THE SUPREME COURT

[RECORD NO.: S:AP:IE:2021:000154]

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

BETWEEN:

PATRICK COSTELLO

APPELLANT

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 11th day of November, 2022

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Summary

1. For the reasons set out in this judgment, I would affirm the order of the High Court and would dismiss the appeal.

2. The appellant seeks to assert that the Comprehensive Economic and Trade Agreement ("CETA" or "the Agreement") is repugnant to the Constitution. He does so on two essential grounds. These arise under Article 15.2.1 and Article 34 of the Constitution.

3. This judgment would reject the case that, by reason of "legislative chill", the Agreement offends against Article 15.2.1 of the Constitution. The case made is speculative, and hypothetical, but, additionally, is a question appropriate to be determined by the Oireachtas, rather than the courts.

4. The judgment would also reject the appellant's case that either the text, or probable application of the CETA Tribunal provisions, would offend against Article 34 of the Constitution, by reason of being an "administration of justice" by a tribunal other than the courts established under the Constitution. Again, the case rests on hypothesis. The appellant's case has not been established either by reference to the text of the Agreement, or on the basis of any probable interpretation or application of CETA. The appeal must fail, as the case does not meet the evidential or legal threshold of probability.

5. However, while holding that the case as pleaded as a constitutional challenge cannot succeed, the judgment adds a number of observations agreeing with legislative measures proposed, which would nonetheless be appropriate for the purposes of ratification by the Government and the Oireachtas.

SECTION I – THE PARAMETERS OF THE APPEAL

Introduction

6. In this appeal the Court is asked to consider the constitutionality of the Comprehensive Economic and Trade Agreement entered into between Canada, of the one part, and the European Union and its member states, including Ireland, of the other part. The negotiating parties reached agreement on a text as long ago as 30th October, 2016. Since then, the question of ratification has been under consideration by the member states.

7. The appellant, a Green Party member of Dáil Eireann, contends the Agreement is repugnant to the Constitution of Ireland. His claim failed in the High Court. He has now appealed directly to this Court, in what, by any standards, is a highly complex case, which raises issues which are fundamental to democracy and the rule of law.

Context

8. Four provisions of the Constitution provide the essential reference points for the assessment of constitutionality.

9. First, Article 5 of the Constitution is fundamental to the structure of the State. It provides that Ireland is a sovereign, independent, democratic state.

10. Second, Article 6, equally significantly, states that all powers of government derive under God from the People. Article 6.2 provides, in terms, that the powers of government are exercisable only by, or on the authority of, the organs of State established by this Constitution. What is provided in both Articles are part of the constitutional identity of this State.

11. This appeal focuses on two further fundamentally important Articles which deal with the legislative and judicial organs of government.

12. Therefore, third, Article 15.2.1 deals with legislative power. It states that the sole and exclusive power of making laws for the State is vested in the Oireachtas. It provides that no other legislative authority has power to make laws for the State. The appellant contends the Agreement would impose a "legislative chill" on our national parliament's willingness to legislate in areas he identified in evidence, including those touching on the environment.

13. Fourth, Article 34 of the Constitution deals with judicial power. It states that justice is to be administered in courts established by law, by judges appointed in the manner provided by the Constitution. Furthermore, it provides that the decisions of this Court shall, in all cases, be final and conclusive. The appellant contends that Tribunals which are proposed to be set up under CETA would amount to an "administration of justice" prohibited under the Constitution.

14. The appellant's case is that, if ratified, the Agreement would be void, as it would be repugnant to these Articles of the Constitution. Through counsel, he contends that for ratification, it would be necessary to have a referendum of the People to determine whether to ratify the Agreement, and, if so, the terms under which the Constitution might be amended to accommodate the Agreement.

15. This judgment considers the constitutionality of CETA, having regard to Articles 15 and 34 of the Constitution.

The Constitution and International Law

16. By way of background, it should be said that the Constitution already contains a number of amendments concerning accession to international agreements and EU instruments. These are to be found in Article 29 of the Constitution. These include accession to the European

Atomic Energy Community (Article 29.4.3); the European Union (Article 29.4.4); the Treaty of Lisbon (Article 29.4.5); the Belfast Agreement and institutions created by that agreement (Article 29.7); and accession to the Rome Statute of the International Criminal Court. These amendments were deemed necessary as it considered accession to each would involve questions of sovereignty, specifically the legislative or judicial powers of this State.

17. The extent to which Ireland has acceded to other international treaties and agreements without the necessity for a referendum is not always appreciated. These include membership of the Council of Europe, involving the European Convention on Human Rights in 1950; and membership of the United Nations in 1954. By varying legal routes, this State has acceded to over 1,000 international agreements, sometimes, but not always, concerning trade. (see The Law Reform Commission's Discussion Paper on *Domestic Implementation of International Obligations*, LRC 124-2020).

The Questions Arising

18. When described in an over-simplistic way, it might appear at first sight that the issues for the Court to determine are relatively straightforward. If engaged in a normal adversarial procedure, the Court would examine the CETA text in order to determine whether, as a matter of probability or likelihood, the Agreement did offend against either of those Articles, either on its face or in its likely interpretation.

19. In this appeal, however, that apparently simple question is not so easily answered. What is before this Court is unique in many respects – not least because of a want of certainty as to what exactly the Agreement will finally provide. That is not the fault of the parties. The Court is dealing with an ongoing process.

20. But, here, the Court finds itself having to consider matters of form, substance, and contingency. In legal form, this appeal is a constitutional challenge, based on alleged repugnancy. But the question of legal substance not only involves the Agreement itself, but provisions within it which allow for amendment of terms, and other possible amendments now envisaged. These latter factors raise the problem of contingency. They concern aspects of the Agreement which, the appellant contends, would offend the Constitution if they occurred. But these events have not occurred.

21. In bringing this case, the appellant, understandably in view of his area of interest, focused on the effect which ratification of CETA might have on the ability, or willingness of the Oireachtas to legislate on environmental issues. He apprehends that one of the potential consequences of the Agreement might be that an arbitral award made under CETA, compensating a Canadian investor for legislation curtailing its activities, might expose the State

to large awards in damages awarded by arbitrators appointed under the CETA. Put more specifically, the Article 15 question is whether, if ratified, CETA might deny or inhibit the power of the Oireachtas to be sole legislator for the State?

22. A somewhat similar question is whether the Agreement actually offends against the Article 34 of the Constitution, which rests the administration of justice on the judiciary appointed under the Constitution. As I seek to explain in this judgment, this case is unlike any other constitutional appeal. Even now, it is not based on a complete, concrete, factual background or description as to how the CETA arbitral system *will* operate. This renders the task facing the Court far more difficult. It is, I suggest, one of the reasons for the approaches taken by my colleagues.

23. I will presently consider aspects of the CETA text. But a simple textual analysis would be too narrow. There are good reasons to ask a second question. This is whether, on a fair reading of the text, there may be circumstances where an unconstitutionality may be foreseeable. This second question can be divided into two sub-divisions, asking respectively whether unconstitutionality is probable or merely possible. The third issue is, even if an unconstitutionality is hypothetically possible, but not probable, what steps should be taken to protect the Constitution.

The Task Facing the Court

24. At the outset, it is worthwhile reflecting on the process in which the Court is constrained to engage. Again, it must be emphasised that the term "constrained" does not connote any attribution of blame to the parties. They are not responsible either for the Agreement or events which occurred subsequently. But the Court is asked to provide what, in many respects, is close to an advisory opinion.

25. It is true that the Constitution makes provision for advisory opinions. But, generally, this is in one circumstance only. Article 26 of the Constitution permits the President, after consultation with the Council of State, to refer a Bill to this Court for its opinion as to whether such Bill, or any part thereof, is repugnant to the Constitution. But that jurisdiction is used sparingly. In such a proceeding, the Court must examine a range of hypothetical circumstances of varying probability in determining constitutionality or repugnancy. But ultimately the threshold must be reasonableness and probability. This is a difficult process, made more so by a short timescale, and by the fact that, once a decision as to constitutionality is reached, it is conclusive for all purposes.

26. In such references, the test of repugnancy or invalidity is as to the form and effect the Bill will have if, and when, ratified (*In re Article 26 and the Emergency Powers Bill 1976*

[1977] I.R. 159, at 174, O'Higgins C.J.). But the threshold is not whether some proposal might *conceivably* affect an Article of the Constitution, but whether, on a reasonably objective reading, the particular proposal *actually*, or probably, offends the Constitution.

27. This is not an instance where the Court is asked by the President to provide an advisory opinion as to constitutionality. Here, the first task is to consider the text itself, next, to consider any reasonably foreseeable consequences, and, finally, contingency.

The Text of CETA

28. As set out earlier, the negotiations began in a different international trading environment from now. The entry into force, and provisional application of the Agreement, are both governed by Article 30.7 of the Agreement. This provides that the parties are to approve it in accordance with their respective "internal requirements and procedures". Many parts of CETA are already in operation. But Section 8, which deals with the arbitral Tribunal, is not in effect. Under Article 30.7.2, CETA is not to enter into full force until a prescribed date, after the parties have exchanged written notifications, certifying that they have completed their respective internal requirements and procedures. The question of ratification is one of mixed or shared competence. Thus, as well as ratification by the European Union itself, CETA falls to be approved in accordance with the law and the Constitution of this State, and other member states.

Scope and Range

29. The High Court judgment fully describes the content of the Agreement which runs to over 1,000 pages. Its overarching purpose is to reduce trade barriers between Canada and the EU and its member states. It comprises both text, running to 200 pages, a series of annexes, grouped by reference to chapters of the main agreement, protocols, and reservations. Nearly half of the document (just under 500 pages) is said to involve reservations which, under the terms of the Agreement, may be taken by a party with respect to existing measures that do not conform to CETA provisions.

30. Even such a cursory description of the Agreement gives some idea of the extent of detail involved. It contains provisions relating to a vast range of goods, services, and products, as broad as the export of motor vehicles from Canada into the European Union, and as narrow and precise as trade in fibres of stipulated specifications, types of footwear, agricultural products, fish export and import, and identified types of food products.

31. Some further measure of the detail of the issues can be gauged from the fact that, by the time it reached this Court, it had already been the subject of a comprehensive judgment in the High Court of some 120 pages. But an additional mark of this complexity is the fact that, as a

number of important features had not been fully explored in the first hearing, this Court took the unusual, but not unprecedented, step of again sitting in order to allow the parties to address a considerable number of specific questions put by the Court.

The High Court Judgment

32. The High Court judge, Butler J., helpfully summarised her conclusions on the various strands of the case.

33. First, she held that the appellant had *locus standi* to bring the action. But it followed from the nature of his claim, which sought to prevent the ratification of CETA through the method proposed, that he should be allowed to make arguments, which could be characterised as speculative, as to how CETA would operate if ratified. However, Butler J. concluded that the appellant should not be permitted to make arguments specifically invoking the rights or interests of third parties where it would remain legally possible for those third parties to bring proceedings if they so wished after the ratification of CETA (if that occurred).

34. Second, the judge held that the presumption of constitutionality applied; thus the appellant bore the onus of proof and must clearly establish the unconstitutionality which he alleged in order to succeed in his claim. However, the focus of the appellant's case was not upon the policy choices made by the Government in entering into CETA; rather it was on the procedures through which it proposed to ratify CETA. The resolution of that issue did not attract an additional or higher standard of review.

35. Third, the judge held CETA was an international agreement which, if ratified, would bind the State as a matter of international law. However, she concluded that under its own terms, it would not have direct effect in Ireland, and could not be invoked before the Irish courts. Equally, the CETA Tribunals would not have jurisdiction to declare any provision of Irish law, or any act taken by an Irish authority to be invalid.

36. Fourth, the judge held that, because CETA would operate only at the level of international law, its provisions could not be characterised as laws made for this State in breach of Article 15.2 of the Constitution.

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

38. Sixth, and significantly, the judge held the jurisdiction to be exercised by the CETA Tribunal did have the characteristics of an administration of justice. However, she concluded, this would not be an "administration of justice" under the Irish Constitution, because the

disputes which would be determined by the CETA arbitral Tribunal were not justiciable under Irish law; rather, they would arise, and could be determined only, as matters of international law. Although investors would have a choice of jurisdiction in which to bring their claims, the choice to bring a claim before the CETA Tribunal would not amount to a subtraction of jurisdiction from the Irish Courts. Consequently, the judge concluded, the creation of, and conferral of jurisdiction upon the CETA Tribunals, would not be contrary to Article 34.1 of the Constitution.

39. Seventh, if the foregoing conclusion was not correct, and the CETA Tribunal was administering justice within the meaning of Article 34, then its jurisdiction was not "limited" for the purposes of Article 37.

40. Eighth, the judge held that CETA did not entail an unconstitutional transfer of the State's sovereignty. Consequently, ratification of CETA through Article 29.5.2 of the Constitution was appropriate and permissible. It was a matter for the Dáil as to whether it is politically desirable to do so.

41. Ninth, the judge concluded, the subject matter of the entirety of CETA fell within the competence of the European Union, being either a matter of exclusive EU competence (under the common commercial policy), or a matter of shared competence (under free movement of capital). However, she observed the CJEU had held, as regards a similar free trade agreement, that ratification by member states was required, not just because of the fact that part of the subject matter fell within an area of shared competence, but because of a dispute resolution mechanism contained within that agreement. In those circumstances it was difficult to construe ratification of CETA as something that was "necessitated" by virtue of obligations of membership of the EU for the purposes of Article 29.4.6 of the Constitution.

42. It followed from these conclusions that the High Court judge was of the view that the appellant had not established that ratification of CETA by the Dáil would be clearly unconstitutional. Therefore, upon that basis, she refused the reliefs sought by him.

43. I would here add a comment. In the past, the People of this State have shown themselves well able to deal with complex issues by way of referendum. If there are clear grounds for determining that there may be constitutional repugnancy, that cannot be a deterrent to holding there must be a referendum. But even that very short description of the dense content might provide grounds for reflection, if no more.

The Negotiating Parties to CETA

44. This is a judicial consideration of whether constitutional issues arise in CETA. But it is important not be misunderstood. The negotiating parties have approached this issue in good

faith. Canada, the European Union, and its member states, all enjoy the highest reputation as jurisdictions bound by, and operating under, the rule of law; in the case of Canada, expressed in its Charter and laws, supported by independent courts applying a comprehensive body of influential constitutional jurisprudence, at the apex of which is the Supreme Court of Canada. There is no question of *mala fides*.

45. The Union, too, is bound by the treaties and laws made thereunder, and subject to the Charter of Fundamental Rights. Ireland, as every other member state, is bound by its own constitution, laws and regulations, as well as provisions for the manner in which, on the basis of shared political sovereignty, EU law will take effect within this State. What is in issue in this case are not the *bona fides* of the negotiating parties involved, but, rather, the constitutional effects of what will be entailed by ratification of the Agreement. The issues now become clearer by an outline of the parties' cases.

The Submissions to this Court

The Appellant

46. Counsel for the appellant submitted that the issue of sovereignty lay at the centre of this case. He contended that the Agreement was one which the State and the Executive did not have the capacity to enter without the mandate of the People of Ireland speaking through a referendum. His submission largely focused on Article 34 of the Constitution.

47. Counsel contended that, if ratified, Chapter 8 of the Agreement, a section not yet ratified, would enable Canadian investors to pursue CETA claims against this State through an arbitral Tribunal established under the Agreement. The effect of this, he submitted, would be that, having pursued a CETA claim, such investor would thereby preclude any further litigation of the issues before the courts of this State. The consequences of this were that State liability for legislative measures adopted which might be inimical to Canadian investors would move from a national to an international law plane. The State would become subject to a mandatory external jurisdiction should it fail to regulate or legislate in accordance with CETA.

48. Counsel argued that this "external jurisdiction" was such as would permit substantial awards to be made in favour of Canadian investors against the State; but these awards would be binding and cognisable under rules made and promulgated by ICSID (International Centre for Settlement of Investment Disputes) and UNCITRAL (United Nations Commission on International Trade Law). Counsel submitted that under Chapter 8 of CETA all signatories and organisations within this State would be subject to potential adjudication in respect of their actions and measures.

49. Thus, he submitted the judicial power of the State, under Article 34 of the Constitution, would no longer be the sole repository of the administration of justice, as provided for in the Constitution. Rather, in matters coming within the CETA remit, and at the sole election of a Canadian investor, it would be CETA which would be empowered to make an award, including vesting it with a process with extensive powers of enforcing the claim. The effect of these arrangements would be to create potential liabilities for the State, which could not currently arise. Counsel submitted that the effect of CETA was to abrogate the sovereign immunity of the State, protected under Article 29.3 of the Constitution.

50. Counsel referred the Court to Article 8.22(f) CETA. Under it, if a Canadian investor withdraws legal proceedings concerning a measure alleged to constitute a breach of the Agreement and waived his or her right to compensation in a national court, such investor may thereafter submit a CETA claim, pursue such a claim before an arbitral Tribunal subject to ICSID or UNCITRAL Rules, which claim would become binding in this State under the Arbitration Act, 2010.

51. Under Article 8.25, member states would consent to the settlement of disputes of the CETA Tribunal under what is, effectively, a self-contained code. Counsel submitted that this vested a jurisdiction to determine claims, which might otherwise be brought in Irish courts, in CETA, in circumstances where the consent to jurisdiction by the CETA courts was, in effect, irrevocable, or at least irrevocable for many years. This, it was submitted, constituted an alteration to the substantive law of the State. Counsel argued that, by contrast to a single arbitration agreement, or even a series of them, what was referred to as a "habitual giving effect" to the Treaty would have consequences which, absent a referendum, would constitute a violation of Article 29 of the Constitution.

52. Thus, he contended, this Court had to consider whether a distinction could be made between, on the one hand, a normal commitment to an arbitration, to which the State might be a party, and, on the other hand, one where CETA created a framework which, effectively, "captured" all arbitrations within its remit, and where the State would not have a power of opting out, save after many years, with unknown consequences Adherence to CETA, it was argued, constituted an "*ongoing temporal surrender"* of jurisdiction by comparison to a simple agreement to submit a claim to arbitration. Such a measure would not be capable of remedy by legislation, as a matter of ratification would, by then, not be in compliance with Article 29.4 of the Constitution. It would, rather, be an abdication of sovereignty, rendering the CETA procedures as ones having a status equivalent to the laws of this State.

53. Counsel referred the Court to Article 5, 6.1 and 6.2 of the Constitution, which define the nature of the State, and provide that all powers of government derive from the People, which powers of government are exercisable only by, or on the authority of, the organs of the State, (Executive, Legislative, Judicial), established under the Constitution. He contended that the open-ended nature of the Agreement was inherently constitutionally objectionable. This distinguished it from the factual situation which existed from the Court in *Pringle v. Ireland* [2013] 3 I.R. 1 ("*Pringle*"), which envisaged that there might be a single, or even a number of, individual instances of potential incursions into sovereignty. In this case, it was said that it was not open to the State to ratify the Agreement by passage of a resolution in Dáil Éireann.

54. When the case came before this Court, counsel informed the Court that CETA had reached a preliminary stage of existence, that is, that fifteen Tribunal members had already been identified, but that the Tribunal itself had not been established, and that this would not take place until the entire Agreement was ratified.

An Observation

55. It is not unfair to make a comment here. Reduced to its essentials, this appeal is not only about text, but contingency. Underlying the appellant's case is a question of apprehended threat. It is that CETA has some of the features of a Trojan Horse. While portrayed as a benefit, bringing free trade and economic growth, it is suggested it could carry with it the potential for an enhanced supernational form of trade dispute resolution, which goes further than that to be found in other free trade agreements, and, itself, would become an "administration of justice".

56. Just as a constitution is a living instrument, counsel argues this Agreement, entered into in good faith, might by reason of its own terms, and their application or interpretation, evolve into a "living instrument", which, even if not at present offensive to the Constitution, might, in time, become so, on the occurrence of particular claims or interpretations.

57. The appellant contends that, by creating the potential for large awards of compensation for disappointed investors in CETA arbitral awards, the Agreement might, for example, inhibit the Oireachtas from legislating on an environmental issue, for fear of serious financial consequences to the State. This second concern, of no less significance, is the potential for an infringement of the constitutional protection of the status of the courts, specifically in the area of enforcement of CETA awards. Counsel raised the possibility that an award made by the Tribunal might become a form of administration of justice having an effect *in* this State, although not as a result of an administration of justice by the courts *of* this State.

The Respondent

58. Counsel for the State responded that the appellant had failed to analyse the meaning and ambit of the constitutional provisions, which, he said, would prohibit ratification. The core proposition for the State was that CETA would not form part of the domestic law of the State. Thus, it simply was not possible to conclude that CETA violated Articles 15 or 34 of the Constitution, or any other Article.

59. Counsel referred to Article 30.6 of CETA, which provides that nothing in the Agreement was to be construed as conferring rights or imposing obligations on persons, other than those created by the parties under public international law. The Agreement could not be directly invoked in the domestic legal systems of the parties. He submitted that, when, or if, established, a CETA Tribunal would be applying the Vienna Convention on the Law of Treaties, and other rules and principles of international law (Article 8.31.1), not national law.

60. Counsel contended that under Article 8.31.2, the Tribunal would not have jurisdiction to determine the legality of a measure alleged to constitute a breach of the Agreement under the domestic law of a party. Rather, the Tribunal might consult the domestic law of a party as a matter of fact; and in doing so, the Tribunal would have to follow the prevailing interpretation given to the domestic law by the courts or authorities of that party, and any meaning given to the domestic law by the Tribunal would not be binding upon the courts or authorities of that party.

61. Counsel drew attention to the fact that, under Article 8.22.1 of CETA, it is provided that an investor might only submit a claim pursuant to Article 8.23 if such investor withdraws any proceedings before a tribunal or court under domestic or international law, with respect to a measure alleged to constitute a breach referred to in its claim; and if such investor waived its right to initiate any claim under domestic or international law in any domestic court.

62. As to its effect, counsel referred the Court to the judgment of this Court in *McD v. L* [2010] 2 I.R. 199. There, this Court emphasised that Article 29.6 of the Constitution is imbued with the notion of dualism. It provides that no international agreement is to be part of the domestic law of the State, save as may be determined by the Oireachtas. Thus, in the domestic sphere, national law takes precedence over international law. By contrast, on the international plane, international law will take precedence over national law. Thus, a state cannot generally rely on its constitutional provisions as an excuse for not fulfilling international obligations. But international law can only take effect within the State to the extent permitted by the Oireachtas.

63. Counsel cited passages from *Pringle* to similar effect. It was not disputed that it was intended that a CETA decree could be enforced in this State by virtue of the Arbitration Act, 2010, but that alone did not transgress the law of this State.

Issues Discussed in Legal Argument

64. In the course of submissions, it was suggested that the text of the Agreement would not preclude the possibility that, having brought proceedings in Ireland to a conclusion, an investor might thereafter invoke the CETA jurisdiction. But counsel for the State pointed out that, in such a scenario, the investor would thereafter be invoking the CETA jurisdiction and, therefore, it would not be the same claim, but rather a CETA claim. The Court raised the point as to whether, for a CETA enforcement claim to be rejected in an Irish court, the award would have to be based on a manifest denial of justice.

65. Similarly, if an issue emerged where an investor might invoke CETA claiming a monetary award by an Irish court did not constitute fair compensation, counsel submitted such a scenario would not be offensive to the Constitution, as it would not constitute a subtraction from the jurisdiction of the Irish courts, but rather orders operating in two different spheres of law, one national, the other international. Thus, as a hypothesis, a CETA Tribunal might potentially conclude that a decision of this Court was a denial of justice. But counsel submitted such an eventuality could occur only were there a finding of targeted discrimination, a matter prohibited by CETA.

Areas of Agreement

66. I now deal with some areas of agreement.

67. First, I agree that there is no question that the Agreement is necessitated by membership of the European Union. Ratification is a matter of mixed competence.

68. Second, subject to what is said later, I accept this is a case where, *potentially*, the effect of the Agreement *might* raise a question of creating a charge upon public funds of the State. This means, at minimum, the Agreement must be approved in full by Dáil Éireann (*The State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 201).

69. Third, I approach the case on the basis that the appellant bears the onus of proof. But, having identified these three, one cannot ignore the fact that difficult questions nonetheless remain concerning the task which falls to the Court.

70. There is no doubt that, in bringing this case, the appellant and his legal team performed a substantial public service. This is, pre-eminently, an issue of general public importance. But while argument in this Court, both in the first and second hearing, brought clarity to some issues, it also identified a number of questions which, even now, cannot be said to be fully

determined. This judgment now deals with the fact that further material emerged even after the appeal was heard. Prior to considering the content, it may be useful to consider the principles of justiciability and judicial discretion when there is uncertainty as to facts.

Factual Uncertainty, Justiciability and Discretion

71. At the level of constitutional law principle, there remain areas in this appeal where, despite the detailed argument, are so uncertain that one might almost question whether this case is actually justiciable, in the sense of being apt, appropriate, or capable of determination by a court. A number of factors, both internal to the Agreement, and external to it, which, in normal circumstances, might lead a court to decline jurisdiction, as it is being asked to provide an advisory opinion. (On which, see H. Hogan, *The Decline of Article 26: reforming abstract constitutional review in Ireland*, Irish Jurist, Vol. LXVII, New Series 2022, Round Hall, p.123).

72. Again, speaking at the level of principle, courts operate upon an identified set of facts. When interpreting a document, whether it be a treaty, a piece of legislation, or a contract, a court will have the defined and final text before it. Constitutional law proceeds upon the well-known concept of *maturity*. When an issue is "*mature*", this means that an issue before a court is one which is appropriate for decision by that court. In United States jurisprudence, the term used is that the question is "*ripe*" for legal determination. A case is mature, or "ripe for determination", when the facts are capable of ascertainment.

73. But the doctrine of maturity has a corollary. Courts may decline to determine issues or deliver a judgment on a question which is *premature*, that is, one which, although it might raise a *potential* legal issue, is one where it is by no means certain that such issue will, in the event, actually arise, or is even likely to arise in the future. Such issues are defined as "contingencies", that is, events which may occur, but where it is unclear whether they will, or will not. When faced with prematurity, courts will, generally, refrain from expressing a conclusive view, especially on a hypothetical situation. It is not necessary to look to the United States for illustrations. They are to be found in our own case law. I refer to these other cases not as by any means determinative of the issue in the case but purely as illustrations of points made in legal argument in this appeal regarding the unprecedented "advisory" nature of the task the Court is asked to undertake.

McNally v. Ireland

74. In *McNally v. Ireland* [2011] 4 I.R. 431, the High Court had to deal with an application by a plaintiff seeking to challenge a provision which created a criminal offence for the sale of mass cards, even though he himself was not facing a prosecution. The court took the view that the plaintiff had *locus standi* to take the proceedings as the new offence could have impacted

upon his business of selling pre-signed mass cards. However, the court went on to hold that he did not have *locus standi* to make various arguments based on provisions of Article 44 of the Constitution regarding the wall of separation between Church and State.

75. The court held that the challenge brought by the plaintiff was based upon a series of contentions relating to the penalties which would apply upon conviction on indictment. But, the court concluded, this was premature and could not be determined. First, the offences in question were triable either way. Second, it would be purely speculative to allow the plaintiff to make the argument of disproportionality, as it could neither be assumed that he would face a prosecution, nor that it would be an indictment, nor that, upon conviction, a court would be minded to impose a severe sentence. As these were theoretical or hypothetical questions, the case could not succeed.

Blythe v. Attorney General

76. Much earlier in our legal history, in *Blythe v. Attorney General (No. 2)* [1936] I.R. 549 ("*Blythe*"), the plaintiffs, who had previously formed organisations which had been declared unlawful by the Executive Council of the Irish Free State, apprehending that they might again be prosecuted, sought a declaration that, under the 1922 Constitution, they were entitled to form a new body known as the League of Youth, "a disciplined unarmed association", in place of an earlier organisation, the Young Irelanders Association.

77. The action was based on the then Order XXV, Rule 6, of the then Rules of the Superior Courts, which provided that no action or proceeding should be open to objection on the ground that a merely declaratory judgment or order was sought thereby, and the court might make binding declarations of right whether consequential relief is, or could be, claimed or not. Speaking for the former Supreme Court, Johnston J. held that the fact that every individual was bound by rights and duties did not confer jurisdiction to make a declaration of rights in every case. A declaration must be binding. The Court held that it had no jurisdiction to make a binding declaration, or, even if it had jurisdiction, it would exercise its discretion to dismiss the action because the plaintiffs had not been "attacked". The Government had taken no action whatsoever to suppress the new association. (page 554). (See also *Lennon v. Ganly* [1981] ILRM 84).

U.S. Case Law

78. I refer to case law from other jurisdictions merely by way of illustration of the points just made. The proposition that a court will not, generally, deliver a judgment in relation to a speculative future contingency, is well established elsewhere in the common law world. What is generally needed is a real and substantial controversy admitting of specific relief through a

decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (*Lewis v. Continental Bank Corp*., 494 US 472, 477 [1990]; *North Carolina v. Rice*, 404 US 244, 246 [1971]; *AETNA Life Insurance Co. v. Haworth*, 300 US 227, 241 [1937].) (See, generally, Tribe, *America Constitutional Law*, 3rd Ed., Foundation Press.)

79. In *United States v. Fruehauf*, 365 U.S. 146 (1961), the Supreme Court of the United States refused to give an "*advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faceted situation*" embracing conflicting and demanding interests (p.157).

80. While the appeal before this Court lacked nothing in the clash of "adversary argument"; while the appeal is undoubtedly "multi-faceted", it must be said that through no fault of the parties there remains a distinct "lack of concreteness".

McDonald v. Bord Na gCon and Zalewski v. Workplace Relations Commission

81. The question of hypothesis or contingency can be seen through another prism. This Court has recently had the occasion to consider the features and characteristics of the administration of justice as identified earlier in *McDonald v. Bord na gCon* [1965] I.R. 217, and considered in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. While, in *Zalewski*, a broad interpretation to the five indicia of the administration of justice identified in *McDonald* was held appropriate by the majority, the decision is nonetheless useful when considering those indicia in the context of what the Court is asked to do in this case.

82. The first "*McDonald* criterion" is whether there is a dispute or controversy as to the existence of legal rights or a violation of the law. As in "concreteness", the underlying assumption, however, is that the dispute or controversy is to take place on the basis of *known, fixed facts*. As will soon become apparent, all the facts here are not "known or fixed". The Court is already constrained to deal with areas of hypothesis as to how the Agreement *might*, *potentially*, operate in a manner repugnant to the Constitution. But, as will be seen, the Court was presented with further material indicating that the issues for determination could surely be said to be "set" or fixed.

83. The second *McDonald* criterion is the identification or determination of the rights of parties, or the imposition of liabilities, or the infliction of a penalty. This, too, raises an issue as to what, in this instance, *are* the potential liabilities? It will soon be seen that there are

proposed amendments seem to place considerable limitations on the areas where there might be liabilities. But, as yet, these are only proposals.

84. The third *McDonald* criterion is the *final* determination of legal rights or liabilities, or the imposition of penalties. As it happens, this is a highly relevant consideration which must be considered later. It touches on whether judgments of the courts of this State on an issue might, in effect, be subject to review, or being set to one side by the decision of a CETA Tribunal.

85. Even more material is the fourth criterion, that is, the *enforcement* of rights or liabilities as found, or the imposition of a penalty by the Court, or by the executive power of the State which is called in by the Court to enforce its judgment. The question of the potential enforcement of a hypothetical CETA award running at variance with a judgment of the courts of this State is central.

86. So, too, is the fifth criterion, which is the making of an order by a court which, as a matter of history, is an order characteristic of the courts in this country. The question here is whether the courts in this State could, or should, give what it is suggested might be tantamount to automatic recognition of a final CETA awards. Whether narrowly or broadly, these are helpful indicia on the issue of justiciability. Those identified above pinpoint the profound difficulties facing this Court in reaching a concluded view both on jurisdiction and the exercise of discretion in relation to the Agreement. But the questions of want of definition or concreteness do not end there. One of the most difficult of issues concerns how, and in what circumstances, the operation of CETA Tribunal's rights be subject to review and renegotiation by a Joint Committee. Here, events after the appeal provide an illustration.

Proposals to Interpret CETA

87. At the hearing of the appeal, the court was provided with what the parties understood to be a final text of the Agreement. But even whilst the appeal was pending, it was brought to the attention of the Court that, in fact, further negotiations were taking place. This concerned the preparation of a new text of certain provisions intended to clarify certain aspects within CETA. Neither the parties, nor the Court, were aware of this fact until after the hearing concluded.

88. It is an unsatisfactory situation where a court is asked to deliver a final judgment on the text of the Agreement, the repugnancy of what is challenged, but where parts of the text are still evolving and are not yet agreed. It is still more unsatisfactory when it cannot even be said these new proposed interpretations are actually under negotiation between the parties. Matters have not gone that far. Instead, the proposed *de facto* amendments (by way of interpretative ruling from the Joint Committee under Article 26.1(5)(e) CETA) remain under consideration

by one side, that is, the European Commission and its member states, with the intention that, subject to the views of that side, the proposals may then become part of a renegotiation of an agreement, where the text of the Agreement itself makes provision for a review of its operations, including a review of essential terms which can be defined, or reviewed.

89. The Court received further material from the appellant without objection from the State. Both sides are to be commended for the sensible approach. But why these issues have arisen, now, has not been fully explained by the European Union, or any other body. In fairness, it must be said that many of the amendments appear to arise from the Paris Accord on Climate Change. But, as appears from a recent communication from the European Union, which was brought to the Court's attention after the appeal, such essential terms, including not only "*indirect expropriation*", but also "*fair and equitable treatment of investors*", are apparently now under reconsideration, and will, subject to ratification by the EU member states, be the subject of further negotiations with Canada.

90. Further consideration is also to be given to the capacity of the parties to regulate, and to give judicial decisions in accordance with, their constitutions upon such vital matters such as climate, energy and health. All of these may, potentially, raise questions of a further important term to the Agreement, that is, what is a "*legitimate public objective*", which might provide a defence to an enforcement claim.

91. But the EU communication goes further. It reads that the text should be revised in light of the commitments of the contracting parties under the Paris Agreement. Thus, it is said, an investor should expect that the contracting parties will adopt measures that are designed and applied to combat climate change, or address present or future consequences of climate change measures, of mitigation, adaptation, reparation, compensation, or otherwise. When interpreting the provisions of the Investment Chapter, the Tribunal should take due consideration of the commitments of the parties under the Paris Agreement and their respective climate neutrality objectives.

92. Thus, it is proposed that, subject to agreement, under Chapter 8 the parties are to confirm their understanding that the provisions of that Chapter concerned shall be interpreted and applied by the Tribunal by taking due consideration of the commitments of the parties under the Paris Agreement and their respective climate neutrality objectives, and in a way that allows the parties to pursue their respective climate change mitigation and adaptation policies.

93. It is now proposed that Article 8.39.3 of CETA shall be interpreted for greater certainty in the calculation of monetary damages, to take account of an unreasonable failure by a claimant to act subsequent to the breach of the Treaty, where it could have reduced any

damages arising, or of the unreasonable incurring of expenses by the claimant subsequent to a Treaty breach which results in increasing the size of its claim, or in the contribution to the injury allegedly sustained by that claimant by wilful or negligent action or omission of the investor or any entity in relation to whom reparation is sought.

94. All these are fundamentally important questions. They may affect whether state parties are entitled, and their capacity and willingness, to legislate on such issues. They may affect how and when they may legislate, as they undoubtedly concern the potential adverse consequences of such investor claims, as a result of legislation, if member state parliaments enact provisions which may be detrimental to investor/claimant interests.

95. But the proposals also go to the issue of whether, on an enforcement claim or otherwise, courts in member states may have capacity and jurisdiction to deliver decisions on questions such as climate, energy and health which are now of prime importance to the international community, and which may afford a defence to claim.

96. All these proposals come from the Joint Committee created by CETA, which, it is said, may address matters of interpretation of terms. These negotiations have taken place between the European Commission and the Federal Republic of Germany. A draft position paper has been prepared. But the text of these proposed interpretations is still not fully agreed by the member states. The member states are now called upon to approve the text, in order that they may become the subject of further good-faith negotiations with Canada. The very fact that it is suggested that CETA may be subject to potential interpretations in this way gives rise to concerns as to the extent to which what is presently written, or what may be agreed in the future, may be subject to later, unforeseen, alterations.

97. As outlined, the culmination of these negotiations will be pronounced at the level of a political declaration by the EU, the member states and Canada, which is to have the effect of further defining the terms of the Agreement. (Statement from the European Commission 29th August, 2022, and later, documents made available to the Court on 5th October, 2022 concerning Proposal for a Draft Decision of the CETA Joint Committee with the aim of Interpreting Certain Standards in the Investment Protection Chapter of CETA.) While one can see that many would see such amendments as desirable, none of this material was the subject of legal submissions in this Court. Again, a question arises as to substance and form. Despite all the appearance of form of an adversarial constitutional process, the appeal has inexorably acquired features of an advisory opinion.

98. As it happens, it may well be that the outcome of such negotiations may allay apprehensions expressed by critics of the Agreement. But the very fact that the position is still

so fluid renders it still more difficult for this Court to come to a final judgment. For all the Court is aware, there may be still yet further negotiations on these issues. The concerns raised may be shared by Canada.

A Comparison with Earlier Case Law

Crotty

99. A consideration of earlier relevant authorities provides some illustration by way of contrast to the unprecedented nature of the issue in this appeal. In *Crotty v. An Taoiseach* [1987] I.R. 713, the plaintiff sought a declaration that any purported ratification of the Single European Act would be void, having regard to the provisions of the Constitution. What the Court was invited to consider there was highly illuminating, by contrast to this case. In *Crotty*, the matters before the Court were utterly specific.

100. This Court held that so much of the Single European Act ("SEA"), which was to become law in 1986, was properly within the constitutional licence of Article 29 s.4, sub-s. 3. This authorised the State to accede to a living, dynamic European Community. The proposed changes to qualified voting in the European Council had already been anticipated in the establishing treaties after the transitional period. The Court also held that the allegedly new objectives of the Single European Act brought into Irish law would amount to no more than a specific enumeration of the objectives of the establishing treaties, and that the proposed new Court of First Instance did not in any way extend the primacy of the Court of Justice of the European Communities over the Irish courts, beyond that already authorised by Article 29, s. 4, sub-s. 3 of the Constitution.

101. But, on the issue of Title III, being the treaty whereby Ireland agreed to adopt its foreign policy positions within the framework of European political co-operation, not being part of domestic law incorporated by the Act of 1986, this Court held by a majority that, since Title III of the SEA would bind the State to concede part of its sovereignty in its relations with other states, and to conduct foreign policy without regard to the requirements of the common good, the ratification proposed by the government was impermissible in the absence of authorisation by the Constitution.

102. The contrast with this case is clear. The Court was in a position to deal with the relevant provisions of the SEA, the legal parameters of which, had been identified. But the Court was also in a position to consider, on concrete facts, the circumstances and consequences of Title III SEA, in the light of the actual constitutional repugnancy, rather than something hypothetical.

Pringle

103. By further contrast, in *Pringle*, insofar as material to this case, this Court had to address a decision to enter into the treaty establishing the European Stability Mechanism, which pursued a *clearly defined policy to which the government had agreed*, which specified a stability mechanism of implementation of that policy, and a maximum financial contribution. On that basis, the Court held that this was an exercise in, rather than abdication of, sovereignty. Again, the factual and legal parameters were clearly defined.

104. I add, in *Pringle,* two members of the Court, O'Donnell J. and Murray J., held that a court should be slow to take a step which would effectively amount to a substitution of its decision for that of the Executive, even if only temporary and suspensive in effect. They pointed out that the proper functioning of the constitutional balance required that considerable weight be accorded to the constitutional interest in ensuring that the Government performed its executive functions in a way it considered appropriate, and in a way for which it was accountable to Dáil Éireann, and through it to the People.

105. In both *Crotty* and *Pringle*, this Court was presented with a clear, concrete, set of facts, all of which were clear in their meaning and foreseeable effect. These were justiciable issues in the *McDonald* sense. The Single European Act was clear in its terms. The European Stability Mechanism was clear in its operation and consequences. This is by contrast to the position in this case, where the Joint Committee may meet from time to time to consider potential alterations to CETA.

106. The case, as advanced at present, is different from *Crotty* and *Pringle*. Many, but not all, of the true questions which truly arise are not in relation to the *text* of the agreement, but, rather, how, *possibly*, as opposed to *probably,* that text might be altered or applied. As matters stand, the Court is invited not only to proceed and decide upon the basis of the text, but of contingency.

The Form of Remedy: Declarations

107. This situation also presents difficulty on the form of remedy sought. This point is presaged by the reference to *Blythe* above. Now in this appeal, the appellant seeks a series of *declarations* on repugnancy to the Constitution. This is the gist of the entire case. On a number of occasions, this Court has had the occasion to consider the appropriateness of whether a declaration, in essence an equitable remedy, should be granted. Obviously, a declaration may be granted concerning the constitutionality of identified sections or provisions in legislation, *where the facts and subject matter can be clearly identified.* A declaration may be granted in a

matter of public interest. It is very arguable that the jurisdiction to grant a declaration by a court is less rigorous than at the time of *Blythe*. (See Order 19, Rule 29, RSC 1986.)

108. But for a declaration, the question before a court must be a *real* question, not one which is *theoretical* (*Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438). It is abundantly clear that, in considering whether to grant a declaration, a court should be satisfied that there is good reason for so doing (*Transport Salaried Staffs' Association and Others v. Córas Iompair Éireann* [1965] I.R. 180; *Omega v. Barry*, [2012] IEHC 23).

109. But many of the contingencies in this case are indeed theoretical, which in normal circumstances would speak against the granting of a declaration. It does no injustice to the appellant's case to suggest that, insofar as Article 34 is concerned, the case is based on a theoretical possibility. That is a scenario where the courts of this State were called upon to enforce a CETA award which is not in accordance with public policy of the State, or a prior judgment of the courts of this State that, on the same facts, an investor is not entitled to an award.

110. Such a hypothesis makes many assumptions. It presumes that, for some unspecified reason, CETA arbitrators might set a judgment of this Court to one side, and elect to treat the fact of such a pronouncement as of no significance. It is worth posing the rhetorical question, in what precise circumstances is it suggested that such an eventually "will, actually, occur", as opposed to "might, possibly, arise"? One cannot preclude such a possibility, I concede. The question is whether such a contingency is possible as opposed to probable or evident from the text itself. This goes to the question of whether the appellant has proved his case.

111. This is not a situation where the appellant lacks *locus standi*. What is necessary, rather, is to consider the outlines of the appeal in order to determine whether there is a real justiciable controversy capable of giving rise to an order bearing on the constitutionality of the Agreement. It is, I suggest, far easier to envisage a real situation where an Irish court would simply be called upon to enforce a CETA award which is consistent with the public policy of this State, just as the courts, on occasion, are called on to enforce a foreign arbitration award under the Arbitration Act, 2010. The High Court judge very fairly permitted the appellant to argue on the basis of hypothesis. But she concluded that the appellant had not *proved* his case. I think that is a most important finding, to which I will return later. I am satisfied that, on the basis of the text itself, and the question of probable interpretation or application, the Court can proceed on the basis that the issues are justiciable. But that there is a significant hypothetical aspect to the appeal cannot be forgotten.

SECTION II - ARTICLE 15

112. With this preface in mind, I come now to consider the first of the two main issues before this Court, that is, Article 15 and "legislative chill".

113. But, here, the theoretical basis of the case emerges quite starkly. When, and in what circumstances, might the legislature be inhibited from passing legislation contrary to an investor's interest? This would require much reflection. For the reasons set out earlier, it seems to me that the question arising under Article 15 of the Constitution presents a further real constitutional difficulty.

114. Under Article 29.4.2, the State may avail of any method or procedure used for the purposes of membership of any "*group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern*". At the time of its enactment, this was an oblique reference to both the British Commonwealth and the League of Nations. The provision, in effect, allowed the State to continue to have diplomatic and consular representatives formerly accredited by the British Crown, which continued until 1949 when the Republic of Ireland Act, 1948 came into force. Since 1949, Irish diplomatic and consular representatives are accredited by the President of Ireland acting on the advice of the Government.

115. Articles 29, ss. 1 to 3, set out broad declarations in relation to Ireland's relationship with international law generally. Under Article 29.1, Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. Under Article 29.2, Ireland there affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. Under Article 29.3, Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. But, again, it is relevant to ask, is the Court being invited to consider something actual or theoretical? In my view, it is the latter. This, in itself, would be determinative.

116. But I add, I am not at all convinced that the question of "legislative chill" is one appropriate for legal determination by a court, or, in fact, goes to the constitutional issues truly at stake. This is not in any way to minimise the importance of that issue. It is, rather, a question of constitutional allocation of roles. It is, of course, necessary to make a determination of law on the question of jurisdiction. The Court has *jurisdiction* to determine whether what is before it is a matter upon which it should make a judicial determination. But, both as a constitutional requirement under Article 15 and, were it necessary, as a matter of discretion, I would also

conclude the Court should decline to deal with this aspect of the claim as being constitutionally inappropriate.

117. Whether CETA represents an inhibition on the Oireachtas legislating has not been shown in a concrete way. Whether it *might* be such an inhibition, as well as being hypothetical, is also, very arguably, a political question, that is, a matter appropriate for determination by the Oireachtas itself. Even the description of "legislative chill" raises the issue of jurisdiction and hypothesis. What legislation might be affected? By what standard should the question of legislative chill be measured? The case simply is that, by a consideration of the circumstances and consequences of legislation, perhaps upon an environmental issue, some members of the Oireachtas might feel constrained not to legislate for fear of financial consequence upon the State on foot of a substantial CETA award.

118. The principle of separation of powers and its jurisprudence must be understood in context. It cannot be understood without a consideration of the precise scope of the High Court order under appeal in T.*D. v. Minister for Education* [2001] 4 I.R. 259. (See, Hickey "*Reading TD Down*"; and Kenny "*TD v. Minister for Education, Constitutional Culture, and Constitutional Dark Matter* " (2022), Irish Judicial Studies Journal Vol 6(3)). But it does not require a rigid interpretation of Article 15 to conclude that, at the level relevant to this case, there is a fundamental distinction between the courts permissibly determining whether policies of the Executive, or Oireachtas, were compatible with their legal and constitutional obligations, and, by contrast, a court impermissibly "taking command" of such matters so as to usurp a core constitutional function of another organ of State. Such difficult issues would fall to be determined on a case-by-case basis.

119. It is not, in fact, always possible to draw a bright-line distinction between the powers of the Executive, Oireachtas and the judiciary. In this case, and others, there is the possibility that the actions of one organ of government may affect the activities of another. This appeal is not, however, a situation where the Court must address some vexed issue concerning the rights of an individual who, as a result of government action or inaction, is placed in a position which is fundamentally detrimental to that person's rights. This part of the appeal, rather, deals with whether what can only be seen as a core function of a vital organ of government, that is, the Oireachtas, will, or might, refrain from legislating, in certain areas in the light of CETA. Irrespective of the hypothetical nature of the question, it appears to me that this is also a political question.

120. It is one for the democratically elected members of the Oireachtas to consider, assess and determine. In the truest sense of the word it would appear to be a "political question", upon

which the Court should not express a view. It is a matter, rather, that falls for determination within the domain of deputies elected by the People within their constitutional domain, and the members of the Senate, applying their political judgements as representatives of the People, as to advisability of such legislation and its consequences.

121. A conclusion that this issue lies to be determined in Kildare Street, rather than Inns Quay, does not in any way seek to diminish the political importance or significance of the question. It is, rather, a matter of a court determining a legal question, that question being whether the point which is canvassed is one which does fall properly within the domain of the courts. The focus now turns to Article 34, again necessarily asking the question as to whether the issue of constitutional repugnancy is mature or appropriate for determination.

SECTION III - ARTICLE 34

122. Article 34.1 provides that the administration of justice is committed to courts created under the Constitution. The courts fulfil that mandate by confining themselves to the resolution of actual legal controversies. Here, the case moves from the realm of pure hypothesis. In this appeal, the Court has been presented with some rather more concrete illustrations of the type of arbitral issues that have arisen in relation to the effect of bilateral treaties.

Micula v. Romania

123. I now deal briefly with case law more extensively outlined elsewhere. *Micula v. Romania* [2020] UKSC 5 concerned a claim brought by Swedish investors against Romania under a Sweden/Romania bilateral investment treaty. This provided for an arbitral tribunal operating under ICSID arbitration rules. The Swedish investors maintained that Romania had wrongfully withdrawn certain tax advantages which they had been promised, but which were then withdrawn after Romania's accession to the European Union in 2007. The arbitral tribunal found in the claimants' favour, concluding that the withdrawal of tax incentives constituted a breach of the fair and equitable treatment standard provided for in the Treaty. Romania was ordered to pay €178 million in compensation.

124. The claimants sought to have the award registered and enforced in the United Kingdom, along with a variety of other jurisdictions, apart from Romania. The matter came before the Supreme Court of the United Kingdom. In their joint judgment, Lord Lloyd-Jones and Lord Sales considered the question as to whether the ICSID scheme, under which the agreement was made, was such that, once the authenticity of an award had been established, a domestic court could not re-examine such an award on grounds of national or international public policy, but rather could confine itself only to ascertaining the award's authenticity.

125. The Supreme Court of the United Kingdom held that Article 53(1) of the ICSID Convention provided that awards are binding on parties, and are not subject to an appeal, or to some other legal remedy, except such remedies as provided for under the ICSID Convention. The court held the point was made explicit in Article 54 ICSID. The court went on to compare and contrast the narrow basis for non-enforcement in the case of ICSID awards, by contrast with the New York Convention, where domestic courts have a wider discretion with regard to enforcement.

126. *Micula* presents a somewhat clearer and relatively concrete picture which, at least, allows the Court to grapple with the vexed issue of the near automatic enforceability of an arbitral agreement. It is the type of issue which should afford pause for reflection. One must ask oneself whether such a contingency is probable or merely possible.

127. It is much easier to envisage a "normal" determination of a CETA Tribunal which determines issues which had not been decided by a court of this State. It is significantly more difficult to conceive how the implementation of such an award would raise issues of contrary to Article 34. What arose in *Micula,* does however illustrate some of the possible difficulties that could arise from CETA.

Criticisms

128. One can of course criticise the concept of CETA as well as its text. It can be said that both in the EU and Canada, foreign investors already have extensive protection through the respective legal systems. The Agreement raises questions as to whether it is truly necessary, and whether the proposed artificially isolates trade issues from other questions which could potentially arise in the administration of justice in either Canada, or EU member states. ICSID awards would not merely encompass matters such as workers or consumer rights, or the observance of health and safety standards for workers. The CJEU sought to address these criticisms in Opinion 1/17.

CJEU Jurisprudence

129. The judgments of my colleagues refer to other relevant case law as well as Opinion 1/17. Here, I prefer to focus on two cases alongside the Opinion. They are: *Slowakische Republik v Achmea BV*, Case C-284/16 ("*Achmea*"), where the CJEU found Article 8(2) of the Bilateral Treaty between the Netherlands and the Czech and Slovak Federative Republic were incompatible with Article 267 and 344 TFEU; and *Republic of Moldova v. Komstroy LLC*, Case C-741/19.

***Achmea*, Case C-284/16**

130. The first CJEU case for consideration is *Achmea*. Achmea was a Dutch insurer which had operated in the Slovakian market. Slovakia, in part, reversed measures taken to liberalise its health insurance market. The effect of these measures was to prevent the distribution of profits derived from Achmea's insurance business in Slovakia.

131. Achmea brought arbitration proceedings, the final result of which was to award the claimant, Achmea, €22 million. Slovakia brought proceedings in the German Court seeking to set aside the award as contravening EU law. It submitted that the arbitration lacked jurisdiction, as the arbitration clause contravened Articles 18, 267 and 344 TFEU. The case was eventually referred to the Court of Justice, which found that Article 8(2) of a Bilateral Treaty between the Netherlands and the Czech and Slovak Federative Republic was incompatible with the named TFEU Articles.

132. The court emphasised that an international agreement cannot affect the allocation of powers under the EU Treaties, and the autonomy of the EU legal system. An arbitral tribunal, which had been provided for in the agreement, was neither an EU body, nor a national court, nor a tribunal of a member state, nor a court common to several member states. A determination of such an arbitral tribunal was not subject to review by a court of a member state, to the extent that would allow a reference to the Court of Justice under Article 267. Therefore, such arbitral tribunal, established under the Bilateral Treaty, could not ensure that disputes were solved in a manner that safeguarded the full effectiveness of EU law. The Bilateral Treaty, therefore, violated EU law.

133. It might have been thought that observations of this type might have applied, *a fortiori*, to CETA, but in Opinion 1/17, the CJEU considered otherwise.

The CETA Recitals

134. Prior to consideration of the Opinion, some observations may be useful. In EU law, it is to be expected that any Directive or Regulation will be interpreted having regard to its objectives as set out in Recitals. The Recitals to CETA contain highly important statements of principle. They include that the Agreement seeks to establish clear, transparent, predictable and mutually advantageous rules. It is said to recognise the importance of international security, democracy, human rights, and the rule of law.

135. Importantly, the recitals recognise that the provisions of the Agreement preserve the rights of the parties *to regulate* within their territories, and the parties' flexibility *to achieve legitimate policy objectives* such as public health, safety, environment, public morals, and the promotion and protection of cultural diversity.

136. The Agreement recognises that the provisions to protect investments and investors with respect to their investments are intended to stimulate mutually beneficial business activity, *without undermining the right of the parties to regulate in the public interest within their territories*. The Recitals reaffirm a commitment to promote sustainable development. The Agreement is to be implemented in a manner consistent with the *enforcement of state parties' respective labour and environmental laws*, so as to ensure the level of labour and environmental protection and building upon their international commitments on labour and environmental matters.

137. These Recitals must be taken as containing guidance for the interpretation of the entirety of CETA. Were it to be a situation where a particular CETA award stepped entirely outside these principles, issues would arise in relation to its validity or compliance. Were a CETA Tribunal to make an award which stepped entirely beyond those principles, it would raise significant issues regarding enforcement in a domestic court, and as will now be seen before the CJEU.

Opinion 1/17

138. I turn to Opinion 1/17. Its title must be emphasised. It was an *Opinion*. By contrast to the general position which obtains in this State, the CJEU does have jurisdiction to issue advisory opinions. It has done so on a number of occasions.

139. But the observations of the court bear close comparison with the proposed amendments to the Agreement. Echoing *Achmea*, the court observed that it would not be permissible for the EU to enter into an agreement which had the effect of adversely affecting the autonomy of the EU legal order. The court warned that, if the CETA Tribunal or appellate tribunal were to have jurisdiction to issue awards, which found that the treatment of a Canadian investor was incompatible with CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled to pay damages to a claimant investor, the achievement of that level of protection might have to be abandoned by the Union. This is a very complex finding. In simple terms, it raises questions as to the circumstances in which CETA might not be consistent with the EU treaties.

140. The CJEU's response to CETA was, in my view, more guarded than might be thought. The court observed that the resolution of an issue such as that envisaged would depend upon a close analysis of the arbitral structure, including the appellate body, the method of appointment and choice of arbitrators, and, in particular, the grounds upon which such an arbitral body was entitled to find a breach of the agreement, and the remedies which could be awarded. Then the

court observed that the possibility that such an issue could be consigned to a separate adjudicative body could mean that, at least in theory, the possibility of an outcome with which a national or Union court might disagree, might be enforceable. This was a very important observation. The Opinion requires and deserves slow and careful reading. The provisos contained there are relevant to the potential issues which *might*, not *will*, arise in the future.

141. A number of factors must be borne in mind. These include that the provisions of CETA do not appear intended to provide a first port of call to a disappointed investor. Rather, they are to be understood as provisions of last resort to be availed of when a legal relationship between two states has been fundamentally undermined. Second, the agreement is limited as to categories of parties, investments, and remedies. An investor is entitled to recover only when there is loss, which, at the level of principle, would arise even if measures tantamount to expropriation were challenged in Irish law. On those assumptions, it is difficult, but it is not impossible, to conceive that the existence of such a jurisdiction would impinge on Article 34 considerations.

***Komstroy v. Moldova*, Case C-741/19**

142. A further indication of the "reach" of EU law in the area of bilateral treaties can be gleaned from the decision in *Komstroy*. As explained earlier, in *Achmea*, the CJEU had held that the arbitration clause in a bilateral investment treaty had an adverse effect on the autonomy of EU law. Komstroy was a Ukrainian company. It sued a Moldavian public entity. In *Komstroy*, the Luxembourg court adopted a somewhat similar approach in relation to the Energy Charter Treaty, which was in question in *Komstroy*.

143. The court held that an investment arbitration, made under that treaty, between an EU investor, and an EU host state, was non-compatible with EU law. Adopting the same reasoning as in *Achmea*, having examined the complex procedural background, the court addressed the question of jurisdiction.

144. Contrary to the submissions of a number of state parties, the court held that it had jurisdiction to interpret the treaty, despite the fact that the parties to the case were non-EU member states. It did so upon the basis that the EU itself was a signatory to the Energy Charter Treaty, and to forestall any possible future differences in interpretation. The determination was in order to ensure that there would be legal certainty. The court referred to the fact that the seat of arbitration was Paris, and therefore the law of the forum was French, and therefore EU law. Significantly, *Komstroy* involved two states which were not even members of the European Union. But the CJEU held that the arbitral tribunal, established under the Energy Treaty, was

required to interpret and apply EU law, and therefore the issue was sufficiently connected to the EU legal order for the CJEU to have jurisdiction.

145. As in *Achmea*, the court held that tribunals of the type envisaged in the Energy Charter Treaty were not subject to the same protections for the vindication of EU law through EU courts. Importantly, the court drew a distinction in *Komstroy* between commercial arbitration, on the one hand, and investment arbitration, on the other. It held that commercial arbitration clauses were unexceptionable, in the sense that they were freely and voluntarily entered into by the parties. Per contra, however, investment arbitrations did not have that same status. For the purposes of this judgment, it is sufficient to say that, on the basis of *Achmea* and *Komstroy*, the jurisdiction of the Court in Luxembourg to interpret EU law has a very wide scope indeed.

EU Law in its broader context

146. But it is also fruitful to consider the nature of EU law more generally, especially with regard to foreseeability and remoteness of a potential conflict between CETA and EU law or the law of member states. The decision in *Van Gend en Loos NV v. Netherlands Inland Revenue Administration*, Case 26/62 established that the EU legal order is autonomous from both domestic and international law. In Opinion 1/17, the CJEU considered this question of legal autonomy from two standpoints. First, in an echo of a decision of the Federal German Court in the "*Solange"* case law, the CJEU reaffirmed its jurisprudence according to which international agreements that establish an international dispute settlement body with binding jurisdiction over the EU, are permitted by EU law, *as long as* they do not affect the autonomy of the EU legal order (Opinion 1/17, paras. 106-107). Thus, the arbitral system could not possess a competence to interpret any other provisions of EU law than those of CETA.

147. Second, in Opinion 1/17, the court held that the jurisprudence of an arbitral court system must not prevent EU institutions from operating in accordance with their constitutional framework pursuant to EU law (Opinion 1/17, paras. 109 to 117). This is a very significant statement indeed. It was upon that basis, the court concluded that there was no incompatibility between the arbitral system envisaged under CETA, and the requirements of EU law, albeit a CETA Tribunal would consider the domestic law of a party, including EU law, "as a matter of fact" (Article 8.31). The applicable law clause would also apply to an investment court established under CETA to follow the prevailing interpretation of domestic law by the national courts of the respective party. It provides that the consideration of domestic law by the investment court has no binding effect on national courts and authorities.

148. Again, upon that same basis, that CJEU opined that a CETA arbitral court could apply EU law only as a matter of fact; would be required to follow the interpretation of EU law by

the CJEU; and would not itself render any binding interpretations of EU law. Thus, and importantly, the court found that an investment court's interpretative power would be confined to the provisions of CETA. An investment court would not be entitled to call into question the level of protection of public interest determined by the Union following a democratic process.

149. In the view of the CJEU, no CETA decision could have the effect of impinging upon the autonomy and protections provided for in EU law. In particular, an investment court would have no jurisdiction to declare the level of protection of public interest under EU law as incompatible with CETA's investment protection standards.

150. It is important to note that the Opinion 1/17 ruling was premised upon the proposition that the consideration of EU law as a matter of fact could not lead to any discordance between EU law and that of a CETA investment court. As a consequence, a national court in this State, faced with a question of enforcement of a CETA award might well find itself in a situation where, under Article 267 of the Treaty, it would be constrained to seek a preliminary ruling of the CJEU on any relevant interpretation of EU law. The Treaty on the Function of the European Union requires EU national courts, whose decisions cannot be challenged by a judicial remedy under national law, to bring matters of EU law that are relevant for its final decision before the CJEU for its opinion.

151. It would appear to follow, therefore, that an Irish court, facing a question of EU law relating to the enforcement of an ICSID award, might well be obliged by EU law to halt the enforcement proceedings and request a preliminary ruling under Article 267.

152. Furthermore, the TFEU's Protocol on the Privileges and Immunities of the European Union states that the property assets of the Union are not the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice. (TFEU Protocol No. 7 on the Privileges and Immunities of the European Union, Article 1). (See Butz, *Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union*, Volume 7 (2020-2021) No. 4 McGill Journal of Dispute Resolution). These important observations might well allay a number of apprehensions and concerns regarding the potential effect of the proposed CETA arbitral system.

Enforceability of CETA in this State

153. I turn then to enforceability. I accept that, at the level of hypothesis, this is an area of legitimate concern. In the High Court, Butler J. held that because of its international nature, disputes arising under the terms of CETA could never fall within the exclusive jurisdiction of the courts of any of the parties. Consequently, she held, ratification of CETA, and the consequent submission by the State to the jurisdiction of the CETA Tribunal, did not reflect a

subtraction of jurisdiction from the Irish courts. This was not just because the jurisdictional issue was one which the Irish courts had never exercised, but also because the jurisdiction was one which could neither be created nor conferred by the State alone.

154. Clearly, the Irish Constitution does not, and could not, confer on the Irish courts a jurisdiction over disputes occurring outside the State, and which do not arise under Irish law. The CETA disputes which may, generally, fall to be determined by a tribunal are indeed capable of being characterised as non-justiciable by our courts, not simply because they are inherently incapable or unsuited to judicial resolution within this State, but, rather, and in addition, because the courts would not have jurisdiction to apply the law to which they were subject. Save in the case of identified exceptions, the administration of justice is necessarily territorially limited to the resolution in this State of disputes under the law created by, or under, the Constitution.

155. I would accept, as was stated in Opinion 1/17 CJEU, that CETA was framed so as not to have direct effect within the legal system of the parties, and that a CETA Tribunal was separate from, and outside, the judicial system of the parties. This means that disputes arising under CETA, which a CETA Tribunal might determine, would not, generally, be justiciable as a matter of Irish law.

156. I would also acknowledge that, in the context of international business, litigants would frequently have a choice of jurisdiction, including within the European Union, under Regulation (EU) No 1215/2012 ("Brussels I recast") . Generally, the fact that a litigant might opt to sue in the jurisdiction of one state, in preference to another, would not mean that there has been a subtraction of jurisdiction from the courts of that state which would not be determining the dispute.

157. As pointed out earlier, the appearances are that, now, the negotiating parties are aware of the fact that there are, or may be, questions of definition, and application, in the areas such as climate, energy and health policy, so as to achieve legitimate public objectives, and in the prevention of investor misuse of state dispute settlement mechanisms. The correlation between the recent announcements by the Commission, and what is to be found in the Court of Justice in Opinion 1/17, does not need repetition. The relevance of these features self-evidently also relates to concerns of the appellant in bringing this case.

Contingency

158. But a court must not be naïve. Courts know that there is such a thing as an evolutive, or expanding jurisdiction. That question, in fact, does touch on precisely the type of issue which *might,* potentially*,* cause entirely legitimate constitutional concern, were a court in this State

called upon to give "near automatic enforcement" to a CETA award. Here I choose my words carefully. Arguably, there *might* be the *potential* for a conflict between a CETA award and a prior judgment or decision of this Court, or other courts in this State, on issues, such as climate, energy or health measures aimed at achieving legitimate public objectives, or perhaps in some other category entirely.

Enforcement

159. Speaking then as a hypothesis, and at the level of national law, one cannot deny that there is, at least, some potential for conflict between the powers and duties vested in our courts under the Constitution, and the jurisdiction of a CETA Tribunal. The fact that CETA could be found constitutional at present does not preclude the possibility that a different situation, changed effect, events, attitudes or decision-making, might take place which would give rise to unconstitutionality.

SECTION IV - CONCLUSION

160. Whether this appeal succeeds cannot, however, depend on hypothesis. The appellant's case can only succeed either by showing unconstitutionality on the text or face of the Agreement, or the probability of unconstitutionality. On *balance*, I do not think the various theoretical hypotheses are sufficiently likely so as to provide a basis upon which there should be a referendum.

Observations

161. But this does not entirely conclude the matter. The difficulty facing this Court, and perhaps others, is that, while the text of the Agreement may be unexceptionable from a constitutional point of view, it might contain the potential for conflict between a CETA Tribunal award, and a final decision of the courts in this State. While this may be regarded as hypothetical, or even fanciful, in law, prudent foresight should prevail over regretful hindsight.

162. The question of the enforcement of rights and liabilities by the executive power of the State is fundamental. In general, one can envisage that a CETA arbitral Tribunal will not pose a constitutional difficulty. While it is not likely or probable, however, it is possible to envisage a situation where, being dissatisfied with a final decision of the courts in this State, a Canadian investor might seek to avail of the CETA process, thereafter obtaining an award which runs counter to a final decision of the courts in this State. On one "malign scenario", create a direct challenge to Article 34.6 of the Constitution, which provides for finality.

163. It is not open to a government, or any other body, to amend the Constitution of this State, simply by an international treaty. The Agreement is not necessitated by membership of

the European Union, and, therefore, does not come within Article 29.4 of the Constitution. To permit an amendment of the Constitution *sub silentio* by a treaty would, now and in the future, be to offend against a fundamental feature of the constitutional identity and sovereignty of the State. Were it to be found that some action or actions, or decisions on foot of CETA did offend against fundamental constitutional values or the constitutional identity of the State, such as judicial independence, or the finality of judgments, a court, acting under the Constitution, would have no alternative but to refuse to enforce such an award.

164. What is in question here may be a remote contingency. But, as the case law in *Micula* and *Achmea* illustrates, such issues might arise, albeit rarely. A court should be very slow to allow a situation to crystalise into a clear cause of action in a situation of this type, when a legal matter has, by then, become so "ripe" or mature, that it is also critical; and when there may be an alternative course of action which could forestall such a situation ever arising.

165. There are, of course, powerful reasons for assuming that a CETA Tribunal proceeding could hardly ignore a decision of the courts of this State as to the law of this State, or the CJEU on EU law. The intended composition of the arbitral tribunals, including significant representation from member state parties, would, and should, have the consequence of preventing such a contingency. So, too, the proposed amendments described earlier. But there have been instances in the past where arbitral tribunals have taken a broad view on jurisdiction. Some awards have run into very substantial figures. The question is whether it has been shown this is likely or probable, such as would warrant a declaration of repugnancy? Despite the forceful arguments of counsel, I am not convinced.

166. I do not believe that the answer to such a possibility is that the Government would be responsible to Dáil Éireann under Article 28.4 of the Constitution. Nor is the answer that international agreements to which the State becomes a party should simply be laid before the Dáil. Nor can it be said that such a potential conflict is one of the inevitable consequences of entry into an agreement such as CETA. Were any of these to be so, quite profound constitutional difficulties would arise, as the Treaty entered into without a referendum might, potentially, have the effect of a *de facto* amendment of the Constitution regarding finality of judgments of a court in this State.

167. Were it to be the situation that the provisions of CETA in a given case compelled the payment of prohibitive penalties, in circumstances where, contrary to the concluded view of an Irish court, an arbitral tribunal, or an appeal body, determined that measures adopted in this State were, contrary to CETA, then a question would arise as the power of the Government of this State to give, or to have given, effect to any such agreement, even if it was agreed with

another state party. The treaty power is generally constrained by the Constitution. On occasion, this has led to challenges to the exercise of that power. The enforcement of orders is, unavoidably, part of the exclusive domain of the courts.

168. Were it also to be shown that there was an alienation of sovereignty, without specific constitutional amendment for that purpose, then Article 29.4.6 could not provide an answer. The extent of sovereignty which can be transferred must, ultimately, lie with the People. To paraphrase a decision of the United States Federal Supreme Court, neither a treaty, nor an executive agreement, can confer power on the Oireachtas, or any other branch of government, which would be free from the restraints of the Constitution. (See *Reid v. Covert*, 354 US 1,16 [1957].) In *Pringle*, Clarke J. and O'Donnell J. made observations to similar effect. A treaty could not vest in the Executive or the Oireachtas authority to circumvent the structural limitations set out in the Constitution itself. This does not, of course, mean that there is a limitation on the power of the Executive to enter into treaties not involving a transfer of sovereignty or decision-making power.

169. While *realpolitik* considerations will obviously now arise in the negotiations, it must be understood that states with written constitutions must deal with legal issues on the basis of that constitution, which include rights and duties which were hard-won. Matters going to the constitutional identity of the State cannot be abrogated by a treaty. Legitimacy of action must depend on a democratic mandate for such action.

170. It stands repetition that, in Opinion 1/17, the CJEU held that the principle of autonomy of EU law, and the exclusive jurisdiction of the CJEU, was protected in CETA. The principle of equal treatment before the law and effectiveness was also protected. The Charter of Fundamental Rights guaranteed a right of access to a court, and the right to an independent and impartial tribunal under the Charter. But the court also held that, in considering autonomy, that the CETA Tribunal and the appellate Tribunal would not form part of the judicial system of the parties to the agreement.

171. The fact that this case is unprecedented in Irish courts, and that circumstances are still evolving, leads me to conclude that, while I believe the appeal should be dismissed, there must be an unusual type of response, where the Court is, in all truth, faced with a situation without precedent, and where, had it been shown there was a clear transfer of sovereignty, a referendum could have been the only response under the Constitution.

172. Despite the fact that I believe the appeal should be dismissed, I see force in what my colleagues have to say to the effect that ratification must be dealt with by the Oireachtas in legislation. Such ratification would, in my view, require amendment of the terms of the 2010

Arbitration Act, and the Schedules thereto. In my view, the problem is best seen on the basis of having regard to recent developments as, it is to be hoped, providing a constitutional "floor", rather than a ceiling. The judgment of Hogan J., therefore, while arriving at a different outcome, contains matters with which I respectfully agree, although they do not affect my view of what the outcome of the case as pleaded must be.

173. So long as the protections of the type which are envisaged in the Preamble, and in Opinion 1/17, are in place, and so long as further evolutions in the draft proposals ensure constitutional protection, I think, on balance, this Court may proceed upon that basis.

The Approach of Other Constitutional Courts

174. In October, 2016 the German Federal Constitutional Court found that the committee system under CETA might violate the principle of democracy in the basic law, or, at least, that a violation was not entirely impossible. To avoid any such violation, the German Government committed to three things: (i) it would agree with the provisional application of any part of CETA that might fall outside the exclusive competence of the European Union, such as Chapter Eight; (ii) it would ensure that the decisions of the CETA Joint Committee were of a sufficiently democratic provenance for the duration of the provisional application of the Treaty; and (iii) if it were unable to ensure that the decisions of the Joint Committee were of a sufficiently democratic provenance, it would unilaterally terminate the provisional application of CETA under Article 30.7(3)(c).

175. The democratic basis of the Committee can only be seen as an open question (Heppner, "*A Critical Appraisal of the Investment Courts System proposed by the European Commission"*, Irish Journal of European Law, Vol. 19(1), pp. 38 to 63). No judgment to date addresses the possibility that the ratification of Chapter Eight of CETA by member states might, ultimately, have the effect of moving the competence to deal with foreign indirect investment and investor/state dispute resolution away from member states to the European Union itself. (See Heppner, p. 45.)

176. What cannot be denied is that there is here something of an analogy of the approach earlier adopted by German Constitutional Court in what became known as the *Solange* jurisprudence. (*Internationale Handelsgesellschaft* Case 11/70, ("*Solange I")*). When dealing with the question of the then treaties of the European Union, the German Constitutional Court concluded that, "so long as" the protection of fundamental rights under the treaties was commensurate with that under the German Basic Law, there would be no incompatibility. Applying the same approach, I take the view the Court can proceed on the basis that, "so long

as" the protection of the fundamental rights and constitutional identity are preserved in CETA, there will be no incompatibility.

Article 34

177. Any court will be alive to the criticisms that, in speaking of the scope of Article 34 judicial power, it is engaging in special pleading. Judicial rhetoric on this issue is sometimes regarded with reserve. It is not coincidental that there are other constitutions which, through inheritance and adaptation, share some identity or constitutional "DNA" with ours. The Indian Constitution of 1950 is one such constitution. Courts sometimes resort to quotations from Madison or Jefferson. I refer instead to one of the great framers of the Indian constitution, a man who deserved to be referred to in the same breath as the American framers. Dr. Ambedkar referred to the power of the Indian Supreme Court contained in the constitution of the largest democracy in the world as being "the soul of the constitution, and the very heart of it". To Ambedkar, a member of the Dalit social caste, who were a sometimes described as "Untouchables", the constitutional provision had a particular importance. It provided the means whereby remedies could be provided for rights violations, oppression and discrimination, including those on caste. Article 32 of the Indian Constitution, dealing with the jurisdiction of that Supreme Court, was one, without which the Indian constitution would be nothing but a "nullity". It "made rights real" (Constitutional Assembly Debates, December 9, 1948). I would respectfully adopt the same phraseology with regard to Article 34 of our Constitution.

178. It is true that, now, the administrative State has made provision for many forms of tribunals and decision-making bodies for the assertion of statutory rights and to remedy wrongs. But the position of the judiciary under the Constitution remains integral to the democratic process. By virtue of Article 34, the power of the State is extended to vindicate the rights of individuals, even against the State itself. That power is vested in courts established by law. That system of independence, checks and balances was achieved over centuries. It is essential to the rule of law in a democracy. It cannot be yielded up or diluted. To do so would be to undermine the Constitution itself.

179. This is not to say, however, that the State, by statute or other means, might provide means for the protection of those same values in a particular situation, or other commensurate means. But it is the courts which are, in fact, the ultimate protection. There cannot be two parallel systems for the administration of justice within the State. The exercise of limited functions and powers of a judicial nature under Article 37 would not provide an alternative route.

180. In the High Court, Butler J. concluded that the CETA system satisfied the *McDonald* criteria, but that the issue was saved from constitutional offence by the fact that CETA Tribunals would not be applying Irish law, and that enforcement did not offend the Constitution. There are potentially aspects of CETA that do indeed come close to administration of justice. While there is sometimes an interaction between the actions of the Executive and the courts, no organ of State can trench on the core functions of another organ of Government. This ascription of roles is one of the distinctions between the rule of law in a liberal democracy, and an autocracy. It is fundamental.

181. That the decisions of an independent judiciary applying the Constitution and applying check and balances, can, on occasion, give rise to difficult outcomes for governments is an unavoidable fact. It is one, I would suggest, which is a small price to pay for the benefits of democracy, by contrast to autocracy, or the exercise of centralised and non-democratic power, sometime by one individual or small group.

182. As will be evident, there are some areas where I respectfully differ from my colleagues in the majority. But we all share the same concern for the protection of the Constitution. But, as matters now stand, and in the light of the proposed amendments, I think the risks of a malign scenario is substantially reduced. It would appear the resolution of outstanding future issues will lie within the realm of the Oireachtas, the European Union, of which Ireland is a member, and negotiation among the member states and with Canada. Were there a difficulty or objection in including protective provisions in amending the legislation in question, then a question might surely arise as to why such a difficulty arose. Were it to be the case that the difficulty arose because of an apprehended incompatibility between CETA and what was contained in such intended legislation, then a question would again arise as to the requirement to hold a referendum.

Proposed Order

183. At the outset, I referred to this appeal raising issues of form and substance. The history of the law contains many instances where the procedural form has evolved in order to give effect to the substance of justice. The law is too wise to do otherwise. Despite all the elaborate material and consideration, this case, like all adversarial cases, comes down to one ultimate question. That question is: has the appellant proved his case on facts, evidence or legal principles? If he has not, his case seeking declarations cannot succeed. For the reasons set out in this judgment, I would hold the appellant is not entitled to a declaration. The CETA text does not offend the Constitution. Any probable application of it does not offend the

Constitution. I think the contingencies envisaged are too remote. An adversarial case of this type cannot be decided on remote contingency, or hypothesis. As to form, therefore, I would make an order dismissing the appeal, and uphold the order of the High Court dismissing the claim made by the appellant, that the Agreement, as it stands, is repugnant to Articles 15 and 34 of the Constitution, and that a constitutional referendum is necessary for its ratification.

184. But, turning now to the substance of justice, and the duty owed to the Constitution, I simply make the observation that as long as the constitutional values laid down in 1937 are protected in legislation, then the Agreement can withstand constitutional scrutiny. While I am not persuaded that what is proposed elsewhere in the other judgments of this Court can be made part of an order of this Court, I simply make the observation that what is proposed as amending legislation there does no more than protect fundamental features of the sovereignty of the State. The duty which we owe the Constitution requires we do no less. But it also requires we cannot do otherwise.

The Questions Raised in the Appeal

185. For the reasons set out, subject to the observations contained in this judgment, I propose the following answers to the questions identified by Dunne J. in her judgment:

(1) Is ratification of CETA necessitated by membership of the EU?

No

(2) (a) Is ratification of CETA incompatible with Article 34 on the basis that it impermissibly withdraws disputes from the jurisdiction of the Irish courts?

No

(b) Is ratification of CETA incompatible with the finality of decisions of the Irish courts under Article 4?

No

(3) Is ratification of CETA incompatible with the legislative sovereignty of the State under Article 15.2?

No

(4) Is ratification of CETA incompatible with the democratic nature of the State under Article 5?

No

(5) Would amendment of the Arbitration Acts permit ratification of CETA?

Yes