An Chúirt Uachtarach

The Supreme Court

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

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

Between

Patrick Costello
Plaintiff/Appellant

- and -

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

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

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

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

Operation of CETA

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

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

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

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

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

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

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

Reason for this dissent

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

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

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

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

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

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

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

Canada

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

How principles develop into laws

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

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

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

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

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

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

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

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

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

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

Trust

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

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

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

Principles of CETA law

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

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

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

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

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

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

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

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

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

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

An example

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

Fundamental principles as a genesis for concrete law

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

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

> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment; or
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
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> 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.
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> 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.
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> 5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to the physical security of investors and covered investments.
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> 6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
>
> 7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

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

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

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

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

Ceding control to the Joint Committee

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

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

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

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

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

Judicial power as a necessary component of legal norms

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

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

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

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

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

Legislation and legislating

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

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

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

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

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

Two powers

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

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

Necessitated: pre-ratification

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

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

Necessitated: post-ratification

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

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

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

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

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

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

Legislative remedy

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

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

Protocol

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

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

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

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

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

Clear disregard

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

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

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

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

Summary

61. To summarise:

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

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

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

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

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

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

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

Ultimate dissent

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