AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000124

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

Between/

PATRICK COSTELLO

Appellant

-and-

THE GOVERNMENT OF IRELAND, IRELAND, AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 11th day of November, 2022.

Contents

I. Introduction

1. This is a case whose novelty is surpassed only by its importance. It requires this Court to consider the extent and nature of the limitations that the Constitution imposes upon the conduct by the State of its external relations, which by Article 29.4.1° is an exercise of executive power, and thus is exercised in accordance with that Article and Article 28.2 by or on the authority of the Government.

2. This is an issue which has come before the Court only rarely in the 85 years since Bunreacht na hÉireann came into force and effectively completed the task, commenced in 1922, of establishing the State as a sovereign, independent and democratic State (Article 5). The appellant says that the execution by the Government of the Comprehensive Economic Trade Agreement ("CETA") and ratification of same by the Dáil pursuant to Article 29.5.2° impermissibly infringes the internal sovereignty of the State. In particular, the appellant contends that execution and ratification infringes the legislative sovereignty of the State established by Article 15.2, providing that the sole and exclusive power of making laws for the State is vested in the Oireachtas. Furthermore, the appellant contends that CETA also infringes the executive sovereignty of the State (Article 26.3) and the juridical sovereignty of the State contemplated by Article 34, which provides that justice shall be administered solely in courts established by legislation enacted by the Oireachtas, other than in cases contemplated by Article 37 (and which in my view does not arise here).

3. Although much of the argument on behalf of the appellant sought to contend that the execution of CETA involved a *direct* breach of the provisions of the Constitution (and moreover, the legislative sovereignty of the State protected by Article 15, the executive sovereignty of the State provided for in Articles 28 and 29, and as already

mentioned, the juridical sovereignty of the State under Article 34, in the sense that it was argued that the provisions of CETA constitute 'law' and the decisions of the CETA Tribunal constitute the administration of justice) it will, I think, become clear that, at least at the level of formal analysis, the provisions of CETA do not infringe either the internal or external sovereignty of the State, whether executive, legislative or judicial. Simply put, the provisions of CETA operate at the level of international law, and while they may have practical effects within this jurisdiction, in any case where they can be said to lead to outcomes which have *legal effect* within the national *legal* order, they do so not by their own force, but rather by the force and effect of Irish law duly enacted in accordance with Article 15. The question, therefore, at least in my view, becomes whether the execution of CETA, in the exercise of the external sovereignty of the State, would, in substance or effect, impermissibly trench upon, cede, transfer, or abdicate the internal sovereignty of the State, whether executive, legislative, or judicial.

4. It is also the case, at least in my view, that the impugned provisions of CETA do not infringe any of the *express* limitations which the Constitution places upon the exercise by the Government of the executive power of the State in relation to external or foreign relations. The issue is, therefore, whether the impugned provisions of CETA contravene limitations which must necessarily be implied upon the conduct by the Government of the external relations of the State.

5. While it will be necessary to discuss these matters in much greater detail, I think it is possible to set out a series of propositions which encapsulate, in my view, the reasons why, on true analysis of the provisions of the agreement and Irish law, that the execution of CETA by the Government and its ratification or approval by the Dáil do not infringe the Constitution, but rather is completely consistent with it:-

(i) The 1937 Constitution brought to conclusion the process, commenced and largely achieved in 1922, of establishing Ireland as a sovereign independent State (Article 5);

(ii) The sovereignty of the State so established has a number of facets: external and internal. The external sovereignty of the State, in the sense of its relationships on the international plane, is expressly, and exclusively, consigned to the Government by Article 29.4;

(iii) What can be described as the internal sovereignty of the State is arranged in accordance with the separation of powers described and recognised, but not itself established, by Article 6 of the Constitution. The internal executive power of the State is exercised by the Government (Article 28.2), the legislative power by the Oireachtas (Article 15.2), and the judicial power by the courts established under Article 34 subject only to Article 37;

(iv) It follows that no other body, whether internal or external, can exercise those powers of government, internal or external, whether executive, legislative, or judicial (again with the exception in the sphere of judicial power of bodies expressly contemplated by Article 37 and which is expressly provided for in the Constitution itself);

(v) The above conclusion follows from an analysis of the Constitution, but is reinforced by an understanding of constitutional history which led, in part, to the framing of the Constitution in the terms which still obtain today;

(vi) It follows from the organisation of the sovereignty of the State, that no organ of the State may usurp the functions or powers of another organ in the field assigned to it;

(vii) However, the separation of powers effected by the Constitution is not hermetically sealed: the branches of government are not entirely independent of each other, and the proper exercise of each organ of government of the powers assigned to it may *affect* the exercise of its powers by another organ of State, within the field of activity assigned to it;

(viii) In particular, the exercise of sovereignty within the State by the organs of government may affect the exercise by the Government of the external sovereignty of the State under Article 29.4;

(ix) By the same token, the exercise by the Government of the external sovereignty of the State, may *affect* the matters occurring within the domestic order: this is established not just by long practice (exemplified by the operation of the European Convention on Human Rights ("ECHR")) but also by precedent (*Pringle v. Government of Ireland and Others* [2012] IESC 47, [2013] 3 I.R. 1 ("*Pringle*"));

(x) The execution of CETA may undoubtedly have *effect* within the domestic sphere, and may also affect the exercise of powers by the other organs of State within areas assigned to them by the Constitution, but is not such as to have the effect of usurping or purporting to alienate the functions assigned to another organ of government;

(xi) It was an objective of the Constitution enacted in 1937 that Ireland would take its place among the family of nations, and be able to participate fully in international affairs;

(xii) If the appellant is correct, the Constitution, as properly interpreted, imposes very significant constraints upon the exercise of the external affairs of the State, and prevents the State, as currently established, from entering into

agreements which are commonplace in the international order, and which many other countries have executed, without it being considered that the execution of such agreements infringes the same sovereignty which Ireland asserts, and which was established as a matter of law by Article 5 of the Constitution;

(xiii) The Constitution does nonetheless impose some limited express restraints on the power of the Government to conduct the external affairs of the State, and further implied constraints derived from the structure of the State established by the Constitution. The Government may not, under guise of conducting the external affairs of the State, usurp, alienate, concede, or purport to exercise functions properly assigned to another branch. The provisions of CETA do not do so.

(xiv) On proper analysis, the appellant's arguments, though framed as support of the Constitutional order established in 1937, would subvert it, and in the field of external affairs create a form of foreign relations by popular vote not contemplated by the Constitution. If upheld by this Court, it would, in my view, amount to an improper interference by the judicial branch in an area the Constitution consigns to the executive branch.

6. The argument in this case has developed very considerably from the basis upon which the proceedings were launched, and even from the case argued in the High Court. A number of different arguments are advanced which have the capacity to distract from the core issues which must be identified and analysed. While it will be necessary to return to these issues in greater detail later in this judgment, I should say that, at this point, I do not consider that it can be said that the execution of CETA by the State is in any way necessitated by the obligations of membership of the

European Union so that it would be immune from constitutional challenge pursuant to the provisions of Article 29.4.6°. CETA, and similar agreements, are determined to be mixed agreements covering an area in which the EU has not yet asserted competence, and which thus requires the assent of the Member States. If this is so, then and notwithstanding the detailed and sophisticated argument presented by Ms. Donnelly SC, I cannot see how it can be said that the exercise of a power which, as a matter of EU law is currently consigned to the Member States, can be said to be required to be exercised in one way because of the obligations of membership of the EU.

7. By the same token, however, I consider that the case cannot be approached on the basis that the character of the agreement changes once executed and ratified by Ireland in accordance with its constitutional requirements. I do not understand how any obligation of EU law, or any obligation of sincere cooperation, could constrain the exercise by Ireland, or any other Member State, of the powers it has in international law to denounce or resile from an international agreement which it had power to enter. However, for reasons which it may be necessary to explain in greater detail, I do not consider that this is in any event a significant point: while the argument on behalf of the appellant – that CETA was one which would bind Ireland in perpetuity – had an understandable rhetorical attraction, it is not a necessary or essential part of the argument in this case. The issue raised by the appellant is one of principle, namely that the entry into force of CETA is an impermissible diminution, dilution or subtraction from sovereignty. If so, it does not matter if that is of limited, extended or indefinite duration. Taking the argument of the appellant at its height, no external or foreign body has the right to exercise executive legislative or judicial

powers for matters that are properly reserved to those organs by the Irish Constitution for a single day.

8. I accept and agree that the historical background to the entry into force of the 1937 Constitution is of some relevance and assistance in this regard. In my view however, that historical background undermines rather than supports the appellant's arguments. I do consider that the claim in this case, being one that the Government in the exercise of the external affairs of the State has breached an implied Constitutional limitation on the exercise of those powers, is one which requires the court to apply the "clear disregard" standard first established in analogous circumstances in the decision in *Boland v. An Taoiseach* [1974] I.R. 338 ("*Boland*"), and recently discussed in *Burke v. The Minister for Education and Skills* [2022] IESC 1, [2022] 1 ILRM 73("*Burke*"). However, I do not consider that the application of that test is decisive, or that it is necessary to rely upon it to uphold the lawfulness of the execution of the CETA agreement as, for reasons I will set out, I do not consider that the execution of the agreement disregards the Constitution, clearly or otherwise.

9. I do not think it has been established in this case that the enforcement of a CETA award under the provisions of the Arbitration Act, 2010, even if the award is made pursuant to the International Centre for Settlement of Investment Disputes' (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Washington Convention") rules, which came into force in 1966 and was ratified by Ireland in 1981, should be treated as automatic or a mere formality. The obligation to seek the leave of an Irish court is not, in my view, a polite fiction, but something of real legal and constitutional significance, and there are grounds upon which such an award may not be enforced. However, and again, I

do not consider that analysis of the enforcement power is central to the validity of the agreement. It must be accepted that CETA would permit a tribunal to make a determination in relation to a provision of Irish legislation, an administrative decision made by a body under the executive power of the State, or a judicial decision, with which an Irish court would disagree. That, in itself, could not be a ground for refusal of enforcement of the award under the Arbitration Act, 2010, and therefore the central issue of sovereignty in this case, must be confronted.

10. I do agree, that as a matter of probability, it is unlikely that an aggrieved Canadian investor would choose to invoke CETA rather than challenge a relevant measure before the Irish courts, and perhaps even more unlikely that the ruling of the CETA Tribunal would attach liability to a measure which would not itself fall foul of the provisions of Irish public law, whether Constitutional law or administrative law more generally. That is not simply because of the high reputation with which the courts of this jurisdiction and those of Canada, for example, tend to enjoy, but also because the grounds upon which a measure may be impugned in domestic law are more expansive than those contemplated as giving rise to potential CETA liability, and the standard to be satisfied is less demanding.

11. But, once again, while the scope of CETA jurisdiction is perhaps relevant in another respect, the limited nature of the jurisdiction and the remoteness of the possibility of its application in respect of Irish measures, does not remove the necessity to address the issue of principle at the core of this case. If the appellant's case is correct, it does not matter if CETA rules are models of clarity and fairness, and if decisions of the CETA Tribunal are modest, cautious and much more limited than those of Irish court. Assuming for these purposes, that in all respects the CETA rules were similar to, or less demanding than the rules of Irish public law, and the CETA Tribunal's

decisions were more limited and cautious than similar decisions being made by Irish courts, the fact remains that the decision is being made by bodies other than the Irish legislative, executive and judicial organs in Irish law. The whole concept of sovereignty means that it is for the Oireachtas as the Irish legislature to make laws applicable in Ireland, for an Irish executive to take administrative decisions, and for Irish courts to administer justice. It is to be hoped, that it is not regularly a feature of the Irish constitutional system that bad, offensive and discriminatory laws are made, offensive administrative decisions are applied, or unjust decisions reached by Irish courts: but, at a fundamental level, that is an attribute of sovereignty; the right to make law includes the right to make bad law. If truly outrageous laws are made by the Oireachtas, or manifestly improper administrative decisions made, the principle of sovereignty means they still have full force and effect unless and until courts, established under Article 34, exercise the jurisdiction granted to the Superior Courts by the Constitution to declare such laws invalid.

12. I think the issues in this case can best be approached by considering if Ireland could, through the executive branch, enter into CETA with Canada alone as a bilateral rather than multilateral treaty (or indeed any similar agreement with any other country). In the light of the answer to that question, it may be necessary to consider if any other aspect of membership of the European Union would lead to a different conclusion. However, the core issue is whether the essential sovereignty of the State established by the 1937 Constitution is infringed, diluted, alienated, or usurped by Ireland, through the organ of the Government, executing any agreement containing provisions such as those contained in CETA. It is necessary, accordingly, to turn to the provisions of CETA and to understand what it does, before addressing the arguments in this case.

II. The Comprehensive Economic Trade Agreement ("CETA")

A. *Background*

13. The relevant provisions of CETA are set out in some detail in the judgment of the High Court, and in the judgments of my colleagues, Dunne and Hogan JJ. delivered today, and it is not necessary to repeat them in detail here. It is, however, important to note that the dispute in this case centres on a relatively small number of provisions in an agreement that is, as it is titled, a comprehensive trade agreement running to more than 2,000 pages and making detailed provisions for the conduct of trade between Canada and the Member States of the EU.

14. A starting point is to recognize that the negotiation of trade agreements and treaties regulating foreign businesses and the supply of foreign goods in domestic markets, and the securing of agreements in relation to the treatment of domestic goods, and businesses in other countries, has been a basic part of the conduct of international relations between states for hundreds of years. There is no doubt, therefore, that the negotiation and execution of a trade agreement is properly the function of the executive, which in Ireland, as in most countries with whom Ireland interacts, is the organ of government charged with the conduct of foreign affairs.

15. It is also important to recognise that it is of the nature of the conduct of international relations and, particularly that conduct regulated by international law and treaties between states, that such issues will, by definition, rarely cross the desk of national courts dealing with national law. This is particularly so in jurisdictions such as Ireland, which adhere to a dualist system, and where, therefore, the execution of an international agreement does not, by that fact alone, become part of the domestic legal system. It is necessary, therefore, to place such an agreement in its proper context, and to seek to understand it against the background of existing agreements

and practices at an international level, and to avoid treating provisions as dubious simply because they are novel and unfamiliar in a domestic setting.

16. There is no doubt that the provisions of agreements such as CETA deserve close scrutiny. At their heart, they amount to an agreement made by Ireland to accept and abide by the determinations made by tribunals outside the Irish legal system, in relation to measures which are part of the public law of Ireland, whether legislative, administrative, or judicial, and to permit such determinations to be made at the suit of individual persons, human or legal. However, as we will see, such agreements are not only a routine aspect of international affairs between many members of the international community and with whom the Constitution contemplated Ireland would engage as an equal sovereign nation but have also been features of a series of agreements that Ireland has entered at international level, and which are contemplated by Irish law. It is particularly important, therefore, that if it is to be said that the ratification and execution of CETA is constitutionally impermissible, that the reasons why this is so are clearly identified and the limits of any resulting principle be closely and precisely defined.

B. ***Preamble and Objectives***

17. The preamble to the agreement gives a good general indication of its contents, purpose and objective. Thus, after reciting the parties to the agreement, it is stated that the parties resolve to:-

> "**FURTHER** strengthen their close economic relationship and build upon their respective rights and obligations under the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation;

CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment;

ESTABLISH clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment;

AND,

. . . .

RECOGNISING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;

RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;

. . .

RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories;

REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;

ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and

principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct;

IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection and building upon their international commitments on labour and environmental matters".

18. This preamble shows that the objectives of the agreement are part of the classic functions of international agreements, that is the promotion of mutually beneficial trade and business activity, and is a development of agreements made by the same parties. Thus, for example, Ireland has been a member of the World Trade Organisation ("WTO") since January, 1995 in common with other members of the European Union and the European Union itself. The WTO is referred to in the first recital. Ireland has also been a member of the General Agreement of Tariffs and Trade ("GATT") since 1967. The preamble also recognises that the development of international trade and economic cooperation depends in part upon international security, democracy, and the protection of human rights and respect for the rule of law, and also expressly recognises that the provision of the agreement is intended to preserve the rights of the parties to regulate within their territories to achieve legitimate policy objectives such as public health, safety, environment, public morals and the promotion and protection of cultural diversity, sustainable development and corporate social responsibility.

19. "Measures" the subject matter of the agreement are defined importantly as:-

> "a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party".

"Party" is itself defined as:-

> ". . . the European Union and its Member States within their respective areas of competence . . . and on the other hand, Canada".

It is clear, therefore, that the subject matter of the agreement is and is explicitly intended to be, the laws, regulations and decisions made by the organs of government in each of the participating parties.

20. The fundamental rule is that established by Article 2.3 which requires each Party to:-

> ". . . accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994. To this end Article III of the GATT 1994 is incorporated into and made part of this Agreement".

That means that a Member State of the European Union must accord treatment no less favourable to directly competitive or substitutable goods from Canada to that which it accords to goods of the Member State and goods from any other Member State of the EU, and *vice versa*. That Article is then subject to exceptions.

C. ***Chapter 8 and the Investment Provisions***

21. Most attention in these proceedings has focused on the provisions of Chapter 8 in relation to investment. Chapter 8 is defined as applying to a "covered investment", which is an investment made in the territory of a Party, which is directly or indirectly owned by an investor of the other Party. Thus, in Irish terms, Chapter 8 would apply to investments made in Canada by Irish investors, or investments made in Ireland by Canadian investors. Investment is defined broadly as including:-

> ". . . every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration

> and other characteristics such as the commitment of capital or other resources".

While that definition is expansive, claims to money are, for example, defined as not including:-

> "(a) . . . claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party.
>
> (b) the domestic financing of such contracts; or
>
> (c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b)."

22. "Investor" includes:-

> ". . . a Party, a natural person, or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party".

Finally, an enterprise is defined as something:- "constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party".

23. Article 8.2 provides that the Chapter applies to measures adopted or maintained by a Party relating to an investor of another Party and/or a covered investment but excludes air services other than repair or maintenance services. The Agreement, while comprehensive within its own scope, is closely defined and subject to defined exceptions. In particular, claims may only be made by investors (as defined) in respect of investments on the grounds set out in the Agreement, which are themselves subject to the limitations and acknowledgements set out.

24. Claims under Article 8 must be submitted in accordance with Article 8.18, and in compliance with the procedures set out in Section F. Importantly, claims in respect

of an obligation set out in Section B (which sets rules for the establishment of investments) are excluded from the scope of Section F, and therefore the dispute resolution procedure establishing the CETA Tribunal. Financial services regulations are dealt with under a separate chapter.

25. Section B, which deals with establishment of investments, and which is excluded from the CETA Tribunal dispute resolution process, provides that a Party shall not adopt or maintain measures which impose limitations on the number of enterprises in a particular field or the total value of transactions or assets involved, or the participation of foreign capital in terms of maximum percentage, or the total number of natural persons that may be employed, or limit the type of legal entity or joint venture through which an enterprise may carry out an economic activity. However, under subsection 2, it is provided that what might be described as general regulatory matters concerning zoning, planning regulations or the ownership of goods and services to ensure fair competition, competition law generally or measures seeking to ensure the conservation and protection of the natural resources and the environment are all consistent with paragraph (i), and would not, therefore, fall foul of the agreement not to adopt or maintain provisions limiting market access. Similarly, under Article 8.5, a Party shall not impose performance requirements in respect of the conduct, operation, and management of any investment, but subparagraph 4 excludes commitments or undertakings enforced by a court, administrative tribunal, or competition authority to remedy a violation of competition laws. This is consistent with the recitals and the general agreement prohibiting discriminatory measures while recognising the right of Parties to make regulations of a general nature in the public interest. The exclusion of Section B from the dispute resolution process illustrates the fact that the dispute resolution process

is directed towards measures causing individual loss rather than more general provisions which, while covered by the agreement, do not give rise to a possible claim by an individual investor.

26. Section C deals with non-discriminatory treatment, and Articles 8.6 and 8.7 contain general obligations to accord to an investor of the other Party treatment no less favourable than the treatment that a Party accords in a like situation to its own investors and their investments, or which it accords to investors of a third country having most favoured nation status. Article 8.8 precludes a requirement that an enterprise of a Party which is also a covered investment shall not be required to appoint management or a board of directors of any particular nationality.

27. The core of this case relates to the investment protection provisions set out in Section D. That provision opens with a reaffirmation of the Party's right to regulate. Thus, it is provided that the parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety and the environment, or public morals, social or consumer protection or the promotion and protection of cultural diversity. For greater certainty it is also provided, that the mere fact that a Party regulates in a manner which negatively effects an investment or interferes with an investor's expectations including its expectations of profits does <u>not</u> amount to a breach of an obligation under the section.

28. Article 8.10 has been set out in the judgment of the High Court and in the judgments already being delivered by my colleagues, but is of such central importance, that it deserves direct quotation rather than paraphrasing. Thus, it is headed "<u>Treatment of investors and of covered investments</u>" and provides:-

"1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief;

(e) abusive treatment of investors, such as coercion, duress, and harassment;

or

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

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

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific

representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to the physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.

7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1".

It will be necessary to return to the provisions of Article 8.10 in greater detail in due course.

29. Article 8.11 provides that, where an investor suffers loss due to armed conflict, civil strife, or a state of emergency or even a natural disaster within the territory of a Party, that Party will treat such an investor no less favourably than it treats its own investors or investors of a third country for the purposes of restitution, indemnification, or compensation. Similarly, Article 8.12 provides that a Party shall not "nationalise or expropriate a covered investment either directly or indirectly" except for a public purpose, under due process of law, in a non-discriminatory manner, on payment of prompt, adequate and effective compensation, such compensation being required to provide for the fair market value of the investment, and for interest at a normal commercial rate, and an affected investor should have the right under the law of the

expropriating Party to a prompt review of its claim and the valuation of its investment by a judicial or other independent authority.

30. Article 8.13 provides that transfers relating to a covered investment should be made without restriction or delay, but sub-Article 3 excludes from these measures applying, in an equitable and non-discriminatory way, laws relating to bankruptcy, insolvency, and the protection of the rights of creditors, laws relating to the issuance or trading, dealing in securities, criminal laws providing for criminal or penal offences, financial reporting relating to law enforcement or the satisfaction of judgments. Section E contains reservations or exceptions which are identified in a Schedule to the agreement, which provides that certain existing non-conforming measures maintained either by the European Union, Canada or a national government and identified in the agreement, shall not constitute a breach of Articles 8.4 to 8.8.

D. ***Section F and the Dispute Resolution Process***

31. Section F sets out the dispute resolution process that is limited to claims of a breach of Section C of Chapter 8 (non-discriminatory treatment), and Section D (investment protection) which are set out above, and where the investor claims to have suffered loss or damage as a result of the alleged breach. Such a claim may be submitted only to the extent that the measure challenged relates to an existing business operation of a covered investment and the investor has, as a result, incurred loss, or damage with respect to the covered investment, and excludes investments made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of the process. The tribunal is limited to claims as so defined and cannot decide claims that fall outside the scope of the Article.

32. Under Article 8.22, para. 1(f) and (g), an investor must satisfy certain procedural requirements for the lodgement of a claim, and may only submit a claim if the investor:-

> "(f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and
>
> (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim".

This is what is known as a "Fork in the Road" ("FITR") provision requiring an investor who complains about the content of a measure to choose the remedy they seek, or perhaps more accurately, requires a claimant bringing a claim under CETA, to withdraw and discontinue any proceedings and waive any claim in domestic or international law. This provision has been the subject of debate in the course of these proceedings.

33. Article 8.22 provides that a claim may be submitted under the ICSID Convention and Rules of Procedure for Arbitration Proceedings ("the Washington Convention"), and/or the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, or any other essentially similar rules. Article 8.25 provides that the respondent (being the Party whose measures are challenged) consents to the settlement of the dispute by the tribunal in accordance with the procedures set out in the section. Article 8.27 provides for the constitution of the tribunal and an appellate tribunal.

34. Article 8.29 provides that the parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and when and if such a tribunal

is established, the CETA Joint Committee shall adopt a decision providing that investment disputes will be decided pursuant to that mechanism. These provisions are particularly important in these proceedings as the arbitral awards made under ICSID and UNCITRAL rules are enforceable in Ireland under the provisions of the Arbitration Act, 2010. The appellant contends that this commits the parties to establish, or become bound by, a permanent judicial body with power, it is said, to administer justice.

35. Article 8.31 provides that the tribunal established under the section shall apply the agreement to be interpreted in accordance with the Vienna Convention on the Law of Treaties, 1969, and shall not have jurisdiction to determine:-

> "the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party".

It is also provided that:-

> ". . .for greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party".

These provisions, in conjunction with similar provisions in the agreement, make it clear that, at the level of form at least, it is not within the jurisdiction of the arbitral tribunal to consider the validity of any challenged measure.

36. Article 8.34 permits interim measures of protection. Article 8.38 permits the non-disputing Party to be provided with details of the claim pleadings and submissions and may be permitted to make oral or written submissions regarding the

interpretation of the agreement and the Party may attend the hearing held under the Section. This means that, for example, Canada would be entitled to participate in a dispute between a Canadian investor and Ireland, and *vice versa*.

37. Article 8.39 provides that the nature of the award that a tribunal may make is limited to monetary damages and any applicable interest, and restitution of property in which case the award shall provide for the option of payment of monetary damages representing fair market value for the property at the time immediately before the expropriation. The monetary damages awarded shall not be greater than the loss suffered, and the tribunal is precluded from awarding punitive damages. By Article 8.41, an award is binding between the disputing parties in respect of a particular case, and the disputing Party shall recognise and comply with an award without delay. Sub-article 3 of Article 8.41 provides for the procedure where enforcement of a final award is sought either under the ICSID Convention or the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules and further provides that "[e]xecution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought".

38. It is also necessary to refer to the provisions of Chapters 23 and 24, which in the context of trade and labour and trade and environment respectively, recognise the parties' right to regulate and certain levels of protection. Thus, in the context of the environment it is provided that:-

> "The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies

provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection".

E. ***Analysis of the Domestic Effects of CETA***

39. It is clear that this agreement is a development in the field of international relations which is consistent and intersects with other international agreements containing trade agreements and dispute resolution procedures to which Ireland, in common with any other country, is already a party. The objective it pursues is also central to, and to that extent is an unremarkable aspect of, international agreements: that is, the promotion of beneficial trade between participating countries. For example, CETA is designed to sit alongside Ireland's participation in GATT, which Ireland has been a member of since the mid 1960s. In addition, GATT has its own disputes resolution procedure.

40. The specific provisions relating to investment are also unremarkable. The basic agreement is that each Party agrees not to discriminate against foreign investors, or at least investors of the other Party, and in this instance Canada. Each Party also agrees to treat such investors and investments in the same way as it treats its own investors and investments made by domestic enterprises and individuals, or in the same way with which it treats investments and investors emanating from countries with most favoured nation status in the domestic regime.

41. The agreement also provides that fair and equitable treatment is to be afforded to such investors and covered investments, and for the resolution of disputes in relation to a claim that such an investor or covered investment has not had the benefit of fair and equitable treatment. The standard of fair and equitable treatment is recognisable and normally amounts to matters which would undermine the validity and

lawfulness of a measure as a matter of Irish law, albeit that the Tribunal is limited to the award of damages to an individual investor amounting to compensation for loss suffered. While in the case of expropriation the Tribunal is empowered to award restitution, that award must also provide for the alternative of an award of compensation. In essence, therefore, the Tribunal is limited to awards of compensation to individual investors and is not entitled to make any determination as to general validity of the measure in question.

42. The procedure for the Arbitral Tribunal may include the investor, the Party (in this case Ireland) and the non-disputing Party (in this example, Canada). The Parties' agreement to be bound by the award is capable of enforcement under the New York or Washington Conventions, are therefore enforceable in Irish law, originally by the provisions of the Arbitration Act, 1980 and, now by the provisions of the Arbitration Act, 2010. It is noteworthy, that in respect of any such claim a claimant is required to discontinue legal proceedings whether domestic or international and/or to waive the right to bring any such claim. To that extent, there is, in my view, no question of the Tribunal coming to an outcome inconsistent with the decision of an Irish court in relation to disputes in respect of relevant measures – the FITR provision means that an investor must choose their forum. While the CETA Tribunal is empowered to consider decisions and awards of judicial bodies, it may not reconsider the issue on the merits, and rather is limited to a question of whether there has been a denial of justice in criminal or civil proceedings, or a fundamental breach of due process under Article 8.10(2)(a) or (b).

43. However, there can be little doubt as to the significance of an agreement from the point of view of the national constitutional system. The agreement permits tribunals which are not part of the national legal order to consider the public law of a state,

whether primary or secondary legislation, administrative decisions or other orders, and judicial decisions, and to award compensation for loss, which became capable of enforcement as a matter of national law in any state which adheres to the Washington or New York Conventions. At the level of principle, therefore, such an award may conceivably alter, counter, or neutralise the impact or effect of a domestic provision or other measure, at least as far as the individual investor is concerned, in fact, if not in law.

44. At the same time, the limitations of the system must also be noted. The scheme of dispute resolution can only apply to certain covered investments and investors. In Irish terms, this means that the system is limited to Canadian investors and investments (with some further significant limitations in respect of subject matter). The Tribunal is limited to a monetary award which must be compensatory only and cannot exceed the loss occasioned to an individual investor or investment. The determination does not have the power to alter an impugned provision or affect its validity. As a matter of Irish, Canadian, or indeed European law, a measure found to give rise to an award of compensation under CETA remains applicable to all addressees including the covered investment and/or investor as a matter of national law or applicable Member State law. The function of the scheme is limited to compensation for actual loss occasioned to the investment and/or investor and cannot extend beyond that. The Tribunal must follow the national courts' interpretation of national law and can only have regard to national law as a matter of fact. The threshold for liability is very high. The scheme recognises at a number of points the right of a national government to regulate in the public interest, particularly in protection of employment and the environment or the common good

more generally – even if such regulation causes loss to an investor or in respect of an investment.

45. There is no doubt, however, that even recognising the limits on the jurisdiction, the fact is that public law measures of a sovereign country can be reviewed, and compensation awarded for loss caused by them. That decision can be made by a Tribunal which is not part of the national legal system. These are matters therefore that require close scrutiny. The issue, however, cannot be resolved by any *a priori* superficial judgment: a moment's thought reveals that there are a number of agreements which have similar and indeed more far-reaching scope of application in some respects. To take only one example, much debated in the hearing, the European Convention of Human Rights ("ECHR") is not limited to the citizens of contracting states, or limited to operating on any reciprocal basis. Instead, it applies to any person within the territory of the contracting states. The scope of the Convention extends much further in terms of subject matter, and the Court of Human Rights is not limited to an award of damages to the individual complainant. If it determines that legislation is incompatible with the Convention, then the obligation on the State is to remedy that generally, and not merely by payment of compensation to the individual complainant. On the other hand, it is accepted that the State may, through the Government, enter into agreements to resolve disputes either with other countries, or individuals, and have them determined by arbitration with the effect that any award made may be enforceable as a matter of Irish law. It is implicit in the argument advanced on behalf of the appellants, that neither of the above-mentioned examples poses any constitutional difficulty. If the appellant's case is correct, and CETA is impermissible as a matter of fundamental principle, then it is necessary to

identify very carefully and precisely, both the principle leading to this conclusion and its limits and why existing agreements do not fall foul of it.

F. ***CETA and International Investor-State Dispute Settlement***

46. As mentioned above, it is important to place CETA in terms of its development in its context in international relations. What appears novel in a domestic sphere may be unremarkable at the international level. The principal novelty of CETA, in terms of the development of investment agreements executed by states, is that the method of appointment of the tribunal to exercise the dispute resolution function is fixed by the agreement itself, and which moreover requires that the appointees satisfy certain objective criteria akin to the standards required of a judge being appointed in the national system.

47. This is an innovation introduced to deal with one of the criticisms of the legitimacy of investor-state dispute settlement ("ISDS"). It was considered by some that the system of *ad hoc* appointment of a panel of three arbitrators, with one being nominated by the investor another by the State, and a third independently nominated (often by ICSID), lacked the degree of detachment and neutrality which was desirable in decision making, and the *ad hoc* nature of the tribunal necessarily gave rise to the possibility of inconsistent and therefore unpredictable outcomes. The fact that one arbitrator was normally nominated by the claimant and another by the Party against whom the claim was made, was also considered undesirable as encouraging an identification, if not a loyalty, between the arbitrator and his or her appointer, while at the same time unduly increasing the burden upon the independently appointed arbitrator. It was also possible that persons appointed arbitrators in one case could appear as advocates in another or *vice versa*. In that respect, the system of appointment provided for by CETA and similar agreements is seen as an

important innovation. The aspiration towards a permanent adjudicative system expressed in Article 8.29 of CETA can be seen in this light.

48. While a degree of permanence, predictability and professionalism of the Arbitral Tribunal would appear to address, at least in part, that criticism, the merits of the different provisions are a matter for discussion in a different forum. This innovation of CETA would not appear to be the factor that determines that a fundamental principle of sovereignty has been breached. If the appellant's arguments are correct, then it must follow that sovereignty is concerned if any external tribunal is empowered to deliver rulings and award compensation in respect of measures adopted by Irish law, or the exercise of legislative executive or judicial power. The method of appointment of such a tribunal is not determinative or even in this respect particularly relevant. While, therefore, CETA is a major multilateral treaty between two large trading blocs and the individual Member States of the EU, containing investment protection provisions and a dispute resolution process, the issue raised would appear to arise in any Bilateral Investment Treaty ("BIT") permitting compensation awards in respect of the public law measures of a country alleged to cause loss to an investor or investment.

49. There is an undercurrent in the argument made on behalf of the appellant that investment protection treaties are outliers not properly the subject international relations between states, and which is more properly concerned with matters such as war-peace alliances, territory and, perhaps, armaments. However, treaties regulating commerce and providing protection for foreign investors and businesses, have been an important part of international law going back to at least to the 18th century. For example, the provisions of the Paris Peace Treaty of 1783 provided that, between the new United States and the United Kingdom, creditors should meet no lawful

impediment to the recovery of the full value of *bona fide* debts. The protection and advancement of trade between citizens and subject of different states has always been an important aspect of international affairs, and agreements and consequently international law.

50. The concept of agreements providing for investor-state dispute settlement mechanisms emerged after the Second World War with an increasing awareness of the interconnectedness of countries and economies and the collective importance of securing international consensus on the treatment of foreign traders and investors and the creation of international bodies to advise, supervise, regulate and, where necessary, resolve disputes. A recent study in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration, Empirical Perspectives* (Cambridge University Press 2022) suggests that there now are over 3,500 signed investment treaties. It appears that there are at least 2,900 bilateral investment treaties. Nine of the newer Member States of the EU have bilateral investment treaties with the US. There are almost 400 signed regional bilateral trade agreements with investment chapters, and seven multilateral investment treaties, most notably perhaps in 1994 the North American Free Trade Agreement ("NAFTA") between Canada, the US and Mexico, now superseded and replaced by the United States-Mexico-Canada Agreement, 2019 ("USMCA").

51. ICSID is an organisation established by the World Bank to provide for the resolution of international investment disputes. The ICSID Convention ("The Washington Convention") came into force in 1965. It was signed by Ireland in 1966 and ratified in 1980 when the enactment of the Arbitration Act, 1980 provided for the enforcement of awards made under that convention (and the New York Convention), both of which were set out in appendices to the 1980 Act. Not only, therefore, are

investment treaties and dispute resolution processes well-established features of the post-War international order, but they have been contemplated by Irish law for at least 40 years and provision has been made for the enforcement of awards made in respect of disputes in relation to their application.

52. The regulation of foreign investment in Ireland, the protection of Irish foreign investment abroad, and the establishment of a procedure for resolving disputes, is, in principle, therefore a valid and important aspect of the exercise of foreign affairs on the part of the State. The observations of the former Justice Stephen Breyer in *The Court and the World: American Law and the New Global Realities* (Alfred A. Knopf 2015) as to the development of treaty making in the context of the United States, can, in my view, be applied equally to Ireland. As he noted, on page 167, there has been a notable increase in treaty making since the establishment of the United States, and the subject matter has changed:-

> "At the nation's founding, treaties almost exclusively concerned war and peace, territory, armaments, trade, and occasionally aliens' property rights. Today they also cover matters once solely of domestic concern, such as individual social and political rights, technical aspects of private commercial contracts, the arbitration of disputes, and even marriage, divorce and child custody. That is not surprising, for today ordinary travel, communication, business dealings, and even family relationships routinely take place across international borders."

This passage explains that while trade and aliens' property rights have always been the subject of international agreement, the developments since the Second World War have meant that the world is even more interconnected, and that is reflected in the subject matter of international agreements, often creating international bodies

and dispute resolution processes, and, as we shall see, often providing that complaints are not limited to the contracting states but may be advanced by individual persons or interested bodies.

53. This is important in at least two respects. First, the international community in which the Constitution envisages Ireland participating as a fully independent sovereign state, is one in which investment treaties with dispute resolution mechanisms are now a commonplace feature of international affairs and regularly entered by states claiming the same sovereign status as Ireland asserts in Article 5 of the Constitution. Further, despite the proliferation of treaties, and the extensive debate and controversy they have generated in recent years, we have not however, been referred to any decision of a national court deciding that the execution of an investor compensation agreement permitting binding arbitration in respect of measures adopted which affect that investment, impermissibly infringes national sovereignty, as is alleged in these proceedings.

III. The Irish Authorities: *Boland*, *Crotty* and *Pringle*

54. The relative sparseness of authority on the question of constitutional constraints upon the conduct by the Government of the external affairs of the State, is instructive in itself. It illustrates the fact that the Constitution says very little in *express* terms about the manner in which the Government is to conduct those relations with other states, and furthermore, that the Constitution contemplates that, in general, the Government is not to be made accountable in respect of strict legal rules to the supervision of the courts, but rather is accountable to the Dáil at a more general and political level, under Article 28.4.1°. The Irish authorities are not decisive on the issue arising in this case but are instructive.

A. ***Boland***

55. *Boland v. An Taoiseach* [1974] I.R. 338 ("*Boland*") is not only the first case in which the Court had to consider a challenge to the conduct by the Government of the foreign affairs of the State, but is also, perhaps, structurally the closest, since the essential argument in that case was that the action by the Government in issuing a communiqué after the Sunningdale Conference, was, or would be if embodied in an international agreement, a breach of constitutional constraints on the exercise by the Government of the foreign affairs of the State, which were not express in the Constitution, but rather, it was said, implied by it.

56. The joint communiqué issued by the British and Irish governments after the Sunningdale Conference establishing the power-sharing executive in Northern Ireland, set out certain matters and anticipated a further agreement. Paragraph 5 of the communiqué contained two separate declarations by the Irish and UK governments set out side by side. The Irish Government declared that it accepted that the status of Northern Ireland should only be altered with the consent of the majority of the population of Northern Ireland. The plaintiff, a former TD and government minister, contended that the communiqué was repugnant to the Constitution and in particular Articles 2 and 3 of the then Constitution.

57. That claim was met by a defence that the Constitution did not permit the courts to review the actions of the Government in the exercise of external affairs. This position was, perhaps, unsurprising: while the Constitution contemplated an express power of review of the validity of Acts of the Oireachtas (Article 34.3.2°), linked to the express prohibition on the Oireachtas precluding the enactment of legislation repugnant to the Constitution (Article 15.4), there is no similar express reference to powers of review in respect of the actions of the Government in the exercise of the

executive power whether internal or external. The plaintiff argued, however, that Article 28.2 provided for the exercise of executive power of the State, by or on the authority of the Government, but "subject to the provisions of the Constitution" and this implied limitations on the Government's powers which would, if necessary, be require enforcement by the courts.

58. The High Court (Murnaghan J.) accepted the Government's argument in an *ex tempore* judgment and the Supreme Court dismissed the appeal. The *ratio* of the decision was, however, a little more qualified than the absolute position asserted on behalf of the Government and accepted in the High Court. The conclusion of the Supreme Court was that the Constitution did not permit the courts to review the actions of the Government in the circumstances relied upon by the plaintiff; that is, in the circumstances of the communiqué issued expressing Government policy. Fitzgerald C.J. appeared to broadly accept the Government's arguments but stopped short of an absolute rule of non-justiciability. Having observed that the cases cited did not support the claim that the courts had power to intervene or restrain the Government in the exercise of the executive function, but rather led to the contrary conclusion, he stated his conclusion in more qualified terms:-

> "… the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it". [Emphasis added]

59. The principle that the actions of the Government in the proper exercise of the executive functions of the State should only be impugned by the courts in cases of clear disregard of clear constitutional provisions, is one which was applied by Kearns J. (as he then was) in *Horgan v. Ireland* [2003] IEHC 64, [2003] 2 I.R. 468,

where a declaration was sought that a Government decision to permit the use of Shannon Airport by US aircraft engaged in military action in Iraq was unconstitutional. Kearns J. held that:-

> "… some quite egregious disregard of constitutional duties and obligations would have to have taken place before [the Court] could intervene under Article 28 of the Constitution … The judicial organ does not decide the issue of "participation" in this context [in a war] in this context as a primary decision maker. Under the Constitution, those decisions are vested in the Government and Dáil Éireann respectively".

60. I discussed the application of the 'clear disregard' standard in the judgment I delivered in *Burke* at paragraphs 57 – 61 and drew a distinction between proceedings in which it was contended that the exercise of the executive power, whether external or internal, infringed the constitutional rights of a citizen, and those cases in which the claim was made that the Government was exceeding its proper role under the Constitution. The clear disregard standard was appropriate and correct in the latter context, but not in the former. At paragraph 57, I said that:-

> "[i]t was entirely logical, therefore, that the Court should find that the power of the Court to intervene in such circumstances would, in a field such as foreign relations, only arise where it could be said that the executive was acting in "clear disregard" of what the Constitution either expressly said, or necessarily implied".

The field of foreign relations is the context in which the present case arises and no claim is or could be made that a personal right of the citizen is being interfered with by executive action. In my view, therefore, the clear disregard standard set out in

Boland applies. However, in my view the resolution of this case is not dependent upon the application of that standard.

B. *Crotty*

61. *Crotty v. An Taoiseach* [1987] IESC 4, [1987] I.R. 713 ("Crotty") is a landmark case in Irish constitutional law in which the Supreme Court, by a majority of three to two, held that the Government could not execute and the Dáil could not ratify the Single European Act ("SEA") without the assent of the People. That decision was, like the *Boland* case, decided under considerable pressure of time, and a number of issues were considered, and separate judgments delivered. This had led to some confusion in the subsequent years. However, the decision has now been considered by this Court in *Pringle,* and for present purposes, the *ratio* of the case is now reasonably clear.

62. The Supreme Court held unanimously in *Crotty* that the amendment of the Treaty of Rome provided for in the Single European Act, and with increased use of majority voting in the European Council, the enumeration of detailed objectives of what was then the European Economic Community ("EEC"), and the creation of a new court of first instance were all matters which did not amount to an additional transfer of sovereignty to the then EEC, requiring an amendment to the Constitution and approval by the People. However, Title III of the SEA constituted a separate treaty, under which the parties agreed to adapt their foreign policy within a structured framework known as European Political Cooperation. A majority of the Court, (Walsh, Henchy and Hederman JJ.; Finlay C.J. and Griffin J. dissenting), held that this would effect a transfer of sovereignty that was not already permitted and required approval of the People in a referendum.

63. Notwithstanding the outcome of *Boland*, the claim in *Crotty* was defended by the Government on the basis that the courts had simply no power to constrain the Government in the exercise of foreign relations under Article 29.4. However, as Finlay C.J. pointed out, there were a number of specific, if limited, constraints established by the Constitution in respect of the exercise by the Government of the executive power of the State in external affairs. Thus, for example, war could not be declared without the assent of Dáil Éireann (Article 28.3), the Government was obliged to lay all international agreements before the Dáil, (Article 29.5), and the Government was in that respect responsible to the Dáil, (Article 28.4). The Government was similarly obliged not to bind the State by an international agreement involving a charge on public funds unless the terms of the agreement had been approved by the Dáil, (Article 29.5.2°). If any of these provisions were not complied with, the provisions of the Constitution could and would be enforced by the courts. Indeed, in *The State (Gilliland) v. The Governor of Mountjoy Prison* [1986] IESC 3, [1987] I.R. 201, the Court found that the State was not bound by an agreement because it involved a charge on public funds and had not been approved by the Dáil.

64. The essence of the decision in *Crotty* was that the execution of the SEA was also a breach of an express provision of the Constitution, namely that contained in Article 29.4, that the executive power of the State in the conduct of external relations was to be exercised by or on the authority of the Government, which carried with it the necessary corollary that the Government was the only body which could conduct foreign relations, and the majority of the Court concludes that the SEA would permit others to determine Ireland's foreign policy. Walsh J. said at p. 777 of the reported judgment "it is the government alone which negotiates and makes treaties, and it is

the sole organ of the State in the field of international affairs". As Henchy J. put it at p. 787:-

> "It follows in my view, that any attempt by the Government to make a binding commitment to alienate in whole or in part to other states the conduct of foreign relations would be inconsistent with the Government's duty to conduct those relations in accordance with the Constitution".

65. As observed in *Pringle*, the difference of opinion between the minority and majority can be seen not as a difference on this principle, but rather whether the provisions of Title III of the SEA went as far as abdicating, alienating or subordinating or transferring the Government's power (and in this respect duty) to conduct foreign affairs. Viewed in this way, *Crotty* is an example of the Court enforcing one of the few constraints imposed by the Constitution on the exercise by the Government of the executive power of the State in external relations: that is that the assignment to the Government of that power and duty means, as Walsh J. said, that such power is *only* to be exercised by the Government.

C. ***Pringle***

66. *Pringle* is a decision which is perhaps the most instructive in the present context. The facts are well-known. In the context of the relatively recent financial crisis which presented so many difficulties for the economies of Europe (and indeed that those of other countries), it was considered necessary to establish support mechanisms for the financial system with sufficient resources to protect the euro in any conceivable circumstance. However, without the approval of the United Kingdom, which was not forthcoming, such a mechanism could not be established by the EU. Instead, a separate treaty was made by 17 members of the Union who were also members of the euro group. For this reason, the provisions of the Treaty

fell to be analysed by reference to the Government's general power to conduct foreign affairs, and without reference to the particular provisions of Article 29 relating to membership of the European Union.

67. The European Stability Mechanism ("ESM") was established by a treaty bearing the same name in 2012. That mechanism required a paid-up capital of some €80 billion, which was divided proportionately between the Member States, including Ireland. However, the mechanism had an authorised capital of €700 billion, again divided proportionately. On this basis, Ireland could conceivably be called on to contribute a staggering amount of €11,145,400,000 for the purposes of supporting the financial system under crisis in other participating states. The Oireachtas had enacted the European Stability Mechanism Act, 2012 to give effect in Irish law to the Treaty, and accordingly the constitutional formalities had been satisfied. The Treaty had been made by the Government. It had been laid before the Dáil and because it involved a charge on public funds it had received the approval of the Dáil, and those provisions which required to be made part of the domestic law of the State were enacted by the Oireachtas in accordance with Article 29.6. Thus the formal requirements of the Constitution had been complied with.

68. The plaintiff, a TD, argued however, that the *effect* of the treaty was to transfer Ireland's economic sovereignty to an external body, or at least to significantly and impermissibly constrain Ireland's economic sovereignty and the capacity of the Government and the Oireachtas to make decisions in the interests of the common good. If a demand were made on Ireland in accordance with the Treaty to contribute its full proportion of the authorised capital to the ESM, that action would necessarily severely limit the budgetary capacity of the State for years to come, and likely lead to obligations to raise additional revenue, restrict existing spending and forego

planned expenditure. It was argued that an agreement having such a far-reaching effect could not be made by the Government or ratified by the Dáil and so far as relevant, legislation giving effect to such an agreement could not be enacted by the Oireachtas.

69. This argument was accepted by Hardiman J. in dissent, but rejected by all other members of the Court (Denham C.J., Murray, Fennelly, O'Donnell, McKechnie and Clarke JJ.) The Court held that an important aspect of the sovereignty of the State was the exercise of the fundamental powers of the State by the organs designated in the Constitution. Since it was empowered under the Constitution to exercise the executive functions of the State including foreign policy, the Government had wide discretion to enter into international treaties as a matter of policy, subject only to the obligation to lay the treaty before Dáil Éireann, to obtain its approval if there was a commitment to financial expenditure and to obtain the approval of the Oireachtas if domestic law had to be changed to comply with obligations under the Treaty. Otherwise, the Court had no role in relation to foreign policy decisions taken by the Government. Their only role was to enforce the boundaries of and limitations on the exercise of executive power in foreign relations which were either expressed in or to be implied from the Constitution, and at the same time to reject any attempt to impose limitations on Governmental conduct of foreign relations that were not required by the Constitution. This is all well explained in the passages form the judgment of Denham C.J. set out at paragraph 66 of the judgment of Dunne J. in the case at hand. In my judgment, at paragraph 316 of the reported version, I said:-

> "It is indeed in the nature of international relations, and expressly contemplated by the Constitution, that states will make treaties, enter into trade agreements, form alliances, join groups and assist in the setting up of

> international bodies with agreed mandates and which on occasion may have adjudicative functions … Indeed as a matter of history Ireland was a member of the League of Nations at the time the Constitution was adopted and in the early years of the Constitution's life became a member of the United Nations (1955), subscribed to the World Bank and the International Monetary Fund ("IMF") (1957), became a member of the Council of Europe (1949), and accepted the jurisdiction of the European Court of Human Rights (1959). To take only one example, it cannot be suggested that Ireland retains a freedom not to abide by sanctions imposed by a UN resolution even if Ireland considered that the sanctions were misguided, or that it stood to gain considerably by continuing to trade with the State in question."

70. *Pringle* is, therefore, an authority for the proposition that decisions made at international level by the Government can have effects, and indeed, profound effects, within the State and moreover, on the capacity of the Government itself and other organs of government in the exercise of their functions, but the mere fact that an international agreement properly entered by the Government may have some *effect* domestically does not itself offend the Constitution.

IV. Sovereignty

A. *The Constitutional Concept*

71. The concept of sovereignty is central to this case, although somewhat surprisingly it was not debated in any detail, perhaps because the argument against the ratification of CETA appears to have proceeded on an assumption that this difficult and somewhat elusive concept had an obvious and clearly understood meaning. It was discussed briefly in my judgment in *Pringle* at paragraphs 3.17 – 3.18. The preamble to the Constitution provides that, among other things, it seeks to promote concord

with other nations. Article 1 affirms the Irish nation's sovereign right to determine its relations with other nations, and Article 5 states that Ireland is a sovereign, independent and democratic state. That assertion is then carried into operation by the other provisions of the Constitution. Part of the concept of being a sovereign state is perhaps described (if not defined or explained) in a passage in the judgment of Griffin J. in *Boland* at p.370. Having set out the provisions of Articles 15, 28, 29 and 34, he said:-

> "In my view these Articles demonstrate that the Oireachtas, and the Oireachtas alone, can exercise the legislative power of government; that the Government, and the Government alone, can exercise the executive power of government; and that the judicial power of government can be exercised only by judges duly appointed under the Constitution in courts established by law under the Constitution". [Emphasis added]

72. It will be necessary to return to this point later, but for present purposes it can be said that the Constitution establishes a sovereign state and conceives of that sovereignty being exercised both externally in relation to other sovereign states, and internally in the exercise of executive power by the Government alone, in the making of laws by the Oireachtas (and no one else) and in the administration of justice by courts (or bodies constituted in accordance with Article 37) and no one else, and in each case certainly by no external body, or even one of the other organs of state.

B. *The Separation of Powers*

73. However, as discussed in *Pringle,* the separation of powers is established under the Irish Constitution was not intended to be, and is not, one of hermetically sealed independent units which do not interact with each other. Rather, it is contemplated that there will be a degree of intersection between them, and more generally, that the

exercise of powers by one branch, may have an effect on another. In particular, the Constitution does not state that actions taken in the exercise of external sovereignty may not have an effect internally, or *vice versa*. A Government may declare war, but its capacity to wage it may be dependent on the willingness of the Oireachtas to provide funds or perhaps authorise conscription. Decisions of the Government in relation to declaration of war or in relation to tariffs and trade agreements or to adhere to conventions protecting human rights, may all have a significant effect within the domestic sphere. A difficult question to which it will be necessary to return, is whether there is any limit on the exercise of sovereign powers because of the effect they have on the sphere of activity of another branch. However, before turning to that question it is necessary to address the case made by the appellant, which contends that the execution of CETA amounts to a formal transfer, abdication, or alienation of sovereignty in all fields of government, but most clearly in the legislative and judicial field. This argument focuses on the legal effect and characterisation of CETA and is not dependent on any question of practical effect.

74. As I understand it, my colleague Dunne J., would find that CETA does not amount to an abdication, transfer, or alienation of legislative power, but is an impermissible interference with the juridical sovereignty of the State. Hogan J. would find that the agreement does infringe legislative and (for somewhat different reasons) juridical sovereignty, which perhaps is the main ground of his decision and is the area of greatest contention in this case. It is, however, useful to consider the arguments made by the appellant in respect of the legislative sovereignty, since, in my view, the reasons why that claim must be rejected, are instructive when considering the more contentious area of juridical sovereignty.

C. ***Legislative Sovereignty***

75. The argument for the appellant put at its height, is that rules contained in CETA and, in particular, Chapter 8 concerning investments, constitute norms created by the State, and which results in a new administrative law which is both binding and enforceable within the jurisdiction. It is said that Article 8.10, for example, imposes an obligation on the State as to how it may treat both covered investments and investors who benefit from CETA. This is in addition to any other applicable legislation or body of principles established by judicial decision in the Irish courts. These rules prohibit arbitrary discrimination and enforce legitimate expectations and, in all cases, permit recovery of damages for loss. It does not matter, for present purposes, that these provisions are not significantly different from applicable principles of Irish administrative law: they emanate from CETA and not from the Oireachtas, and thus on this argument are impermissible under Article 15.2.

76. An immediate response is that provisions of Art. 8.10 (and CETA more generally) operate outside the domestic Irish legal system and take effect by virtue of the agreement of the parties. They are not of general application to all persons affected by a measure, but only apply to a particular investor or investment contemplated by CETA. The provisions cannot be enforced in an Irish court, even within their own field of application. This is made clear at a number of points such as paragraph 7 of Article 8.10 which provides that the mere fact that a measure breaches domestic law does not of itself establish a breach of the Article, and by the provisions of paragraph 2 of Article 8.3.1, which provides that the CETA Tribunal shall not have jurisdiction to determine the legality of a measure under the domestic law of a Party and may only consider the domestic law of a Party as a matter of fact, and that any decision of the tribunal in that regard, must follow the prevailing interpretation given by the

courts or authorities of the Party and any meaning given to domestic law by a tribunal shall not be binding on the courts or authorities of the Parties. The basis of the terms of CETA are agreement, and therefore consent, including consent to the settlement of the dispute by an arbitral tribunal. Any such arbitration agreement is not part of the law of the State: it takes effect by virtue of the agreement of the Parties and not by any authority of the State.

77. A more sophisticated version of the argument might look not just at the form but also at the effect of the CETA rules. It might be said that when the rules take effect and an award is made, that may disapply or neutralise what is otherwise a public law of the State, and that this amounts to amendment of, or even limited repeal, of the measure in question which may indeed extend to primary legislation. To take a simple example, if an Act of the Oireachtas provided for the compulsory acquisition without compensation of all businesses in a certain class and the CETA Tribunal upheld a claim that this was a breach of Article 8.12 in respect of a specified Canadian owned business and ordered restitution or, in the alterative, damages, then it might be argued that the law made by the Oireachtas would have been altered, and would now *in effect* provide for the compulsory acquisition of all such businesses without compensation, save that owned by the investor claimant. But while the outcome in the example in practice may be to some extent to insulate or protect a successful claimant from the impact of Irish measures, that does not render the provisions of CETA *a law*. It is merely the consequence of an international agreement which Ireland agrees to abide by, and to pay damages amounting to compensation in the event that it is held by a tribunal that it has not done so. The law of Ireland remains the same, and applies to every person including the claimant, even if successful. If, in the example just given, the compulsory acquisition was effected

by a local authority or statutory body, then as a matter of law, the acquisition would be lawful and the authority would become the owner of the property and entitled to enforce the order. It would be the State, Ireland, which would have an obligation to pay compensation fixed by the CETA Tribunal.

D. ***Juridical Sovereignty***

78. It is argued that CETA offends juridical sovereignty in two different, and to some extent inconsistent, respects. First, it is argued that the provisions of Article 8.22(1)(f) and (g) requiring either a waiver of existing proceedings or the waiver of a right to bring proceedings, means that the scheme effects an impermissible withdrawal of claims from the jurisdiction of the courts. Such claims might be for a breach of Article 8.12 limiting expropriation, or for breaches of Article 8.10(2)(c)-(f). A different argument is made which focuses on the other provisions of Article 8.10(2), that is subparagraphs (a) and (b). Those provisions allow a CETA claim in respect of judicial decisions. under these headings, it is possible to have recourse to the CETA Tribunal which will adjudicate on a claim that there has either been a denial of justice in criminal proceedings, or a fundamental breach of due process in judicial proceedings. While the focus of the CETA claim will necessary be different from the domestic proceedings giving rise to the claim, it is possible to anticipate that the effect may be that a successful claim would reverse or alter the position which had applied at the end of the proceedings, at least as far as the investors concerned. Thus, if a fine is imposed in criminal proceedings, or an award of damages made against an investor, and the CETA Tribunal found a breach of Article 8.10(2)(a) or (b) and awarded compensation in the same amount, then it is argued that the essential finality of the legal proceedings, which is a core feature of the

administration of justice, and an express requirement of the decisions of the Court of Appeal and Supreme Court, would be undermined.

E. *Waiver*

79. A waiver of a right of action, or discontinuance of existing proceedings is sometimes contrasted unfavourably with provisions requiring an exhaustion of domestic remedies. However, it must be recognised that any such provision would face a different constitutional challenge. If, instead of the FITR provision, the CETA system required exhaustion of domestic remedies (as indeed is required by Article 35(1) of the ECHR), then that would involve a more expansive consideration of matters which had been the subject of domestic litigation than is contemplated under Article 8.10(2)(a) and (b) and would face the claim that the CETA Tribunal system was incompatible with the necessary finality of legal proceedings which is an essential feature of the administration of justice under Article 34 of the Constitution. It does not follow, therefore, that an exhaustion of remedies provision is necessarily any more compatible with the Constitution than a FITR provision requiring waiver.

80. The fact that there are provisions requiring a waiver illustrates the fact that a CETA claim, and domestic public law proceedings challenging a measure in Irish law (or indeed, in Canadian law) will cover the same ground and may consider the same measures by somewhat similar criteria, and to that extent can be said to overlap. But that in itself does not mean that a determination by the CETA Tribunal is itself the administration of justice reserved to courts or Article 37 bodies by the Constitution. The determination of the CETA Tribunal is not made by reference to Irish law but rather by reference to the provisions of CETA. It is made in different proceedings, before a different tribunal, with different parties, (including the non-disputing Party)

by reference to different provisions, and moreover, derives its force not from the law of the State, but rather from an agreement embodied in the Treaty.

81. The parties are not compelled by any law to have the dispute determined by the CETA Tribunal. It is only when an investor chooses to initiate CETA claims, that he/she becomes obliged to discontinue proceedings or waive any right of action. There is nothing unusual or impermissible in this at the level of constitutional principle. It is a commonplace of arbitration agreements that parties agree not to litigate their claims in court and such agreements are routinely enforced by the courts. Indeed, some arbitration agreements preclude any claim being made at any time. There have, moreover, been compensation schemes established either by executive decision such as the Compensation Scheme for Personal Injuries Suffered at the Stardust, Artane on 14 February,1981, or by statute, such as the Hepatitis C Compensation Tribunal Act, 1997, or the Residential Institutions Redress Act, 2002. It is a common feature of any such scheme, that a party is obliged to waive any cause of action in private law as a condition of accepting an award made under the scheme. While a claim in private law and a claim pursuant to a compensation scheme both seek an award of compensation, they are clearly separate and distinct procedures. The operation of a compensation scheme, or indeed an arbitration agreement in which a claimant agrees to waive a claim which could otherwise be the subject of litigation, does not impermissibly remove claims from the jurisdiction of the Irish courts. Neither does CETA. In particular, the CETA Tribunal does not obtain jurisdiction or take effect by operation of law. No investor is compelled to bring any claim arising out of a contested measure before the Tribunal or precluded from bringing proceedings as a condition of making a CETA claim, and the fact that any such claimant is obliged to waive a claim at law does not mean that a claim has been

compulsorily and impermissibly removed from the jurisdiction of the Irish courts; where there is a waiver of a claim, it is effected by the person entitled to bring such a claim.

82. It is equally clear, at least in my view, that a decision of the CETA Tribunal making a finding under Article 8.10(2)(a) or (b) in respect of a judicial decision does not amount to a breach of the principle of finality, nor does it constitute the CETA Tribunal a potential appellate tribunal from the decision of the Irish courts including this Court, and which are required to be final and unappealable. A decision of the CETA Tribunal is not a rehearing of legal proceedings on the merits, and the Tribunal cannot reverse, alter or interfere with the decision of a court. Furthermore, a claim under Article 8.10(2)(a) or (b) is not an appeal on the merits permitting the CETA Tribunal to substitute its own award for that of an Irish court in respect of the same subject matter. Rather, it addresses only the manner in which the decision was made, and can moreover, only result in an award of compensation under the scheme and made against Ireland in its capacity as a Party to the Treaty rather than the other Party to the proceedings. A successful claim before the CETA Tribunal on these grounds, does not overturn the decision of the Irish courts which remains binding on the parties as a matter of Irish law and within the Irish legal system.

83. This can be illustrated by observing that a CETA claim can be made in respect of proceedings to which the State itself is not a party. It is conceivable that a claimant may contend that it has been the subject of a fundamental denial of justice resulting in an award of damages to a private plaintiff. A successful claim before the CETA Tribunal would not result in the reversal of that decision. The plaintiff would still be entitled to execute its award against the investor. It would not be a defence to any enforcement proceedings that the investor had obtained a CETA determination under

Article 8.10(2)(a) or (b). Instead, the investor would be limited to recovering the compensation awarded by the CETA Tribunal against Ireland as a Party to CETA. Even in the situation where the State was the other Party to the proceedings, and where it is contended that the State has been the beneficiary of a denial of justice or a fundamental breach of due process, and that the investor has suffered loss thereby, that determination would not in itself have an impact on the validity or enforceability of the judgment in Irish law. It would not, moreover, provide a defence to enforcement of the judgment. Indeed, it would only be when the judgment was enforced, that the claimant would suffer the loss necessary to make the CETA claim. This illustrates the fact that a CETA claim is separate and distinct from any claim in Irish law and cannot, therefore, be said to affect the finality of any such decision as a matter of Irish law. It would merely entitle the investor to compensation, if obliged to comply with the judgment.

84. This contrasts sharply with the appeal to the Privy Council which was provided for by Article 66 of the Irish Free State Constitution between 1922 and 1933. The comparison is instructive. The Privy Council was an appellate court empowered to hear appeals from the decision of the Irish courts and to reverse, vary or uphold them on their merits. Any decision was binding not just upon the parties but became a precedent which the Irish courts were obliged to follow. Where a decision was made in the field of public law on the validity of an administrative measure or even on legislation challenged pursuant to the Constitution, a decision of the Privy Council would take effect as a matter of law not merely between the parties to the dispute, but generally, *erga omnes*. There is no sense in which a claim before the CETA Tribunal is comparable as a matter of law.

85. This example is one illustration of the value of an understanding of the historical background. The conclusion that the provisions of CETA do not amount to legislation made by a body other than the Oireachtas, and that the decisions of the CETA Tribunal do not amount to the administration of justice by a body other than the courts can also be approached by a consideration of the history of the relevant constitutional provisions. It is also useful to consider some international agreements to which the State has been a party, and which have never been challenged. Finally, it will be useful to have regard to the consideration of CETA in European law, which is a valuable comparator.

F. ***History as a Guide***

86. The expression of legislative, executive, and juridical sovereignty contained in the 1937 Constitution is clear in its own terms but gains considerably from an understanding of the historical background to the provision. Ireland, as a country, traces its independence to 1922 and the settlement embodied in the Anglo-Irish Treaty. However, formally, that Treaty provided for dominion status within the British Commonwealth. Much of the debate after 1922 can be seen as a disagreement between those who pointed to the limitations in law and theory on the independence being obtained, and those who pointed to the practical reality of the independence obtained as a matter of fact. This explains, for example, the repeated references to the position and practice in respect of Canada both in the Treaty, and the in the Irish Free State Constitution. Canada was the dominion whose usage was seen as enjoying the greatest degree of practical independence from Westminster.

87. Nevertheless, as a matter of law, there were significant legal constraints upon the independence then achieved. The Treaty itself reserved particular areas of competence of the Imperial Parliament such as maritime matters, and in

constitutional theory that parliament still had the right to legislate for the internal affairs of any dominion, although this had largely fallen into disuse even by 1922. Nevertheless, the Colonial Laws Validity Act, 1865 (which was only repealed by the Statute of Westminster in 1931), provided that laws enacted within a dominion would take effect, but only insomuch as they were not repugnant to an Act of the Westminster Parliament. This background goes some way to explaining the emphatic terms of the second phrase in Article 15.2 adding, in this respect, to the terms of Article 12 of the Irish Free State's Constitution and providing that "no other legislative authority has power to make laws for the State".

88. Similarly, as just discussed, Article 66 the Irish Free State Constitution provided that an appeal would lie from the Irish courts, not to the House of Lords, which had been the case since 1800, but henceforth, to the judicial committee of the Privy Council. The story of the long struggle over this provision is told by Thomas Mohr in his insightful book *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Four Courts Dublin 2016) and once again, this background adds an extra resonance to the reference in Article 34.2 of the 1937 Constitution to "a Court of Final Appeal", and to the provisions of Article 34.4.6° that the decisions of that Court of Final Appeal "shall in all cases be final and conclusive". For reasons set out above, it is not possible, however, to see the provisions of CETA as performing the same function as a statute of the Westminster Parliament, or the CETA Tribunal as a latter-day Privy Council.

89. A third contentious aspect of the Treaty settlement and the dominion status it created was the position of the dominions in foreign affairs. The Imperial Government sought to control the external relations of the Empire and resist independent activity by the dominions. The position is well set out in D.W. Harkness*, The Restless*

Dominion: the Irish Free State and the British Commonwealth of Nations, 1921-31 (Macmillan London 1969), which recorded that:-

> "The dominions were still placed under the British Colonial office. Though they had signed the peace treaty [Versailles] and were full members of the League of Nations, other international activity was lacking. However, the power to make ambassadors was tentatively being acquired by Canada, and it was a convention that the dominions should have a full say in commercial treaties affecting their interest".

90. It was only in 1920 that Canada had taken the unprecedented step of announcing an intention to appoint an ambassador to the US. Almost contemporaneously with the Treaty, the representatives of the Irish Government were focused closely on the League of Nations, established a permanent representative there, and sought registration of the Treaty under Article 18 of the Covenant of the League of Nations. The capacity to be a full participant in international affairs was seen as a key attribute of an independent, sovereign state.

91. As has been observed elsewhere, the fact that President de Valera was the President of the League of Nations in 1935, at the time when the Constitution was being discussed and drafted, is important in the understanding of the initial work in the provisions of Article 29.1, 2° and 3° which echoed the Covenant of the League of Nations and states:-

> 1. "Ireland affirms its devotion to the ideal of peace and friendly cooperation among nations founded on international justice and morality.
>
> 2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.

3. Ireland accepts the generally recognised principles of international laws as its rule of conduct in its relations with other states.

Article 29.4.2° provided that "the government may avail of or adopt any organ, instrument or method of procedure used, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern".

92. These provisions cast a light in turn on the specific provisions of Article 29.5 dealing with the execution of international agreements. The significance of these provisions becomes apparent when it is understood that no dominion had asserted the power to negotiate any treaty until 1923. The provisions for Article 29 are, therefore, not only a forceful assertion of Ireland's status as a state in international affairs with an equal status to all other independent states, it also expresses an enthusiasm for engagement with other states in the field of international affairs and a desire to exercise fully Ireland's status as an independent sovereign state.

G. ***The European Convention on Human Rights as a Comparator***

93. This background is also of some relevance in considering the comparator much discussed during this case: Ireland's membership of the Council of Europe and adherence in 1953 to the European Convention on Human Rights. Ireland was one of ten founding members of the Council of Europe and heavily involved in the negotiation of the Convention, being represented by two of the most accomplished constitutional lawyers of the time, Seán MacBride and Cecil Lavery, and joined by F.H. Boland, one of Ireland's most distinguished public servants. Ireland was the first state to recognise the compulsory jurisdiction of the ECtHR and the second after Sweden to recognize the competence of the new body to receive individual petition.

Ireland's relative isolation after the Second World War was keenly felt, something enhanced by the State's exclusion from the newly formed United Nations by reason of the Soviet veto. The Council of Europe was, therefore, a major opportunity to put into practice the ideals which had been expressed in Articles 29.1-3 of the Constitution. Seán MacBride was reported to have said on the signing of the Convention in Rome in 1950, that the fact that Ireland was represented was proof of the fact that she considers herself part of the European continent. (See Michael Kennedy and Eunan O'Halpin, Ireland and the Council of Europe – *From Isolation towards Integration* (Council of Europe 2000) at page 7).That work also records the fact that an editorial in the Irish Independent did raise concerns about sovereignty and the possibility that the ECtHR could come to a decision contrary to that of the Supreme Court but what is striking is the apparent consensus that Ireland's ratification of the Convention was permissible, and indeed desirable.

94. It is useful to attempt to understand the significant novelty of what was contained in the ECHR in 1953, especially when viewed through the lens of international relations as they had been known in 1937 and the arguments about sovereignty made in these proceedings. First, the subject matter of the Convention had no necessary connection with any intercourse between contracting states. The Convention set out to provide for the protection of rights enumerated within the legal systems of contracting states. Furthermore, the rights guaranteed were not limited to any particular sphere of activity such as trade, international commerce or other international transactions, or to any group of persons such as the nationals of contracting states. The guarantee was to <u>all</u> persons within the jurisdiction of any contracting state. There was no requirement of an international connection; the rights guaranteed were available to be invoked and in practice were invoked by the citizens

and subjects of the respective Member States against their own states and put in issue domestic law, which took effect within those states, and in respect of those states' own citizens. It followed that the entire corpus of a state's public law, including executive action, public general legislation, and judicial decisions were in principle capable of giving rise to a complaint against the State and an adjudication by the Court. A further striking feature of the Convention supported by Ireland and accepted at the outset was that the rights guaranteed were not merely capable of being enforced by the contracting states who were parties to the Convention, but rather could be the subject of petition by the affected individual. Furthermore, the rights were to be enforced not by committee decision but by court adjudication by appointed judges. This all meant that citizens, (and indeed non-citizens) of contracting states could hold those states to account before an international tribunal in respect of law which took effect solely within the national boundaries of the State.

95. It is worth considering why these significant developments were considered to lie within the province of international law. As the Second Circuit of the US Federal Court of Appeals put it in *Filartiga v. Pena-Irala* (1980) 630 F.2d 876: "humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest…". In the immediate aftermath of the Second World War, it was recognised that a failure to provide a robust system for the protection of rights had contributed to the horror of the Nazi regime in Germany becoming entrenched, leading to genocide, and the conduct of a world war. It was recognized, therefore, that a collective agreement protecting rights in one country, benefited all countries, and that there were matters of fundamental basic rights, in respect of which no country could, or at least should, be a legal island in isolation from the rest of the

world community. It became accepted that the protection of fundamental rights was as legitimate a subject for international law as protection for trade, or agreements on strategic alliances and furthermore that protection of rights could require the possibility of individual complaint to a court like body having power to making binding decisions.

96. The Convention also provided for a court-based system of enforcement; a proposal Ireland also supported. The Convention also required that all contracting states accept the courts' decisions. Article 46.1 of the Convention provided:-

> "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

Pausing there, this was a provision under which Ireland bound itself to accept and abide by, and therefore be bound by the decisions of the ECtHR, in respect of domestic law and decisions made in Ireland, and in due course to do so in respect of complaints made by individuals affected by such laws, decisions or measures. Notwithstanding the significant novelty of the provisions of the Convention and its structure, it does not appear that any legal objection was raised as to the capacity of Ireland to become a member of the Council of Europe and to adhere to the Convention either at that time, which, as mentioned already, was relatively soon after the sovereignty of the State had been asserted in such striking fashion in the Constitution, or indeed, at any time since.

97. The existence of a court having jurisdiction in respect of the laws of Ireland, the decisions of the Irish administration and the judgments of the Irish courts, and which jurisdiction may be invoked by individuals not a party to the Convention or even nationals of contracting states, and empowered to give binding decisions which Ireland has in turn bound itself to accept, poses a significant difficulty for any theory

that the legislative or juridical sovereignty of the State is compromised by adherence to, and ratification of a comparatively more limited trade agreement such as CETA. This is all the more so when it is considered that a requirement for exhaustion of domestic remedies, which means that in every case that at least in theory, and most if not all cases in fact, the factual and legal issues surrounding giving rise to a complaint to the ECtHR, will already have been considered by Irish courts and, as a matter of Irish law finally determined by them, and indeed, since the coming into force of the European Convention on Human Rights Act, 2003, often by reference to the self-same ECtHR code. Furthermore, unlike the provisions of CETA, the determinations by which Ireland is bound under Article 46 are not limited to awards of compensation in individual cases; instead, it is anticipated that the rulings made by the Court will be of general application, and will therefore, often require an alteration in the law.

98. This problem is addressed squarely in an eloquent passage in the judgment of Hogan J. at paragraph 179:-

> "In some respects our accession to the jurisdiction of the European Court of Human Rights in 1952 and the enactment much later of the European Convention on Human Rights Act, 2003 are, so to speak, to our own legal system what Wagner to music or Joyce is to literature. In all three cases the pre-existing rules were stretched to their limits and all three instances represent examples of exceptionalism in their own fields which does not necessarily translate in favour of any successors seeking to emulate them. This is perhaps especially true of the ECHR itself. Created in exceptional circumstances and dedicated to the case of personal liberty and ensuring minimum standard of

civilised behaviour within the contracting states, it has long been a favourite of the law and our constitutional order".

I regret that I cannot agree. First, Joyce and Wagner deliberately set out to test the limits of the existing understanding of literature, language and music. As already pointed out, while the ECHR was undoubtedly a novelty in the field of international relations in 1950, there is no hint that Ireland, in acceding to the ECHR, considered that it was operating at the very limits of its constitutional order. If anything, adherence to the ECHR was seen as making good on the promise the Constitution made in Article 29. Second, the issue raised here is one of principle, indeed, the fundamental principle of national sovereignty. There is no sense in which a breach of that principle can be permitted simply because a particular process or subject matter is designated, by a process left opaque, as a favourite of the law and our constitutional order.

99. For much the same reasons, it is impossible to accept that the ECHR should be treated as a permissible exception to an otherwise general rule. For reasons already touched on, if it is an exception, it is so large as to swallow the rule itself. The jurisdiction of the ECtHR is not limited in respect of parties, subject matter, or remedy. In any event it is not an exceptional case. There are many international agreements to which Ireland is a party involving both individual petition and an obligation to be bound by a decision of a court, committee or monitoring body. These include the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. The European Social Charter for its part permits complaints by

representative bodies. Finally, and in any event, the principle of sovereignty is one which might be thought to be one which, by very definition, did not admit of exceptions.

100. The appellant's argument must either distinguish the case of the ECHR or accept that the argument necessarily sweeps so far as to put in doubt that Convention and a significant number of international agreements to which Ireland has adhered and mean that adherence to such treaties and any further treaty would require a decision of the People and a constitutional amendment. This appears very far from the role envisaged by the Constitution for the State in international agreements, which provides that the executive power of the State in foreign affairs must be exercised exclusively by the Government.

101. It is suggested, however, that the ECHR or any similarly structured international agreement, is saved from unconstitutionality by the fact that Ireland is a dualist country which is recognised by the fact that Article 29.6 provides that no international agreement should be part of the domestic law of the State save as may be determined by the Oireachtas. It is said, therefore, that "a decision of the ECHR does not have binding force and effect so far as the domestic law of the State is concerned". Here however, it is said that by contrast the provisions of Article 8.23 of CETA would allow investors to submit claims for resolution under the ICSID Convention, or the UNCITRAL Arbitration Rules (although the parties may agree any other rules), and since a determination made under those specific dispute resolution systems may now be enforced in Irish law by an application under the Arbitration Act, 2010 (re-enacting in this respect the Arbitration Act, 1980) the decision of the CETA Tribunal may take effect insofar as the domestic law of the State is concerned, and that this distinguishes the case of CETA from the ECHR.

102. It must be acknowledged immediately, that there is a difference in the regime in respect of the judgments of the ECtHR and decisions of the CETA Tribunal and that there is currently no similar provision permitting enforcement in Irish law of judgments of the ECtHR. But, with respect, that is a difference without distinction in the law. It cannot, at least in my view, be accepted that this difference makes a principled distinction between a dispute resolution model which breaches Irish juridical sovereignty, and one which stays – just, it appears – on the right side of a constitutional boundary.

103. First, it should be observed that nothing in CETA itself requires that its determinations be capable of enforcement in the contracting states. It is only if the parties select one of the arbitration systems which are capable of enforcement under the Arbitration Act, 2010 either in their own terms, or because of the location of the arbitration, that it is possible to seek enforcement in Irish law. Any enforceability is, in turn, because of the operation of Irish domestic law, presumed constitutional, permitting an application for enforcement of awards made under those systems. It has never been suggested that Ireland was not entitled to accede to either the ICSID or UNCITRAL Conventions, or that the Arbitration Acts from 1980 – 2010 were in that respect repugnant to the Constitution.

104. The Arbitration Acts since 1954 have permitted application to court for enforcement of claims made under various forms of arbitration agreement. Since 1980, that has been extended to arbitrations under ICSID or UNCITRAL rules. In constitutional terms, an application to an Irish court for enforcement creates a justiciable controversy, and the decision on enforcement is an administration of justice under Article 34 carried out by an Irish court. This is so even if there are only limited proofs necessary to obtain an enforcement order, and limited grounds upon which it may

be resisted. It has never been suggested that the enforcement of an award under the Arbitration Acts since 1954 in respect of a dispute which could have been the subject of traditional court determination is a breach of the juridical sovereignty of the State, or that the enforcement of international awards made under ICSID or UNCITRAL rules is such a breach. If so, it is difficult to understand precisely how the fact that for example ICSID rules may be invoked in respect of a dispute under CETA, can by that fact alone, offend the Constitution.

105. The fact that the award of the CETA Tribunal *may* be made under ICSID or UNCITRAL rules, and therefore, capable of enforcement under the Arbitration Act, 2010 illustrates the fact that the award of the CETA Tribunal in this respect, is no different from any other arbitral award which becomes enforceable in Irish law. If, it is accepted, as it appears to be, that the subject matter of such arbitration can involve the treatment of an investor or other person under the law of the State, then it is difficult to see what is novel or impermissible about the provisions of CETA.

106. However, at a more fundamental level, this analysis of the impact of enforceability under the Arbitration Act is beside the point. It is true that even awards of compensation made by the ECtHR are not enforceable in Irish whether under the Arbitration Act or any other mechanism and that is a, indeed *the* difference between the CETA Tribunal's determination and a decision of the ECtHR, but that is not a distinction which is capable of defining a constitutional Rubicon.

107. It is important to observe that while the Constitution recognises and effects that the State established by it is one which has a separation of powers, the State itself is a single entity. When each organ of the State acts, it acts for the State. When a complaint is made to any of the bodies empowered to determine complaints about

legislative executive or judicial action, it is Ireland which is the respondent and not the particular branch.

108. In these proceedings, it is contended, therefore, that Ireland acting through the Government in the conduct of external affairs, may not bind itself in a way which is said to infringe its own juridical sovereignty. It is said that the Constitution constrains the type of agreement which the Government may make at the level of international law and in this case, such conduct is constrained by the juridical sovereignty of the State exemplified by the finality of decisions of the Irish courts. But if this is correct, then adherence to the ECHR is clearly impermissible since in Article 46, Ireland bound itself to do just that. It agreed to obey the decisions of ECtHR and has habitually obeyed those decisions as a matter of fact. If a Rubicon is crossed, it is when Ireland agrees to be bound, or again, when Ireland complies in fact.

109. It makes no difference to this analysis, that if Ireland failed to comply with its obligations, that there is currently no mechanism which, as a matter of Irish law, permits an Irish court to order enforcement as a matter of domestic law. The entire thrust of these proceedings, and the precedents which are relied upon, is to restrain the Government in its conduct of international affairs, that is at the level of international law. The argument runs that the Constitution, either expressly or by necessary implication, constrains what Ireland may do in the sphere of international relations. If, for example, the Court had been persuaded in either *Boland* or *McGimpsey v. Ireland* [1990] IESC 3, [1990] 1 I.R. 110, that the Constitution provided that the status of Northern Ireland was not to be recognised, then an order could have been made restraining the Government from so doing. It would have been

irrelevant that there was no effect in the domestic legal system. Enforceability in domestic law is not the decisive feature.

110. It is a fallacy, perhaps, to assume that because Ireland is a dualist state that it follows that any international agreement can only have *effects* at some international level. Since the Second World War, at least, it is plain that international agreements can, and are intended to have *effects* at the national and domestic level. Where, for example, sanctions are imposed on a state, that has an immediate effect on nationals of that state and businesses in which they engage. To take a different example, the claimant in *O'Keeffe v. Ireland* (2014) 59 EHRR 605 obtained compensation ordered by the ECtHR which was paid by the State, notwithstanding the fact that a claim against the State in domestic law had failed in the High Court, had not been appealed, and that there had furthermore been a final determination of the Supreme Court in domestic law to which Article 34.4.6° (as it then was) applied. But the plaintiff received an award of compensation by virtue of the decision of the ECtHR. Moreover, all the beneficiaries of the scheme subsequently established (entitled "Ex Gratia Scheme-Implementation of ECtHR in *O'Keeffe v. Ireland"*) are undoubtedly now in a different position, notwithstanding the finality of the decision of the Supreme Court in *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302, its binding effect in Irish law, and indeed, the discontinuance of their own legal proceedings. The fact that an international agreement does not become part of the domestic law of the State other than in accordance with Article 29.6, does not mean that it does not have *effect*, sometimes considerable, in the national order.

111. Finally, it must be recognised that not only did the Government by Article 46 of the ECHR bind the State to obey the decisions of the ECtHR, it does so consistently and, until now, without exception. It can certainly be said that Ireland complies with its

obligations and habitually obeys the decisions of the ECtHR. That can involve paying the award made by the ECtHR in those cases in which one is made, or refraining from further enforcement of a law found non-compliant, and indeed changing laws found by the ECtHR to breach the Convention. But if the Government was bound in the conduct of international relations by the exclusive legislative sovereignty of the Oireachtas, the juridical sovereignty of the courts or its own sovereignty in administrative and executive matters, it could not do so and could be restrained by the courts from doing so. Manifestly, this has never been understood to be the case.

112. The true reason why adherence to the ECHR, and compliance with Article 46 thereof is not an impermissible breach of the juridical, executive or legislative sovereignty of the State, does not lie in the possibility of enforcement by action in domestic law or the lack of it. It is rather, because of the obverse of the principle that the Ireland is a dualist system. The decisions of the Irish courts are final and conclusive, and Ireland has juridical sovereignty*, as a matter of Irish law*. That principle is not breached, at least *per se*, by the possibility of proceedings at the level of international law even concerning the same subject matter, or for that matter by an arbitration based on consent. While it is not necessary to determine in this case, it is interesting to note, as the respondents point out, that the possibility of a legislative provision permitting enforcement of awards of the ECtHR appeared to have been contemplated by Murray C.J. (whose experience in this regard as a former Attorney General, judge of the CJEU and a member of the committee supervising the appointment of judges to the ECtHR is extensive) in *JMcD v. PL* [2009] IESC 81, [2010] 2 IR 199, where he set out the law relating to the enforceability of Convention rights in Irish law. In doing so, he said, at paragraph 27:-

> "The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the State is not answerable before the national courts for a breach of Convention obligations unless provision is duly made in national law for such liability". [Emphasis added]

Even more clearly he continued at paragraph 31:-

> "The ECtHR in exercising its jurisdiction to find that a contracting state has breached its obligations under the Convention may, and does, award damages to victims who may also benefit from declarations as to their rights. Even then orders or declarations of the Court are not enforceable at national level unless national law makes them so". [Emphasis added]

These observations are plainly inconsistent with any theory that domestic enforceability of ECtHR awards would be impermissible.

H. *The European Perspective*

113. In *Opinion 2/15* on the Free Trade Agreement between the European Union and the Republic of Singapore of 16/5/2017, EU:C:2017:376, the CJEU concluded that trade agreements with investor protection provisions do not lie solely within the competence of EU, but rather were mixed agreements requiring the approval of Members States as well that of the EU. The Court observed in this regard, at paragraph 276, that it was settled law that an agreement falling properly within the competence of the EU could be coupled with institutional and other provisions of an ancillary nature which themselves would thereby fall within the original competence of the EU. However, in this case, because an investor had the right to submit a dispute to arbitration, which a Member State was obliged to agree to, it was

considered that the dispute resolution scheme "remove[d] disputes from the jurisdiction of the national courts" and accordingly, the provisions of the agreement could not be considered to be purely ancillary to an area lying within the sole competence of the EU.

114. Following from this, the Court issued *Opinion 1/17* (EU-Canada CETA Agreement) of 30 April 2019 EU:C:2019:341 on the compatibility of CETA with EU law, and decided that the EU was entitled to execute the agreement. The reasoning of the Court in this regard was of some assistance in considering the issues arising in this case. The EU is a unique institution based upon its constituent Treaties made by the Member States, and formed by the pooling of their sovereignty, and its autonomy is jealously guarded by the institutions of EU, including the CJEU. At paragraph 106 of the Opinion the Court recalled that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union was, in principle, compatible with EU law and furthermore, that "an international agreement entered into by the Union may moreover, affect the powers of the EU institutions provided, however, that the indispensable conditions for safeguarding the essential character of those powers are satisfied and consequently there is no adverse effect on the autonomy of the EU legal order".

115. It is important for present purposes that, in considering this latter issue, the Court did not resolve the question as a matter of principle by reference to the simple fact that EU law measures including judicial decisions could be subject to adjudication by CETA arbitral tribunals and conclude either that such agreements were always incompatible with the autonomy of the EU legal order, or conversely, always

compatible. Instead, it conducted a close analysis of the *scope* of the agreement the nature and terms of appointment of the arbitral tribunal, and the test it was to apply. At paragraph 119, the CJEU posed two essential questions to determine the compatibility of the envisaged dispute resolution mechanism with the autonomy of the legal order namely: whether Chapter 8 permitted the envisaged tribunals to interpret or apply EU law and secondly, whether such tribunals could issue awards having effect of preventing institutions from operating in accordance with the EU constitutional framework. In this regard, a central issue was whether a tribunal award could call into question the level of protection of the public interest which had led to the introduction of the challenged measure. If so, that might "create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union" (paragraph 149).

116. On the first issue, the Court distinguished its decision in *Achmea* (C-284/16, EU:C:2018:158) ("*Achmea"*) on the Bilateral Investment Treaty between Germany and Romania and noted that under CETA the tribunal could only consider EU law as a matter of fact. In relation to the second issue, the Court noted that the agreement envisaged tribunals to hear a wide range of disputes. However, the Court had regard to the terms of the agreement, and the repeated recognition of the right of states to regulate in the public interest. The Court also considered that Article 28.3 provided that provisions of Section C could not be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or protect human, animal or plant life or health, subject only to a requirement that such measures should not be applied in a matter that would constitute a means of arbitrary or unjustifiable discrimination or

disguised restriction on trade. As a result, the Court concluded, at paragraph 153 of its opinion that it followed that "the CETA tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of public interests established by EU measures and on that basis to order the Union to pay damages".

117. It has been argued that this opinion represents a departure from the reasoning in *Achmea*, and that the distinction drawn – that a CETA Tribunal is only entitled to have regard to EU law as a matter of fact and is obliged to follow the interpretations applied by the CJEU – is insufficient. It might equally be argued that *Achmea* was unduly restrictive, and a more realistic position was arrived at in *Opinion 1/17*. It might also be observed, however, that *Achmea* and *Opinion 1/17* occur in different contexts. *Achmea* concerned an existing country, one of whom had not been a member of the European Union at the time of execution, but who by the time of the Opinion was a member. The operation of a Bilateral Investment Treaty between Member States of the Union might be thought to raise different issues of principle than the execution of a foreign direct investment treaty with an external country. Furthermore, even if *Opinion 1/17* represents the development of the view of the CJEU, there is no suggestion that that development is likely to change.

118. There is also some merit in the contention that once a tribunal is given power to consider whether a national measure is fair and equitable, even by the restrictive tests set out at Article 8.10, it is always possible that such a tribunal may find that a measure which the EU or a Member State might consider to have been adopted properly in the public interest and for the protection of public security or the environment, could be an arbitrary or unjustifiable discrimination and accordingly, it may be open to doubt whether it can be said that the tribunal has no *jurisdiction* to come to such a conclusion. However, the fact that, by definition, such a possibility

cannot be definitively excluded, does not have the effect of preventing EU institutions from operating in accordance with the EU constitutional framework. The tribunal is not given any power to review the measure on the basis of the level of regulation necessary to protect the public interest and to that extent, while the agreement may *affect* the powers of the EU institutions, it does not interfere with their essential autonomy.

V. Analysis

A. *Does CETA impermissibly withdraw claims from the jurisdiction of the Irish courts?*

119. It is argued that the execution of CETA creates an impermissible parallel jurisdiction which has the effect of withdrawing claims from the jurisdiction of the Irish courts at the sole election of an investor. This is said to be contrary to the Constitution by reference to certain dicta in a judgment I delivered in *Zalewski v. Adjudication Officer & ors* ("*Zalewski*") [2021] IESC 24 , [2021] 32 ELR 213, [2021] 32 ELR 277, and the decisions of the CJEU in cases such as *Republic of Moldova v. Komstroy* (Case C-741:19) where the CJEU said:-

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

120. In my view, it is important to separate these two strands of authority. First, as a matter of Irish constitutional law, I respectfully doubt that it is useful to commence with the abstract question whether the determination of the CETA Tribunal

constitutes “the administration of justice”, which in Ireland is confined to courts established under Article 34, subject only to the possibility of the creation of bodies under Art. 37 having limited judicial functions in non-criminal matters. The case law surveyed in *Zalewski* shows that, approached in the abstract, this is not an easy question, and it is perhaps doubtful that there is any single infallible jurisprudential test. It is certainly true that a complaint by an investor about a measure could give rise to a challenge in the Irish courts by reference to Irish law and it is also true that the same measure could give rise to a claim for compensation under CETA before an arbitral tribunal and pursuit of one will normally exclude the other. This in itself does not constitute the CETA Tribunal as a body administering justice intended to be captured by Article 34, or mean that there has been an impermissible withdrawal or subtraction from the jurisdiction of the Irish courts.

121. The discussion in *Zalewski* related to a question which was posed as a hypothetical circumstance, against which the issues in that case were sought to be tested. A question arose as to whether the Oireachtas could properly establish an Article 37 body which would, in effect, remove a whole area of law from the traditional jurisdiction of the courts and I observed that any such proposal would be closely scrutinised. That of course, did not occur in *Zalewski* and is far removed from the facts here.

122. First, in any such hypothetical case, it would be necessary to remove an entire area of dispute from the jurisdiction of the courts. Here, the CETA agreement does not purport to address the general public law remedies available in Irish law but is confined to qualifying claims made by defined investors. In the hypothetical situation, claims between private citizens are transferred to a separate tribunal. In this case, the State is agreeing that, in certain circumstances, it will defend a claim

brought before the CETA Tribunal. The CETA Tribunal cannot entertain any question of the validity of a measure by reference to Irish law and the fact that a measure may be invalid as a matter of Irish law is not relevant to the determination of the CETA Tribunal. By the same token, a claim that a measure is a breach of CETA is not a claim which is justiciable in an Irish court. The entry into CETA does not transfer or subtract any claim by legislation enacted by the Oireachtas. Instead, the basis of the jurisdiction is the agreement of Ireland with the other contracting parties. The selection of the CETA Tribunal to resolve the dispute is not compelled by law, but is, rather, effected by the voluntary decision of the investor. The investor retains the same entitlement to commence proceedings in Irish courts after the execution of CETA as before. CETA simply gives an investor an additional option which they are free to exercise or not. The claim is made, not by reference to Irish law, but by reference to CETA rules and will normally involve different parties. The CETA Tribunal is not empowered to compel the attendance of witnesses or punish them for non-compliance, and the Tribunal and/or any successful claimant is dependent upon national law, and an application to court, to obtain enforcement, which may not even be in Ireland.

123. It is true that Ireland is obliged to defend a claim brought before the CETA Tribunal, but that is a consequence of an agreement made and not by compulsion of law enacted by the Oireachtas. In this respect, it is no different to a situation where a party is obliged to respond to arbitration proceedings which have their basis in an agreement. Indeed, such proceedings are in some respects closer to Irish litigation than any CETA claim, since arbitration agreement can permit a tribunal to make a determination in respect of Irish law and in respect of causes of action existing in Irish law. A CETA claim is no more the administration of justice governed by

Articles 34 and 37, and no more a subtraction of claims from the Irish courts (and indeed, in some respects less) than any arbitration of a cause of action in Irish law and where an agreement to arbitrate would be enforced by an Irish court.

124. Nor can it be said that the existence of the possibility of CETA claim acts *in effect* to withdraw disputes from the Irish courts in such a way as to offend the Constitution. A claimant is given a choice which is real, but there is no sense in which would become an irresistible option for a disappointed investor. For practical reasons an investor would be slow to commence proceedings before the CETA Tribunal. It means, in effect, the rupture of the relationship with the State in which a Party has made a substantial investment. For legal reasons, CETA is less attractive than a claim before domestic courts so long as investors continue to have confidence in the national system. The grounds for challenge are more limited, the remedy more restricted, and the proceedings more expensive and often lengthier. As a matter of practicality, the execution of an investment protection agreement provides for a form of safety net against improbable but not impossible circumstances that may occur over the lifetime of an investment. Claims under such agreements are seen as "a weapon of last resort": see Szilard Gaspar-Szilagyi, "Foreign Investors, Domestic Courts and Investment Treaty Arbitration" in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration, Empirical Perspectives* (Cambridge University Press 2022). It cannot be said, therefore, that the mere existence of the CETA jurisdiction operates as an irresistible gravitational pull that would, in effect, undermine the jurisdiction of the courts.

125. The decisions of the CJEU in respect of Bilateral Investment Treaties ("BITs"), do use the language of withdrawal, or removal of disputes from the legal system of the Member States. First, however, that language is used to do no more than explain

why an investment protection agreement with a dispute resolution mechanism has sufficient connection with the Member States that such agreements cannot be treated as within the exclusive competence of the EU. Plainly, the CJEU did not decide that the agreements impermissibly removed disputes from the jurisdiction of the courts of the Member States, or where relevant, the CJEU .

126. Second, the *Achmea* line of authority was concerned with bilateral investment treaties made by parties who are now Member States of the European Union and thus raised the possibility of interference with the full effectiveness of EU law within the EU. The CJEU considered, in that case, and in *Komstroy*, that the fact that a tribunal could interpret and apply European law interfered with the autonomy of the EU legal system so as to mean that the full effectiveness of that law was not guaranteed.

127. These matters were referred to in argument only in so much as they provide an analogy for an argument in Irish constitutional law. It is not for this Court to consider if *Opinion 1/17* represents a significant change in the approach of the Court more generally or whether the differences between the BITs in issue in *Komstroy* and *Achmea* on the one hand and CETA on the other were decisive, or whether *Achmea* was too strict or *Opinion 1/17* too indulgent. But it is inescapable that the CJEU does not consider that the terms of CETA interfere with the autonomy of the EU legal order so as to mean that the effectiveness of EU law cannot be guaranteed for reasons already discussed. This represents in the clearest terms, the view of the CJEU in relation to the provisions of the very agreement which is the subject matter of these proceedings. It cannot therefore, be said that EU law provides any support for the appellant's constitutional claim.

128. I would conclude, at least in principle, therefore, that the execution by the Government and ratification by the Dáil of an agreement such as CETA does not infringe the sovereignty of the State. However, while the central issue in this appeal has been the power of the Irish State to become bound by CETA, there are a number of ancillary arguments made which loomed large in the course of the hearing, and on which it is necessary to set out my views.

B. ***Withdrawal from CETA and the duty of sincere cooperation***

129. It was argued that while entry into CETA was an exercise of both European Union competence and Member State competence, once CETA came into force, it would become part of the EU legal order, and the duty of sincere cooperation would preclude Ireland from exercising what would otherwise be its separate entitlement to withdraw from the agreement in accordance with its terms and/or the provisions of international law as set out in the Vienna Convention on the Law of Treaties, 1969. It was said, therefore, that Ireland was being faced with an irrevocable decision to bind itself in perpetuity to a treaty containing Chapter 8, and its dispute resolution procedures.

130. I do not agree that the question in this appeal should be approached on this basis. Instead, I agree with the views expressed by Advocate General Hogan in *Opinion 1/19* on the Istanbul Convention on Combating Violence Against Women and Domestic Violence, which are set out at paragraph 155 of the judgment of Dunne J., in which he observed that the logical and inescapable consequence of the principle of attribution of competence is that a member state may withdraw from a mixed agreement as long as part of the agreement still falls within the competence of the states, either because the Union has not yet pre-empted all of the shared

competences, or because certain parts of the agreement fall within the exclusive competence of the Members States.

131. Further, and in any event, I do not consider that the issue should be approached on the basis that the Treaty, once made, should be considered as binding Ireland or the EU in perpetuity. It is important to recall that Chapter 8 is only part of a comprehensive trade agreement, and it is in the nature of such agreements that they are revised as the nature of international trade, and the interests of the respective parties change. Thus, for example, the NAFTA agreement was replaced by USMCA, an agreement which in turn borrowed from the Comprehensive and Progressive Agreement for Trans Pacific Partnership ("CPTPP") itself a successor to the Trans Pacific Partnership ("TPP"). Different provisions for trade agreements and investment treaties incorporate adjustments which are designed to address criticisms of the process which have emerged. In this case, CETA reflects the EU's concern that such processes should move towards a permanent judicial body filled by a cohort of demonstrably qualified arbitrators with guaranteed independence. Countries may, from time to time, alter their approach to investment agreements. For example, in 2011, Australia announced it would not execute any future international arbitration agreements containing ISDS but reversed its policy in 2016 when it signed the TPP and subsequently the CPTPP. Ireland and the Czech Republic signed a BIT in 1997 (ITS No 10 1997) which was mutually terminated in 2010. In any event, as set out above, I do not consider that the duration of the agreement is decisive in resolving the questions raised in this case.

C. *Is enforcement of CETA awards automatic?*

132. I do not agree that the provisions for enforcement under the Arbitration Act, 2010 are merely a polite formality. Nor would I accept that the matter should be

approached on the basis that a decision of an arbitral tribunal under CETA becomes automatically enforceable, so that the necessity for proceedings in domestic law should not be regarded as of significance when considering the nature of the jurisdiction created. The requirement for an application for leave to enforce an award does involve some process, and allows for the possibility of refusal of enforcement in at least some situations. In that respect I respectfully agree with what is said at paragraphs 69-78 of the joint judgment of Lord Lloyd Jones and Lord Sales in *Micula v. Romania* [2020] UKSC 5, [2020] 1 WLR 1033 quoted at paragraph 148 of the judgment of the High Court in this case.

133. Furthermore, the very fact that these are agreements in the nature of international treaties to which sovereign governments or parties, and involving the public law of those states, put such determinations in a different category to simple awards made in private arbitration. It appears, for example, that it is clear that the principle of sovereign immunity must still be applicable if, for example, it was sought to execute against the property of the State in the courts of another state. Article 55 of the ICSID Convention provides that parties have not waived sovereign immunity in respect of execution. See in this regard Leo Butz, 'Beyond the Pledge: The Imperfect Legal Framework for Enforcing Awards of the CETA Investment Court against the European Union' (2020) 7 *McGill Journal of Dispute Resolution* 89, which also notes that, where EU measures are involved it is entirely conceivable that a national court could, or might indeed, be obliged, to make a reference to the CJEU. If, for example, contrary to the view set out in *Opinion 1/17*, an arbitral tribunal was to consider that it was entitled to review a measure simply on the basis that it disagreed with the level of protection put in place by either the European Union or a Member State then it is hard to believe that there will not be repercussions both at a political,

and perhaps a legal level. The long saga involving the series of claims made against Argentina in the early part of this century in which claims which had commenced in 2001 had not been determined by 2020 shows that enforcement of claims is not necessarily an automatic process. As Butz *op. cit.* notes at page 90:- " state practice demonstrates the refusal to honour an investment award is an infrequent but still regular occurrence in the realm of international investment dispute resolution. This is particularly true for large scale awards that vastly exceed the total value of foreign investment in the debtor State". Again, this reflects the fact that, while investor protection treaties are carefully drafted legal documents, which borrow some of the techniques of private law, they involve sovereign states, and operate at the level of international law. The very fact that enforcement is dependent on domestic legislation courts and processes means that there are still limitations on the capacity of claimants to force States to comply with awards against their will. None of this, however, is to suggest that the execution and ratification of this agreement is not a significant legal obligation. And in any event, if the agreement was an impermissible breach of sovereignty, it would not much matter if the agreement was easily resiled from or permanently binding, or whether execution was discretionary or automatic. For my part, as already explained, the extent to which enforcement can be said to be automatic cannot be the decisive feature in this case. However, in the interest of accuracy, I consider it is important to set out the limits, both legal and practical, on enforcement.

134. By the same token, if it is appropriate to approach this case by attempting to locate the CETA dispute resolution process somewhere on a spectrum which runs from arbitral determinations based on consent, to judicial determinations based on and having the force of law, then the CETA Tribunal, even if the permanent judicial body

contemplated by Article 8.29 of CETA were established, would still be located at the arbitral end of that spectrum. As already discussed, the process of what has been described as "judicialization" of the investment dispute resolution system has been championed by bodies such as the EU to address criticisms of the fact that *ad hoc* appointments of arbitrators leads to a higher element of unpredictability and gives rise to a small pool of self-perpetuating experts in international law firms who may moreover seamlessly between adjudication in some cases, and advocacy in others, a practice known as "double-hatting". But the essence of the jurisdiction of any such body remains consensual and arbitral which indeed, is a requirement for enforceability under the New York Convention which applies only to arbitral awards. This was discussed by Butz *op. cit.* at pages110-111:-

> *"Despite many intersections, arbitration is traditionally contrasted with the domain of adjudication. While the former is a mode of private dispute resolution the latter is administered by the State and hence belongs to the public sphere. With regard to investor-state arbitration, the categorization along that dichotomy is more complex. Considering the hybrid legal structure of the CETA investment court [the body contemplated by Art. 8.29], it is even more intricate to differentiate between private arbitration on the one hand and public adjudication on the other. Nonetheless, it can be argued that the CETA investment court forms part of the realm of arbitration. This is because the investment court is a neutral dispute resolution forum created by equal partners for certain types of disputes in accordance with their individual preferences. Put differently, the court is a customized dispute resolution mechanism that primarily serves the interests of its parties. Thus, notwithstanding its name, the CETA investment court is considerably more*

similar to an arbitral tribunal than to a public court. The CETA investment court should be viewed as a private dispute resolution mechanism. Rather than striving for the consistent development of international investment law, the court is responsible for upholding justice between the parties to CETA. If it fails to deliver on that promise, the parties have the chance to intervene in the court's performance by adopting binding notes of interpretation in the CETA Joint Committee. An intervention of this kind would be unthinkable in the sphere of litigation. Despite its judicial features, the CETA investment court hence belongs to the realm of arbitration."[Emphasis added]

This conclusion applies *a fortiori* to decisions of the CETA arbitral tribunal appointed in accordance with Article 8.23, which is the present position.

D. *Constitutional authorisation for the entry of other international agreements – Articles 29.7 and 29.9*

135. Article 29.7 permitted the State to be bound by the British/Irish Agreement at Belfast on 10 April, 1998. Article 29.9 permitted the State to ratify their own statute of the International Criminal Court ("ICC") done at Rome on 17 July, 1998. It has been argued that these express provisions introduced by the 19th and 23rd Amendments respectively illustrate a principle which would require similar approval by referendum if the State were to permit itself to be bound by CETA. If anything, however, in my view these provisions support the contrary interpretation.

136. Part of the British/Irish Agreement of 1998, known colloquially as the Good Friday Agreement/ Belfast Agreement, contemplated the amendment of Articles 2 and 3 of the Constitution and thus, in any event a referendum was necessary. However, both the amended Article 3.2, and Article 29.7.2° also contemplated, in slightly different ways, the creation of institutions whether under the agreement itself, or under some

future bilateral agreement between the State, and Northern Ireland, which might exercise powers and perform functions on any part of the island of Ireland notwithstanding any other provision of the Constitution, and such powers or functions could involve the settlement or resolution of disputes, again in addition to or in substitution for any like power or function conferred by the Constitution on any person or organ. The Belfast Agreement contemplated the establishment of a North/South Ministerial Council, a British/Irish Council and a British/Irish Intergovernmental Conference, and six implementation bodies having executive powers on a cross-border basis. Because the Agreement addressed the long running problem of Northern Ireland, it was popularly understood as involving changes in that jurisdiction, permitting all Ireland bodies in which the Republic of Ireland would have the right to participate which had jurisdiction in Northern Ireland. However, these bodies (and any future body established under either Article 3.2 or Article 29.7.2°) were set up on the basis of reciprocity and could be empowered to exercise both executive power and resolve disputes, within the territory of *both* jurisdictions. In other words, it was anticipated that these bodies would be empowered to exercise executive, and perhaps judicial powers within this jurisdiction which under the Constitution were otherwise reserved to the Government and the courts. That this required a constitutional amendment was plain, and had indeed been anticipated much earlier in a Thomas Davis lecture delivered by Mr. Justice Barrington entitled *The North and the Constitution* and published in Brian Farrell (ed), *De Valera's Constitution and Ours* (Gill and MacMillan 1988):-

> "If at any time the question of setting up any form of all Ireland body exercising executive, legislative or judicial powers should arise, a

constitutional referendum would be necessary, but if that were to happen, we would be on the road to an ultimate solution".

The amendments explicitly contemplate the exercise of executive functions in this jurisdiction in substitution for the bodies established by the Constitution until then, and plainly required an amendment of the Constitution. This provides no support for the appellant's arguments.

137. By the same token, the International Criminal Court established under the Rome statute of 1998 was to be empowered to exercise direct criminal jurisdiction within the jurisdictions of any contracting state. Thus, if Ireland agreed to be bound by it, it would, as discussed at paragraph 5.3.154 of Hogan, Whyte, Kenny and Walsh (eds) *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) effect "a limited transfer (albeit and strictly defined in particular cases) of national, executive and juridical sovereignty to the ICC. Despite the limited nature of this transfer of sovereignty, it seems clear ……that a referendum was required before the State could accede to the Rome statute" [Emphasis added]. The distinction between this situation and an investment treaty is plain: the ICC was to be empowered by Irish law to exercise direct criminal jurisdiction in respect of persons in Ireland and conceivably in respect of offences occurring in Ireland. An investment treaty such as CETA involves the State making an agreement and agreeing that its compliance or otherwise with the terms of that agreement will be determined by an arbitral tribunal whose determinations if made will become enforceable within the domestic legal order only by virtue of Irish law.

138. None of this is to suggest, however, that the matters raised in this case are not serious, or do not touch upon important aspects of national sovereignty. This is, I consider, not because of the *mechanism* adopted, whose features can be found in other

provisions and agreements, but rather because of the *subject matter* of the agreement. The measures which are made the subject of consideration by an arbitral tribunal pursuant to the specific provisions of the Agreement include measures which are the exercise of the legislative executive and juridical sovereignty of the State. The issues raised in this case concern not only the juridical sovereignty of the State but rather touch on every aspect of its internal sovereignty. Of course, CETA is not unique in this respect; since adherence to the European Convention on Human Rights, there have been a number of occasions on which the State has been agreed to be bound by determinations of arbitral, judicial or quasi-judicial tribunals in respect of determinations made on the measures adopted in the exercise of legislative, executive or juridical sovereignty. But the fact that the same thing, or something similar has occurred before does not lessen its significance or mean that when the issue is raised the process should not receive close scrutiny.

E. ***What are the constraints implied by the Constitution on the Government's exercise of its treaty making powers?***

139. This case has been conducted by both parties on the basis that the Court is faced with a binary choice. The appellant argues that if CETA affects in any way matters which are the subject of the executive, legislative or juridical sovereignty of the State or, indeed, can have an influence on the exercise of those powers by the respective organs of the State, it must be treated as an impermissible interference with the sovereignty of the State, and the Government may not properly enter such an agreement in the exercise of its powers under Article 28.4. On the other hand, the State defendants make their case purely at the level of legal form. As a matter of legal analysis, they argue, this is an agreement taking effect at the level of international law under which the State agrees to be bound to be liable to identifiable

parties, if so determined by an arbitral tribunal, and under which Irish nationals obtain equivalent rights in the corresponding jurisdiction. Those are matters, it is said, which lie properly within the field of international affairs, and accordingly, within the function of the Government in the conduct of external affairs, and where moreover, the procedural requirements of Article 29 have been complied with. If a determination of a tribunal is made, and has legal effect within the jurisdiction, that is as a consequence of Irish law properly enacted by the Oireachtas under Article 15.2, and which has not been challenged. Furthermore, the provisions of such legislation, is, on the face of it, within the proper sphere of decision making reserved to the Oireachtas, which is in principle entitled to determine the range of arbitral awards which should be capable of being enforced in Irish law. In 1980, and again in 2010, the Oireachtas has determined that it would permit enforcement of awards made pursuant to the ICSID Convention which is addressed to disputes between investors and states. The terms of CETA do not thereby become law in Ireland contrary to Article 15.2 and the determinations of a tribunal are not the administration of justice under Article 34. Nor is the fact that the subject matter of any determination is a measure adopted in Irish law, itself an impermissible interference with the legislative, executive or juridical sovereignty of the State. The operation of the legislative, executive or juridical sovereignty of the State may give rise to effects and even liability at international law, and by the same token the operation of CETA may have some effect in the domestic order but that does not infringe sovereignty.

140. I have no doubt that, at this level at least, the arguments advanced by the defendants are correct. In so much as this is a matter of legal form, the fact that Ireland, by entering into an agreement which may give rise to a potential liability by reason of

a legislative provision, an executive measure or a judicial decision, does not in itself, and by that fact alone, constitute an impermissible ceding of the internal sovereignty of the State.

141. However, the Constitution looks both to form and substance. This case cannot, therefore, be resolved solely on the basis that as a matter of form, CETA is an international agreement if its effect is such as to significantly constrain the exercise by the organs of government of their powers, and the performance of their duties, under the Constitution. Thus, I would accept the argument not expressly articulated by the plaintiff, but underlying his case, that the Constitution imposes limits upon the exercise by the Government of its power to conduct the external affairs of the State over and above the explicit constraints contained in Article 29, and the implicit constraint illustrated in *Crotty* that the Government may not abdicate transfer or subordinate its power to conduct the external relations of the State in accordance with its conception of the common good. Such implicit constraints must, however, be deduced from the Constitution itself. In this case, that is the fundamental structure of the Constitution whereby sovereignty is exercised under a separation of powers. Since this matter was not argued and is a matter of considerable constitutional and institutional importance, and since moreover, it is my conclusion that the agreement in this case does not infringe such implied restraints on the exercise of the Government's powers under Article 29 which resolves this case, it is both impossible, and, in any event, undesirable, to seek to identify the precise terms of any agreement which might infringe this principle. Indeed, any such conclusion in a concrete case would involve a consideration of the entire agreement, all its terms and its background, and would in any event by judged by the clear disregard standard

first set out in *Boland*. However, it is important to explain the nature of those constraints imposed by the structure of the Constitution.

142. In the first place, there remains the basic distinction between international affairs and the regulation of purely domestic matters. In *The Federalist Papers No. 42*, James Madison referred to the treaty power as one to "regulate the intercourse of foreign nations". The examples he gave illustrated how, even in 1788, there were a range of matters considered to be the subject of such intercourse such as the making of treaties, sending and receiving ambassadors, defining and punishing piracies and felonies committed on the high seas and offences against the law of nations, and the regulation of foreign commerce. He said, in words which could have been echoed by the drafters of the Constitution in 1937, that "this class of powers form an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations". By the same token, in 1937 the State wished to assert its status as a nation in particular in respect to other nations. This is the field that the Constitution allocated to the executive power. But it must be exercised for the purpose of regulating intercourse with foreign nations.

143. As discussed earlier, the field of what is properly seen as intercourse with foreign nations has developed substantially since 1788 and, indeed, 1937. We live in an interconnected and interdependent world, and in addition to substantial international commercial transactions, private consumer contracts, ordinary travel, family relationships and property transactions routinely take place across national borders and as already discussed, the protection of individual social and political rights are all now seen as a significant aspect of international relations. However, the developments and the understanding of what is properly the subject of international intercourse is something which the Constitution contemplates. The fact that Article

29.3 provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in relation to other states requires the State to consider from time to time what are or have become generally recognised principles of international law. Furthermore, given the developing nature of international transactions, whether political, commercial and personal, the action of the Government in entering an agreement with other nations would in this regard be judged by the clear disregard standard.

144. However, put negatively it can be said that the power under Article 29.4 could not be used in respect of *purely* domestic matters. A government could not, using the form of an international agreement, seek to regulate domestic matters within the purview of the Oireachtas, or indeed the judicial branch. It could not, therefore, use this mechanism to seek to erect an alternative justice system or to generally disapply legislation, or indeed, to preclude a future passage of legislation of which it disapproved. That would, to adapt an approach in the field of administrative law, to use a power conferred for a purpose not properly within the contemplated scope of the statute, or in this case, the Constitution.

145. A different, although perhaps related, constraint is somewhat analogous to the approach of the CJEU in *Opinion 1/17*. The Court considered that it would not be permissible for the EU to enter an agreement which had the effect of adversely affecting the autonomy of the EU legal order. In particular, at paragraph 149 of the opinion, it was explained that if the CETA Tribunal or an appellate tribunal were to have jurisdiction to issue awards finding that the treatment of a Canadian investor was incompatible with CETA because of the level of protection of a public interest established by the EU institutions, this could create a situation where, in order to avoid being repeatedly compelled to pay damages to a claimant investor, the

achievement of that level of protection might have to be abandoned by the Union. This issue was to be resolved however, not by a bright line rule, but rather by the nature of the jurisdiction conferred upon the CETA Tribunal. It was not enough, therefore, that another tribunal had the power to award damages because it considered that a measure of an EU institution was in breach of CETA. Rather, resolution of this issue depended upon a close analysis of the arbitral structure including the appellate body, the method of appointment and choice of arbitrators, and in particular, the grounds upon which such an arbitral body was entitled to find a breach of agreement, and the remedies which could be awarded.

146. It was not enough that an adjudicative body not part of the EU legal order was empowered to award damages because of its analysis of the effect of an EU measure. It follows, as a matter of logic, that the very fact that an issue is consigned to a separate adjudicative body means that there is at least in theory the possibility of an outcome with which a national or, in this case, a Union court might disagree, but that possibility would not itself make the agreement impermissible; the question was whether the overall impact of the agreement was such as to adversely affect the autonomy of the EU legal order and to create a situation where an EU institution would be precluded in effect from exercising its function of introducing legislation in the public interest, to achieve a level of protection for it which the institution considered appropriate. In this respect, CETA gave no general power to review the decisions of the EU institutions in respect of the level of protection necessary for the public interest, and, accordingly, the provisions of the agreement could not be interpreted to prevent a Party, in this case the EU, from adopting an applying measure necessary to protect security or public morals or maintain public order, protect human, animal or plant life or health of the environment.

147. In this regard, it is significant that the provisions of CETA do not appear intended to provide the first port of call for a disappointed investor. Rather, they appear to be provisions of last resort, and which are resorted to when a relationship has been fatally ruptured. It is relevant, therefore, that the scope of application of the agreement is limited (in this regard to Canadian investors and identified Canadian investments) the remedies limited (arising only when there is loss and providing only for compensation for such loss) and on grounds which at the level of generality would normally lead to the clear invalidity of such measures if challenged in Irish law. It cannot be said therefore, that the existence of such a jurisdiction would have an impermissible chilling effect whereby the institutions of the State would be precluded, or indeed, dissuaded from regulatory measures of general application and which were not plainly discriminatory or arbitrary. If by contrast, a treaty contained provisions for the payment of prohibitive penalties in the event that an arbitral tribunal over other adjudicative bodies determined that measures adopted in the public interest were incompatible with some economic world view, and, even more clearly, if the type of measures specified had no connection to international trade or investment, then clearly a serious issue would arise as to the power of the Government to enter into any such agreement even if in form of a treaty agreed with some other state.

F. ***The Constitutional role of Dáil Éireann***

148. These matters are, of necessity, somewhat hypothetical and speculative. It is, however, enough to observe that the Governmental treaty power is constrained by the Constitution and may on occasion give rise to challenges which this and other courts may be required to address. However, the Constitution also contains another and significant real constraint, which is hiding in plain view in this case. Review of

an agreement for compatibility with the Constitution is not the only, or indeed primary, limitation on the adoption of an agreement. The Government is in general responsible to Dáil Éireann under Article 28.4 of the Constitution. All international agreements to which the State becomes a party shall be laid before Dáil Éireann (Article 29.5). In this case, CETA is currently before Dáil Éireann prior to its execution by the Government, because it is considered to fall under Article 29.5.2° and thus, cannot be adopted without the approval of Dáil Éireann.

149. The popularly elected House of the Oireachtas is, under the Constitution, intended to be the location for the debate of matters of public importance, and one of the ways in which the Irish Nation, under Article 1 of the Constitution, determines its relations with other nations and develops its life, political, economic and cultural in accordance with its own genius and traditions.

150. The question posed in any challenge brought to these courts in respect of the treaty making power of the Government is a necessarily blunt one: may the State enter a particular agreement? The outcome is binary. If the Government *may* enter such an agreement, it is no part of the courts' jurisdiction to consider whether, if the State may, *it should* do so. That, however, is a matter in the first place within the judgement of the Government, but subject to its responsibility to Dáil Éireann. The power of the Dáil in this regard is not only a real and constitutional constraint on the power of the Government to bind the State but involves a much broader and nuanced judgement as to merits of a particular agreement. Although, in my view, the outcome of this case must be to uphold the decision of the High Court and dismiss the appellant's appeal, this particular appellant, uniquely, is part of a collective body given an express constitutional power and to that extent, duty, to consider the detail

and merits of this agreement. This is where, in my judgment, the Constitution provides that CETA is to be assessed.

151. I have had the opportunity of reading in draft the judgment which Hogan J. delivers today. Perhaps because of the hypothetical nature of the case, the debate in these judgments has developed well beyond the confines of the arguments made in the High Court and even in this Court. A comparison of the judgment of Hogan J. with the judgment of Dunne J. for example, will show that a large range of the authorities considered in his judgment, and instances, hypotheses and arguments advanced were not the subject of argument in the case. It is perhaps inevitable that in a case such as this that sustained engagement with the fundamental issues raised will mean that the boundaries created by legal argument advanced by the parties will give way on occasion, and Hogan J.'s judgment is a testament to the vast catalogue of legal knowledge that is impressively and often illuminatingly displayed in the judgment. But what is dazzling can sometimes blind rather than illuminate. It may be helpful therefore, to explain why I am not persuaded by the arguments and instances so impressively arrayed in his judgment.

G. ***Is CETA unique?***

152. Firstly, CETA is undoubtedly the first time that an investment treaty with an arbitral adjudication mechanism permitting enforcement under the provisions of the Arbitration Acts has come before the Irish courts. It is, however, by no means Ireland's first engagement with the concept. The Energy Charter Treaty of 1994, which gave rise to *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 ("*Vattenfall*") is one example. This is, in itself, not a trivial instance. Cooperation in relation to energy is clearly a major issue, and if Ireland were not able to enter such an agreement without a referendum, it could have serious long-

term consequences. It appears that if ratification of CETA is impermissible then the Energy Charter Treaty must be equally forbidden. As mentioned earlier in this judgment, Ireland did have a Bilateral Investment Treaty with the Czech Republic. More tellingly again, Ireland ratified both the ICSID and UNCITRAL conventions, and gave effect to them in the Arbitration Acts of 1980 and again in 2010.

153. The ICSID Convention explicitly provides for the enforcement of arbitration decisions made pursuant to the Washington/ICSID Convention which is included as an appendix in both the 1980 and the 2010 Act. That Convention is addressed to, as indeed, it says in express terms, the settlement of disputes between states and investors. Such disputes involve claims made by investors; they almost always necessarily involve measures adopted by the State which are alleged to affect the investment. The concept of bilateral and multilateral investment treaties was already well known by 1980 and were very widespread in 2010. The preamble for the ICSID Convention recites that it is adopted bearing in mind the possibility that from time-to-time disputes may arise in connection with investments between contracting states and the nationals of other contracting states and the Convention was adopted in recognition of the fact that while such disputes would usually be the subject of national legal processes, international methods of settlement may be appropriate in certain cases. Investor /State agreements and dispute resolution processes are therefore not by any means unknown in Irish law.

154. I cannot agree therefore, that CETA somehow impermissibly conscripts the Arbitration Acts to its own purposes, or as it is put, constructs a makeshift legal pontoon to permit passage from the territory of international law into domestic law. The ICSID Convention (and, indeed, all other international conventions permitting for dispute resolution) undoubtedly operate at the level of international law. The

Arbitration Acts of 1980 and 2010 equally operate at the level of domestic law. In a dualist system the Arbitration Acts are only two of a number of bridges, all of them constructed in accordance with Article 29.6, that permit what is agreed by the State in international law to take effect within the domestic legal system.

155. CETA is an international agreement, it is true. It provides for the possibility of disputes between investors and states to be resolved by an arbitral tribunal which can be established under a number of different international conventions. The Arbitration Acts of 1980-2010 provide, that as a matter of domestic law, a determination made by such a tribunal under the Convention will be enforceable in Ireland. There is nothing dubious or makeshift in this. As a matter of Irish law, awards made by arbitral bodies under the ICSID, UNCITRAL or ICC conventions or any other system, do not take effect in Ireland of their own force but only because of, and in accordance with the provisions of Irish law enacted in exercise of Ireland's legislative sovereignty.

H. ***If a bespoke agreement is permissible, is CETA?***

156. Hogan J. also considers that it would be permissible for an arbitration agreement between states to permit resolution of disputes which had arisen between states and the nationals of other contracting states. He instances the example of the US/Iran Tribunal and the judgment of Justice Rehnquist in *Dames & Moore v Regan* (1981) 453 US 654. It would be startling indeed, if Ireland, which affirms its devotion to the ideal of friendly cooperation amongst nations founded upon international justice and morality, and which accepts the generally recognised principles of international law, could not enter such agreements. The US/Iran Claims Tribunal was not a novel development in international law. As illustrated earlier, and indeed as referred to by Justice Rehnquist, disputes between states and the nationals of other states seeking

to do business in their territory, have long been the subject of international disputes and given rise to attempts to resolve them by means of arbitration or judicial determination rather than, in extreme examples, by force of arms. That has from time immemorial been properly the subject of international law and international agreements. As I understand it, Hogan J. considers that such *post-hoc* tribunals would be compatible with the Irish Constitution because there would be an example of the pacific settlement of international disputes by international arbitration or judicial determination to which Ireland has affirmed its adherence under Article 29.2. I agree. But this necessary concession it seems to me, is inconsistent with the broader thrust of his judgment, and indeed, its conclusion.

157. The strength of the argument against CETA, is that it is said to offend against a constitutional principle of sovereignty. Such a principle by definition cannot conceive of exceptions, whether it be the European Convention on Human Rights, the European Court of Human Rights, or the possibility of *post-hoc* arbitral tribunals. If it is impermissible to permit an arbitral tribunal to consider adjudication on measures of Irish domestic law, whether administrative, legislative or judicial, then it is not possible to do so on an *ad-hoc* basis. The fundamental argument is that the determination of such matters is the *exclusive* province of the Irish legal system.

158. If Article 29.2 permits international arbitration or adjudication on domestic measures after the fact as it were, because, for example, expropriation of property of a foreign national has given rise to an international dispute, then I do not understand why it is not possible to establish the dispute resolution mechanism in advance, to deal with any dispute which may arise. To take a concrete example, if there had been no Energy Treaty, to which Sweden and Germany were participants, and Germany terminated nuclear power giving rise to the same uncompensated loss to a Swedish

nuclear power facility, and that in turn had given rise to a dispute between Sweden and Germany which they had agreed to refer to arbitration pursuant to ICSID or UNCITRAL rules, and to determine whether the German measure offended against principles akin to those contained in the Energy Charter Treaty, I cannot see how that would be permissible, but that the Energy Charter Treaty would not.

159. Indeed, the *Vattenfall* example is important in another respect. The claim made by the Swedish company, made to the arbitral tribunal, was, as I understand it, made in parallel with claims made in the German courts that the law terminating nuclear power without compensation was contrary to the German Constitution. That claim was upheld in the German courts, although by the time of the settlement the measure had not been reversed, or compensation paid. The resolution of the dispute, therefore, was not simply the settlement of the claim under the Energy Treaty but also of the consequences of an extant domestic challenge. It is true that a national legislature in a state which had ratified the Energy Charter Treaty would have to consider in enacting a similar legislation, not merely the prospect of the law being invalidated by a domestic constitutional challenge, but also that any such law might give rise to a claim for damages under the Treaty. It is not apparent to me why that is an interference with German legislative sovereignty; legislatures must take into account a range of possible consequences which may follow from legislation they might enact. But what is perhaps more striking about the *Vattenfall* example, is that it does not seem to have been determined at any stage that the execution of the Energy Charter Treaty was an impermissible subtraction from German sovereignty, legislative, executive, or juridical, although that is something which is understandably guarded jealously by the Bundesverfassungsgericht.

I. ***Is the possibility of an award of damages pursuant to CETA in respect of a judicial decision in the Irish courts incompatible with the Constitution?***

160. Hogan J. also raises the suggestion that while the grounds upon which the CETA Tribunal would be permitted to entertain a claim in relation to the exercise of the juridical power of this state are necessarily limited to those under Article 8.10(2)(a) and (b), then it is nevertheless feasible for example, that the CETA Tribunal could find that the Irish courts system failed to meet the standards of the administration of justice required under that agreement, by reason for example, of unacceptable delays in the system akin to those which gave rise to the judgment of the ECtHR in *McFarlane v. Ireland* [2010] ECHR 1272 *("McFarlane*"). I agree that this is a possibility, although as Hogan J. fairly acknowledges, the standard demanded under CETA in this regard, might be even more demanding than that applied by the ECtHR, and therefore instances of possible claims are even more rare.

161. However, I fail to see how this can in any way be seen to be a subtraction or interference with the juridical sovereignty of the State. Such a determination does not constitute an appeal from a particular decision, or address the substance of an Irish court's decision. Rather, the performance of the administration of justice can give rise to a claim under a separate legal code or, indeed, in Irish law. The juridical sovereignty of the State does not require that the administration of justice be beyond challenge, or that the method in which that justice is administered cannot give rise to a separate claim either in Irish law or under a jurisdiction created by an international treaty. In Irish law itself it is recognised that the *manner* in which the administration of justice is performed can give rise to a claim for damages for breach of the constitutional right to a speedy trial: *O'Callaghan v. Ireland and the Attorney General* [2021] IESC 68, [2021] 2 I.L.R.M. 397. Section 54 of the Irish Human

Rights and Equality Commission Act, 2014 amends the European Convention on Human Rights Act, 2003 to explicitly permit the recovery of compensation in Irish law for the unlawful deprivation of liberty "as a result of a judicial act". Furthermore, compliance with the *McFarlane* decision has led to a proposal contained in the European Convention on Human Rights (Delay of Court Proceedings) Bill, 2021 which would permit, as a matter of Irish law, the recovery of damages for delays in the court process. Nothing in the finality which the Constitution required be accorded to judicial proceedings precludes this.

162. Because there is a tendency to blur the lines of different arguments which have been raised in this case, it is important to point out that it is not enough to distinguish these cases on the basis that such claims are permitted by the case law of the Irish courts, or if appropriate, by legislation enacted by the Oireachtas. The objection raised in this regard, is not one which distinguishes between international and domestic law. Rather, it is contended, as I understand it, that the juridical sovereignty of the State precluded anybody, even a subsequent Irish court or the Irish legislature, from reviewing or passing upon the administration of justice in a particular case. This is manifestly not the case. Juridical sovereignty means the finality of decisions of the Irish courts, on matters of Irish law within their jurisdiction on the issues the subject matter of that dispute. This does not preclude any other body, national or international, from addressing either the subject matter of that decision, or the manner in which that decision was arrived at, by reference to a different legal code or standard. In particular, the possibility that the CETA Tribunal might find that delays akin to those in *McFarlane* were a breach of CETA and award compensation does not impermissibly interfere with the finality of decisions or the juridical sovereignty of the State.

J. ***Is there a Constitutional principle that requires the State to be immune from claims for damages?***

163. By the same token, I do not believe it is possible to deduce from the *Pine Valley Developments v. Minister for Environment* [1987] I.R. 23 ("*Pine Valley*") decision some general principle that the legislative or administrative sovereignty of the State requires that the Executive or Legislature be free from the possibility of an action of damages on grounds such as those contemplated by CETA. The principle in *Pine Valley* does not preclude a claim for the award of damages, or decisions having financial consequences, sometimes substantial, for the State. The reference to strict liability is itself perhaps somewhat misleading. As the judgment implicitly recognises, it would be, for example, quite possible to have a contractual liability, which is what occurs in the case of international arbitration, and arguably occurs in the case of CETA. *Pine Valley* itself contemplated damages if the action challenged constituted a recognised tort or malicious conduct on the part of the Executive. The principle of exemplary damages in Irish law is particularly available in the cases of the wrongful exercise of power by the State. More fundamentally, the type of consideration gave rise to a claim for compensation in CETA, would in many if not most cases give rise to a claim in invalidity of the measure in question in national law, with the consequence that the State would not be able to retain any financial benefit it had obtained under the measure. To take a simple example, if the State were to introduce a plainly discriminatory tax targeting Canadian investors, the investor would in the first place be obliged to comply with it. If a claim were brought to the CETA Tribunal, the investor might succeed and obtain compensation for the amount they had paid. If, however, the investor elected for a claim in Irish law which resulted in the invalidation of the measure, the State would be bound to repay that

sum. The financial consequences would be exactly the same. There is, it is true, a difference of legal categorisation, but that only illustrates the fact that CETA is different from the claim in Irish law and therefore, not a subtraction or interference with Irish juridical or legislative sovereignty: a successful CETA claim does not impugn the validity of the measure. Instead, it assumes validity and effectiveness as a matter of Irish law and requires the payment of compensation for loss occasioned by the measure. A successful claim in Irish law could invalidate the measure and as a result certain financial consequences would follow. It is not apparent to me why the possibility of a damages award under CETA is fundamentally incompatible with Irish legislative or executive sovereignty when the same financial consequences can follow from action in Irish law.

K. ***Is a determination of the CETA Tribunal a collateral attack on the validity of administrative measures?***

164. For similar reasons I cannot accept that a CETA determination would amount to an impermissible collateral attack on administrative decisions precluded by Irish law. The example given of s.50(4) of the Planning and Development Act, 2000 ("PDA 2000") is instructive. Section 50 precludes any claim which questions the validity (as a matter of Irish law) of a planning decision. A CETA claim for damages arising from such a decision does not question its validity as a matter of Irish law (or otherwise). Indeed, it retains both its validity and effectiveness in Irish law, since that is a necessary predicate to a claim to have suffered loss, thereby giving rise to a CETA compensation claim. All these instances are therefore only different ways of recycling the same argument and all suffer from the same frailty, that they necessarily assert a principle of constitutional law which would invalidate much more than CETA, a consequence the argument disavows. But if, for example, a *claim*

for damages under CETA in respect of a planning decision crosses a constitutional boundary, then so too does a claim that the decision infringes a rights protected under the ECHR, and if an award of such damages would impermissibly detract from, or question the validity of, such a decision in Irish law, contrary to section 50(4) of the PDA 2000, then so too must payment by the State of any award of compensation made by the ECtHR in that regard. This brings us back to enforceability under the Arbitration Acts, which is a *difference*, but this proliferation of examples only serves to demonstrate it is not a *distinction* which justifies a different conclusion in law.

165. It follows, that with great respect, I cannot accept that the examples or hypotheses advanced in the judgment of Hogan J., establish the conclusion that the ratification of CETA as it stands, is not permitted by the Constitution. Underlying much of the argument in this case is an unarticulated and to my mind somewhat rudimentary view of sovereignty, particularly in the sphere of international relations. The distinguished jurist H.L.A. Hart in his famous work *The Concept of Law* (3rd edn, Clarendon Law Series 2012) said:-

> "Whenever the word 'sovereign' appears in jurisprudence, there is a tendency to associate with it the idea of a person above the law whose word is law for his inferiors or subjects. We have seen … how bad a guide this seductive notion is to the structure of a municipal legal system; but it has been an even more potent source of confusion in the theory of international law."

Later in the same text he observed:-

> "For the word 'sovereign' means here no more than 'independent'; and like the latter is negative in force: a sovereign state is one *not* subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous. Some measure of autonomy is imported …. by the very meaning

of the word state but the contention that this '*must'* be unlimited or '*can'* only be limited by certain types of obligation is at best the assertion of a claim that states ought to free of all other restraints, and at worst is unreasoned dogma".

Put simply the strength of the argument against ratification of CETA lies in a strong conception of sovereignty albeit not articulated or examined. But if that principle leads to conclusions in relation to other agreements which we are unwilling to accept, and which, moreover, is inconsistent with the manner in which other sovereign states conduct themselves, then that should lead us to reconsider the concept of sovereignty asserted or at least assumed. In my view, the Constitution established a sovereign state that was capable of taking its place among the states of the world and participating in international agreements and bodies that showed a common and sometimes developing understanding of the powers and functions of sovereign states in an ever increasingly interconnected world, and ratification of CETA does not breach that sovereignty.

L. ***Amendment of the Arbitration Act, 2010 to address constitutional frailty***

166. However, it is apparent that my views in this matter, are not shared by a majority of the Court. I do agree with MacMenamin J. that it is unsatisfactory to have to attempt to judge the validity of the execution of CETA by reference to a series of hypothesised, necessarily exaggerated, and unlikely scenarios. More importantly, I also agree with him that in a hypothesised scenario, where the determination of the CETA Tribunal was fundamentally incompatible with the Constitution, then an Irish court would be precluded from granting leave to enforce such a judgment. It also follows, therefore, that I agree that if the Arbitration Act 2010 were amended in the manner suggested by Hogan J. at Part XIII of his judgment that that would remove any such constitutional frailty.

167. It follows from what is set out in this judgment that I consider that ratification of CETA would be permissible as it stands. It must follow, *a fortiori*, that if such amendment were introduced that the ratification of CETA would be even more clearly consistent with the Constitution.

168. I have also had the opportunity of reading the judgments of Charleton and Baker JJ. in draft. As I understand it, Charleton J. for his part considers that legislative and supra-judicial authority is given to a body outside the constitutional framework. He considers that at least some of the terms of CETA are themselves acceptable and do not breach the Constitution (paragraph 25) but they contain vague principles which may develop into law through judicial or arbitral activism, and furthermore, that the process of interpretation through the Joint Committee under Article 26 of CETA involves the making of law. It is not the *text* which is in issue, but, as he puts it, the implication of the text (paragraph 33). He argues that, in reality, the process of interpretation *is* legislation, and the process of interpretation through the Joint Committee is even more obviously a legislative act which infringes Article 15.2.

169. It is not possible to address all the examples and observations made in this judgment save to say, that I, for myself, would not accept without considerable qualifications the account of the development of law either in this jurisdiction or in the US, and by reference to which it is sought to reason by analogy in this case. But even on its own terms I would respectfully disagree that the Joint Committee procedure constitutes legislation, or, as both Charleton and Hogan JJ. would find, breaches the Article 5 statement that Ireland is a democratic state, or anything that can be said to follow from that.

170. First, I would respectfully disagree with the premise that interpretation is legislation. It is not true in the field of statutory interpretation, or interpretation of the

Constitution. It is true that giving a power to any tribunal or court to interpret a document whether contract, statute, Constitution or treaty, gives to the interpreter a power to say at least in theory, that black is indeed white. However, the requirements of basic fidelity to the text, of standards of judicial and arbitral competence, of professional obligations, intellectual honesty, and the existence of an appellate process itself, all mean that legislation by interpretation, is properly regarded more as a criticism of individual decisions than a description of the essence of the arbitral or judicial process. It cannot be assumed to be a sure guide to the constitutional validity of a scheme which requires an arbitral panel chosen from persons who satisfy the standards of professional competence to be appointed a judge in the courts of their own state, which provides for appellate review, and a further process of potential review by the Parties themselves, and which is also the subject of a well-developed and sophisticated system for the interpretation of treaties.

171. The CETA mechanism whereby a select committee is empowered to make proposals to the Joint Committee to issue binding interpretations, cannot realistically be seen as anything other than a procedure designed to preclude the possibility of the development of jurisprudence beyond the scope anticipated by the Parties in the individual treaty provisions. If anything, this provides a further protection against the expansive and unjustified interpretation which is apparently feared.

172. Furthermore, I cannot agree that the possibility of interpretation by the Joint Committee is a breach of the fundamental democratic nature of the State guaranteed by Article 5 of the Constitution. I am not sure what is meant by a concept of democratic oversight and how that is derived from the essence of Article 5. It is true that Ireland may not be directly engaged in the select committee or the Joint Committee, but it is in a position to make representations through the institutions of

the European Union, of which it is and remains a member. But that is not a critical distinction. If Ireland ratifies the Treaty in this case, that will require the approval of the Dáil because it is considered to involve a charge on public funds. If, however, it was not considered there was such a charge, then ratification would be a decision for the Government alone. All of this is, however, contemplated by the Constitution. None of it offends the concept of a democratic state. The Government is answerable to the Dáil, and the Dáil is elected by popular vote. Ireland would be as much a democratic state after ratification of CETA (whatever method was required) as it was before ratification.

173. CETA, like many other international agreements, provides for arbitration of disputes, and therefore, the possibility of interpretation by a tribunal, and a binding interpretation by the Joint Committee. However, this does not appear to offend against any principle of democracy. The Treaty provides for the possibility of a Joint Committee issuing an agreed interpretation of the treaty provisions in order to create agreed and binding precedent (Article 26.1(5)(e)). This is something which is apparent on the face of the Treaty itself. Ireland, in ratifying the Treaty, whether by decision of the Government, the Dáil, the Oireachtas or the People, must be taken to have agreed to that possibility, just as it does when it ratifies any agreement which provides for dispute resolution by a court, or committee of experts. This is all the more so, in the case of the Joint Committee procedure under CETA, since it is clearly designed to restrict the possibility of inconsistent or unduly expansive interpretations.

174. I cannot agree that it is possible to distinguish the case of the ECtHR by describing the decision of the Government to abide by a decision which runs counter to the outcome of a decision of an Irish Court as a political decision. If the Constitution

requires finality for all purposes of decisions of the Irish Courts, then it is difficult to understand how the Government, which is bound by the Constitution, could agree that Ireland should be bound by the decisions of another body which may have the effect of altering the outcome of a case, or could validly decide to comply with them in fact, where they do so. Nor does it appear to me that the fact that both damages and costs under the ECHR may be lower than those routinely awarded in Ireland is at all relevant to the issue of principle raised in this case.

175. While it is not perhaps a central or dispositive issue, I should also observe that I do not consider that it would be possible to challenge a measure in Irish law, and thereafter contend that the same measure was a breach of the general provisions of CETA. In such a case, I consider that a claim would be restricted to the grounds of challenge set out at Article 8.10(2)(a) and (b): i.e., that the manner in which the case was decided constituted a denial of justice or a fundamental breach of due process. The provisions of Article 8.22(1)(f) and (g) in relation to the withdrawal or discontinuance of any other domestic or international proceedings and the waiver of a right to initiate claims, when, if necessary, read together with the provisions of Article 29.3(1) and (2) and indeed Article 8.22(1)(f) and (g) seem to make it clear that the choice of forum is exclusive.

176. We were not referred to any example of the interpretation of CETA or a similar provision in another multilateral agreement, where it had been held that it was permissible to relitigate the substance of a claim before a tribunal established under the Treaty where there had been a final determination of proceedings brought in a contracting state. The *Vattenfall* litigation to which reference has been made, was brought under the provisions of the Energy Charter Treaty, 1994 which had materially different terms . Under the provisions of Article 26(2) thereof, parties

were given the right to choose to submit a dispute to either the courts or administrative tribunal of the contracting party, or under the Treaty, and it appears the choice of one did not exclude the other, but certain contracting parties (including Ireland, but excluding Germany) did not give unconditional consent to the submission of the dispute international arbitration under the treaty, where the investor had previously submitted the dispute to the courts or tribunals of the contracting party to the dispute. Thus, *Vattenfall* is not itself a guide to CETA on this point.

177. I do not see that the possible amendment of the Arbitration Acts discussed by Hogan J. at Part XIII of his judgment amounts to a constitutional example of a serpent devouring itself (Charleton J. paragraph 53. It is manifest that the amendment discussed provides for a much narrower and more limited exception to enforcement, and that the vast majority of CETA awards would be enforceable and would not fall foul of any such amended provision. Nor can I agree that such a provision would involve a breach of any CETA treaty obligation. First, the question of the interpretation of any international convention or treaty is not a matter for a domestic court unless it has been made part of domestic law in accordance with the constitutional formalities or is the accepted background against which a national measure is to be interpreted. Second, the question for this Court is whether Irish constitutional law permits the State to ratify the CETA agreement, and not whether the CETA Parties would consider that ratification was precluded. Third, and in any event, CETA itself only requires that under Article 8.41 the execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought. Fourth, (and subject to the same caveat that interpretation of international agreements is not normally a matter for national

courts) it is not apparent to me that any such amendment of the Arbitration Act, 2010 would involve derogation from the terms of either the New York or Washington Conventions, if that is suggested. Those Conventions require that arbitral awards be enforceable in the same manner as judgments of the national courts. No judgment could be enforceable in this jurisdiction where such enforcement was contrary to the constitutional identity of the State, or fundamental principles of European law (although the latter matter would itself necessarily require a reference to the CJEU). In any event, the issue for this Court is whether or not Ireland may ratify the Treaty as currently proposed by decision of the Government and resolution of the Dáil. The majority of the Court have concluded that it may not do so and have identified what is considered to be the near automatic enforceability of an award as a fundamental objection. This necessarily identifies a provision of national law, which precludes ratification. It is of course, a matter entirely for the Government and the Oireachtas if any step is taken to amend national law in this regard or whether this is possible or desirable having regard to Ireland's international obligations.

178. Finally, for reasons already set out I cannot agree that it is a matter of law or practicality that Ireland would be precluded by the obligation of sincere cooperation from refusing enforcement in such extreme circumstances. Although once again, it is additional comfort that in the case of any award considered to run afoul of fundamental principles of EU law that would ultimately be a matter for the CJEU.

M. ***Conclusion***

179. I would answer the questions posed by Dunne J at paragraph 13 of her judgment as follows:-

(1) Is ratification of CETA necessitated by the obligations of membership of the EU for the purposes of Article 29.4.6° of the Constitution? **No.**

(2) Is ratification of CETA incompatible with the legislative sovereignty of the State under Article15.2? **No.**

(3) Does the creation of the CETA Tribunal amount to the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the courts in this jurisdiction contrary to Article 34 of the Constitution? **No.**

(4) Does the "automatic enforcement" of a CETA Tribunal award under the enforcement provisions of CETA together with the provisions of the Arbitration Act, 2010 constitute a breach of Article 34? **No. For reasons set out, I do not agree that CETA Tribunal awards are "automatically enforceable" and/or that the enforceability of such awards is or would be a breach of Article 34.**

(5) What is the effect of the interpretive role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution? **For reasons set out above I do not consider that the role of the Joint Committee constitutes a breach of Article 15.2.**

(6) Would an amendment of the Arbitration Act, 2010 to alter the "automatic enforcement" of a CETA Tribunal award as proposed in Part XIII of the judgment to be delivered herein by Hogan J. alter the position in relation to the ratification of CETA? **It follows from my judgment that the enforcement provisions of CETA do not themselves constitute a breach of Article 34, and this proposition would only be strengthened if the 2010 Act were amended to make explicit the possibility of refusal of enforcement.**