting states, or limited to operating on any reciprocal basis. Instead, it applies to any person within the territory of the contracting states. The scope of the Convention extends much further in terms of subject matter, and the Court of Human Rights is not limited to an award of damages to the individual complainant. If it determines that legislation is incompatible with the Convention, then the obligation on the State is to remedy that generally, and not merely by payment of compensation to the individual complainant. On the other hand, it is accepted that the State may, through the Government, enter into agreements to resolve disputes either with other countries, or individuals, and have them determined by arbitration with the effect that any award made may be enforceable as a matter of Irish law. It is implicit in the argument advanced on behalf of the appellants, that neither of the above-mentioned examples poses any constitutional difficulty. If the appellant's case is correct, and CETA is impermissible as a matter of fundamental principle, then it is necessary to

identify very carefully and precisely, both the principle leading to this conclusion and its limits and why existing agreements do not fall foul of it.

F. ***CETA and International Investor-State Dispute Settlement***

46. As mentioned above, it is important to place CETA in terms of its development in its context in international relations. What appears novel in a domestic sphere may be unremarkable at the international level. The principal novelty of CETA, in terms of the development of investment agreements executed by states, is that the method of appointment of the tribunal to exercise the dispute resolution function is fixed by the agreement itself, and which moreover requires that the appointees satisfy certain objective criteria akin to the standards required of a judge being appointed in the national system.

47. This is an innovation introduced to deal with one of the criticisms of the legitimacy of investor-state dispute settlement ("ISDS"). It was considered by some that the system of *ad hoc* appointment of a panel of three arbitrators, with one being nominated by the investor another by the State, and a third independently nominated (often by ICSID), lacked the degree of detachment and neutrality which was desirable in decision making, and the *ad hoc* nature of the tribunal necessarily gave rise to the possibility of inconsistent and therefore unpredictable outcomes. The fact that one arbitrator was normally nominated by the claimant and another by the Party against whom the claim was made, was also considered undesirable as encouraging an identification, if not a loyalty, between the arbitrator and his or her appointer, while at the same time unduly increasing the burden upon the independently appointed arbitrator. It was also possible that persons appointed arbitrators in one case could appear as advocates in another or *vice versa*. In that respect, the system of appointment provided for by CETA and similar agreements is seen as an

important innovation. The aspiration towards a permanent adjudicative system expressed in Article 8.29 of CETA can be seen in this light.

48. While a degree of permanence, predictability and professionalism of the Arbitral Tribunal would appear to address, at least in part, that criticism, the merits of the different provisions are a matter for discussion in a different forum. This innovation of CETA would not appear to be the factor that determines that a fundamental principle of sovereignty has been breached. If the appellant's arguments are correct, then it must follow that sovereignty is concerned if any external tribunal is empowered to deliver rulings and award compensation in respect of measures adopted by Irish law, or the exercise of legislative executive or judicial power. The method of appointment of such a tribunal is not determinative or even in this respect particularly relevant. While, therefore, CETA is a major multilateral treaty between two large trading blocs and the individual Member States of the EU, containing investment protection provisions and a dispute resolution process, the issue raised would appear to arise in any Bilateral Investment Treaty ("BIT") permitting compensation awards in respect of the public law measures of a country alleged to cause loss to an investor or investment.

49. There is an undercurrent in the argument made on behalf of the appellant that investment protection treaties are outliers not properly the subject international relations between states, and which is more properly concerned with matters such as war-peace alliances, territory and, perhaps, armaments. However, treaties regulating commerce and providing protection for foreign investors and businesses, have been an important part of international law going back to at least to the 18th century. For example, the provisions of the Paris Peace Treaty of 1783 provided that, between the new United States and the United Kingdom, creditors should meet no lawful

impediment to the recovery of the full value of *bona fide* debts. The protection and advancement of trade between citizens and subject of different states has always been an important aspect of international affairs, and agreements and consequently international law.

50. The concept of agreements providing for investor-state dispute settlement mechanisms emerged after the Second World War with an increasing awareness of the interconnectedness of countries and economies and the collective importance of securing international consensus on the treatment of foreign traders and investors and the creation of international bodies to advise, supervise, regulate and, where necessary, resolve disputes. A recent study in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration, Empirical Perspectives* (Cambridge University Press 2022) suggests that there now are over 3,500 signed investment treaties. It appears that there are at least 2,900 bilateral investment treaties. Nine of the newer Member States of the EU have bilateral investment treaties with the US. There are almost 400 signed regional bilateral trade agreements with investment chapters, and seven multilateral investment treaties, most notably perhaps in 1994 the North American Free Trade Agreement ("NAFTA") between Canada, the US and Mexico, now superseded and replaced by the United States-Mexico-Canada Agreement, 2019 ("USMCA").

51. ICSID is an organisation established by the World Bank to provide for the resolution of international investment disputes. The ICSID Convention ("The Washington Convention") came into force in 1965. It was signed by Ireland in 1966 and ratified in 1980 when the enactment of the Arbitration Act, 1980 provided for the enforcement of awards made under that convention (and the New York Convention), both of which were set out in appendices to the 1980 Act. Not only, therefore, are

investment treaties and dispute resolution processes well-established features of the post-War international order, but they have been contemplated by Irish law for at least 40 years and provision has been made for the enforcement of awards made in respect of disputes in relation to their application.

52. The regulation of foreign investment in Ireland, the protection of Irish foreign investment abroad, and the establishment of a procedure for resolving disputes, is, in principle, therefore a valid and important aspect of the exercise of foreign affairs on the part of the State. The observations of the former Justice Stephen Breyer in *The Court and the World: American Law and the New Global Realities* (Alfred A. Knopf 2015) as to the development of treaty making in the context of the United States, can, in my view, be applied equally to Ireland. As he noted, on page 167, there has been a notable increase in treaty making since the establishment of the United States, and the subject matter has changed:-

> "At the nation's founding, treaties almost exclusively concerned war and peace, territory, armaments, trade, and occasionally aliens' property rights. Today they also cover matters once solely of domestic concern, such as individual social and political rights, technical aspects of private commercial contracts, the arbitration of disputes, and even marriage, divorce and child custody. That is not surprising, for today ordinary travel, communication, business dealings, and even family relationships routinely take place across international borders."

This passage explains that while trade and aliens' property rights have always been the subject of international agreement, the developments since the Second World War have meant that the world is even more interconnected, and that is reflected in the subject matter of international agreements, often creating international bodies

and dispute resolution processes, and, as we shall see, often providing that complaints are not limited to the contracting states but may be advanced by individual persons or interested bodies.

53. This is important in at least two respects. First, the international community in which the Constitution envisages Ireland participating as a fully independent sovereign state, is one in which investment treaties with dispute resolution mechanisms are now a commonplace feature of international affairs and regularly entered by states claiming the same sovereign status as Ireland asserts in Article 5 of the Constitution. Further, despite the proliferation of treaties, and the extensive debate and controversy they have generated in recent years, we have not however, been referred to any decision of a national court deciding that the execution of an investor compensation agreement permitting binding arbitration in respect of measures adopted which affect that investment, impermissibly infringes national sovereignty, as is alleged in these proceedings.

III. The Irish Authorities: *Boland*, *Crotty* and *Pringle*

54. The relative sparseness of authority on the question of constitutional constraints upon the conduct by the Government of the external affairs of the State, is instructive in itself. It illustrates the fact that the Constitution says very little in *express* terms about the manner in which the Government is to conduct those relations with other states, and furthermore, that the Constitution contemplates that, in general, the Government is not to be made accountable in respect of strict legal rules to the supervision of the courts, but rather is accountable to the Dáil at a more general and political level, under Article 28.4.1°. The Irish authorities are not decisive on the issue arising in this case but are instructive.

A. ***Boland***

55. *Boland v. An Taoiseach* [1974] I.R. 338 ("*Boland*") is not only the first case in which the Court had to consider a challenge to the conduct by the Government of the foreign affairs of the State, but is also, perhaps, structurally the closest, since the essential argument in that case was that the action by the Government in issuing a communiqué after the Sunningdale Conference, was, or would be if embodied in an international agreement, a breach of constitutional constraints on the exercise by the Government of the foreign affairs of the State, which were not express in the Constitution, but rather, it was said, implied by it.

56. The joint communiqué issued by the British and Irish governments after the Sunningdale Conference establishing the power-sharing executive in Northern Ireland, set out certain matters and anticipated a further agreement. Paragraph 5 of the communiqué contained two separate declarations by the Irish and UK governments set out side by side. The Irish Government declared that it accepted that the status of Northern Ireland should only be altered with the consent of the majority of the population of Northern Ireland. The plaintiff, a former TD and government minister, contended that the communiqué was repugnant to the Constitution and in particular Articles 2 and 3 of the then Constitution.

57. That claim was met by a defence that the Constitution did not permit the courts to review the actions of the Government in the exercise of external affairs. This position was, perhaps, unsurprising: while the Constitution contemplated an express power of review of the validity of Acts of the Oireachtas (Article 34.3.2°), linked to the express prohibition on the Oireachtas precluding the enactment of legislation repugnant to the Constitution (Article 15.4), there is no similar express reference to powers of review in respect of the actions of the Government in the exercise of the

executive power whether internal or external. The plaintiff argued, however, that Article 28.2 provided for the exercise of executive power of the State, by or on the authority of the Government, but "subject to the provisions of the Constitution" and this implied limitations on the Government's powers which would, if necessary, be require enforcement by the courts.

58. The High Court (Murnaghan J.) accepted the Government's argument in an *ex tempore* judgment and the Supreme Court dismissed the appeal. The *ratio* of the decision was, however, a little more qualified than the absolute position asserted on behalf of the Government and accepted in the High Court. The conclusion of the Supreme Court was that the Constitution did not permit the courts to review the actions of the Government in the circumstances relied upon by the plaintiff; that is, in the circumstances of the communiqué issued expressing Government policy. Fitzgerald C.J. appeared to broadly accept the Government's arguments but stopped short of an absolute rule of non-justiciability. Having observed that the cases cited did not support the claim that the courts had power to intervene or restrain the Government in the exercise of the executive function, but rather led to the contrary conclusion, he stated his conclusion in more qualified terms:-

> "… the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it". [Emphasis added]

59. The principle that the actions of the Government in the proper exercise of the executive functions of the State should only be impugned by the courts in cases of clear disregard of clear constitutional provisions, is one which was applied by Kearns J. (as he then was) in *Horgan v. Ireland* [2003] IEHC 64, [2003] 2 I.R. 468,

where a declaration was sought that a Government decision to permit the use of Shannon Airport by US aircraft engaged in military action in Iraq was unconstitutional. Kearns J. held that:-

> "… some quite egregious disregard of constitutional duties and obligations would have to have taken place before [the Court] could intervene under Article 28 of the Constitution … The judicial organ does not decide the issue of "participation" in this context [in a war] in this context as a primary decision maker. Under the Constitution, those decisions are vested in the Government and Dáil Éireann respectively".

60. I discussed the application of the 'clear disregard' standard in the judgment I delivered in *Burke* at paragraphs 57 – 61 and drew a distinction between proceedings in which it was contended that the exercise of the executive power, whether external or internal, infringed the constitutional rights of a citizen, and those cases in which the claim was made that the Government was exceeding its proper role under the Constitution. The clear disregard standard was appropriate and correct in the latter context, but not in the former. At paragraph 57, I said that:-

> "[i]t was entirely logical, therefore, that the Court should find that the power of the Court to intervene in such circumstances would, in a field such as foreign relations, only arise where it could be said that the executive was acting in "clear disregard" of what the Constitution either expressly said, or necessarily implied".

The field of foreign relations is the context in which the present case arises and no claim is or could be made that a personal right of the citizen is being interfered with by executive action. In my view, therefore, the clear disregard standard set out in

Boland applies. However, in my view the resolution of this case is not dependent upon the application of that standard.

B. *Crotty*

61. *Crotty v. An Taoiseach* [1987] IESC 4, [1987] I.R. 713 ("Crotty") is a landmark case in Irish constitutional law in which the Supreme Court, by a majority of three to two, held that the Government could not execute and the Dáil could not ratify the Single European Act ("SEA") without the assent of the People. That decision was, like the *Boland* case, decided under considerable pressure of time, and a number of issues were considered, and separate judgments delivered. This had led to some confusion in the subsequent years. However, the decision has now been considered by this Court in *Pringle,* and for present purposes, the *ratio* of the case is now reasonably clear.

62. The Supreme Court held unanimously in *Crotty* that the amendment of the Treaty of Rome provided for in the Single European Act, and with increased use of majority voting in the European Council, the enumeration of detailed objectives of what was then the European Economic Community ("EEC"), and the creation of a new court of first instance were all matters which did not amount to an additional transfer of sovereignty to the then EEC, requiring an amendment to the Constitution and approval by the People. However, Title III of the SEA constituted a separate treaty, under which the parties agreed to adapt their foreign policy within a structured framework known as European Political Cooperation. A majority of the Court, (Walsh, Henchy and Hederman JJ.; Finlay C.J. and Griffin J. dissenting), held that this would effect a transfer of sovereignty that was not already permitted and required approval of the People in a referendum.

63. Notwithstanding the outcome of *Boland*, the claim in *Crotty* was defended by the Government on the basis that the courts had simply no power to constrain the Government in the exercise of foreign relations under Article 29.4. However, as Finlay C.J. pointed out, there were a number of specific, if limited, constraints established by the Constitution in respect of the exercise by the Government of the executive power of the State in external affairs. Thus, for example, war could not be declared without the assent of Dáil Éireann (Article 28.3), the Government was obliged to lay all international agreements before the Dáil, (Article 29.5), and the Government was in that respect responsible to the Dáil, (Article 28.4). The Government was similarly obliged not to bind the State by an international agreement involving a charge on public funds unless the terms of the agreement had been approved by the Dáil, (Article 29.5.2°). If any of these provisions were not complied with, the provisions of the Constitution could and would be enforced by the courts. Indeed, in *The State (Gilliland) v. The Governor of Mountjoy Prison* [1986] IESC 3, [1987] I.R. 201, the Court found that the State was not bound by an agreement because it involved a charge on public funds and had not been approved by the Dáil.

64. The essence of the decision in *Crotty* was that the execution of the SEA was also a breach of an express provision of the Constitution, namely that contained in Article 29.4, that the executive power of the State in the conduct of external relations was to be exercised by or on the authority of the Government, which carried with it the necessary corollary that the Government was the only body which could conduct foreign relations, and the majority of the Court concludes that the SEA would permit others to determine Ireland's foreign policy. Walsh J. said at p. 777 of the reported judgment "it is the government alone which negotiates and makes treaties, and it is

the sole organ of the State in the field of international affairs". As Henchy J. put it at p. 787:-

> "It follows in my view, that any attempt by the Government to make a binding commitment to alienate in whole or in part to other states the conduct of foreign relations would be inconsistent with the Government's duty to conduct those relations in accordance with the Constitution".

65. As observed in *Pringle*, the difference of opinion between the minority and majority can be seen not as a difference on this principle, but rather whether the provisions of Title III of the SEA went as far as abdicating, alienating or subordinating or transferring the Government's power (and in this respect duty) to conduct foreign affairs. Viewed in this way, *Crotty* is an example of the Court enforcing one of the few constraints imposed by the Constitution on the exercise by the Government of the executive power of the State in external relations: that is that the assignment to the Government of that power and duty means, as Walsh J. said, that such power is *only* to be exercised by the Government.

C. ***Pringle***

66. *Pringle* is a decision which is perhaps the most instructive in the present context. The facts are well-known. In the context of the relatively recent financial crisis which presented so many difficulties for the economies of Europe (and indeed that those of other countries), it was considered necessary to establish support mechanisms for the financial system with sufficient resources to protect the euro in any conceivable circumstance. However, without the approval of the United Kingdom, which was not forthcoming, such a mechanism could not be established by the EU. Instead, a separate treaty was made by 17 members of the Union who were also members of the euro group. For this reason, the provisions of the Treaty

fell to be analysed by reference to the Government's general power to conduct foreign affairs, and without reference to the particular provisions of Article 29 relating to membership of the European Union.

67. The European Stability Mechanism ("ESM") was established by a treaty bearing the same name in 2012. That mechanism required a paid-up capital of some €80 billion, which was divided proportionately between the Member States, including Ireland. However, the mechanism had an authorised capital of €700 billion, again divided proportionately. On this basis, Ireland could conceivably be called on to contribute a staggering amount of €11,145,400,000 for the purposes of supporting the financial system under crisis in other participating states. The Oireachtas had enacted the European Stability Mechanism Act, 2012 to give effect in Irish law to the Treaty, and accordingly the constitutional formalities had been satisfied. The Treaty had been made by the Government. It had been laid before the Dáil and because it involved a charge on public funds it had received the approval of the Dáil, and those provisions which required to be made part of the domestic law of the State were enacted by the Oireachtas in accordance with Article 29.6. Thus the formal requirements of the Constitution had been complied with.

68. The plaintiff, a TD, argued however, that the *effect* of the treaty was to transfer Ireland's economic sovereignty to an external body, or at least to significantly and impermissibly constrain Ireland's economic sovereignty and the capacity of the Government and the Oireachtas to make decisions in the interests of the common good. If a demand were made on Ireland in accordance with the Treaty to contribute its full proportion of the authorised capital to the ESM, that action would necessarily severely limit the budgetary capacity of the State for years to come, and likely lead to obligations to raise additional revenue, restrict existing spending and forego

planned expenditure. It was argued that an agreement having such a far-reaching effect could not be made by the Government or ratified by the Dáil and so far as relevant, legislation giving effect to such an agreement could not be enacted by the Oireachtas.

69. This argument was accepted by Hardiman J. in dissent, but rejected by all other members of the Court (Denham C.J., Murray, Fennelly, O'Donnell, McKechnie and Clarke JJ.) The Court held that an important aspect of the sovereignty of the State was the exercise of the fundamental powers of the State by the organs designated in the Constitution. Since it was empowered under the Constitution to exercise the executive functions of the State including foreign policy, the Government had wide discretion to enter into international treaties as a matter of policy, subject only to the obligation to lay the treaty before Dáil Éireann, to obtain its approval if there was a commitment to financial expenditure and to obtain the approval of the Oireachtas if domestic law had to be changed to comply with obligations under the Treaty. Otherwise, the Court had no role in relation to foreign policy decisions taken by the Government. Their only role was to enforce the boundaries of and limitations on the exercise of executive power in foreign relations which were either expressed in or to be implied from the Constitution, and at the same time to reject any attempt to impose limitations on Governmental conduct of foreign relations that were not required by the Constitution. This is all well explained in the passages form the judgment of Denham C.J. set out at paragraph 66 of the judgment of Dunne J. in the case at hand. In my judgment, at paragraph 316 of the reported version, I said:-

> "It is indeed in the nature of international relations, and expressly contemplated by the Constitution, that states will make treaties, enter into trade agreements, form alliances, join groups and assist in the setting up of

> international bodies with agreed mandates and which on occasion may have adjudicative functions … Indeed as a matter of history Ireland was a member of the League of Nations at the time the Constitution was adopted and in the early years of the Constitution's life became a member of the United Nations (1955), subscribed to the World Bank and the International Monetary Fund ("IMF") (1957), became a member of the Council of Europe (1949), and accepted the jurisdiction of the European Court of Human Rights (1959). To take only one example, it cannot be suggested that Ireland retains a freedom not to abide by sanctions imposed by a UN resolution even if Ireland considered that the sanctions were misguided, or that it stood to gain considerably by continuing to trade with the State in question."

70. *Pringle* is, therefore, an authority for the proposition that decisions made at international level by the Government can have effects, and indeed, profound effects, within the State and moreover, on the capacity of the Government itself and other organs of government in the exercise of their functions, but the mere fact that an international agreement properly entered by the Government may have some *effect* domestically does not itself offend the Constitution.

IV. Sovereignty

A. *The Constitutional Concept*

71. The concept of sovereignty is central to this case, although somewhat surprisingly it was not debated in any detail, perhaps because the argument against the ratification of CETA appears to have proceeded on an assumption that this difficult and somewhat elusive concept had an obvious and clearly understood meaning. It was discussed briefly in my judgment in *Pringle* at paragraphs 3.17 – 3.18. The preamble to the Constitution provides that, among other things, it seeks to promote concord

with other nations. Article 1 affirms the Irish nation's sovereign right to determine its relations with other nations, and Article 5 states that Ireland is a sovereign, independent and democratic state. That assertion is then carried into operation by the other provisions of the Constitution. Part of the concept of being a sovereign state is perhaps described (if not defined or explained) in a passage in the judgment of Griffin J. in *Boland* at p.370. Having set out the provisions of Articles 15, 28, 29 and 34, he said:-

> "In my view these Articles demonstrate that the Oireachtas, and the Oireachtas alone, can exercise the legislative power of government; that the Government, and the Government alone, can exercise the executive power of government; and that the judicial power of government can be exercised only by judges duly appointed under the Constitution in courts established by law under the Constitution". [Emphasis added]

72. It will be necessary to return to this point later, but for present purposes it can be said that the Constitution establishes a sovereign state and conceives of that sovereignty being exercised both externally in relation to other sovereign states, and internally in the exercise of executive power by the Government alone, in the making of laws by the Oireachtas (and no one else) and in the administration of justice by courts (or bodies constituted in accordance with Article 37) and no one else, and in each case certainly by no external body, or even one of the other organs of state.

B. *The Separation of Powers*

73. However, as discussed in *Pringle,* the separation of powers is established under the Irish Constitution was not intended to be, and is not, one of hermetically sealed independent units which do not interact with each other. Rather, it is contemplated that there will be a degree of intersection between them, and more generally, that the

exercise of powers by one branch, may have an effect on another. In particular, the Constitution does not state that actions taken in the exercise of external sovereignty may not have an effect internally, or *vice versa*. A Government may declare war, but its capacity to wage it may be dependent on the willingness of the Oireachtas to provide funds or perhaps authorise conscription. Decisions of the Government in relation to declaration of war or in relation to tariffs and trade agreements or to adhere to conventions protecting human rights, may all have a significant effect within the domestic sphere. A difficult question to which it will be necessary to return, is whether there is any limit on the exercise of sovereign powers because of the effect they have on the sphere of activity of another branch. However, before turning to that question it is necessary to address the case made by the appellant, which contends that the execution of CETA amounts to a formal transfer, abdication, or alienation of sovereignty in all fields of government, but most clearly in the legislative and judicial field. This argument focuses on the legal effect and characterisation of CETA and is not dependent on any question of practical effect.

74. As I understand it, my colleague Dunne J., would find that CETA does not amount to an abdication, transfer, or alienation of legislative power, but is an impermissible interference with the juridical sovereignty of the State. Hogan J. would find that the agreement does infringe legislative and (for somewhat different reasons) juridical sovereignty, which perhaps is the main ground of his decision and is the area of greatest contention in this case. It is, however, useful to consider the arguments made by the appellant in respect of the legislative sovereignty, since, in my view, the reasons why that claim must be rejected, are instructive when considering the more contentious area of juridical sovereignty.

C. ***Legislative Sovereignty***

75. The argument for the appellant put at its height, is that rules contained in CETA and, in particular, Chapter 8 concerning investments, constitute norms created by the State, and which results in a new administrative law which is both binding and enforceable within the jurisdiction. It is said that Article 8.10, for example, imposes an obligation on the State as to how it may treat both covered investments and investors who benefit from CETA. This is in addition to any other applicable legislation or body of principles established by judicial decision in the Irish courts. These rules prohibit arbitrary discrimination and enforce legitimate expectations and, in all cases, permit recovery of damages for loss. It does not matter, for present purposes, that these provisions are not significantly different from applicable principles of Irish administrative law: they emanate from CETA and not from the Oireachtas, and thus on this argument are impermissible under Article 15.2.

76. An immediate response is that provisions of Art. 8.10 (and CETA more generally) operate outside the domestic Irish legal system and take effect by virtue of the agreement of the parties. They are not of general application to all persons affected by a measure, but only apply to a particular investor or investment contemplated by CETA. The provisions cannot be enforced in an Irish court, even within their own field of application. This is made clear at a number of points such as paragraph 7 of Article 8.10 which provides that the mere fact that a measure breaches domestic law does not of itself establish a breach of the Article, and by the provisions of paragraph 2 of Article 8.3.1, which provides that the CETA Tribunal shall not have jurisdiction to determine the legality of a measure under the domestic law of a Party and may only consider the domestic law of a Party as a matter of fact, and that any decision of the tribunal in that regard, must follow the prevailing interpretation given by the

courts or authorities of the Party and any meaning given to domestic law by a tribunal shall not be binding on the courts or authorities of the Parties. The basis of the terms of CETA are agreement, and therefore consent, including consent to the settlement of the dispute by an arbitral tribunal. Any such arbitration agreement is not part of the law of the State: it takes effect by virtue of the agreement of the Parties and not by any authority of the State.

77. A more sophisticated version of the argument might look not just at the form but also at the effect of the CETA rules. It might be said that when the rules take effect and an award is made, that may disapply or neutralise what is otherwise a public law of the State, and that this amounts to amendment of, or even limited repeal, of the measure in question which may indeed extend to primary legislation. To take a simple example, if an Act of the Oireachtas provided for the compulsory acquisition without compensation of all businesses in a certain class and the CETA Tribunal upheld a claim that this was a breach of Article 8.12 in respect of a specified Canadian owned business and ordered restitution or, in the alterative, damages, then it might be argued that the law made by the Oireachtas would have been altered, and would now *in effect* provide for the compulsory acquisition of all such businesses without compensation, save that owned by the investor claimant. But while the outcome in the example in practice may be to some extent to insulate or protect a successful claimant from the impact of Irish measures, that does not render the provisions of CETA *a law*. It is merely the consequence of an international agreement which Ireland agrees to abide by, and to pay damages amounting to compensation in the event that it is held by a tribunal that it has not done so. The law of Ireland remains the same, and applies to every person including the claimant, even if successful. If, in the example just given, the compulsory acquisition was effected

by a local authority or statutory body, then as a matter of law, the acquisition would be lawful and the authority would become the owner of the property and entitled to enforce the order. It would be the State, Ireland, which would have an obligation to pay compensation fixed by the CETA Tribunal.

D. ***Juridical Sovereignty***

78. It is argued that CETA offends juridical sovereignty in two different, and to some extent inconsistent, respects. First, it is argued that the provisions of Article 8.22(1)(f) and (g) requiring either a waiver of existing proceedings or the waiver of a right to bring proceedings, means that the scheme effects an impermissible withdrawal of claims from the jurisdiction of the courts. Such claims might be for a breach of Article 8.12 limiting expropriation, or for breaches of Article 8.10(2)(c)-(f). A different argument is made which focuses on the other provisions of Article 8.10(2), that is subparagraphs (a) and (b). Those provisions allow a CETA claim in respect of judicial decisions. under these headings, it is possible to have recourse to the CETA Tribunal which will adjudicate on a claim that there has either been a denial of justice in criminal proceedings, or a fundamental breach of due process in judicial proceedings. While the focus of the CETA claim will necessary be different from the domestic proceedings giving rise to the claim, it is possible to anticipate that the effect may be that a successful claim would reverse or alter the position which had applied at the end of the proceedings, at least as far as the investors concerned. Thus, if a fine is imposed in criminal proceedings, or an award of damages made against an investor, and the CETA Tribunal found a breach of Article 8.10(2)(a) or (b) and awarded compensation in the same amount, then it is argued that the essential finality of the legal proceedings, which is a core feature of the

administration of justice, and an express requirement of the decisions of the Court of Appeal and Supreme Court, would be undermined.

E. *Waiver*

79. A waiver of a right of action, or discontinuance of existing proceedings is sometimes contrasted unfavourably with provisions requiring an exhaustion of domestic remedies. However, it must be recognised that any such provision would face a different constitutional challenge. If, instead of the FITR provision, the CETA system required exhaustion of domestic remedies (as indeed is required by Article 35(1) of the ECHR), then that would involve a more expansive consideration of matters which had been the subject of domestic litigation than is contemplated under Article 8.10(2)(a) and (b) and would face the claim that the CETA Tribunal system was incompatible with the necessary finality of legal proceedings which is an essential feature of the administration of justice under Article 34 of the Constitution. It does not follow, therefore, that an exhaustion of remedies provision is necessarily any more compatible with the Constitution than a FITR provision requiring waiver.

80. The fact that there are provisions requiring a waiver illustrates the fact that a CETA claim, and domestic public law proceedings challenging a measure in Irish law (or indeed, in Canadian law) will cover the same ground and may consider the same measures by somewhat similar criteria, and to that extent can be said to overlap. But that in itself does not mean that a determination by the CETA Tribunal is itself the administration of justice reserved to courts or Article 37 bodies by the Constitution. The determination of the CETA Tribunal is not made by reference to Irish law but rather by reference to the provisions of CETA. It is made in different proceedings, before a different tribunal, with different parties, (including the non-disputing Party)

by reference to different provisions, and moreover, derives its force not from the law of the State, but rather from an agreement embodied in the Treaty.

81. The parties are not compelled by any law to have the dispute determined by the CETA Tribunal. It is only when an investor chooses to initiate CETA claims, that he/she becomes obliged to discontinue proceedings or waive any right of action. There is nothing unusual or impermissible in this at the level of constitutional principle. It is a commonplace of arbitration agreements that parties agree not to litigate their claims in court and such agreements are routinely enforced by the courts. Indeed, some arbitration agreements preclude any claim being made at any time. There have, moreover, been compensation schemes established either by executive decision such as the Compensation Scheme for Personal Injuries Suffered at the Stardust, Artane on 14 February,1981, or by statute, such as the Hepatitis C Compensation Tribunal Act, 1997, or the Residential Institutions Redress Act, 2002. It is a common feature of any such scheme, that a party is obliged to waive any cause of action in private law as a condition of accepting an award made under the scheme. While a claim in private law and a claim pursuant to a compensation scheme both seek an award of compensation, they are clearly separate and distinct procedures. The operation of a compensation scheme, or indeed an arbitration agreement in which a claimant agrees to waive a claim which could otherwise be the subject of litigation, does not impermissibly remove claims from the jurisdiction of the Irish courts. Neither does CETA. In particular, the CETA Tribunal does not obtain jurisdiction or take effect by operation of law. No investor is compelled to bring any claim arising out of a contested measure before the Tribunal or precluded from bringing proceedings as a condition of making a CETA claim, and the fact that any such claimant is obliged to waive a claim at law does not mean that a claim has been

compulsorily and impermissibly removed from the jurisdiction of the Irish courts; where there is a waiver of a claim, it is effected by the person entitled to bring such a claim.

82. It is equally clear, at least in my view, that a decision of the CETA Tribunal making a finding under Article 8.10(2)(a) or (b) in respect of a judicial decision does not amount to a breach of the principle of finality, nor does it constitute the CETA Tribunal a potential appellate tribunal from the decision of the Irish courts including this Court, and which are required to be final and unappealable. A decision of the CETA Tribunal is not a rehearing of legal proceedings on the merits, and the Tribunal cannot reverse, alter or interfere with the decision of a court. Furthermore, a claim under Article 8.10(2)(a) or (b) is not an appeal on the merits permitting the CETA Tribunal to substitute its own award for that of an Irish court in respect of the same subject matter. Rather, it addresses only the manner in which the decision was made, and can moreover, only result in an award of compensation under the scheme and made against Ireland in its capacity as a Party to the Treaty rather than the other Party to the proceedings. A successful claim before the CETA Tribunal on these grounds, does not overturn the decision of the Irish courts which remains binding on the parties as a matter of Irish law and within the Irish legal system.

83. This can be illustrated by observing that a CETA claim can be made in respect of proceedings to which the State itself is not a party. It is conceivable that a claimant may contend that it has been the subject of a fundamental denial of justice resulting in an award of damages to a private plaintiff. A successful claim before the CETA Tribunal would not result in the reversal of that decision. The plaintiff would still be entitled to execute its award against the investor. It would not be a defence to any enforcement proceedings that the investor had obtained a CETA determination under

Article 8.10(2)(a) or (b). Instead, the investor would be limited to recovering the compensation awarded by the CETA Tribunal against Ireland as a Party to CETA. Even in the situation where the State was the other Party to the proceedings, and where it is contended that the State has been the beneficiary of a denial of justice or a fundamental breach of due process, and that the investor has suffered loss thereby, that determination would not in itself have an impact on the validity or enforceability of the judgment in Irish law. It would not, moreover, provide a defence to enforcement of the judgment. Indeed, it would only be when the judgment was enforced, that the claimant would suffer the loss necessary to make the CETA claim. This illustrates the fact that a CETA claim is separate and distinct from any claim in Irish law and cannot, therefore, be said to affect the finality of any such decision as a matter of Irish law. It would merely entitle the investor to compensation, if obliged to comply with the judgment.

84. This contrasts sharply with the appeal to the Privy Council which was provided for by Article 66 of the Irish Free State Constitution between 1922 and 1933. The comparison is instructive. The Privy Council was an appellate court empowered to hear appeals from the decision of the Irish courts and to reverse, vary or uphold them on their merits. Any decision was binding not just upon the parties but became a precedent which the Irish courts were obliged to follow. Where a decision was made in the field of public law on the validity of an administrative measure or even on legislation challenged pursuant to the Constitution, a decision of the Privy Council would take effect as a matter of law not merely between the parties to the dispute, but generally, *erga omnes*. There is no sense in which a claim before the CETA Tribunal is comparable as a matter of law.

85. This example is one illustration of the value of an understanding of the historical background. The conclusion that the provisions of CETA do not amount to legislation made by a body other than the Oireachtas, and that the decisions of the CETA Tribunal do not amount to the administration of justice by a body other than the courts can also be approached by a consideration of the history of the relevant constitutional provisions. It is also useful to consider some international agreements to which the State has been a party, and which have never been challenged. Finally, it will be useful to have regard to the consideration of CETA in European law, which is a valuable comparator.

F. ***History as a Guide***

86. The expression of legislative, executive, and juridical sovereignty contained in the 1937 Constitution is clear in its own terms but gains considerably from an understanding of the historical background to the provision. Ireland, as a country, traces its independence to 1922 and the settlement embodied in the Anglo-Irish Treaty. However, formally, that Treaty provided for dominion status within the British Commonwealth. Much of the debate after 1922 can be seen as a disagreement between those who pointed to the limitations in law and theory on the independence being obtained, and those who pointed to the practical reality of the independence obtained as a matter of fact. This explains, for example, the repeated references to the position and practice in respect of Canada both in the Treaty, and the in the Irish Free State Constitution. Canada was the dominion whose usage was seen as enjoying the greatest degree of practical independence from Westminster.

87. Nevertheless, as a matter of law, there were significant legal constraints upon the independence then achieved. The Treaty itself reserved particular areas of competence of the Imperial Parliament such as maritime matters, and in

constitutional theory that parliament still had the right to legislate for the internal affairs of any dominion, although this had largely fallen into disuse even by 1922. Nevertheless, the Colonial Laws Validity Act, 1865 (which was only repealed by the Statute of Westminster in 1931), provided that laws enacted within a dominion would take effect, but only insomuch as they were not repugnant to an Act of the Westminster Parliament. This background goes some way to explaining the emphatic terms of the second phrase in Article 15.2 adding, in this respect, to the terms of Article 12 of the Irish Free State's Constitution and providing that "no other legislative authority has power to make laws for the State".

88. Similarly, as just discussed, Article 66 the Irish Free State Constitution provided that an appeal would lie from the Irish courts, not to the House of Lords, which had been the case since 1800, but henceforth, to the judicial committee of the Privy Council. The story of the long struggle over this provision is told by Thomas Mohr in his insightful book *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Four Courts Dublin 2016) and once again, this background adds an extra resonance to the reference in Article 34.2 of the 1937 Constitution to "a Court of Final Appeal", and to the provisions of Article 34.4.6° that the decisions of that Court of Final Appeal "shall in all cases be final and conclusive". For reasons set out above, it is not possible, however, to see the provisions of CETA as performing the same function as a statute of the Westminster Parliament, or the CETA Tribunal as a latter-day Privy Council.

89. A third contentious aspect of the Treaty settlement and the dominion status it created was the position of the dominions in foreign affairs. The Imperial Government sought to control the external relations of the Empire and resist independent activity by the dominions. The position is well set out in D.W. Harkness*, The Restless*

Dominion: the Irish Free State and the British Commonwealth of Nations, 1921-31 (Macmillan London 1969), which recorded that:-

> "The dominions were still placed under the British Colonial office. Though they had signed the peace treaty [Versailles] and were full members of the League of Nations, other international activity was lacking. However, the power to make ambassadors was tentatively being acquired by Canada, and it was a convention that the dominions should have a full say in commercial treaties affecting their interest".

90. It was only in 1920 that Canada had taken the unprecedented step of announcing an intention to appoint an ambassador to the US. Almost contemporaneously with the Treaty, the representatives of the Irish Government were focused closely on the League of Nations, established a permanent representative there, and sought registration of the Treaty under Article 18 of the Covenant of the League of Nations. The capacity to be a full participant in international affairs was seen as a key attribute of an independent, sovereign state.

91. As has been observed elsewhere, the fact that President de Valera was the President of the League of Nations in 1935, at the time when the Constitution was being discussed and drafted, is important in the understanding of the initial work in the provisions of Article 29.1, 2° and 3° which echoed the Covenant of the League of Nations and states:-

> 1. "Ireland affirms its devotion to the ideal of peace and friendly cooperation among nations founded on international justice and morality.
>
> 2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.

3. Ireland accepts the generally recognised principles of international laws as its rule of conduct in its relations with other states.

Article 29.4.2° provided that "the government may avail of or adopt any organ, instrument or method of procedure used, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern".

92. These provisions cast a light in turn on the specific provisions of Article 29.5 dealing with the execution of international agreements. The significance of these provisions becomes apparent when it is understood that no dominion had asserted the power to negotiate any treaty until 1923. The provisions for Article 29 are, therefore, not only a forceful assertion of Ireland's status as a state in international affairs with an equal status to all other independent states, it also expresses an enthusiasm for engagement with other states in the field of international affairs and a desire to exercise fully Ireland's status as an independent sovereign state.

G. ***The European Convention on Human Rights as a Comparator***

93. This background is also of some relevance in considering the comparator much discussed during this case: Ireland's membership of the Council of Europe and adherence in 1953 to the European Convention on Human Rights. Ireland was one of ten founding members of the Council of Europe and heavily involved in the negotiation of the Convention, being represented by two of the most accomplished constitutional lawyers of the time, Seán MacBride and Cecil Lavery, and joined by F.H. Boland, one of Ireland's most distinguished public servants. Ireland was the first state to recognise the compulsory jurisdiction of the ECtHR and the second after Sweden to recognize the competence of the new body to receive individual petition.

Ireland's relative isolation after the Second World War was keenly felt, something enhanced by the State's exclusion from the newly formed United Nations by reason of the Soviet veto. The Council of Europe was, therefore, a major opportunity to put into practice the ideals which had been expressed in Articles 29.1-3 of the Constitution. Seán MacBride was reported to have said on the signing of the Convention in Rome in 1950, that the fact that Ireland was represented was proof of the fact that she considers herself part of the European continent. (See Michael Kennedy and Eunan O'Halpin, Ireland and the Council of Europe – *From Isolation towards Integration* (Council of Europe 2000) at page 7).That work also records the fact that an editorial in the Irish Independent did raise concerns about sovereignty and the possibility that the ECtHR could come to a decision contrary to that of the Supreme Court but what is striking is the apparent consensus that Ireland's ratification of the Convention was permissible, and indeed desirable.

94. It is useful to attempt to understand the significant novelty of what was contained in the ECHR in 1953, especially when viewed through the lens of international relations as they had been known in 1937 and the arguments about sovereignty made in these proceedings. First, the subject matter of the Convention had no necessary connection with any intercourse between contracting states. The Convention set out to provide for the protection of rights enumerated within the legal systems of contracting states. Furthermore, the rights guaranteed were not limited to any particular sphere of activity such as trade, international commerce or other international transactions, or to any group of persons such as the nationals of contracting states. The guarantee was to <u>all</u> persons within the jurisdiction of any contracting state. There was no requirement of an international connection; the rights guaranteed were available to be invoked and in practice were invoked by the citizens

and subjects of the respective Member States against their own states and put in issue domestic law, which took effect within those states, and in respect of those states' own citizens. It followed that the entire corpus of a state's public law, including executive action, public general legislation, and judicial decisions were in principle capable of giving rise to a complaint against the State and an adjudication by the Court. A further striking feature of the Convention supported by Ireland and accepted at the outset was that the rights guaranteed were not merely capable of being enforced by the contracting states who were parties to the Convention, but rather could be the subject of petition by the affected individual. Furthermore, the rights were to be enforced not by committee decision but by court adjudication by appointed judges. This all meant that citizens, (and indeed non-citizens) of contracting states could hold those states to account before an international tribunal in respect of law which took effect solely within the national boundaries of the State.

95. It is worth considering why these significant developments were considered to lie within the province of international law. As the Second Circuit of the US Federal Court of Appeals put it in *Filartiga v. Pena-Irala* (1980) 630 F.2d 876: "humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest…". In the immediate aftermath of the Second World War, it was recognised that a failure to provide a robust system for the protection of rights had contributed to the horror of the Nazi regime in Germany becoming entrenched, leading to genocide, and the conduct of a world war. It was recognized, therefore, that a collective agreement protecting rights in one country, benefited all countries, and that there were matters of fundamental basic rights, in respect of which no country could, or at least should, be a legal island in isolation from the rest of the

world community. It became accepted that the protection of fundamental rights was as legitimate a subject for international law as protection for trade, or agreements on strategic alliances and furthermore that protection of rights could require the possibility of individual complaint to a court like body having power to making binding decisions.

96. The Convention also provided for a court-based system of enforcement; a proposal Ireland also supported. The Convention also required that all contracting states accept the courts' decisions. Article 46.1 of the Convention provided:-

> "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

Pausing there, this was a provision under which Ireland bound itself to accept and abide by, and therefore be bound by the decisions of the ECtHR, in respect of domestic law and decisions made in Ireland, and in due course to do so in respect of complaints made by individuals affected by such laws, decisions or measures. Notwithstanding the significant novelty of the provisions of the Convention and its structure, it does not appear that any legal objection was raised as to the capacity of Ireland to become a member of the Council of Europe and to adhere to the Convention either at that time, which, as mentioned already, was relatively soon after the sovereignty of the State had been asserted in such striking fashion in the Constitution, or indeed, at any time since.

97. The existence of a court having jurisdiction in respect of the laws of Ireland, the decisions of the Irish administration and the judgments of the Irish courts, and which jurisdiction may be invoked by individuals not a party to the Convention or even nationals of contracting states, and empowered to give binding decisions which Ireland has in turn bound itself to accept, poses a significant difficulty for any theory

that the legislative or juridical sovereignty of the State is compromised by adherence to, and ratification of a comparatively more limited trade agreement such as CETA. This is all the more so when it is considered that a requirement for exhaustion of domestic remedies, which means that in every case that at least in theory, and most if not all cases in fact, the factual and legal issues surrounding giving rise to a complaint to the ECtHR, will already have been considered by Irish courts and, as a matter of Irish law finally determined by them, and indeed, since the coming into force of the European Convention on Human Rights Act, 2003, often by reference to the self-same ECtHR code. Furthermore, unlike the provisions of CETA, the determinations by which Ireland is bound under Article 46 are not limited to awards of compensation in individual cases; instead, it is anticipated that the rulings made by the Court will be of general application, and will therefore, often require an alteration in the law.

98. This problem is addressed squarely in an eloquent passage in the judgment of Hogan J. at paragraph 179:-

> "In some respects our accession to the jurisdiction of the European Court of Human Rights in 1952 and the enactment much later of the European Convention on Human Rights Act, 2003 are, so to speak, to our own legal system what Wagner to music or Joyce is to literature. In all three cases the pre-existing rules were stretched to their limits and all three instances represent examples of exceptionalism in their own fields which does not necessarily translate in favour of any successors seeking to emulate them. This is perhaps especially true of the ECHR itself. Created in exceptional circumstances and dedicated to the case of personal liberty and ensuring minimum standard of

civilised behaviour within the contracting states, it has long been a favourite of the law and our constitutional order".

I regret that I cannot agree. First, Joyce and Wagner deliberately set out to test the limits of the existing understanding of literature, language and music. As already pointed out, while the ECHR was undoubtedly a novelty in the field of international relations in 1950, there is no hint that Ireland, in acceding to the ECHR, considered that it was operating at the very limits of its constitutional order. If anything, adherence to the ECHR was seen as making good on the promise the Constitution made in Article 29. Second, the issue raised here is one of principle, indeed, the fundamental principle of national sovereignty. There is no sense in which a breach of that principle can be permitted simply because a particular process or subject matter is designated, by a process left opaque, as a favourite of the law and our constitutional order.

99. For much the same reasons, it is impossible to accept that the ECHR should be treated as a permissible exception to an otherwise general rule. For reasons already touched on, if it is an exception, it is so large as to swallow the rule itself. The jurisdiction of the ECtHR is not limited in respect of parties, subject matter, or remedy. In any event it is not an exceptional case. There are many international agreements to which Ireland is a party involving both individual petition and an obligation to be bound by a decision of a court, committee or monitoring body. These include the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. The European Social Charter for its part permits complaints by

representative bodies. Finally, and in any event, the principle of sovereignty is one which might be thought to be one which, by very definition, did not admit of exceptions.

100. The appellant's argument must either distinguish the case of the ECHR or accept that the argument necessarily sweeps so far as to put in doubt that Convention and a significant number of international agreements to which Ireland has adhered and mean that adherence to such treaties and any further treaty would require a decision of the People and a constitutional amendment. This appears very far from the role envisaged by the Constitution for the State in international agreements, which provides that the executive power of the State in foreign affairs must be exercised exclusively by the Government.

101. It is suggested, however, that the ECHR or any similarly structured international agreement, is saved from unconstitutionality by the fact that Ireland is a dualist country which is recognised by the fact that Article 29.6 provides that no international agreement should be part of the domestic law of the State save as may be determined by the Oireachtas. It is said, therefore, that "a decision of the ECHR does not have binding force and effect so far as the domestic law of the State is concerned". Here however, it is said that by contrast the provisions of Article 8.23 of CETA would allow investors to submit claims for resolution under the ICSID Convention, or the UNCITRAL Arbitration Rules (although the parties may agree any other rules), and since a determination made under those specific dispute resolution systems may now be enforced in Irish law by an application under the Arbitration Act, 2010 (re-enacting in this respect the Arbitration Act, 1980) the decision of the CETA Tribunal may take effect insofar as the domestic law of the State is concerned, and that this distinguishes the case of CETA from the ECHR.

102. It must be acknowledged immediately, that there is a difference in the regime in respect of the judgments of the ECtHR and decisions of the CETA Tribunal and that there is currently no similar provision permitting enforcement in Irish law of judgments of the ECtHR. But, with respect, that is a difference without distinction in the law. It cannot, at least in my view, be accepted that this difference makes a principled distinction between a dispute resolution model which breaches Irish juridical sovereignty, and one which stays – just, it appears – on the right side of a constitutional boundary.

103. First, it should be observed that nothing in CETA itself requires that its determinations be capable of enforcement in the contracting states. It is only if the parties select one of the arbitration systems which are capable of enforcement under the Arbitration Act, 2010 either in their own terms, or because of the location of the arbitration, that it is possible to seek enforcement in Irish law. Any enforceability is, in turn, because of the operation of Irish domestic law, presumed constitutional, permitting an application for enforcement of awards made under those systems. It has never been suggested that Ireland was not entitled to accede to either the ICSID or UNCITRAL Conventions, or that the Arbitration Acts from 1980 – 2010 were in that respect repugnant to the Constitution.

104. The Arbitration Acts since 1954 have permitted application to court for enforcement of claims made under various forms of arbitration agreement. Since 1980, that has been extended to arbitrations under ICSID or UNCITRAL rules. In constitutional terms, an application to an Irish court for enforcement creates a justiciable controversy, and the decision on enforcement is an administration of justice under Article 34 carried out by an Irish court. This is so even if there are only limited proofs necessary to obtain an enforcement order, and limited grounds upon which it may

be resisted. It has never been suggested that the enforcement of an award under the Arbitration Acts since 1954 in respect of a dispute which could have been the subject of traditional court determination is a breach of the juridical sovereignty of the State, or that the enforcement of international awards made under ICSID or UNCITRAL rules is such a breach. If so, it is difficult to understand precisely how the fact that for example ICSID rules may be invoked in respect of a dispute under CETA, can by that fact alone, offend the Constitution.

105. The fact that the award of the CETA Tribunal *may* be made under ICSID or UNCITRAL rules, and therefore, capable of enforcement under the Arbitration Act, 2010 illustrates the fact that the award of the CETA Tribunal in this respect, is no different from any other arbitral award which becomes enforceable in Irish law. If, it is accepted, as it appears to be, that the subject matter of such arbitration can involve the treatment of an investor or other person under the law of the State, then it is difficult to see what is novel or impermissible about the provisions of CETA.

106. However, at a more fundamental level, this analysis of the impact of enforceability under the Arbitration Act is beside the point. It is true that even awards of compensation made by the ECtHR are not enforceable in Irish whether under the Arbitration Act or any other mechanism and that is a, indeed *the* difference between the CETA Tribunal's determination and a decision of the ECtHR, but that is not a distinction which is capable of defining a constitutional Rubicon.

107. It is important to observe that while the Constitution recognises and effects that the State established by it is one which has a separation of powers, the State itself is a single entity. When each organ of the State acts, it acts for the State. When a complaint is made to any of the bodies empowered to determine complaints about

legislative executive or judicial action, it is Ireland which is the respondent and not the particular branch.

108. In these proceedings, it is contended, therefore, that Ireland acting through the Government in the conduct of external affairs, may not bind itself in a way which is said to infringe its own juridical sovereignty. It is said that the Constitution constrains the type of agreement which the Government may make at the level of international law and in this case, such conduct is constrained by the juridical sovereignty of the State exemplified by the finality of decisions of the Irish courts. But if this is correct, then adherence to the ECHR is clearly impermissible since in Article 46, Ireland bound itself to do just that. It agreed to obey the decisions of ECtHR and has habitually obeyed those decisions as a matter of fact. If a Rubicon is crossed, it is when Ireland agrees to be bound, or again, when Ireland complies in fact.

109. It makes no difference to this analysis, that if Ireland failed to comply with its obligations, that there is currently no mechanism which, as a matter of Irish law, permits an Irish court to order enforcement as a matter of domestic law. The entire thrust of these proceedings, and the precedents which are relied upon, is to restrain the Government in its conduct of international affairs, that is at the level of international law. The argument runs that the Constitution, either expressly or by necessary implication, constrains what Ireland may do in the sphere of international relations. If, for example, the Court had been persuaded in either *Boland* or *McGimpsey v. Ireland* [1990] IESC 3, [1990] 1 I.R. 110, that the Constitution provided that the status of Northern Ireland was not to be recognised, then an order could have been made restraining the Government from so doing. It would have been

irrelevant that there was no effect in the domestic legal system. Enforceability in domestic law is not the decisive feature.

110. It is a fallacy, perhaps, to assume that because Ireland is a dualist state that it follows that any international agreement can only have *effects* at some international level. Since the Second World War, at least, it is plain that international agreements can, and are intended to have *effects* at the national and domestic level. Where, for example, sanctions are imposed on a state, that has an immediate effect on nationals of that state and businesses in which they engage. To take a different example, the claimant in *O'Keeffe v. Ireland* (2014) 59 EHRR 605 obtained compensation ordered by the ECtHR which was paid by the State, notwithstanding the fact that a claim against the State in domestic law had failed in the High Court, had not been appealed, and that there had furthermore been a final determination of the Supreme Court in domestic law to which Article 34.4.6° (as it then was) applied. But the plaintiff received an award of compensation by virtue of the decision of the ECtHR. Moreover, all the beneficiaries of the scheme subsequently established (entitled "Ex Gratia Scheme-Implementation of ECtHR in *O'Keeffe v. Ireland"*) are undoubtedly now in a different position, notwithstanding the finality of the decision of the Supreme Court in *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302, its binding effect in Irish law, and indeed, the discontinuance of their own legal proceedings. The fact that an international agreement does not become part of the domestic law of the State other than in accordance with Article 29.6, does not mean that it does not have *effect*, sometimes considerable, in the national order.

111. Finally, it must be recognised that not only did the Government by Article 46 of the ECHR bind the State to obey the decisions of the ECtHR, it does so consistently and, until now, without exception. It can certainly be said that Ireland complies with its

obligations and habitually obeys the decisions of the ECtHR. That can involve paying the award made by the ECtHR in those cases in which one is made, or refraining from further enforcement of a law found non-compliant, and indeed changing laws found by the ECtHR to breach the Convention. But if the Government was bound in the conduct of international relations by the exclusive legislative sovereignty of the Oireachtas, the juridical sovereignty of the courts or its own sovereignty in administrative and executive matters, it could not do so and could be restrained by the courts from doing so. Manifestly, this has never been understood to be the case.

112. The true reason why adherence to the ECHR, and compliance with Article 46 thereof is not an impermissible breach of the juridical, executive or legislative sovereignty of the State, does not lie in the possibility of enforcement by action in domestic law or the lack of it. It is rather, because of the obverse of the principle that the Ireland is a dualist system. The decisions of the Irish courts are final and conclusive, and Ireland has juridical sovereignty*, as a matter of Irish law*. That principle is not breached, at least *per se*, by the possibility of proceedings at the level of international law even concerning the same subject matter, or for that matter by an arbitration based on consent. While it is not necessary to determine in this case, it is interesting to note, as the respondents point out, that the possibility of a legislative provision permitting enforcement of awards of the ECtHR appeared to have been contemplated by Murray C.J. (whose experience in this regard as a former Attorney General, judge of the CJEU and a member of the committee supervising the appointment of judges to the ECtHR is extensive) in *JMcD v. PL* [2009] IESC 81, [2010] 2 IR 199, where he set out the law relating to the enforceability of Convention rights in Irish law. In doing so, he said, at paragraph 27:-

> "The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the State is not answerable before the national courts for a breach of Convention obligations unless provision is duly made in national law for such liability". [Emphasis added]

Even more clearly he continued at paragraph 31:-

> "The ECtHR in exercising its jurisdiction to find that a contracting state has breached its obligations under the Convention may, and does, award damages to victims who may also benefit from declarations as to their rights. Even then orders or declarations of the Court are not enforceable at national level unless national law makes them so". [Emphasis added]

These observations are plainly inconsistent with any theory that domestic enforceability of ECtHR awards would be impermissible.

H. *The European Perspective*

113. In *Opinion 2/15* on the Free Trade Agreement between the European Union and the Republic of Singapore of 16/5/2017, EU:C:2017:376, the CJEU concluded that trade agreements with investor protection provisions do not lie solely within the competence of EU, but rather were mixed agreements requiring the approval of Members States as well that of the EU. The Court observed in this regard, at paragraph 276, that it was settled law that an agreement falling properly within the competence of the EU could be coupled with institutional and other provisions of an ancillary nature which themselves would thereby fall within the original competence of the EU. However, in this case, because an investor had the right to submit a dispute to arbitration, which a Member State was obliged to agree to, it was

considered that the dispute resolution scheme "remove[d] disputes from the jurisdiction of the national courts" and accordingly, the provisions of the agreement could not be considered to be purely ancillary to an area lying within the sole competence of the EU.

114. Following from this, the Court issued *Opinion 1/17* (EU-Canada CETA Agreement) of 30 April 2019 EU:C:2019:341 on the compatibility of CETA with EU law, and decided that the EU was entitled to execute the agreement. The reasoning of the Court in this regard was of some assistance in considering the issues arising in this case. The EU is a unique institution based upon its constituent Treaties made by the Member States, and formed by the pooling of their sovereignty, and its autonomy is jealously guarded by the institutions of EU, including the CJEU. At paragraph 106 of the Opinion the Court recalled that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union was, in principle, compatible with EU law and furthermore, that "an international agreement entered into by the Union may moreover, affect the powers of the EU institutions provided, however, that the indispensable conditions for safeguarding the essential character of those powers are satisfied and consequently there is no adverse effect on the autonomy of the EU legal order".

115. It is important for present purposes that, in considering this latter issue, the Court did not resolve the question as a matter of principle by reference to the simple fact that EU law measures including judicial decisions could be subject to adjudication by CETA arbitral tribunals and conclude either that such agreements were always incompatible with the autonomy of the EU legal order, or conversely, always

compatible. Instead, it conducted a close analysis of the *scope* of the agreement the nature and terms of appointment of the arbitral tribunal, and the test it was to apply. At paragraph 119, the CJEU posed two essential questions to determine the compatibility of the envisaged dispute resolution mechanism with the autonomy of the legal order namely: whether Chapter 8 permitted the envisaged tribunals to interpret or apply EU law and secondly, whether such tribunals could issue awards having effect of preventing institutions from operating in accordance with the EU constitutional framework. In this regard, a central issue was whether a tribunal award could call into question the level of protection of the public interest which had led to the introduction of the challenged measure. If so, that might "create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union" (paragraph 149).

116. On the first issue, the Court distinguished its decision in *Achmea* (C-284/16, EU:C:2018:158) ("*Achmea"*) on the Bilateral Investment Treaty between Germany and Romania and noted that under CETA the tribunal could only consider EU law as a matter of fact. In relation to the second issue, the Court noted that the agreement envisaged tribunals to hear a wide range of disputes. However, the Court had regard to the terms of the agreement, and the repeated recognition of the right of states to regulate in the public interest. The Court also considered that Article 28.3 provided that provisions of Section C could not be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or protect human, animal or plant life or health, subject only to a requirement that such measures should not be applied in a matter that would constitute a means of arbitrary or unjustifiable discrimination or

disguised restriction on trade. As a result, the Court concluded, at paragraph 153 of its opinion that it followed that "the CETA tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of public interests established by EU measures and on that basis to order the Union to pay damages".

117. It has been argued that this opinion represents a departure from the reasoning in *Achmea*, and that the distinction drawn – that a CETA Tribunal is only entitled to have regard to EU law as a matter of fact and is obliged to follow the interpretations applied by the CJEU – is insufficient. It might equally be argued that *Achmea* was unduly restrictive, and a more realistic position was arrived at in *Opinion 1/17*. It might also be observed, however, that *Achmea* and *Opinion 1/17* occur in different contexts. *Achmea* concerned an existing country, one of whom had not been a member of the European Union at the time of execution, but who by the time of the Opinion was a member. The operation of a Bilateral Investment Treaty between Member States of the Union might be thought to raise different issues of principle than the execution of a foreign direct investment treaty with an external country. Furthermore, even if *Opinion 1/17* represents the development of the view of the CJEU, there is no suggestion that that development is likely to change.

118. There is also some merit in the contention that once a tribunal is given power to consider whether a national measure is fair and equitable, even by the restrictive tests set out at Article 8.10, it is always possible that such a tribunal may find that a measure which the EU or a Member State might consider to have been adopted properly in the public interest and for the protection of public security or the environment, could be an arbitrary or unjustifiable discrimination and accordingly, it may be open to doubt whether it can be said that the tribunal has no *jurisdiction* to come to such a conclusion. However, the fact that, by definition, such a possibility

cannot be definitively excluded, does not have the effect of preventing EU institutions from operating in accordance with the EU constitutional framework. The tribunal is not given any power to review the measure on the basis of the level of regulation necessary to protect the public interest and to that extent, while the agreement may *affect* the powers of the EU institutions, it does not interfere with their essential autonomy.

V. Analysis

A. *Does CETA impermissibly withdraw claims from the jurisdiction of the Irish courts?*

119. It is argued that the execution of CETA creates an impermissible parallel jurisdiction which has the effect of withdrawing claims from the jurisdiction of the Irish courts at the sole election of an investor. This is said to be contrary to the Constitution by reference to certain dicta in a judgment I delivered in *Zalewski v. Adjudication Officer & ors* ("*Zalewski*") [2021] IESC 24 , [2021] 32 ELR 213, [2021] 32 ELR 277, and the decisions of the CJEU in cases such as *Republic of Moldova v. Komstroy* (Case C-741:19) where the CJEU said:-

> "the exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one member state and another member state concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed".

120. In my view, it is important to separate these two strands of authority. First, as a matter of Irish constitutional law, I respectfully doubt that it is useful to commence with the abstract question whether the determination of the CETA Tribunal

constitutes “the administration of justice”, which in Ireland is confined to courts established under Article 34, subject only to the possibility of the creation of bodies under Art. 37 having limited judicial functions in non-criminal matters. The case law surveyed in *Zalewski* shows that, approached in the abstract, this is not an easy question, and it is perhaps doubtful that there is any single infallible jurisprudential test. It is certainly true that a complaint by an investor about a measure could give rise to a challenge in the Irish courts by reference to Irish law and it is also true that the same measure could give rise to a claim for compensation under CETA before an arbitral tribunal and pursuit of one will normally exclude the other. This in itself does not constitute the CETA Tribunal as a body administering justice intended to be captured by Article 34, or mean that there has been an impermissible withdrawal or subtraction from the jurisdiction of the Irish courts.

121. The discussion in *Zalewski* related to a question which was posed as a hypothetical circumstance, against which the issues in that case were sought to be tested. A question arose as to whether the Oireachtas could properly establish an Article 37 body which would, in effect, remove a whole area of law from the traditional jurisdiction of the courts and I observed that any such proposal would be closely scrutinised. That of course, did not occur in *Zalewski* and is far removed from the facts here.

122. First, in any such hypothetical case, it would be necessary to remove an entire area of dispute from the jurisdiction of the courts. Here, the CETA agreement does not purport to address the general public law remedies available in Irish law but is confined to qualifying claims made by defined investors. In the hypothetical situation, claims between private citizens are transferred to a separate tribunal. In this case, the State is agreeing that, in certain circumstances, it will defend a claim

brought before the CETA Tribunal. The CETA Tribunal cannot entertain any question of the validity of a measure by reference to Irish law and the fact that a measure may be invalid as a matter of Irish law is not relevant to the determination of the CETA Tribunal. By the same token, a claim that a measure is a breach of CETA is not a claim which is justiciable in an Irish court. The entry into CETA does not transfer or subtract any claim by legislation enacted by the Oireachtas. Instead, the basis of the jurisdiction is the agreement of Ireland with the other contracting parties. The selection of the CETA Tribunal to resolve the dispute is not compelled by law, but is, rather, effected by the voluntary decision of the investor. The investor retains the same entitlement to commence proceedings in Irish courts after the execution of CETA as before. CETA simply gives an investor an additional option which they are free to exercise or not. The claim is made, not by reference to Irish law, but by reference to CETA rules and will normally involve different parties. The CETA Tribunal is not empowered to compel the attendance of witnesses or punish them for non-compliance, and the Tribunal and/or any successful claimant is dependent upon national law, and an application to court, to obtain enforcement, which may not even be in Ireland.

123. It is true that Ireland is obliged to defend a claim brought before the CETA Tribunal, but that is a consequence of an agreement made and not by compulsion of law enacted by the Oireachtas. In this respect, it is no different to a situation where a party is obliged to respond to arbitration proceedings which have their basis in an agreement. Indeed, such proceedings are in some respects closer to Irish litigation than any CETA claim, since arbitration agreement can permit a tribunal to make a determination in respect of Irish law and in respect of causes of action existing in Irish law. A CETA claim is no more the administration of justice governed by

Articles 34 and 37, and no more a subtraction of claims from the Irish courts (and indeed, in some respects less) than any arbitration of a cause of action in Irish law and where an agreement to arbitrate would be enforced by an Irish court.

124. Nor can it be said that the existence of the possibility of CETA claim acts *in effect* to withdraw disputes from the Irish courts in such a way as to offend the Constitution. A claimant is given a choice which is real, but there is no sense in which would become an irresistible option for a disappointed investor. For practical reasons an investor would be slow to commence proceedings before the CETA Tribunal. It means, in effect, the rupture of the relationship with the State in which a Party has made a substantial investment. For legal reasons, CETA is less attractive than a claim before domestic courts so long as investors continue to have confidence in the national system. The grounds for challenge are more limited, the remedy more restricted, and the proceedings more expensive and often lengthier. As a matter of practicality, the execution of an investment protection agreement provides for a form of safety net against improbable but not impossible circumstances that may occur over the lifetime of an investment. Claims under such agreements are seen as "a weapon of last resort": see Szilard Gaspar-Szilagyi, "Foreign Investors, Domestic Courts and Investment Treaty Arbitration" in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration, Empirical Perspectives* (Cambridge University Press 2022). It cannot be said, therefore, that the mere existence of the CETA jurisdiction operates as an irresistible gravitational pull that would, in effect, undermine the jurisdiction of the courts.

125. The decisions of the CJEU in respect of Bilateral Investment Treaties ("BITs"), do use the language of withdrawal, or removal of disputes from the legal system of the Member States. First, however, that language is used to do no more than explain

why an investment protection agreement with a dispute resolution mechanism has sufficient connection with the Member States that such agreements cannot be treated as within the exclusive competence of the EU. Plainly, the CJEU did not decide that the agreements impermissibly removed disputes from the jurisdiction of the courts of the Member States, or where relevant, the CJEU .

126. Second, the *Achmea* line of authority was concerned with bilateral investment treaties made by parties who are now Member States of the European Union and thus raised the possibility of interference with the full effectiveness of EU law within the EU. The CJEU considered, in that case, and in *Komstroy*, that the fact that a tribunal could interpret and apply European law interfered with the autonomy of the EU legal system so as to mean that the full effectiveness of that law was not guaranteed.

127. These matters were referred to in argument only in so much as they provide an analogy for an argument in Irish constitutional law. It is not for this Court to consider if *Opinion 1/17* represents a significant change in the approach of the Court more generally or whether the differences between the BITs in issue in *Komstroy* and *Achmea* on the one hand and CETA on the other were decisive, or whether *Achmea* was too strict or *Opinion 1/17* too indulgent. But it is inescapable that the CJEU does not consider that the terms of CETA interfere with the autonomy of the EU legal order so as to mean that the effectiveness of EU law cannot be guaranteed for reasons already discussed. This represents in the clearest terms, the view of the CJEU in relation to the provisions of the very agreement which is the subject matter of these proceedings. It cannot therefore, be said that EU law provides any support for the appellant's constitutional claim.

128. I would conclude, at least in principle, therefore, that the execution by the Government and ratification by the Dáil of an agreement such as CETA does not infringe the sovereignty of the State. However, while the central issue in this appeal has been the power of the Irish State to become bound by CETA, there are a number of ancillary arguments made which loomed large in the course of the hearing, and on which it is necessary to set out my views.

B. ***Withdrawal from CETA and the duty of sincere cooperation***

129. It was argued that while entry into CETA was an exercise of both European Union competence and Member State competence, once CETA came into force, it would become part of the EU legal order, and the duty of sincere cooperation would preclude Ireland from exercising what would otherwise be its separate entitlement to withdraw from the agreement in accordance with its terms and/or the provisions of international law as set out in the Vienna Convention on the Law of Treaties, 1969. It was said, therefore, that Ireland was being faced with an irrevocable decision to bind itself in perpetuity to a treaty containing Chapter 8, and its dispute resolution procedures.

130. I do not agree that the question in this appeal should be approached on this basis. Instead, I agree with the views expressed by Advocate General Hogan in *Opinion 1/19* on the Istanbul Convention on Combating Violence Against Women and Domestic Violence, which are set out at paragraph 155 of the judgment of Dunne J., in which he observed that the logical and inescapable consequence of the principle of attribution of competence is that a member state may withdraw from a mixed agreement as long as part of the agreement still falls within the competence of the states, either because the Union has not yet pre-empted all of the shared

competences, or because certain parts of the agreement fall within the exclusive competence of the Members States.

131. Further, and in any event, I do not consider that the issue should be approached on the basis that the Treaty, once made, should be considered as binding Ireland or the EU in perpetuity. It is important to recall that Chapter 8 is only part of a comprehensive trade agreement, and it is in the nature of such agreements that they are revised as the nature of international trade, and the interests of the respective parties change. Thus, for example, the NAFTA agreement was replaced by USMCA, an agreement which in turn borrowed from the Comprehensive and Progressive Agreement for Trans Pacific Partnership ("CPTPP") itself a successor to the Trans Pacific Partnership ("TPP"). Different provisions for trade agreements and investment treaties incorporate adjustments which are designed to address criticisms of the process which have emerged. In this case, CETA reflects the EU's concern that such processes should move towards a permanent judicial body filled by a cohort of demonstrably qualified arbitrators with guaranteed independence. Countries may, from time to time, alter their approach to investment agreements. For example, in 2011, Australia announced it would not execute any future international arbitration agreements containing ISDS but reversed its policy in 2016 when it signed the TPP and subsequently the CPTPP. Ireland and the Czech Republic signed a BIT in 1997 (ITS No 10 1997) which was mutually terminated in 2010. In any event, as set out above, I do not consider that the duration of the agreement is decisive in resolving the questions raised in this case.

C. *Is enforcement of CETA awards automatic?*

132. I do not agree that the provisions for enforcement under the Arbitration Act, 2010 are merely a polite formality. Nor would I accept that the matter should be

approached on the basis that a decision of an arbitral tribunal under CETA becomes automatically enforceable, so that the necessity for proceedings in domestic law should not be regarded as of significance when considering the nature of the jurisdiction created. The requirement for an application for leave to enforce an award does involve some process, and allows for the possibility of refusal of enforcement in at least some situations. In that respect I respectfully agree with what is said at paragraphs 69-78 of the joint judgment of Lord Lloyd Jones and Lord Sales in *Micula v. Romania* [2020] UKSC 5, [2020] 1 WLR 1033 quoted at paragraph 148 of the judgment of the High Court in this case.

133. Furthermore, the very fact that these are agreements in the nature of international treaties to which sovereign governments or parties, and involving the public law of those states, put such determinations in a different category to simple awards made in private arbitration. It appears, for example, that it is clear that the principle of sovereign immunity must still be applicable if, for example, it was sought to execute against the property of the State in the courts of another state. Article 55 of the ICSID Convention provides that parties have not waived sovereign immunity in respect of execution. See in this regard Leo Butz, 'Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union' (2020) 7 *McGill Journal of Dispute Resolution* 89, which also notes that, where EU measures are involved it is entirely conceivable that a national court could, or might indeed, be obliged, to make a reference to the CJEU. If, for example, contrary to the view set out in *Opinion 1/17*, an arbitral tribunal was to consider that it was entitled to review a measure simply on the basis that it disagreed with the level of protection put in place by either the European Union or a Member State then it is hard to believe that there will not be repercussions both at a political,

and perhaps a legal level. The long saga involving the series of claims made against Argentina in the early part of this century in which claims which had commenced in 2001 had not been determined by 2020 shows that enforcement of claims is not necessarily an automatic process. As Butz *op. cit.* notes at page 90:- " state practice demonstrates the refusal to honour an investment award is an infrequent but still regular occurrence in the realm of international investment dispute resolution. This is particularly true for large scale awards that vastly exceed the total value of foreign investment in the debtor State". Again, this reflects the fact that, while investor protection treaties are carefully drafted legal documents, which borrow some of the techniques of private law, they involve sovereign states, and operate at the level of international law. The very fact that enforcement is dependent on domestic legislation courts and processes means that there are still limitations on the capacity of claimants to force States to comply with awards against their will. None of this, however, is to suggest that the execution and ratification of this agreement is not a significant legal obligation. And in any event, if the agreement was an impermissible breach of sovereignty, it would not much matter if the agreement was easily resiled from or permanently binding, or whether execution was discretionary or automatic. For my part, as already explained, the extent to which enforcement can be said to be automatic cannot be the decisive feature in this case. However, in the interest of accuracy, I consider it is important to set out the limits, both legal and practical, on enforcement.

134. By the same token, if it is appropriate to approach this case by attempting to locate the CETA dispute resolution process somewhere on a spectrum which runs from arbitral determinations based on consent, to judicial determinations based on and having the force of law, then the CETA Tribunal, even if the permanent judicial body

contemplated by Article 8.29 of CETA were established, would still be located at the arbitral end of that spectrum. As already discussed, the process of what has been described as "judicialization" of the investment dispute resolution system has been championed by bodies such as the EU to address criticisms of the fact that *ad hoc* appointments of arbitrators leads to a higher element of unpredictability and gives rise to a small pool of self-perpetuating experts in international law firms who may moreover seamlessly between adjudication in some cases, and advocacy in others, a practice known as "double-hatting". But the essence of the jurisdiction of any such body remains consensual and arbitral which indeed, is a requirement for enforceability under the New York Convention which applies only to arbitral awards. This was discussed by Butz *op. cit.* at pages110-111:-

> *"Despite many intersections, arbitration is traditionally contrasted with the domain of adjudication. While the former is a mode of private dispute resolution the latter is administered by the State and hence belongs to the public sphere. With regard to investor-state arbitration, the categorization along that dichotomy is more complex. Considering the hybrid legal structure of the CETA investment court [the body contemplated by Art. 8.29], it is even more intricate to differentiate between private arbitration on the one hand and public adjudication on the other. Nonetheless, it can be argued that the CETA investment court forms part of the realm of arbitration. This is because the investment court is a neutral dispute resolution forum created by equal partners for certain types of disputes in accordance with their individual preferences. Put differently, the court is a customized dispute resolution mechanism that primarily serves the interests of its parties. Thus, notwithstanding its name, the CETA investment court is considerably more*

similar to an arbitral tribunal than to a public court. The CETA investment court should be viewed as a private dispute resolution mechanism. Rather than striving for the consistent development of international investment law, the court is responsible for upholding justice between the parties to CETA. If it fails to deliver on that promise, the parties have the chance to intervene in the court's performance by adopting binding notes of interpretation in the CETA Joint Committee. An intervention of this kind would be unthinkable in the sphere of litigation. Despite its judicial features, the CETA investment court hence belongs to the realm of arbitration."[Emphasis added]

This conclusion applies *a fortiori* to decisions of the CETA arbitral tribunal appointed in accordance with Article 8.23, which is the present position.

D. *Constitutional authorisation for the entry of other international agreements – Articles 29.7 and 29.9*

135. Article 29.7 permitted the State to be bound by the British/Irish Agreement at Belfast on 10 April, 1998. Article 29.9 permitted the State to ratify their own statute of the International Criminal Court ("ICC") done at Rome on 17 July, 1998. It has been argued that these express provisions introduced by the 19th and 23rd Amendments respectively illustrate a principle which would require similar approval by referendum if the State were to permit itself to be bound by CETA. If anything, however, in my view these provisions support the contrary interpretation.

136. Part of the British/Irish Agreement of 1998, known colloquially as the Good Friday Agreement/ Belfast Agreement, contemplated the amendment of Articles 2 and 3 of the Constitution and thus, in any event a referendum was necessary. However, both the amended Article 3.2, and Article 29.7.2° also contemplated, in slightly different ways, the creation of institutions whether under the agreement itself, or under some

future bilateral agreement between the State, and Northern Ireland, which might exercise powers and perform functions on any part of the island of Ireland notwithstanding any other provision of the Constitution, and such powers or functions could involve the settlement or resolution of disputes, again in addition to or in substitution for any like power or function conferred by the Constitution on any person or organ. The Belfast Agreement contemplated the establishment of a North/South Ministerial Council, a British/Irish Council and a British/Irish Intergovernmental Conference, and six implementation bodies having executive powers on a cross-border basis. Because the Agreement addressed the long running problem of Northern Ireland, it was popularly understood as involving changes in that jurisdiction, permitting all Ireland bodies in which the Republic of Ireland would have the right to participate which had jurisdiction in Northern Ireland. However, these bodies (and any future body established under either Article 3.2 or Article 29.7.2°) were set up on the basis of reciprocity and could be empowered to exercise both executive power and resolve disputes, within the territory of *both* jurisdictions. In other words, it was anticipated that these bodies would be empowered to exercise executive, and perhaps judicial powers within this jurisdiction which under the Constitution were otherwise reserved to the Government and the courts. That this required a constitutional amendment was plain, and had indeed been anticipated much earlier in a Thomas Davis lecture delivered by Mr. Justice Barrington entitled *The North and the Constitution* and published in Brian Farrell (ed), *De Valera's Constitution and Ours* (Gill and MacMillan 1988):-

> "If at any time the question of setting up any form of all Ireland body exercising executive, legislative or judicial powers should arise, a

constitutional referendum would be necessary, but if that were to happen, we would be on the road to an ultimate solution".

The amendments explicitly contemplate the exercise of executive functions in this jurisdiction in substitution for the bodies established by the Constitution until then, and plainly required an amendment of the Constitution. This provides no support for the appellant's arguments.

137. By the same token, the International Criminal Court established under the Rome statute of 1998 was to be empowered to exercise direct criminal jurisdiction within the jurisdictions of any contracting state. Thus, if Ireland agreed to be bound by it, it would, as discussed at paragraph 5.3.154 of Hogan, Whyte, Kenny and Walsh (eds) *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) effect "a limited transfer (albeit and strictly defined in particular cases) of national, executive and juridical sovereignty to the ICC. Despite the limited nature of this transfer of sovereignty, it seems clear ……that a referendum was required before the State could accede to the Rome statute" [Emphasis added]. The distinction between this situation and an investment treaty is plain: the ICC was to be empowered by Irish law to exercise direct criminal jurisdiction in respect of persons in Ireland and conceivably in respect of offences occurring in Ireland. An investment treaty such as CETA involves the State making an agreement and agreeing that its compliance or otherwise with the terms of that agreement will be determined by an arbitral tribunal whose determinations if made will become enforceable within the domestic legal order only by virtue of Irish law.

138. None of this is to suggest, however, that the matters raised in this case are not serious, or do not touch upon important aspects of national sovereignty. This is, I consider, not because of the *mechanism* adopted, whose features can be found in other

provisions and agreements, but rather because of the *subject matter* of the agreement. The measures which are made the subject of consideration by an arbitral tribunal pursuant to the specific provisions of the Agreement include measures which are the exercise of the legislative executive and juridical sovereignty of the State. The issues raised in this case concern not only the juridical sovereignty of the State but rather touch on every aspect of its internal sovereignty. Of course, CETA is not unique in this respect; since adherence to the European Convention on Human Rights, there have been a number of occasions on which the State has been agreed to be bound by determinations of arbitral, judicial or quasi-judicial tribunals in respect of determinations made on the measures adopted in the exercise of legislative, executive or juridical sovereignty. But the fact that the same thing, or something similar has occurred before does not lessen its significance or mean that when the issue is raised the process should not receive close scrutiny.

E. ***What are the constraints implied by the Constitution on the Government's exercise of its treaty making powers?***

139. This case has been conducted by both parties on the basis that the Court is faced with a binary choice. The appellant argues that if CETA affects in any way matters which are the subject of the executive, legislative or juridical sovereignty of the State or, indeed, can have an influence on the exercise of those powers by the respective organs of the State, it must be treated as an impermissible interference with the sovereignty of the State, and the Government may not properly enter such an agreement in the exercise of its powers under Article 28.4. On the other hand, the State defendants make their case purely at the level of legal form. As a matter of legal analysis, they argue, this is an agreement taking effect at the level of international law under which the State agrees to be bound to be liable to identifiable

parties, if so determined by an arbitral tribunal, and under which Irish nationals obtain equivalent rights in the corresponding jurisdiction. Those are matters, it is said, which lie properly within the field of international affairs, and accordingly, within the function of the Government in the conduct of external affairs, and where moreover, the procedural requirements of Article 29 have been complied with. If a determination of a tribunal is made, and has legal effect within the jurisdiction, that is as a consequence of Irish law properly enacted by the Oireachtas under Article 15.2, and which has not been challenged. Furthermore, the provisions of such legislation, is, on the face of it, within the proper sphere of decision making reserved to the Oireachtas, which is in principle entitled to determine the range of arbitral awards which should be capable of being enforced in Irish law. In 1980, and again in 2010, the Oireachtas has determined that it would permit enforcement of awards made pursuant to the ICSID Convention which is addressed to disputes between investors and states. The terms of CETA do not thereby become law in Ireland contrary to Article 15.2 and the determinations of a tribunal are not the administration of justice under Article 34. Nor is the fact that the subject matter of any determination is a measure adopted in Irish law, itself an impermissible interference with the legislative, executive or juridical sovereignty of the State. The operation of the legislative, executive or juridical sovereignty of the State may give rise to effects and even liability at international law, and by the same token the operation of CETA may have some effect in the domestic order but that does not infringe sovereignty.

140. I have no doubt that, at this level at least, the arguments advanced by the defendants are correct. In so much as this is a matter of legal form, the fact that Ireland, by entering into an agreement which may give rise to a potential liability by reason of

a legislative provision, an executive measure or a judicial decision, does not in itself, and by that fact alone, constitute an impermissible ceding of the internal sovereignty of the State.

141. However, the Constitution looks both to form and substance. This case cannot, therefore, be resolved solely on the basis that as a matter of form, CETA is an international agreement if its effect is such as to significantly constrain the exercise by the organs of government of their powers, and the performance of their duties, under the Constitution. Thus, I would accept the argument not expressly articulated by the plaintiff, but underlying his case, that the Constitution imposes limits upon the exercise by the Government of its power to conduct the external affairs of the State over and above the explicit constraints contained in Article 29, and the implicit constraint illustrated in *Crotty* that the Government may not abdicate transfer or subordinate its power to conduct the external relations of the State in accordance with its conception of the common good. Such implicit constraints must, however, be deduced from the Constitution itself. In this case, that is the fundamental structure of the Constitution whereby sovereignty is exercised under a separation of powers. Since this matter was not argued and is a matter of considerable constitutional and institutional importance, and since moreover, it is my conclusion that the agreement in this case does not infringe such implied restraints on the exercise of the Government's powers under Article 29 which resolves this case, it is both impossible, and, in any event, undesirable, to seek to identify the precise terms of any agreement which might infringe this principle. Indeed, any such conclusion in a concrete case would involve a consideration of the entire agreement, all its terms and its background, and would in any event by judged by the clear disregard standard

first set out in *Boland*. However, it is important to explain the nature of those constraints imposed by the structure of the Constitution.

142. In the first place, there remains the basic distinction between international affairs and the regulation of purely domestic matters. In *The Federalist Papers No. 42*, James Madison referred to the treaty power as one to "regulate the intercourse of foreign nations". The examples he gave illustrated how, even in 1788, there were a range of matters considered to be the subject of such intercourse such as the making of treaties, sending and receiving ambassadors, defining and punishing piracies and felonies committed on the high seas and offences against the law of nations, and the regulation of foreign commerce. He said, in words which could have been echoed by the drafters of the Constitution in 1937, that "this class of powers form an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations". By the same token, in 1937 the State wished to assert its status as a nation in particular in respect to other nations. This is the field that the Constitution allocated to the executive power. But it must be exercised for the purpose of regulating intercourse with foreign nations.

143. As discussed earlier, the field of what is properly seen as intercourse with foreign nations has developed substantially since 1788 and, indeed, 1937. We live in an interconnected and interdependent world, and in addition to substantial international commercial transactions, private consumer contracts, ordinary travel, family relationships and property transactions routinely take place across national borders and as already discussed, the protection of individual social and political rights are all now seen as a significant aspect of international relations. However, the developments and the understanding of what is properly the subject of international intercourse is something which the Constitution contemplates. The fact that Article

29.3 provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in relation to other states requires the State to consider from time to time what are or have become generally recognised principles of international law. Furthermore, given the developing nature of international transactions, whether political, commercial and personal, the action of the Government in entering an agreement with other nations would in this regard be judged by the clear disregard standard.

144. However, put negatively it can be said that the power under Article 29.4 could not be used in respect of *purely* domestic matters. A government could not, using the form of an international agreement, seek to regulate domestic matters within the purview of the Oireachtas, or indeed the judicial branch. It could not, therefore, use this mechanism to seek to erect an alternative justice system or to generally disapply legislation, or indeed, to preclude a future passage of legislation of which it disapproved. That would, to adapt an approach in the field of administrative law, to use a power conferred for a purpose not properly within the contemplated scope of the statute, or in this case, the Constitution.

145. A different, although perhaps related, constraint is somewhat analogous to the approach of the CJEU in *Opinion 1/17*. The Court considered that it would not be permissible for the EU to enter an agreement which had the effect of adversely affecting the autonomy of the EU legal order. In particular, at paragraph 149 of the opinion, it was explained that if the CETA Tribunal or an appellate tribunal were to have jurisdiction to issue awards finding that the treatment of a Canadian investor was incompatible with CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled to pay damages to a claimant investor, the

achievement of that level of protection might have to be abandoned by the Union. This issue was to be resolved however, not by a bright line rule, but rather by the nature of the jurisdiction conferred upon the CETA Tribunal. It was not enough, therefore, that another tribunal had the power to award damages because it considered that a measure of an EU institution was in breach of CETA. Rather, resolution of this issue depended upon a close analysis of the arbitral structure including the appellate body, the method of appointment and choice of arbitrators, and in particular, the grounds upon which such an arbitral body was entitled to find a breach of agreement, and the remedies which could be awarded.

146. It was not enough that an adjudicative body not part of the EU legal order was empowered to award damages because of its analysis of the effect of an EU measure. It follows, as a matter of logic, that the very fact that an issue is consigned to a separate adjudicative body means that there is at least in theory the possibility of an outcome with which a national or, in this case, a Union court might disagree, but that possibility would not itself make the agreement impermissible; the question was whether the overall impact of the agreement was such as to adversely affect the autonomy of the EU legal order and to create a situation where an EU institution would be precluded in effect from exercising its function of introducing legislation in the public interest, to achieve a level of protection for it which the institution considered appropriate. In this respect, CETA gave no general power to review the decisions of the EU institutions in respect of the level of protection necessary for the public interest, and, accordingly, the provisions of the agreement could not be interpreted to prevent a Party, in this case the EU, from adopting an applying measure necessary to protect security or public morals or maintain public order, protect human, animal or plant life or health of the environment.

147. In this regard, it is significant that the provisions of CETA do not appear intended to provide the first port of call for a disappointed investor. Rather, they appear to be provisions of last resort, and which are resorted to when a relationship has been fatally ruptured. It is relevant, therefore, that the scope of application of the agreement is limited (in this regard to Canadian investors and identified Canadian investments) the remedies limited (arising only when there is loss and providing only for compensation for such loss) and on grounds which at the level of generality would normally lead to the clear invalidity of such measures if challenged in Irish law. It cannot be said therefore, that the existence of such a jurisdiction would have an impermissible chilling effect whereby the institutions of the State would be precluded, or indeed, dissuaded from regulatory measures of general application and which were not plainly discriminatory or arbitrary. If by contrast, a treaty contained provisions for the payment of prohibitive penalties in the event that an arbitral tribunal over other adjudicative bodies determined that measures adopted in the public interest were incompatible with some economic world view, and, even more clearly, if the type of measures specified had no connection to international trade or investment, then clearly a serious issue would arise as to the power of the Government to enter into any such agreement even if in form of a treaty agreed with some other state.

F. ***The Constitutional role of Dáil Éireann***

148. These matters are, of necessity, somewhat hypothetical and speculative. It is, however, enough to observe that the Governmental treaty power is constrained by the Constitution and may on occasion give rise to challenges which this and other courts may be required to address. However, the Constitution also contains another and significant real constraint, which is hiding in plain view in this case. Review of

an agreement for compatibility with the Constitution is not the only, or indeed primary, limitation on the adoption of an agreement. The Government is in general responsible to Dáil Éireann under Article 28.4 of the Constitution. All international agreements to which the State becomes a party shall be laid before Dáil Éireann (Article 29.5). In this case, CETA is currently before Dáil Éireann prior to its execution by the Government, because it is considered to fall under Article 29.5.2° and thus, cannot be adopted without the approval of Dáil Éireann.

149. The popularly elected House of the Oireachtas is, under the Constitution, intended to be the location for the debate of matters of public importance, and one of the ways in which the Irish Nation, under Article 1 of the Constitution, determines its relations with other nations and develops its life, political, economic and cultural in accordance with its own genius and traditions.

150. The question posed in any challenge brought to these courts in respect of the treaty making power of the Government is a necessarily blunt one: may the State enter a particular agreement? The outcome is binary. If the Government *may* enter such an agreement, it is no part of the courts' jurisdiction to consider whether, if the State may, *it should* do so. That, however, is a matter in the first place within the judgement of the Government, but subject to its responsibility to Dáil Éireann. The power of the Dáil in this regard is not only a real and constitutional constraint on the power of the Government to bind the State but involves a much broader and nuanced judgement as to merits of a particular agreement. Although, in my view, the outcome of this case must be to uphold the decision of the High Court and dismiss the appellant's appeal, this particular appellant, uniquely, is part of a collective body given an express constitutional power and to that extent, duty, to consider the detail

and merits of this agreement. This is where, in my judgment, the Constitution provides that CETA is to be assessed.

151. I have had the opportunity of reading in draft the judgment which Hogan J. delivers today. Perhaps because of the hypothetical nature of the case, the debate in these judgments has developed well beyond the confines of the arguments made in the High Court and even in this Court. A comparison of the judgment of Hogan J. with the judgment of Dunne J. for example, will show that a large range of the authorities considered in his judgment, and instances, hypotheses and arguments advanced were not the subject of argument in the case. It is perhaps inevitable that in a case such as this that sustained engagement with the fundamental issues raised will mean that the boundaries created by legal argument advanced by the parties will give way on occasion, and Hogan J.'s judgment is a testament to the vast catalogue of legal knowledge that is impressively and often illuminatingly displayed in the judgment. But what is dazzling can sometimes blind rather than illuminate. It may be helpful therefore, to explain why I am not persuaded by the arguments and instances so impressively arrayed in his judgment.

G. ***Is CETA unique?***

152. Firstly, CETA is undoubtedly the first time that an investment treaty with an arbitral adjudication mechanism permitting enforcement under the provisions of the Arbitration Acts has come before the Irish courts. It is, however, by no means Ireland's first engagement with the concept. The Energy Charter Treaty of 1994, which gave rise to *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 ("*Vattenfall*") is one example. This is, in itself, not a trivial instance. Cooperation in relation to energy is clearly a major issue, and if Ireland were not able to enter such an agreement without a referendum, it could have serious long-

term consequences. It appears that if ratification of CETA is impermissible then the Energy Charter Treaty must be equally forbidden. As mentioned earlier in this judgment, Ireland did have a Bilateral Investment Treaty with the Czech Republic. More tellingly again, Ireland ratified both the ICSID and UNCITRAL conventions, and gave effect to them in the Arbitration Acts of 1980 and again in 2010.

153. The ICSID Convention explicitly provides for the enforcement of arbitration decisions made pursuant to the Washington/ICSID Convention which is included as an appendix in both the 1980 and the 2010 Act. That Convention is addressed to, as indeed, it says in express terms, the settlement of disputes between states and investors. Such disputes involve claims made by investors; they almost always necessarily involve measures adopted by the State which are alleged to affect the investment. The concept of bilateral and multilateral investment treaties was already well known by 1980 and were very widespread in 2010. The preamble for the ICSID Convention recites that it is adopted bearing in mind the possibility that from time-to-time disputes may arise in connection with investments between contracting states and the nationals of other contracting states and the Convention was adopted in recognition of the fact that while such disputes would usually be the subject of national legal processes, international methods of settlement may be appropriate in certain cases. Investor /State agreements and dispute resolution processes are therefore not by any means unknown in Irish law.

154. I cannot agree therefore, that CETA somehow impermissibly conscripts the Arbitration Acts to its own purposes, or as it is put, constructs a makeshift legal pontoon to permit passage from the territory of international law into domestic law. The ICSID Convention (and, indeed, all other international conventions permitting for dispute resolution) undoubtedly operate at the level of international law. The

Arbitration Acts of 1980 and 2010 equally operate at the level of domestic law. In a dualist system the Arbitration Acts are only two of a number of bridges, all of them constructed in accordance with Article 29.6, that permit what is agreed by the State in international law to take effect within the domestic legal system.

155. CETA is an international agreement, it is true. It provides for the possibility of disputes between investors and states to be resolved by an arbitral tribunal which can be established under a number of different international conventions. The Arbitration Acts of 1980-2010 provide, that as a matter of domestic law, a determination made by such a tribunal under the Convention will be enforceable in Ireland. There is nothing dubious or makeshift in this. As a matter of Irish law, awards made by arbitral bodies under the ICSID, UNCITRAL or ICC conventions or any other system, do not take effect in Ireland of their own force but only because of, and in accordance with the provisions of Irish law enacted in exercise of Ireland's legislative sovereignty.

H. ***If a bespoke agreement is permissible, is CETA?***

156. Hogan J. also considers that it would be permissible for an arbitration agreement between states to permit resolution of disputes which had arisen between states and the nationals of other contracting states. He instances the example of the US/Iran Tribunal and the judgment of Justice Rehnquist in *Dames & Moore v Regan* (1981) 453 US 654. It would be startling indeed, if Ireland, which affirms its devotion to the ideal of friendly cooperation amongst nations founded upon international justice and morality, and which accepts the generally recognised principles of international law, could not enter such agreements. The US/Iran Claims Tribunal was not a novel development in international law. As illustrated earlier, and indeed as referred to by Justice Rehnquist, disputes between states and the nationals of other states seeking

to do business in their territory, have long been the subject of international disputes and given rise to attempts to resolve them by means of arbitration or judicial determination rather than, in extreme examples, by force of arms. That has from time immemorial been properly the subject of international law and international agreements. As I understand it, Hogan J. considers that such *post-hoc* tribunals would be compatible with the Irish Constitution because there would be an example of the pacific settlement of international disputes by international arbitration or judicial determination to which Ireland has affirmed its adherence under Article 29.2. I agree. But this necessary concession it seems to me, is inconsistent with the broader thrust of his judgment, and indeed, its conclusion.

157. The strength of the argument against CETA, is that it is said to offend against a constitutional principle of sovereignty. Such a principle by definition cannot conceive of exceptions, whether it be the European Convention on Human Rights, the European Court of Human Rights, or the possibility of *post-hoc* arbitral tribunals. If it is impermissible to permit an arbitral tribunal to consider adjudication on measures of Irish domestic law, whether administrative, legislative or judicial, then it is not possible to do so on an *ad-hoc* basis. The fundamental argument is that the determination of such matters is the *exclusive* province of the Irish legal system.

158. If Article 29.2 permits international arbitration or adjudication on domestic measures after the fact as it were, because, for example, expropriation of property of a foreign national has given rise to an international dispute, then I do not understand why it is not possible to establish the dispute resolution mechanism in advance, to deal with any dispute which may arise. To take a concrete example, if there had been no Energy Treaty, to which Sweden and Germany were participants, and Germany terminated nuclear power giving rise to the same uncompensated loss to a Swedish

nuclear power facility, and that in turn had given rise to a dispute between Sweden and Germany which they had agreed to refer to arbitration pursuant to ICSID or UNCITRAL rules, and to determine whether the German measure offended against principles akin to those contained in the Energy Charter Treaty, I cannot see how that would be permissible, but that the Energy Charter Treaty would not.

159. Indeed, the *Vattenfall* example is important in another respect. The claim made by the Swedish company, made to the arbitral tribunal, was, as I understand it, made in parallel with claims made in the German courts that the law terminating nuclear power without compensation was contrary to the German Constitution. That claim was upheld in the German courts, although by the time of the settlement the measure had not been reversed, or compensation paid. The resolution of the dispute, therefore, was not simply the settlement of the claim under the Energy Treaty but also of the consequences of an extant domestic challenge. It is true that a national legislature in a state which had ratified the Energy Charter Treaty would have to consider in enacting a similar legislation, not merely the prospect of the law being invalidated by a domestic constitutional challenge, but also that any such law might give rise to a claim for damages under the Treaty. It is not apparent to me why that is an interference with German legislative sovereignty; legislatures must take into account a range of possible consequences which may follow from legislation they might enact. But what is perhaps more striking about the *Vattenfall* example, is that it does not seem to have been determined at any stage that the execution of the Energy Charter Treaty was an impermissible subtraction from German sovereignty, legislative, executive, or juridical, although that is something which is understandably guarded jealously by the Bundesverfassungsgericht.

I. ***Is the possibility of an award of damages pursuant to CETA in respect of a judicial decision in the Irish courts incompatible with the Constitution?***

160. Hogan J. also raises the suggestion that while the grounds upon which the CETA Tribunal would be permitted to entertain a claim in relation to the exercise of the juridical power of this state are necessarily limited to those under Article 8.10(2)(a) and (b), then it is nevertheless feasible for example, that the CETA Tribunal could find that the Irish courts system failed to meet the standards of the administration of justice required under that agreement, by reason for example, of unacceptable delays in the system akin to those which gave rise to the judgment of the ECtHR in *McFarlane v. Ireland* [2010] ECHR 1272 *("McFarlane*"). I agree that this is a possibility, although as Hogan J. fairly acknowledges, the standard demanded under CETA in this regard, might be even more demanding than that applied by the ECtHR, and therefore instances of possible claims are even more rare.

161. However, I fail to see how this can in any way be seen to be a subtraction or interference with the juridical sovereignty of the State. Such a determination does not constitute an appeal from a particular decision, or address the substance of an Irish court's decision. Rather, the performance of the administration of justice can give rise to a claim under a separate legal code or, indeed, in Irish law. The juridical sovereignty of the State does not require that the administration of justice be beyond challenge, or that the method in which that justice is administered cannot give rise to a separate claim either in Irish law or under a jurisdiction created by an international treaty. In Irish law itself it is recognised that the *manner* in which the administration of justice is performed can give rise to a claim for damages for breach of the constitutional right to a speedy trial: *O'Callaghan v. Ireland and the Attorney General* [2021] IESC 68, [2021] 2 I.L.R.M. 397. Section 54 of the Irish Human

Rights and Equality Commission Act, 2014 amends the European Convention on Human Rights Act, 2003 to explicitly permit the recovery of compensation in Irish law for the unlawful deprivation of liberty "as a result of a judicial act". Furthermore, compliance with the *McFarlane* decision has led to a proposal contained in the European Convention on Human Rights (Delay of Court Proceedings) Bill, 2021 which would permit, as a matter of Irish law, the recovery of damages for delays in the court process. Nothing in the finality which the Constitution required be accorded to judicial proceedings precludes this.

162. Because there is a tendency to blur the lines of different arguments which have been raised in this case, it is important to point out that it is not enough to distinguish these cases on the basis that such claims are permitted by the case law of the Irish courts, or if appropriate, by legislation enacted by the Oireachtas. The objection raised in this regard, is not one which distinguishes between international and domestic law. Rather, it is contended, as I understand it, that the juridical sovereignty of the State precluded anybody, even a subsequent Irish court or the Irish legislature, from reviewing or passing upon the administration of justice in a particular case. This is manifestly not the case. Juridical sovereignty means the finality of decisions of the Irish courts, on matters of Irish law within their jurisdiction on the issues the subject matter of that dispute. This does not preclude any other body, national or international, from addressing either the subject matter of that decision, or the manner in which that decision was arrived at, by reference to a different legal code or standard. In particular, the possibility that the CETA Tribunal might find that delays akin to those in *McFarlane* were a breach of CETA and award compensation does not impermissibly interfere with the finality of decisions or the juridical sovereignty of the State.

J. ***Is there a Constitutional principle that requires the State to be immune from claims for damages?***

163. By the same token, I do not believe it is possible to deduce from the *Pine Valley Developments v. Minister for Environment* [1987] I.R. 23 ("*Pine Valley*") decision some general principle that the legislative or administrative sovereignty of the State requires that the Executive or Legislature be free from the possibility of an action of damages on grounds such as those contemplated by CETA. The principle in *Pine Valley* does not preclude a claim for the award of damages, or decisions having financial consequences, sometimes substantial, for the State. The reference to strict liability is itself perhaps somewhat misleading. As the judgment implicitly recognises, it would be, for example, quite possible to have a contractual liability, which is what occurs in the case of international arbitration, and arguably occurs in the case of CETA. *Pine Valley* itself contemplated damages if the action challenged constituted a recognised tort or malicious conduct on the part of the Executive. The principle of exemplary damages in Irish law is particularly available in the cases of the wrongful exercise of power by the State. More fundamentally, the type of consideration gave rise to a claim for compensation in CETA, would in many if not most cases give rise to a claim in invalidity of the measure in question in national law, with the consequence that the State would not be able to retain any financial benefit it had obtained under the measure. To take a simple example, if the State were to introduce a plainly discriminatory tax targeting Canadian investors, the investor would in the first place be obliged to comply with it. If a claim were brought to the CETA Tribunal, the investor might succeed and obtain compensation for the amount they had paid. If, however, the investor elected for a claim in Irish law which resulted in the invalidation of the measure, the State would be bound to repay that

sum. The financial consequences would be exactly the same. There is, it is true, a difference of legal categorisation, but that only illustrates the fact that CETA is different from the claim in Irish law and therefore, not a subtraction or interference with Irish juridical or legislative sovereignty: a successful CETA claim does not impugn the validity of the measure. Instead, it assumes validity and effectiveness as a matter of Irish law and requires the payment of compensation for loss occasioned by the measure. A successful claim in Irish law could invalidate the measure and as a result certain financial consequences would follow. It is not apparent to me why the possibility of a damages award under CETA is fundamentally incompatible with Irish legislative or executive sovereignty when the same financial consequences can follow from action in Irish law.

K. ***Is a determination of the CETA Tribunal a collateral attack on the validity of administrative measures?***

164. For similar reasons I cannot accept that a CETA determination would amount to an impermissible collateral attack on administrative decisions precluded by Irish law. The example given of s.50(4) of the Planning and Development Act, 2000 ("PDA 2000") is instructive. Section 50 precludes any claim which questions the validity (as a matter of Irish law) of a planning decision. A CETA claim for damages arising from such a decision does not question its validity as a matter of Irish law (or otherwise). Indeed, it retains both its validity and effectiveness in Irish law, since that is a necessary predicate to a claim to have suffered loss, thereby giving rise to a CETA compensation claim. All these instances are therefore only different ways of recycling the same argument and all suffer from the same frailty, that they necessarily assert a principle of constitutional law which would invalidate much more than CETA, a consequence the argument disavows. But if, for example, a *claim*

for damages under CETA in respect of a planning decision crosses a constitutional boundary, then so too does a claim that the decision infringes a rights protected under the ECHR, and if an award of such damages would impermissibly detract from, or question the validity of, such a decision in Irish law, contrary to section 50(4) of the PDA 2000, then so too must payment by the State of any award of compensation made by the ECtHR in that regard. This brings us back to enforceability under the Arbitration Acts, which is a *difference*, but this proliferation of examples only serves to demonstrate it is not a *distinction* which justifies a different conclusion in law.

165. It follows, that with great respect, I cannot accept that the examples or hypotheses advanced in the judgment of Hogan J., establish the conclusion that the ratification of CETA as it stands, is not permitted by the Constitution. Underlying much of the argument in this case is an unarticulated and to my mind somewhat rudimentary view of sovereignty, particularly in the sphere of international relations. The distinguished jurist H.L.A. Hart in his famous work *The Concept of Law* (3rd edn, Clarendon Law Series 2012) said:-

> "Whenever the word 'sovereign' appears in jurisprudence, there is a tendency to associate with it the idea of a person above the law whose word is law for his inferiors or subjects. We have seen … how bad a guide this seductive notion is to the structure of a municipal legal system; but it has been an even more potent source of confusion in the theory of international law."

Later in the same text he observed:-

> "For the word 'sovereign' means here no more than 'independent'; and like the latter is negative in force: a sovereign state is one *not* subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous. Some measure of autonomy is imported …. by the very meaning

of the word state but the contention that this '*must'* be unlimited or '*can'* only be limited by certain types of obligation is at best the assertion of a claim that states ought to free of all other restraints, and at worst is unreasoned dogma".

Put simply the strength of the argument against ratification of CETA lies in a strong conception of sovereignty albeit not articulated or examined. But if that principle leads to conclusions in relation to other agreements which we are unwilling to accept, and which, moreover, is inconsistent with the manner in which other sovereign states conduct themselves, then that should lead us to reconsider the concept of sovereignty asserted or at least assumed. In my view, the Constitution established a sovereign state that was capable of taking its place among the states of the world and participating in international agreements and bodies that showed a common and sometimes developing understanding of the powers and functions of sovereign states in an ever increasingly interconnected world, and ratification of CETA does not breach that sovereignty.

L. ***Amendment of the Arbitration Act, 2010 to address constitutional frailty***

166. However, it is apparent that my views in this matter, are not shared by a majority of the Court. I do agree with MacMenamin J. that it is unsatisfactory to have to attempt to judge the validity of the execution of CETA by reference to a series of hypothesised, necessarily exaggerated, and unlikely scenarios. More importantly, I also agree with him that in a hypothesised scenario, where the determination of the CETA Tribunal was fundamentally incompatible with the Constitution, then an Irish court would be precluded from granting leave to enforce such a judgment. It also follows, therefore, that I agree that if the Arbitration Act 2010 were amended in the manner suggested by Hogan J. at Part XIII of his judgment that that would remove any such constitutional frailty.

167. It follows from what is set out in this judgment that I consider that ratification of CETA would be permissible as it stands. It must follow, *a fortiori*, that if such amendment were introduced that the ratification of CETA would be even more clearly consistent with the Constitution.

168. I have also had the opportunity of reading the judgments of Charleton and Baker JJ. in draft. As I understand it, Charleton J. for his part considers that legislative and supra-judicial authority is given to a body outside the constitutional framework. He considers that at least some of the terms of CETA are themselves acceptable and do not breach the Constitution (paragraph 25) but they contain vague principles which may develop into law through judicial or arbitral activism, and furthermore, that the process of interpretation through the Joint Committee under Article 26 of CETA involves the making of law. It is not the *text* which is in issue, but, as he puts it, the implication of the text (paragraph 33). He argues that, in reality, the process of interpretation *is* legislation, and the process of interpretation through the Joint Committee is even more obviously a legislative act which infringes Article 15.2.

169. It is not possible to address all the examples and observations made in this judgment save to say, that I, for myself, would not accept without considerable qualifications the account of the development of law either in this jurisdiction or in the US, and by reference to which it is sought to reason by analogy in this case. But even on its own terms I would respectfully disagree that the Joint Committee procedure constitutes legislation, or, as both Charleton and Hogan JJ. would find, breaches the Article 5 statement that Ireland is a democratic state, or anything that can be said to follow from that.

170. First, I would respectfully disagree with the premise that interpretation is legislation. It is not true in the field of statutory interpretation, or interpretation of the

Constitution. It is true that giving a power to any tribunal or court to interpret a document whether contract, statute, Constitution or treaty, gives to the interpreter a power to say at least in theory, that black is indeed white. However, the requirements of basic fidelity to the text, of standards of judicial and arbitral competence, of professional obligations, intellectual honesty, and the existence of an appellate process itself, all mean that legislation by interpretation, is properly regarded more as a criticism of individual decisions than a description of the essence of the arbitral or judicial process. It cannot be assumed to be a sure guide to the constitutional validity of a scheme which requires an arbitral panel chosen from persons who satisfy the standards of professional competence to be appointed a judge in the courts of their own state, which provides for appellate review, and a further process of potential review by the Parties themselves, and which is also the subject of a well-developed and sophisticated system for the interpretation of treaties.

171. The CETA mechanism whereby a select committee is empowered to make proposals to the Joint Committee to issue binding interpretations, cannot realistically be seen as anything other than a procedure designed to preclude the possibility of the development of jurisprudence beyond the scope anticipated by the Parties in the individual treaty provisions. If anything, this provides a further protection against the expansive and unjustified interpretation which is apparently feared.

172. Furthermore, I cannot agree that the possibility of interpretation by the Joint Committee is a breach of the fundamental democratic nature of the State guaranteed by Article 5 of the Constitution. I am not sure what is meant by a concept of democratic oversight and how that is derived from the essence of Article 5. It is true that Ireland may not be directly engaged in the select committee or the Joint Committee, but it is in a position to make representations through the institutions of

the European Union, of which it is and remains a member. But that is not a critical distinction. If Ireland ratifies the Treaty in this case, that will require the approval of the Dáil because it is considered to involve a charge on public funds. If, however, it was not considered there was such a charge, then ratification would be a decision for the Government alone. All of this is, however, contemplated by the Constitution. None of it offends the concept of a democratic state. The Government is answerable to the Dáil, and the Dáil is elected by popular vote. Ireland would be as much a democratic state after ratification of CETA (whatever method was required) as it was before ratification.

173. CETA, like many other international agreements, provides for arbitration of disputes, and therefore, the possibility of interpretation by a tribunal, and a binding interpretation by the Joint Committee. However, this does not appear to offend against any principle of democracy. The Treaty provides for the possibility of a Joint Committee issuing an agreed interpretation of the treaty provisions in order to create agreed and binding precedent (Article 26.1(5)(e)). This is something which is apparent on the face of the Treaty itself. Ireland, in ratifying the Treaty, whether by decision of the Government, the Dáil, the Oireachtas or the People, must be taken to have agreed to that possibility, just as it does when it ratifies any agreement which provides for dispute resolution by a court, or committee of experts. This is all the more so, in the case of the Joint Committee procedure under CETA, since it is clearly designed to restrict the possibility of inconsistent or unduly expansive interpretations.

174. I cannot agree that it is possible to distinguish the case of the ECtHR by describing the decision of the Government to abide by a decision which runs counter to the outcome of a decision of an Irish Court as a political decision. If the Constitution

requires finality for all purposes of decisions of the Irish Courts, then it is difficult to understand how the Government, which is bound by the Constitution, could agree that Ireland should be bound by the decisions of another body which may have the effect of altering the outcome of a case, or could validly decide to comply with them in fact, where they do so. Nor does it appear to me that the fact that both damages and costs under the ECHR may be lower than those routinely awarded in Ireland is at all relevant to the issue of principle raised in this case.

175. While it is not perhaps a central or dispositive issue, I should also observe that I do not consider that it would be possible to challenge a measure in Irish law, and thereafter contend that the same measure was a breach of the general provisions of CETA. In such a case, I consider that a claim would be restricted to the grounds of challenge set out at Article 8.10(2)(a) and (b): i.e., that the manner in which the case was decided constituted a denial of justice or a fundamental breach of due process. The provisions of Article 8.22(1)(f) and (g) in relation to the withdrawal or discontinuance of any other domestic or international proceedings and the waiver of a right to initiate claims, when, if necessary, read together with the provisions of Article 29.3(1) and (2) and indeed Article 8.22(1)(f) and (g) seem to make it clear that the choice of forum is exclusive.

176. We were not referred to any example of the interpretation of CETA or a similar provision in another multilateral agreement, where it had been held that it was permissible to relitigate the substance of a claim before a tribunal established under the Treaty where there had been a final determination of proceedings brought in a contracting state. The *Vattenfall* litigation to which reference has been made, was brought under the provisions of the Energy Charter Treaty, 1994 which had materially different terms . Under the provisions of Article 26(2) thereof, parties

were given the right to choose to submit a dispute to either the courts or administrative tribunal of the contracting party, or under the Treaty, and it appears the choice of one did not exclude the other, but certain contracting parties (including Ireland, but excluding Germany) did not give unconditional consent to the submission of the dispute international arbitration under the treaty, where the investor had previously submitted the dispute to the courts or tribunals of the contracting party to the dispute. Thus, *Vattenfall* is not itself a guide to CETA on this point.

177. I do not see that the possible amendment of the Arbitration Acts discussed by Hogan J. at Part XIII of his judgment amounts to a constitutional example of a serpent devouring itself (Charleton J. paragraph 53. It is manifest that the amendment discussed provides for a much narrower and more limited exception to enforcement, and that the vast majority of CETA awards would be enforceable and would not fall foul of any such amended provision. Nor can I agree that such a provision would involve a breach of any CETA treaty obligation. First, the question of the interpretation of any international convention or treaty is not a matter for a domestic court unless it has been made part of domestic law in accordance with the constitutional formalities or is the accepted background against which a national measure is to be interpreted. Second, the question for this Court is whether Irish constitutional law permits the State to ratify the CETA agreement, and not whether the CETA Parties would consider that ratification was precluded. Third, and in any event, CETA itself only requires that under Article 8.41 the execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought. Fourth, (and subject to the same caveat that interpretation of international agreements is not normally a matter for national

courts) it is not apparent to me that any such amendment of the Arbitration Act, 2010 would involve derogation from the terms of either the New York or Washington Conventions, if that is suggested. Those Conventions require that arbitral awards be enforceable in the same manner as judgments of the national courts. No judgment could be enforceable in this jurisdiction where such enforcement was contrary to the constitutional identity of the State, or fundamental principles of European law (although the latter matter would itself necessarily require a reference to the CJEU). In any event, the issue for this Court is whether or not Ireland may ratify the Treaty as currently proposed by decision of the Government and resolution of the Dáil. The majority of the Court have concluded that it may not do so and have identified what is considered to be the near automatic enforceability of an award as a fundamental objection. This necessarily identifies a provision of national law, which precludes ratification. It is of course, a matter entirely for the Government and the Oireachtas if any step is taken to amend national law in this regard or whether this is possible or desirable having regard to Ireland's international obligations.

178. Finally, for reasons already set out I cannot agree that it is a matter of law or practicality that Ireland would be precluded by the obligation of sincere cooperation from refusing enforcement in such extreme circumstances. Although once again, it is additional comfort that in the case of any award considered to run afoul of fundamental principles of EU law that would ultimately be a matter for the CJEU.

M. ***Conclusion***

179. I would answer the questions posed by Dunne J at paragraph 13 of her judgment as follows:-

(1) Is ratification of CETA necessitated by the obligations of membership of the EU for the purposes of Article 29.4.6° of the Constitution? **No.**

(2) Is ratification of CETA incompatible with the legislative sovereignty of the State under Article15.2? **No.**

(3) Does the creation of the CETA Tribunal amount to the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the courts in this jurisdiction contrary to Article 34 of the Constitution? **No.**

(4) Does the "automatic enforcement" of a CETA Tribunal award under the enforcement provisions of CETA together with the provisions of the Arbitration Act, 2010 constitute a breach of Article 34? **No. For reasons set out, I do not agree that CETA Tribunal awards are "automatically enforceable" and/or that the enforceability of such awards is or would be a breach of Article 34.**

(5) What is the effect of the interpretive role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution? **For reasons set out above I do not consider that the role of the Joint Committee constitutes a breach of Article 15.2.**

(6) Would an amendment of the Arbitration Act, 2010 to alter the "automatic enforcement" of a CETA Tribunal award as proposed in Part XIII of the judgment to be delivered herein by Hogan J. alter the position in relation to the ratification of CETA? **It follows from my judgment that the enforcement provisions of CETA do not themselves constitute a breach of Article 34, and this proposition would only be strengthened if the 2010 Act were amended to make explicit the possibility of refusal of enforcement.**

AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000124

O'Donnell C. J.
MacMenamin J.
Dunne J.
Charleton J.
Baker J.
Hogan J.
Power J.

Between/

PATRICK COSTELLO

Appellant

-and-

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Ms Justice Power delivered on the 11th day of November, 2022

Introduction

1. Every judge appointed in the manner provided for by the Constitution has '*solemnly and sincerely*' promised and declared in '*the presence of Almighty God*' to '*uphold the Constitution and the laws*' (Article 34.6.1°). Any case that asks of Ireland's Court of Final Appeal to rule on what the People intended when they adopted, enacted and gave to themselves the

Constitution of Ireland, is a case of significant moment. Constitutionally, how that question is answered is a matter of ultimate concern. This is such a case.

2. The subject matter of the appeal involves a detailed and complex international trade agreement styled the 'Comprehensive Economic Trade Agreement' ('CETA'), between Canada of the one part, and the European Union and its Member States of the other. Because it is a mixed agreement, member states have a say in determining whether they should ratify it. Many issues have been raised and interesting arguments canvassed but, essentially, the question before this Court comes down to whether it is permissible under the Constitution for the Government to execute and ratify CETA in the manner proposed. Complex as the trade agreement itself may be, the discrete question before the Court is a binary one.

3. I have read the judgments of my colleagues in draft form. All are agreed that the case raises an issue of fundamental principle. The majority has decided that it is not permissible for the Government to act as proposed. In its view, there are provisions within Chapter 8 of CETA which, if binding upon Ireland, would be incompatible with the sovereign nature of the State and its sovereign powers, whether executive, legislative or judicial. That being so the majority considers that ratification in the manner proposed by the Government would be unconstitutional and, for that reason, has determined that the appeal should be allowed.

4. Respectfully, I disagree. My position mirrors that of O'Donnell, C.J., and I agree with his views as articulated in the extensive and compelling judgment he has delivered in this matter. Without underestimating the importance of the issues that cause concern to the majority and whilst recognising that the case touches upon several important aspects of the State's sovereignty, I am firmly of the view that ratification of CETA in the manner proposed by the Government pursuant to Article 29.5.2° of the Constitution, falls squarely within the scope of the executive power of the State which, in or in connection with its external relations, the People have decided, is to be exercised by or on the authority of the Government (Article 29.4.1°).

5. That is not to say that I misjudge the potential and, possibly, significant *impact* that CETA *may* have within the State. It is, rather, to recognise that, subject to remaining within the constitutional constraints on the exercise of its executive powers, whether express or necessarily implied, there are wide-ranging decisions that may be taken in the conduct of the State's external relations that fall within the exclusive prerogative of the Government under Article 29.4.1° of the Constitution.

6. Of course, the powers exercised by the three organs of government within the State's constitutional architecture are not '*hermetically sealed*' as the Chief Justice points out. They do not operate in isolation, one from the other. The mere fact, however, that powers reserved to one organ of State may have an impact upon those of another, is not a sufficient basis, in my view, for declaring that the exercise of powers in such circumstances is unconstitutional.

Points of Divergence

7. All members of the Court agree that there are certain obligations necessitated by Ireland's membership of the European Union and that the ratification of CETA is not one of them. The Court of Justice of the European Union ('CJEU') in its Opinion 2/15 (EU/Singapore Free Trade Agreement) of 16 May 2017 EU:C:2017:376 has found that non-direct foreign investment falls beyond the scope of the European Union's common commercial policy as defined in Article 207(1) of the Treaty on the Functioning of the European Union ('TFEU') and, that, as such, it falls outside the Union's exclusive competence pursuant to Article 3(1)(e) of the TFEU. It held that non-direct investment and the EU-Singapore trade agreement's provisions pertaining to Investor-State dispute settlement, fell within a competence shared between the Union and the Members States. Being a mixed agreement and engaging as it does, the internal competence of the State, ratification of CETA falls to be determined as a matter of Irish constitutional law.

8. Apart from that, it seems to me that there are certain key issues upon which the Members of the Court differ in their views. The first concerns the nature of the agreement itself and

whether it can be said that CETA operates, exclusively, on the international plane and thus outside the Irish constitutional order or whether it, in fact, creates a '*parallel jurisdiction*' that removes certain disputes from the jurisdiction of the Irish courts in breach of Article 34 of the Constitution and/or that it is capable of calling into question the finality of decisions of the Irish courts. The second issue is whether the mechanism for enforcing an award made by a CETA tribunal engages and breaches judicial sovereignty by 'converting' an international ruling into an enforceable judgment required to be recognised, as such, at domestic level. A third issue concerns the jurisdictional limits of a CETA tribunal and whether its decisions would or could have the effect of undermining or destabilizing the 'constitutional identity' of the State. The argument goes that to the extent that a CETA award *could,* in effect, negate or undermine the validity of an otherwise lawful measure—whether legislative, executive or judicial—it would compromise Ireland's legislative and juridical sovereignty.

9. As I have already indicated my agreement with the position and reasoning of O'Donnell, C.J., I do not propose to express a view on every issue raised in the case or rehearse all of the arguments that lead me to conclude that the provisions of CETA do not infringe upon the essential sovereignty of the State, whether in its internal or external aspects. I propose only to outline the principal reasons for the conclusion I have reached. To a large extent, I am persuaded by the incontestable similarities that exist between the framework of CETA and that of the European Convention on Human Rights ('the Convention' or 'the ECHR'). Where there are differences between how those international instruments operate, in practice, such differences are not sufficient, in my view, to substantiate the contention that whilst the ECHR's ratification by the State did not infringe upon Ireland's sovereignty, the ratification of CETA in the manner proposed, would. To my mind, the differences have to be seen within the context of the respective agreements and, when viewed in this way, they are entirely coherent and consistent with the respective provisions thereof. I will also say a brief word about what I regard as the safeguarding provisions within the agreement which circumscribe the jurisdiction

of a CETA tribunal. These have been considered by the CJEU in *Opinion 1/17* (EU-Canada CETA) of 30 April 2019 EU:C:2019:341 on the compatibility of CETA with EU law ('*Opinion 1/17'*). The limited nature of a CETA tribunal's delineated jurisdiction further persuades me that the execution and ratification of this trade agreement by the Government in the manner proposed is constitutionally permissible.

10. A brief pause, at this point, might be apposite to reflect on the treaty-making power of the Executive within the context of Ireland's sovereignty as a nation and the stated objectives of the People.

Sovereignty

11. The nation of Ireland, by Article 1 of the Constitution, '*affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations and to develop its life, political, economic and cultural, in accordance with its own genius and traditions*.' (Emphasis added here and throughout this judgment is mine, unless otherwise indicated.) The '*sovereign, independent and democratic*' nature of the State is guaranteed by Article 5. In exercise of their inalienable, indefeasible and sovereign right, the People have chosen their own form of Government and by Article 6 have declared that: -

> *"(1) All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*
>
> *(2) These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."*

12. Thus, the architecture of the Constitution is well defined. The People have vested the powers of government in separate institutions, each assigned its own distinct field of responsibility. To the Oireachtas, has been assigned the power to make laws for the State

(Article 15.2.1°). Its power is '*sole and exclusive*'. To Judges, has been assigned the administration of justice (Article 34.1) and, subject to the qualifying provisions of Article 37, no other adjudicatory body may carry out this function for the People within the State. To the Government, has been assigned the exercise of the State's executive power, such power to be exercised subject to the provisions of the Constitution (Article 28.2). Executive power is exercised both within the State and, externally, in the context of the State's conduct of its relations with other nations.

'Concord' With Other Nations

13. The establishment of 'concord' or the creation of harmony with other nations is one of the guiding principles that inspired the People to adopt and enact the Constitution. Just as membership of a natural family carries a shared genetic make-up, so, too, membership of the global or human family carries a shared imprint of value and this is recognized, implicitly, in the *Preamble* to the Constitution. In seeking to promote the *common* good, so that certain objectives may be achieved, the Constitution was adopted and enacted. Firmly among those objectives is the establishment of '*concord*' with other nations. Mindful that the State would, necessarily, takes its rightful place within the global community of nations and engage in a whole range of international relations, the People, under Articles 28 and 29 of the Constitution vested responsibility in the Government for conducting the State's foreign affairs (Article 29.4.1°) providing that the executive power of the State *'in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.'* O'Donnell C.J.'s recall of the particular historical circumstances that prevailed when the Constitution was being drafted underscores the fact that the State's membership of the global family and the implications flowing therefrom cannot but have been to the forefront of considerations when Article 29 of the Constitution was being drafted.

14. It is in and through its external relations with other nations and by its comportment and commitments on the international stage, that Ireland, as a sovereign State, demonstrates its adherence to the guiding principles of the Constitution. The *free* entry into international agreements—whether of a political, social or economic nature—with other nations for the mutual benefit of both constitutes the type of '*concord*' to be established and pursued as envisaged by the Constitution.

15. The Constitution confers a wide though not unlimited discretion on the Government in the conduct of the State's foreign affairs. I am grateful to those colleagues who have set out in some detail the relevant principles articulated in the seminal cases of *Boland v. An Taoiseach* [1974] I.R. 338 ('*Boland'*), *Crotty v. An Taoiseach* [1987] IESC 4, [1987] I.R. 713 ('*Crotty*') and *Pringle v. Government of Ireland and Others* [2012] IESC 47, [2013] 3 I.R. 1 ('*Pringle*'). What the jurisprudence indicates is that, in the ordinary course of affairs, treaties entered into by the State are considered to be the exercise of sovereignty rather than the alienation or transfer of same. The express limitations imposed on the Government are discussed by Clarke J. (as he then was) in *Pringle*. Article 29.5 and Article 29.6 provide several specific examples of the important oversight role played by Parliament. An over-riding constraint of a more general nature is that imposed by Article 28.2 which is *'the requirement that an international agreement not infringe the terms of the Constitution'.* Whether or not a particular treaty crosses constitutional boundaries is to be answered by reference to its specific terms.

16. It is fair to say that it is only in exceptional cases that the terms of a treaty would require that it be put before the People in a referendum. Respecting the exceptional nature of such a requirement is essential to the effective functioning of the State in its foreign relations. Ireland has significant standing and reputation, internationally. Small as the nation may be, it is recognised and respected for its contribution, impact and influence. This benefits not just the State but is a significant factor in establishing the concord or harmony with other nations that the People set out to achieve. It is, perhaps, when such '*concord*' with other nations is most at

risk that the importance of the State's power to engage in foreign relations is accentuated. The exercise of executive power in foreign relations would become entirely unworkable and thus, not in the best interests of the nation, if the Government were obliged to have its decisions in international affairs cross-checked, systematically, and sanctioned by the People. Such persistent second-guessing of the Government's exercise of executive power in the conduct of the State's foreign relations would be constitutionally impermissible.

17. Thus, it was for good reason that the courts have been slow to interfere with the exercise of executive power in this regard. This is not because of any special deference to the Government. It is respect for the Constitution that restrains such intrusion. Subject to express or necessarily implied constitutional constraints discussed in the case law above, the executive power of the democratically elected Government to discharge its constitutional functions ranks equal in importance to the sole and exclusive power of the Oireachtas to make laws for the State (Article 15.2) and the exclusive power of the courts to administer justice within it (Article 34.1).

Concerns over CETA

18. In the interests of its People and of the common good, Ireland has entered multiple international agreements through which the Irish State is bound, under penalty, to fulfil certain obligations. One of the principal concerns aired in this case is that, if executed and ratified, CETA will bind Ireland, as a matter of international law, to be liable for damages which an international adjudicatory body—and not an Irish court—deems payable where that body considers that a particular measure of a legislative, executive or judicial nature breaches CETA's terms. Concern is further fuelled by the fact that this *could* occur in circumstances where, as a matter of Irish law, the measure complained of would not give rise to any right to damages. Like any new treaty, the terms of CETA require close and careful consideration. However, in all of the issues and arguments raised by the appellant I have been unable to

discern anything which convinces me that CETA crosses a constitutional boundary, particularly, in circumstances where an analogous and far more extensive international treaty does not. That treaty is, of course, the ECHR and, as the most obvious comparator, consideration of its operation featured significantly during the oral hearing.

The ECHR – An Appropriate Comparator

19. It is said by my colleague Hogan J., in his considered and detailed judgment, that the ECHR represents something of an exception within the Irish legal system, something that stretches the '*pre-existing rules'* to their limits. That position, in my view, is rather difficult to reconcile with the major role that Ireland played in the drafting and adoption of the Convention. Nor is it consistent with the fact that, though not the first State to ratify the Convention, Ireland was the first to recognize the jurisdiction of the court established thereunder. No doubt, the draft provisions of the ECHR generated debate and attracted careful scrutiny and, in some quarters at least, concerns were expressed in terms and tones not altogether dissimilar to those articulated in this appeal. An observation in Egan, Thornton and Walsh, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014) recalls that the *Irish Independent's* editorial, marking the government's ratification of the Convention in Strasbourg, warned that it conferred on:

> *"an external judicial body the right to adjudicate on matters of purely Irish concern . . . It seems to us that this external court may even reverse or render nugatory a decision made by our Supreme Court".*

20. Whilst concerns about the scope or impact of a new treaty may be entirely appropriate they must arise, at least in my view, from the actual terms of the treaty under review and not from speculative apprehensions about what could or might go wrong. There was, in fact, no reality back in 1953 to the apprehension that the ECtHR could '*reverse*' or '*render nugatory*' a judgment of this Court because the terms of the Convention did not confer upon the ECtHR

the jurisdiction so to do. There may well have been surprise or even indignation to discover that the court's first case to be litigated was against Ireland, particularly, when an earlier memorandum to government, prepared in anticipation of ratification of that treaty, had advised that the likelihood of Ireland being brought before the court was '*very remote'*. (See Schabas, 'Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride*'* in Morison, McEvoy and Anthony, *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (OUP, 2006), 19). Surprised or not by that turn of events, there is, as O'Donnell, C.J. points out, nothing to suggest that Ireland regarded itself as operating at the very limits of its constitutional order by acceding to the ECHR. Almost seventy years on and dozens of judgments later, nobody contends that Ireland's sovereignty has been undermined or diluted by reason of it being a contracting party to the Convention.

21. It seems clear, from this vantage point, that CETA's operation, if ratified by Ireland, will resemble, generally, though more narrowly, the operation of the ECHR. The Convention is considerably more extensive in its scope and impact. The similarities between both systems are numerous. First, as with CETA, the ECHR involves an international adjudicatory body with power to decide that a measure taken (or not taken) by the organs of this State may breach or violate a term of a treaty to which Ireland is a signatory. Second, as with CETA, membership of that adjudicatory body is not confined to persons who are serving judges. Some members of the Strasbourg court may possess the qualifications required for appointment to judicial office but that is not mandatory. Being a 'jurisconsult' of recognised competence is sufficient for eligibility. Third, as with CETA, there is no requirement that persons appointed to serve on the court be answerable to any of the institutions of the State. On the contrary, all members are independent of the states in respect of which they are elected. Fourth, as with a CETA tribunal, the court's ruling may impugn a measure that is entirely lawful in Ireland. Fifth, the ECtHR may direct Ireland to pay damages to a successful complainant and, in certain instances, it may direct that general measures be taken by the State. Sixth, as under CETA, a judgment

of the Strasbourg is binding upon and enforceable against Ireland (see *Norris v. Ireland* (Application no. 10581/83) (1988) 13 EHRR 186; see also *O'Keeffe v. Ireland* [2014] ECHR 96, (2014) 59 EHRR 15).

22. Another similarity between the CETA and ECHR frameworks is that whereas neither adjudicatory body established thereunder has jurisdiction to declare upon the *validity* of Irish law, both may consider and review it in the context of deciding upon a claim. In several cases, the Strasbourg court has considered provisions of domestic legislation and reviewed final judgments of this Court for the purpose of determining whether, in their impact upon an applicant, a violation of the Convention had occurred (see *Norris, O'Keeffe, Donohoe v. Ireland* [2013] ECHR 1276 and *Keena and Kennedy v. Ireland* [2014] ECHR 1284). It is envisaged that a CETA tribunal will have similar powers of review for the purpose of determining whether a term of the trade agreement has been breached.

23. Notwithstanding the numerous structural similarities between CETA and the Convention, the appellant submits, and the majority agrees, that an aspect of the State's sovereignty is compromised by accession to the former but not to the latter. It seems to me that it is, precisely, at the points where those international frameworks differ, that the majority discerns a difficulty with CETA's constitutional compatibility. Those points of divergence concern, first, the conferral upon investors of a choice of forum without any requirement to exhaust domestic remedies and, second, the inclusion of a provision within CETA on the enforceability of awards within the domestic legal system. This latter provision is of particular concern to my colleague, Hogan J. He considers that the manner of enforceability of a CETA award is a critical distinction between CETA and the ECHR and one which, in his view, constitutes an essential point of principle where the constitutional line is crossed. He also expresses concern about the absence of any recourse which this State would have in the event that a CETA tribunal erred in its interpretation of our law even as a matter of fact. Both of these are matters to which I shall return, presently.

The Choice of Forum and 'Removal' of Disputes

24. Unlike the Convention, there is no requirement upon an investor whose investment is covered under CETA to exhaust domestic remedies within the state in which an investment has been made. Such an investor has a choice. Thus, a Canadian investor in Ireland *may* pursue Ireland before the Irish courts or, having met certain procedural criteria, may bring a claim before a CETA tribunal. If the latter option is chosen, then any domestic legal proceedings initiated in respect of an impugned measure must be withdrawn and the investor must waive the right to initiate such proceedings at domestic level (Article 8.22.1). It seems rather unlikely, in my view, that a Canadian investor in Ireland would engage in expensive international proceedings against the European Union and/or the State in which it had made significant investment, without seeking to resolve its grievances at local level. A complaint under CETA about 'a denial of justice' may be difficult to sustain if the judicial system for remedying and resolving injustices was never invoked. Nevertheless, the fact remains that there is a choice of forum under CETA and, if the covered investment is in Ireland, the option to bypass the Irish courts is there. Whether that constitutes an infringement of Article 34 must be confronted, squarely.

25. Article 34 confers upon judges appointed under the Constitution the duty to administer justice in courts established by law and, with limited exceptions, to do so in public. By conferring a right upon Canadian investors in Ireland to elect to bring a dispute before a CETA tribunal, the appellant contends that judicial sovereignty in the administration of justice is, thereby, diminished. Such sovereignty, it is argued, will be diluted as claims may be *'removed'* from the jurisdiction of the courts. It is said that the conferral of a choice of forum would preclude the Irish courts from determining a dispute in circumstances where it is the Irish courts and those alone who are charged with administering justice within the State. This, it is said, would constitute an alienation by the State of its sovereign immunity within the terms described by the Supreme Court in *Crotty*.

26. As I read the considered and weighty judgment to be delivered my colleague, Dunne J., it seems to me that this is where she locates the crux of the problem with CETA. Having discussed what was in issue in *Crotty* and regarding as '*relevant*' to the 'removal from the jurisdiction' issue what the CJEU determined in *Republic of Moldova v Komstroy LLC* Case C-741/19 ECLI:EU:C:2021:655 (in the context of the application of EU law), Dunne J. articulates, succinctly, the problem she discerns.

> *"[. . .], I find it extremely difficult to see how the ratification of CETA as contemplated by a resolution of the Dáil can withstand constitutional scrutiny. This is an international treaty by which the jurisdiction of the Irish courts to rule on a dispute between an entity operating in Ireland against the Irish State can be removed and, in effect, will be removed from the jurisdiction of the Irish courts. I cannot see how that is permissible. In practical terms, there will be two parallel jurisdictions open to the Canadian investor, either to bring proceedings before the Irish Courts or to submit a claim to the CETA Tribunal. If the latter option is taken, the dispute is removed from the jurisdiction of the Irish courts which would otherwise have had jurisdiction to deal with the matter. What's more, the award of the CETA Tribunal then has the benefit of almost automatic enforcement in this jurisdiction. In Crotty, the issue concerned the removal of the constitutional function of the State in relation to international relations. That was a function conferred on the Executive by the Constitution through the People. Here, the jurisdiction of the courts is removed by an agreement entered into by the Executive whereby the jurisdiction of the courts is cut down. I do not see how this cannot involve a breach of Article 34."*

27. The above finding is the principal point upon which I dissent, respectfully, from the decision of Dunne J. The finding reflects the argument made by the appellant that, as matters stand, a Canadian investor who has a problem with the Irish State is required to bring proceedings within this jurisdiction. That, it was submitted, is the '*regime*' before going off '*out into the international plane'*. This argument, to my mind, is flawed. There is no 'requirement' on any aggrieved individual or entity to litigate before the Irish courts. Litigation is a choice, and many choose other forms of dispute resolution. Thus, for example, under an international bilateral agreement, the parties may give prior consent to resolve, by way of

arbitration, any dispute that may arise and to do so without recourse to the courts. There is nothing unlawful or unconstitutional in that choice. Thus, there is not now, nor is there under CETA, any *a priori* requirement on a Canadian investor to resolve a dispute by bringing it before the Irish courts. There is a right of access to courts that administer justice within the State, but there is no obligation to exercise it.

28. If an investor whose investments are covered under CETA, elects to bring its grievance before the Irish courts in public law proceedings, the only complaint that may be made in respect of an impugned measure is that it constitutes a breach of Irish law. Any effort to rely upon the fact that an investment was covered by CETA would be to no avail. An alleged breach of an international agreement is not a justiciable dispute under Irish law, unless Irish law makes it so. If such an investor were successful in its claim before the Irish courts and were to obtain an award of damages against the State, then the legal liability upon which any such award would be made, is a liability in Irish law.

29. An investor who, on the other hand, elects to seek relief before a CETA Tribunal, may only complain that an impugned measure constitutes a breach of that international agreement. Any award obtained on foot of such a complaint would be based on a liability under international law. Although the same measure may be the subject of dispute, a different complaint will be framed, a different question will be posed, and a different basis of liability will be engaged, depending on the jurisdiction that is invoked.

30. A Canadian investor who elects to pursue a claim before a CETA tribunal does not subtract one jot from the jurisdiction of the Irish courts. In my view, the contention that CETA creates '*a parallel jurisdiction*' conflates, with respect, the nature of two distinctly and fundamentally different claims. A failure to distinguish between the different legal bases upon which liability could be imposed, forms part of the same error. An investor who alleges a breach of an international trade agreement and succeeds in obtaining an award of damages arising therefrom, does not, in any way, diminish or detract from the jurisdiction of the Irish

courts. Again, and respectfully, a claim before a CETA tribunal is not one which, had *that* claim not been taken, is one in respect of which the Irish courts '*would otherwise have had jurisdiction*'. One cannot lose what one does not have, and the Irish courts have no jurisdiction to determine a claim that involves an alleged breach of CETA.

31. If a Canadian investor operating within the State were to be *deprived* of an opportunity to litigate before the Irish courts and were obliged to present any complaint it may have only to a CETA tribunal, then that would be an altogether different scenario and one which would certainly raise an issue in respect of its constitutional compatibility. It was*, inter alia,* because the International Criminal Court could exercise a *direct* jurisdiction in respect of persons within the State for serious international crimes, that the Rome Statute was deemed to transfer (albeit in a limited way) an aspect of sovereignty such that a referendum was required prior to accession thereto.

32. At the level of *form*, there are certain similarities between a CETA tribunal and an Irish court but the same may be said of any other juridical body. At the level of substance, however, there is a world of a difference. That the same facts may generate fundamentally different disputes does not, in itself, mean that a parallel jurisdiction is, thereby, created. CETA offers an alternative jurisdiction, not a parallel one and, importantly, it is a jurisdiction that stands outside of the Irish constitutional order. Depending on the choice of jurisdiction invoked by a Canadian investor whose investment is covered, different claims will be made, different parties will present, different obligations will be disputed, different laws will apply, different rules will govern procedure, different juridical bodies will deliberate, different determinations will be delivered and, where a claim succeeds, a different legal basis will ground any liability in damages. This is a not a question of semantics. It is a matter of jurisdictional boundaries—national and international—and the consequences and competences that flow therefrom. That such a jurisdiction was not 'contemplated' by the Constitution (Charleton J. para. 61.3) is no more problematic from a constitutional perspective than was the non-contemplated jurisdiction

of the Strasbourg court which was recognised by Ireland on 21 April 1959 almost twenty-two years after the enactment of the Constitution.

Domestic Remedies

33. Nor does the absence within CETA of any requirement to exhaust domestic remedies create a problem in respect of any aspect of Ireland's sovereignty. Indeed, it is entirely consistent with the nature of CETA and the 'either/or' choice of jurisdiction provided, thereunder, that there is no requirement to exhaust domestic remedies. The Irish courts have neither power nor authority to interpret, apply or uphold the provisions of CETA or, indeed, to grant any remedy for a breach thereof. Since the Irish courts have no jurisdiction to rule on an alleged breach of CETA there is no obligation under that treaty for the State, as a party, to provide a remedy for any alleged breach thereof. A complaint about CETA is not one which could be made, properly, before an Irish court and, thus, it would make no sense at all for the agreement to require exhaustion of a remedy for a breach which the Irish courts have no jurisdiction to grant.

34. In contrast to CETA, the Convention provides, expressly, that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. Under the ECHR framework, therefore, remedies are required to be exhausted and that is entirely consistent with the nature of *that* agreement based, as it is, on the principle of subsidiarity. That is because, though not cast in identical terms, rights protected under the Convention are also protected as substantive rights at domestic level and, in some respects an enhanced level of protection is afforded under Irish law. By contrast, the range of claims in respect of which complaint may be made to a CETA tribunal is considerably narrower than, and of an altogether different nature to, the range of claims that could be brought before the Irish courts. The requirement to exhaust domestic remedies cannot be view in isolation

from the different nature of the claims in issue and the availability or otherwise of remedies in respect thereof appertaining to the different jurisdictions in question.

35. Although Dunne J. found the observations of the CJEU on the removal from the courts of Member States disputes concerning the application of EU law to be *relevant* to her analysis, they were not, at least in my view, entirely on point. The essential difference, of course, between CETA and the agreement under consideration in *Achmea* (C‑284/16, EU:C:2018:158) is that unlike that bilateral agreement, CETA is not an agreement *between two Member States within the Union* who agree to allow an independent tribunal, whose rulings are not subject to scrutiny by the CJEU, to determine the outcome of a dispute. It was, at least as I read it, the fact that such a tribunal was ruling on an application of EU law but in the absence of the safeguards and remedies provided, thereunder, that created the difficulty, in principle.

CETA's Interaction with Irish Law

36. Apart from the creation of a '*parallel*' jurisdiction, a further unease among some members of the majority concerns CETA's interaction with Irish law and the potential effect thereon which a ruling of a CETA tribunal may have upon the finality of judgments emanating from the Irish courts. Particular concern is expressed about the potential impact that a CETA award may have in circumstances where it would be enforceable within the domestic legal order. It is said that this could have the effect of '*going behind*' the finality of judgments of this Court. If CETA is executed and ratified, it has to be acknowledged that it could, potentially, have a significant impact upon Ireland, with positive and/or negative outcomes. A CETA tribunal, however, has no power to direct any change in Irish law or to reverse any final decision of an Irish court. The fact that an award of a CETA tribunal may have a significant impact or even inspire the future amendment or enactment of legislation does not compromise legislative or judicial sovereignty any more than did the rulings of the Strasbourg Court in *Norris* or in *McFarlane v Ireland* [2010] ECHR 1272 ('*McFarlane*') or in *O'Keeffe*.

37. A successful applicant before the ECtHR may consider, quite incorrectly, that a 'win' in Strasbourg constitutes an overruling of a final judgment of the Irish courts. That, of course, is to misunderstand, entirely, the nature of the Convention system. The ECtHR does not function as a court of appeal or a court of 'fourth instance'. It is a court of supervisory jurisdiction in respect of an international agreement to which Ireland is a contracting party. A 'win' for an applicant is a finding of non-compliance on the part of the State with an obligation it had undertaken to fulfil at international level. It is not an overruling or reversal of a final judgment of this Court which, irrespective of what the ECtHR may find, remains final and binding in domestic law. The same reality will prevail if CETA is ratified and a Canadian investor who fails in a claim brought under Irish law, goes on to secure a 'win' under the terms of CETA.

38. My colleague, Hogan J., has raised (at para. 112) the possibility and prospect of a CETA tribunal giving an erroneous interpretation of Irish law. In a passage expressing some concern, he says that:

> "[*I]t would also seem quite possible that a situation might arise in which the CETA Tribunal interprets the domestic law of the State – including EU law – and the State would be without recourse if this interpretation was erroneous. Although I naturally accept that the CETA Tribunal is expressly confined by Article 8.31(2) CETA to interpreting the law in force in the State as a matter of fact, one could, I think, easily foresee a situation in which the CETA Tribunal could err in interpreting our law as a matter of fact, particularly on a matter of law that has not previously been adjudicated on in the Irish courts. In these circumstances, neither the State (nor the CJEU for that matter) would have any recourse and, indeed, the State would be obliged to enforce any award made for the reasons I have outlined above*."

39. In my view, the situation described by Hogan J. is not a novel phenomenon and has already occurred in the context of proceedings before the ECtHR without giving rise to the slightest concern that Ireland's sovereignty was at stake. In *McFarlane*, the Irish Government presented compelling expert evidence from one of Ireland's most distinguished constitutional lawyers which confirmed, unequivocally, that Irish law provided a remedy in damages for a

breach of constitutional rights. The right to a trial in due course of law (including the right to an expeditious trial) is such a right and, in *McFarlane*, the State argued that if this right were violated, then a remedy in damages could be sought. The fact that nobody had taken proceedings of this nature and, thus, a breach of this specific constitutional right *had not previously been adjudicated on in the Irish courts,* did not detract from the fact that, under Irish law, a remedy in damages existed for such a breach.

40. The Strasbourg court, nevertheless, concluded that there was no effective remedy for breach of the constitutional right to an expeditious trial or, in Convention terms, to a trial within a reasonable time. The Grand Chamber, in my view, had erred, fundamentally, in its rejection of the State's expert evidence and in its interpretation of Irish law and I explained why I took that view in the dissenting opinion I wrote on behalf of the minority. The State, in those circumstances, did not have any recourse and, indeed, was obliged to abide by the ruling of the court and to enforce the award at national level. All of this occurred without the slightest suggestion that Ireland's sovereignty as guaranteed under the Constitution was in any way compromised.

41. Hogan J. considers that to the extent that CETA permits disputes that involve public law in this State to be the subject of a binding adjudication by a CETA tribunal which is *prima facie* enforceable in the State, it is '*plainly incompatibl*e' with the juridical sovereignty of the State. He contemplates the possibility that a supra-national tribunal with power to make binding awards against the State might be constitutionally permissible if the disputed events took place *outside the State* (see para. 176). With respect, this overlooks the reality that, for several decades, the Strasbourg Court has been and remains empowered to make binding awards against the State in respect of disputed events and actions that take place *inside* the State and that engage a wide range of laws without the slightest hint that the exercise of its jurisdiction in this regard is, constitutionally, objectionable. (In this regard see *Airey v Ireland* [1979] ECHR 3, (1979-80) 2 EHRR 305, *Norris*, *O'Keeffe*, *McFarlane* and, as to the court's

power to resolve disputes involving the State's criminal laws see *MD v Ireland* (Application No. 50936/12, 16 September 2014), *Donohoe*, *Lynch and Whelan v Ireland* (Application Nos. 70495/10 and 74565/10, 8 July 2014) and *Boyce v Ireland* (2013) 56 EHRR SE11). This takes us to what must be regarded as the principal structural difference between the framework of a CETA tribunal and that of the ECtHR, namely, the mechanism for the enforcement of binding awards at domestic level.

The Enforcement of Awards

42. Pursuant to CETA's provisions, a claim may be submitted under the rules of the Conventions identified under Article 8.23.2 (a) to (c), namely, the ICSID (International Centre for Settlement of Investment Disputes) Convention and Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules or the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. A claim may also be brought under any rules on the agreement of the disputing parties (Article 8.23.2 (d)). It is common case that the ICSID and UNCITRAL Conventions provide for the execution of awards on foot of binding agreements.

43. The parties to CETA agree that an award issued shall be binding between the disputing parties (Article 8.41). They further agree that a disputing party shall, subject to certain procedural requirements, recognise and comply with an award without delay (Article 8.41.2) and that the execution of the award '*shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought'* (Article 8.41.4). In this jurisdiction, awards become binding through the Arbitration Act 2010 and, in particular, sections 24 and 25 thereof.

44. A number of colleagues consider that enforcement of a CETA tribunal award by means of the Arbitration Act 2010 creates a fundamental difficulty in terms of the agreement's constitutional compatibility. For Dunne J., it is CETA's creation of a '*parallel jurisdiction*'

together with the '*almost automatic enforcement*' provision that constitutes a breach of Article 34. She distinguishes CETA's enforcement mechanism from that of the ECHR framework and points to the fact that judgments of ECtHR are not enforceable through the domestic courts while those of CETA are. It is said by my colleague Hogan J. that the 2010 Act serves as '*a sort of makeshift pontoon bridge*' by which a CETA tribunal award '*crosses the legal Rubicon from the realm of international law into an enforceable judgment recognised under domestic law on a more or less automatic basis'*.

45. For my part, I cannot agree that the enforceability mechanism for awards issued by a CETA tribunal is of such distinction and significance as to constitute the decisive feature that makes CETA '*plainly incompatible*' with the juridical sovereignty of the State. First, the fact that an ECtHR ruling is not enforced through the Irish courts does not, in any way, diminish its binding nature upon and its enforceability within the State (see *Norris, O'Keeffe, MacFarlane*). The State has committed itself to abiding by decisions of the Strasbourg court and, under Article 46 §2 of the Convention, it is the Committee of Ministers of the Council of Europe that is entrusted with supervising the execution of court judgments. Those judgments leave to the contracting parties the choice of the means to be used to give effect to their obligation to abide by the court's decisions (see *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, §78; and *Scordino v. Italy* [GC], 29 March 2006, §233). Whether a ruling is issued by a CETA tribunal (assuming CETA's ratification) or the ECtHR, the outcome for the State is the same. If it is constitutionally permissible for the State to abide by and 'give effect to' a ruling of the Strasbourg court, then something more than a difference in the mechanism for achieving the same result is required if CETA is to be deemed constitutionally objectionable.

46. In my view, the difference in the mechanism for executing decisions under the ECtHR system and under the CETA framework cannot be sufficient, in and of itself, to establish a constitutional frailty. It is, as the Chief Justice puts it (at para. 164), a *difference* but not a *distinction* which justifies a different conclusion in law. Either way, under both frameworks

there is an obligation to abide by rulings of an international body that are binding upon the State. In *Norris*, the ECtHR held that the Irish government had adduced no evidence which would point to factors '*justifying the retention of the impugned laws*'. The court recognised that its decision would have effects extending beyond the confines of that particular case. It went on to state that it will be for Ireland *'to take the necessary measures in its domestic legal system'* to ensure the performance of its obligation to abide by the decision of the Court.

47. Under the terms of CETA it is envisaged that '*the necessary measures'* to be taken by the State *in the domestic legal system* are identified, not in the aftermath of an international ruling, but in advance and at an earlier stage. The fact that the Government decides to agree the method for executing a binding international decision *prior* to a treaty's ratification makes little, if any, difference to its constitutional compatibility. There is nothing at the level of principle which prevents the executive organ of the State from deciding, in advance of a treaty's ratification, how the State will fulfil or perform its obligation to abide by the terms thereof. If, as happens in this case, there is already a provision within Irish law which can accommodate the fulfilment of the obligation in question there is nothing that is constitutionally impermissible, as I see it, in deciding to deploy that mechanism.

48. The fact that the Irish courts may find themselves presented with applications for leave to enforce a CETA arbitral award made under ICSID or UNCITRAL rules, is precisely because, and only because, Irish law so permits it. Why the enforcement of a CETA tribunal arbitral award made under rules which are recognised and accepted in the State should be constitutionally objectional where the enforcement of awards made by other external arbitral bodies under the same rules is not, is a question that, at least in my view, has not been answered, convincingly, by the majority. It is Irish law that stipules that obligations imposed by awards made under ICSID or the New York Convention shall, by leave of the High Court, be enforceable in the same manner as a judgment or order of the High Court to the same effect. Thus, to the extent that CETA crosses any 'Rubicon' from international to national law – that

crossing is permitted only because Irish law provides an entry point for an identifiable category of entrants who have obtained awards under rules that are recognised under Irish law. Any 'conversion' of the international ruling, as Hogan J. puts it, arises by virtue of the operation of Irish law.

49. Reliance was placed by the appellant on *J.McD v. PL* [2010] 2 I.R. 199 wherein Murray C.J. made certain observations about the status of the ECHR and its effect at national level. In this regard, it is true that he observed that contracting states may, in principle, ignore the decisions of the Strasbourg court but it is equally clear that the former Chief Justice recognised that there was nothing that prohibited such decisions from being enforceable at national level. Such rulings, he stated, '*are not enforceable at national level unless national law makes them so*'.

50. Given the evolution of Irish constitutional law, for example, on the recovery of damages for delay in the court process and in the light of the ongoing judicial 'dialogue' between national and international courts, I am not at all convinced that, at least at the level of practice, the Irish courts would simply 'ignore' a ruling of the Strasbourg Court. But even if, in principle, they could do so, such an option is not permissible when it comes to an application for leave to enforce an award made by an arbitral tribunal under ICSID or UNCITRAL rules. Irish judges have promised, solemnly, to uphold the Constitution and the laws. In exercising his or her discretion on an application for leave, wide or limited as that discretion may be, an Irish judge is engaged in the administration of justice in Ireland and is discharging the solemn promise '*to uphold the Constitution and the laws*'. There is, therefore, at least in my view, no question of a CETA arbitral award crossing, impermissibly and unconstitutionally, any '*pontoon bridge*' and demanding of the Irish courts its '*almost automatic*' enforcement. Nor by issuing such an arbitral award does a CETA tribunal trespass upon any aspect of Ireland's juridical sovereignty any more than the Strasbourg court does when it delivers judgment against

the State. Neither body has any jurisdiction to direct the Irish courts to do anything. The Irish courts act only in accordance with the Constitution and the laws made thereunder.

51. As the Chief Justice points out, for over forty years provision has been made in Irish law under the Arbitration Act 1980 for the enforcement of awards made under the ICSID Convention or the New York Convention. For the sake of completeness, the argument that, in contrast to commercial arbitration agreements, third parties with no privity of contract may invoke and benefit from the terms of CETA makes no difference at the level of principle as to whether the agreement is constitutionally compatible. Third parties from across the globe may also be in a position to benefit from Ireland's ratification of the ECHR. In neither instance does the inability to name a potential beneficiary engage any aspect of the State sovereignty. I, too, consider it telling that no authority has been opened to the Court to say that executing an investor compensation agreement with enforcement provisions similar to those contained in CETA is an impermissible infringement of national sovereignty.

52. I am satisfied that CETA operates at the level of international law. In my view, the conferral upon investors of a choice of forum without a requirement to exhaust domestic remedies does not involve the creation of a parallel jurisdiction. The enforceability of a CETA arbitral award by reason of the operation of the provision of Irish law does not cross any boundary in terms of what is constitutionally permissible.

Jurisdictional Safeguards

53. As in life, the inability to predict the future may give rise to several potential 'doomsday' scenarios in terms of how CETA may operate, in practice. Neither Canada, the EU, Ireland or any other state party to CETA can immunise itself, absolutely, against the risk of a truly perverse ruling following a claim made under this multilateral trade agreement. As matters stand, however, there is nothing within the terms of CETA itself that suggests to me that such a scenario is likely to unfold. If, in the final analysis, an award issued by a CETA tribunal

were to be incompatible with the Constitution, then the reality is that no Irish judge would or could grant leave to enforce it.

54. There are several safeguarding provisions in the agreement that circumscribe the jurisdiction of a CETA tribunal. The agreement recognises that a party has the right to set, for example, environmental and labour priorities and to establish levels of protection in other important respects. Thus, for example, with regard to the environment, Article 24.3 provides that:-

> *"The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve such laws and policies and their underlying levels of protection".*

55. I am grateful to my colleague, Dunne J., for her detailed and careful summary of the findings of the CJEU in *Opinion 1/17*. It is obvious that the Court was cognisant of the fact that awards of a CETA tribunal could have a chilling effect upon the European Union ***if*** the tribunal had jurisdiction to find that the treatment of a Canadian investor was incompatible with CETA because of the level of protection of a public interest established by the EU institutions. The CJEU recognized that, realistically, to avoid being compelled, repeatedly, to pay damages, the achievement of the level of protection would need to be abandoned by the Union. It also recognized that if the Union or a Member State had to amend or withdraw legislation because of an assessment made by a CETA tribunal of the level of protection of a public interest, that, too, would undermine the capacity of the Union to operate autonomously within its unique constitutional framework.

56. Crucially, however, the Court underscored the fact that there are several important areas which are expressly removed from CETA's jurisdiction. In *Opinion 1/17*, the CJEU concluded

that a CETA tribunal does not have jurisdiction '*to call into question*' or '*declare incompatible*' with the agreement the level of protection of a public interest established by EU measures and, on that basis, to order the Union to pay damages. It recalled the explicit right of the parties to the agreement *'to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'* (Article 8.9.1). Additionally, the Court also recognised that the jurisdiction of the CETA Tribunal to find infringements of the '*fair and equitable treatment*' obligation was specifically circumscribed in that Article 8.10.2 provides an exhaustive list of the situations in which such a finding can be made.

57. After a lengthy reasoning process the CJEU (at para. 160) concluded:

> *"It is accordingly apparent from all those provisions, contained in the CETA, that, by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement, which are the only sections that can be relied upon in claims before the envisaged tribunals by means of Section F of that Chapter, the Parties have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights."*

58. Although this Court considers this appeal only from the perspective of the Irish constitutional law, I find the CJEU's analysis, reasoning and conclusion in *Opinion 1/17* to be helpful, by analogy. The CJEU observed that CETA tribunals could only be compatible with EU law if they had no adverse effect on the autonomy of the EU legal order. It noted that a CETA tribunal does not operate as part of the judicial system of either of the parties and that such a body cannot interpret or apply EU law or make awards that have the effect of preventing the EU institutions from operating in accordance with their own constitutional framework.

59. As the CJEU was satisfied that CETA does not interfere with the constitutional structure of the European Union, I consider that the same conclusion may be drawn, with equal validity, in respect of the constitutional structure and identity of the State. CETA cannot be directly invoked in the domestic legal system of a Party. A CETA Tribunal stands outside the Irish constitutional order. It does not operate at national level, does not determine the legality of a measure under the domestic law of a Party. In weighing the respective interests of the parties, a CETA tribunal does not have jurisdiction to make awards that '*call into question'* or '*declare incompatible*' with the agreement the level of protection of a public interest established by the EU or a Member State. On the contrary, it expressly recognises a Party's right to regulate within its territory so that it can achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. The mere fact that a Party regulates in a manner which negatively affects an investment or interferes with an investor's expectations, including, its expectations of profits, does not amount to a breach of the agreement.

60. Furthermore, CETA makes provision for an application, at appellate level, to annul an award on the basis that a tribunal has exceeded its jurisdiction. In addition to the grounds set for modifying or reversing an award as stipulated under Article 8.28.2 (a) and (b) of CETA, the grounds as set out in Article 52 (1) (a) through (e) of the ICSID Convention apply. Those grounds expressly include '*that the Tribunal has manifestly exceeded its powers'.*

61. There is nothing, at this point, to indicate or suggest to me that the essential character of the Irish Constitutional order would be affected by an award of a CETA tribunal. If a CETA tribunal were to exceed the limits of its jurisdiction as identified by CJEU in *Opinion 1/17* and were to deliver a perverse ruling that was, manifestly, in excess of its powers, then it seems to me that, at that point, the submission of counsel for the respondents would take on a particular significance. In such an event, it was submitted that the *Greendale* jurisdiction (*Greendale Developments Ltd, Re,* (No. 3) [2000] 2 I.R. 514) could be used to resist an application for

enforcement because ICSID allows for defences that would be available in respect of judgments in the national courts, to be applied in respect of CETA arbitral award and that this was permitted under *Micula's* interpretation of Article 54 of ICSID (see *Micula v. Romania* [2021] WLR 1033).

62. I agree with the Chief Justice that the obligation to seek the leave of an Irish court is a matter of real legal and constitutional significance. In the administration of justice, all applications to the High Court merit careful judicial attention and an application made under the Arbitration Act 2010 seeking leave to enforce an arbitral award is no exception. If the High Court were to refuse leave because a CETA tribunal arbitral award was manifestly incompatible with the Constitution or, indeed, with a fundamental aspect of EU law—and certainly in excess of the jurisdiction identified by the CJEU in *Opinion 1/17*—then the likelihood is that the matter would be appealed to this Court. At that point, and faced with the facts of a live dispute, consideration might well be given to making a reference to the CJEU. If this were to transpire, it might well be anticipated that the agreement itself was in danger of unravelling, presenting a need for the parties to return to 'the drawing board'. All of this is, of course, entirely speculative but it is indicative of a path that may be pursued if a 'doomsday' scenario were to unfold.

Summary

63. This Court is not called upon to determine whether the ratification of CETA by the State is a good idea or a positive move. That is not its judgment call to make. As matters stand, the respondents consider that CETA will bring enormous benefits regarding trade and investment. That may be so. Equally, time may change the Government's view of the prudence or otherwise of ratifying CETA. In recent times, several EU Member States that ratified the Energy Charter Treaty ('ECT') have announced an intention to withdraw therefrom based on the view that it is not in line with commitments made under the Paris Agreement (UN

Framework Convention on Climate Change). If CETA is ratified by the State it may transpire that in years to come Ireland may wish to withdraw therefrom but decisions concerning the ratification of or the withdrawal from an international treaty, such as, this one, are decisions for the Government to take, falling, as they do, within the remit of the executive power of the State under Article 29.4.1° of the Constitution.

64. The Court is called upon to review the provisions of CETA in order to determine whether its ratification by the Government in the manner proposed would offend any provision of the Irish Constitution. In my view, there is nothing within CETA's terms that undermines the capacity of Ireland to operate autonomously within its unique constitutional framework. I do not consider that the ratification of CETA in the manner proposed by the Government would in any way compromise the sovereign, democratic and independent nature of the State as stated in Article 5 of the Constitution.

65. Nor, in my view, would the exercise of powers by the Joint Committee under Article 26 of CETA encroach upon the sole and exclusive power of the Oireachtas to make laws for the State. Neither a proposal made by a select committee nor a binding interpretation of CETA issued by the Joint Committee involves the act of legislating for the State and thus it cannot be said to contravene Article 15.2.1° of the Constitution.

66. As the rights conferred and the obligations imposed under CETA are those created by the Parties under public international law (Article 30.6.1), the ratification of CETA in the manner proposed would not infringe upon the judicial sovereignty of the State's legal system. CETA does not create a '*parallel*' jurisdiction operating alongside the Irish courts in breach of Article 34 of the Constitution. Nor would an arbitral award of a CETA tribunal displace, in any way, the finality of judgments of the Irish courts as a matter of Irish law. CETA would not, if ratified, subtract in any way from the jurisdiction of the Irish Courts.

67. As matters stand, I cannot say that there is anything in the agreement that fetters or encroaches upon the State's sovereignty. I find the observations of O'Donnell C.J.. in *Pringle* to be particularly apt in this case:

> *"... In the Plaintiff's determination to challenge the wisdom and legality of the Government's decision, he appears to give no weight to the fact that it is a decision made by the Government. That is the body to which the Constitution has allocated the task of making such decisions whether trivial, important, wise, or profoundly misguided. Here the Court is invited to restrain the exercise of constitutional function by a body authorised to carry out that function, and in respect of which function the Constitution imposes little in the way of express limitation, and contemplates direct accountability to the Dáil and indirectly the People, rather than to the courts ... Governments are elected to make decisions whether trivial or momentous, successful or catastrophic, and for those decisions they are answerable to the Dáil, and through it to the People".*

68. In my view, the ratification of CETA in the manner proposed by the Government would constitute a lawful exercise of State sovereignty and would be permissible under the Constitution.

Conclusion

69. For the reasons set out above, I would dismiss the appeal.

70. However, as I am in the minority in finding that ratification of CETA in the manner currently proposed would be constitutionally permissible, I would have to accept that, to the extent that the majority perceives any constitutional frailty in the agreement, such frailty as it identifies would be 'cured' by amending the Arbitration Act 2010 in the manner suggested by Hogan J. in his judgment.

71. As to the issues identified by Dunne J. at para. 13 of her judgment, my position is as follows.

(i) Is ratification of CETA necessitated by the obligations of membership of the EU?

No.

(ii) Is CETA a breach of Article 15. 2 of the Constitution?

No.

(iii) Does the creation of the CETA Tribunal amount to the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the courts in this jurisdiction contrary to Article 34 of the Constitution?

No.

(iv) Does the 'automatic enforcement' of a CETA tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 constitute a breach of Article 34 of the Constitution?

I do not regard enforcement as being 'automatic' and, in any event, No.

(v) What is the effect of the interpretative role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution?

The interpretative role of the Joint Committee has no effect in Irish law and its role does not constitute a breach of Article 15.2 of the Constitution.

(vi) Would an amendment of the Arbitration Act, 2010 to alter the 'automatic enforcement' of a CETA Tribunal award as proposed in Part XIII of the judgment to be delivered herein by Hogan J. alter the position in relation to the ratification of CETA?

I see no constitutional impediment to the ratification of CETA in the manner currently proposed as its enforcement provisions do not, in my view, breach

Article 34 of the Constitution. Ratification of CETA following an amendment of the Arbitration Act 2010 in the manner envisaged by Hogan J. would also be constitutionally permissible.