THE HIGH COURT

[2021] IEHC 600

[2021 No. 1282 P.]

BETWEEN

PATRICK COSTELLO

PLAINTIFF

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 16th day of September, 2021

Introduction

1. A Comprehensive Economic Trade Agreement (CETA) was entered into between Canada on the one part and the European Union and its Member States, including Ireland, on the other, on the 30th October, 2016. The signing of CETA on behalf of Canada, the EU and each of its Member States represent both the conclusion of seven years of negotiation and the commencement of a process of ratification. The entry into force and provisional application of CETA is governed by Article 30.7 of CETA. Article 30.7.1 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*". From a European Union (EU) perspective, CETA must be ratified by each Member State in accordance with the constitutional requirements of that Member State as well as by the EU itself.

2. However, Article 30.7.3 of CETA allows the parties to apply CETA on a provisional basis pending full ratification and also allows the parties to identify and notify to each other provisions that they do not intend to apply provisionally. Consequently, since February, 2017, CETA has applied on a provisional basis subject to certain reservations while the ratification process has been underway. Many of the articles which are the subject of these proceedings and which are contained in Sections C, D and F of Chapter 8 have been excluded from the provisional application of CETA.

3. On the 28th October, 2016, the Council of the EU adopted Council Decision (EU) 2017/37 which authorised the signing of CETA on behalf of the EU. The preceding day, 27th October, 2016, a number of statements and declarations were entered as statements to the Council minutes "*on the occasion of the adoption by the Council of the decision authorising the signing of CETA*". These statements were made variously by the Council, the Commission and certain Member States. Statement 36 by the Commission and Council on *"investment protection and the Investment Court System*" confirms that the institutions of the EU regard CETA as aiming *"at a major reform of investment dispute resolution"* and that the mechanisms provided in CETA "*constitutes 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"*. Significantly for the purposes of this case, statement 36 goes on to provide:-

> *"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."

Thus, ratification of CETA by Ireland is a precondition to the provisions to which the plaintiff objects coming into force. The central issue in these proceedings is the form such ratification must take in order to be constitutionally valid.

4. The plaintiff is a member of Dáil Éireann having been elected for the Green Party in the general election of February, 2020. His evidence to the court is that he has been aware of CETA, although not all of its detail, since 2016 and that the Green Party (including, presumably, himself) was part of an alliance of NGOs and advocacy groups campaigning against it. A proposed resolution to ratify CETA was laid before the Dáil on 15th December, 2020. In the event, a vote was not taken and, instead, CETA was referred for scrutiny to certain Oireachtas Committees. At the time this case was heard, the EU Affairs Committee had concluded its deliberations but had not yet reported. The Budgetary Oversight Committee was not due to commence its deliberations until after the Dáil recess in October, 2021.

5. The plaintiff gave evidence of his concerns as to the potential impact ratification of CETA might have on the State's ability to introduce regulation, particularly in the environmental sphere. In simple terms his concern is that although CETA does not purport to restrict the type of environmental regulation that the State can introduce, the fact that the State can be made liable in damages for loss suffered by a Canadian investor as a result of such regulation may have a chilling effect on the willingness of the State to introduce measures which are otherwise desirable. He also queried how, what he termed an "*investor court service*", could be created without CETA being put to the people in a referendum and he cited examples of previous constitutional referenda to facilitate the State's participation in other analogous international bodies. There is no doubt that the plaintiff is sincere in his concerns and, as an elected public representative, he is perhaps an especially suitable plaintiff to take proceedings of this nature. His entitlement to do so as a matter of general principle was not questioned by the defendants. However, the defendants have raised issues as regards the plaintiff's locus standi to advance certain discrete arguments, a matter to which I shall return in due course.

Overview of Legal Issues

6. As noted above, Article 30.7.1 of CETA requires that it be ratified by the parties in accordance with their own internal legal requirements and procedures. CETA says nothing, and indeed could say nothing, about what those requirements might be. The parties are defined in Article 1.1 of CETA as being "*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, of course, Canada. These treaties will be referred to in this judgment as the TEU and the TFEU or, collectively as, "*the treaties*". Whilst there is some disagreement between the parties as to whether certain matters covered by Chapter 8 of CETA fall within the shared competence of the EU and its Member States or the exclusive competence of the Member States, there is no dispute that at this

stage ratification by Ireland is essential if CETA is to enter into force. The real issue is the form that such ratification must take in order to be constitutionally compliant.

7. As will be considered in more detail below, the Constitution envisages that the State may enter into international agreements and it confers upon the Government the executive power of the State to act in this regard (Article 29.4.1). However, this power must be exercised in accordance with the Constitution itself which provides that all international agreements entered into by the State must be laid before the Dáil (Article 29.5.1), the terms of international agreements which involve a charge on public funds must be approved by the Dáil before the State can become bound by them (Article 29.5.2) and if all or any part of an international agreement is to become part of our domestic law, this must be as "*determined by the Oireachtas*", presumably by the passing of legislation (Article 29.6). The proposed resolution to approve the terms of CETA put before the Dáil on 15th December 2020 reflects the view of the defendants that CETA is an international agreement involving a charge on public funds and must, therefore, be approved by the Dáil in order to be ratified by the State.

8. The plaintiff disagrees with this view. He contends that CETA is more than simply an international agreement operating at an international level. He contends that ratification of CETA would entail a transfer of important elements of the State's sovereignty to institutions created by CETA. In particular, he is concerned 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 is also concerned that CETA transfers part of the judicial power of the State to the tribunals established under Chapter 8 to resolve investor/State disputes (and any future multilateral investment tribunal (MIT) envisaged by Chapter 8) contrary to Article 34.1 of the Constitution. Consequently, in the plaintiff's view, CETA cannot be ratified through any of the mechanisms contained in Article 29 of the Constitution. On the contrary, as it entails a permanent ceding of elements of the State's sovereign powers, it can only be ratified by way of a constitutional amendment following a referendum under Articles 46 and 47 of the Constitution. It is central to the plaintiff's case that, as CETA cedes national sovereignty to international institutions, a vote of the people is required to ratify it.

9. The defendants disagree with the plaintiff's characterisation of CETA as an international agreement which will have effect within the domestic legal order. Instead, the defendants characterise CETA as an international agreement *simpliciter* which only gives rise to legal effects or creates legal obligations as a matter of international law. The defendants rely on both the terms of CETA itself and the views of the Court of Justice of the European Union in support of their contentions. Consequently, entering into CETA was a proper exercise by the Government of the executive power of the State as regards external relations under Article 29.4.1 of the Constitution and ratification through securing the approval of the Oireachtas in accordance with Article 29.5.2 would be both appropriate and constitutionally compliant. As CETA does not have direct legal effect as a matter of Irish law nor as a matter of European law, it does not impinge on the constitutional allocation of the State's sovereign powers under Article 15.2 or Article 34.1.

10. In the alternative, the defendants argue that ratification of CETA is a measure necessitated by the obligations of EU membership and, thus, is constitutionally protected by Article 29.4.6. The plaintiff strongly disagrees with this proposition. He contends that, as the EU acknowledges that ratification of CETA by each Member State is expressly required for it to enter into force, ratification could not simultaneously be an obligation flowing from EU membership.

11. This broad outline does not do justice to the depth and complexity of the arguments advanced by counsel on each side of this case. Rather than attempt to summarise those arguments in the introductory part of this judgment, I will address them in more detail when looking at the provisions of CETA which are at the heart of this litigation and when considering the substantive issues. Nonetheless, it may be useful for the purposes of this overview to identify the specific reasons the plaintiff is concerned about the ratification of CETA – or at least ratification without the approval of the people in a constitutional referendum.

12. Chapter 8 of CETA deals with investment and one of the main aims of the chapter is to ensure protection for investors from each party when investing in the economy of the other. Consequently, Canadian investors are to be provided with certain protections when investing in EU countries and, likewise, EU investors are to have the same protections when investing in Canada. To a large extent, this protection involves a party treating the investors of the other party at least as well as it treats its own investors or as well as it treats investors from a "*most favoured nation"* third country. There is also an obligation to ensure *"fair and equitable treatment*" of investors from the other party and to provide them with "*full protection and security*". In the event that a Canadian investor believes that it has suffered losses by reason of a measure introduced by the Irish State, it can sue in normal course before the Irish courts. However, the investor will also have the option of bringing a claim before the CETA Tribunals established under Chapter 8 if it contends that the measure in question is in breach of an obligation under Section C or Section D of Chapter 8. In addition to the constitutional arguments outlined above, the plaintiff argues that this gives Canadian investors greater legal rights in Ireland than those afforded to Irish or EU investors.

13. The defendants disagree. In addition to arguing that there is little or no difference between the substantive content of the rights that might be said to be acquired by a Canadian investor by virtue of a breach of CETA obligations by the State and the rights which such investors enjoy under Irish law in any event, the defendants argue that rights under CETA exist only in the international law sphere. The plaintiff points out that no matter how the defendants characterise CETA, it allows for extremely large claims to be made against the State and that the CETA Tribunals may make awards which are binding and, in practical terms, enforceable against the State. To this extent, the obligations created by CETA are unusual in that they apply not just as between the signatories to CETA, as an international agreement, but are framed in a way that allows them to be invoked by third parties and enforced against the State.

14. It is primarily because of the fact that a third party investor can bring claims resulting in decisions against the State which are binding and enforceable in this jurisdiction, that the plaintiff contends the CETA rules or obligations constitute laws and the CETA Tribunals are administering justice. In order to assess the validity of these claims, it is necessary to look in detail at some of the provisions of CETA, at the relevant articles of Bunreacht na hÉireann and to understand how the Irish Courts have treated international agreements from a constitutional perspective.

CETA

15. It may be useful to look firstly at the provisions of CETA to which particular objection is taken by the plaintiff which are mostly to be found in Chapter 8 and then to look at some of the more general provisions which may assist in understanding the intended legal architecture of CETA. As CETA is lengthy and its individual provisions are complex, I do not intend to set out the text of all of the articles under discussion in full unless it is necessary in order to understand the arguments that are being made.

16. CETA, as published in the official journal of the EU, runs to over a thousand pages. It comprises the text of the agreement itself, running to some 200 pages, a series of annexes (grouped by reference to the chapters of the main agreement to which they relate), protocols and reservations. Nearly half the text of CETA (just under 500 pages) comprises reservations which, under the terms of CETA, may be taken by a party with respect to existing measures that do not conform to various CETA provisions, including some of those in Chapter 8. The plaintiff complains that Canada has taken a significantly greater number of reservations than Ireland and the EU combined but this does not seem to be especially relevant to any of the issues in this case. The disparity may reflect no more than the possibility that the detailed provisions of CETA are closer in form to existing EU regulation than to existing Canadian regulation and, thus, there may be more non-conforming measures in existence in Canada to be the subject of such reservations.

17. It goes without saying that, as a trade agreement, much of CETA is very technical in nature. There are detailed provisions dealing with, for example, the type of health certificates that must accompany the export of animals and animal products between the parties and lists of the bodies within each party which are to be "*procuring entities*" for the purposes of the Government procurement provisions of Chapter 19. Much of this is unremarkable and has not given rise to any particular legal concerns. This is not the case however as regards Chapter 8, entitled "*Investment".*

Investor Protection:

18. The scope of Chapter 8 is set out in Article 8.2 which states that it applies to a measure adopted or maintained by a party relating to an investor or covered investment, with the exception of Article 8.5 which applies to "*any investments*". A covered investment is defined under Article 8.1 as one made in the territory of a party, in accordance with the applicable law at the time of the investment, which is directly or indirectly owned or controlled by an investor of the other party and which exists at or postdates the entry into force of CETA. Investment is defined very broadly and somewhat circularly as "*every kind of asset that an investor owns or controls, directly or indirectly, that has the*

characteristics of an investment…" albeit with some element of continuity or commitment. An illustrative but non-exhaustive list of the types of investment falling within the definition is provided. Finally, in this regard, Article 8.3 provides that Chapter 8 does not apply to investors or investments covered by Chapter 13 which deals with Financial Services. The structure and content of Chapter 13 is similar to Chapter 8 and, under Article 13.21, investment disputes to which Chapter 13 applies are made subject to the dispute resolution mechanisms of Section F of Chapter 8 with certain modifications.

The plaintiff relies on the breadth of the definition of "*investment*" and the consequently broad scope of Chapter 8 to argue that the jurisdiction conferred on the CETA Tribunals to deal with disputes between investors and States is so broad as to be unlimited for constitutional purposes.

19. As previously mentioned, the purpose of Chapter 8 is to provide protection for investors of one party in respect of their investments in the territory of the other party. The substantive provisions which do this are found in Sections B, C and D of Chapter 8 of CETA. There is an important distinction between Section B on the one hand and Sections C and D on the other because the jurisdiction of the CETA Tribunals in respect of investor disputes only covers certain obligations under Section C and all obligations under Section D. This means that an investor has no recourse to the CETA Tribunals in respect of an alleged infringement of Section B.

20. Section B, which deals with the establishment of investments, has two articles, Article 8.4 on market access and Article 8.5 on performance requirements. Article 8.4 precludes measures which restrict market access through the imposition of limits on the number of enterprises that may engage in a given activity; the total value of transactions; the number of operations or quantity of output; the participation of foreign capital or the number of persons that may be employed. It also precludes restrictions on the type of legal entity or joint venture through which an enterprise can carry out economic activity. Interestingly, Article 8.4.2 lists a number of types of measure which are deemed to be consistent with Article 8.4.1. These include planning and zoning measures, various measures which promote or ensure fair competition, measures for the conservation and protection of natural resources and of the environment, including measures limiting the availability or scope of concessions granted up to and including a moratorium or a ban and measures limiting the number of authorisations granted because of technical or physical constraints. The plaintiff points out that there are no provisions equivalent to Article 8.4.2 in Sections C or D which would expressly reserve to the parties the entitlement to introduce measures, for example, for planning or environmental reasons without infringing obligations owed to the other party's investors under CETA.

21. Article 8.5.1 precludes the imposition by a party of various types of requirements, characterised as performance requirements, in respect of the "*establishment, acquisition, expansion, conduct, operation, and management of any investments in its territory".* Article 8.5.2 precludes a party conditioning the receipt of an advantage by reference to similar types of requirement, e.g. to achieve a level of domestic content or to use or

prefer domestically produced goods. Notably, whilst the application of Chapter 8 is generally limited to "*covered investments*", Article 8.5 applies to any investment. However, as Article 8.5 falls within Section B, the CETA Tribunals do not have jurisdiction in respect of any dispute arising concerning an alleged breach of its terms.

22. The substantive provisions of Chapter 8 contained in Sections C and D apply to investors and covered investments of either party in the territory of the other. In practice, that means that the plaintiff's concerns are expressed in terms of the rights of Canadian investors in Ireland and, for convenience, I will refer to Canadian investors when discussing the legal issues. However, it should be borne in mind that the obligations assumed under CETA by Ireland and by the EU in respect of Canadian investors are reciprocated by obligations assumed by Canada in respect of Irish and EU investors. Further, the defendants argue that although CETA creates a right of recourse to the CETA Tribunals for Canadian investors in Ireland, it does not confer materially different substantive rights to those that exist under Irish law in any event.

23. Section C is entitled "*Non-discriminatory treatment*" and contains three articles, the more important being Article 8.6 on national treatment and Article 8.7 on most favoured nation treatment. The core principle of Article 8.6 is reflected in the obligation under Article 8.6.1 that each party must accord to investors of the other party treatment which is "*no less favourable than the treatment it accords, in like situations to its own investors and to their investments*". A similar obligation arises under Article 8.7, save that the treatment in question must be no less favourable than that accorded in like situations to investors of third countries and their investments. Notably, the concluding sentence of Article 8.7.4 reads:-

> *"Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."*

24. "*Treatment*" is not defined in either Article 1 of CETA nor, for the purposes of Chapter 8, in Article 8.1. However, given the very broad definition of "*measures*" in Article 1 capturing laws, regulations, rules, procedures, decisions, administrative actions, requirements, practices *"or any other form of measure by a Party*", it seems reasonable to presume that the application of any measure constitutes "*treatment*". Indeed, the quoted sentence from Article 8.7.4 suggests that there is a very substantial overlap between the concept of treatment and the effect of measures. Although it is difficult to envisage any form of treatment that does not involve the application of a measure, it cannot be definitively excluded that a potentially discriminatory treatment may arise that does not also involve a measure. Articles 8.6 and 8.7 do not, of themselves, entail any substantive obligations nor do they preclude the adoption of any type of measure by the parties. They simply require that Canadian investors in the EU be treated in the same manner as EU investors (or the investors of the most favoured third party nation) and *vice versa.*

25. Section D is entitled "*Investment Protection*" and merits more detailed examination as most of the complaints made by the plaintiff as regard the substantive content of the CETA rules relate to these provisions. The first article in Section D, Article 8.9, does not, in fact, impose any obligation on the parties but instead recognises the continuing right of the parties to regulate to achieve legitimate policy objectives within their territories. These policy objectives are listed – again on an apparently non-exhaustive basis - as including "*the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*". There follows a series of sub-articles which "*for greater certainty*" make clear that the parties are entitled to discontinue subsidies provided there is no breach of any specific commitment or legal requirement in doing so. Of potential significance is Article 8.9.2 which states:-

> *"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."*

This establishes the principle that an investor is not entitled to claim against a party for losses sustained just because that party changed its laws or its administrative practices in a way which caused loss to the investor. There must, in addition, be a specific breach of an obligation under Sections C or D of CETA. A Joint Interpretative Instrument ("JII") made by the parties at the time CETA was signed emphasises that CETA preserves the parties' "*right to regulate*" noting that the parties may "*adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives*". The objectives listed in the JII are broad and include "*the environment".*

26. As the focus of the plaintiff's argument has been on the obligation of fair and equitable treatment and the provision of full protection and security under Article 8.10, that article merits being set out in full:-

"Treatment of investors and of covered investments

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."

27. A few observations may be made. Firstly, fair and equitable treatment means something more than the non-discriminatory treatment required under Articles 8.6 and 8.7. The plaintiff places particular emphasis on Article 8.10 as conferring substantive rights on Canadian investors in Ireland which are not - or not necessarily – available to what the plaintiff sees as equivalent Irish investors. Secondly, the CJEU has confirmed that the matters listed at Article 8.10.2 comprise an exhaustive list of the circumstances in which a breach of Article 8.10.1 can be found. In delivering Opinion 1/17 on 30th April, 2019 dealing with issues raised by Belgium concerning certain aspects of CETA, the CJEU stated, at para. 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."

28. Whilst certain of the subparagraphs of Article 8.10.2 relate to procedural fairness ((a) and (b)) which is an important component of Irish law and others relate to matters which are already contrary to either Irish law or EU law and, thus, unlawful in Ireland (e.g. (d)), there is some potential for differences between Irish and European law and CETA rules under the other sub-paragraphs. The plaintiff points to two sub-paragraphs, in particular, as giving rise to obligations beyond those which might be taken to exist in Irish law. The first of these is *"manifest arbitrariness"* under sub-paragraph (c). The plaintiff argues that under Irish law an injured party cannot recover damages for loss suffered by reason of the unreasonable or negligent acts of a public authority acting within the scope of its statutory duties (*Glencar Explorations Plc v. Mayo County Council (No. 2)* [2002] 1 IR 84 and *Cromane Seafoods Ltd v. Minister for Agriculture* [2017] 1 IR 119), whereas under Article 8.10.2(c) of CETA, a Canadian investor sustaining loss in identical circumstances can make a claim to the CETA Tribunal. Further, the plaintiff points to sub-paragraph (f) and to Article 8.10.3 to argue that the scope of the fair and equitable obligation is not, in fact, fixed nor constrained in the manner suggested by the CJEU. Instead, the content of the obligation may be changed and increased by additional rules made by the CETA Joint Committee.

29. The final observation in relation to Article 8.10 is to note that a breach of the fair and equitable treatment principle cannot be established merely by pointing to a breach of another provision of CETA nor to a breach of domestic law. A party making a claim must, therefore, point to something substantive within Article 8.10.2 in order to succeed in that claim.

30. The principle of "*treatment no less favourable*" is applied by Article 8.11 to losses sustained by Canadian investors as a result of "*armed conflict, civil strife, a state of emergency or natural disaster*" in Ireland insofar as the State is providing compensation to its own nationals or those of the EU or any other third country. Like Articles 8.6 and 8.7, this does not create a positive obligation on the State to provide compensation in those circumstances. Rather, it must extend any compensation that it chooses to provide to Irish or EU investors to Canadian investors who are affected in a like manner.

31. Because of the reliance placed by the plaintiff on the provisions covering expropriation, it is again useful to set out the first four subparagraphs of Article 8.12 in full:-

"Expropriation

1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except:

(a) for a public purpose;

(b) under due process of law;

(c) in a non-discriminatory manner; and

(d) on payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex 8-A.

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

4. The affected investor shall have the right, under the law of the expropriating Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article."

32. Annex 8-A sets out the shared understanding of the parties as to what constitutes both direct and indirect expropriation. The former is relatively straightforward; the latter arises where measures have "*an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment*". The Annex also acknowledges that the issue of whether something constitutes indirect expropriation will require a case-by-case, fact-based inquiry in light of the specific circumstances and identifies relevant factors which should be considered. Finally, para. 3 makes it clear that non-discriminatory measures taken by 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 unless the impact of the measures is so severe that they are "*manifestly excessive"* in light of the purpose of the measure. This appears to reflect a type of proportionality analysis, save that a considerably greater margin of appreciation is afforded to the party introducing the measures than would normally be the case under Irish, EU or European Court of Human Rights jurisprudence which assess whether the affected right is impaired as little as possible consistent with the impugned measure achieving its intended and legitimate effect. "*Manifestly excessive*" would appear to permit more than what might be minimally required to achieve an objective.

33. Looking at these provisions, it is clear that CETA does not preclude the expropriation of a Canadian investor's property. The conditions for permitted expropriation as set out in Article 8.12.1 are very similar, if not identical, to those which already apply under Irish law. The expropriation must be authorised by law, it must serve a genuine public purpose and adequate compensation must be paid to the property owner who is to be deprived of his property. The reference to "*non-discriminatory*" in the context of Article 8.12(c) is presumably intended to mean non-discriminatory as between Canadian and EU property owners. However, even if it is read more broadly to cover discrimination under other grounds, it is difficult to see that it materially adds to or alters the constitutional protection already afforded to property rights under Irish law. Notably in this regard, the Supreme Court has held a statute which exempted one group of land owners from the application of compulsory purchase powers on the basis of their "pedigree" to be unconstitutional. It found that the statutory classification which made this distinction did not provide a legitimate legislative purpose for a proposed compulsory acquisition (see *An Blascaod Mór Teoranta v. Commissioners of Public Works* (No. 3) [2000] 1 IR 1).

34. Payment of compensation assessed at a fair market value is already enshrined in Irish law as is the existence of a statutory mechanism to facilitate the independent determination of the appropriate value (including, in particular, the Acquisition of Land (Assessment of Compensation) Act, 1919). The entitlement to a review of the claim and of the valuation by a judicial or other independent authority mirrors provisions now frequently seen in EU Directives that impact on personal rights. It is generally accepted that in Ireland the availability of judicial review of the decisions made under statutory authority meets this requirement. Nonetheless, the plaintiff characterises Article 8.12.4 as imposing an obligation in relation to something to be done in this jurisdiction which, it is contended, amounts to a law.

35. The final provisions in Section D are Article 8.13 which deals with transfers and Article 8.14 which deals with subrogation. Although Article 8.13 was opened to the court by counsel for the plaintiff, and the defendants in response relied on the free movement of capital provisions under Article 63 of the TFEU in the context of examining whether competence was shared between the EU and its Member States, no real argument was directed to either of these provisions. I will return to the question of shared competence and the implications of Article 63 of the TFEU for the subject matter of Chapter 8 of CETA in due course.

Investment Disputes and the CETA Tribunals

36. Section F of Chapter 8 of CETA deals with the resolution of disputes between investors and States by creating an entitlement on the part of investors to submit a claim against a State for losses arising as a result of an alleged breach of obligations under CETA and establishing the mechanisms through which that claim can be adjudicated upon. In particular, a tribunal is established under Article 8.27 and an appellate tribunal established under Article 8.28 to which an investor may submit a dispute under Article 8.18. As previously noted, it is a distinctive feature of CETA that it gives third parties an

entitlement to make claims against the signatories to CETA. That right is grounded in Article 8.18 which provides that:-

> *"…an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under:*
>
> *(a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or*
>
> *(b) Section D, where the investor claims to have suffered loss or damage as a result of the alleged breach."*

CETA encourages the use of alternative dispute resolution mechanisms and provides for formal consultation following the submission of a claim under Article 8.19 and for mediation under Article 8.20.

37. In considering the dispute resolution provisions of CETA, I propose to examine, firstly, the establishment and structure of the tribunals which constitute the adjudicative machinery under CETA and, secondly, the procedural aspects of making a claim and receiving and enforcing an award. On one level, neither the structural nor the procedural detail of Chapter 8 is relevant to the arguments the plaintiff makes in respect of the transfer of sovereignty. However, reliance is placed by the plaintiff on some of these provisions as being indicative of the existence and exercise of a judicial power. Significantly, although the CETA procedures are built around existing international arbitral procedures, the plaintiff argues that the compulsory adjudicative powers which may be exercised by the CETA Tribunals are materially different to the contractually based jurisdiction of an arbitrator.

38. The CETA Tribunal itself is established under Article 8.27. It is to comprise fifteen members, five of whom are to be Canadian, five from the EU and five from third party countries. It will generally sit in three-person divisions comprising one member from each group and with the neutral member acting as the chairperson. The composition of divisions is to be randomly allocated. Members are to be appointed on a five-year renewable term. Under Article 8.27.14, the fees payable to tribunal members are to be the same as those paid to arbitrators under ICSID unless the CETA Joint Committee decides to pay tribunal members a regular salary. Until this occurs, members are to be paid a retainer to ensure their availability.

39. An appellate tribunal is established under Article 8.28 and either party may appeal an award. Under Article 8.28.2, the appellate tribunal may uphold, modify or reverse a tribunal award based on legal error or manifest error in the appreciation of the facts or on certain grounds under the ICSID Convention.

40. In addition to the CETA Tribunal and appellate tribunal, Section F also refers to the future establishment of a multilateral investment tribunal and appellate mechanism to be modelled on those created by CETA. Article 8.29 provides:-

> *"Establishment of a multilateral investment tribunal and appellate mechanism*
>
> *The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements."*

41. This article was the subject of much debate between the parties. The plaintiff takes the view that, although it does not yet exist, the multilateral investment tribunal (MIT) is actually established by Article 8.29.2. There were two strands to this argument. Firstly, the plaintiff contends that, if CETA is ratified by Ireland, then the State will have accepted an obligation to pursue the establishment of the MIT such that, at a later stage, would not be able to refuse to accept the jurisdiction of the MIT. The plaintiff points to ongoing work on the part of the EU including positions adopted in negotiation directives which are clearly directed at progressing the establishment of the MIT. Secondly, the plaintiff argues that the mandatory obligation on the parties to transfer the jurisdiction which will be exercisable under CETA by the CETA Tribunals to the MIT is indicative of the fact that Article 8.29 provides the legal basis for the establishment of the MIT. I found the latter argument unconvincing. A mandatory obligation to do something if something else happens does not, of itself, provide the legal basis for the second thing to happen or even necessarily assume that it will happen. A multilateral investment tribunal cannot by definition be established between the parties to a single bilateral agreement and Article 8.29 in its terms anticipates that the parties to CETA will pursue the establishment of a MIT with other trading partners. This will, at minimum, require further international agreements to be reached between as yet unidentified countries or groups of countries and Canada and the EU. I will return to the plaintiff's first argument under this heading in the analysis which follows.

42. In arguing that the CETA Tribunal is exercising judicial power, the plaintiff points to the requirement under Article 8.27.4 that tribunal members "*shall possess the qualifications required in their respective countries for appointment to judicial office*", albeit with the specific additional requirement that they have expertise in public international law and international investment law. The plaintiff regards the ethics provisions of Article 8.30 which requires tribunal members to be independent (Article 8.30.1) and which establish a procedure in the event that a disputing party considers a tribunal member to have a conflict of interest and the tribunal member has elected not to resign (Article 8.30.2 and 3) as being equivalent to the standards expected of judicial office holders. Finally, the plaintiff points to the fact that a member can only be removed from the tribunal where his or her behavior is inconsistent with the ethical standards set by Article 8.30.1 and that a

procedure is provided in that regard. The plaintiff considers that these provisions make the role of and conduct expected from a CETA Tribunal member analogous to that of a judge.

Procedural Aspects of Dispute Resolution

43. In defining the scope of Section F, Article 8.18 confers an entitlement on investors to submit claims to the tribunal established under Section F alleging that the relevant party has breached an obligation under Sections C or D. The entitlement in respect of Section C is limited but in a manner which does not appear to have a bearing on the arguments made in these proceedings. Articles 8.19 to 8.20 inclusive provide for certain procedures to take place before the claim properly becomes the subject of the tribunal's adjudication. Article 8.19 provides for formal consultations to take place to encourage settlement of disputes. An investor must submit a request for consultation to the other party, although it is not mandatory for such consultations to actually occur. Under Article 8.20, the parties may agree to go to mediation, in which case certain time limits are suspended. Finally, under Article 8.21, where the intended claim relates to an alleged breach of CETA by the EU or a Member State, the investor must notify the EU requesting a determination of which party should be the respondent to the claim.

44. The procedural requirements for the submission of a claim are contained in Article 8.22. Of most significance are Articles 8.22.1(f) and (g) under which an investor must withdraw or discontinue any existing claim before any court or tribunal under domestic or international law in respect of the same measure or waive the right to initiate such a claim. The plaintiff argues that in an Irish context, a Canadian investor will have a choice of jurisdiction between seeking a domestic remedy before the Irish courts or a remedy under CETA from the CETA Tribunal that is not available to an Irish investor in an equivalent position. The defendants argue that the position of these investors is never equivalent since one is engaged in international trade and the other in purely domestic trade. There is a similar provision in Article 8.24 which applies if a claim is brought under both Section F and another international agreement where there is a potential for overlap or for the outcome of the international claim to impact upon the claim under CETA, in which case the CETA Tribunal must stay its proceedings. All of these provisions are directed at ensuring that there is no duplication of claims before different courts or tribunals causing the plaintiff to describe the CETA Tribunal as having a parallel jurisdiction with the Irish courts. The defendants dispute this on the basis that any claim before the Irish courts will be determined purely as a matter of Irish law (which may incorporate elements of EU law), whereas any claim before the CETA Tribunal would be limited to determining whether there has been a breach of CETA obligations by the State.

45. The claim itself is submitted to the CETA Tribunal under Article 8.23. Of particular significance for the plaintiff's argument is the fact that, under Article 8.23.2, the investor has a choice of the rules under which the claim is submitted and may choose between those of the Washington Convention (ICSID), the ICSID Additional Facility Rules (where they apply), the UNCITRAL "Model Law" or any other rules agreed between the parties. This, in turn, has an effect on the enforceability of any award made by the CETA Tribunal.

If the claim is submitted under the ICSID rules, there is then very limited scope for the national courts to decline to enforce the resulting award. This will be considered further below. Whilst claims are normally submitted to a full CETA Tribunal as established under Article 8.27, under Article 8.23.5, if an investor is a small or medium-sized enterprise and the compensation claimed is relatively low, the investor can propose that the claim be heard by a single member of the CETA Tribunal. Effect may be given by the tribunal to this request under Article 8.27.9.

46. Another provision of particular significance to the plaintiff's argument is Article 8.25.1 which provides as follows:-

"Consent to the settlement of the dispute by the Tribunal

1. The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section."

The respondent is defined in Article 8.1 as meaning, in the case of the European Union, either the Member State of the European Union or the European Union under Article 8.21, i.e. whichever of those parties has been determined by the EU to be the appropriate respondent for the dispute, the subject of the claim.

47. The effect of this provision is that, if Ireland ratifies CETA, the State will have consented to the CETA Tribunal hearing and determining any claim submitted by a Canadian investor against Ireland under CETA. At the time such consent is given (i.e. on ratification), neither the investors who may be the potential claimants nor the circumstances of any claim will be known to the State. Indeed, they could not be known since, if CETA is ratified and applies indefinitely into the future, it will potentially cover investments which have not yet been made by legal entities which do not yet exist. All that can be stated about them with certainty at this point is that they will be Canadian.

48. Articles 8.32 and 8.33 allow the respondent to a claim to seek to have it dismissed on a summary basis on the grounds that it is either manifestly without legal merit or unfounded as a matter of law. On receipt of an objection under these headings, the CETA Tribunal must suspend the proceedings on the merits while it considers and determines the objection. Interim measures may be ordered under Article 8.34. The scope of the potential interim measures which may be ordered is unclear as the only type of order specifically mentioned is one *"to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction*". Given that neither CETA nor the decisions of the CETA Tribunal will have direct effect at a domestic level, there was some discussion at the hearing, albeit inconclusive, as to exactly what, if any, other type of interim measure could be ordered.

49. Provisions concerning the discontinuance of proceedings (Article 8.35) and information sharing (Article 8.37) were not the subject of any submissions at the trial. For the most part, neither was Article 8.36 which applies the UNCITRAL transparency rules to proceedings under Section F. However, the plaintiff did point to the requirement that

hearings be open to the public under Article 8.36.5 as being indicative of the judicial nature of the power being exercised by the CETA Tribunal.

50. An unusual feature of the CETA Tribunal's procedure is the entitlement of the "*non-disputing party*" to be provided with all of the documents relevant to a claim and to be heard by the tribunal on the interpretation of CETA (Article 8.38.2). In practical terms, this means that in a dispute between a Canadian investor and Ireland, Canada will have a right of audience before the CETA Tribunal, albeit limited to questions of the interpretation of CETA. Whilst the plaintiff presumed that this would likely result in the Canadian Government supporting the position of the Canadian investor in proceedings against Ireland, this would not necessarily be the case. Any interpretation of CETA in favour of an investor may ultimately lead to the non-disputing party being fixed with similar liability as regards investors in its territory. Therefore, a non-disputing party may well have a real interest in the interpretation of the agreement which goes beyond or differs from the interests of its investor in seeking compensation.

The Making and Enforcement of CETA Awards

51. Awards are made by the CETA Tribunal under Article 8.39.1 and are limited to monetary damages (and interest on such award) or the restitution of property. The tribunal is expressly precluded from awarding punitive damages (Article 8.39.4). Any monetary damages awarded cannot be greater than the loss suffered by the investor (Article 8.39.3) and must be reduced to take account of any restitution of property or the repeal or modification of any measure. The tribunal also has power to award costs (Article 8.39.5). Of significance to the defendants' case is the fact that, although a claim may be brought in respect of losses arising because of a breach of CETA obligations by a party, the CETA Tribunal has no power to invalidate the measure which has caused the loss.

52. The provisions of Article 8.41 as regards the enforcement of CETA Tribunal awards formed the basis of much of the plaintiff's argument to the effect that CETA is exercising a judicial power. The relevant provisions of Article 8.41, being sub-paragraphs 1, 4, 5 and 6, provide as follows:-

"*Enforcement of awards*

1. An award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case.

…

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.

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.

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."*

53. Put simply, an investor may elect to submit a claim under the ICSID rules and, as awards made under those rules (i.e. under the Washington Convention) are, according to the plaintiff, virtually automatically enforceable in Ireland under Irish law, the plaintiff argues that the CETA tribunal is exercising judicial power and making decisions which are both binding and enforceable in Ireland. These awards are not enforceable per *se* by virtue of CETA but because they are deemed to be arbitral awards and are, therefore, enforceable under the New York Convention, the Washington Convention or the UNCITRAL rules as appropriate. Ireland has ratified these various conventions and adopted their provisions into domestic law under the Arbitration Act, 2010. The defendants dispute the contention that CETA awards are automatically enforceable and point to the requirement under the Arbitration Act, 2010 that the leave of the High Court be sought and obtained before any such award can be enforced as if it were a judgment of the High Court. For obvious reasons the plaintiff did not argue that Article 8.41.4 had the automatic effect of making a CETA Tribunal award enforceable as if it were an award of an Irish court. Clearly, although CETA requires that its Tribunal's awards be enforceable, it nonetheless acknowledges that execution in the territory of each party must be subject to the laws of that party. Again, I will return to consider these matters in more detail below.

Legal Architecture of CETA – CETA Joint Committee

54. Both parties rely, to opposite effect, on certain provisions of CETA which are not substantive in nature but which can be considered part of the legal architecture of the agreement. One of those provisions, Article 8.31 is found in Section F of Chapter 8 (Resolution of investment disputes between investors and states), the substantive provisions of which have been set out above. The others are found in Chapter 26 on Administrative and Institutional Provisions and under the Final Provisions of Chapter 30. Broadly speaking, the plaintiff relies on the provisions of Article 26.1 and 26.3 to contend that the decision-making power of the CETA Joint Committee amounts to a power to make laws for the State contrary to Article 15.2 of the Constitution. The defendants rely on Article 8.31 and Article 30.6 to illustrate the fundamental nature of CETA as an international agreement operating only within the sphere of international law and its lack of legal effect within the domestic legal systems of the parties. Rather than looking at the provisions in chronological order, I propose to look firstly at those relied on by the plaintiff and then at those relied on by the defendants.

55. The main administrative body of CETA is a Joint Committee established under Article 26.1. The CETA Joint Committee comprises representatives of Canada and of the EU and is to be co-chaired by the Minister and Commissioner responsible for trade in each of those Parties. Article 26.3 describes the overarching functions of the CETA Joint Committee with Article 26.4 conferring mandatory powers and Article 26.5 conferring discretionary powers upon it. The key provisions relied on by the plaintiff, namely Article

26.1.3, Article 26.1.4(a), (b) and (c) and Article 26.1.5(c) and (e), provide as follows (insofar as relevant):-

"3. The CETA Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement. A Party may refer to the CETA Joint Committee any issue relating to the implementation and interpretation of this Agreement, or any other issue concerning trade and investment between the Parties.

4. The CETA Joint Committee shall:

(a) supervise and facilitate the implementation and application of this Agreement and further its general aims;

(b) supervise the work of all specialised committees and other bodies established under this Agreement;

(c) without prejudice to Chapters Eight (Investment)… seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement, or of resolving disputes that may arise regarding the interpretation or application of this Agreement;

…

5. The CETA Joint Committee may:

…

(c) consider or agree on amendments as provided in this Agreement;

…

(e) adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement);"

56. Article 26.2 establishes a series of specialised committees, the main one of relevance to investor protection under Chapter 8 being the Committee on Services and Investments under Article 26.2(b). Under Article 8.44.3(a) that committee can recommend the adoption of interpretations of CETA to the CETA Joint Committee. However, it should be noted that any such recommendation is dependent on "*agreement of the Parties, and after completion of their respective internal requirements and procedures*". This suggests that if any proposed interpretation could itself be regarded as constituting a material alteration of CETA, it must firstly be ratified in accordance with the parties' internal legal requirements before the Committee on Services and Investments can make the recommendation. The CETA Joint Committee is not bound to act on foot of a

recommendation made by the Committee on Services and Investments but, if it chooses to do so, there is no further requirement that it seek, nor that the Parties provide, their formal agreement to any resulting decision.

57. The mechanism under which the CETA Joint Committee acts is a decision making power under Article 26.3 which provides as follows:-

"Decision making

1. The CETA Joint Committee shall, for the purpose of attaining the objectives of this Agreement, have the power to make decisions in respect of all matters when this Agreement so provides.

2. 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.

3. The CETA Joint Committee shall make its decisions and recommendations by mutual consent."

58. Although the CETA Joint Committee is to act by mutual consent, as the plaintiff points out, this effectively means the mutual consent of Canada and the EU. The Member States of the EU, including Ireland, do not have automatic representation on the CETA Joint Committee and, as it is unlikely that the Commissioner nominated by Ireland will hold the trade portfolio at any given time, this means that there is no guarantee of Irish representation on the CETA Joint Committee when decisions which are potentially binding on Ireland are taken. However, the defendants point out that in order for decisions of the CETA Joint Committee to have effect within the EU, they must be reflected in decisions taken by the Council and Ireland will have an input into any such decisions at EU level.

59. Article 26.3.2 and the binding nature of decisions made by the CETA Joint Committee are at the core of the dispute between the parties as to whether ratification of CETA without a constitutional referendum would constitute a breach of Article 15.2 of the Constitution. Much turns on whether the phrase "*subject to the completion of any necessary internal requirements and procedures*" imposes on the parties an obligation to undertake and complete those requirements and procedures or, alternatively, makes the binding nature of the decision subject to a precondition that those requirements and procedures have been completed whilst leaving to the parties a discretion as to when and whether they are in fact completed.

60. In principle and unsurprisingly, the amendment of CETA under Article 30.2.1 is reserved to the parties, again subject to the completion of their respective internal requirements and procedures. A separate procedure is provided in Article 30.2.2 under which the CETA Joint Committee may decide to amend the protocols and annexes to the agreement. However, the language of Article 30.2.2 suggests that a decision of the CETA Joint

Committee under its provisions is not binding in normal course under Article 26.3.2. Instead, "*The Parties may approve the CETA Joint Committee's decision in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment*". Thus, although the CETA Joint Committee can "decide" to amend the annexes or protocols of CETA any such amendment is subject to approval by the Parties and that approval in turn requires ratification in accordance with their own legal requirements. In any event, the amendment of certain of the annexes to CETA are excluded from the procedure under Article 30.2.2. Importantly for this case these include "*amendments to the annexes of Chapter Eight (Investment)".*

61. The plaintiff's argument to the effect that the CETA Joint Committee is exercising law making powers is based on four provisions; firstly, the power of the Committee on Services and Investments to make recommendations and the power of the CETA Joint Committee to take decisions adopting "*further elements*" of the fair and equitable treatment obligation under Articles 8.10.2(f) and 8.10.3; secondly, the fact that the decisions of the CETA Joint Committee are binding under Article 26.3.2 with a requirement on parties to implement them; thirdly, the power of the CETA Joint Committee to adopt binding interpretations of CETA under Article 26.1.5(e); and, fourthly, the power of the CETA Joint Committee to agree on amendments to CETA under Article 26.1.5(c) and Article 30.2.2.

62. However, it is notable that the decision-making power of the CETA Joint Committee and its power to make certain amendments to CETA are subject to the parties approving the decision or otherwise completing their respective internal requirements and procedures. This suggests that in making decisions, the CETA Joint Committee is not making "law" since its decisions are subject to a further level of ratification or approval by the Parties. Even the power to adopt further elements of the fair and equitable treatment obligation under Articles 8.10.2(f) and 8.10.3 (being the aspect of the CETA Joint Committee's powers called in aid most frequently by the plaintiff to contend that it would be making laws for the State contrary to Article 15.2 of the Constitution) is a power which is only exercisable through the making of a decision and, thus, it is also subject to the strictures of Article 26.3.2.

63. The only aspect of the four provisions outlined above which is not expressly subject to the subsequent sanction of the Parties in accordance with their internal requirements and procedures, is the adoption of interpretations of CETA under Article 26.1.5(e). The potential circumstances in which this may arise are expanded upon in Articles 8.31.3 and 8.44.3(a) under which the Committee on Services and Investments may recommend to the CETA Joint Committee the adoption of an interpretation on matters affecting investment. It is not clear that the adoption of an interpretation will necessarily require a formal decision under Article 26.3, although in practise this may well transpire to be the case. In any event, this is a power to interpret the text which expresses what has already been agreed between the parties and consequently does not confer on the CETA Joint Committee a power to add to or to alter that agreement. In addition, it is clear from

the text of Articles 26.1.5(e) and 8.31.3 that any such interpretation is binding only on the CETA Tribunals and not on the parties.

Legal Architecture of CETA – Lack of Direct Effect

64. The provisions relied on by the defendants are ones which they contend demonstrate that CETA operates only at the level of international law and which make clear that CETA does not have any direct effect in Irish law. Firstly, the defendants point to Article 8.31 governing the law to be applied by the CETA Tribunals in the adjudication of disputes between investors and States and which provides as follows:-

"Applicable law and interpretation

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."*

This provision does two separate but related things. Firstly, it confirms not just that the applicable law is CETA itself but that CETA is to be interpreted in accordance with rules and principles of international law rather than the domestic law of any of the parties. Secondly, it confirms that the CETA Tribunal does not have jurisdiction to interpret or to rule on the legality of a domestic measure. The CETA Tribunal must accept the prevailing interpretation of domestic law by the domestic courts and authorities of the party concerned and cannot purport to give any binding interpretation to a domestic measure. The defendants rely on these provisions to illustrate the purely international character of CETA and its adjudicative mechanisms.

65. The defendants regard Article 30.6 as having a similar effect. It provides:-

"Private rights

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."*

Thus, in its express terms, Article 30.6 makes it clear that CETA is not directly effective in the domestic legal systems of the parties. It defines its own legal effect as limited to the conferral of rights and the imposition of obligations between the parties and under public international law. Of course, Chapter 8 confers rights on investors who are not parties to CETA so it would seem that the appropriate reading of this provision is that the rights conferred by CETA on such persons are limited to those created between the parties as a matter of international law. In fact, the article goes further and precludes the parties from enacting any measure which would enable it to have direct effect in the sense of being capable of being relied on by third parties before the domestic courts of a party to make a claim against the other party. Article 30.6.2 does not expressly preclude a party providing a right of action against itself under its own domestic law (e.g. the enactment in Ireland of legislation which would allow a Canadian investor to sue the Irish State before the Irish courts for breach of an obligation under CETA) but clearly this is not something required by CETA. Further, as it would be *prima facie* inconsistent with the explanatory provisions of Article 30.6.1, any decision by the State to enact legislation of that nature would necessarily be a purely domestic choice.

Relevant Constitutional Provisions

65. The main fault lines between the parties are evident from the arguments they have made in respect of the provisions of CETA examined above. Essentially the issue is whether ratification of CETA without a constitutional referendum would constitute an impermissible transfer of the State's sovereignty. In particular, the plaintiff contends that ratification in the manner currently proposed would breach Article 15.2 and Article 34.1 of the Constitution which confer exclusive power to make laws for the State on the Oireachtas and under which the judicial power of the State is conferred exclusively on the courts established by and under the Constitution. Consequently, it is necessary to consider both of these provisions together with the overarching provisions of Articles 1, 5 and 6 and those of Article 29 under which the government, in the exercise of the executive power of the State, may enter into international agreements on behalf of the State.

66. In the case law considering the interaction of the Constitution with international agreements to which the State proposes to become a party, the starting point for judicial analysis is not the specific constitutional provisions of which breach is alleged. Rather it is the anterior provisions which establish the independent, sovereign and democratic nature of the State and the fact that the powers of government identified and allocated by the Constitution are exercisable on behalf of the Irish people. A full understanding of the detailed constitutional architecture under which those powers are exercisable can only be

obtained by appreciating their origin in the sovereignty of the people by whom the Constitution was adopted. For the purpose of the present case the following provisions are relevant:

> *"Article 1*
>
> *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.*
>
> *Article 5*
>
> *Ireland is a sovereign, independent, democratic state.*
>
> Article 6
>
> 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."*

66. Whilst the plaintiff emphasises the reference to the sovereignty of the nation and the State expressed in Articles 1 and 5 and implicit in Article 6, the defendants point to the fact that Article 1 recognises the right and ability of the State to determine its relations with other States as an inherent element of that sovereignty. The case law has evolved to reflect movement from an assumption that any international agreement which commits the State into the future in a manner or to an extent not currently identifiable or measurable involves the ceding of sovereignty to a more nuanced position which recognises that entry into an international agreement is itself an act of sovereignty which will necessarily curtail the State's freedom to act in certain ways. Thus, the question of whether ratification of an international agreement involves the ceding of sovereignty is one to be considered in light of the nature of the agreement itself and following a close examination of its terms.

67. Our Constitution reflects a tripartite division of the powers of government. That division is not absolute with the interactions between the respective powers being detailed in the Constitution itself. However, the core areas of the legislative and judicial powers are clearly defined and attributed to the Oireachtas and the courts respectively under Article 15.2 and Article 34.1 which provide as follows:

> *"Article 15.2*
>
> 1. *The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.*

Article 34

1. 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."

68. Under Article 34.3.1 full original jurisdiction and power to determine all matters and questions whether of law or fact, civil or criminal is vested in the High Court with a right of appeal to the Court of Appeal under Article 34.4.1 and a further, more limited, possibility of appeal to the Supreme Court under Article 34.5. Courts of local and limited jurisdiction can be established under Article 34.3.4 and the District and Circuit Courts have been established by legislation enacted pursuant to these provisions. All judges sitting in all of these courts are appointed pursuant to Article 35 of the Constitution. Finally, Article 37 allows for the exercise of limited judicial powers by bodies which are not courts in the following terms:

"Article 37

1. Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

69. As noted above at para. 61, the plaintiff contends that the power of the CETA Joint Committee to make binding decisions (especially as regards the content of the "*fair and equitable*" obligation) and to give binding interpretations of CETA amounts to a power to make laws for the State which is inconsistent with Article 15.2. Central to this argument is the fact that what the plaintiff terms the "*CETA rules"* are not immutable and can be changed or expanded through the workings of the committee system. The defendants disagree on the basis that the reference in Article 15.2 to a power to make laws for the State identifies the scope of that power on a geographic or territorial basis. On this analysis, Article 15.2 does not restrict the State in submitting, as a matter of international law, to rules made pursuant to an international agreement. Consequently, on this argument the extent to which CETA rules may change or be changed is irrelevant as they are not made "*for the State"* and have no legal effect within the State.

70. It seems likely that Article 15.2.1 was intended not only to allocate the legislative power of the State to the Oireachtas, but also to reiterate the absence of any residual power vested in the parliament in London to make laws for Ireland. It is therefore unlikely that the framers of the Constitution had the type of circumstances presented by this case in mind when drafting Article 15.2.1. The Irish text of Article 15.2.1 uses the phrase "*Dlíthe a déanamh don Stát*" with the words "*for the State*" being a direct translation of "*don Stát*". As the language used is more or less a direct translation, an examination of the Irish language text does not provide any further assistance in ascertaining whether a rule by which the State is bound under an international treaty is a *"law for the State"* or

whether that phrase is limited to laws which are binding within the State, albeit that the State itself is in principle subject to its own laws.

71. There is a certain symmetry to the plaintiff's arguments under Article 15.2 and Article 34. Although the text of Article 34 does not contain any expression equivalent to *"for the State*", it is implicit that the jurisdiction exercised by the Irish courts, with very limited exceptions, is geographically or territorially based. Thus, on the assumption that the CETA tribunals are exercising a judicial power (a fact which is not accepted by the defendants) the issue is whether a decision made under the adjudicative machinery provided for by an international agreement and which is binding on the State and ultimately enforceable against the State in this jurisdiction is an exercise of the State's judicial power. In other words, to what extent does the fact that the State itself will become subject to CETA rules and the decisions of CETA Tribunals make those rules and decisions ones made "*for the State*" when they do not otherwise have direct effect in the State?

72. The defendants point to the acknowledged dualist approach of the State to international law to argue that an international agreement to which many States are party and which has no automatic legal effect in Ireland without further specific incorporation into domestic law cannot be said to be a law made *"for"* Ireland nor can decisions made under that international agreement constitute an exercise of the State's judicial power. The dualist approach of the State to international law is evident from the terms of Article 29 of the Constitution:

Article 29

1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst 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 law as its rule of conduct in its relations with other states.

4.1 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.

4.2 For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument 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."

Article 29.4.3 to Article 29.4.5 inclusive allow for Ireland's membership of what is now the European Union. The detail of these provisions is not relevant for present purposes, but the plaintiff relies on the fact that they have been repeatedly amended to take account of significant constitutional and institutional change at an EU level which, since the decision of the Supreme Court in *Crotty v. An Taoiseach* [1987] IR 713, has been regarded as an additional ceding of sovereignty by the State requiring a vote of the people in a constitutional referendum on each occasion. This is apparent from a number of sub paras. of Article 29 which have been inserted into the Constitution by referendum over the past thirty years. These include Article 29.4.7 and Article 29.4.8 which allow the State to exercise certain options or discretions under the TEU and TFEU and to agree to decisions, regulations or acts under those treaties even in situations where Ireland does not retain a veto, subject only to the prior approval of both Houses of the Oireachtas and, by necessary implication, without the requirement for further constitutional referendum. Under Article 29.4.10 the people authorised the State to ratify the treaty on the Economic and Monetary Union of 2012 and by Article 29.9 the State was authorised to ratify the Rome Statute of the International Criminal Court of 1998.

73. The defendants argue that the subject matter of CETA falls either within the exclusive competence of the EU or in the area of shared competence between the EU and its Member States such that Article 29.4.6 provides constitutional protection in respect of the downstream constitutional consequences of CETA. The issue of exclusive and shared competence will be considered further below. Article 29.4.6, insofar as relevant, provides as follows:

> *"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on, or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5 of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by –*
>
> *i. The said European Union or the European Atomic Energy Community, or institutions thereof,*
>
> *ii. The European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or*
>
> *iii. Bodies competent under the treaties referred to in this section, from having force of law in the State."*

74. The plaintiff argues that as the EU has recognised that ratification of CETA by each Member State is required before it can enter fully into force, ratification cannot be said to be necessitated by the obligations of EU membership and relies on *Crotty* in support of this proposition. The defendants' argument is somewhat more nuanced and is based on the division of competence between the Member States and the European Union, which is governed by the EU treaties and, in particular, the TFEU. However, an element of CETA which is not within the exclusive competence of the EU and which is central to the

plaintiff's arguments in respect of Chapter 8 is non-direct foreign investment. The defendants rely on a suite of EU treaty provisions, namely Article 4 (3) and Article 623 of the TEU and Article 216 (1), 218 (5) and 219 (1) of the TFEU as creating an obligation at the level of EU law to achieve ratification of CETA such that ratification can be said to be "*necessitated*" in the Irish constitutional sense. I will look at these in more detail when considering the extent to which CETA might be regarded as covered by the constitutional saver in Article 29.4.2, if indeed it requires such saving.

75. The last group of constitutional provisions which are central to dispute between the parties and thus which merits setting out in full are those which deal with the procedures required under the Constitution for the recognition and approval of international agreements to which the State has become a party and, if appropriate, their incorporation into Irish domestic law. These are found at Article 29.5 and Article 29.6 of the Constitution:

> *"5.1 Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.*
>
> *5.2 The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.*
>
> *5.3 This section shall not apply to agreements or conventions of a technical and administrative character.*
>
> *6. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."*

These provisions reflect the State's dualist approach to international law. In his *obiter* comments in *Barlow v Minister for Agriculture* [2017] 2 IR 440 O'Donnell J. noted that legislative authority is not required for the normal conduct of international relations, including the negotiation of and entry into international agreements. Where the commitments entered into under such an agreement require implementation at the domestic level, this must be achieved by domestic legislation. He observed at p. 464 of the judgment:

> *"36. 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 if 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."*

76. Finally, Article 29.8 should be noted as the defendants link its provisions to their argument as to the meaning of *"for the State"* in Article 15.2:

> *"8. The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law."*

Thus, actions taken internationally by the State, including actions pursuant to an agreement to which the State is a party, are legally discrete and operate on a different, extra-territorial level governed by international law in contrast to actions taken domestically by the organs of government acting pursuant to the Constitution. The defendants argue that not only is this so, but that it is explicitly recognised by Article 29.8.

77. Perhaps the clearest explanation of the operation and interaction of these various provisions is to be found in the judgment of O'Donnell J. in *Pringle v. Ireland* [2013] 3 IR 1 which, rather than paraphrase, I will set out in full omitting only portions of para. 308 of that judgment dealing with declarations of war. Fortunately, even the most serious trade dispute between the EU and Canada is unlikely to result in an outbreak of war. Starting on p. 102 O'Donnell J. stated:

> *"Thus it is noteworthy that the Constitution contemplates that the Government may enter into international agreements and then divides those agreements into a number of types, with different constitutional consequences. All international agreements must be laid before Dáil Éireann under Article 29.5 (and it is to be noted, only the Dáil and not the Oireachtas generally), consistent with the Government's answerability to that house under Article 28.4.1. Any agreement which goes further and involves a charge on public funds (other than an agreement of a technical or administrative character), must be approved by the Dáil, again consistent with that body's distinct role in financial matters reflected in Articles 17, 20, 21, 22, and 28.7. Finally, in this regard no international agreement may become part of the law of the State save as may be determined by the Oireachtas as a whole pursuant to Article 29.6, a provision which is once again consistent with the vesting in the Oireachtas of the sole and exclusive power of making laws for the State under Article 15.2.1. From these provisions may be drawn the unremarkable conclusion that the Constitution contemplates that the conduct of the State's foreign relations will necessarily involve the making of binding agreements with other states, which agreements could have financial consequences for the State, and on occasions require an alteration of its domestic law….*
>
> *….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. Article 29.4.2 is a little discussed provision nowadays, being seen as of largely historically interest. However, it again clearly envisages that in its conduct of foreign affairs, Ireland*

could adopt mechanisms utilised by members of any group or league of nations with which the State could become associated for the purposes of international cooperation. This again contemplates that the business of the conduct of foreign affairs might necessarily involve the making of agreements with foreign States, cooperation with, and membership of, international bodies, and occasionally, and regrettably, the possible occurrence of disputes including the commitment of the State to a war."

Standard of Review

78. The defendants' written submissions contain a detailed exposition of the standard of review in constitutional litigation such as this. To a certain extent the argument made is unremarkable and can be readily accepted. Insofar as it is contended by the defendants that the presumption of constitutionality applies, this was not seriously disputed by the plaintiff. The practical effect of such a presumption is that the plaintiff bears the onus of proving the unconstitutionality alleged and such constitutionality must be clearly shown. Although the authorities cited by the defendants all concern challenges to Executive action, in fact any plaintiff in a constitutional action of any type must clearly establish the alleged unconstitutionality as, unless this is done, the presumption of constitutionality will prevail.

79. However, the submissions also contend for a higher standard of review, namely the application of the "clear disregard" test applicable in cases where the Courts are asked to review the actions of the Executive particularly in the conduct of foreign relations (See *Boland v An Taoiseach* [1974] IR 338 and *Horgan v Ireland* [2003] 2 IR 468). This standard is posited because it is contended that the decision under challenge is that of the Government that Ireland should adopt CETA. It is also intended by the defendants to be a higher standard than the onus which lies on the plaintiff in any constitutional action to show clearly the unconstitutionality which is alleged.

80. However, I do not think that the defendants' characterisation of the decision under challenge is entirely accurate. The authorities relied on as regards this issue emphasise the discretion available to the Government in the conduct of foreign relations and the inappropriateness of the Courts presuming to intervene where matters of the State's international policy are in issue. When the Government has entered into an international agreement on behalf of the State, it is simply not a matter for the Courts to approve or to disapprove of the contents of that agreement or the policies thereby pursued. The plaintiff is clearly opposed to the adoption of CETA by both the EU and by the State and indeed gave evidence as to his membership of groups opposed to CETA even before he was elected to the Dáil. However, the case made on his behalf is not a generalised one against CETA; if it were, I fully acknowledge that the underlying policy choices made by the Government would be largely non-justiciable. Rather it is a sophisticated legal case specifically focused on the proposed method of ratification of CETA by resolution of the Dáil under Article 29.5.2. The policy choices made by the Government in deciding to adopt CETA are largely irrelevant to the proposed method of ratification. However, if the proposed method of ratification is in breach of the Constitution, then the Court must have

the power to intervene. The method of ratification is not an issue of high policy which intrinsically does not lend itself to judicial evaluation (to paraphrase the Court of Appeal in *Burke and P (a minor) v Minister for Education and Skills* [2021] IECA 67 (a case which, although it concerned the executive power, did not involve international relations). The method of ratification is the procedural nuts and bolts whereby the policy choices made by the Government are given effect in a constitutionally prescribed manner. I do not think that a higher standard of review necessarily applies to the Court's consideration of whether a constitutionally appropriate choice has been made as to the procedure through which CETA is to be ratified.

81. I might also observe in passing that it is not quite clear to me exactly what difference is contended for between the undisputed requirement that a plaintiff must clearly establish the alleged unconstitutionality and a requirement that the plaintiff show that there has been a clear disregard of by the Government of the powers and duties conferred on it by the Constitution. If it is implicit in the defendants' submission that were the plaintiff to show that the proposed resolution was clearly unconstitutional but not that the Government had acted in clear disregard of its duties, then he could not succeed in his case, I disagree. No challenge to the merits of an international agreement or to the policy choices made by the Government in pursuing it could succeed unless it were shown that the Government had acted in clear disregard of its duties under the Constitution. However, the mere fact that the Government has made a decision to seek the approval of the Dáil under Article 29.5.2 rather than seeking the approval of CETA in a referendum of the People, does not remove the question of whether this form ratification is constitutionally valid from the jurisdiction of the Courts or make it subject to a standard of review which is designed to protect the freedom of the Government to act in the context of international relations.

Legal Analysis – Interaction of International Law and the Constitution

82. Whilst the defendants have responded in detail to all of the plaintiff's claims, the main argument made on their behalf is relatively straightforward and, counsel submits, that if it is correct, it disposes of the plaintiff's claim in its entirety. Therefore, I propose to commence my analysis of the issues by considering whether the defendants are correct in contending that as CETA is an international agreement it operates only at the level of international law and cannot be understood as effecting a transfer of either the State's legislative or judicial power. This argument presupposes that as it is not proposed to take any steps to incorporate CETA into Irish domestic law through the enactment of legislation, then it follows from Article 29.6 that CETA cannot be and thus is not part of the domestic law of the State.

83. This is clearly correct as a matter of principle, but the plaintiff points to the judgment of Clarke C.J. in *Conway v. Ireland* [2017] 1 IR 53 as sounding a cautionary note in this regard. That case considered the status in Irish law of the Aarhus Convention which Ireland had ratified but not made part of its domestic law in circumstances where the Convention had also been ratified by the EU and partial effect had been given to it

through EU Directives. The starting point for the court's analysis was Article 29.6 of the Constitution with Clarke C.J. stating as follows at p. 58:

> *"7. It seems to me that the appropriate starting point must be the Constitution. Article. 29.6 of the Constitution provides that 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'. This provision is clear in its terms and has been consistently applied in a series of cases at least since In Re Ó Láighléis [1960] I.R. 93. Indeed, it may well be that the provisions of Article 29.6 are part of the general arrangements which confer the exclusive law making power of the State on the Oireachtas (subject only to the special provisions deriving from Ireland's membership of the European Union).*
>
> *8. The power of making foreign policy (as part of the Executive function of the State in relation to external relations) is, of course, vested in the Executive or Government (see Articles 28 and 29). 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. While the separation of powers between the Government and the Oireachtas has, perhaps, been less explored in Irish constitutional litigation than the separation of powers between the courts, on the one hand, and the Government or the Oireachtas, on the other, nonetheless the division of responsibilities between Government and Oireachtas in the particular way in which that division is specified in the Irish Constitution forms an important part of the Irish constitutional architecture.*
>
> *9. It follows that there can be no doubt but that, as a matter of Irish constitutional law, the Aarhus Convention cannot, save to the extent that it may be 'determined by the Oireachtas', become part of Irish domestic law. While the constitutional architecture in other jurisdictions may differ, that aspect of the position in Irish constitutional law is at least clear. In fairness, counsel for Mr. Conway did not argue otherwise. There would not have been any legitimate basis on which counsel could have so argued."*

84. Whilst the defendants rely on these passages as confirming the constitutional requirement for the Oireachtas to determine whether, and the extent to which, an international agreement can become part of Irish law, the plaintiff relies on the same passages as illustrating that the Chief Justice was live to the concerns raised in this case, i.e. that although CETA purports to be an international agreement it is nonetheless capable of changing our domestic law in an unconstitutional manner.

85. This begs the question of whether CETA is capable of having the type of legal consequences contended for by the plaintiff within our domestic legal system. In my view there are two reasons for concluding that it is not. Firstly, the terms of CETA itself are designed to ensure that the 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. It may be pertinent to bear in mind that these provisions are intended to govern the application - or rather the non-application – of CETA in the domestic legal systems of all of the parties including those who apply a monist approach to international law. Therefore, even where the internal constitutional rules of a party do not include a provision equivalent to Article 29.6 of our Constitution, the articles of CETA referred to above ensure that it operates only within the sphere of international law.

86. Secondly, it is well established as a matter of Irish constitutional law that ratification of an international treaty *simpliciter* does not give it any legal effect under Irish law and Article 29.6 expressly reserves to the Oireachtas the extent, if any, to which an international agreement will become part of the domestic law of the State. This remains so even where the treaty creates rights for private individuals and establishes an adjudicative mechanism which may make decisions against the State at the suit of those individuals, as is the case under the European Convention on Human Rights. The decision of the Supreme Court to this effect in *In Re O Laighleis* [1960] IR 93 was followed in the more recent decision of that court in *J. McD v. PL* [2010] 2 IR 199 notwithstanding the enactment in the interim of the European Convention on Human Rights Act, 2003 which gave certain effect, but not direct effect, to the ECHR in Ireland.

87. In *J. McD v PL,* a guardianship and access dispute arose between a female couple, one of whom had given birth to a child they intended to raise jointly, and the natural father of the child. The High Court held that the 2003 Act and the ECHR required the court to treat the couple and the child as a *"de facto family"* and to afford them legal protection as such. The Supreme Court disagreed with this element of the High Court's reasoning. Murray C.J. analysed the matter starting at p. 247 as follows:

> *"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.*
>
> *28. Even though the Contracting parties undertake to protect convention rights by national measures, the Convention does not purport to be directly applicable in the national legal systems of the high contracting parties. Nor does the Convention require those parties to incorporate the provisions of the Convention as part of its domestic law. So far as the Convention is concerned it is a matter for each*

Contracting Party to fulfil its obligations within the framework of its own constitution and laws. The Convention does not seek to harmonise the laws of the contracting states but seeks to achieve a minimum level of protection of the rights specified in the Convention leaving the States concerned to adopt a higher level of protection should they chose to do so…

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). Fortunately, its decisions are generally respected and executed. …

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.

37. Consequently 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."

88. When looking at the extent to which the Irish courts could have regard to or apply the ECHR itself or the jurisprudence of the European Court of Human Rights, Murray CJ. observed at p. 253 of his judgment:

"56. While conceptually the Convention does of course expect contracting states to provide remedies before a 'national authority', usually the courts, it does not purport to impose or confer any jurisdiction on national courts. The duty of the courts is to enforce the Constitution and the laws of the State. Thus the declaration which the Constitution requires every judge to make before entering upon his or her office is, inter alia, to 'uphold the Constitution and the laws'. Accordingly, courts will enforce or adjudicate on issues concerning rights which have their origin in an international convention when duly conferred with such jurisdiction as a matter of national law. Otherwise they have no jurisdiction to do so."

89. Fennelly J. in the same case took an equally strict approach to the demarcation between the State's obligations under an international treaty as a matter of international law and the extent to which those obligations could give rise to rights enforceable against the State before our domestic courts and was critical of the trial judge for failing to have observed this distinction. He stated at p. 311:

> *"309. … throughout this part of his reasoning the judge implies that Convention provisions and principles impose obligations directly on the courts of the contracting states. That assumption seems particularly to underlie the passage which I have quoted above. The judge speaks of the possibility of a declaration of incompatibility pursuant to s. 5, in the event of conflict with Irish law. In the absence of such a conflict, it seems that the 'de facto family has such family rights as may arise under article 8…'. This is to overlook the distinction between the international obligations of the State pursuant to the Convention and its effect in domestic law. Under the Constitution, only the Oireachtas has the power to give effect in 'the domestic law of the State' to the terms of an international agreement….*
>
> *311. The High Court judgment does not provide any basis by reference to the Act of 2003 or otherwise for the application in Irish law of the notion of de facto family based on Article 8 of the Convention. It seems that the trial judge effectively gave direct effect to the Convention. That is not permissible, having regard to Article 29 of the Constitution. The Convention does not have direct effect in Irish law. Thus, the trial judge was in error in his application of the notion of a de facto family (comprising the respondent and the child). For these reasons, the trial judge should not have considered Article 8 of the Convention. That should suffice to persuade the Court to allow the appeal."*

90. On the basis of these authorities 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. However, as the plaintiff has argued strongly that this is not legally or factually correct, I will proceed to consider those arguments in more detail.

91. Before doing so 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.

92. This remains so even as regards decisions of the CETA Joint Committee to be made in the future, and especially so bearing in mind that under the terms of CETA those decisions themselves require the completion of any necessary internal requirements and procedures. As it happens, since most of CETA concerns matters within the exclusive competence of the EU, the requirements and procedures in question will be those of the EU rather than the Member States. However, where the CETA Joint Committee makes a decision on matters falling within the competence of the Member States, then that decision must be subject to the requirements and procedures that apply under Irish law.

93. The fact that the State has agreed to be bound by the terms of an international treaty as a matter of international law, does not make the terms of the treaty a "*law for the State"* within the meaning of Article 15.2.

Sovereignty

94. In framing his argument to the effect that ratification of CETA without a constitutional referendum would constitute an unlawful ceding of the State's sovereignty, the plaintiff relied heavily on the decision of the Supreme Court in *Crotty v. An Taoiseach* [1987] IR 713 and, in particular, on the following seminal passage from the judgment of Walsh J. at p. 783:-

> *"In enacting the Constitution the People conferred full freedom of action upon the Government to decide matters of foreign policy and to act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, this freedom does not carry with it the power to abdicate that freedom or 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, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate. The latter two have now been curtailed by the consent of the People to the amendment of the Constitution which is contained in Article 29, s. 4, sub-s. 3 of the Constitution. 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." In the last analysis it is the People themselves who are the guardians of the Constitution."

95. The defendants, in contrast, take as their starting point the fact that the Supreme Court in *Crotty* accepted that the Single European Act, with the exception of Title III on European political cooperation, was properly within the constitutional licence of Article 29.4.3 which authorised the State's accession to the European Communities. In particular, the Supreme Court accepted that proposed changes to qualified voting at the European Council which have removed Ireland's right of "*veto*" in certain circumstances, were constitutionally permissible within the framework of the then-existing provisions of the Constitution. Title III was distinct because it dealt with an area, namely foreign policy, which had not heretofore been within the competence of the European Communities and thus would entail an additional surrender of sovereignty which was not within the scope of the then-existing constitutional provisions. Thus, the issue was not one of the division of competences between the EU and the Member States under the Treaties much less a question of whether a shared competence had been exercised by the EU. Rather, it was whether the Government could enter into a Treaty which bound the State to act in conjunction with other Member States in an area which did not fall within the competence of the EU (then the European Communities) at all and consequently was not covered by the constitutional amendments made to facilitate membership of the European Communities.

96. In addition, considerable emphasis was placed by the defendants on the re-examination of *Crotty* by the Supreme Court in *Pringle v. Ireland* [2013] 3 IR 1. That case concerned an amendment to Article 136 of the TFEU which permitted the establishment of the European Stability Mechanism (ESM) and a subsequent treaty between those Member States who were part of the euro area establishing the ESM. The purpose of the ESM was to provide financial support to Member States in financial difficulty in order to safeguard the financial stability of the euro area as a whole. The ESM was funded by capital paid in by the members and by borrowings. Ireland's commitment was significant, involving a potential liability to pay billions of euro if called upon to do so. The ESM was to be governed by a board of governors. Although each member was entitled to appoint a governor, not all decisions of the board would require unanimity. The plaintiff challenged the validity of the Council Decision and of the treaty on a range of grounds. These included an allegation that the ESM treaty involved an unconstitutional transfer of sovereignty in breach of the principles laid down in *Crotty*. The Supreme Court ultimately rejected the plaintiff's appeal. Clarke J. (as he then was) considered in some detail the extent to which the jurisprudence in *Crotty* imposed a restriction on the State entering into international agreements which are not then put to the people in a referendum. He

noted initially (at para. 420) 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 and that such obligation only arose where an international agreement breached the terms of the Constitution as it then stands. He also noted that because of Article 29.4.6, a special status applied to the EU treaties and that the only issue arising pursuant to *Crotty* was whether changes in those treaties "*are of a type which would bring the scope of the competences of the EU beyond those which might be said to have been authorised by the Constitution in its then current form in a way which would render ratification of the new amending treaty itself a breach of the Constitution*" (para. 422). He then stated:-

"423. The Government is given a very wide discretion as to how to conduct the foreign policy of this State under the Constitution (see Horgan v. An Taoiseach [2003] 2 I.R. 468). 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. Many legitimate policy objectives which the Government, in exercise of its constitutional entitlement to formulate and implement foreign policy, might wish to pursue can only, as a matter of practicality, be achieved by entering into bi-lateral or multi-lateral treaty arrangements with other countries of like or similar mind with a view to securing specified ends.

424. Obviously, such treaties, if they involve an exposure to financial obligations, require the approval of the Dáil in accordance with Art. 29.5.2° of the Constitution. However, subject to that requirement, what limitations can properly be said to lie on the discretion of the Government to enter into international treaties?

425. It seems to me that the limitation can be found in the language of the judgments of the majority in Crotty v. An Taoiseach [1987] IR 713. Walsh J., at p. 783, spoke of the limitation as being 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… so to bind the State in its freedom of action in its foreign policy"…

426. On that basis it seems to me that the overall position is quite clear. The Government enjoys a wide discretion, under Art. 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."

97. 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 nor 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.

98. At a later stage in his judgment, Clarke J. (as he then was) teased out the implications of this constitutional architecture. He did so as follows:-

"460. … 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…

463. Without pushing the analogy too far, it seems to me that there are parallels in the international sphere. The way in which international policy is pursued in a whole range of areas is by states entering into treaties whether bi-lateral or multi-lateral. In modern conditions many multi-lateral treaties involve the establishment of bodies or institutions with a greater or lesser permanence. At the level of principle, sovereign nations who enter into such agreements are exercising their sovereign right to adopt policy directed towards what they perceive to be their own advantage or in support of values which they wish to uphold. Inevitably entering into such treaties involves some diminution in freedom of action in the future. As a matter of international law countries are bound by the obligations which they undertake in treaties. The international community is entitled to expect that countries can be taken at their word most particularly when that word is expressed in the solemn form of a treaty. Having to be taken at your word means that your freedom of action is necessarily circumscribed. However, even then, as a matter of practicality, sovereign nations retain the ability to breach treaty obligations provided they are prepared to face whatever consequences, as a matter of law or politics, flow from such a decision.

464. However there may be circumstances where the commitment entered into does, in truth, amount not to an exercise in sovereignty which has, as a necessary consequence, a narrowing of the freedom to act in the future but rather amounts to such a significant narrowing of future policy options so that it can be properly be said that there has been a transfer or pooling of sovereignty. This will be particularly so where those future policies by which the contracting parties are bound are as yet undecided and are to be determined in the future by others or by collective bodies.

465. The real question on the issue of loss of sovereignty seems to me to turn on the nature of the commitments entered into and the extent to which those commitments can truly be said to involve an abdication of the powers conferred by the Constitution, an alienation to others of such powers or the subordination of those powers to the interests of others."

O'Donnell J. in the same case was critical of the approach taken by the plaintiff in that case which placed significant emphasis on a single passage of the judgment of Walsh J. in *Crotty* at p. 781 to the effect that "*the essential nature of sovereignty is the right to say yes or say no*" and noting that the treaty provisions under consideration materially qualify that right. O'Donnell J. regarded the argument which had been made as a misunderstanding and misinterpretation of *Crotty* and, by extension of the Constitution. He noted the substantial nature of those provisions of the Single European Act which had not been found to be unconstitutional by the Supreme Court:-

"311. …That judgment however, upheld the Act of 1986 which implemented the provisions of the SEA which took effect in domestic law on the grounds that the original licence granted by the People to join the European Communities was a

licence to join a dynamic and developing entity. Therefore, incremental changes in European institutions within the scope of the existing licence did not require further express approval by the People. But one of the most significant changes challenged was the adoption by the European Community of qualified majority voting rather than unanimity in certain cases. In each such case the consequence of the change was that Ireland (and necessarily every other member state) lost its veto: in specific terms, Ireland lost the right, in those circumstances, to say no. Yet that change was not incompatible with the Constitution. That in itself is a powerful indicator that the single phrase, vivid though it may be, cannot be read in the simplistic way put forward by the plaintiff in this case."

99. He echoed the views of Clarke J. as regards the exercise of sovereignty necessarily restricting the State's freedom to act into the future:-

"316. 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. 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. 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… The fallacy is perhaps to conceive of the breadth of the power accorded to the Government in the field of foreign affairs as amounting itself to a constraint: on this reading the Government only has freedom of action so long as it does not use it. Quite apart from the fact that such a conception makes little sense, and has not historically been the position taken by the State in the field of foreign affairs, it also appears to me to be inconsistent with what is explicitly contemplated both by the words and structure of the Constitution…

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 "Do hereby adopt, enact, and give to ourselves this Constitution".

Accordingly, Article 1 states that "the Irish nation hereby affirms its… sovereign right to choose its own form of Government…". Consistent with this assertion of sovereignty, Article 6 declares that "all 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."

100. O'Donnell J. regarded the true rationale of Crotty as deriving from the fact that Title III of the SEA affected *"the entirety of the foreign policy of the State and not simply one area of agreed cooperation"*. In this context, the ESM mechanism was materially different as it did not concern Ireland's foreign policy as a whole (see para. 322). There is an obvious analogy to be drawn from this distinction between the ESM and CETA. CETA does not concern the entirety of the foreign policy of the State. In fact, as will be seen from the analysis below, the entirety of CETA's subject matter falls within either the exclusive competence of the EU or competence shared between the EU and its Member States and consequently there is very little, if any, scope for Ireland to adopt an approach which would differ from that of the EU as regards these matters. Further CETA deals only with trade and even then only trade with one other country, Canada. Without downplaying the importance of CETA and acknowledging that trade is a broad concept which encompasses a valuable aspect of international relations, CETA does not engage the sovereignty of the State in the same fundamental way that European Political Cooperation did in *Crotty*.

101. It seems to me that the judgments in *Crotty,* and particularly the passages from the judgment of Walsh J quoted above, must be considered, firstly, bearing in mind the extent to which the Single European Act was regarded as uncontroversial and, secondly, in light of the judgments in *Pringle*. Consequently, *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. Every international agreement seeks to obtain the commitment of the parties as to how they will act as regards the subject matter of that agreement into the future. 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 light of the international commitments thereby entered into would restrict rather than protect its sovereignty. To require every such agreement to be put to the People in a referendum would upend rather than uphold the constitutional architecture so carefully set out in Articles 28 and 29.

102. Finally in this regard, the State has argued for the possibility that the mechanism provided by CETA for the resolution of investor disputes comes within *"the principle of the pacific settlement of international disputes by international arbitration"* to which the State adheres by virtue of Article 29.2 of the Constitution. There has been little or no judicial examination of Article 29.2. Both intuitively and because of the location of Article 29.2 between Article 29.1 and Article 29.3, I am of the view that it is intended to reflect the State's commitment to the resolution of international disputes, being disputes between nations, by formal peaceful means rather than through hostile ones. Article 29.1 refers to

"*peace and friendly co-operation among nations*" and under Article 29.3 the State accepts *"the generally recognised principles of international law as its rule of conduct in its relations with other States".* Thus, the first three sub-articles of Article 29 seem to focus specifically on relations between Ireland and other nations or States. "*International"* in this context signifies between nations rather than the distinct meaning of beyond the State's own national boundaries.

103. The Irish language text adds support to the suggestion that the international disputes which are to be the subject of international arbitration are those between nations and that Article 29.2 is not intended to cover financial claims by commercial entities against the State. The Irish text provides:-

"Ndéanfaí gach achrann idir náisiúin a réiteach go síochánta le headráin idirnáisiúnta…"

There is a distinction between "*idir náisiúin*" meaning "*between nations*" and "*idirnáisiúnta*," generally translated as "*international",* which is not so readily apparent by the use of the word "international" in both contexts in the English language text. Consequently, I am not satisfied that Article 29.2 can be called in aid to provide a constitutional basis for the exercise of jurisdiction in investor/ State disputes by the CETA Tribunal, but for the reasons set out in the preceding two sections of this judgment I do not think that this is in fact required.

Competence of the EU and its Member States

104. The arguments made in this case have an added layer of complexity because CETA is what is described as a "*mixed agreement*" under European law. This means that the subject matter of parts of CETA fall within the exclusive competence of the EU whereas other parts fall within the shared competence of the EU and its Member States. Where the EU has exclusive competence in an area, then it also has ancillary competence to enter into international agreements on behalf of the EU and its Member States in that area. Considerable argument was directed at the effect ratification of CETA might have on the distribution of competence between the EU and its Member States in the areas where the EU does not currently have exclusive competence. It seems to be accepted by the plaintiff that the bulk of CETA's substantive provisions deal with matters within the exclusive competence of the EU (i.e. international trade under the common commercial policy) and no issue is raised in respect of those provisions in these proceedings. The area of dispute is largely Chapter 8 and procedural provisions (such as those concerning the CETA Joint Committee) which will apply to Chapter 8 in common with other chapters of CETA. As previously noted, Chapter 8 deals with investor protection and applies to both direct and indirect Canadian investment in the EU. Again, it is accepted by the plaintiff that direct investment is an exclusive EU competence. Both parties agree however that indirect investment is a shared competence. It is not contended by the plaintiff that indirect investment or any other element of Chapter 8 falls within the exclusive competence of the Member States, although the parties differ in their understanding of the inherent nature of the Member States' competence in an area of shared competence that has not been exercised, or fully exercised, by the EU. As the definition of investment is very broad, the provisions of Chapter 8 apply equally to a wide range of both direct and

indirect investment. Thus, on one level the concerns raised by the plaintiff are not ones directed at the terms of Chapter 8 *per se* but at the application of those terms to indirect investment.

105. It is fundamental to the EU constitutional order and reflected in Article 5.2 of the TEU, that the EU can only act within the limit of the competences conferred upon it by the Member States and that competences not conferred upon the EU remain with the Member States. Greater detail as to how this division of competence maps onto substantive policy areas is to be found in Articles 1 to 6 inclusive of the TFEU. Article 3.1 of the TFEU lists the areas in which the EU has exclusive competence and includes at sub para. (e) the common commercial policy. It is not disputed that trade, including international trade, forms part of the common commercial policy and, thus, falls within the exclusive competence of the EU.

106. Key to understanding the division of competences between the EU and its Member States and the legal effect that the exercise of competence by the EU will have is Article 2 of the TFEU, the relevant parts of which provide as follows:

"Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. 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.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

…

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. *The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area."*

107. Whilst the notion of exclusive competence is readily understandable, that of shared competence is more complex. Under Article 2.2 the EU may act at any time in an area of shared competence and when it does so Member States are then precluded from exercising competence as regards that particular matter save to the extent that the EU has not done so. Thus, action by the EU in an area of shared competence will have the legal effect of converting that shared competence into a Union competence to the extent that the EU has acted and for as long as it continues to act. This will in turn have a knock-on effect on the extent to which the EU has ancillary competence to enter into international agreements in respect of that part of an area of shared competence in which it has acted.

108. As this case concerns an alleged ceding of sovereignty if CETA is to be ratified in the manner proposed, it is important to appreciate as regards the areas of shared competence with which CETA deals that although competence in these matters currently rests with the Member States, it is a competence which can, at any time, be exercised by the EU without any further change to the Treaties being required. Consequently, and perhaps crucially from a constitutional perspective, the potential exercise by the EU of any shared competence was already approved by the People in adopting the 28th amendment to the Constitution which resulted in the insertion of the current text of Article 29.4.4 to 29.4.9 inclusive. Whilst the chronology of the changes to the EU's founding treaties and of Ireland's consequent constitutional amendments can be difficult to follow, in simple terms the Treaty of Lisbon, which the State ratified pursuant to Article 29.4.5 of the Constitution, reformulated and renamed the Treaty of Rome (itself already refashioned as the Maastricht Treaty) as the Treaty on the Functioning of the European Union. As a result, the entitlement of the EU to act in an area of shared competence under Article 2.2 TFEU and the subsequent exclusion of Ireland's current competence in that area if it does so, is contemplated by Article 29.4.5 of the Constitution and cannot of itself represent an unconstitutional ceding of sovereignty which would require the approval of the People in a referendum.

109. This is not, however, the end of the matter because under Article 2.2 of the TFEU, the exercise by the EU of a shared competence requires the adoption of legally binding acts in that area. Until the EU has acted through the adoption of legislation, then the competence remains with the Member States. Under Article 288 of the TFEU the EU exercises its competence through the adoption of legal acts by its institutions. These legal acts comprise regulations, directives, decisions, recommendations and opinions (the latter two having no binding legal force). Under Article 216 the EU may conclude international agreements *"where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union Act or is likely to affect common rules or alter their scope"*. The procedure for the conclusion of an international agreement by the EU is set out in Article 218 of the TFEU. Significantly for the purposes of the

argument in this case, the negotiation, conclusion and ratification of an international agreement is not one of the legal acts listed at Article 288 through which the EU exercise its competences.

110. Further, Article 207 of the TFEU dealing with the operation of the EU's common commercial policy lists at Article 207.1 the matters that are to be subject to the uniform principles of that policy. These include "*foreign direct investment",* a phrase introduced into the Treaties by the Treaty of Lisbon. Given that foreign direct investment is expressly listed, by implication it follows that foreign indirect investment does not come within the scope of the common commercial policy nor, by extension, the scope of the EU's exclusive competence in relation to that policy. The defendants argue, and the plaintiff does not seem to disagree in principle, that foreign indirect investment nonetheless falls within the general competence of the EU and, hence into the residual, but large, category of shared competence.

111. Indeed, the CJEU accepted this to be the case in its Opinion 2/15 on issues raised by the Commission in respect of a Free Trade Agreement (FTA) between the EU and Singapore. This agreement is in very similar terms to CETA and confers rights on investors from each party in the territory of the other but does not include the establishment of a tribunal to resolve any resulting disputes. The Opinion, to which I will return, held at para. 227, *"that non-direct foreign investment may, inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and to control of the undertaking ("portfolio" investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU…"* Thus, the court located the EU's general competence in respect of foreign indirect investment in Article 63 of the TFEU which governs the free movement of capital and prohibits restrictions on payment. Significantly, Article 63 is framed in terms which render it applicable not just to capital movements between Member States but also "*between Member States and third countries".* Consequently, indirect investment by Canadian investors in Ireland and a repatriation of the profits of those investments to Canada comes within the scope of Article 63 and, by extension, within the general competence of the EU.

112. Nonetheless the plaintiff's argument proceeds on the basis that as the EU has not exercised its competence in respect of foreign indirect investment, it remains a Member State competence. The plaintiff then argues that the effect of ratification of CETA will be to vest in the EU competence in relation to foreign indirect investment which it does not currently have and as a result of which Ireland will be bound by any future actions taken by the EU in respect of foreign indirect investment including the establishment of a multilateral investment tribunal.

113. The defendants, correctly in my view, reject the binary characterisation of EU competence inherent in this argument. Matters fall within the exclusive competence of Member States either because they are not covered by the EU Treaties at all or because they are listed in Article 6 of the TFEU as matters in respect of which the EU's competence is limited to

carrying out actions to support, coordinate or supplement the actions of the Member States. Neither of these are the case here – the former because of Article 63 of the TFEU and the latter because of Article 6 itself. Consequently, competence in respect of foreign indirect investment is not a national competence *per se* but is a shared competence in respect of which Member States may currently act because the EU has not yet legislated. Thus, although foreign indirect investment is not an exclusive EU competence, it is equally not an exclusive Member State competence. It remains a shared competence which the EU may exercise at any time. That characterisation may change after the EU acts because the very fact that the EU has acted may (depending on the nature and extent of the action) thereafter preclude the Member States from acting and thus continuing to share in the competence.

114. This leads to the question the plaintiff has posed as to whether ratification of CETA will convert this shared competence into an EU competence, presumably meaning an exclusive EU competence since it is already a general EU competence by virtue of Article 63 of the TFEU. If the answer to this question were positive, it would in my mind still beg the question as to whether it amounted to an unconstitutional ceding of sovereignty in circumstances where the shared nature of residual EU competences and the ability of the EU to preclude further national action by taking appropriate legislative action in a sphere of shared competence as set out in the Treaty of Lisbon, has already been approved by the People. However, that subsequent question does not fall to be answered because it seems clear that as a matter of EU law the entry into an international agreement by the EU is not of itself a legislative act sufficient to alter the shared nature of a competence.

115. Under Article 2.2 of the TFEU the exercise by the EU of a shared competence is effected through legislation and the adoption of legally binding acts in that area. As noted, the legally binding legislative acts which the institutions of the EU may adopt on its behalf under Article 288 TFEU comprise regulations, directives and decisions. Entry into an international agreement by the EU is not an exercise of shared competence much less one that precludes further action by Member States in the area covered by the agreement.

116. Further, there is a distinction in EU law between the internal and external exercise of a shared competence. The issue arose initially as regards the extent to which the EU (then the European Community) could exercise external competence (i.e. enter into an international agreement) in the absence of an express treaty basis for doing so. In Case 22/70 *Commission v. Council* ("the AETR case") [1971] ECR 263, the Court of Justice held that "*each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, … to undertake obligations with third countries which affect those rules."* And "*…it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope."* This is known as the doctrine of implied exclusive external competence although by virtue of Article 3.2 of the

TFEU the competence has, since the Treaty of Lisbon, been expressed rather than implied. Article 3.2 provides:

> *"The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."*

117. In the argument before the CJEU in the Singapore Opinion 2/15, the Commission contended that as a result of the conclusion of the Singapore FTA, Article 3.2 TFEU meant that there was an implied exclusive external competence for the EU in the area of foreign indirect investment. The court identified the issue as follows at para. 226 of its judgment:

> *"It must now be determined whether the European Union also has exclusive competence pursuant to Article 3(2) TFEU in so far as Section A of Chapter 9 relates to other foreign investment between the European Union and the Republic of Singapore."*

And answered it in the negative, reasoning as follows:

"229. Relying essentially on the case-law recalled in paragraph 201 of this opinion, according to which, even if there is no contradiction with common EU rules, an agreement concluded by the European Union may 'affect' those rules, within the meaning of Article 3(2) TFEU, the Commission submits that Section A of Chapter 9 of the envisaged agreement may affect Article 63 TFEU and accordingly falls within the exclusive competence of the European Union referred to in Article 3(2) TFEU.

230. However, as has been maintained by the Council and the Member States which have submitted observations to the Court, that case-law cannot be applied to a situation where the EU rule referred to is a provision of the FEU Treaty and not a rule adopted on the basis of the FEU Treaty."

Having cited from the AETR judgment the court continued:

> *"It is clear from this passage of the judgment of 31 March 1971, Commission v Council (22/70, EU:C:1971:32), that provisions of secondary law which the Community, now the European Union, has progressively laid down are 'common rules' and that, when the European Union has thus exercised its internal competence, it must, in parallel, have exclusive external competence in order to prevent the Member States from entering into international commitments that could affect those common rules or alter their scope.*

234. Regard would not be had to the reasoning inherent in the rule as to exclusive internal competence contained in the [the AETR judgment], a judgment confirmed by the Court's subsequent case-law … if the scope of that rule, currently laid down in the final limb of Article 3(2) TFEU, were extended to a situation which, as in the present instance, concerns not rules of secondary law laid down by the European

Union in the exercise of an internal competence that has been conferred upon it by the Treaties, but a rule of primary EU law adopted by the framers of those Treaties.

235. *Secondly, in the light of the primacy of the EU and FEU Treaties over acts adopted on their basis, those acts, including agreements concluded by the European Union with third States, derive their legitimacy from those Treaties and cannot, on the other hand, have an impact on the meaning or scope of the Treaties' provisions. Those agreements accordingly cannot 'affect' rules of primary EU law or 'alter their scope', within the meaning of Article 3(2) TFEU.*

236. *The conclusion of an international agreement — in the present instance with the Republic of Singapore — concerning non-direct foreign investment is, as EU law currently stands, likewise not 'provided for in a legislative act of the Union', within the meaning of Article 3(2) TFEU.*

237. *Furthermore, as the Commission has expressly stated in its observations submitted to the Court, the conclusion of such an agreement does not appear 'necessary to enable the Union to exercise its internal competence', within the meaning of Article 3(2) TFEU.*

238. *It follows that the European Union does not have exclusive competence to conclude an international agreement with the Republic of Singapore in so far as it relates to the protection of non-direct foreign investments.*

239. *On the other hand, the conclusion by the European Union of an international agreement relating to such investments may prove 'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties', within the meaning of Article 216(1) TFEU.*

240. *In particular, in the light of the fact that the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which contribute to the establishment of such free movement on a reciprocal basis may be classified as necessary in order to achieve fully such free movement, which is one of the objectives of Title IV ('Free movement of persons, services and capital') of Part Three ('Union policies and internal actions') of the FEU Treaty.*

…

243. *It is apparent from paragraphs 80 to 109 and 226 to 242 of this opinion that the commitments contained in Section A of Chapter 9 of the envisaged agreement fall within the common commercial policy of the European Union and, therefore, within the latter's exclusive competence pursuant to Article 3(1)(e) TFEU in so far as they concern foreign direct investment of Singapore nationals in the European Union and vice versa. On the other hand, those commitments fall within a competence shared*

between the European Union and the Member States pursuant to Article 4(1) and (2)(a) TFEU in so far as they concern other types of investment.

244. It follows that Section A of Chapter 9 of the envisaged agreement cannot be approved by the European Union alone."

118. Whilst this reasoning is clear as regards the current division of competence between the EU and its Member States, it is not exactly on point with the entire of the argument the plaintiff is making. From a constitutional perspective the issue is not just whether there is a need for parallel ratification of CETA by Ireland and the EU as that requirement is accepted at both EU and national level. Rather, the concern is that once ratification has occurred, the very fact of ratification would commit Ireland to what the plaintiff characterises as the *"CETA project"* such that further changes may take place to the CETA rules and the multilateral investment tribunal (MIT) will be established without Ireland having the opportunity to veto those changes or to opt out of the project. It is these, as yet undefined, future steps that underlie the plaintiff's argument that ratification pursuant to Article 29.5.2 is constitutionally insufficient and a full referendum to amend the Constitution is required.

119. The plaintiff points firstly to a line of EU case law establishing that once signed by both the EU and the Member States, a "*mixed"* international agreement has the same status in EU law as a purely EU agreement – although of course the fact that it has the same status is not actually determinative of what that status might be. The plaintiff relies on paras. 14 and 15 of the judgment of the CJEU in Case-13/00 *Commission v. Ireland* which concerned Ireland's alleged failure to adhere to the Berne Convention (on the protection of literary and artistic works). The Convention dealt with certain intellectual property rights which had not been harmonised at an EU level. The court held:

"14. The Court has ruled that mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, as these are provisions coming within the scope of Community competence (see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9).

15. From this the Court has concluded that, in ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Demirel, cited above, paragraph 11)."

The defendants rely on the fact that the court went on to point out that the Berne Convention covers "*an area which comes in large measure within the scope of Community competence"* and because the Convention created rights and obligations in areas covered by Community law, there was a Community interest in ensuring adherence to that Convention. The plaintiff also relies on more recent comments by the CJEU in Case C-

266/03 *Commission v. Luxemburg* (and echoed in Case C-433/03 *Commission v. Germany* and Case C-246/07 *Commission v. Sweden*) to the following effect:

> *"59. In that regard, it must be recalled that the Court has already held that the Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action (see Case 804/79 Commission v United Kingdom [1981] ECR I-1045, paragraph 28).*
>
> *60. The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation."*

120. In my examination of the CETA provisions above, I have indicated that I do not accept that Article 8.29 CETA establishes a MIT. Rather, it establishes the commitment of the parties to pursue the establishment of an MIT and sets out the consequences for the CETA Tribunal if and when an MIT is established. The nuanced argument the plaintiff makes based on this line of case law is that once CETA is ratified, Ireland will have committed itself to the establishment of the MIT and once the EU has adopted a negotiating position by way of formal decision, then Ireland will no longer be able to object to or withdraw from the proposal to establish an MIT. Instead it will be subject to a duty of close cooperation to facilitate the action of the EU institutions at an international level which necessarily anticipates the ultimate establishment of an MIT.

121. I do not think that this argument withstands scrutiny particularly when regard is had to the very passages of Opinion 2/15 relied on by the plaintiff as demonstrating that the institutional change effected by the establishment of the CETA Tribunals is something that requires ratification by each Member State in addition to the EU. As it happens, the Singapore FTA did not provide for the establishment of a tribunal, rather under that agreement investors may submit a dispute to arbitration and, in a manner similar to Article 8.25.1 of CETA, ratification of the agreement provided the consent of the parties in advance to any such submission to arbitration. The CJEU regarded this as a significant change to the jurisdiction of the courts of the Member States stating at paras. 290 to 292 as follows:-

> *"290. Without prejudice to what is stated in paragraph 30 of this opinion, the Court has the task of ruling on the nature of the competence to establish such a dispute settlement regime. In that regard, whilst it is true that, as is clear from Article 9.17 thereof, the envisaged agreement does not rule out the possibility of a dispute between a Singapore investor and a Member State being brought before the courts*

of that Member State, the fact remains that that is merely a possibility in the discretion of the claimant investor.

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."

122. The court had earlier held (at paras. 276 to 278 of its Opinion) that where the EU had competence to enter into an international agreement, it had an ancillary competence to include institutional provisions in any such agreement but only insofar as the substantive provisions fell within the EU's exclusive competence. Where the substantive provisions of an international agreement fall within a shared competence, they cannot be approved by the EU alone and also require ratification by Member States. It is difficult to see how or why the same rationale would not apply to the establishment of the MIT just because CETA has been ratified by all parties. 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, the conclusions of the CJEU at para. 292 are not limited to jurisdiction over disputes concerning foreign indirect investment but relate to all investor disputes potentially arising under the Singapore agreement. Therefore, even if the EU were to exercise its shared competence in respect of foreign indirect invest in a manner which excluded future Member State action, the establishment of a MIT, which can only be done by way of further international agreement would still not be *"ancillary"* so as to dispense with the requirement of Member State ratification.

Administration of Justice

123. Whilst the plaintiff is undoubtedly concerned by the potential establishment of a MIT and the extent to which ratification of CETA commits the State to a course of action in that regard from which there can be no turning back, it is not actually clear that it alters the constitutional argument significantly. An MIT would likely have a similar structure to and would perform the same functions as the CETA Tribunal, albeit as regards investors from a wider range of countries. The potential effects of the operation of the CETA Tribunal would be magnified in an MIT but they would not be materially different. It seems unlikely that adherence to CETA and the establishment of the CETA Tribunal could be constitutional if adherence to an MIT were to be unconstitutional. Thus, the real question is whether CETA represents an unconstitutional ceding of the State's judicial power to the CETA Tribunal.

124. The argument on this issue took place at three levels. On one level, the defendants' principal argument was that as the CETA Tribunals only have jurisdiction as a matter of

international law, CETA does not affect an unconstitutional transfer of the judicial power of the State. On another level, the plaintiff argued that the CETA Tribunal will be administering justice both because of the nature of the disputes over which it will have seisin and because its awards will be automatically enforceable against the State in this jurisdiction. The defendants disagreed with this characterisation, particularly as regards the automatic enforceability of CETA Tribunal awards. Finally, and in the alternative, the defendants argued that if the CETA Tribunal is administering justice, then it is exercising a limited judicial function within Article 37 of the Constitution. The most useful starting point for an analysis of the nature of the CETA Tribunal's jurisdiction lies in the middle, i.e. a consideration of whether the CETA Tribunal is, in principle, administering justice before considering whether, on the one hand, it is doing so at a purely international level or, alternatively, in a constitutionally permissible limited manner.

125. The Supreme Court approved the identification by the High Court of the features characteristic of the administration of justice in *McDonald v. Bord Na gCon* [1965] IR 217. These are set out by McKechnie J. in his dissenting judgment in *Zalewski v. Work Place Relations Commission* [2021] IESC 24 with the addition of a useful descriptor of the core element of each characteristic added in brackets after each one. These are noted as follows at para. 47 of his judgment:-

> *"(1) A dispute or controversy as to the existence of legal rights or a violation of the law: [subject matter]*
>
> *(2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty: [decision]*
>
> *(3) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties: [finality]*
>
> *(4) 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 judgments: [enforcement]*
>
> *(5) The making of an order by the court which as a matter of history is an order characteristic of courts in this country, [characteristic of courts]"*

126. The plaintiff relied on the analysis by O'Donnell J. in the majority decision in the same case to contend that the "*McDonald test*" should be applied broadly rather than rigidly. It may be useful to set out part of that analysis in full:-

> *"91. It is worth recalling that Kenny J., in setting out the test in the High Court in McDonald v. Bord na gCon, would have applied it in a very broad way to find that the powers of Bord na gCon to investigate complaints and make an exclusion order enforceable by a racecourse operator nevertheless constituted the administration of justice. However, almost from the time of the decision of the Supreme Court in that case, the test, while remaining in a form identical to that advanced by Kenny J.,*

has been interpreted and applied narrowly, with the effect that few, if any, provisions have fallen foul of it. To that extent, it perhaps owes its longevity to the fact that, by emphasising the historical, it tends to exclude novelty and thus achieves a desired balance and avoids any undue restriction on the capacity of the State to provide for a range of decision-making functions with particular expertise, or informal procedures, or both. However, the treatment of the criteria in McDonald as a checklist which must be minutely and precisely complied with risks missing the wood for the trees. It also encourages an approach to drafting that could remove proceedings from the field of the administration of justice because of some small, and in truth insignificant, deviation from the checklist. That would be a triumph of form over substance. But, whatever the conceptual difficulties of delineating the precise borders of the judicial function, the Constitution requires that there be an area that is and will remain the exclusive domain of the administration of justice in courts by judges, or in Article 37 tribunals. It is important to apply any test, therefore, with an understanding of the substance it is meant to determine.

92. *It may be preferable, therefore, as indicated by McCarthy J. in Keady, to treat McDonald v. Bord na gCon as part of a general approach to the issue alongside, rather than replacing, the observations in Lynham v. Butler (No. 2) and those in State (Shanahan), and as indicating general features which tend to show the administration of justice, rather than as a definite and prescriptive test. As one commentator observed of the test, it:-*

> *"provides only a descriptive summary of the everyday workload of the contemporary court. An ex post facto overview of the average judicial caseload, it does not offer a suitably prescriptive analysis of the core concepts of the judicial function. The logic of Kenny J.'s position is hopelessly circular, relying on the current nature of the court's activities to define its function into the future. The McDonald criteria reflect the judge's estimation only of what the courts do, rather than what they ought to do. In this, it owes more to historical happenstance than conceptual coherence." (E. Carolan, The New Separation of Powers: A Theory for the Modern State, (Oxford: Oxford University Press, 2009)).*

93. *The features in McDonald v. Bord na gCon are closely linked and, to some extent, overlap. They do identify something central to the administration of justice and may be understood as indicating features of importance rather than establishing a statutory checklist. Some, indeed, of the features may be more important than others, and it may also be relevant to consider not merely whether the provision satisfies the particular heading, but also to assess the extent to which it does so.*

94. *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. The fifth feature is, however, quite different. Viewed and applied narrowly, it has the effect of confining judicial power to the areas of the traditional causes of action and proceedings and fossilising the administration of justice in the form of the business of courts in the mid-20th century…

95. 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."

At a slightly later point in the same judgment (para. 96), O'Donnell J. talks about areas being "*intrinsically within the scope of the administration of justice*" which cannot be determined "*simply by analogy with what was done by the courts as a matter of history and still less by the form of orders traditionally made by them".* Consequently, although it would be difficult, to the point of impossibility "*to define with precision the exact boundaries of the administration of justice"*, it should nonetheless be possible for the most part to identify areas which can be agreed to fall within their scope. Of course, the cases that come before the courts will necessarily tend to involve areas of decision making that are very close to those boundaries and the ultimate decision as to whether something does or does not constitute an administration of justice will depend on the weight to be given to an accumulation of factors rather than on the application of any strict test.

127. Given the view of the CJEU in the Singapore Opinion 2/15 to the effect that the dispute resolution provisions of the Singapore Agreement removed disputes from the jurisdiction of the courts of the Member States, I think that the close scrutiny called for by O'Donnell J. is necessary here in order to determine if the parallel jurisdiction of the CETA Tribunal is constitutionally permissible under Irish law.

128. The plaintiff's counsel went through the provisions of Chapter 8 of CETA identifying points of similarity with our existing court system and arguing that, looked at broadly, in accordance with *Zalewski*, its jurisdiction amounts to an administration of justice. Particular emphasis was placed on features such as the qualification for appointment as members of the CETA Tribunal and the requirement that tribunal members be impartial, which was described as being the insignia of the administration of justice under our Constitution. Most of the argument centred on the enforceability of CETA awards, a topic to which I shall return.

129. In response, counsel for the defendants traversed much of the same ground, this time emphasising the points of difference with our constitutional provisions in respect of the administration of justice, for example, tribunal members are not appointed permanently and the requirement to possess specific expertise in public international law and in international investment or trade law. However, the focus of the argument was on two things – a response to the plaintiff's arguments on the enforceability of awards and

pointing to a material difference between the making of claims and their adjudication under domestic and under international law. She contended that the first three limbs of the *McDonald* test were not met as the international disputes which can be submitted to the CETA Tribunal are not a "*justiciable controversy*" as a matter of Irish law. This argument was heavily premised on acceptance by the Court of the defendants' overarching argument as regards the status of CETA as an international agreement and, in my view, does not really engage with the core issue of whether what the CETA Tribunal will be doing is an administration of justice. In fairness, this results from the defendants' focus on the specific concept of administration of justice under the Irish Constitution rather than the administration of justice *simpliciter.* However, I find it more helpful to look initially at the inherent nature of the action to assess whether or not it is judicial and then place it in a constitutional context rather than to conflate these two steps.

130. I am satisfied that, in principle, the first three limbs of the *McDonald* test, characterised by McKechnie J. in *Zalewski* as subject-matter, decision and finality, are met. As O'Donnell J. points out, these features are closely interrelated. As a result of Article 8.25.1 of CETA, ratification of CETA by the State will effectively mean that the State has submitted to the jurisdiction of CETA Tribunal. Thus, the jurisdiction of the Tribunal can be invoked by a Canadian investor against the State without any further requirement for the State's consent. If the international aspect of the dispute and of the CETA Tribunal is left aside for a moment, there is clearly a dispute or controversy about the existence of legal rights or a violation of the law (albeit of international law), a determination of those rights and the imposition of potential liability by the CETA Tribunal and that determination is final subject only to an appeal to the CETA Appellate Tribunal.

131. Somewhat sweepingly, the plaintiff argues that the fifth *McDonald* characteristic has been "*watered down*" as a result of the majority decision in *Zalewski.* I prefer the defendants' interpretation of that decision as meaning the fact that a type of order has not been historically characteristic of the courts in this country is no longer a decisive, exclusionary factor where all the other criteria are satisfied. Presumably, where an order of the type in question has been historically characteristic of the courts in this country, it would be a strong indicator that the body making that order is administering justice but the mere fact that an order was not historically characteristic of the courts, although relevant, would not carry quite the same weight. *Zalewski* reflects a shift in our understanding of the way in which the fifth *McDonald* criteria should be approached. It is not intended to draw a historical line in the sand beyond which any changes to the law which introduce new rights or provide new remedies will always fail the *McDonald* test by virtue of not being historically characteristic of the courts. Instead, a more fundamental question should be asked as to whether the establishment of a new dispute resolution mechanism represents a subtraction from the court's traditional jurisdiction.

132. This question is difficult to answer in the case of the proposed jurisdiction of the CETA Tribunal without reverting back to the defendants' primary argument regarding the international nature of the jurisdiction being exercised. On the one hand, awards of damages are manifestly typical of the type of orders the Irish courts have always made,

including awards of damages in favour of a private party against the State or a public authority. On the other hand, because of the State's dualist approach to international law (see above para. 72), Irish courts have never had jurisdiction to award damages to an individual because of the State's breach of an international treaty. Further, part of the plaintiff's complaint is that CETA opens up the possibility of a Canadian investor being awarded damages against the State for negligence in the formulation or implementation of legislative policy in a manner which is not permissible under Irish law (see *Glencar Exploration Plc v. Mayo County Council* (No. 2) [2002] 1 IR 84 and *Cromane Seafoods Ltd v. The Minister for Agriculture* [2017] 1 IR 119). In other words, it is part of the plaintiff's case that the CETA Tribunal may make awards which are not only not characteristic of the Irish courts but which the Irish courts are precluded from making. Thus, whilst the fact that the type of award the CETA Tribunal may make is novel does not necessarily preclude it from being involved in the administration of justice in the constitutional sense, the combination of this factor with the fact that the jurisdiction being exercised derives from an international agreement and is exercised under international law suggests that the fifth McDonald criteria is not satisfied.

133. The situation is made even more complex because of the fact that a Canadian investor will have the right to choose to sue before the Irish courts for any losses sustained as a result of the breach of Irish law in lieu of bringing a claim to the CETA Tribunal for losses sustained as a result of the State's breach of CETA obligations. Thus, the same losses may be the subject of alternative actions in two different jurisdictions. The legal basis for the claims will be different, but the impugned measure and the resulting loss may be identical. Does this mean that there has been a subtraction of jurisdiction from the Irish courts?

134. On balance, I am inclined to think not. Whilst it is tempting to draw a straightforward analogy with the creation of statutory employment rights and the conferral of jurisdiction to resolve disputes in respect of those rights on the Workplace Relations Commission – a jurisdiction which was held by the Supreme Court to involve an administration of justice – in my view, that analogy would be a false one. The legislation under scrutiny in *Zalewski* was a purely domestic matter and reflected a choice made by the Oireachtas for various policy reasons to provide an alternate forum to the ordinary court system for the determination of a particular type of legal dispute. While the pre-existing right of action before the courts for claims of that general type remained, the overwhelming majority of cases which concern additional statutory entitlements could not be raised before the courts. Thus, the statutory development of the law in that area was deliberately designed to exclude the jurisdiction of the courts.

135. In contrast, CETA is an international agreement. If ratified, it will be an agreement to which the State is a party, but it is not a reflection of the exercise by the State of legislative choices in any domestic sense. It reflects agreement reached following negotiation between the parties and necessarily entails an element of compromise, albeit compromise made in pursuit of broader objectives which the parties regard as being furthered by CETA. 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, ratification of CETA and the consequent submission by the State to the jurisdiction of the CETA Tribunal does not reflect a subtraction of jurisdiction from the Irish courts. This is not just because the jurisdiction in issue is one which the Irish courts never exercised (this was also the case in *Zalewski*),but also because it is a jurisdiction which could neither be created nor conferred by the State alone.

136. In fact, many of the concerns raised by the plaintiff regarding the investor's dispute mechanism in CETA (also referred to as ISDS) were the subject of a request by Belgium for an opinion from the CJEU. As the plaintiff points out, the request focused on the compatibility of the envisaged ISDS mechanism with the autonomy of the EU's legal order which is a materially different issue to its compatibility with the constitutional requirements of this State. However, the opinion given by the CJEU (Opinion 1/17 30th April, 2019) emphasised CETA's inherent nature as an international agreement and the resulting distinction between the ISDS mechanism and the EU judicial system in a way which has resonance for this case. The CJEU acknowledged that the establishment of the CETA Tribunal (and in the longer term of a MIT) could only be compatible with EU law if it had no adverse effect on the autonomy of the EU legal order (para. 108). In order to be so satisfied, two requirements had to be met. Firstly, the CJEU had to be satisfied that CETA did not confer upon the envisaged tribunal power to interpret or apply EU law other than power to interpret and apply the CETA agreement having regard to the rules and principles of international law applicable between the parties and, secondly, that the powers of the CETA Tribunal were not structured in a way which, whilst not themselves engaging in the interpretation or application of rules of EU law, might result in awards which had the effect of preventing EU institutions from operating in accordance with the EU constitutional framework.

137. At the outset, the CJEU emphasised that the envisaged ISDS mechanism stands outside the EU judicial system (para. 113) and that the CETA Tribunal is separate from and does not form part of the judicial system of the parties (para. 114). In looking at the two issues raised above, the court examined the provisions of Article 8.31.2 of CETA and concluded as follows:-

> *"131. Those provisions serve no other purpose than to reflect the fact that the 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. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic*

law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.

…

134. 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.

135. For the same reasons, it is, moreover, consistent that the CETA confers on those Tribunals the power to give a definitive ruling on a dispute brought by an investor against the investment host State or against the Union, without establishing any procedure for the re-examination of the award by a court of that State or by the Court and without that investor being permitted — subject to the specific exceptions listed in Article 8.22.5 of the CETA — to bring, during or on the conclusion of the procedure before those Tribunals, the same dispute before a court of that State or before the Court.

136. It follows from the foregoing that Section F of Chapter Eight of the CETA does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement."

138. In considering the second issue, the CJEU acknowledged that the underlying purpose of the ISDS was to protect foreign investors, that being an object of CETA itself (para. 147). It also accepted that the jurisdiction of the CETA Tribunal would adversely affect the autonomy of the EU legal order if it could call into question the level of protection afforded to public interests that led the EU to introduce restrictions affecting all operators rather than just determining whether the treatment of an individual investor was vitiated by a breach of Sections C or D of Chapter 8 (para. 148), particularly if that were to lead to the EU abandoning achievement of that level of protection to avoid being repeatedly compelled to pay damages to the claimant investor (para. 149). A similar *"chilling effect"* argument is advanced by the plaintiff in respect of national measures on the basis that the State's exclusion from liability under Irish law as a result of the Glencar/Cromane line of authority would not apply before the CETA Tribunal. 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. Article 28.3 which contains General Exemptions has not been previously set out. It provides for the purposes of a number of chapters including Sections B and C (but

not Section D) of Chapter 8 and subject to the requirement that measures are not applied in an arbitrary or discriminatory way, that CETA shall not be construed as preventing the adoption or enforcement by a party of measures necessary to protect a listed range of public interests. 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".* Consequently, the CJEU went on to hold:-

"*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 whether treatment accorded by a Party to an investor or a covered investment is 'fair and equitable'.

160 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 those circumstances, the CJEU held that CETA did not adversely affect the autonomy of the EU legal order. The rationale for this conclusion is twofold. It is based in part on the fact that the CETA Tribunal will be operating exclusively in the international law sphere and in part on the fact that the terms of CETA protect the parties' "*right to regulate*" as it is described in the Joint Interpretative Instrument (see above para. 26). This means that the parties retain a significant margin of appreciation to introduce "*public interest"* measures without attracting liability under CETA even if those measures have an adverse impact on the other party's investors.

139. Although this portion of the judgment looks at the impact of the ISDS on the autonomy of the EU legal order, there are clear parallels to be drawn with the domestic legal system of each of the parties. The analysis goes well beyond merely establishing that the CETA Tribunal system exists on an international plain separate from that of the EU legal order and, by extension, those of its Member States. The analysis of the CJEU between paras. 147 and 160 of its Opinion is focused on whether the operation of the ISDS – which is

central to Chapter 8 – will interfere with the ability of the EU to act to advance important public policy objectives and to protect the public interest. In concluding that it does not, the CJEU identifies the range of measures built into CETA which preserve the entitlement of the parties, which includes Ireland as much as the EU, to protect those interests. 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.

Enforceability

140. The relevance of the fourth McDonald characteristic, enforceability, lies in the coercive nature of a court's judgment. The enforceability of a decision of an adjudicative body offers a significant clue as to the legal nature of the decision and, by extension, to the legal nature of the body which has made the decision (paraphrasing para. 103 of O'Donnell J.'s judgment in *Zalewski*). The fact that a decision depends for its enforcement on the decision of another body, especially if the enforcing body can decide not to enforce the decision if not satisfied that it is correct, is an important indicator of whether the initial decision entails an administration of justice. In *Zalewski,* O'Donnell J. described the court processes as being *"conscripted in aid of enforcement of the decision of the W.R.C."*, in circumstances where the successful party before the WRC could make an application for enforcement to the courts without notice to the losing party and the making of an enforcement order was mandatory on presentation of the requisite form of proofs. Consequently, the determination made by the WRC was definitive, as the enforcement mechanism, albeit requiring a further application to court, was one in respect of which the court decision did not have any independent content.

141. The plaintiff argues that the enforcement mechanism under CETA is analogous because enforcement of a CETA Tribunal award by the Irish courts would be virtually automatic, especially if the investor has submitted the claim under the ICSID provisions (the Washington Convention). Article 8.41.1 of CETA provides that awards made by the CETA Tribunal are binding as between the disputing parties and Article 8.41.2 requires a disputing party to recognise and comply with an award. Article 8.41.4 provides that the execution of an award is to be governed by the laws governing the execution of judgments and awards in force in the place where execution is sought. Final awards are deemed to be arbitral awards under Article 8.41.5 and 6.

142. Although it is not inconceivable that a CETA Tribunal award against Ireland might be enforced elsewhere, for the most part such awards will fall to be enforced in Ireland and, consequently, will be governed by Irish law as regards the execution of judgments and awards. This is, however, subject to the fact that under CETA such awards are binding and there is an obligation on the State to recognise and comply with any award made against it. The Arbitration Act, 2010 provides for the enforcement of arbitral awards in

Ireland. How they are to be enforced depends on whether enforcement is sought under the New York or the Washington Conventions.

143. As much of the plaintiff's argument on enforceability depends on the fact that under Article 8.23.2 of CETA, a claimant can elect to submit a claim to the CETA Tribunal under the Washington Convention rules in preference to the UNCITRAL or any other rules and that, although the default position under Article 8.41.5 of CETA is that a final award is deemed to be an arbitral award under the New York Convention, an award made in respect of a claim submitted under the Washington Convention qualifies as an award under that convention, it is important to understand the distinction between these conventions. The Washington Convention on the settlement of investment disputes between States and nationals of other States is overseen by the International Centre for the Settlement of Investment Disputes (ICSID) and deals specifically with arbitration in respect of the type of investment disputes covered by Chapter 8 of CETA. The UNCITRAL Model Law provides a mechanism for international commercial arbitration more generally which can include, but is not limited to, investment disputes of a Chapter 8 type. The New York Convention deals only with the recognition and enforcement of foreign arbitral awards.

144. The Arbitration Act, 2010 gives force of law in the State to each of these conventions. It does so unreservedly to the UNCITRAL Model Law (s. 6) and to the New York Convention (s. 24) but gives effect to the Washington Convention subject to certain provisos regarding the non-application of parts of the 2010 Act (s. 25).

145. Recognition and enforcement of awards under the UNCITRAL Model Law and the New York Convention follow a similar pattern. In each case, there is a general obligation to recognise the award as binding and to enforce it subject to the provisions of the Convention. However, refusal of recognition or enforcement by the competent court is permissible but only on stipulated grounds. To a certain extent, those grounds reflect what would, under Irish law, be regarded as judicial review-type grounds – e.g. invalidity of the arbitration agreement under which the award was made; inadequate notice of the arbitral proceedings; the award being *ultra vires* the submission to arbitration; the composition of the tribunal or the procedure being inconsistent with the arbitration agreement or the relevant law and prematurity. These grounds can be invoked by the party against whom enforcement is sought. More generally, a competent court can refuse to recognise or enforce an award if the subject matter of the dispute is not capable of settlement by arbitration under the law of the State or if recognition and enforcement would be contrary to the public policy of the State (Article 36 of the UNCITRAL Model Law and Article V(1) of the New York Convention). The recognition and enforcement provisions of the Washington Convention are materially different. Under Article 54 of that Convention, there is a similar general obligation to recognise an award as binding and to enforce the pecuniary obligations as if it were the final judgment of a court of the country concerned. That general obligation is not followed by the identification of any grounds on which recognition or enforcement can be refused. Instead, Article 54(2) stipulates the procedural requirements on the party seeking recognition or enforcement and Article

54(3) provides that execution of the award is to be governed by the laws concerning the execution of judgments in force in the State where execution is sought. Finally, Article 55 provides that nothing in Article 54 is to be "*construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution".*

146. The distinction between the two categories of award is maintained in the 2010 Act although the language used in respect of each is similar. Section 23 deals with the enforcement of arbitral awards other than those under s. 25 (i.e. awards under the Washington Convention) and awards in arbitral proceedings which took place in the State. Subsection (1) provides:-

> *"23(1) An award (other than an award within the meaning of section 25) made by an arbitral tribunal under an arbitration agreement shall be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award."*

Section 25(5) contains the equivalent provision governing the enforcement of the pecuniary obligations of an award under the Washington Convention. It provides:-

> *"25(5) The pecuniary obligations imposed by an 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 under the award."*

Thus, enforcement of all arbitral awards in Ireland is made subject to the leave of the High Court being granted. The plaintiff argues that notwithstanding the requirement for leave, the grounds on which enforcement may be refused are very limited as regards any award and virtually non-existent as regards an ICSID award under the Washington Convention. The public policy grounds, although ostensibly quite far-reaching, have been interpreted by the courts in a narrow fashion. The grounds relied on must reflect public policy considerations in this State and in considering those grounds, the court must bear in mind the contrary public policy in ensuring the enforceability of such awards (see Kelly J. in *Broström Tankers AB v. Factorias Vulcano SA* [2004] 2 IR 191). Consequently, the plaintiff characterises the intermediate requirement of a High Court order granting leave to enforce an award of the CETA Tribunal as being on all fours with the role played by the courts in the enforcement of WRC determinations in *Zalewski.*

147. In contrast the defendants regard the requirement for leave of the High Court in order to execute a CETA award as an important step and a step of real content. They argue that the High Court retains its obligation to act in accordance with the Constitution even when dealing with an application for enforcement under the Washington Convention. Thus, a major constitutional infirmity on, for example, *East Donegal* grounds (see *East Donegal Co-operative v Attorney General* [1970] IR 317), could justify refusal of enforcement although the circumstances in which this might arise would, of necessity, be very limited

especially since the CETA Tribunal would not have been subject to the Irish Constitution in reaching its decision.

148. The defendants found support for this proposition in the recent decision of the UK Supreme Court in *Micula v. Romania* [2020] UKSC 5. The factual background to that case was extremely complex. Broadly speaking, it involved an ICSID Tribunal award against Romania for breach of a *"fair and equitable treatment"* obligation in a bilateral treaty to which Romania was party. The EU Commission then intervened to contend that payment of the award would constitute an unlawful state aid. The Commission's decision (2015/1470) was annulled by the General Court, and the decision of the General Court was appealed by the Commission to the Court of Justice. The claimant sought to enforce the award in six different jurisdictions, including the UK. Meanwhile the Commission issued infringement proceedings against Romania for failing to recover the sums paid to the claimants. The Supreme Court was considering the claimant's appeal against the grant of a stay on the enforcement of the award and Romania's cross-appeal against the imposition of an order for security as a condition of that stay. Whilst ultimately the court lifted the stay and the question of security became moot, in doing so it considered whether there was scope under the Washington Convention for defences to be raised to an enforcement application. In the joint judgment of Lord Lloyd-Jones and Lord Sales, they observed:-

> *"69. 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.*
>
> *…*
>
> *73. 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.*
>
> *74. The travaux préparatoires also indicate that it was accepted that further defences available in national law in relation to enforcement of court judgments could be available in exceptional circumstances by virtue of the formulation of the obligation in article 54(1) …*

78. 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…"

149. 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.

150. Based on this analysis, I am of the view that the exercise of jurisdiction by the CETA Tribunal does, in principle, involve an administration of justice. Once CETA is ratified, the State will have submitted to the jurisdiction of the CETA Tribunal, it will be compelled to respond to any claim brought against it by an investor or face an award made in its absence. Further, although the outcome of a CETA Tribunal award is framed as an arbitral award for the purposes of enforcement, the jurisdiction through which it is granted is not contractual. Instead, it is based on the acceptance by the State of the legal framework established by CETA. The CETA Tribunal will determine disputes between investor's rights and the State's liability. An award of the tribunal will constitute the making of a definitive decision as regards those rights and liabilities. The award is, for all practical purposes, enforceable. Whilst I do not regard a CETA Tribunal award as being one historically characteristic of the Irish courts nor the vesting of jurisdiction in CETA as a subtraction of jurisdiction from the Irish courts, this latter conclusion is relatively finally balanced and, thus, in my view it is not of sufficient weight to displace all of the other considerations.

151. However, that is not the end of the matter. The defendants treated the first three elements of the *McDonald* test together and argued that the CETA Tribunal was not administering justice because the disputes which will be referred to it are not justiciable. In essence, because the disputes do not arise under and will not be determined in

accordance with national law, they are not justiciable by the national courts, in this case the Irish courts. Alternatively, it was argued that international law is not justiciable unless it has been given force in national law by the Oireachtas, which of course will not occur in respect of CETA because CETA itself does not permit it. These statements are really two different ways of saying the same thing. Because CETA does not have direct effect in and will remain separate from the national legal system, the resolution of disputes under its terms is simply not a matter for the Irish courts. The circularity of this argument was initially unappealing: something which is excluded from the jurisdiction of the Irish courts is not justiciable because it is excluded from the jurisdiction of the Irish courts. However, closer examination disclosed that despite its circularity, the argument has merit.

152. 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.

153. O'Donnell J. in his judgment in *Zalewski* addresses the link between the nature and extent of the judicial power and the justiciability of issues falling to be determined by it, noting the lack of a clear and definitive test identifying the boundary between judicial and quasi-judicial decision making. He did, however, conclude that the characterisation of issues as justiciable is "*unavoidably, a judicial task".* This is particularly so in light of the full, original jurisdiction of the High Court under Article 34.3.1 of the Constitution which not only confers upon the High Court the power to determine all justiciable controversies, but in so doing also creates a duty to accept and to exercise that jurisdiction.

154. 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.

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. The first three paragraphs of Article 29 of the Constitution require, at a minimum, that the courts afford respect to the terms of an international treaty to which the State is a party. Any such treaty will be the product of lengthy negotiations which I must assume have been conducted in good faith by the parties. It is, of course, ultimately a political decision for the Government and, in this case, for the Dáil as to whether an international agreement should be entered into or approved as the case may be. If the terms of an international treaty require implementation in domestic law, it is a matter for the Oireachtas to make legislative choices as to how and when that should be done. However, when called upon to examine the terms of an international treaty for constitutional reasons, the court cannot approach the task on the basis that there is a fiction or a stratagem involved.

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.

Is the CETA Tribunal exercising Local and Limited Jurisdiction under Article 37

157. Because I have found in favour of the defendants' argument at this level, it is unnecessary for me to proceed to decide whether, if the jurisdiction of the CETA Tribunal is to be considered an administration of justice under the Irish Constitution, it would

either "*limited"* or "*authorised by law"* so as to come within Article 37. However, I will very briefly outline my views less this become an issue elsewhere.

158. The plaintiff argues that the exercise of judicial functions by the CETA Tribunal is not authorised by law. In principle, I accept this to be the case because, if ratified, as an international agreement, CETA will not form part of either Irish or of EU law. However, another court will only be examining whether the CETA Tribunal comes within Article 37 if my conclusions as regards the purely international-law nature of CETA, of the decisions to be made by the CETA Joint Committee and the exercise of jurisdiction by the CETA Tribunal have not been upheld. Therefore, it follows that for Article 37 to become a live issue, the distinction between international law and domestic law relied on by the defendants must be rejected. It is difficult to see how the disputes to be determined by the CETA Tribunal could be characterised as justiciable in the sense of being determined according to law, if that same law is not regarded as "*law"* for the purposes of Article 37. Therefore, if this issue arises, I would be compelled to conclude that CETA is in fact authorised by law, although the logic of my earlier conclusion is to the contrary.

159. The more difficult issue is whether the functions and powers being exercised by the CETA Tribunal can be described as limited. The plaintiff points to the broad definition of investment under CETA and the fact that the subject matter of investments covered by Chapter 8 is also potentially very broad. Further, there is no restriction on the legal form of the entities that can make a claim to CETA. However, these arguments could equally be made as regards the type of employment disputes coming before the Workplace Relation Commission. If you look at "*employment"* as reflecting the various areas in which an employee might be employed rather than reflecting a category of dispute, the same argument could be made as to the unlimited scope of the WRC's jurisdiction. However, the powers exercisable by the WRC were held to be limited in *Zalewski*. Thus, the requirement that the powers and functions being exercised be limited was satisfied in part by reference to the limited category of disputes coming within the jurisdiction of the WRC and not by reference to the types of employment underlying those disputes.

160. The plaintiff also argues there is no limit on the compensation that may be ordered. The defendants point to the judgment in *Permanent TSB plc v. Langan* [2018] 1 IR 375 which dealt with an appeal from a case stated by the Circuit Court in possession proceedings where the fact the property concerned did not have a rateable valuation did not prevent the Circuit Court's jurisdiction from being limited. The Circuit Court is a court of local and limited jurisdiction established under Article 34.3.4 of the Constitution and it is not unreasonable to presume that the word *"limited"* has a similar meaning in both articles. In considering whether the jurisdiction of the Circuit Court could be said to be limited in such case as required by Article 34.3.4, Clarke C.J. stated:-

> *"72. However, it does not seem to me that the Constitution requires that there be some form of financial or value type limit in each and every category of case in which it is decided to confer a jurisdiction on the Circuit (or indeed the District) Court. It is perfectly possible and proper to consider that such Courts have a jurisdiction which*

is limited in an overall way even though there may be certain specified categories of cases in which the jurisdiction is not limited by monetary amount, property value or the like. The jurisdiction remains limited because it is confined to a particular type of proceeding even though all proceedings of that type, without an internal limitation, can be brought in the lower court.

…

74. A real meaning must be given to the requirement that the jurisdiction of a court such as the Circuit Court is limited. To do otherwise would be to disregard the Constitution. But it is not necessary to go so far as to require that each and every category of case in which a jurisdiction is conferred on the Circuit Court must have a monetary or value limitation. However, that being said, it might be the case that to confer a jurisdiction in a very wide category of case without any limitation might cause constitutional difficulties."

161. It is clear from this that an express monetary limit is not required in respect of each class of case in the District or Circuit Courts in order for the jurisdiction of that court to be properly characterised as limited. It is notable that the "*local*" element of the constitutional characterisation of the Courts of First Instance as being ones of local and limited jurisdiction was not in dispute and was clearly satisfied by reference to the location of the property in issue. However, this passage looks at the global jurisdiction of our lower courts in respect of which certain discrete elements may not have a financial limit. I am not certain that the reasoning can be readily transferred to an international tribunal exercising jurisdiction over a single discrete type of case where almost all of the claims coming before it are likely to ones be for very large sums of money. Put simply, it is difficult to see how a tribunal whose sole jurisdiction concerns multi-million euro claims could be said to be exercising limited powers and functions.

162. To this can be added the fact that, unlike the WRC, the CETA Tribunal is clearly not subject to judicial review by the Irish courts. O'Donnell J. in *Zalewski* (para. 117) regarded the availability of judicial review of the decisions of quasi-judicial bodies as being in itself a significant limitation on the exercise of powers and functions by such a body. Consequently, within our constitutional framework it is easier to characterise a jurisdiction as limited if its exercise is subject to the supervision of those courts on which full original jurisdiction has been conferred.

163. For these reasons, were I required to decide whether the constitutional saver provided by Article 37 for the administration of justice in certain circumstances by persons who are not judges and bodies which are not courts applied to the CETA Tribunal, I would conclude that it does not.

Locus Standi

164. The claim pleaded by the plaintiff is very broad and the defendants do not, in principle, dispute the plaintiff's entitlement to challenge the constitutional legality of the method by which it is proposed that CETA be ratified. However, issue is taken with the plaintiff's

locus standi to raise certain discrete elements of his case. The objection taken is twofold. Firstly, the defendants contend that the plaintiff cannot raise hypothetical arguments, many of which the defendants perceive to be based on speculation as to what will occur if CETA is ratified. Secondly, the defendants contend that the plaintiff cannot raise an equality argument based on the position of a putative Irish investor in contrast to that of a putative Canadian investor.

165. I do not accept the first argument. In a typical *Cahill v. Sutton* [1980] IR 269 situation, the plaintiff advances a hypothetical argument challenging an existing legal provision in circumstances where the courts must allow for the possibility that a plaintiff may come forward at a later stage who is better placed to make those arguments, the outcome of which may have a real bearing on his legal rights or liabilities. Crucially, the provision in question remains open to challenge by another plaintiff. However, because this plaintiff's challenge is to the proposed method of ratification of CETA, if the challenge is disallowed on locus standi grounds, then there must be a real prospect that CETA will be ratified (subject of course to the fact that the approval of the Dáil is required). Once CETA has been ratified, the State will have assumed obligations as a matter of international law and the Irish courts cannot revisit the constitutional legality of the obligations thereby assumed. Whilst there might hypothetically be a better plaintiff than this plaintiff, there is a very narrow window within which the proposed ratification of CETA can be challenged and if that window closes without a challenge having been brought, then it will most likely be impossible for anyone to challenge ratification of CETA thereafter. Therefore, it might work a significant constitutional injustice if the plaintiff is not allowed a degree of latitude in terms of the argument he wishes to make, even if those arguments necessarily speculate as to what might occur if the thing he seeks to prevent goes ahead. Indeed, in their written submissions, the defendants take issue with the plaintiff's argument that claims might be made against Ireland as a result of changes to the laws in Ireland, complaining that such claims are hypothetical, unidentified and unexplained. Although it is possible that such claims might never arise, the purpose of Chapter 8 of CETA is to give investors the right to bring a claim in the event of measures (such as changes to the law) taken by a party causing loss. Leaving aside the issue as to whether CETA itself effects any change "*to laws in Ireland"* (I have concluded that it does not), the possibility of claims against Ireland and the potential liability of the State in respect of such claims is very real. It would, in my view, be completely unrealistic for the court to deal with this case on the basis that because all the potential claims are currently hypothetical and unidentified (necessarily so since these parts CETA have not yet entered into force) no consideration should be given to the potential liability of the State created under CETA.

166. However, there is merit in the second argument made as regards the plaintiff's *locus standi* insofar as the plaintiff asserts that, under CETA Canadian investors will be given rights and an entitlement to bring a claim to the CETA Tribunal which will not be available to Irish investors who might also be affected by the measures complained of, and that this represents unequal treatment contrary to Article 40.1 of the Constitution. It seems to me that if this factual situation were to materialise, an Irish investor in that position would be able to bring a complaint before the Irish courts to the effect that its

constitutional right to equal treatment had been breached. Whilst CETA mandates the remedy that must be made available to the Canadian investor, if the claim of the Irish investor were upheld, it would be a matter for the Irish courts to fashion an appropriate remedy to meet that breach of a constitutional right. Therefore, the argument which the plaintiff seeks to make is not one which a properly placed Irish investor would be precluded from making if the ratification of CETA proceeds. The plaintiff does not assert that he is an investor or, indeed, that he intends to become an investor. Therefore, I do not propose to consider the arguments that the plaintiff has raised under the heading *"equal treatment".* However, I do note that the defendants in response to this argument rely heavily on the views of the CJEU in the Belgian Opinion 1/17 at section B between paras. 162 and 186 in which similar arguments raised by Belgium were rejected.

Necessitated by the Obligations of EU Membership – Article 29.4.6

167. If my conclusions as to the international-law nature of the CETA structures and obligations are correct, then it follows that CETA does not represent an unconstitutional transfer of legislative or judicial power and consequently it is unnecessary to consider whether the ratification of CETA is necessitated by virtue of the obligations of EU membership under Article 29.4.6 of the Constitution. Again, I propose to look very briefly at the issue lest it assume a relevance elsewhere. The plaintiff argued strongly that since the EU itself recognises that ratification of CETA might fail because of the ruling of a constitutional court or following the completion of other constitutional processes (see Statement no. 20 of the Council Minutes on the making of the decision to ratify CETA), a position echoed by the CJEU in the Belgian Opinion 1/17, ratification cannot simultaneously be an obligation of EU membership. This argument echoes the views of Supreme Court in *Crotty* (per Finlay CJ giving the judgment of the Court at p.767 of the report) that ratification by the State of the Single European Act was not "necessitated" by membership of the European Communities, although it appears that this was not actually disputed by the defendants in that case.

168. The defendants' argument threads the difficult line between acknowledging the fact that individual ratification of CETA by each Member State is required and simultaneously asserting that the duty of sincere cooperation pursuant to Article 4(3) of the TEU and the need *"to ensure fulfilment of the obligations arising out of the treaties or resulting from the Acts of the institutions of the Union"* nonetheless means that as a matter of Irish constitutional law, ratification is necessitated by the State's obligations of membership of the EU. This argument relies initially on the views expressed by the Court of Justice in an opinion on the compatibility of an International Labour Organisation (ILO) Convention with the EEC Treaty in circumstances where the then European Community was not a member of the ILO (Opinion 2/91). Having acknowledged the principle of implied exclusive external competence (at para. 7) (discussed above at para. 117), the court went on to state as follows:-

> *"36 At points 34 to 36 in Ruling 1/78 [1978] ECR 2151, the Court pointed out that when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member*

States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community.

37. In this case, cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States.

38. It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention."

169. The argument further entailed a consideration of the distinction between the internal and external competences of the EU and the extent to which the EU would acquire exclusive external competence (i.e. to enter into an international agreement on behalf of the Member States) if it has taken sufficient legislative action internally which thereafter precludes the independent action of Member States in an area of shared competence (see discussion above at para. 100). In its Singapore Opinion 2/15, the CJEU clearly stated that entry into a CETA-like international agreement is not a legislative Act under EU law sufficient to convert a shared competence into an exclusive EU competence. Nonetheless, the Court concluded that the EU had power to enter into the agreement in question, albeit not on an exclusive basis. The Court stated:-

"237. Furthermore, as the Commission has expressly stated in its observations submitted to the Court, the conclusion of such an agreement does not appear 'necessary to enable the Union to exercise its internal competence', within the meaning of Article 3(2) TFEU.

238. It follows that the European Union does not have exclusive competence to conclude an international agreement with the Republic of Singapore in so far as it relates to the protection of non-direct foreign investments.

239. On the other hand, the conclusion by the European Union of an international agreement relating to such investments may prove 'necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties', within the meaning of Article 216(1) TFEU.

240. In particular, in the light of the fact that the free movement of capital and payments between Member States and third States, laid down in Article 63 TFEU, is not formally binding on third States, the conclusion of international agreements which contribute to the establishment of such free movement on a reciprocal basis

may be classified as necessary in order to achieve fully such free movement, which is one of the objectives of Title IV ('Free movement of persons, services and capital') of Part Three ('Union policies and internal actions') of the FEU Treaty."

170. The court went on to conclude that as the commitments fell within a shared competence, then that portion of the agreement could not be approved by the European Union alone. Of course, because the Singapore agreement, like CETA, was a unitary agreement, Member States were not asked to approve the application of its provisions to foreign indirect investment separately to the approval of the treaty itself.

171. It is perhaps unhelpful that the word "*necessary"* is used in both Article 3(2) and Article 216(1) of the TFEU and its cognate "*necessitated"* is used in Article 29.4.6. The word may not be intended to have the same meaning in both Treaty articles and there is, of course, no reason to assume that the word has the same meaning in the Treaties and in the Constitution. This is particularly so because the language in Article 29.4.6 was originally chosen as part of a constitutional amendment effected on Ireland's accession to the European Communities in 1973 and, thus, predates the formalisation of the treaty provisions concerning the EU's implied exclusive external competence in Article 3(2) of the TFEU. However, there is clearly some co-relation as the very use of the word connotes some level of need or requirement and thus of obligation or commitment.

172. The core issue is how the duty of sincere cooperation, effectively to ensure a coherent approach between the EU and its Member States in respect of an international agreement such as CETA, interacts with the saver provided for by Article 29.4.6 of the Constitution. In bald terms, is ratification of CETA by the State a measure necessitated by the obligations of EU membership? If so, then most of the constitutional arguments made by the plaintiff would fall away as nothing in the Constitution would invalidate such a measure and there would no need for a referendum to amend the Constitution to facilitate ratification. The State lays heavy emphasis on the fact that the CJEU in its Singapore Opinion 2/15, accepted that the conclusion of the Singapore FTA was not "*necessary*" for the EU to exercise its internal competence (para. 237), it could nonetheless be "*necessary*" to achieve free movement of capital, a treaty objective, with a third country with which it had entered into agreement (para. 240). *"Necessary"* in the latter context is clearly not synonymous with being absolutely mandatory. Rather, it expresses the utility of a positive choice made by the EU in the securing, at least in in part, of a treaty objective.

173. Similar considerations apply to CETA. The bulk of CETA's terms concern matters within the exclusive competence of the EU. Consequently, there is no issue but that the EU has exclusive external competence to enter into an international agreement in respect of those matters and, having done so, that Ireland must adhere to that agreement. Where CETA covers matters in respect of which the EU has a shared competence with its Member States (foreign indirect investment), ratification by the Member State is required pursuant to its shared competence in the area as a matter of both international law and EU law. However, such ratification can still amount to a duty with which Member States must

comply. It is somewhat difficult to square this logic with a simultaneous acceptance that the approval of the Member States is required, if that approval is to have any substance. Nonetheless it is pertinent to note that when concluding that the Member States were obliged "*to take all the measures necessary"* to ensure *inter alia* ratification of the ILO Convention considered in Opinion 2/91, the Court of Justice was doing so as regards a Convention to which the Community was not even a party. Thus, the requirement of "*unity in the international representation of the community"* (para. 36 of that Opinion) is capable of imposing on a Member State the requirement to act in a particular way even if such a requirement does not flow directly from the terms of the Treaties or of any EU legislation.

174. As a matter of domestic constitutional law "*necessitate*" also does not carry the connotation of being absolutely mandatory even when linked with the notion of such necessity flowing from the State's obligations under EU law. This issue was first comprehensively addressed by Denham J. in *Meagher v. Minister for Agriculture* [1994] 1 IR 329 when considering the discretion available to the State as regards the choice of form or method for giving effect to a directive in Irish law. A European directive required Member States to prohibit the use of illegal growth hormones in farm animals including cattle. Ireland had given effect to this directive through a series of regulations under s. 2 of the European Communities Act, 1972. These regulations prohibited the use of illegal growth hormones and made it a criminal offence to be in possession of those products without the requisite legal authority. The regulations also extended the period under s. 10(4) of the Petty Sessions (Ireland) Act, 1851 during which proceedings for such an offence could be instituted from one year to two years from the date of the offence. In effect, a statutory provision governing the time limit for the institution of criminal proceedings was amended by secondary legislation in a manner which would not normally be constitutionally permissible. The applicant farmer was prosecuted and brought judicial review proceedings contending that the amendment of existing statutory law by way of regulation was a breach of Article 15.2 of the Constitution. The issue before the court concerned whether implementation of the directive in the manner of which the State had chosen to do so was "*necessitated*" by the obligations of membership of the European Communities so as to benefit from the saver now contained in Article 29.4.6 of the Constitution. The Supreme Court ultimately held that it was. Denham J. addressed the matter as follows at p. 365:-

> "*The term "necessitated" in Article 29, s. 4, sub-s. 5 together with Article 189 of the Treaty make it clear that in balancing the two the mere fact that the substance in laws enacted, acts done or measures adopted, is necessary to be incorporated into domestic Irish law, is not the end of the matter.*
>
> *The term "necessitated" is relevant to the choice of method, however membership has not itself obligated a special form and method of implementation. Article 15, s. 2 and the choice of form and methods of Article 189 must then be read together with Article 29, s. 4, sub-section 5…*

If the directive left to the national authority matters of principle or policy to be determined then the "choice" of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice. The fact that an Act of the Oireachtas has been affected by the policy in a directive, is a "result to be achieved" wherein there is now no choice between the policy and the national act. The policy of the directive must succeed. Thus where there is in fact no choice on a policy or a principle it is a matter appropriate for delegated legislation. If the directive or the Minister envisaged any choice of principle or policy then it would require legislation by the Oireachtas."

The analysis here clearly mirrors the exiting jurisprudence of the Supreme Court concerning the validity of delegated legislation in *Cityview Press v. An Chomhairle Oilina* [1980] IR 381 and more recently revisited by the Supreme Court *in McGowan v. The Labour Court* [2013] 3 IR 718. Although not readily apparent from the passages quoted, the effect of the judgment was to give the State considerable latitude in the choice of form or method of implementing an EU directive, given that implementation is of course a mandatory requirement of EU law. This is because although the directive required Member States to prohibit the use of the products in question and to make provision for prosecution for breach of the requirements of the directive, it did not include any provisions as to the procedural requirements for such prosecutions which remained, at all times, a matter of national law. In particular, the directive did not stipulate the period within which prosecutions were to be brought nor did it require that the existing period for the institution of such proceedings in Ireland be extended in the manner which was actually done. Rather, the Minister took the view that those prosecutions were likely to be technical and complex as a result of which additional time would be required for the investigation of cases before prosecutions could be commenced.

175. The matter was perhaps more clearly expressed by Murphy J. (then of the High Court) in a milk quota case, namely *Lawlor v. Minister for Agriculture* [1990] 1 IR 356 at p. 377:-

"…I am satisfied that the apparent infringement would fall within the exception provided by Article 29, s. 4, sub-s. 3 of the Constitution. It seems to me that the word "necessitated" in that sub-section could not be limited in its construction to laws, acts or measures all of which required in all of their parts to be enacted, done or adopted by the obligations of membership of the Community. It seems to me that the word "necessitated" in this context must extend to and include acts or measures which are consequent upon membership of the Community and in general fulfilment of the obligations of such membership, and even where there may be a choice or degree of discretion vested in the State as to the particular manner in which it would meet the general spirit of its obligations of membership."

176. The notion of something being consequent upon membership or in general fulfilment of the obligations of membership is a different and less strict threshold than something being a mandatory requirement of membership. Looked at in this way, the State argues that the mere fact that CETA must be ratified by all Member States before it can enter into force is not determinative of whether Article 29.4.6 permits such ratification through Article 29.5 as opposed to requiring a constitutional amendment. Each such mixed agreement must be examined and the answer will depend on the nature and content of the agreement. In this case, because the element of shared competence relates to a matter covered by Article 63 TFEU, the State argues that the duty of sincere cooperation requires the State to ratify CETA and, thus, it is a matter which is "*necessitated*" under Article 29.4.6. If that is the case, then the plaintiff's arguments of a breach of Article 15.2 and Article 34.1 fall away since those provisions of the Constitution could not invalidate the measure adopted by the State for the purposes of ratification of CETA.

177. I am inclined to accept that this analysis is correct insofar as it goes. However, I am not sure that it deals with the other reason expressed by the CJEU in its Singapore Opinion 2/15 as to why ratification by the Member States was required. As previously noted, (above para. 122) at para. 292 of its opinion, the CJEU held that the investment dispute mechanism created by the Singapore FTA (which it will be recalled did not of itself establish a tribunal or similar decision making body) was such that it removed disputes from the jurisdiction of the courts of the Member States and, thus, could not be characterised as ancillary and so required the consent of the Member States. This conclusion related to the dispute resolution mechanism per se and was not limited to that mechanism insofar as it related to foreign indirect investment. In other words, the dispute resolution mechanism required Member State consent even insofar as it related to foreign direct investment which is a matter within the exclusive competence of the EU as part of the common commercial policy under Article 207.

178. Even allowing for the openness afforded by the Irish courts to the term "*necessitated*" in Article 29.4.6, 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 that is, as a matter of Irish constitutional law, necessitated by the State's obligations of membership of the EU. Therefore, were the case to have turned on whether the otherwise unconstitutional ratification of CETA was saved by Article 29.4.6, I would have been minded to conclude that it was not. Needless to say, these comments are necessarily *obiter* as for the reasons set out above I have concluded that the proposed ratification of CETA through Article 29.5.2 would not be unconstitutional.

Conclusions:

179. It may be useful to summarise the conclusions I have reached on the various strands of this case.

- The plaintiff has *locus standi* to bring this action. It follows from the nature of his claim which seeks 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 will operate if it is ratified. However, he should not be permitted to make arguments specifically invoking the rights or interests of third parties where it will remain legally possible for those third parties to bring proceedings if they so wish after the ratification of CETA (if that occurs).

- The presumption of constitutionality applies; the plaintiff bears the onus of proof and must clearly establish the unconstitutionality which he alleges in order to succeed in his action. However, the focus of the plaintiff's case is not on the policy choices made by the Government in entering into CETA; rather it is on the procedures through which it is proposed to ratify CETA. The resolution of that issue does not attract an additional or higher standard of review.

- CETA is an international agreement which, if ratified, will bind the State as a matter of international law. However, under its own terms it will not have direct effect in Ireland and cannot be invoked before the Irish Courts. Equally, the CETA Tribunals will not have jurisdiction to declare any provision of Irish law or any act taken by an Irish authority to be invalid.

- Because CETA will operate only at the level of international law, its provisions cannot be characterised as laws made for this State in breach of Article 15.2.

- The decision making power of the CETA Joint Committee does not amount to a power to make laws for this State. The decisions so made cannot be characterised as laws and, in any event, they also require that the parties conclude their internal requirements and procedures.

- The jurisdiction to be exercised by the CETA Tribunal does have the characteristics of an administration of justice. However, it will not be an administration of justice under the Irish Constitution because the disputes which it will determine are not justiciable under Irish law as they will arise and can be determined only as a matter of international law. Although investors will have a choice of jurisdiction in which to bring their claims, the choice to bring a claim before the CETA Tribunal does not amount to a subtraction of jurisdiction from the Irish Courts. Consequently, the creation of and conferral of jurisdiction on the CETA Tribunals is not contrary to Article 34.1 of the Constitution.

- If the foregoing conclusion is not correct and the CETA Tribunal is administering justice within the meaning of Article 34, then its jurisdiction is not "limited" for the purposes of Article 37.

- CETA does not entail an unconstitutional transfer of the State's sovereignty. Consequently, ratification of CETA through Article 29.5.2 is constitutionally appropriate and permissible. It is a matter for the Dáil as to whether it is politically desirable to do so.

- 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.

180. It follows from these conclusions that the plaintiff has not established that ratification of CETA in the manner proposed would be clearly unconstitutional. Therefore, I must refuse the relief sought by the plaintiff.