Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Patrick Costello v. The Government of Ireland, Ireland and the Attorney General

On appeal from: [2021] IEHC 600

Judgment delivered on 11 November 2022 **[2022] IESC 44**

Headline

The Supreme Court by a majority of 4-3 (Dunne, Charleton, Baker and Hogan JJ.; O'Donnell C.J., MacMenamin and Power JJ. dissenting) holds that the Constitution of Ireland precludes the Government and Dáil Éireann from ratifying the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") as Irish law now stands.

The Court by majority 6-1 (O'Donnell C.J., MacMenamin, Dunne, Baker, Hogan and Power JJ.; Charleton J. dissenting), also holds that certain amendments of the Arbitration Act, 2010 (as detailed in Part XIII of the judgment of Hogan J.) would, if effected, permit ratification without breaching the Constitution.

Composition of Court

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

Judgments

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

Background to the Appeal

The EU-Canada Comprehensive Economic Trade Agreement ("CETA") was entered into between Canada and the European Union and its Member States on 30 October, 2016. Certain provisions of CETA have already provisionally entered into force with effect from September, 2017, but the full agreement will not enter into effect until the ratification of CETA by all Member States. It is the proposed ratification of CETA by the Government of Ireland and Dáil Éireann by means of an Article 29.5.2° resolution that forms the subject of these proceedings. To understand the precise nature of this challenge, it is necessary to set out the essence of CETA in addition to some of its more contentious provisions.

CETA is a trade agreement setting the conditions of trade between Canada, and the EU and its Member States in respect of a large number of goods and services. It is, however, the provisions

relating to investor protection and dispute resolution which have been the focus of debate in these proceedings. CETA is an example of an investor-state dispute settlement ("ISDS") treaty. ISDS treaties have become a common feature of international law and practice, in place between nations on both bi-lateral and multi-lateral bases. Broadly defined, under CETA, the Parties agree that "measures" (defined to include legislation, administrative action, and judicial decisions) will not offend against certain principles set out in the Treaty. These principles of equal treatment, non-discrimination, and fair and equitable treatment are to apply to covered investments made within the territory of one of the Parties to the Treaty by investors who are nationals of, or established in, another Party to the Treaty.

In the case of the CETA, the most important of these provisions for these proceedings are set out in Article 8.10 of the Treaty. This provides that a Party breaches the obligation of fair and equitable treatment if a measure constitutes "(a) a denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process 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 [a procedure established under] paragraph 3 of this Article". This procedure allows for a specialist committee to review the content of the obligation to provide fair and equitable treatment and develop recommendations for submission to the CETA Joint Committee, which is in turn empowered to issue binding interpretations of the Treaty obligations. There are further relevant provisions of CETA and recourse should be had to the judgment of Dunne J. for a more thorough explanation of the relevant terms.

CETA also provides for an arbitral process to make determinations in respect of disputes. CETA permits claims to be made by individual investors for compensation in respect of loss suffered by them in circumstances where a measure adopted by a Party is alleged to have breached the provisions of CETA. Chapter 8, Section F of CETA provides for the creation of a standing panel of arbitrators (5 from Canada, 5 from the EU and 5 from third countries, all of whom shall satisfy the standards set for appointment of judges in their respective countries) and a further appellate body staffed by members similarly qualified who are empowered to review the decisions of a CETA Tribunal. This is as opposed to the standard model in ISDS treaties, whereby disputes between foreign investors and host states have been settled by *ad hoc* arbitral tribunals constituted for the specific dispute. Article 8.29 also provides that the Parties to CETA agree to pursue the establishment of a permanent multilateral investment tribunal. Furthermore, Article 8.22(1)(f) and (g) of CETA establishes what is known as a "fork in the road" provision and provides that an investor, prior to commencing proceedings before the CETA Tribunal, must withdraw or discontinue any existing proceedings in domestic or international law and also waive their right to initiate any future claim or proceeding regarding the measure alleged to constitute a breach of CETA.

Under the provisions of Article 8.23, claims under CETA may be submitted under the rules of the United Nations Commission on International Trade Law ("UNCITRAL") Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"); the International Centre for Settlement of Investment Disputes ("ICSID") Convention on the Settlement of Investment

Disputes between States and Nationals of Other States, 1965 ("Washington Convention") or any similar rules. Both Conventions have been ratified by Ireland and awards made in arbitrations under the New York or Washington Conventions are enforceable in Irish law under the provisions of the Arbitration Act, 1980 and 2010, to which the respective Conventions are annexed.

The Constitution envisages that the State may enter into international agreements and Article 29.4.1° confers upon the Government the executive power of the State to do so. However, this power is not without limit, and the appellant in this case contends that the ratification of CETA by the Government is beyond the Article 29.4.1° power unless the matter is first put to the People by way of referendum. The overarching theme of the appellant's arguments concerns the concept of sovereignty. It is contended that CETA is a breach of the internal sovereignty of the State in two principal respects: firstly, the legislative sovereignty and secondly, the juridical sovereignty of the State.

In what may be referred to as the "legislative argument", the appellant contended that the Government is not entitled to accept the "the legal framework established by CETA" without there being a domestic legal framework in place. Article 29.6 of the Constitution provides that no international law shall become part of the domestic law of the State, save as determined by the Oireachtas. The appellant argued that, if the Government were to ratify CETA, this would be effectively allowing CETA to become domestic law without having formally made it so, pursuant to Article 29.6. In addition, the appellant argued that this would also mean that a body of laws made other than in accordance with Article 15.2.1° would determine disputes against the State and be enforceable within the State. This, it was argued, would be unconstitutional, as the sole and exclusive power of making laws is vested in the Oireachtas. Finally, the appellant argued that the ratification of CETA could induce what was termed as a "regulatory chill" on the operation and application of Irish law and policy development. In other words, it was argued that the ability of the CETA Tribunal to make monetary awards against the Irish State may deter the Oireachtas from enacting laws likely to attract such awards. The appellant was particularly concerned about the application of this effect to law and policy in the sphere of environmental regulation. Secondly, in what may be referred to as the "juridical argument", the appellant submitted that the ratification of CETA would fall foul of Article 34 of the Constitution, which provides that justice shall be administered in courts established by law by judges appointed in the manner prescribed by the Constitution. It was contended that, because the CETA Tribunal is given the power to determine a dispute as to whether an act or omission of the State within Ireland breached CETA, and can award monetary damages against the State on that basis which are enforceable within Ireland, the CETA Tribunal is effectively acting as a court but not one established pursuant to Article 34 nor one permitted under Article 37.

The State respondents argued that the CETA agreement is an international treaty which operates at the level of international law and as such, does not constitute the making of law for the State contrary to Article 15. Furthermore, they argued that the determinations of a CETA tribunal would not constitute the administration of justice reserved to courts under Article 34 or bodies constituted under Article 37 of the Constitution. In this regard, the respondents noted a number of international agreements already in existence which permit individual complaints and provide for arbitration and determination by a tribunal, most notably the European Convention on Human Rights which has

significant effects within the State, notwithstanding final determinations made by Irish courts, and does not offend the Constitution. Finally, the respondents argued that the fact that CETA awards are enforceable in Irish law was not a consequence of CETA, but rather the provisions of Irish legislation, such as the Arbitration Act, 2010, which is constitutional, and has not been challenged here.

The High Court (Butler J.) dismissed the appellant's challenge, considering that the provisions of CETA did not amount to a law required by Article 15.2 to be the sole and exclusive domain of the Oireachtas, and the determinations of the CETA Tribunal did not constitute the administration of justice reserved to courts under Article 34, or court-like bodies under Article 37.

Reasons for the Judgment of the Supreme Court

The Supreme Court held:-

(1) (*Unanimously*) the ratification of CETA is not an obligation "necessitated" by membership of the EU for the purposes of Article 29.4.6° of the Constitution and is thus not immune from constitutional challenge;

(2) (Per Dunne, Charleton, Baker and Hogan JJ.) the ratification of CETA would breach Article 34 because it would infringe Irish juridical sovereignty by permitting an international tribunal to make binding decisions enforceable in Irish law;

(3) (Per Charleton, Baker and Hogan JJ.) ratification of CETA would offend Article 5 and the democratic nature of the State by permitting the interpretation and therefore amendment of CETA by the CETA Joint Committee without democratic oversight;

(4) (Per Charleton and Hogan JJ.) ratification of CETA would constitute a breach of the legislative sovereignty of the State (per Hogan J.) by providing for damages awards against the State based on strict liability in respect of laws enacted by the Oireachtas, or (per Charleton J.) by permitting laws to be made for the State otherwise than in accordance with Article 15.2;

(5) (Per O'Donnell C.J., MacMenamin and Power JJ. *dissenting*) ratification of CETA would not infringe the legislative sovereignty of the State (Dunne and Baker JJ. concurring in this respect); and

(6) (Per O'Donnell C.J., MacMenamin and Power JJ. *dissenting*), ratification of the provisions of CETA would not constitute a breach of juridical sovereignty, and (per MacMenamin J. *dissenting*) the challenge to CETA on grounds of an interference with the jurisdiction of courts under Article 34 of the Constitution was premature.

Held further by the Supreme Court:-

(7) (Per O'Donnell C.J., MacMenamin, Dunne, Baker, Hogan and Power JJ.) that the Government and Dáil's ratification of CETA by way of Article 29.5.2° resolution would not offend the Constitution if the provisions for enforcement of awards of the CETA Tribunal under the Arbitration Act, 2010 were amended by the Oireachtas in the manner suggested by Hogan J. in Part XIII of his judgment, although this would be a matter for the Oireachtas;

(8) (Per Charleton J. *dissenting*) that this course was not permissible under the Constitution, as it would contradict the terms of CETA fundamentally and even a protocol to the Treaty enabling this step would be contrary to the Vienna Convention on the Law of Treaties, 1969. This course, furthermore, would not be effective as, on ratification, enforcement of CETA Tribunal awards would become a legal obligation under EU law which would override any domestic legislation.

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case History

29,30,31 March 2022 & 16 June 2022	Oral submissions made before the Court
[2022] IESCDET 1	Supreme Court Determination granting leave
[2021] IEHC 600	Judgment of the High Court **(judgment which was the subject of the appeal to the Supreme Court)**