AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No: S:AP:IE:2021:000124

[2022] IESC 44

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

BETWEEN/

PATRICK COSTELLO

APPELLANT

AND

GOVERNMENT OF IRELAND, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 11th day of November 2022

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Part I: Introduction

Introduction

1. The emergence of investor tribunals is one of the striking developments in international trade law over the last 50 years or so. These tribunals – which nowadays are a common feature of either bi-lateral or multilateral trade agreements – are generally empowered to rule on the question of whether a host country has, by its laws, judicial decisions or executive actions complied with certain standards and requirements specified in the relevant trade agreement itself. A review of tribunal awards involving a range of countries over the last few decades shows that many of the awards relate to matters such as the withdrawal of tax privileges, the nationalisation of industry, far-reaching price controls, environmental regulation or the award or cancellation of government contracts, permissions and licences and the like.

2. The claims themselves are generally brought by large and well-resourced commercial entities. It is not unknown for such investor tribunal awards to be very substantial, sometimes running to hundreds of millions of US dollars and even in a few instances over a billion US dollars. Thus, for example, following the decision of the German Bundestag in August 2011 to phase out nuclear energy power plants, a Swedish state-owned company which had significant shares in two nuclear plants in Germany brought a claim before such a tribunal under the terms of the Energy Charter Treaty for some €4.7 billion in damages. It seems that that claim was ultimately settled in November 2021 for the sum of €1.4 billion following a series of important rulings from that tribunal: see *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12: see "Ballantyne, "Vattenfall saga at an end" *Global Arbitration News*, 12 November 2021.

3. With perhaps one other exception dating from the Energy Charter Treaty (1994), this State has never previously provided for or participated in a treaty allowing for investor tribunals. This is the issue which now squarely arises in this appeal, as the Canada-EU Comprehensive Economic and Trade Agreement ("CETA") provides for such tribunals ("CETA Tribunals"). It is envisaged that the CETA Tribunals will have the power to make binding arbitral awards against Ireland (along with, as the case may be, the European Union, the other 26 Member States of the Union and Canada). In the case of Ireland, these disputes will arise from the application of the general public law of this State.

4. It is important at the outset to be clear regarding what this case is about and what it is not about. It is not about international trade or investment, because these are (and will remain) a fundamental feature of our economy. Ireland's prosperity, living standards and general reputation as a modern, open, outward-looking State all rest on international trade.

5. Nor is it about Canada, one of the other partners to the CETA agreement. One may take judicial notice of the fact that Canada is a trusted partner of Ireland and the European Union and few (if any) countries live up to the ideals of the United Nations Charter better than Canada. The Canadian legal system is rooted fundamentally on the rule of law and its judicial system is widely admired and greatly respected. The appeal is not even about CETA itself, the great bulk of which is wholly unproblematic. Rather the appeal focuses entirely on the role of the special CETA investor tribunals which Chapter 8 of CETA proposes to call into force.

6. CETA was itself laid before Dáil Éireann. It is envisaged that the appropriate resolution approving that Treaty will be submitted to that House (but by that House alone) for approval in accordance with Article 29.5.2 of the Constitution. This is considered to be

constitutionally necessary as adherence to that Treaty involves a charge on public funds. Armed with that (anticipated) Dáil resolution, the Government now proposes to ratify CETA by simple executive act. I should add that, as Dunne J. has already detailed in greater length in her judgment, the bulk of the rest of CETA (i.e., apart in particular from Chapter 8 dealing with investor tribunals) has already been provisionally in force since the 21st September 2017 in the manner permitted by Article 30.7(3) CETA.

7. The ultimate question which now arises is whether this is constitutionally permissible or whether the ratification of an agreement providing for the establishment of a tribunal with a binding jurisdiction to pronounce on State liability arising from the general public law of this State would compromise our juridical sovereignty, contrary to Article 5, Article 34.1 and Article 34.5.6 of the Constitution.

8. One of the reasons why this case is such a difficult one is that the proposed investor tribunals sit somewhere – in perhaps a slightly ill-defined position - between regular international commercial arbitration on the one hand and a permanent international court enjoying a binding and enforceable jurisdiction on the other. In some respects, the tribunals have a sort of chameleon like quality which means that they possess features of both models. And herein lies the difficulty: there is, of course, no constitutional issue with regular international commercial arbitration, whereas the participation by the State in a permanent international court with adjudicatory powers which are binding in national law would quite obviously require a specific constitutional amendment. Perhaps the real issue confronting this Court on this appeal is to ascertain just where precisely in the spectrum between international commercial arbitration on the one hand and a permanent international court with binding adjudicatory powers on the other the investor tribunals envisaged by CETA actually lie. It is the characterization of these

investor tribunals which is difficult and ascertaining just where they lie on this spectrum is a question which remains problematic and elusive.

9. The issues which arise on this appeal accordingly to go to the very heart of our constitutional architecture. All of this means that the present appeal may yet be regarded as among the most important which this Court has been required to hear and determine in its almost 100-year history.

10. Before proceeding further, a few words about the structure of this judgment might be of assistance. Part II of the judgment describes the scope of the appeal and the applicable standard of review. Part III describes in outline the CETA investment tribunals (including their composition and jurisdiction). Part IV addresses the question of whether the ratification of CETA is "necessitated" by the obligations of membership of the European Union for the purposes of Article 29.4.6. (In passing I might here observe that if I were to have concluded that ratification was so necessitated, then this would have been the end of the appeal. Since, however, I am of the view that it is not so necessitated, I then proceed to examine the merits of the constitutional argument).

11. Part V then considers in more detail the jurisdiction of the CETA Tribunals, including the extent to which any award made by a CETA tribunal can be reviewed by a national court (including an Irish court) when it is sought to enforce that award. Part VI discusses the question of whether ratification of CETA would imperil the sovereignty of the State, contrary to Article 5 of the Constitution. Part VII considers the question of legislative sovereignty. Part VIII addresses the issue of judicial sovereignty. Part IX deals with the issues of our accession to the jurisdiction of the European Court of Human Rights. Part X examines specific constitutional provisions giving authority to the State to participate in international agreements providing for the resolution of disputes other than by Arti-

cle 34 courts. Part XI deals with issues of democratic legitimacy arising from the decisions of the CETA Joint Committee. Part XII contains the overall conclusions. Finally, Part XIII deals with the issue of curing the unconstitutionality identified by the majority of the Court.

12. Given that the Court is divided and in view of the fact that there are multiplicity of issues arising in the present case, it might also be convenient at the outset if I were to indicate my general agreement with the lead judgment of Dunne J. for the majority so far as the Article 34.1 issue is concerned. Specifically, I consider that the six principal issues identified by all members of the Court should be answered as follows:

13. **Issue 1**: Is the ratification of CETA "necessitated" by Ireland's obligations of Union law for the purposes of Article 29.4.6 of the Constitution? **Answer**: No, it is not so necessitated.

14. **Issue 2:** Would the ratification of CETA compromise the legislative autonomy of the Oireachtas, contrary to Article 15 of the Constitution? **Answer**: Yes, insofar as CETA provides for a form of strict liability on the part of the State in respect of legislation which is found to be contrary to CETA and insofar as it does not contain a good faith defence in respect of any damages claim which might be brought against the State.

15. **Issue 3:** Would the ratification of CETA subtract from the jurisdiction of the Irish courts, contrary to Article 34.1 of the Constitution? **Answer**: Yes, but the constitutional objection chiefly rests in the fact that a judgment of the CETA Tribunal is made virtually automatically enforceable in the High Court.

16. **Issue 4:** Would the ratification of CETA be contrary to Article 34.1 insofar as enforcement of such judgments of a CETA Tribunal would be almost automatic? **Answer**: Yes, because as matters stand the High Court would have no power to refuse enforcement

even where the award compromised Irish constitutional identity or constitutional values in a fundamental way or where it was inconsistent with the requirements of EU law.

17. **Issue 5:** Would the ratification of CETA be unconstitutional inasmuch as Article 25 CETA allows for the Joint Committee to give interpretative decisions which bind the CETA Tribunals, thus compromising the democracy guarantee in Article 5 of the Constitution? **Answer**: Yes. An interpretative ruling of this kind is really a form of quasi-legislation which in practice amounts to a de facto amendment of CETA. Even though such an interpretative decision might well – and probably would - involve a (potential) charge on public funds in the course of what might well amount to the de facto amendment of an international agreement, there would be no procedure whereby the prior consent of Dáil Éireann could be obtained in the manner required by Article 29.5.2.

18. **Issue 6:** Would it be open in principle to the Government to ratify CETA if the Oireachtas were to amend the Arbitration Acts? **Answer**: While this would be a matter for Government and Oireachtas to consider, it would in principle be open to Oireachtas to cure the unconstitutionality identified in this judgment. It could do this by amending the Arbitration Act 2010 in order to vest the High Court with an express jurisdiction to refuse to give effect to a decision of a CETA Tribunal if:

(a) such an award materially compromised the constitutional identity of the State or fundamental principles of our constitutional order, or

(b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of Fundamental Rights and Freedoms) and to preserve its coherence and integrity.

19. Since Article 5 of the Constitution assumes very considerable importance regarding the resolution of this appeal, it is as well to set out its provisions at this stage:

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

20. Article 34.1 of the Constitution further provides:

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

21. At the heart of this appeal is whether these particular constitutional guarantees would be compromised by the ratification of CETA. I now propose to consider these issues, starting with a consideration of the scope of the appeal

Part II: Scope of the appeal

Scope of the appeal and the constitutional review by this Court

22. The present proceedings have been brought by the appellant, Patrick Costello, who is a member of the Green Party. He is currently a Dáil Deputy for the constituency of Dublin South Central and in these proceedings he seeks an order restraining the Government from ratifying CETA on the ground that its provisions in respect of investor tribunals are unconstitutional. This claim was ultimately rejected in the High Court in a comprehensive judgment delivered on September 2021 by Butler J.: see *Costello v. Ireland* [2021] IEHC 600, [2021] 2 ILRM 145. It is only proper to state that this is a judgment of remarkable quality from which I have derived the greatest assistance in this most difficult of cases, even if I find myself compelled to arrive at a different result from that of the trial judge.

23. This Court granted the appellant leave to appeal directly to this Court pursuant to Article 35.5.4 of the Constitution: see [2022] IESCDET 1.

24. The nature of the proceedings necessarily requires this Court to assess as best it can the likely impact and possible consequences of CETA (or, perhaps, in strictness, Chapter 8 of CETA) were it to be ratified by this State. In this regard it has to be said that any assessment made by this Court is accordingly to some degree contingent and uncertain,

precisely because by definition it is almost impossible at this juncture to predict precisely how the CETA Tribunal will approach its task in respect of any given claim. I share the concerns expressed by many members of the Court regarding the abstract nature of this claim. Given, however, that CETA will ultimately become an obligation necessitated by membership of the European Union of Article 29.4.6 of the Constitution – and thus immune from any further constitutional scrutiny - were it be ratified by this State and the other 26 Member States and CETA subsequently entered into force, there is no alternative but to consider the constitutionality of what is proposed on this abstract, *ex ante* basis. All of this makes our task even more difficult because it would, for example, have been far easier to consider many of the difficult problems arising in this appeal if this Court had been confronted with a real life CETA Tribunal award based on the facts of a specific, real-life case.

25. In this judgment I endeavour, therefore, to sketch out what the possible implications of such accession might be, conscious, as I am, that any such assessment could not possibly bind or otherwise constrain the CETA Tribunal were it seized of some future case involving this State. In performing this exercise, I propose, therefore, to adhere as closely as possible to the text of CETA itself and in the process to reject any interpretations or consequences of CETA which appear to be unlikely or implausible.

26. A further difficulty is that it is not clear that there will be many – or even any – cases brought against the State under CETA. Yet it would be unrealistic not to suppose that this *could* happen: it is entirely possible that an award *might* be made by a CETA investor tribunal against the State which award *could* then be enforced by the High Court under the provisions of ss. 24 and 25 of the Arbitration Act 2010 ("the 2010 Act") in circumstances which I propose to outline at a later stage in this judgment.

27. This immediately raises the issue of principle of whether accession to such an international agreement would be at variance with either Article 5 and Article 34.1 (legislative and juridical sovereignty) or Article 34.5.6 (the finality of decisions of this Court) of the Constitution. This presents an issue of principle which raises a clear-cut question that essentially admits only of a binary response.

The standard of review, Article 29 and international relations

28. It is true, of course, that the conduct of international relations is committed generally by Article 29 of the Constitution to the executive branch of government. The power to make treaties is a matter in the first instance for the executive as Article 29.5.1 itself makes clear. Diplomacy is generally conducted by and with the governments of other nation states. The conduct of foreign affairs more often yields to the necessities of pragmatism and *Realpolitik* than the dispassionate, principles-based approach which is the lodestar of judging. Matters such as treaty-making, State recognition, diplomacy and the practical realities of policy making and the day-to-day relations with other States are quite obviously committed to the Government to determine. The precepts of international law – to which Article 29 itself makes several references – are, of course, traditionally the concern of nation states rather than individuals.

29. In *Boland v. An Taoiseach* [1974] IR 338 the plaintiff had challenged the constitutionality of the Sunningdale Agreement of 1973 on the ground that the Government had acknowledged the status *de jure* of Northern Ireland as part of the United Kingdom, contrary – or so the argument ran – to the provisions of the (original versions, now replaced) of Article 2 and Article 3 of the Constitution. In his judgment dismissing the claim, FitzGerald C.J. stated ([1974] IR 338 at 362) that the courts had no power to "supervise or interfere" with the exercise by the Government of its executive functions

"unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

30. In his masterly judgment in *Burke v. Minister for Education and Skills* [2022] IESC 1, [2022] 1 ILRM 73 O'Donnell C.J. has explained how the "clear disregard" test had evolved in the intervening years. I could not hope to improve upon this historical analysis and his close and compelling reading of the constitutional text with which I respectfully agree. As the Chief Justice stated (at paragraph 60):

> "It is also arguably consistent with this approach, that where the Constitution calls for a broad-based judgment [by the Government], and does not constrain it by any specific restrictions or standards, that the primary accountability for such action lies under Article 28 with the Dáil, and that this reinforces the analysis of the judicial role as arising only in the cases of clear disregard. These cases illustrate circumstances where the courts have been called on to review the actions of the Government in different spheres, where it is contended the Government has failed to act in accordance with the express or implied mandates of the Constitution, and have held that the court may only interfere in an exercise of power consigned by the Constitution to the Government where there has been clear disregard of such express or implied mandate."

31. Unlike the situation in *Burke*, however, the present appeal does not concern a challenge which directly affects the constitutional rights of individuals as such. It rather concerns the contention that the Government is about to ratify – with the approval of the Dáil – a treaty which abrogates features of our legislative and juridical sovereignty, contrary to Article 5, Article 34.1 and Article 34.5.6 by reason (it is said) of the State's submission to the jurisdiction of the CETA Tribunals.

32. For my part I do not consider it necessary to determine whether this is a case governed by the "clear disregard" test or some other, less demanding test for review. It is sufficient to say that for reasons which I propose now to explain I am of the view that the ratification of CETA would clearly breach specific constitutional boundaries, express or implied, as objectively interpreted and construed by this Court. In other words, even assuming that the "clear disregard" test is the applicable test, I consider that that test is clearly met in the present case.

The appellant's standing

33. There is no issue, of course, regarding the appellant's standing to make this case. Like any other citizen acting *bona fide* he is entitled to come to court to say that the adoption of an international agreement is unconstitutional even if he cannot demonstrate the type of actual or apprehended injury to himself generally envisaged by Henchy J. in *Cahill v. Sutton* [1980] IR 269. This principle was established by this Court in its judgments in *Crotty* and, indeed, *McGimpsey v. Ireland* [1990] 1 IR 110 and such must, if necessary, be regarded as one of the exceptions to the general standing rules envisaged by Henchy J in *Cahill v. Sutton*.

34. In this respect the fact that the appellant is a member of Dáil Eireann is really immaterial to the issue of standing in a case of this kind, any more than it was, for example, for a member of the Seanad in a case concerning Dáil constituencies in *O'Donovan v. Attorney General* [1961] IR 114 or for the plaintiff – who was (and is) a Dáil Deputy - challenging the ESM Treaty in *Pringle v. Government of Ireland* [2012] IESC 47, [2013] 3 IR 1. In all of these cases, membership of the Oireachtas simply served to underscore the bona fides of the respective plaintiffs. The same can equally be said of the present appellant.

35. I mention all of this because at the conclusion of his judgment the Chief Justice notes – perfectly correctly – that the requirement contained in Article 29.5.2 that Dáil Eireann gives its approval prior to the ratification of CETA is itself an important constraint in terms of the conclusion of international agreements by the State. It is also true that the appellant in his capacity as a member of the Dáil would be well placed to contribute to the merits of this debate. As this Court noted in *The State* (*Gilliland) v. Governor of Mountjoy Prison* [1987] IR 201, Article 29.5.2 is an important democratic safeguard inasmuch as international agreements which involve a charge on public funds (save those of a technical or administrative character) must secure the prior approval of the Dáil before the State can be bound by any such agreements.

36. None of this is, however, strictly germane to this appeal. We are not concerned with the *merits* of CETA – since this is a matter for the Government and Dáil (and, indeed, as I shall later explain, the wider Oireachtas) to assess and consider – but rather with the *constitutionality of the proposed method of its ratification*. Despite the fact that he can participate in any debate qua Dáil Deputy in any Dáil debate in respect of the merits of that Agreement he, like any other citizen, also remains free to come to this Court to contend that the ratification of CETA in the manner proposed is unconstitutional. Having been thus seized with this matter our sole task is instead to adjudicate on its legal merits and to address the constitutional issues presented by this appeal.

Part III: The CETA investment tribunals

The composition and jurisdiction of the CETA Tribunal

37. It is next necessary to describe the composition and jurisdiction of the CETA Tribunal. The composition of the CETA Tribunal is provided for in Article 8.27 CETA. Article 8.27(2) CETA envisages that the Tribunal will be a fifteen-member Panel consisting of five members who shall be EU nationals, five Canadians and five shall be nationals of

third countries. Article 27.4 CETA requires that the members be eligible for judicial office or be "jurists of recognised competence." Expertise in public international law is essential and it is desirable that they should have expertise in international trade law and international investment law and the resolution of such disputes.

38. Members are to be appointed for a five-year term, with certain transitional arrangements (Article 8.27(5) CETA). The Tribunal is to sit in divisions, with the three members drawn from the EU, Canada and the third country nationals (Article 8.27(6) CETA). The members are to sit in rotation, with the President of the Tribunal taking steps to ensure that the "composition of the divisions is random and unpredictable" (Article 8.27(7) CETA). The members of the Tribunal are to be paid a monthly retainer fee which is to be determined by the CETA Joint Committee (Article 8.27(12) CETA). They are also to be paid a daily fee corresponding to that payable to members of arbitral panels sitting under the International Centre for Settlements of Investment Disputes Convention ("ICSID") (Article 8.27(14) CETA).

39. Article 8.30(1) CETA further provides that members of the Tribunal shall be independent and may not be affiliated with any government, although the fact that a person "receives remuneration from a government does not in itself make that person ineligible." Article 8.30 then prescribes a set of ethical rules, including provision for recusal and, ultimately, removal of a Tribunal member whose independence is in doubt.

40. In this respect the rules regarding membership of CETA Tribunals addresses many of the traditional concerns voiced in relation to the role of arbitrators in international arbitration law, namely, lack of independence from nominating governments on the one hand and a certain eagerness to please the international investment community on the other. Indeed, at the time of the adoption of CETA, the European Union, its Member States and Canada established a Joint Interpretative Instrument (OJ L 11, p.3), Point

6(f) of which declares that CETA "moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals" which were inspired "by the principles of public judicial systems in the European Union and its Member States and Canada, as well as…international courts such as the International Court of Justice and the European Court of Human Rights."

41. While CETA goes a long distance towards addressing these concerns, the fact remains that as matters stand members of the arbitral tribunals will not be judges and nor will they enjoy the standard guarantees in respect of fixity of tenure and salary which are generally deemed to be essential prerequisites to judicial independence in the western democratic legal tradition. One might also draw attention to the fact that CETA Tribunals will not sit in public, something which as Article 34.1 of the Constitution makes clear, is of the essence of our constitutional order.

42. It is next necessary to address the actual jurisdiction of the CETA Tribunals. Article 8.31 CETA is a very important provision which sets out the jurisdiction of the CETA Tribunals. It provides as follows:

> "1. When rendering its decisions, the Tribunal established under this Section shall apply the Agreement as interpreted under the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
>
> 2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing

interpretation given to the domestic law by the courts or authorities of the Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."

43. To this, Article 8.39 CETA may be added which provides that the Tribunal may award only either damages (plus interest) or restitution of property. Even in the case of restitution, Article 8.39(1)(b) CETA provides that the award shall provide that the respondent state "may pay monetary damages representing the fair market value of the property immediately before the expropriation." Article 30.6(1) CETA provides that CETA does not form part of the domestic law of any of the contracting parties.

44. Article 8.41 CETA deals with the enforcement of awards. Article 8.41(1) CETA provides that an award "shall be binding between the disputing parties and in respect of that particular case." Article 8.41(4) CETA provides that execution of the award shall be governed "by the laws concerning the execution of judgments or awards in force where the execution is sought." Article 8.41(5) CETA provides that such an award is an arbitral award which "is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention." Article 8.41(6) CETA further provides that if a claim has been submitted "pursuant to Article 8.23(2)(a), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention." (Article 8.23(2)(a) CETA allows an investor to submit a claim under the provisions of the ICSID Convention.)

45. Article 28.5(1) CETA, Article 8.28(5) CETA and Article 8.28(7) CETA all make provision for the establishment of the CETA Appellate Tribunal, along with matters relating to the composition, organization and administration of that body. Article 8.39(9)(d) provides that a "final award by the Appellate Tribunal shall be regarded as a final award for the purposes of Article 8.41." Article 8.41(1) CETA provides that an "award issued

pursuant to this Section shall be binding between the disputing parties and in respect of that particular case." Article 8.41(2) CETA states that a "disputing party shall recognise and comply with an award without delay." Article 8.41(4) CETA further provides that execution of the award "shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought."

46. As we shall later see, provision is given for the enforcement of these awards under our domestic law by reason of the operation of ss. 24 and 25 of the 2010 Act. Of course, it is clear from Article 8.41(4) CETA that any CETA Tribunal award against the State would not necessarily have to be enforced here. The application for enforcement could be in any country which is a party to ICSID.

47. Since, in my view, this is a case which is essentially about *sovereignty* rather than the separation of powers *as such* or a possible encroachment into the judicial function *as such*, it is unnecessary for present purposes to revisit any of the Article 34/Article 37 issues which have recently been so comprehensively examined in the various judgments of this Court in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. It is, I think, sufficient to say that, on any view, a CETA Tribunal would be exercising powers corresponding to the judicial powers of the State. As the CJEU observed in the *CETA Opinion 1/17* (*Opinion 1/17*, EU: C:2019: 341) (at paragraph 197), these tribunals "will, in essence, exercise judicial functions", adding that:

> "They will be permanent and they will be established by law in the form of the acts approving the CETA adopted by the Parties. They will apply, following an adversarial procedure, rule of law, will be required to exercise their functions wholly autonomously and will issue decisions that are final and binding."

The duration of CETA

48. It is next necessary to say something about the duration of CETA. Article 30.9(1) CETA permits any party to denounce CETA upon giving 180 days' notice. Article 30.9(2) CETA further provides, however, that, even in that event, the provisions of Chapter 8 dealing with investor tribunals will continue in operation for a further 20 years in respect of investments made prior to that point.

49. The issue of termination is, however, complicated by membership of the European Union. It is clear – and, in any event, the parties to the appeal agree – that *post-ratification* the obligation to adhere to CETA will be one which is "necessitated" by the obligations of membership of the Union for the purposes of Article 29.4.6 of the Constitution. It is, moreover, not entirely clear whether the State could unilaterally withdraw from CETA in those circumstances, not least having regard to our duty of sincere co-operation in Article 4(3) TEU.

50. It is true that in *Wightman* (C 621/18, EU: C: 2018: 999) the CJEU acknowledged not only that the United Kingdom could withdraw from the Union, but also that during the currency of the two year notice period of withdrawal specified in Article 50 TEU it was open to the United Kingdom to revoke that notice of withdrawal by virtue of a further decision to that effect taken in accordance with its own constitutional requirements. That decision turns, however, on the very specific provisions of Article 50 TEU dealing with *withdrawal* from the European Union. The situation with regard to CETA will be quite different, since the issue then would be whether the State could unilaterally exercise a right of withdrawal under CETA in circumstances where, post-ratification and the entry into force of that agreement, adherence to its terms would nonetheless be an obligation of Union membership.

51. While it is not necessary to determine this issue, it is clear that, one way or the other, it would seem that, once ratified, the State will be bound by the provisions of the Treaty for a long time so far as the investor tribunals are concerned.

Part IV: Whether ratification of CETA is "necessitated by the obligations of membership of the European Union" for the purposes of Article 29.4.6

52. Perhaps the first argument which the Court is called upon to address is whether the ratification by the Government of CETA in the exercise of its executive powers under Article 28.2 would itself be immune from constitutional scrutiny by reason of Article 29.4.6. While accepting that the State was under no legal obligation arising from European Union law to ratify CETA, counsel for the State, Ms. Donnelly SC, contended nonetheless that the act of ratification was necessitated by reason of the fact that, once ratified by the Member States and the European Union, there would *then* be a binding obligation on the State to comply with the requirements of CETA. This is undoubtedly true, but it does not mean that ratification of CETA is nonetheless "necessitated by the obligations of membership of the European Union" within the meaning of Article 29.4.6.

53. I propose later in this judgment to explore in detail the two Opinions of the Court of Justice in *Opinion 2/15* ("Singapore")(Opinion 2/15, EU:C: 2017: 376) and *CETA Opinion 1/17* (Opinion 1/17, EU: C:2019: 341) ("the CETA Opinion"). It is sufficient for present purposes simply to record that in both *Singapore* and the *CETA Opinion* the Court of Justice unambiguously held that in the case of "mixed" agreements – such as trade agreements of this nature negotiated by the European Union on behalf of its members – the consent of the individual Member States was required by reason of the fact that "such a regime…removes disputes from the jurisdiction of the courts of the Member States". As it cannot, therefore, be of a "purely ancillary nature", the CJEU held

that the consent of the individual Member States to such a mixed agreement is therefore required: see *Singapore* at paragraph 292.

54. In these circumstances, one can only agree with the conclusions of Butler J. (at paragraph 178 of her judgment, [2021] 2 ILRM 145 at 223) in the High Court that, even on the most generous interpretation of the term "necessitated by the obligations of membership of the European Union", it is difficult to see "how something which, as a matter of EU law, cannot be characterised as ancillary to the competence of the EU to enter into an international agreement can, at the same time, be something which is [also], as a matter of Irish constitutional law" necessitated for this purpose.

55. In these circumstances it is unnecessary to review any of the judicial and other debates which have taken place in the course of the highly complex case-law which has attended the meaning of this phrase. It is, perhaps, sufficient to say that, save for the important decisions of this Court in *Crotty* and *Pringle*, all of these cases from *Lawlor v. Minister for Agriculture* [1990] 1 IR 356 onwards have concerned some feature of EU law which did, at some level, impose an obligation on the State. This is illustrated by *Lawlor* itself where Community law (as it then was) *required* the State to choose as between one of two options regarding the operation of the milk quota regime. The debate in that case was, essentially, whether the election for one or other choice was *itself* a necessitated obligation.

56. The situation in *Crotty* was different since it concerned the decision by this State to ratify the Single European Act ("SEA"). It is clear from the judgment of Finlay C.J. (at 767) that the Court considered that this decision was not "necessitated by the obligations of membership", although, of course, the situation became entirely different once we had ratified and the SEA had subsequently entered into force. At that point, post-ratification, the State was, of course, obliged to comply with the requirements of the

SEA precisely because that series of treaty amendments which were contained in the SEA had then entered into force following its ratification by all of the members of the (then) European Economic Community.

57. In this respect I am not unmindful of the fact that Ms. Donnelly SC contended that in *Crotty* this issue does not appear to have been argued or, at least, argued at any length. In his judgment for the Court Finlay C.J. said (at 767) that it was "clear and was not otherwise contended by the [State] defendants that ratification of the SEA (which has not yet taken place) would not constitute an act 'necessitated by the obligations of membership of the Communities.'"

58. While all of this may be so, I think it is plain that, one way or another, on this point the reasoning of Finlay C.J. in *Crotty* is quite obviously correct. If it were otherwise, it would mean that the act of ratification of a variety of European Union treaties – each of which in their own right might have considerable implications for the sovereignty of the State – would have been "necessitated" in this sense without the possibility of prior judicial scrutiny or, for that matter, the necessity for a referendum.

59. It is, perhaps, at times difficult to avoid the impression from various judicial dicta and the vast literature which attends this debate that, at least in the eyes of some, the issue of necessitated obligations is simply a highly technical and obtuse debate with no real wider significance beyond its resolution in any given case. Yet the issue of the interpretation of Article 29.4.6 is of fundamental importance.

60. So far as Irish law is concerned, the Constitution represents the most fundamental *Grundnorm* ("Bunreacht") of all. It is, after all, the ultimate repository of our sovereignty and democracy. It expresses in a profound way key aspects of our national identity in legal form. Since our accession to the European Economic Community (as it then was) in 1973 and throughout the evolution of that Community into the European Union

from 1973 onwards, Ireland has shared and pooled its sovereignty with other European states for the greater benefit of all in the manner so memorably described by the Court of Justice in *Van Gend en Loos* (Case 26/62, EU:C: 1963: 1). Critically, however, at all relevant stages the Irish People have assented to that sharing and pooling of sovereignty in a series of constitutional amendments from 1972 onwards. If, however, there is to be any further material transfer of that sovereignty, it is essential to our system of constitutional democracy that the further consent of the Irish People is obtained.

61. As Article 5, Article 6 and Article 47 all in their own way demonstrate, this, at any rate, is the theory upon which the Constitution is founded. And herein lies the importance of Article 29.4.6. While it acknowledges the transfer of sovereignty which, for example, was entailed by the ratification of the Treaty of Lisbon (and, for that matter, the other relevant European treaties) and the assumption of the obligations thereby imposed by Union law, it also acts as a check on the further pooling of such sovereignty in a material fashion without the democratic assent of the People.

62. If, as the appellant contends, the ratification by the State of CETA amounts to a *fresh* transfer of sovereignty of a kind not *heretofore* provided for by a specific constitutional amendment or amendments, then Article 29.4.6 cannot avail the State in this appeal. All of this is yet another way of saying that if there is *no existing legal obligation* on the part of the State to ratify CETA arising from our membership of the Union – and it is conceded that there is not – then the ratification of CETA falls to be judged by reference to ordinary constitutional criteria. The fact that CETA *would* enjoy immunity from constitutional scrutiny for the purposes of Article 29.4.6 *if* ratified by the Union and all the Member States is really quite beside the point, because *prior* to such ratification – which, of course, is the position at the moment - there is no such obligation.

63. As it is accepted that there is currently no obligation imposed on the State to ratify CETA arising from our membership of the European Union, I consider that for all of these reasons the act of ratification itself cannot enjoy the constitutional immunity provided for by Article 29.4.6.

64. It is next necessary to examine the jurisdiction of the CETA Tribunals, as it is this issue which is at the heart of the present appeal.

Part V: The jurisdiction of the CETA Tribunals

The jurisdiction of the CETA Tribunals

65. The jurisdiction of the CETA Tribunals is set out in Chapter 8 of CETA. In essence, that jurisdiction enables the Tribunals to review a variety of executive, legislative and judicial measures taken by this State (along, of course, with those of the other 26 Member States, the European Union and Canada itself) by reference to a variety of metrics and indicators, including market access and performance indicators set out in almost 2,000 pages of CETA text. Sections C and D are very important provisions, preventing as they do discriminatory treatment and dealing with the rights of investors and of covered investments.

66. It is, however, the provisions of Article 8.25, Article 8.31, Article 8.39 and Article 8.41 which take centre stage in any assessment of the jurisdiction of the CETA Tribunal. It may be convenient at this point to set out in full the relevant portions of these provisions. They provide as follows:

> "8.25.1. The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this section.
>
> 8.25.2. The consent under paragraph 1 and the submission of a claim to the Tribunal under this Section shall satisfy the requirements of:

(a) Article 25 of the ICSID Convention and Chapter II of Schedule C of the ICSID Additional Facility Rules regarding written consent of the disputing parties; and

(b) Article II of the New York Convention for an agreement in writing."

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

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

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

"8.39.1. If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination:

(a) Monetary damages and any applicable interest;

(b) Restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined a manner consisted with Article 8.12.

8.39.2. Subject to paragraphs 1 and 5, if a claim is made under Article 8.23.1(b):

(a) An award of monetary damages and any applicable interest shall provide that sum be paid to the locally established enterprise;

(b) An award of restitution of property shall provide that restitution be made to the locally established enterprise;

(c) An award of costs in favour of the investor shall provide that it is to be made to the investor; and

(d) The award shall provide that it is made without prejudice to a right that a person, other than a person which has provided a waiver pursuant to Article 8.22, may have in monetary damages or property awarded under a Party's law.

8.39.3. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.

8.39.4. The Tribunal shall not award punitive damages.

8.39.5. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. If only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

8.39.6. The CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought.

8.39.7. The Tribunal and the disputing parties shall make every effort to ensure the dispute settlement process is carried out in a timely manner. The Tribunal shall issue its final award within 24 months of the date the claim is submitted pursuant to Article 8.23. If the Tribunal requires additional time to issue its final award, it shall provide the disputing parties the reasons for the delay…..

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

8.41.2. Subject to paragraph 3, a disputing party shall recognize and comply with an award without delay.

8.41.3. A disputing party shall not seek enforcement of a final award until:

(a) In the case of a final award issued under the ICSID Convention:

i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

ii. Enforcement of the award has been stayed and revision or annulment proceedings have been completed;

(b) In the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any others applicable pursuant to Article 8.23.2(d):

i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or

ii. Enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

8.41.4. Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought.

8.41.5. A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

8.41.6. For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention."

66. Provision is also made for an appeal by either party to a CETA Appeal Tribunal: see Article 8.28 CETA.

67. While it is clear from the provisions of Chapter 8 that the CETA Tribunals are empowered to review features of the general public law of the State, Article 8.31(2) CETA makes it clear nevertheless that the Tribunal does not have jurisdiction "to determine the legality of a measure, alleged to constitute a breach of the Agreement, under the domestic law of a Party." Article 30.6(1) CETA further states that the agreement itself cannot be "directly invoked in the domestic legal systems of the Parties."

68. The jurisdiction of the CETA Tribunals is instead confined simply to the award of damages (plus interest) or (in certain circumstances) the restitution of property: see Article 8.39(1) CETA. These awards are then made enforceable as if they were either "arbitral awards" for the purposes of Article 1 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") or a "final award" for the purposes of Chapter IV, Section 6 of the ICSID Convention 1966. It is worth noting that both the New York Convention and the ICSID Convention have the force of law in the State: see generally 2010 Act, s. 24(1) and s. 25(3) respectively.

69. What, then, is the practical effect of these provisions? It means that the State has given a unilateral consent to the CETA Tribunal to hear claims for damages (and, perhaps, in some limited instances, restitution of property or its equivalent in monetary terms) brought by investors in respect of what, for present purposes, amounts almost to perpetuity: see Article 8.25 CETA. This consent is, however, quite different from that which is given in specific commercial arbitration proceedings where the consent is contractual in nature. In that situation the consent represents the free contractual wishes of the parties and is one which (normally, at least) is specific to an identifiable and identified

claim from an identified or at least identifiable party. *Both* parties are also free to submit the claim to arbitration and each defendant (including State parties) may counter-claim. Such claims, moreover, relates essentially to the private law of the State in that they are generally fundamentally contractual in nature.

70. The striking difference between the two forms of arbitration was memorably expressed by Paulsson, "Arbitration without Privity" (1995) 10 *ICSID Rev – Foreign Investment Law Journal* 232:

> "It is commonplace to say of arbitration that it is consensual. A claimant initiates arbitration because it has agreed with the defendant that any dispute between them will be thus resolved. Either party can commence proceedings as a claimant: once an arbitration has started, the defendant may raise a counterclaim. This is the arbitration world as we know it today. Hundreds of thousands of international contracts adhere to this basic framework, more or less dependable in individual cases. But explorers have set out to discover a new territory for international arbitration. They have already landed on a few islands, and they have prepared maps showing a vast continent beyond. This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned: the defendant could not have initiated the arbitration, nor is it certain of being able to bring a counterclaim."

71. By contrast, the consent here derives from a multi-lateral treaty provision in which the state parties have agreed to vest jurisdiction in the CETA Tribunals to make damages awards in respect of the general public law of each state (and, as the case may be, the European Union): see, by analogy, the comments of the Court of Justice to this effect in *Achmea* (C-284/16, EU:C: 2018: 158) at paragraphs 55 and 56 and in *European Food*

SA (Case C-638/19P, EU: C: 2022: 50) at paragraph 144. Unlike the ordinary arbitration case, this jurisdiction exists *only* for the benefit of the disappointed or aggrieved investor: this jurisdiction cannot be invoked by the State itself.

72. These awards are then made enforceable in our domestic law by virtue of Article 8.41 CETA and, by extension, ss. 24 and 25 of the 2010 Act. Following a detailed examination of these provisions, in the High Court Butler J. concluded (at paragraph 149 of her judgment, [2021] 2 ILRM 145 at 211), that "enforcement is almost automatic and the losing party would know that if they did not comply with the award of their own volition, they could be forced to do so by power of the State." This analysis was strongly disputed by counsel for the State parties in this appeal.

73. Given the central importance of this issue, it is convenient that we should turn to it now. It is worth saying, of course, that the grounds of review of any tribunal award under the New York Convention are possibly wider than under the ICSID Convention in that, for example, the former provides that the enforcing court may decline to do so if it is incompatible with the public policy of that State, whereas this is *not* true of ICSID. The fact remains, of course, that Article 8.23(2) CETA expressly allows an investor claimant the right to elect to have the award enforced under ICSID. Since in practice one must assume that most successful investors would follow this course of action, the scope of review under ICSID therefore assumes considerable importance.

Review by a national court under the ICSID Convention

74. The extent to which an arbitral award made under the ICSID Convention can be reviewed or examined by a national court has been the subject of extensive analysis in the exceptionally thorough joint judgment of Lord Lloyd-Jones and Lord Sales for the UK Supreme Court in *Micula v. Romania* [2020] UKSC 5, [2020] 1 WLR 1033. Here

a claim was brought by Swedish investors against Romania under a Sweden/Romania bi-lateral investment treaty which provided for an arbitral tribunal operating under ICSID arbitration rules. The Swedish claimants maintained that Romania had wrongfully withdrawn certain tax advantages which they had been promised but which had then been withdrawn after Romania's accession to the European Union in 2007. The arbitral tribunal found in the claimant's favour. The claimants then sought to have the award registered and enforced in the United Kingdom, along with a variety of other jurisdictions apart from Romania.

75. Parallel with all of this, the European Commission had conducted an investigation into the entire affair. It concluded that the tax advantages in question had amounted to an unlawful State aid for the purposes of Article 107(1) TFEU. It directed Romania not to pay the award. Romania (supported by the Commission) then applied to the English High Court for an order staying both registration and enforcement of the award pending a separate challenge brought by the claimants before the General Court of the European Union seeking to have the Commission's decision set aside.

76. Following a series of appeals, the matter ultimately came before the UK Supreme Court where that Court ultimately lifted the stay upon registration and enforcement. For our purposes, what is significant is that while the UK Supreme Court took the view that while the true scope and meaning of Article 54 of ICSID could only authoritatively be determined by the International Court of Justice, at the same time that Court considered a domestic court was nonetheless entitled to consider and rule upon the effect of a multilateral treaty such as ICSID insofar as it bore on the issues before them. The judgment of the UK Supreme Court simply serves to illustrate the very narrowness of the review which is open to any court called upon to enforce an arbitral award of this nature.

77. In their joint judgment, Lord Lloyd-Jones and Lord Sales took the view that the scheme of ICSID was such that once the authenticity of an award had been established, a domestic court could not re-examine such an award on its merits. They continued ([2022] 1 WLR 1033 at 1055):

> "It is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The position is stated in this way by Professor Schreuer in his commentary on Article 54(1): "The system of review under the Convention is self-contained and does not permit any external review. This principle also extends to the stage of recognition and enforcement of ICSID awards. A domestic court or authority before which recognition and enforcement is sought is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. This is in contrast to non-ICSID awards, including Additional Facility awards, which may be reviewed under domestic law and applicable treaties. In particular, the New York Convention gives a detailed list of grounds on which recognition and enforcement may be refused …" (Christoph H Schreuer, *The ICSID Convention: A Commentary*, 2nd ed (2009), p 1139, para 81). "The Convention's drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review

the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general. The observance of international law is the task of the arbitral tribunal in application of article 42 of the Convention subject to a possible control by an ad hoc committee … Nor would there be any room for the application of the Act of State doctrine in connection with the recognition and enforcement of an ICSID award …" (Schreuer, pp 1140-1141, para 85). "

78. They continued by stating ([2020] 1 WLR 1033 at 1055-1056):

"Contracting States may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the Convention itself (Articles 50-52). Nor may they do so on grounds based on any general doctrine of *ordre public*, since in the drafting process the decision was taken not to follow the model of the New York Convention. However, although it is recognised that this is the general position under the Convention, it is arguable that Article 54(1), by framing the relevant obligation as to enforcement as an obligation to treat an award under the Convention as if it were a final judgment of a local court, allows certain other defences to enforcement which are available in local law in relation to such a final judgment to be raised."

79. Lord Lloyd-Jones and Lord Sales then conducted a close and detailed examination of the drafting history of Article 54 ICSID (and certain other articles) before concluding ([2020] 1 WLR 1033 at 1058-1059):

> "However, in light of the wording of Articles 54(1) and 55 and the *travaux préparatoires* reviewed above, it is arguable that there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under Articles 50 to 52 of the Convention."

80. In an Irish context, these exceptional defences would probably include an allegation that the judgment was procured by fraud (see, *e.g.*, *Waite v. House of Spring Gardens Ltd*., High Court, 26 June 1985; *Desmond v. Moriarty* [2018] IESC 34) or where there had been such a fundamental understanding as to key facts (*The People (Director of Public Prosecutions) v. McKevitt* [2009] IESC 29; *Re McInerney Homes Ltd.* [2011] IESC 34) or where the decision had been given *per incuriam* (*Abbeydrive Developments Ltd. v. Kildare County Council (No.2)* [2010] IESC 8, [2010] 2 IR 397) or a fundamental failure of due process (see, *e.g., Re Greendale Properties Ltd. (No.3)* [2000] 2 IR 514; *LP v. MP* [2001] IESC 76, [2002] 1 IR 219; *Desmond v. Moriarty* [2018] IESC 34). As this Court observed in *Walsh v. Minister for Justice* [2019] IESC 15, [2020] 1 IR 488, the set aside jurisdiction remains quite exceptional.

81. If these defences are available in principle in order to impeach the validity of a domestic judgment which is otherwise final and conclusive, then, in the light of *Micula* and the language of Article 54(1) of ICSID, the same is probably true in respect of an arbitral award given under ICSID.

82. It is unnecessary to be definitive on this question: it is sufficient to say that even if such defences are in theory currently available – or, as Butler J. put it (at paragraph 149, [2021] 2 ILRM 145 at 150), even accepting "the potential existence of some limited

and undefined grounds" of defence - they would by definition be confined to wholly exceptional and unusual situations. Here the wording of s. 25(5) of the 2010 Act is of some relevance:

> "The pecuniary obligations imposed by an [ICSID] award shall, by leave of the High Court, be enforceable in the same manner as a judgment or order of the High Court to the same effect and, where leave is so given, judgment may be entered for the amount due or, as the case may be, the balance outstanding on the award."

83. While some emphasis was placed by Ms. Donnelly SC on the leave requirement imposed by the section, for my part I think that as matters currently stand it is really in the nature of a decorous formality. It certainly does not empower the High Court to review the substance of the award or anything of the kind. The truth of the matter is that, assuming the procedural formalities have been complied with and in the absence of some highly unusual defence such as fraud, the High Court currently enjoys no real discretion in the matter and has little option but to give effect to the award.

84. Of course, as the Chief Justice has noted in his judgment, no one has previously sought to find fault with the Arbitration Act 2010 as a thing in itself, still less contend that s. 25 of the 2010 Act was unconstitutional. The issue is rather that, in the context of CETA, the 2010 Act has, so to speak, been conscripted into service as a means of giving effect to the awards of CETA Tribunals: in this respect the Act serves as a sort of makeshift pontoon bridge by which a CETA Tribunal award is enabled to cross that legal Rubicon from the realm of international law into an enforceable judgment recognised as such by our own legal system on a more or less automatic basis.

85. This would appear to be true even if the CETA Tribunal were to deliver a judgment which was inconsistent with an earlier judgment given by an Irish court. This is a

ground upon which to refuse recognition and enforcement of a foreign judgment under our own rules of private international law: see generally, Binchy, *The Irish Conflicts of Law* (Dublin, 1987) at Chapter 33. It is also a ground for refusal of recognition under the Brussels system: see, e.g., Article 45(1)(c) of the Brussels Regulation No. 1215/2012 (recast). Yet even such a fundamental rule of non-recognition would not seem to be available to resist the enforcement of a CETA award under the ICSID Convention.

86. A further complication might also arise were an Irish court to contemplate a refusal to recognise a CETA award post-ratification. Under those circumstances compliance with CETA would then be a "necessitated obligation" of Union membership for the purposes of Article 29.4.6 of the Constitution. There would be at least a question mark as to whether an Irish court could properly refuse to recognise a CETA award by reference to some domestic *ordre public*-style considerations having regard to the duty of sincere co-operation contained in Article 4(3) TEU which would then be imposed on an Irish court. These agreements are, after all, an "integral part of EU law and may therefore be the subject of references for a preliminary ruling": *CETA Opinion* at paragraph 117 and see generally *Republic of Moldova* (C-741/19, EU: C: 2021: 655) at paragraphs 33 and 50.

87. An investor claimant has, moreover, the option of bringing enforcement proceedings in any country that is a party to the ICSID Convention: see Article 8.23(2) CETA and Article 8.41 CETA. It would not necessarily follow that even these (limited) defences would be available to the State in those circumstances.

88. One way or another, I consider that Butler J. was correct when she described (at paragraph 149, [2021] 2 ILRM 145 at 211) the enforcement of a CETA award as "almost

automatic" and the losing party "would know that if they did not comply with the award of their own volition, they could be forced to do so by power of the State."

Part VI: Whether ratification of CETA would imperil the sovereignty of the State, contrary to Article 5 of the Constitution

The jurisdiction of CETA tribunals to interpret the domestic law of the State

89. At the heart of the appellant's objections to the entire system of the CETA Tribunals is that any awards made against the State are likely to have an inhibiting effect on the Oireachtas in terms of the formulation of legislative policy. In the modern environment where all the Member States of the Union (including the State itself) have committed themselves to the Paris Agreement of 2015 and the necessity to begin the difficult process of decarbonising the economy, it may be supposed that such claims – were they, indeed, ever to arise – would in all likelihood be directed at legislative and other steps taken directly or indirectly to end our reliance on fossil fuels or, at least, broadly similar claims of that nature. In essence, the question is whether there is any real likelihood that a CETA Tribunal might award damages where a new regulatory measure aimed, for example, at curbing carbon emissions, had the effect of rendering an existing business uneconomic and, if it did, whether such an award might effectively jeopardise the legislative or judicial sovereignty of this State, contrary to Article 5 of the Constitution.

90. Before examining this question, a related and equally important issue to be considered in the context of the jurisdiction of the CETA Tribunals is the question of whether a CETA Tribunal may be required to interpret the domestic law of the State. Article 8.31(2) CETA provides that a CETA Tribunal "may consider, as appropriate, the domestic law of a Party as a matter of fact." It further provides that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that party."

91. This is of fundamental importance because, as I propose to explain, if a CETA Tribunal does find that the State has breached its obligations under CETA, the CETA Tribunal has the power to make awards of monetary damages which have almost automatic effect in our own domestic law. As we have seen, the power of the High Court to review an arbitral award is likely to be limited to exceptional and unusual circumstances and certainly as things stand does not extend to a review on the merits. All of this means that if the CETA Tribunal could be said to interpret the domestic law of the State – even if only as a matter of fact and, again, even if only in a way which does not bind the national courts - and the CETA Tribunal does so erroneously, the State would have no recourse.

92. This question of whether arbitral tribunals interpret the law of contracting parties has been central to much of the CJEU's jurisprudence on international agreements which establish tribunals empowered to hear disputes on matters bearing upon EU law. The CJEU has, indeed, considered many of the sovereignty and judicial autonomy arguments which attend the present case. I suggest, therefore, that it might be of assistance first to examine the CJEU's position on this matter.

The jurisprudence of the Court of Justice in respect of legislative autonomy

93. For decades, the CJEU has demonstrated a large degree of solicitude in respect of its own jurisdiction and it generally seems unenamoured of any proposals which involve the ceding to other bodies powers which may conflict generally with those of the EU institutions and with its own jurisdiction in particular. Here it is perhaps not necessary to look any further than the Court's judgment in *Opinion 2/13* (Opinion 2/13, EU:C: 2014: 2454) dealing with the accession of the Union to the European Court of Human Rights in which the Court found that such accession would be contrary to the autonomy of Union law. In this and in other similar cases, the CJEU's principal concern has been

that such bodies would undermine the autonomy of the EU legal order and in turn the full effectiveness of EU law. One way that the CJEU has considered arbitral tribunals capable of doing just that is if those tribunals are required to interpret or apply EU law in a manner which would undermine the exclusive jurisdiction of the CJEU to adjudicate finally on such matters.

94. This concern is perhaps best reflected in the CJEU decision in *Achmea* (C-284/16, EU:C: 2018: 158). *Achmea* concerned a bilateral investment treaty ("BIT") which was agreed between the Netherlands and Slovakia in 1992. The BIT established an investor state dispute settlement procedure which granted exclusive jurisdiction to an arbitral tribunal to determine disputes arising in respect of investors of one state viz-a-viz the actions of the other state.

95. The proceedings in *Achmea* arose after Slovakia reversed its policy of liberalisation of the medical insurance market which had allowed national operators and those from other Member States to offer private sickness insurance services in Slovakia. Achmea, an undertaking belonging to a Dutch insurance group, had entered the medical insurance market in Slovakia following this liberalisation and stood to lose millions of euros as a result of the Slovak Government's policy reversal. Achmea accordingly brought arbitration proceedings against Slovakia pursuant to the investor state dispute settlement mechanism contained in Article 8 of the BIT. Achmea chose Frankfurt as the place of arbitration and therefore German law applied to the proceedings. (There are shades here of the long-running litigation brought by the British insurer, BUPA, in the wake of its decision to exit the Irish market following the triggering by the Minister for Health and Children of the risk equalization scheme in 2005. I propose to return to this point later in this judgment).

96. During the arbitration proceedings Slovakia raised an objection of lack of jurisdiction of the arbitral tribunal and contended that the BIT was incompatible with EU law. By an arbitral award dated 7th December 2012, the arbitral tribunal dismissed this objection and ordered Slovakia to pay Achmea damages in the amount of EUR 22.1 million. Slovakia then appealed on a point of law by which it sought to have that award set aside before the German courts. This appeal ultimately made its way before the Bundesgerichtshof (the German Federal Court of Justice) and that court made a preliminary reference to the CJEU.

97. In his Opinion dated 19 September 2017 Advocate General Wathelet considered the investor state dispute settlement mechanism established by the BIT to be compatible with EU law and with the allocation of powers fixed by the EU and FEU Treaties and the autonomy of the EU legal systems. In its judgment dated 6th March 2018 the CJEU, however, disagreed.

98. One of the reasons offered by the CJEU for its conclusion turned on the question of whether the arbitral tribunal established under the BIT may be required to resolve disputes which would be liable to relate to the interpretation or application of EU law. In answer to this question the CJEU considered that, even if the arbitral tribunal established under the BIT could be said to be called upon only to rule on possible infringements of the BIT, "the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties": see paragraph 40 of *Achmea*. It followed from this that the arbitral tribunal would necessarily be called upon to interpret and apply EU law because EU law – by reason of the doctrines of primacy and direct effect – forms part of the law in force in every Member State. In other words, the arbitral tribunal established by the BIT would be required to

interpret and apply EU law given EU law forms part of the *corpus juris* in force in both the Netherlands and in Slovakia. The CJEU concluded that the arbitral tribunal was therefore liable to negate the powers of the CJEU and the effectiveness of EU law.

CETA Opinion 1/17

99. The CJEU seems, however, to have taken a somewhat different approach to its reasoning in *CETA Opinion* 1/17 in respect of accession by the Union to CETA itself. In *CETA Opinion* 1/17 the Belgian State – as part of an agreement to resolve a domestic political dispute in Belgium involving the regional Walloon Parliament – made several challenges to the validity of CETA under EU law before the CJEU. Belgium's principal objection was that CETA did not respect the exclusive jurisdiction of the CJEU and therefore could not ensure the autonomy of the EU legal order.

100. In particular, the Belgium State contended that the CETA tribunal established under the agreement would be compelled to interpret EU law in a manner similar, in terms of practical effect, to that described in respect of the BIT by the CJEU in *Achmea*. Belgium considered that, notwithstanding the demarcation of the jurisdiction of the CETA tribunal made in Article 8.31 of CETA, the CETA tribunal would be required to examine whether measures adopted by the EU were contrary to CETA in order to determine whether that measure is inconsistent with the EU's obligations under CETA. Belgium noted that CETA tribunals will not necessarily be able to rely on an interpretation of the EU measure provided by the CJEU and thus may in some circumstances be required to determine the correct construction of primary and secondary EU law. This, Belgium argued, would be incompatible with the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law.

101. The CJEU, however, rejected this argument. The CJEU pointed to several provisions in CETA in order to distinguish it from the BIT at issue in *Achmea*. The CJEU recalled, first, that, as provided in Article 8.31(2) of CETA, the CETA Tribunal will not have jurisdiction "to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party." The CJEU therefore ruled that the CETA Tribunals will be confined to applying the provisions of CETA and not domestic or EU law. The CJEU further noted that, pursuant to Article 8.31(2) of CETA, "in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party *as a matter of fact*" (emphasis added) and further states that, "in doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party", adding that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party" (see paragraph 130 of *CETA Opinion* 1/17).

102. The CJEU considered that the fact that the CETA tribunal was confined to examining EU law "as a matter of fact" was critical because this would leave the interpretation of EU law to EU courts. The CJEU explicitly acknowledged that there would be circumstances where the CETA tribunals may have to examine primary and secondary EU law. It considered, however, that this would not threaten exclusive jurisdiction of the CJEU because, first, the CETA tribunals would be bound to apply EU law in a manner consistent with the CJEU's jurisprudence and, second, no judgment of the CETA tribunals would bind an EU court. The CJEU thus concluded that the CETA tribunals would be sufficiently isolated from the EU legal system to protect the autonomy of EU law.

103. The CJEU then acknowledged (at paragraphs 148-150) that if there were circumstances where:

"…..the jurisdiction of those tribunals would adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market, rather than confine itself to determining whether the treatment of an investor or a covered investment is vitiated by a defect mentioned in Section C or D of Chapter Eight of the CETA.

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

If the Union were to enter into an international agreement capable of having the consequence that the Union — or a Member State in the course of implementing EU law — has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework."

104. The CJEU then went on to consider this general question. It noted (at paragraph 152) that Article 28.3.2 CETA restricted the jurisdiction of those Tribunals:

> "With respect to the jurisdiction of the envisaged tribunals to declare infringements of the obligations contained in Section C of Chapter Eight of the CETA, Article 28.3.2 of that agreement states that the provisions of Section C cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties."

105. The CJEU then continued (at paragraphs 153-161) that these restrictions were sufficient to protect the autonomy of the EU judicial system:

> "It follows from the foregoing that, in those circumstances, the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152 of the present Opinion and, on that basis, to order the Union to pay damages.
>
> In the same way, as regards the jurisdiction of the envisaged tribunals to declare infringements of obligations contained in Section D of Chapter Eight of the CETA, Article 8.9.1 of that agreement states explicitly that Parties have the right 'to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals,

social or consumer protection or the promotion and protection of cultural diversity'. Further, Article 8.9.2 of that agreement provides that 'for greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section'.

Moreover, Point 1(d) and Point 2 of the Joint Interpretative Instrument provide that the CETA 'will … not lower [the standards and regulations of each Party] related to food safety, product safety, consumer protection, health, environment or labour protection', that 'imported goods, service suppliers and investors must continue to respect domestic requirements, including rules and regulations', and that the CETA 'preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest'.

It is apparent from reading those provisions together that the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process.

That is also the purport of Point 3 of Annex 8-A to the CETA, which states that 'for greater certainty, except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations'.

It must be added that the jurisdiction of the CETA Tribunal to find infringements of the obligation, laid down in Article 8.10 of the CETA, to accord 'fair and equitable treatment' to covered investments is specifically circumscribed, since Article 8.10.2 lists exhaustively the situations in which such a finding can be made.

In that regard, the Parties have concentrated on, inter alia, situations where there is abusive treatment, manifest arbitrariness and targeted discrimination, which reveals, once again, that the required level of protection of a public interest, as established following a democratic process, is not subject to the jurisdiction conferred on the envisaged tribunals to determine whether treatment accorded by a Party to an investor or a covered investment is 'fair and equitable'.

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

In the light of the foregoing, it must be concluded that Section F of Chapter Eight of the CETA does not adversely affect the autonomy of the EU legal order."

106. I should perhaps pause at this point to note that the CJEU's decisions in *Achmea* and *CETA Opinion 1/17* – and its other decisions relating to the conferral of jurisdiction on other arbitral tribunals – are only binding insofar as they apply *in the EU law context* (see, to this effect, the UK Supreme Court decision in *Micula v. Romania* at paragraph 83). While this Court is, therefore, entitled to consider the CJEU authorities as they apply to the Irish domestic context – and should, indeed, accord very considerable weight to those decisions – it must ultimately form its own independent view in the context of the quite separate questions of Irish constitutional law in respect of whether, first, a CETA Tribunal might be required to interpret the domestic law of the State and, second, whether such might constitute an impermissible transfer of sovereignty under the Constitution. It is important to stress that neither the TEU nor the TFEU contain provisions similar to the Article 5 sovereignty clause or Article 34.1 dealing with the administration of justice or, for that matter, to Article 34.5.6 dealing with the finality of judgments of this Court.

107. For my part I am, indeed, unpersuaded by aspects of the reasoning of the CJEU in *CETA Opinion 1/17* so far as it might be relied on as an authority in the particular and special *sphere of Irish constitutional law*. (The judgment naturally binds this Court so far as the compatibility of CETA with EU law is concerned). The CJEU's reasoning nonetheless invites the following comments in the particular and somewhat different context of Irish constitutional law.

108. First, the CJEU's analysis is predicated on the basis that it is only the *repeated* award of damages by a CETA Tribunal which might impact on the capacity of the Union or a Member State to modify its regulatory legislation. Yet one single large award – or, even, perhaps, the threat of such litigation before CETA – might be enough to dissuade

a Member State to review or change its own legislation. One might here note that Article 8.39(3) CETA provides that in the calculation of damages, the Tribunal "shall also reduce the damages to take account of any restitution of property *or repeal or modification* of the measure." (Emphasis supplied). There is thus here a clear incentive for contracting states to dilute or even repeal regulatory measures when faced with large claims.

109. Second, it seems to me that the Court of Justice takes a rather sanguine view of the jurisdiction of the CETA Tribunals with regard to regulatory legislation. The views of the CJEU will not, of course, bind the CETA Tribunals who will, after all, have sole authority to interpret their own jurisdiction, subject only to a possible judgment of the International Court of Justice. It may be noted that in the *Vattenfall* litigation, an ICSID Tribunal expressly rejected the argument that it lacked jurisdiction to entertain a claim against Germany under the Energy Charter Treaty in the wake of the CJEU's earlier decision in *Achmea,* despite all that the CJEU had said on this very point*: Vattenfall AB v. Federal Republic of Germany: Decision on the* Achmea *issue* ICSID Case No. ARB 12/12, 31 August 2018.

110. In effect, therefore, in *Vattenfall* the ICSID Tribunal did not consider itself bound by the decision of the CJEU in *Achmea*. If an ICSID Tribunal can do this in respect of *Achmea* why, one might ask, should a CETA Tribunal do anything more than pay passing attention to the strictures of the Court of Justice in *Opinion 1/17?* For that matter, if the CETA Tribunal materially disregarded this decision - or some other relevant aspect of EU law - where, one might further ask, could this be the subject of effective review by a national court apart from an appeal to the CETA Appellate Tribunal? The fact that there is no provision for this in the present CETA arrangements seems to me to highlight a significant structural weakness in the very drafting of CETA itself.

111. This very structural weakness highlights the constitutional frailty of what the Government currently proposes to do. Suppose, for example, a CETA Tribunal proceeded to give an award against Ireland where the Tribunal - in the same vein as the ICSID Tribunal's decision in the *Vattenfall* litigation - had expressly disagreed with a key and pertinent decision of the Court of Justice and thereby materially departed from the requirements of EU law. As matters stand it would seem that the High Court would be powerless under the provisions of s. 25 of the 2010 Act to refuse enforcement of such a decision even though this would be manifestly at odds with our duty of sincere cooperation under EU law generally and what one might term the "loyalty" provision of Article 29.4.4 of the Constitution whereby "Ireland affirms its commitment to the European Union." Part of that commitment to the Union involves respecting and upholding the decisions of the Court of Justice in the context of the interpretation and application of EU law.

112. Third, it would also seem quite possible that a situation might arise in which the CETA Tribunal interprets the domestic law of the State – including EU law – and the State would be without recourse if this interpretation was erroneous. Although I naturally accept that the CETA Tribunal is expressly confined by Article 8.31(2) CETA to interpreting the law in force in the State as a matter of fact, one could, I think, easily foresee a situation in which the CETA Tribunal could err in interpreting our law as a matter of fact, particularly on a matter of law that has not previously been adjudicated on in the Irish courts. In these circumstances, neither the State (nor the CJEU for that matter) would have any recourse and, indeed, the State would be obliged to enforce any award made for the reasons I have outlined above.

113. Thus, in sum, it would appear to me that not only would Irish courts be obliged to treat a CETA award as "almost automatic", but Irish courts would also be required to accept

such awards even if they were based upon what the courts considered to be an erroneous interpretation of domestic law (albeit as a matter of fact). It is next necessary to consider the implications of these conclusions. There are clearly implications for both legislative sovereignty and autonomy on the one hand and juridical sovereignty on the other: these are considerations which flow directly from the nature of our constitutional order and are distinct and separate to those questions of EU law examined by the CJEU in *Opinion 1/17*. I propose to consider these matters in turn.

Part VII: The potential implications of CETA for legislative sovereignty

114. There would seem to be two aspects to the issue of whether legislative sovereignty is potentially compromised by reason of adherence to CETA. The first is whether a CETA Tribunal might make an award against the State on the basis that a legislative measure enacted by the Oireachtas breached the CETA principles. The second relates to the fact CETA liability is strict and in no sense dependent on questions of fault.

115. One should say immediately that it seems likely that a CETA Tribunal would at least generally defer to the judgment of a Contacting State in terms of regulatory measures designed to protect important social goals such as public health and the environment. Certainly, in its judgment in the *CETA Opinion 1/17* the CJEU proceeds on the basis that a CETA Tribunal cannot call into question the extent of the public interest considerations underpinning EU regulatory measures: see paragraphs 148 and 149 of the Opinion. The existing specialist literature assumes and predicts that CETA Tribunals will in fact show deference to regulatory judgments made by the Contracting States. As Schacherer observes, "Investment and regulatory measures" in Bungenberg and Reinisch, *CETA Investment Law* (Hart, Beck, Nomos, 2020) at 247:

> "A strong argument for a deferential approach is that a State's decision-making is in principle proximate to its society and is embedded in a specific national context. Public authorities (of a State or of the EU) are better situated to assess the specific societal needs. As far as Canada and the EU are concerned, regulatory measures benefit from democratic legitimacy. And the domestic legislator appears to be in a better position to decide certain trade-offs than investment tribunals. By according policy-makers deference when reviewing their regulatory choices, CETA tribunals can accord the necessary space for safeguarding non-economic public interests."

116. If these assumptions prove to be correct – and there is currently no reason to doubt them – one may assume that awards against this State are likely to be relatively rare, should they happen at all. Many of the individual provisions of CETA - such as, e.g., Article 8.9(1) CETA and Article 8.9(2) CETA - are designed to reinforce the right of the contracting states to achieve legitimate policy objectives.

117. As I have already observed, it is true that the CJEU expressly stated in its *CETA Opinion 1/17* that the CETA Tribunals would have no jurisdiction to make awards which called into question EU measures based on a weighing of legitimate public policy objectives provided that this did not amount to a form of disguised discrimination. As the *Vattenfall* litigation demonstrates it is not altogether clear whether CETA Tribunals will consider themselves bound in this way by the CJEU's comments as to their jurisdictional limits.

118. But even if one assumes that this will be so, the fact remains a CETA Tribunal *could* still make an award in respect in respect of legislative measures otherwise validly enacted by the State. Should this occur, any award of damages will be based on strict

liability and not on considerations of fault. One must also observe that liability will not even be based on considerations of legality under national law. That is significantly different from liability under both national and EU law.

119. So far as Irish national law is concerned, it is clear since the seminal decision of this Court in *Pine Valley Developments Ltd. v. Minister for Environment* [1987] IR 23 that there is in general no liability for a mere ultra vires administrative act unless it also involves the commission of a recognised tort or is actuated by malice or where the public authority knows it does not in fact possess the power which it purports to exercise: see [1987] IR 23 at 36, per Finlay C.J. This was a case where the Minister had wrongfully (albeit in good faith) granted planning permission to the plaintiff company but it ultimately transpired that the permission in question was invalid.

120. This Court ultimately held that there was no liability on the part of the State, the invalidity of the administrative action notwithstanding. The plaintiff company had also contended that all of this amounted to a breach of constitutional rights. While Finlay C.J. was prepared to accept that the invalidation of the planning permission caused the company loss, he drew attention to the fact that the State's obligation in Article 40.3.2 to protect the company's property rights was not absolute and was qualified by considerations of the common good. He then continued (at 38):

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims of compensation where they act bona fide and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would…tend to avoid indecisiveness and delay, which might otherwise be involved."

121. *Pine Valley* was expressly affirmed by this Court in *Glencar Exploration plc v Mayo County Council (No.2)* [2002] 1 IR 84. In his judgment Fennelly J. stated - for the avoidance of any doubt - that he believed ([2002] 1 IR 84 at 150) that "the considered statements of the law made in *Pine Valley* remain the law, despite apparent inconsistency with… *Duff v. Minister for Agriculture* [1997] 2 IR 22… I do not believe that [*Duff*] can have been intended to depart from such an important principle as that laid down in *Pine Valley*." This passage from *Glencar* was, moreover, itself quoted and affirmed in the judgments of both MacMenamin and Charleton JJ. for this Court in *Cromane Seafoods Ltd. v. Minister for Agriculture, Fisheries and Food, Ireland and the Attorney General* [2016] IESC 6, [2017] 1 IR 119. MacMenamin J. also helpfully added that *Duff* was certainly decided on its own facts and that its status as a precedential authority was limited and even doubtful. He also stressed that ([2017] 1 IR 119 at 181 that liability for damage "does not automatically flow from a mistake of law said to have been made by the Minister."

122. This general issue was also considered by Budd J. in *An Blascaod Mór Teo. v. Commissioners of Public Works (No. 4)* [2000] 3 IR 565. Here key sections of certain legislation affecting the Blasket Islands providing for the compulsory expropriation of certain landowners had been found to be unconstitutional as discriminatory and selective and were thus held to be contrary to Article 40.1 by this Court: see *An Blascaod Mór Teo. v. Commissioners of Public Works (No.3)* [2000] 1 IR 6. In the subsequent proceedings Budd J. rejected the argument that a finding of unconstitutionality would sound in damages on a strict liability basis, saying ([2000] 3 IR 565 at 581):

> "In the course of making laws, the legislature frequently has to take into account conflicting individual rights and the exigencies of the common good within a process involving balancing and adjusting the scope of rights. There is therefore

> little justification for a regime of strict liability for infringement of a constitutional right where such rights are competing and in conflict. In such circumstances, "*ubi jus, ibi remedium*" is too simple a formula and strict liability would in many cases be too low and easy a threshold to reach."

123. It is implicit in this analysis that strict liability is essentially inconsistent with the necessary deference and margin of appreciation which must be accorded the Oireachtas when enacting regulatory legislation. This, as we have seen, is the consistent theme which emerges from both the Irish and CJEU case-law on this topic, yet this is precisely what CETA proposes.

124. *An Blascaod Mór* is interesting for another reason. Had the plaintiff been a Canadian investor it would have been entitled to bring such a claim before a CETA Tribunal where the prospects of success would seem to have been high: see the rules regarding targeted discrimination contained in Article 8.10(2)(d) CETA. This is yet another example of where a CETA Tribunal would have jurisdiction to rule on matters internal to this State. Of course, had the plaintiff succeeded and suffered loss and damage, damages would have been awarded by a CETA Tribunal against the State on a *strict liability* basis in respect of the loss caused by this legislation, even though, of course, this form of liability has heretofore been rejected by both our courts and the Court of Justice as inconsistent with the necessary autonomy which national and European legislators should enjoy.

125. Another pertinent example of this kind is supplied by the BUPA litigation to which I have already alluded. Following the decision of the Minister for Health and Children to trigger risk equalization – so that health insurers with an excessive cohort of young and healthy consumers could be required to compensate insurers with a large number of much older and sicker consumers – the British insurance company, BUPA, elected to

exit the Irish health insurance market. This Court later held that the risk equalization scheme was ultra vires the Health Insurance Act 1994 (as amended): see *BUPA Ireland Ltd. v. Minister for Health and Children (No.2)* [2008] IESC 42, [2012] 3 IR 442.

126. In the wake of that decision BUPA then sued the State for the damages which it said was caused by its exit from the market. The claim was ultimately rejected by Cooke J. who, in a characteristically meticulous judgment, concluded that there was no liability as the *Pine Valley* criteria had not been satisfied: see *BUPA Ireland Ltd. v. Minister for Health and Children (No.3)* [2013] IEHC 103, [2014] 2 IR 67. The point here, of course, is that if BUPA had been a Canadian entity, this is precisely the type of case in which it might possibly have succeeded before a CETA Tribunal, as, indeed, had happened in the earlier *Achmea* litigation before a BIT governed by ICSID rules. I mention this simply to show (with respect, once again) that CETA potentially does involve matters internal to this State.

127. As it happens, the CJEU has taken a similar view with regard to liability of the Union under Article 340 FTEU (ex. Article 288 EC). Thus, for example, in *FIAMM and Fedon* (Joined Cases C-120 and 121/06P, EU: C: 2008: 476) two Italian companies contended that they had suffered loss when a WTO Disputes Panel had authorised the US to impose retaliatory tariffs on certain products (namely batteries and spectacle cases) consequent upon a finding that the Union's regime for bananas violated WTO rules.

128. The CJEU ruled that there could be no liability in those circumstances because the Union had not done anything which was actually unlawful *under Union law.* It added nevertheless (at paragraphs 171 and 172 of the judgment) that – in line with established case law –

"As regards, more specifically, liability for legislative activity, the Court moreover pointed out at a very early stage that, although the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy…

The Court has therefore held in particular that, in view of the second paragraph of Article [340 TFEU], the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. The Court has, moreover, stated that the strict approach taken towards the liability of the Community in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial review, *exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests*. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers…" (emphasis supplied).

129. To that extent, therefore, it must be accepted that - at least at a theoretical level - CETA represents a potentially significant extension of the non-contractual liability of the State. Whereas to date both this Court and the Court of Justice have recognised the

desirability of ensuring that neither the State nor (as the case may be, the Union) are exposed to liability in respect of the exercise of legislative functions absent proof of something in the nature of grave and manifest error, this will not necessarily be the case under CETA

130. Here it seems to me that there must be consistency between our general law of State liability and a potential liability under CETA. If, for example, it is accepted that the potential for strict liability in damages under CETA will not compromise our legislative autonomy, then the rule in *Pine Valley* is no longer tenable since, after all, that judgment is premised on the basis that decisive decision-making required that legislators, ministers and administrators enjoy some measure of protection without the threat of a damages award. If, on the other hand, one takes the view that *Pine Valley* is correct, then it would seem to follow that adherence to CETA would necessarily compromise our legislative autonomy in that the State would be exposed to strict liability claims for damages arising from mere legislative non-compliance with CETA, even if the measures in question were not in themselves unconstitutional or otherwise ultra vires or even if the State had acted in perfect good faith by enacting the measure in question.

131. As I already have had occasion to remark at other points in this judgment, part of the difficulty with the present appeal is that it is difficult to anticipate the work of the CETA Tribunals. I am prepared to allow that awards against this State are likely to be at least relatively rare. The fact remains, however, is that they could happen and that the State would thereby be exposed to damages claims on a *strict liability* basis in respect of otherwise *validly* enacted legislative measures. The very fact, however, that this *could* happen is sufficient for constitutional purposes, since to my mind this necessarily compromises the legislative sovereignty of the State. In particular, the absence of a *Pine*

Valley-style good faith protection in respect of legislative measures — heretofore regarded as an essential safeguard for the legislative autonomy of the Oireachtas — is telling.

Part VIII: Whether CETA Tribunals would compromise the juridical sovereignty of the State, contrary to Article 34 of the Constitution

132. The conclusion that the courts would be obliged to treat a CETA award as "almost automatic" gives rise, in my mind, to two potential constitutional objections, one particular and the other general. The particular constitutional objection arises from Article 34.5.6 which provides that the decision of the Supreme Court "shall in all cases be final and conclusive". The general objection is that participation in an international tribunal with power to make binding awards which are enforceable in domestic law is inconsistent with Irish juridical sovereignty as recognised by Article 5 of the Constitution. I now propose to consider each of these objections in turn.

Article 34.5.6 of the Constitution: The Historical Context

133. Article 34.5.6 of the Constitution provides that "The decision of the Supreme Court shall in all cases be final and conclusive."

134. The historical origins of this clause are well known. Article 66 of the Constitution of the Irish Free State had originally provided as follows:

> "The Supreme Court of the Irish Free State (Saorstát Éireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever: Provided that nothing in this Constitution shall impair the right of any

person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

135. The proviso to Article 66 allowed for dissatisfied litigants to petition the Privy Council for leave to appeal from a decision of this Court. One of the reasons for the existence of this right of appeal was, one may suppose, a concern in some quarters that the courts of the newly established Irish Free State might not administer justice with total impartiality, particularly in cases involving the rights of political and religious minorities who retained – or, at least, were perceived to retain - sympathy with the Crown and the pre-1922 British administration: see generally Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin, 2016). The right to petition His Majesty in Council was thus retained.

136. While it is true that the Privy Council granted leave to appeal in only a handful of cases, the very existence of this jurisdiction appears to have been regarded as inconsistent with Irish juridical sovereignty. This right of petition was itself abolished by the Constitution (Amendment No. 22) Act 1933 and the validity of that constitutional amendment was upheld by the Privy Council in *Moore v. Attorney General of the Irish Free State* [1935] IR 472 in a judgment delivered in June 1935. It is perfectly clear from the case-law of the Privy Council up to its abolition that that body exercised a jurisdiction to review aspects of the public law (including constitutional law) of the Irish Free State in the period between 1922 and 1935.

137. This was, moreover, a considerably wider jurisdiction than that which might be exercisable by a CETA Tribunal in that the jurisdiction of the Privy Council was not confined simply to the award of damages. It could - and did - pronounce on a variety of other matters, including the interpretation of aspects of the Anglo-Irish Treaty (*Wigg and Cochrane v. Attorney General of the Irish Free State* [1927] IR 285); the continued

application of the Copyright Act 1911 to the Irish Free State and the interpretation of aspects of the Constitution of the Irish Free State (*Performing Rights Ltd. v. Bray UDC* [1930] AC 397, [1930] IR 509) and even the validity of the Constitution (Amendment No. 22) Act 1933 (*Moore v. Attorney General of the Irish Free State* [1935] IR 472). In all of these cases the appeal to the Privy Council was from an earlier decision of this Court.

138. Regardless of the rights or wrongs of this matter, it seems fairly clear that in 1937 the contemporary understanding was that a decision of this Court was to be final and conclusive and that no other judicial body would have authority to pronounce upon aspects of Irish law in this fashion in a manner which was binding in domestic law. This, indeed, was the very object which, as a matter of history, Article 34.5.6 was designed to achieve. It is clear that Irish Governments of all hues were very exercised by the prospect that a decision of this Court might be questioned in any way by a body such as the Privy Council. Indeed, the Oireachtas legislated to ensure that the decision of that body in *Performing Rights Society* was reversed, and the successful party was prohibited from obtaining any remedies or damages or costs: see ss. 3 and 4 of the Copyright (Preservation) Act 1929. Of course, in Mohr's words, the Government "was less interested in the finer points of copyright and far more concerned about winning another round in its duel with the Privy Council": see *Guardians of the Treaty* at 100.

139. Viewed, therefore, from this historical perspective it is hard to see how the CETA Tribunal would be compatible with Article 34.5.6, at least as this provision was originally understood in 1937, precisely because it *does* have the power to give binding decisions on issues concerning aspects of our public law, which decisions are enforceable under the domestic law of the State. This is true even if that jurisdiction by being confined essentially to an award of damages is more limited than would have been the case in a

Privy Council appeal and even if, as the Chief Justice observes in his judgment, such an award did not have a general *erga omnes* effect. This in itself is not dispositive. The Constitution is, after all, a living Constitution which must be interpreted afresh in the light of our own contemporary experience and requirements, especially where the factual circumstances have changed significantly from 1937: see, *e.g., Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326, [2012] 2 IR 666. This historical understanding is nonetheless relevant.

Article 34.5.6: The Contemporary Understanding

140. There remains the critical question of whether the acceptance by this State of the jurisdiction of the CETA Tribunal would amount to a breach of Article 34.5.6. It is, of course, true that in certain unusual circumstances even an apparently final decision of this Court can be re-opened. As I have already indicated, these cases could include fraud, fundamental misunderstanding or breach of fair procedures.

141. One thing is clear however: the circumstances in which a judgment could be re-opened would have to be exceptional. As Murray J. said in *LP v. MP (Appeal)* [2001] IESC 76, [2002] 1 IR 219 at 230: "…the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice." It is also plain that the decision as to whether an earlier decision of this Court should be re-opened could only be taken *by this Court itself* (of, in the case of alleged fraud, in the High Court if fresh proceedings are commenced) and not by any other entity.

142. Subject, therefore, to this proviso, the critical question is whether the Government could ratify an international treaty which allowed for a form of review of a decision of this Court by an international arbitral tribunal which has then the power to make binding decisions which can be enforced in this State (and, indeed, elsewhere)? Such a decision

would, of course, only be binding *inter partes* and unlike a court ruling it would not have general *erga omnes* effects. Article 30.6(1) CETA further stipulates that such a decision would have no effect on the domestic law of the State.

143. In practice, however, such decisions would tend to acquire their own precedential effects, as previous awards of this kind are regularly cited at least in specialist textbooks on international law and (perhaps especially) international trade law: see Born, *International Commercial Arbitration, Vol. III International Arbitral Awards* (Kluwer, 2020) at 4191-4195. Thus, the experience in practice of the World Trade Organisation dispute resolution procedure is that "disputes brought before the Panel and Appellate Body are not limited to an *inter partes* effect, as every Appellate Body Report may have precedential effect in future cases": Lim, "Dispute Settlement in the World Trade Organisation: Moving Towards an Acknowledgment of *Stare Decisis*" (2018) *Cambridge Law Review* 193 at 197. Indeed, for the purposes of illustrating the effect of CETA, I have found it necessary to refer to many such arbitral awards in the course of this judgment.

144. Perhaps the first thing to note is that it is perfectly clear from the explicit language of CETA itself that in certain circumstances an investor can make a complaint to the CETA Tribunal based on an adverse decision of this Court. This might be in circumstances where it was contended this Court had acted in breach of fair procedures or otherwise denied justice to an investor. Or it might arise where this Court had upheld the constitutionality of a law enacted by the Oireachtas or rejected challenges to the validity of executive or administrative decisions in a manner which prejudiced the investor.

145. It is true that the CETA Tribunal can only award damages (or, perhaps, in some instances, restitution of property or its equivalent in damages) and, unlike the Privy Council prior to 1935, it cannot entertain an appeal *as such*. A CETA Tribunal cannot *as such* rule that a decision of this Court was erroneous. Yet the constitutional incongruousness of the High Court being obliged by the terms of the 2010 Act and the ICSID Convention to give effect to a damages award made by a CETA Tribunal against the State where the subject matter of the complaint was in respect of a decision of this Court is, I suggest, all too obvious.

146. Perhaps all of this may be best examined by way of an example. Article 8.10(2) CETA provides in part as follows:

> "A Party breaches the obligation of fair and equitable treatment…if a measure or series of measures constitutes:
>
> (a) denial of justice in criminal, civil or administrative proceedings,
>
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings…."

147. The denial of justice standard contained in Article 8.10(2)(a) CETA is one which is also found in a range of other parallel investor tribunal arrangements, such as Article 1105 of the North American Free Trade Agreement ("NAFTA"). (NAFTA was superseded in July 2020 by the broadly similar United States – Mexico – Canada Agreement ("USMCA")). It is certainly clear from a series of decisions of NAFTA Tribunals that the standard here is strict and requires something in the nature of a "gross denial of justice" or "manifest arbitrariness" (see *International Thunderbird Gaming Corp. v. Mexico,* UNCITRAL (26 January 2006) (at paragraph 194) or the unjust or arbitrary treatment of an investor (see *SD Meyer v. Canada,* UNCITRAL (Partial Award)(13 November 2000) (at paragraph 263); or "justified concerns as to the judicial propriety

of the outcome" (*Mondev International Ltd. v. United States*, ICSID Award, 11 October 2002)(at paragraph 127). These awards "suggest a high threshold of severity for a verdict of a denial of justice: only the most severe cases will be considered": see Dumberry, "Treatment of investors and covered institutions" in Bungenberg and Reinisch eds., *CETA Investment Law* (Nomos, 2020) at 266.

148. The standard represented by Article 8.10(2)(a) CETA is, accordingly, the most basic of basic standards of international justice. It is difficult to believe that a decision of this Court (or, for that matter, the Court of Appeal) would ever fall below that standard or would even come close to so doing. One can - I hope - discount this as a realistic possibility.

149. There are nevertheless *dicta* to the effect that the NAFTA "denial of justice" standard is breached where the domestic court is guilty of undue delay or where such a court "administer[s] justice in a seriously inadequate way": see *Azinian v. Mexico*, ICSID Award, 1 November 1999 (at paragraph 102). (These comments were, however, pure dicta, because in that case the NAFTA Tribunal expressly rejected any argument that the Mexican courts had behaved in this way).

150. If these principles were, however, to be applied to Article 8.10(2) CETA, then it is certainly perfectly possible that a CETA Tribunal could, for example, hold that an Irish court has been guilty of undue delay. There are already a number of cases in which the European Court of Human Rights has found that Ireland has been in breach of Article 6 ECHR by reason of undue delay in our legal system: see, e.g., *McFarlane v. Ireland* [2010] ECHR 1272 and *Keaney v. Ireland* [2020] ECHR 292. While the position regarding litigation delays has clearly improved significantly in recent years following, for example, the establishment of the Court of Appeal in October 2014, one cannot say

that the possibility that a CETA Tribunal would find against Ireland on this ground is so improbable that this could be discounted as just a remote and speculative possibility.

151. Yet a CETA Tribunal finding that, for example, that this Court had denied the due process rights of an investor contrary to Article 8.10(2)(a) CETA or, for that matter, Article 8.10(2)(b) CETA (and that accordingly it would be appropriate to make a binding award of damages which would be enforceable under domestic law) would in substance amount to a form of collateral attack by an outside judicial-style body in respect of a judgment which Article 34.5.6 of the Constitution declares to be final and unappealable. It would in substance be doing indirectly that which Article 34.5.6 expressly forbids. As this Court observed in *Walsh v. Minister for Justice* [2019] IESC 54, [2020] 1 IR 488 at 559:

> "This case illustrates the important fact that Article 34.5.6 remains relevant at all stages of the proceedings. If it is apparent that an application does not disclose grounds capable of being argued as justifying the exercise of the *In re Greendale Developments Ltd. (No. 3)* jurisdiction, then it would be a breach of the terms of Article 34.5.6, and the object of that provision would be defeated if the court were to entertain such a claim."

152. Much the same can be said in respect of CETA. Since this possibility is expressly provided for in CETA I find myself coerced to the conclusion that the ratification of this agreement would be unconstitutional in its present form as contravening Article 34.5.6. This conclusion is supported by — but is not dependent upon — the historical understanding of this provision.

153. As I propose to explain further with regard to our accession to the jurisdiction of the European Court of Human Rights, it would be otherwise if the decision of the CETA Tribunal were not binding and enforceable in domestic law. The fact that such decisions

are made almost automatically binding and enforceable in this manner is, for me, the decisive consideration: as I have already observed, giving effect to CETA Tribunal awards via the mechanism of s. 25 of the 2010 Act it is the equivalent of a crossing of a legal Rubicon which, in a dualist state such as ours, marks the strict separation between the realm of public international law on the one hand and domestic law on the other.

Would accepting the jurisdiction of the CETA Tribunals amount to a breach of Article 5 of the Constitution?

154. It is clear from the provisions of Article 8.31 CETA (set out above) that a CETA Tribunal cannot *directly* pronounce on the validity of actions of the executive or the Oireachtas or judicial decisions. If a CETA Tribunal were to have been given such a jurisdiction, the conclusion that such would be unconstitutional would be almost beyond dispute. Thus, for example, counsel for the State, Mr. Cush SC, accepted that such a proposal would amount to a circumvention of the provisions of Article 34.3.2 of the Constitution which confines the jurisdiction to declare a law to be unconstitutional to the High Court, the Court of Appeal and to this Court. In any event, the jurisdiction to determine to invalidate or annul decisions taken by the executive or the Oireachtas is a core feature of the juridical sovereignty of this State and, for that matter, that of other states in respect of their own executive, parliamentary and judicial decisions.

155. This is reflected in not only our own rules of private international law but also, for that matter, public international law. Our courts have, for example, consistently held that they have no jurisdiction to pronounce on the actions of the United Kingdom sovereign (including its armed forces) as to do so would represent an unjustified intrusion into the sovereignty of that State: see, *e.g., McElhinney v. Williams* [1995] 3 IR 382*; Adam v.*

Secretary of State for Home Affairs [2001] 1 IR 47; *Short v. Ireland (No. 2)* [2006] 3 IR 297; *Brady v. Choiseul* [2016] IEHC 552, [2016] 2 IR 337.

156. This is well illustrated by the decision of this Court in *Short (No.2)*. Here the plaintiffs sought to bring a claim for damages against British Nuclear Fuels Ltd. in respect of its operation of a nuclear power plant in the UK. In the High Court British Nuclear Fuels argued that the plaintiffs' claim insofar as it related to the granting of licenses and permissions by a foreign government fell outside the jurisdiction of the Irish Courts as the validity of the granting of any such authorisations could not be reviewed here. Peart J. upheld the contention of British Nuclear Fuels in relation to jurisdiction and that decision was upheld by this Court. As Fennelly J explained:([2006] 3 IR 297 at 315):

> "What is at issue is the jurisdiction of an Irish Court to determine the lawfulness or validity, under the law of the United Kingdom, of administrative decisions made in that jurisdiction in accordance with national law and procedures. It seems to me elementary that our courts have no power to review the lawfulness of administrative decisions made by English administrative bodies under English law, any more than the English courts would have corresponding power to pass judgment on Irish administrative decisions. The courts of each country alone have the power to review the legality, within their own frontiers, of decisions of their own government and administration."

157. Fennelly J. continued ([2006] 3 IR 297 at 318-319):

> "I do not believe it to be necessary to lay down any broad principles in order to determine the present case. We are not concerned with sovereign immunity or acts of state. We are concerned with the much simpler and narrower question of whether the courts of one state have jurisdiction to determine the validity of administrative acts of the authorities of another state which are not claimed to

> have any legal effect outside the borders of the latter state… The ultimate question in the present case is whether the courts of one Member State (Ireland) have jurisdiction to determine the lawfulness and validity of administrative procedures and decisions of another Member State (the United Kingdom), where, as is claimed here, those decisions have rendered lawful, by authorising them to be carried out within the boundaries of that other state, activities alleged to cause damage in the first Member State.
>
> I am satisfied that Peart J. was correct to hold that the High Court does not have that jurisdiction… The principle of comity requires that the courts of one state abstain from pronouncing on matters such as the regulatory claims, in respect of which the primary and obvious jurisdiction rests with the courts of another state. In addition, there are practical considerations. Only an English court will be familiar with English law and procedure. It is a matter for English courts, where they are obliged to do so, to interpret national law in the light of Community law. It would be patently absurd for the courts of another Member State to exercise such power. Apart from anything else, there would be a real risk of conflicting decisions, if the same administrative act were to be reviewed according to the laws of two or more Member States."

158. As Kingsmill Moore J. memorably explained in his classic judgment in *Buchanan v. McVey Ltd.* [1954] IR 89, similar concerns explain the traditional rule that one state will not give effect to the penal or taxation laws of another state, save to the extent that such has been modified by international agreement.

159. This is also reflected by general principles of public international law such as the Act of State doctrine whereby (again, absent international agreement) the courts of one state will not, at least generally speaking, inquire into or pronounce upon the validity of the actions *jure imperii* of another state. (If there are exceptions to this rule, they tend to be confined to cases of outrageous violations of human rights, such as the iniquitous laws directed against the Jewish community by the National Socialist regime in Germany between 1933-1945. Even then, it may be a case of one state refusing to *give effect* to the implications of such oppressive laws within its own territories: see, *e.g., Oppenheimer v. Cattermole* [1976] AC 249.)

160. A classic example here is provided by the decision of the US Supreme Court in *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964). This, as it happens, was a case decided at the height of the Cold War and just two years after the Cuban missile crisis. As part of the tit-for-tat retaliation which took place between the US and Cuba following the Castro revolution in December 1959, the Cuban government sought to expropriate property held by US citizens in Cuba. These measures included the seizure of sugar owned by a Cuban company, Compania Azucarera Vertientes-Camaguey de Cuba ("CAV"), which itself was owned by American shareholders. An American commodity broker, Farr, Whitlock & Co., had originally agreed to buy this sugar from CAV, but after it was seized, they bought it directly from the Cuban government. After receiving the sugar however, Farr, Whitlock & Co. did not pay the Cuban government, but it instead paid Mr. Sabbatino, CAV's legal representative in the US. The Cuban government then sued Sabbatino to recover the monies due in respect of the sugar. The case essentially turned on whether the expropriation of the sugar by the Cuban government within Cuba would be regarded by the US courts as lawful.

161. In his judgment for the majority, Harlan J. held (i) that the Cuban State bank had the right to sue in the US courts and (ii) that by virtue of the act of state doctrine in public international law, the US courts had no jurisdiction to rule on the actions of the Castro regime when it expropriated the assets of US companies without compensation following the Communist revolution in 1959. As he put it (376 US at 438):

> "Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

162. The reasoning in *Banco Nacional de Cuba* reflects the traditional concerns regarding State sovereignty in public international law. Putting it more prosaically in an Irish context, the Oireachtas could not, for instance, purport to give our courts the jurisdiction to pronounce on the validity of decisions taken by the Canadian Sovereign within its own jurisdiction. This would clearly represent an extravagant exercise of extra territorial jurisdiction which would not be recognised by the general principles of public international law. Accordingly, any such legislation would be plainly unconstitutional as being contrary to Article 29.8 of the Constitution: see, e.g., *Minister for Justice and Equality v. Pal* [2022] IESC 12, per O'Donnell C.J. (especially at paragraphs 54-58).

163. Although it is perfectly clear from the provisions of Article 8.31(2) CETA that a CETA Tribunal could *not* pronounce *directly* on the validity of the acts (whether judicial, executive or legislative) of the Irish State, the conclusion that it could do so *indirectly* is, I think, inescapable.

164. Consider the following example. Let us suppose that Canadian investors invest heavily in bonds issued by a particular Irish bank. Following a financial crash it transpires that the bank will quickly become insolvent without considerable State financial support which is then injected by the Government into the company. Acting pursuant to legislation enacted by the Oireachtas the Minister for Finance seeks and obtains court orders giving him or her control of the company. As part of the bank resolution process, losses are compulsorily imposed on both senior and subordinated bondholders pursuant to this legislation. Let us further suppose that the constitutionality of this legislation is ultimately upheld by this Court in a case brought by these same investors.

165. Annex 8B of CETA is a special rule dealing with public debt. It provides that no claim can be made in respect of a negotiated public debt restructuring arrangement, save for a claim that this was done in a discriminatory manner contrary to Article 8.6 or Article 8.7 of CETA. All of this seems to imply that *other forms* of compulsory debt restructuring *could* amount to a breach of CETA and such a conclusion is re-enforced by the provisions of Article 8.18 CETA.

166. In these circumstances it is entirely possible that the CETA Tribunal would award compensation to the investors on the basis that the legislation providing for compulsory burden sharing on the part of the bondholders amounted to a measure having an equivalent effect to that of an expropriation, contrary to Article 8.12 and Annex 8A of CETA. If that were to happen, this would in effect be tantamount to saying that this Court's decision on the constitutional question was wrong or in some way unjust. One may assume that in such circumstances the non-Canadian bond holders would be quick to explore ways in which they could be compensated as well.

167. If we take the further example of where a licence or permission of some kind (such as, for example, an exploration licence or a planning permission) is denied to a Canadian

investor. Let us assume that the investor elects to proceed directly to the CETA Tribunal (as it would be entitled to do) and does not challenge the decision (whether by way of judicial review or otherwise) before the Irish courts. If, however, in that example the CETA Tribunal awarded damages to the investor against Ireland this would have to be regarded as a collateral attack on the original decision itself in a manner in which in the case of, say, a planning decision, would amount in substance to a circumvention of, for example, the leave requirement contained in s. 50 of the Planning and Development Act 2000. This is clearly borne out by two recent authorities on this point, one a decision of this Court and the other a decision of the Court of Appeal: see *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 IR 147 and *Express Bus v. National Transport Authority* [2018] IECA 236, [2019] 2 IR 680.

168. In *Shell E & P* the Minister for Communications had made a pipeline consent order pursuant to s. 40 of the Gas Act 1976 and a compulsory acquisition order pursuant to s. 32 of the same Act in respect of plots of land owned by some of the defendants. When the plaintiff company instituted proceedings claiming that the defendants had obstructed its rights of way over the lands in question, the defendants counterclaimed and pleaded that the relevant administrative decisions which had conferred the rights of way were themselves invalid. Clarke J. described these latter claims as ([2013] 1 IR 247, 265): "a challenge to a public law measure designed to underlie a claim for damages rather than a defence to proceedings in which reliance is placed on the measure to maintain a claim against the challenger." He then went on to add ([2013] 1 IR 247, 266) that a "party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings." I took a similar view in *Express Bus* holding that the plaintiff could not simply seek damages

against National Transport Authority without having first sought to challenge the validity of the decision. Just as in *Shell E & P*, the Court of Appeal struck out the claim for damages as amounting in substance to an endeavour to by-pass the time limits contained in Ord. 84 RSC in respect of judicial review proceedings.

169. The real question is whether allowing this form of quasi-appeal to the CETA Tribunal by which the latter body could pronounce indirectly upon the validity of the actions of this State is objectionable from the point of view of the sovereignty provisions of Article 5. It is true that, as this Court put it in *Crotty*, sovereignty means the right to say "yes" or "no". Yet it is equally true that, as O'Donnell J explained in *Pringle v. Ireland* the very exercise of sovereignty also entails having the right to bind the State by means of the treaty-making power vested in the Government by Article 29.5.1. Every treaty by definition binds the State to a particular course of action and it is necessarily implicit in the constitutional scheme of things that the Government can in principle commit the State to a particular course of action in international law by means of such treaties. The State has prospered in the field of international relations by means of entering agreements or treaties which, to one extent or another, involve a sharing or pooling of sovereignty. While this is most obviously true in the case of the European Union (which, admittedly, is dealt with by a separate constitutional regime), it is also a feature of other important international bodies such as the United Nations and the Council of Europe.

170. In one sense, therefore, the decision to ratify CETA amounts to the very exercise of sovereignty as described by O'Donnell J. in *Pringle.* The more specific question in the present case, however, is whether the ratification of an international agreement allowing for the creation of supra-national judicial style tribunals with power to make binding and enforceable awards of damages against the State compromises the juridical sovereignty of the State, contrary to Article 5 of the Constitution.

171. To my mind the entire scheme of the Constitution is that, subject to certain exceptions, the judicial power of the State can be exercised only by persons appointed as judges under the Constitution. It is true that the Constitution allows for certain exceptions to this rule. First, Article 37.1 permits the judicial power to be vested in persons who are not judges in certain limited and non-criminal cases. The unspoken premise, however, of Article 37.1 is that the persons exercising these limited judicial powers will, in one way or another, be part of the Irish administrative apparatus. The whole context and language of this provision ("…duly authorised by law to exercise such functions and powers….") is that the office holder or body in question has been vested with these powers by the Oireachtas and, while independent in the discharge of these powers, is nonetheless ultimately answerable - in the very broadest sense of that term - to the Oireachtas and the Government.

172. It is also true that, as the Chief Justice observes in his judgment, there have been instances of where the Oireachtas has seen fit to give statutory tribunals the power to make binding awards: see, e.g., the Hepatitis C Compensation Tribunal Act 1997. In that particular instance, however, that Tribunal was simply administering an *ex gratia* scheme and it might be argued that it did not involve the administration of justice. But whatever the merits of this approach and regardless of whether it would or would not survive a *Zawelski*-style constitutional challenge, the fact remains that all such bodies remain within the orbit of the High Court and are amenable to judicial control by the courts established under Article 34.1 of the Constitution. This will not be true in respect of the awards of the CETA Tribunal.

173. Second, Article 29.7.2 envisages that judicial powers may be exercised in the context of any cross-border dispute resolution by any institution established under the aegis of

the Belfast Agreement (1998). Third, Article 29.9 allows the State to ratify the Rome Statute of the International Criminal Court.

174. Yet these exceptions simply serve to re-enforce the impression that the judicial power of — and, indeed, in respect of — the State is *otherwise* reserved for judges appointed under the Constitution. This very point was made by Kennedy C.J. in *Lynham v. Butler (No.2)* [1933] IR 74 at 99 when he stated:

> "…the judicial power of the State is, like the legislative power and the executive power, one of the attributes of sovereignty, and a function of government…It is one of the activities of a government of a civillised State by which it fulfills its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over persons and property…."

175. In the present case, the effect of Chapter 8 of CETA is to allow a body composed of persons who are not judges and who are not appointed by or answerable to any of the institutions of the State to exercise judicial powers in respect of the State and, critically, to give judgment which is prima facie binding and enforceable under our own domestic law. In some ways the difference between the majority and the minority in this case really comes down to this point.

176. As I understand the judgment of the Chief Justice, he considers that CETA really remains outside the orbit of our legal system and that it does not seek to duplicate or parallel our own legal system. I agree that there *might* be circumstances where the establishment of such a tribunal with power to make binding awards against the State would be constitutionally unobjectionable. This, however, would be in circumstances

where the disputed events and actions took place *outside the State* and where the tribunal in question essentially replaced or at least supplemented a foreign court which would otherwise have had jurisdiction in the matter.

177. CETA is different in that it involves disputes which directly and immediately concern the public law in this State and (potentially) the administration of justice in this State which have been brought by private individuals and companies. In my view inasmuch as CETA permits *these particular disputes* to be the subject of a binding adjudication by a CETA Tribunal which is prima facie enforceable in this State this is plainly incompatible with the juridical sovereignty of the State. I would therefore hold for this reason that the ratification by the Government of CETA in its present form would infringe Article 5 of the Constitution.

178. It is also not fanciful to suppose that such a ruling from a CETA Tribunal could curtail the State's capacity to legislate in accordance with its own democratic and constitutional framework in a manner which goes beyond the *de minimis* or the purely theoretical. It is possible to envisage similar rulings in a range of areas such as planning control, land zoning, the licensing of mineral resources, taxation or rent control. If such were to occur, then for the reasons I have already sought to explain, this would compromise the essence of the State's legislative sovereignty, contrary to Article 5 of the Constitution.

Part IX: Accession to the European Court of Human Rights and the European Convention of Human Rights Act 2003

179. In some respects, our accession to the jurisdiction of the European Court of Human Rights in 1952 and the enactment much later of the European Convention of Human Rights Act 2003 are, so to speak, to our own legal system what Wagner is to music or Joyce is to literature. In all three cases the pre-existing rules were stretched to their

limits and all three instances represent examples of exceptionalism in their own fields which does not necessarily translate in favour of any successors seeking to emulate them. This is perhaps especially true of the ECHR itself. Created in exceptional circumstances and dedicated to the case of personal liberty and ensuring minimum standards of civilized behavior within the Contracting States, it has long been a favourite of the law and our constitutional order.

180. It is perfectly true that both the Optional Protocol (between 1952 and 1998) and (since the treaty revision in 1998) Article 34 of the European Convention of Human Rights allows an individual to bring a petition to the European Court of Human Rights contending, inter alia, that a decision of this Court amounts to a violation of the ECHR. Some examples – which are by no means comprehensive – include *Norris v. Ireland* (condemning laws on homosexuality); *O'Keeffe v. Ireland* [2014] ECHR 96, (2014) 59 EHRR 15 (no effective remedy for Article 3 violation); *Independent Newspapers v. Ireland* [2017] ECHR 567 (excessive awards in defamation cases); *Keaney v. Ireland* [2020] ECHR 292 (undue delay and lack of effective remedy). In some instances – e.g., *O'Keeffe* and *Independent Newspapers* – the Court has awarded damages.

181. One might fairly ask: what is the difference between the right of petition to the ECtHR on the one hand and the right to bring proceedings before investor tribunals on the other, such that accession to the latter engages fundamental issues in relation to Article 5 and Article 34.5.6, whereas this is not true in respect of the ECHR? To my mind, there is but one essential difference, namely, that, unlike the ECtHR, the investor tribunal decisions have been accorded binding legal status such that their awards are made enforceable in our domestic law.

182. That is *not* the case with regard to decisions of the ECtHR and, indeed, the Oireachtas to date has carefully refrained from according such a status to these decisions. Thus,

for example, s. 4 of the European Convention of Human Rights Act 2003 ("the 2003 Act") merely states our courts must take judicial notice of decisions of the ECtHR and that when "interpreting and applying the Convention provisions", they must take "due account of the principles" laid down by these decisions. The 2003 Act does not state, however, that such decisions of the ECHR have binding legal status in our domestic law. If it did, it would to that extent be unconstitutional because, contrary to the express requirements of Article 5 and Article 34.5.6, it would in substance allow another court – other than this Court – to deliver a final judgment in a dispute between the citizen and the State in a manner which was binding in our domestic law.

183. In passing it may also be noted that this Court has never accorded the status of a binding decision to a judgment of the ECtHR. Thus, for example, in *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan (No. 5)* [1998] 4 IR 343 the High Court had granted an injunction in August 1992 restraining the distribution of certain information in relation to the provision of abortion services. A few months later the ECtHR held that this ban contravened Article 10 ECHR: see *Open Door Counselling Ltd. v. Ireland* (1993) 15 EHRR 244. Around the same time the 14th Amendment of the Constitution Act 1992 took effect, allowing for the distribution of such information.

184. In its judgment delivered in March 1997 a majority of this Court held that the High Court had been correct at the time to grant the injunction, but that the law had been changed in the meantime by the passage of the 14th Amendment so that it would no longer be appropriate to grant such an order. There was, however, no suggestion at all that the judgment of the ECtHR in the meantime in *Open Door Counselling* had had this effect. Indeed, this was accepted by the two dissenting judges, Denham and Keane JJ. Thus, for example, in her judgment Denham J. referred to the ECtHR judgment in *Open Door* and observed that "while that decision is not part of our domestic law, it is

a persuasive analysis of the situation": [1998] 4 IR 343 at 376. Keane J. was likewise of the view that that judgment "is not, of course, in any sense binding on this Court": see [1998] 4 IR 343 at 391.

185. Thus, regardless of the rights and wrongs of the matter under discussion, the key point which emerges for our purposes from *Grogan (No. 5)* is that a decision of the ECtHR does *not* have binding force and effect *so far as the domestic law of this State is concerned*. These decisions are, of course, nevertheless binding at the level of international law and the State has given a solemn political commitment that it will honour and give full effect to them.

186. Narrow as these distinctions may be, they are nonetheless vital ones. It can thus be said that while our accession to the ECtHR (and, for that matter, the 2003 Act) came close to the constitutional boundaries, it did not transgress them, precisely because these judgments have never been given binding status and enforceable effects in our domestic law.

187. That, therefore, is the all essential — if, admittedly, narrow — difference between the ECHR and the CETA investor tribunals.

Part X: Other specific constitutional provisions dealing with the administration of justice by trans-national bodies

188. In this part, I propose to itemise and discuss briefly specific constitutional provisions dealing with the administrative of justice by trans-national bodies or entities. These are admittedly heterogeneous examples: the common theme is that the Constitution (whether as originally enacted or by later specific amendment) has made express provision for such bodies by way of derogation from the general constitutional rule that

the administration of justice is vested in the courts established for the purposes of Article 34 of the Constitution. I propose to start with Article 29.2.

Article 29.2

189. Article 29.2 of the Constitution provides:

> "Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination."

190. This provision clearly reflects the language of Article II of the General Treaty for Renunciation of War as an Instrument of National Policy ("the Kellogg-Briande Pact") of 1928 of which the (then) Irish Free State was one of the original signatories. Both the history and text of Article 29.2 are directed towards international arbitration or judicial determination of *international disputes* as between the State and other states. Article 29.2 is thus concerned with the resolution of issues of public international law. It provides, for example, constitutional authority – if, indeed, such were needed – for our acceptance of the jurisdiction of the International Court of Justice and other forms of judicial determinations of *international disputes at the level of public international law* such as the World Trade Organisation's Dispute Resolution Panel procedures which are designed to resolve inter-State trade disputes. It has, however, no application to a case of this kind which concerns the binding determination of essentially private claims brought by investors before a CETA Tribunal. As Butler J. put it (at paragraph 103 of her judgment) the "international disputes which are to be the subject of international arbitration are between nations and…Article 29.2 is not intended to cover financial claims by commercial entities against the State."

191. One must, of course, acknowledge that there may perhaps be cases where *private* claims brought by *private* parties could be compromised by the State in the interests of the

pacific settlement of an international dispute with another state. In the words of a leading international law scholar, this is an "established international practice reflecting traditional international theory": see Henkin, *Foreign Affairs and the Constitution* (1972) at 262.

192. A good example from international law practice in this regard is provided by the Algiers Agreement of 1981 between the United States of America and the Islamic Republic of Iran. The Algiers Agreement provided for the resolution of the hostage crisis following the unlawful capture of US diplomatic personnel at its embassy in Tehran. The essence of the agreement was that both countries agreed to accept the jurisdiction of the Iran-United States Claims Tribunal which would have the power to make binding adjudications in respect of all claims brought by their respective nationals against the other state. Part of this involved the extinguishment of claims pending before the US courts and their transfer to the Claims Tribunal.

193. In *Dames & Moore v. Regan* 453 US 654 (1981) the US Supreme Court held that the US President could properly exercise the executive power to conclude an agreement of this kind and rejected a challenge to its constitutionality. As Rehnquist J. observed (at 679):

> "Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns. *United States v. Pink* 315 US 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals."

194. For my part, I consider that, in view of the provisions of Article 29.5.2, this State could in principle properly enter into a specific agreement of this kind *as part of the pacific settlement of an international dispute* with another state. This would, I think, be so even

if it involved the renunciation of the jurisdiction of the Irish courts, provided, of course, that the claimants were provided with rights and remedies broadly comparable to those prevailing in our own legal system.

195. One thing, however, is clear: this is *not* the background to the establishment of the CETA Tribunals. These Tribunals will not have been established to resolve inter-State claims in the realm of public international law: they rather concern the resolution of private claims made against the State by private investors. The CETA Tribunals are instead intended to operate in addition to or to supplement the operation of national court systems and, generally speaking, to assuage the concerns of international investors that they might not be treated fairly by either the executive, legislative or judicial branches of the country in which they are investing.

196. In these circumstances, Article 29.5.2 - which, in fairness, was not really relied on by the respondents in the context of this appeal - has no relevance to the establishment of the CETA Tribunals.

Article 29.4.6

197. As I have already observed, Article 29.4.6 gives constitutional immunity to "laws enacted, acts done or measures adopted by the State" which are "necessitated" by the obligations of membership of the European Union. One of those obligations is contained in Article 267 TFEU in that it provides a mechanism whereby national courts can refer a point of European Union law to the CJEU for a binding adjudication. Article 267(3) TFEU imposes a binding obligation on courts of last resort to make a reference, save for special cases such as interlocutory matters or where the issue is *acte clair*: see generally, for example, *Commission v. France* (C-416/17, EU: C; 2018: 811); *Consorzio Italian Management* (C 561/19, EU:C: 2021: 799) and *Randstad Italia SpA* (C-497/20, EU: C: 2021: 799). In some circumstances Member States may be liable in

damages where such a court of last resort improperly fails to make such a reference: see, *e.g., Köbler* (C-224/01, EU: C; 2003/ 513); *Randstad Italia SpA* (C-497/20, EU: C: 2021: 799) and more generally, Varga, *The Effectiveness of the Köbler Liability in the National Courts* (Hart, 2018).

198. There could, I think, be little enough doubt but that the general Article 267 TFEU jurisdiction – involving as it does binding decisions given by the Court of Justice in the course of *inter partes* litigation and which may also involve the disapplication of national law – requires the protection of Article 29.4.6, since it clearly impacts on the exclusive role of the courts in the administration of justice in Article 34.1 and the finality of decisions of this Court (Article 34.5.6).

199. One may immediately observe, of course, that the Article 267 TFEU jurisdiction of the Court of Justice is in some respects broader than that which will be enjoyed by CETA investor tribunals. The CJEU gives binding decisions as to the law of European Union which not only bind the parties and the Irish courts, but which also have *erga omnes* effects. Under the *Simmenthal* doctrine (*Simmenthal SpA* (C-106/77, EU: C: 1978: 49) the Court of Justice can disapply (and thereby effectively nullify) a provision of national law. On the other hand, it should, however, be said that the jurisdiction of the CETA tribunals to award damages against contracting states would appear to be more extensive in practice than that enjoyed by the Court of Justice, since that latter court will only award damages for a breach of EU law where that breach is a "sufficiently serious" one: see*, e.g., Randstad Italia SpA* (C-497/20, EU: C: 2021: 799)(at paragraph 80).

200. No one suggests, of course, that this provision (Article 267 TFEU) is directly relevant to this appeal. Rather, however, it provides another illustration of how provision for

transnational adjudication with binding domestic effects is catered for by means of an existing and specific constitutional amendment within our existing constitutional order.

Article 29.7

201. Article 29.7.2 of the Constitution provides as follows:

> "Any institution established by or under the [Belfast] Agreement may exercise the powers and functions thereby conferred on it in respect of all or any part of the island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution. Any power or function conferred on such institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person or organ of State as aforesaid."

202. Article 29.7 was inserted by the 19th Amendment of the Constitution Act 1998 to allow the State to ratify the Belfast Agreement. The first sentence of Article 29.7.2 is designed to allow any cross-border bodies established under that Agreement to exercise part of the executive power of the State, the provisions of Article 28.2 notwithstanding. The second sentence of Article 29.7.2 provides that where any judicial or judicial-type functions are transferred to these institutions, such powers may lawfully be exercised by them "in addition to or in substitution for any like power or function" conferred on the courts by the Constitution itself.

203. While this is a specific provision designed to deal with a specific issue, it again shows that – just as with Article 29.9. and the International Criminal Court – that all derogation or possible derogations from the juridical sovereignty of the State have heretofore been sanctioned by means of a specific constitutional amendment.

Part XI: The Jurisdiction of the Joint Committees

204. There remains the question of the jurisdiction of the Joint Committees. Article 26.1 CETA provides for a Joint Committee consisting of the European Union and Canada. This Committee is responsible for all questions relating to trade and investment activities between the contracting parties and the implementation and application of CETA: see Article 26(1)(3) CETA. Article 26.3(1) CETA provides that the Joint Committee shall "for the purposes of attaining the objectives of this Agreement, have the power to make decisions in respect of all matters when the Agreement so provides."

205. Article 26.3(2) CETA provides that:

> "The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them. The CETA Joint Committee may also make appropriate recommendations."

206. The most important powers of the Joint Committee include, first, the power to "consider or agree" on amendments to CETA (Article 26.1(5)(e) CETA) and second, the power to "adopt interpretations of the provisions of the Agreement, which shall be binding on" the CETA investor tribunals: see Article 26.1(5)(e) CETA.

207. There are a number of striking features regarding this aspect of CETA. First, no provision is made for any judicial supervision of any decisions of the CETA Joint Committee. Second, their decisions are expressed to be "binding" on the Member States. Some of these decisions under Article 26.1(5)(e) CETA interpreting the provisions of CETA could concern matters such as technical barriers to trade (Chapter 4, CETA), tariffs and trade facilitation (Chapter 5, CETA) or trade subsidies (Chapter 7, CETA). These interpretative decisions would be binding on the CETA Tribunals: see Article 26.3(2) CETA.

208. It is perhaps important to state that the power of amendment of CETA is unproblematic. Article 30.2(1) CETA envisages that the parties may agree to amend the Agreement in accordance with their own "respective internal requirements." In the case of the Protocols and the Annexes to CETA the Joint Committee may also take the initiative in the case of amendment, but here again the approval of the parties in accordance with their own internal requirements is required: see Article 30.2(1) CETA. It is clear from the CJEU's decisions in *Singapore Opinion 2/15* and *CETA Opinion 1/17* that the consent of the Member States in accordance with Article 218(8) TFEU is required in respect of any such amendments insofar as any such amendments affect the jurisdiction of the CETA Tribunals under Chapter 8 of CETA since this concerns a competence of the Member States. This means in turns that in the case of Ireland the amendment would have to be laid before Dáil Éireann and the appropriate consent of that body obtained under Article 29.5.2 of the Constitution.

209. Different considerations apply, however, in the case of the power of interpretation given to the Joint Committees by Article 26.1(5)(e) CETA. These interpretative powers are not really powers of "interpretation" in any true, conventional sense of the term. They are rather a quasi-legislative mechanism where the Joint Committees can oversee and, if necessary, curb or reverse, the actions of the CETA Tribunals by means of an interpretative decision. These interpretative decisions would essentially amend, supplement or otherwise vary the text of CETA in much the same way as a national legislature might reverse the effect of a court decision by an appropriate change in the law. This is made clear by paragraph 6(c) of the *Joint Interpretative Document on CETA between the European Union and Canada* (OJ L 11, 14th January 2017) which provides that:

> "In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions

> that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals."

210. All of this would take place in a context where there is no provision for judicial supervision or oversight in respect of this power of "interpretation." Nor are there any guiding principles contained in CETA itself setting any potential limits to this *soi-disant* power of interpretation. All of this means is that the Joint Committee could effectively take it upon themselves to effect wholescale changes in the text of CETA by means of these "interpretative" rulings. Perhaps many of these rulings would be for the better and might well ensure the CETA Tribunals more faithfully reflected the wishes of the drafters. Yet the fact remains that in this regard the Joint Committee would not be subject to any democratic oversight.

211. Whereas Ireland's consent would be required in respect of actual amendments of CETA, this would *not necessarily* be true in respect of other decisions of the Joint Committee concerning the *interpretation* of CETA. These interpretative decisions would then become binding on the CETA Tribunals as well as, of course, this State.

212. As I have just indicated, what is described as interpretative ruling of this kind would generally amount in substance to an amendment of the text of CETA. There would be no necessary parliamentary input from Ireland before such an interpretative decision was adopted by the Joint Committee and even though such an interpretation would generally involve material changes in substance to the text of an international agreement having a charge on public funds. Specifically, there is no procedure envisaged by these provisions of CETA whereby the consent of Dáil Éireann could be obtained in

respect of what in such circumstances might well amount to such material changes to the text of CETA in the manner required by Article 29.5.2. of the Constitution

213. Article 5 of the Constitution declares that the State is a sovereign and democratic state. Democracy is thus made an indispensable feature of the very constitutional identity of the State and the provisions of Article 15.2.1, Article 16, Article 28.4, Article 29.5.2 and Article 47 are just some of the provisions of the Constitution which give practical effect to this commitment to democratic legitimacy and control. The creation of CETA Joint Committees with these powers to make binding decisions for CETA Tribunals (and, thus, ultimately for the State) by means of these interpretative rulings and in respect of whose activities the State will have no guarantee of being able to exert direct control or influence means that the necessary democratic control pre-supposed by the Constitution simply has not been shown to be present. This is especially so given that, as I have just said, in practice these interpretative rulings would generally amount in substance to an amendment of the text of CETA.

214. All of this is to say that in view of the fact that Chapter 8 of CETA concerns matters which are reserved competences of the Member States, the internal constitutional procedures of this State means that any amendments to such an international agreement must be approved by Dáil Éireann in accordance with Article 29.5.2 of the Constitution where (as here) it involves a charge on public funds. This requirement applies irrespective of whether CETA is expressly amended in accordance with Article 30.2 CETA or indirectly by means of interpretative rulings issued by the Joint Committee.

215. In these circumstances, I find myself obliged to conclude that in this respect the ratification of CETA would also violate the democracy guarantee of Article 5 of the Constitution insofar as (i) Article 26.1(5)(e) CETA permits the Joint Committee to issue interpretative rulings which bind the CETA Tribunals; (ii) these interpretative rulings

amount in substance to material amendments of the text of CETA itself (even if not formally expressed to be such) and (iii) where the parliamentary supervision provided for in such circumstances by Article 29.5.2 of the Constitution is not present.

Part XII: Overall Conclusions

216. There is no doubt but that this appeal presents many complex issues. Once one accepts - as I believe one must - that ratification of CETA is not an obligation which is necessitated by our membership of the European Union for the purposes of Article 29.4.6 of the Constitution, then after this long discussion the essential question really is whether it is open to the State to participate in a treaty which provides for a form of alternative justice system enabling private parties to sue the State for damages in respect of our the application or enforcement of our general public law, which awards are then made binding and enforceable under our domestic law, together with a system of Joint Committees with powers to make binding decisions regarding the interpretation of CETA.

217. At one level, one could adopt a pragmatic stance to this question and say once again that the strong likelihood is that there will ultimately be very few cases of this kind against this State. This appeal, however, ultimately presents a matter of principle and, to adopt the famous words of Alderson B. in *Winterbottom v. Wright* (1842) 10 M. & W. 109 at 155, if we go this one step in order to uphold the constitutionality of CETA investor tribunals, then there is no reason why we should not go another fifty.

218. If this could be done with CETA investor tribunals, there would then be no reason why a similar mechanism could not be adopted at a domestic level by the Oireachtas in large swathes of other areas of the law as well, thus hollowing out the system of justice which is so carefully delineated in Article 34 to Article 38 of the Constitution in a manner which has never previously been contemplated. One may equally say that the Constitution contemplates only one justice system, namely, that provided for in Article 34 *et*

seq. To this extent, the provisions of the Constitution prescribing the separation of powers and providing for the distribution of powers to the various institutions of State are all impliedly closed categories in that they simply contemplate one executive (the Government), one legislature (the Oireachtas) and one system of justice (the courts created under Article 34 of the Constitution). Insofar as the Constitution departs from that model (e.g., allowing for preliminary references to the CJEU under Article 267 TFEU or in relation to the resolution of disputes arising from the operation of cross-border bodies established under the Belfast Agreement or the International Criminal Court or the pooling of executive, legislative and judicial powers with the various institutions of the European Union), it is either only by reason of a specific constitutional amendment allowing this to be done or in the unusual and special context of the pacific settlement of an international disputes under Article 29.2.

219. Just as significantly, the CETA Joint Committees are given significant powers to make binding decisions both for the State and for CETA Tribunals regarding the interpretation of CETA in circumstances where no provision is made for judicial or parliamentary control of such decisions. In these circumstances, there are insufficient checks and balances to ensure that the key constitutional objective of democratic legitimacy – a cornerstone of the Article 5 guarantee - is assured.

Summary of Conclusions

220. In summary, therefore, I would conclude as follows:

221. First, so far as the standard of review is concerned, I do not consider it necessary to determine whether this is a case governed by the "clear disregard" test given that I am of the view that the ratification of CETA would clearly breach specific constitutional boundaries, express or implied, as objectively interpreted and construed by this Court

222. Second, since the Court of Justice has made clear in its *CETA Opinion 1/17* that ratification of CETA requires the consent of each Member State, the ratification by the State of CETA is not a "necessitated obligation" of Union law for the purposes of Article 29.4.6 of the Constitution. This means in turn that the issue in the present appeal reduces itself to whether the ratification of CETA by executive act following Dáil approval for the purposes of Article 29.5.2 would be unconstitutional.

223. Third, it is clear from the terms of the ICSID (Washington) Convention and the judgment of the UK Supreme Court in *Micula* that assuming the procedural formalities have been complied with and in the absence of some highly unusual defence such as fraud, the High Court enjoys no real discretion in the matter and has little option but to give effect to any award of a CETA Tribunal.

224. Fourth, while CETA tribunal awards in respect of this State are likely to be rare, the fact remains, however, is that they could happen. In those circumstances the State would thereby be exposed to damages claims on a *strict liability* basis in respect of otherwise *validly* enacted legislative measures. The very fact, however, that this *could* happen is sufficient for constitutional purposes, since to my mind this necessarily compromises the legislative sovereignty of the State, thereby violating Article 5 of the Constitution. In particular, the absence of a *Pine Valley*-style protection in respect of legislative measures - heretofore regarded as an essential safeguard for the legislative autonomy of the Oireachtas - is telling.

225. Fifth, the effect of CETA is to allow a body composed of persons who are not judges and who are not appointed by or answerable to any of the institutions of the State to exercise judicial powers in respect of the State and, critically, to give judgment which is prima facie binding and enforceable under our own domestic law. In my view this is plainly incompatible with the juridical sovereignty of the State. I would therefore hold

that the ratification by the Government of CETA in its present form would infringe Article 5 of the Constitution read in conjunction with Article 34.1.

226. Sixth, the creation of CETA Joint Committees with the powers to make binding interpretative decisions for the State in respect of important aspects of trade policy and in respect of whose activities the State will have no guarantee of being able to exert direct control or influence means that the necessary democratic control is not present. In these circumstances, the conclusion that the ratification of CETA would also violate the democracy guarantee of Article 5 of the Constitution is inevitable.

227. It follows, therefore, that I would allow the appeal of the plaintiff. I would accordingly grant a declaration to the effect that the ratification by the Government of CETA would be unconstitutional inasmuch as its provision for investor tribunals with powers to make binding and enforceable awards in respect of State liability would compromise our legislative and juridical sovereignty, contrary to Article 5 of the Constitution read in conjunction with Article 15 and Article 34. I would also grant a declaration that ratification of CETA would infringe Article 34.5.6 of the Constitution in that it would purport to allow another court or tribunal to go behind the finality and conclusiveness of a decision of this Court by making a binding award of damages against the State in respect of a decision of this Court.

Part XIII: Curing the unconstitutionality

228. It is clear from all that I have just stated that the Government could not proceed in a constitutionally acceptable manner to ratify CETA *as matters stand.* I emphasise the latter words. There are, however, certain circumstances in which the Government and the Oireachtas could nonetheless give effect to CETA *if* certain legislative changes were to be made. I stress here, of course, that this is entirely a matter for the Government and the Oireachtas. The Government might not, for example, wish to proceed with CETA

in those circumstances or the Oireachtas might not wish to pass the appropriate legislative changes. I am simply indicating what while the ratification of CETA cannot be ratified by Dáil resolution in its present form, it would nevertheless be possible to ratify CETA with the appropriate legislative changes which ensured that the constitutional identity of the State and its sovereignty was thereby safeguarded. I shall now endeavour to explain precisely what I mean.

229. First, under no circumstances could CETA be ratified in its present form *simply* by means of a resolution of Dáil Éireann under Article 29.5.2 of the Constitution because, as I have indicated at various points in this judgment, this method of giving effect to CETA Tribunal decisions amounts in substance to an amendment of s.25 of the 2010 Act. It is important to be clear about this: there is absolutely nothing wrong in s. 25 of the 2010 Act insofar as it generally seeks to give effect to the ICSID and New York Conventions. The difficulty here is that s. 25 of the 2010 Act – designed as it was to give effect to conventional arbitral awards in respect of standard commercial arbitration – has been pressed into service for a different purpose entirely, namely, to give effect on a more or less automatic basis to the decisions of the CETA Tribunal. This amounts in substance to a considerable broadening of the scope and purpose of s. 25 of the 2010 Act for which there has to be the appropriate legislative base in the manner that Article 15.2.1 of the Constitution requires. It would accordingly be necessary that the appropriate legislation - and not simply a Dáil resolution under Article 29.5.2 - modifying or supplementing, for example, s. 25 of the 2010 Act (and perhaps other similar items of legislation as well) be enacted by the Oireachtas as a whole.

230. Second, while such legislation is necessary, this *in itself* would not be sufficient. The Constitution *does not* permit the Government to ratify CETA nor the Oireachtas to enact the appropriate legislation giving effect to that decision *for so long as* the defences

to enforcement of a CETA Tribunal award under the ICSID and the New York Conventions respectively remain as circumscribed as they currently are. The gravamen of the constitutional objection which I have upheld is that, upon ratification of CETA as is currently proposed, the High Court would be virtually powerless to refuse the enforcement of a CETA Tribunal award even where that award is in substance at odds with either our general constitutional identity and fundamental constitutional values on the one hand or our general EU obligations of loyalty to the institutions of Union and upholding the integrity of Union law on the other.

231. In some ways the key to this is the analysis of the ICSID Convention contained in the joint judgment of Lord Lloyd-Jones and Lord Sales for the UK Supreme Court in *Micula v. Romania.* While they noted that the conventional view of the ICSID Convention is that it permits review by a national court only on grounds relating to the authenticity of any award sought to be enforced, they ([2020] 1 WLR 1033 at 1056) also thought it was "arguable" that Article 54(1), by framing the relevant obligation as to enforcement as an obligation to treat an award under the Convention as if it were a final judgment of a local court, allows certain other defences to enforcement which are available in local law in relation to such a final judgment to be raised.

232. In effect, therefore, it is open to the Oireachtas to build on what was said in *Micula* and to spell out in legislative form the defences to the enforcement of such a final judgment of the CETA Tribunal in the manner tacitly contemplated, for example. by Article 54(1) of the ICSID Convention. If, therefore, the range of domestic defences in respect of applications to enforce ICSID (or, for that matter, the New York Convention applications) concerning CETA Tribunal awards currently provided for in the 2010 Act were legislatively broadened in the manner I have just indicated, then in principle ratification of CETA following the enactment of such legislation might lawfully proceed.

233. While not wishing to be prescriptive, it would be necessary at a minimum to move from the present virtually automatic enforcement procedure to a situation where the High Court, when called upon to give effect to a CETA Tribunal award (as distinct from an ordinary commercial arbitration award) under either the ICSID Convention or New York Convention and s. 25 of the 2010 Act, was expressly empowered by that new legislation to refuse to give effect to that award where it considered that:

(a) the award materially compromised the constitutional identity of the State or fundamental principles of our constitutional order, or

(b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of Fundamental Rights and Freedoms) and to preserve its coherence and integrity.

234. Thus, for example, if a CETA Tribunal were in the course of its award to refuse to follow a material decision of the Court of Justice directly on point, then CETA could only be constitutionally ratified in a manner conforming with our general constitutional obligation in Article 29.4.4 to give effect to EU law if the High Court were to be invested with the express power to refuse enforcement of such a CETA Tribunal award on this specific ground.

235. The same naturally holds true where the award materially compromised our own constitutional fundamentals and constitutional identity. While this category is, perhaps, never closed, it would, for example, embrace circumstances where the High Court considered that the CETA award proposed to be enforced was at odds in some material way with the legislative and juridical autonomy of the State.

236. All of this is another way of saying once again that the fundamental constitutional objection to CETA in its current form is that such CETA Tribunal awards are in substance

converted almost automatically into judgments enforceable in this State in circumstances where the High Court has been deprived of its capacity to supervise such awards on the ground that they respect the constitutional identity and values of this State, together with our general duty to uphold the coherence and integrity of EU law. This fundamental constitutional objection would accordingly be cured if the Oireachtas were to amend the 2010 Act so that the High Court were to be expressly invested with this power in respect of the enforcement of decisions of the CETA Tribunal.

237. All of this, however, potentially lies in the future and, to repeat, remains a matter for the Government and the Oireachtas to consider and deliberate. It is sufficient to say that, absent such potential legislative changes, the plaintiff's claim that CETA cannot constitutionally be ratified in its present form must therefore be upheld and his appeal must accordingly be allowed.