



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 Ms Justice Elizabeth Dunne, delivered on the 11th day of November, 2022

Introduction

1. This is an appeal from the judgment of the High Court (Butler J.) in which she refused the Plaintiff's claims seeking to prevent the ratification of a trade agreement between Canada and the European Union by the method proposed by the State. An important aspect

of the case will be a consideration of the provisions of Article 29 of the Constitution and whether the agreement can be ratified in this State under the terms of Article 29 or whether it can only be ratified by means of a constitutional amendment following a referendum. It is relevant to bear in mind that while the trade agreement was negotiated between Canada and the European Union, the parties to the agreement are defined therein to include “*the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union*” and Canada. As will be explained shortly, the trade agreement has to be ratified by the Member States and, from an Irish point of view, it follows that for ratification to be legally effective, the method of ratification must be in accordance with the terms of the Constitution.

Background

2. The Comprehensive Economic Trade Agreement (“CETA” herein) was entered into between Canada and the European Union on the 30th October 2016 following a number of years of negotiation. Article 30.7.1 of CETA stipulates that the parties are to approve the agreement “*in accordance with their respective internal requirements and procedures*”. Under Article 30.7.2, CETA will not enter into force until a prescribed date after the parties have exchanged “*written notifications certifying that they have completed their respective internal requirements and procedures*”. Nonetheless, Article 30.7.3 allows CETA to be applied on a provisional basis pending full ratification subject to the parties identifying and notifying one another as to the parts of the agreement intended not to apply provisionally. A number of the articles which are the subject of contention in these proceedings and which are to be found in Sections C, D and F of Chapter 8 are excluded from the provisional application of CETA.

3. On the 28th October 2016, the Council of the European Union adopted Council Decision (EU) 2017/37 which authorised the signing of CETA on behalf of the European Union. On the preceding day, the 27th of October 2016, a number of statements and declarations were entered as statements to the Council minutes, including statement 36 concerning, *inter alia*, “investment protection and the Investment Court System”:

“All of these provisions having been excluded from the scope of provisional application of CETA, the Commission and the Council confirm that they will not enter into force before the ratification of CETA by all Member States, each in accordance with its own constitutional procedures.”

Statement 36 recognised that CETA and the mechanisms contained therein represented “*a step towards the establishment of a multilateral investment court which will, in the long term, become the body responsible for resolving disputes between investors and States*”. The appellant opposes the coming into force of these provisions and until such time as ratification takes place, they cannot take effect. The agreement is a very substantial document but the parts of the agreement with which the appellant takes issue are to be found in Chapter 8 of the agreement.

4. The appellant is a Teachta Dála, having been elected for the Green Party in the general election in February 2020. The crux of his opposition to CETA is his contention that its terms have the effect of transferring important elements of sovereign power to the institutions created by the agreement. He expressed concern as to the State’s ability to legislate in the environmental sphere, given his contention that although CETA does not preclude such legislation, the State could be made liable to a Canadian investor for damages in respect of loss by reason of such legislation. He describes the agreement as having a potentially chilling effect on regulation in this sphere. In particular, the appellant submits

that the rule-making powers of the CETA Joint Committee amount to a power to make laws which will have binding legal effect domestically in Ireland contrary to Article 15.2 of the Constitution. He states that CETA transfers part of the judicial power of the State to the tribunal established under Chapter 8 of the agreement whose function is to resolve investor/State disputes, contrary to Article 34.1 of the Constitution. Chapter 8 also envisages the establishment of a Multilateral Investment Tribunal (MIT) which he likewise contends would be contrary to Article 34.1. Consequently, in the appellant's view, CETA cannot be ratified through any of the mechanisms contained in Article 29 of the Constitution and can only be ratified by way of a constitutional amendment following a referendum under Articles 46 and 47 of the Constitution.

5. The respondents argue that ratification of CETA will not involve the transfer of State sovereignty to institutions created under the agreement. To this end, their central contention is that CETA operates solely in the realm of international law and does not give rise to any domestic legal effects. Accordingly, the respondents disagree that the ratification of the agreement would diminish the exercise of State sovereignty, and they argue that the appropriate mechanism for ratifying CETA is that stipulated by Article 29.5.1^o of the Constitution. Without prejudice to that position, the respondents alternatively cite Article 29.4.6^o of the Constitution and suggest that ratification of CETA is necessitated by Ireland's membership of the European Union and as such would be in accordance with Article 29.4.6^o. The appellant strongly rejects this proposition and says that as the agreement must be ratified by each Member State before it enters into force, ratification cannot be an obligation flowing from EU membership.

Decision of the High Court

6. On 16th September 2021, Butler J. ([2021] IEHC 600) refused the relief sought by Mr. Costello and found that the ratification of CETA should take place in accordance with

Article 29.5.2° of the Constitution. Butler J. comprehensively analysed the relevant provisions of CETA in finding in favour of the respondents. Butler J. found that CETA is an international agreement which, if ratified, will bind the State as a matter of international law only. At paras. 85 and 86 of her judgment, Butler J. posited two reasons for finding that the ratification of CETA will have no impact on the domestic legal system:

“Firstly, the terms of CETA itself are designed to ensure that entry into force of CETA will not give it legal effect within the domestic legal systems of the parties. Article 30.6 confirms that the rights created by CETA operate only at the level of international law, precludes the direct invocation of CETA before domestic courts and prohibits the creation by a party of a right of action before its domestic courts against another party on the basis of an alleged breach of CETA. Conversely, Article 8.31 prevents the CETA tribunal from purporting to rule on the validity of a domestic measure or giving any interpretation of a domestic measure that will be binding on the parties. Thus, CETA itself creates a strict demarcation between its effect in international law as between the parties and its lack of legal effect in the domestic legal systems of the parties.”

7. Butler J. also placed emphasis on Article 29.6 of the Constitution, which expressly states that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. To this end, the trial judge relied on the decision in *J.McD v. PL* [2010] 2 I.R. 199 where Murray C.J. discussed the interaction between the European Convention on Human Rights and domestic law, which applied only insofar as had been authorised in the European Convention on Human Rights Act 2003. By analogy, Butler J. held that CETA, although creating rights and obligations at an international level, did not form part of or have direct effect in the domestic legal system, and therefore, any decisions made by the CETA Joint Committee under the agreement have no legal effect in Irish law,

and any such decisions cannot be characterised as laws made for this State in breach of Article 15.2 of the Constitution. Indeed, Article 30.6 of CETA expressly precludes its terms from having direct effect in domestic legal systems and precludes its invocation before the domestic courts.

8. Mr. Costello also argued that CETA involved the ceding of sovereign power. In this regard, reliance was placed on the decision of this Court in *Crotty v An Taoiseach* [1987] I.R. 713. The respondents also relied on *Crotty* and in turn, on the subsequent decision in *Pringle v. Ireland* [2013] 3 I.R. 1 in which the decision in *Crotty* was reconsidered. Having considered those judgments in detail Butler J. opined that *Crotty* cannot be read as simply precluding the entry by the State into international agreements which will curtail the ability of the State to act in a manner contrary to those agreements. She expressed the view that to limit the State's ability to enter into such agreements purely because they may influence how the Government or the Oireachtas may choose to act in the light of such international commitments would restrict rather than protect the State's sovereignty. Thus, she was of the view that to require every such agreement to be put before the people in a referendum would upend rather than uphold the constitutional architecture of Articles 28 and 29 of the Constitution.

9. The appellant described the agreement as a "mixed agreement" under European Union law, because it covers matters, some of which are within the exclusive competence of the European Union, and some of which are shared competences between the European Union and the Member States. Article 2(2) TFEU makes clear how shared competences are to be exercised:

"When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their

competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

10. The appellant accepted that common commercial policy, including trade and foreign investment policy, is an exclusive competence of the European Union stipulated by the Treaty of the Functioning of the European Union and that the bulk of the substantive measures covered by CETA fall within the exclusive competence of the European Union. However, Mr. Costello argued, and the State agrees, that indirect foreign investment is a shared competence that the European Union has not previously exercised competence over and given the wide range of investments covered by CETA, the effect of ratification of CETA will vest in the European Union a new competence, binding Ireland to any future actions taken by the European Union in this area. Thus, Ireland could only continue to exercise its competence in the area of foreign indirect investment to the extent that the EU was not exercising that competence. Of particular concern for Mr. Costello is that ratification has the potential consequence of binding Ireland to the “CETA Project” and to the establishment of a Multilateral Investment Tribunal I. This concern was grounded in Article 8.29 of CETA, which the appellant argued was indicative of an on-going project on behalf of the EU to pursue the establishment of an MIT, which would have the effect that Ireland could no longer object to or withdraw from the proposal to establish an MIT, thus leading to a loss of State sovereignty into the future (see para. 118 of the judgment). Butler J. found that entry into CETA would not comprise a legislative act on the part of the EU sufficient to exclude Member States from the shared competence they currently enjoy in respect of foreign indirect investment. Further, she found that the European Union was not exercising a shared competence by ratifying CETA, as the international agreement was not a legally binding instrument, and having regard to Article 2(2) TFEU, the European Union

can only exercise shared competences through legally binding legislation. Further, the trial judge found that if an MIT was to be established, it could only be done by way of further international agreement requiring further ratification.

11. While Butler J. found that the CETA Tribunal established by Chapter 8 of the agreement could be characterised as administering justice, she went on to hold that the jurisdiction to be exercised by the CETA Tribunal was not the administration of justice as per the principles set out in *McDonald v. Bord na gCon* [1965] I.R. 217, which were recently analysed in the decision of this Court in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. Butler J. found that the disputes which are to be determined by the CETA Tribunal are not justiciable under Irish law even where the Irish State is a party as they will arise and can be determined only as a matter of international law. The jurisdiction to be exercised by the CETA Tribunal exists at the level of international law and does not reduce the power of the Irish courts to administer justice. Hence, it was not the exercise of jurisdiction under Article 34 of the Constitution. In this context, she considered the issue of enforceability of awards and noted the fact that awards that will be made by the CETA Tribunal are not those traditionally characteristic of the Irish Courts nor was the vesting of jurisdiction in the CETA Tribunal a subtraction of jurisdiction from the Irish courts. Ultimately, she concluded that the creation of and conferral of jurisdiction on the CETA Tribunals is not contrary to Article 34.1 of the Constitution.

12. A number of other arguments were raised by Mr. Costello in the High Court, which deserve brief comment. Butler J. held that, if she was incorrect and the CETA Tribunal is administering justice within the meaning of Article 34, then she could only conclude that the constitutional saver contained in Article 37 for the administration of justice by persons who are not judges and bodies which are not courts did not apply to the CETA Tribunals as its jurisdiction is not “limited” for the purposes of Article 37 of the Constitution. The trial

judge also found that CETA could not be said to be “necessitated” by the State’s obligations of membership of the European Union, and therefore could not be saved by the provisions of Article 29.4.6° of the Constitution. In respect of Mr. Costello’s *locus standi* to pursue the constitutional challenge, Butler J. found that he was entitled to raise hypothetical arguments as to what might happen upon ratification of CETA, and in fact, he could only raise hypothetical arguments where he was challenging the agreement on the basis that the selected ratification was incorrect or inappropriate. As she pointed out, while there might be a better candidate to make the arguments than this candidate, there was a very narrow window within which the proposed ratification of CETA could be challenged and it could work a constitutional injustice were he not allowed to bring the challenge notwithstanding the fact that some of the arguments were necessarily speculative. Butler J. nonetheless held that the appellant was not entitled to argue that CETA would operate contrary to Article 40.1 of the Constitution as it would confer Canadian investors investing in Ireland with greater benefits than indigenous investors, as if this factual situation were to materialise, an Irish investor in that position would be able to bring a complaint before the Irish court.

Leapfrog Appeal to this Court

13. By a Determination delivered on the 11th January 2021, this Court was satisfied that this was an appropriate case in which to grant leave to appeal to the Supreme Court directly from the High Court and considered that it raised important matters of domestic and EU law. The parties are agreed that the following points of Irish law arise in this appeal:

- i. Is the Government entitled, by way of international treaty, to accept “the legal framework established by CETA”, whose laws are binding within the territory of the State, without that legal framework becoming part of the domestic legal system?
- ii. Is the ratification absent a referendum of CETA contrary to Article 15.2.1° of the Constitution?

- iii. If CETA is ratified without a referendum, would the CETA Tribunal be engaged in the administration of justice contrary to Article 34 of the Constitution?
- iv. If so, can such administration of justice be saved by Article 37 of the Constitution?
- v. Did the High Court and the CJEU apply the correct canons of interpretation to their analysis of CETA?
- vi. Does the appellant have standing to argue that CETA is contrary to Article 40.1 of the Constitution? If so, is CETA contrary to Article 40.1 if ratified absent a referendum?
- vii. Is ratification of CETA necessitated by the obligations of membership of the EU?

Some additional points of EU law will also arise as will be seen later. It will be observed that in the course of the hearing, the issues before the Court crystallised into the following issues:

- i. Is ratification of CETA necessitated by the obligations of membership of the EU?
- ii. Is CETA a breach of Article 15.2 of the Constitution?
- iii. 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?
- iv. Does the “automatic enforcement” of a CETA Tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 constitute a breach of Article 34 of the Constitution?
- v. What is the effect of the interpretative role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution?
- vi. Would an amendment of the Arbitration Act 2010 to alter the “automatic enforcement” of a CETA Tribunal award as proposed in the judgment to be

delivered herein by Hogan J. alter the position in relation to the ratification of CETA?

Submissions

Appellant's Submissions

14. The appellant submits that it does not follow that because CETA operates in the sphere of international law, it will only apply at an international level. He argues that ratification of CETA involves a direct usurpation of the sovereignty of the legislative and judicial powers of the State. The appellant submits that the High Court was incorrect in relying on *J.McD v. PL* and drawing an analogy between the ECHR and CETA. While the decisions of the ECtHR operate at a purely international level and cannot be enforced domestically the same cannot be said for the decision of the CETA Tribunal, whose awards will be directly enforceable in Ireland. Further, the appellant criticises the trial judge's findings that disputes would not be subtracted from the jurisdiction of the Irish courts by the ratification of CETA. To this end, the appellant relies on *Opinion 2/15 (Singapore FTA)* ECLI:EU:C:2017:376, which was also relied on by Butler J., where the CJEU stated in the context of the Singapore FTA that Member State ratification was required because it involved removing certain disputes that would otherwise be litigated by the Member State courts. The appellant queries the trial judge's analogy between an investor's ability under CETA to choose to bring proceedings against the State outside of the Irish courts and the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation"). It is submitted that the Brussels Regulation is distinguishable on a number of grounds, firstly, as it explicitly excludes cases based on the liability of the State for acts and omissions in the exercise of state authority and secondly because the Brussels Regulation forms part of national law and

enjoys the protection of Article 29.4.6° of the Constitution. Accordingly, it is argued the legal framework created by CETA trespasses on and usurps the jurisdiction of the Irish courts and the powers of the Oireachtas without becoming part of the domestic legal system, contrary to the fundamental sovereignty asserted by the People through the Constitution.

15. It is the appellant's case that ratification of CETA would be contrary to Article 15.2.1° of the Constitution. It is argued that the trial judge was incorrect to find that CETA could not be classified as "laws for the State" by virtue of the fact the agreement is designed to ensure that its entry into force will not give it legal effect within the domestic legal systems of the parties. The appellant points to Article 8.10 of CETA to this end, which states that the agreement binds Ireland "in its territory", and he argues that Article 15.2.1° prohibits any law that is not created by the Oireachtas or necessitated by membership of the EU having an effect within the State. It is the appellant's case that CETA laws will be directly binding in the State, even though they would exist outside of the domestic legal system. The appellant further submits if that is correct, the trial judge was wrong to compare CETA with the ECHR, as the latter instrument is only legally binding in this State insofar as is permitted by the 2003 Act. In contrast, the appellant says that CETA has the effect of binding the State to the decisions of the CETA Joint Committee on the interpretation of the agreement and the enforceability of awards of the CETA Tribunal. The appellant goes further and submits that providing for CETA laws in legislation would not remedy this breach of Article 15.2.1° as it would amount to an impermissible delegation of legislative power.

16. The appellant argues that the functions of the CETA Tribunal amount to the administration of justice contrary to Article 34.1 of the Constitution. Relying on the principles set out in *McDonald v. Bord na gCon* and further refined by *Zalewski v. Workplace Relations Commission*, the appellant submits that the CETA Tribunal will be resolving disputes concerning property rights in Ireland and awarding compensation for a

breach of those rights, which will be enforceable in the State. It is argued that this is clearly within the ambit of the Irish courts. The appellant disagrees with the finding of the High Court that Article 34 is not contravened if the law applied is not Irish law and submits that there is nothing in Article 34 which allows it to be circumvented in this way, where the wrong is alleged to have occurred within the State. Further, the appellant points out that the Irish courts are frequently required to apply foreign law within this jurisdiction, for example, where a contract is governed under the Regulation (EC) No 593/2008 (“Rome I”). As such, the appellant argues it cannot be the case that the administration of justice as it is conceptualised in *McDonald* and *Zalewski* arises only where Irish law is applied. The appellant submits that the ceding of judicial power affected by CETA is illustrated by the fact that a claim to the CETA Tribunal precludes any claim before the Irish courts. Further, while the appellant accepts that the CETA Tribunal does not have jurisdiction to invalidate provisions of Irish law, it can make a declaration that a provision of Irish law is incompatible with CETA and make an award of damages against the State for loss suffered by an investor on foot of that provision. The appellant argues that this would create a “regulatory chill” and would impact the application of Irish law and policy development. In turn, the appellant argues this directly contradicts the line of authority to be found in cases such as *Glencar Exploration PLC v. Mayo County Council (No 2)* [2002] 1 I.R. 84. The appellant also argues that the trial judge erred in finding that the ratification of CETA would not bind Ireland to supporting the establishment of an MIT and submit that the agreement frames the establishment of an MIT in mandatory terms.

17. The appellant argues that should this Court find that CETA does breach Article 34, it is not saved by Article 37.1 of the Constitution as it does not exercise a “limited” judicial power, and to this end, submits that the CETA Tribunal can award unlimited damages in any claim that falls within the agreement and it is not subject to any form of appeal or judicial

review by the Irish Courts, thus rendering in it incapable of being considered “limited” by reference to Article 37.

18. It is argued that the jurisdiction conferred on the CETA Tribunal has not been appropriately interpreted by the trial judge or the CJEU. The appellant places considerable reliance on the arbitral decision in *Eco-Oro Minerals Corp v Republic of Columbia* ICSID Case No. ARB/16/41 (“Eco-Oro”), which concerned an international free trade agreement between the Republic of Columbia and Canada. That free trade agreement had similar provisions to Section B of Chapter 8 of CETA, which details particular exceptions under which an investor is precluded from recovering for damages from a signatory state if its loss arises from the pursuit of particular measures, for example, measures for the conservation and protection of natural resources and of the environment. In *Opinion 1/17* ECLI:EU:C:2019:341, the CJEU found that the CETA Tribunal would not have the power to impugn public interest measures or award damages in respect of the passing of such measures. The appellant argues that the decision in *Eco-Oro* is in direct conflict with that finding, as the ICSID Tribunal ordered the Republic of Columbia to pay compensation to a Canadian mining company where the State was pursuing public interest measures similar to those found in the general exceptions in Section B Chapter 8 of CETA. The appellant concedes that while it has no binding effect on the CETA Tribunal, the decision in *Eco-Oro* demonstrates that Canada disagrees with the logic subtending *Opinion 1/17*. Thus, the appellant seeks a reference to the CJEU to clarify the uncertainty he says arises regarding the operation of the jurisdiction of the CETA Tribunal and whether that body would in fact have the power to impugn a measure of national law and award compensation to a Canadian investor where domestic measures were being pursued under one of the general exceptions.

19. The appellant argues that the trial judge was incorrect to find that he did not have *locus standi* to pursue the claim that CETA would operate contrary to Article 40.1 of the

Constitution in conferring certain benefits on Canadian investors which Irish investors could not avail of. It is submitted that, as a TD, Mr. Costello has an interest in ensuring that the business of the Dáil is conducted in accordance with the Constitution. Further, the appellant argues that Butler J. erred in finding that an investor could bring a claim in this jurisdiction alleging a breach of Article 40.1, as that would amount to the Irish courts applying an international legal instrument that the trial judge found to have no domestic effect. It should be noted that this argument was not pursued in the course of the oral submissions before this Court.

20. The appellant argues that CETA cannot be necessitated by Ireland's membership of the European Union as it involves the removal of disputes from the courts of Member States, which exceeds the authority of the European Union.

Respondents' Submissions

21. The respondents base their submissions on the provisions of CETA and the jurisprudence of the Supreme Court regarding international trade deals, such as *Pringle v. Government of Ireland*, which held that trade agreements, and institutional adjudicative mechanisms thereunder, do not result in an unconstitutional diminution of sovereignty. They further emphasise that in their submission, the appellant's case is a complaint against the Arbitration Act 2010, the constitutionality of which is not challenged, which may make tribunal decisions enforceable. It is argued that the essence of the appellant's arguments as to the "administration of justice" is that *all* arbitration is unconstitutional. It adds that the CETA Tribunal does not fulfil any of the criteria for the administration of justice.

22. Reference was made to a number of specific provisions of CETA in relation to the Tribunal and other provisions of relevance which are not necessary to refer to in detail at this point.

23. The respondents submit that CETA does not create any “laws for the State” for Art. 15.2.1° purposes, as Article 30.6.1 of CETA expressly states that “[n]othing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.” They submit that the appellant’s position would collapse the separation between Article 15 and Article 29 of the Constitution, and be inconsistent with this Court’s statements in *Pringle*, indicating that trade agreements with binding adjudication mechanisms are constitutionally permissible.

24. In support of this position, the respondents rely on *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, where Fennelly J. stated at page 129:

“The Constitution establishes an unmistakable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies.” (emphasis in submissions)

Reference was also made to *Barlow v Minister for Agriculture* [2017] 2 I.R. 440 in this context.

25. The respondents submit that there is no loss of sovereignty arising from CETA and no authority that entering into trade agreements which contain adjudicative functions is

impermissible under the Constitution. On this point, the respondents rely on *Pringle*, and in particular the judgment of O’Donnell J. (as he then was), where he stated at para. 308:

“It can be deduced from [Articles 28 and 29 of the Constitution], at a minimum, that the Constitution clearly anticipated the executive power could and would involve the making of binding agreements with other nations, and that Ireland might become involved in disputes which themselves might be resolved by a process involving a binding determination by which Ireland would be obliged to abide.”

(emphasis in submissions)

It is contended that CETA is such an “agreement” and the Tribunal is such a “process”.

26. In response to the appellant’s claim that CETA would create a “regulatory chill”, the respondents submit that this claim relies on extra rights being provided by CETA to Canadian investors beyond those already enjoyed under Irish law, and such rights are not successfully identified in the appellant’s submissions. Furthermore, the argument related to a potential chilling effect is impermissible due to its hypothetical nature, and is not truly a legal argument, but one of political preference that the Court should not engage with. They also submit that, even assuming there would be a chilling effect in the future, that would not justify this Court intervening to prevent a decision which, under the separation of powers, falls to be taken by the Executive.

27. In response to the appellant’s submission that Article 8.29 of CETA would mean that Ireland would be bound to support the creation of the MIT, the respondents submit that the only obligation under Article 8.29 is to “pursue” the MIT’s establishment, and no new adjudicative jurisdiction can be conferred on the MIT, and that it was held in *Crotty v. An Taoiseach* at page 770 that the establishment of what was effectively a new chamber of the Court of Justice – the then court of first instance – gave rise to no constitutional difficulty,

and therefore if, as the respondents submit, the CETA Tribunal gives rise to no constitutional issue, it is difficult to see what extra constitutional issue the MIT then creates.

28. The respondents submit that as non-citizens can seek to have statutes declared unconstitutional, and companies (the vehicles through which Canadians are likely to invest) can invoke constitutional property rights, the protections CETA confers on Canadian investors in Ireland are no greater than the protections which they enjoy under the law applicable domestically in any event.

29. The respondents contend that under the criteria set out in *McDonald v. Bord na gCon*, the jurisdiction to be exercised by the CETA Tribunal does not have the characteristics of the administration of justice. The first criterion, “*dispute or controversy as to the existence of legal rights or a violation of the law*” does not arise. They note the finding of Butler J. at para. 154 of the High Court judgment;

“[t]he Irish Constitution does not and, indeed, could not confer on the Irish Courts’ jurisdiction over disputes occurring outside of Ireland and which do not arise under Irish law.”

30. Rather, there must be a justiciable controversy, but it is submitted that disputes under CETA are not justiciable within the meaning of *Lynham v Butler (No 2)* [1933] I.R. 74.

31. The second and third criteria, “*determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty*” and “*final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties*” do not arise as the Tribunal will not determine any rights/liabilities under Irish law, but only determine rights/liabilities under CETA itself.

32. The fourth criterion, “*enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment*” does not arise as Tribunal awards would be dependent on enforcement

from another body, namely the High Court, and as such the enforcement of awards would not be almost automatic, to use the language of O'Donnell J. in *Zalewski v The Workplace Relations Commission* at para. 101.

33. The respondent says that the fifth criterion: “*the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country*” does not arise in this case, as adjudicating on disputes under an international trade agreement has never been characteristic of the courts of this country.

34. Without prejudice to the aforesaid submissions, if it is found that an administration of justice arises, the respondents rely on Article 37.1 of the Constitution for authorisation of the exercise of this power. They contend here that the Tribunal’s jurisdiction (Article 8.39.1 of CETA) is limited to monetary damages or property restitution, which is much more limited than the jurisdiction of any Irish courts and it is arguably even more limited than the powers which a mere *ad hoc* arbitrator has.

35. The respondents claim that the appellant lacks standing to advance arguments relating to the rights of or impacts on investors. In any event, no case arises under Article 40.1 as foreign and domestic investors are also not similarly situated for the purpose of the Article 40.1 proviso.

36. If the appeal cannot be dismissed on any of the other grounds above, the respondents contend that CETA is necessitated by EU membership, and that CJEU case-law clearly holds that this includes a duty for Member States to cooperate with the EU in the negotiation, conclusion and implementation of international agreements in areas of shared competence. The respondents rely in part on *Commission v Ireland* Case C-13/00 EU:ECLI:2002:184, which held that, by failing to adhere to the Berne Convention, which had been a condition of signature of the EEA Agreement, Ireland had failed to fulfil its obligations under EU law.

37. The respondents do not agree that a reference to the CJEU is required to clarify the jurisdiction of the CETA Tribunal. It is the respondents' case that the decision in *Eco-Oro* is of no relevance to these proceedings. It is argued that the decision is not binding on either the CJEU or the CETA Tribunal, nor is it persuasive, as it does not involve a matter of EU law or CETA. Notwithstanding this, the respondents say that Mr. Costello has failed to explain how the reasoning adopted in *Eco-Oro* would be incompatible with EU law if it was followed by the CETA Tribunal. The respondent argues that *Opinion 1/17* held that no damages could arise on account of the level of protection of a public interest established by the EU institutions, but that this did not preclude the CETA Tribunal from arbitrating disputes relating to, amongst other areas, environmental matters. It is further submitted that it would be inappropriate at this stage to make a reference to the CJEU on a hypothetical issue as to whether the CJEU had correctly identified the jurisdiction of the CETA Tribunal in *Opinion 1/17* before the CETA Tribunal had departed from it. The respondent also notes that there are a number of foundational differences between the FTA at issue in *Eco-Oro* and CETA, for example, the recitals, *Opinion 1/17* of the CJEU, and the Joint Interpretative Instrument.

Sovereignty

38. At the heart of this case is the concept of sovereignty, and it would be appropriate to make a few comments on this complex subject at this point. The starting point must be the Constitution, put before the People and ratified by them in 1937, replacing the Constitution of 1922. It declared in Article 1 that:

“The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.”

39. That Article was relied on in the decision of this Court in the case of *Byrne v. Ireland* [1972] I.R. 241, in which the argument that the State had an internal sovereignty giving it an immunity from suit was rejected. In the course of his judgment in that case, Budd J. expressed the view:

“Article 1 of the Constitution itself underlines that it is the nation, which can only be a reference to the People, which has the sovereign right to choose its form of government; it has in fact done this by the enactment of the Constitution ... Both Articles indicate that it is recognised in the Constitution itself that there is a higher authority than the State, and this again is incompatible with any theory that the State is sovereign as regards internal affairs of government and their exercise through the organs of government.” (see page 296 of his judgment)

40. Earlier, on the same page, Budd J. had made the following observation:

“One finds in the enacting portion of the Constitution perhaps the most striking indication that the State is not sovereign in the sense under consideration. We find that it states that:-

“We, the People of Éire, ... do hereby adopt, enact, and give to ourselves this Constitution”.

This Constitution was passed by the Oireachtas and submitted to the People in a referendum; it was enacted by the People on the 1st July, 1937, and came into operation as and from the 29th December, 1937. It can now only be amended by way of a referendum by a decision of the People. Therefore, the Constitution and its form are the creation of the People and depend upon the will of the People both for its existence and the determination of its form from time to time by way of the referendum provided for by Articles 46 and 47 of the Constitution. The State is, in its turn, recognised by the Constitution. Its powers and obligations are determined

by it. It is thus to be seen that it is the People who are paramount and not the State. Such a conclusion is inconsistent with any suggestion that the State is sovereign internally. In addition, it would appear to me that there are to be found in the Constitution itself further indications that the powers of the State are limited and confined in a fashion which is inconsistent with the State being of a sovereign nature.”

41. Walsh J. in that case referred also to Article 5 of the Constitution, which provides that:

“Ireland is a sovereign, independent, democratic state.”

42. Thus, he stated at page 264:

“I think that the learned trial judge misconstrued the intent of Article 5 if he construed it as a constitutional declaration that the State is above the law. Article 1 ... affirms that the Irish nation has the “sovereign right to choose its own form of Government”. Our constitutional history, and in particular the events leading up to the enactment of the Constitution, indicate beyond doubt, to my mind, that the declaration as to sovereignty in Article 5 means that the State is not subject to any power of government save those designated by the People in the Constitution itself, and that the State is not amenable to any external authority for its conduct. To hold that the State is immune from suit for wrong because it is a sovereign State is to beg the question.”

43. The concept of sovereignty was later considered in the case of *Webb v. Ireland* [1988] I.R. 353, a case concerning the Derrynaflan Hoard, giving rise to a discussion of sovereignty in the context of treasure trove. In his judgment in that case, Walsh J. expressed the view:

“I am satisfied that the People as the sovereign authority having by the Constitution created the State, and by Article 5 declared it to be a sovereign State,

have the right and duty, acting by the State which is the juristic person capable of holding property by virtue of the Constitution, to exercise dominion over all objects forming part of the national heritage whether they be found or not, subject always to the lawful title of a true owner if and when the true owner is discovered and to exercise full rights of ownership when no true owner can be ascertained”.

44. The contrast between the decisions in *Byrne* and *Webb* led to the following observation in *Kelly: The Irish Constitution*, (5th Edition, Bloomsbury Professional, 2018) at para. 3.2.43:

“Byrne and Webb are not easily reconciled on the matter of sovereignty. If one understands ‘sovereignty’ to mean supreme power, then clearly the State is not sovereign internally in the light of Byrne. Unfortunately the resurrection, in a domestic context, of State sovereignty in Webb was unaccompanied by any explanation of the concept, let alone any attempt to accommodate the earlier remarks in Byrne. One senses that it is being used as a type of political magnet to attract to the State powers and privileges which are not explicitly regulated by the Constitution itself, an analogue as it were, to Article 34.3.1° dealing with the jurisdiction of the courts.”

45. While there may well be room for discussion as to the concept of sovereignty in an internal context, it is not necessary to dwell on that issue in the context of this case, which, of course, concerns the concept of external sovereignty. Suffice it to say, that even in the context of internal sovereignty, the concept of sovereignty is not, perhaps, as clear cut as it might be.

Crotty v An Taoiseach

46. I now propose to look at the decision of this Court in *Crotty*, and at the way the issue of external sovereignty was considered in that case. By way of background, the then

members of the EU entered into a series of treaties, collectively known as the Single European Act (“the SEA”) (for ease of reference, I will refer throughout to “the EU” although it was known by different titles at different times in its history to date). It provided for ratification in accordance with the constitutional requirements of each State. A challenge was brought by Mr. Crotty seeking to prevent the enactment into law of the SEA by means of the European Communities (Amendment) Bill 1986, on the grounds that it would, if enacted, be repugnant to the Constitution. On appeal from the High Court, by which time the Bill had been enacted, it was held by the Supreme Court that certain provisions of the Act amounted to no more than a more specific enumeration of the objectives of the establishing treaties, and that the proposed new Court of First Instance did not extend the primacy of the Court of Justice of the European Communities.

47. However, the Court considered that the ratification of Title III of the SEA was unconstitutional. Title III concerned a separate treaty between the Member States, whereby they agreed to adapt their foreign policy positions to those of the other Member States within a structured framework to be known as European Political Co-operation. The Supreme Court dealt firstly with the arguments as to the constitutionality of the Act of 1986. Consideration was given to Article 29.4.3°. Finlay C.J., delivering the judgment of the Court in this respect, made the following observation at page 769 in relation to a proposal to alter the decision-making capacity of the Council of the European Communities, saying as follows:

“The capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was one of the reasons why the Third Amendment to the Constitution was necessary. Sovereignty in this context is the unfettered right to decide: to say yes or no. In regard to proposals coming before the Council which the State might oppose, unanimity is a

valuable shield. On the other hand, in proposals which the State might support, qualified or simple majority is of significant assistance. ... The Community was thus a developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress both in terms of the number of its Member States and in terms of the mechanics to be used in the achievement of its agreed objectives.”

48. He continued, at page 770:

“Having regard to these considerations, it is the opinion of the Court that neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution.”

49. Insofar as the establishment of a Court of First Instance was concerned, it was concluded that the establishment of an additional court had not been shown to exceed the constitutional authorisation. He concluded:

“The proposals contained in Articles 18 and 21 of the SEA have not been shown to contain new powers given to the Council which alter the essential character of the Communities. Neither has it been shown that they create a threat to fundamental constitutional rights. Therefore, it is the opinion of the Court that the appeal under this heading also fails.”

Accordingly, the challenge to the constitutionality of the Act of 1986 was dismissed.

50. The Court then went on to deal with a consideration of the second leg of the case concerning the challenge to the ratification by the State of Title III of the SEA. A number of judgments were delivered in respect of this issue, resulting in the appeal of Mr. Crotty being allowed in this respect.

51. Finlay C.J., in his dissenting judgment, noted that the matters dealt with in Title III, which were entitled “*European cooperation in the sphere of foreign policy*”, did not purport to constitute amendments of, or additions to, any of the treaties establishing the Communities. He was, therefore, of the view that Article 29.4.3^o could not apply. Therefore, the relevant provision of the Constitution to be considered was Article 29.6. He expressed the view that the agreements contained in Article 30 of Title III “*are arrived at with the possible ultimate objective of a form of European political union between the Member States of the Communities as an addition to the existing economic union between them. There can be no doubt that if that aim were ever achieved it would constitute an alteration in the essential scope and objectives of the Communities to which Ireland could not agree without an amendment of the Constitution*” (page 771). Thus, he appears to have been of the view that, at that stage, the provisions of Title III did not, in fact, constitute an alteration to the treaties governing the EEC at that stage, such that an amendment of the Constitution was required. Ultimately, he concluded, *inter alia*, that it had not been established by Mr. Crotty that adherence to the terms of the SEA amounted to “*a clear disregard by the Government of the powers and duties conferred on it by the Constitution.*”

52. The majority of the Court, Walsh, Henchy and Hederman JJ., came to a different conclusion. Walsh J. in his judgment made a number of observations on sovereignty, which are of interest in the context of this case. First of all, he referred to the Constitution, and observed that it conferred upon the government the Executive power of the State. He continued:

“In its external relations it has the power to make treaties, to maintain diplomatic relations with other sovereign States. ... 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.” (page 777)

53. He pointed out that the government did not require an Act of the Oireachtas for the purpose of carrying out those functions. But he pointed out that the powers had to be exercised in subordination to the applicable provisions of the Constitution. He added, at page 778, as follows:

“The powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. They are implicit in the provisions of Article 5 of the Constitution. The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states.”

He went on to note that the exercise of the power was limited. He then referred to the provisions of Article 28 and Article 29 of the Constitution.

54. The particular concern of Walsh J. was the extent to which the Treaty committed the State to pursuing a policy which had, as one of its objectives, the transformation of the relations of Ireland with the other Member States of the European Communities into a European Union. He commented, at page 781, that:

“As was pointed out in the decision of the Court in the first part of this case the essential nature of sovereignty is the right to say yes or to say no. In the present Treaty provisions that right is to be materially qualified.”

55. He then listed a number of matters which he said committed the State and all future governments to do, *inter alia*, to endeavour to formulate and to implement a European foreign policy, to undertake to inform or consult the other Member States on any foreign policy matters of general interest (not just of common interest) so as to ensure that the combined influence of the States is exercised as effectively as possible through co-

ordination, the convergence of their positions and the implementation of joint action. He went on to conclude, at page 783, as follows:

“If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies as from time to time to the Government may seem proper, it is not within the power of the Government itself to do so. The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the People the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 "... in final appeal, to decide all questions of national policy, according to the requirements of the common good.”

Therefore, he concluded that the assent of the people was a necessary prerequisite to the ratification of Title III of the Single European Act.

56. Henchy J., in his judgment, made the point, at page 786, having regard to Article 28.2 of the Constitution, that *“in the conduct of the State's external relations, as in the exercise of the executive power in other respects, the Government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution.”*

57. He went on to consider the terms of Title III of the SEA and concluded that each ratifying Member State would be bound to surrender part of its sovereignty in the conduct of foreign relations. He said that that was to happen as part of a process designed to formulate and implement a European foreign policy. At page 787 he observed:

“Thus, for example, in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under Title III the point of reference is

required to be the common position determined by Member States. It is to be said that such a common position cannot be reached without Ireland's consent, but Title III is not framed in a manner which would allow Ireland to refuse to reach a common position on the ground of its obligations under the Irish Constitution. There is no provision in the Treaty for a derogation by Ireland where its constitutional obligations so require.”

58. He went on to point out that, under Title III, Ireland would be bound to “*take full account*” of the common position of other Member States. He added:

“To be bound by a solemn international treaty to act thus is, in my opinion, inconsistent with the obligation of the Government to conduct its foreign relations according to the common good of the Irish people. In this and in other respects Title III amounts to a diminution of Ireland's sovereignty which is declared in unqualified terms in the Irish Constitution.”

59. He added:

“All this means that if Ireland were to ratify the Treaty it would be bound in international law to engage actively in a programme which would trench progressively on Ireland's independence and sovereignty in the conduct of foreign relations. Ireland would therefore become bound to act in a way that would be inconsistent with the Constitution.”

In those circumstances, he allowed the appeal of Mr. Crotty.

60. Griffin J. agreed with the judgment of the Chief Justice, and Hederman J. agreed with Walsh and Henchy JJ. In a short concurring judgment, he observed:

“The State's organs cannot contract to exercise in a particular procedure, their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers - not the disposers of them.”

As we now know, the SEA was subsequently approved by the People in a referendum.

61. The authors of *Kelly on The Irish Constitution* (5th Edition, Bloomsbury Professional, 208) made the observation, at para. 3.2.46, that:

“The breadth of the majority’s reasoning in Crotty is such that it could plausibly be regarded as casting doubt on the State’s general treaty making powers.”

Pringle v. Ireland

62. However, Crotty was not the last word on the State’s external sovereignty, and its treaty making powers. The matter came before the Supreme Court once more in the case of *Pringle v. Government of Ireland & Others* [2013] 3 I.R. 1. I now propose to look at a number of the judgments in that case, insofar as they concern the issue of external sovereignty, and the treaty making powers of the State. The issue in this case related to the European Stability Mechanism (“ESM”), which was established under a treaty by those members of the EU who were also members of the Eurozone. The object of the Treaty was to provide assistance to Member States in financial difficulty, where such support was *“indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.”*

63. The European Stability Mechanism Act 2012, (“the 2012 Act”), was enacted in the course of the proceedings for the purpose of implementing the Treaty into Irish law. Without going into all of the detail of the obligations under the Treaty, it required funds to be provided by way of capital and borrowings by the parties to the Treaty for the purpose of providing financial stability. The 2012 Act put a limit on the funds to be paid out of central funds to the ESM, but Ireland’s share of the funds to be paid into the authorised capital stock of the ESM was to be in excess of €11,000,000,000, albeit that Ireland’s contribution was

not required to be paid immediately, but as and when called upon to do so under the terms of the Treaty.

64. The plaintiff, a member of Dáil Éireann, commenced proceedings challenging the validity of the European Council decision which permitted the amendment of the Treaty on the Functioning of the European Union, to provide for the establishment of the ESM, and challenging the Treaty establishing the ESM itself. The challenge was based on both European law and the Constitution. For the purpose of this discussion, I propose to focus on the constitutional challenge.

65. The High Court had dismissed Mr. Pringle's claim, save that it was indicated that a part of the case should be referred to the Court of Justice of the European Union ("CJEU"). The matter was then appealed to this Court. Three issues were identified, (i) the sovereignty issue, (ii) the preliminary reference issue, and (iii) an issue relating to whether or not this Court should grant an interlocutory injunction, pending the determination of the proceedings restraining the State from ratifying the Treaty establishing the ESM.

66. The argument in relation to sovereignty was to the effect that participation in the Treaty impinged upon the State's budgetary, economic, and fiscal sovereignty in that it entailed an open-ended and irreversible transfer of powers to an autonomous institution that exposed Ireland to a permanent commitment to provide funding and assume liability, without limit, for the debts of other members, on the basis of decisions that may be made regardless of, and in opposition to, Ireland's views, in circumstances where there was no option or procedure for withdrawal from the mechanism. This Court referred a number of questions to the CJEU by its ruling of the 31st July 2012 and found against Mr. Pringle in relation to the sovereignty issue, and the injunction issue. It subsequently gave its reasons in a series of judgments. There was one dissenting judgment on the issues before the Court, (Hardiman J.). Not surprisingly, the majority of the Court, in a number of judgments, considered the

judgment of the Court in *Crotty* and having done so, followed it. In her judgment, Denham C.J. noted that the principles stated in *Crotty v. An Taoiseach* [1987] I.R. 713, were at the core of the appeal in *Pringle*, and further noted that the appellant and the State relied on the majority judgments in that case. At para. 77 of her judgment, Denham C.J. set out a number of principles derived from the decision in *Crotty*, in the following terms:

“(i) An important aspect of the sovereignty of the State is the exercise of the fundamental powers of the State by the organs designated in the Constitution of Ireland 1937. Under the Constitution the Government has been given the power to exercise the executive functions of State.

(ii) Foreign policy is an important aspect of executive power and is a function of the Government.

(iii) It is a routine exercise of executive power for the Government to enter into a treaty, as a matter of foreign policy, for the State.

(iv) All treaties involve an element of policy. That is the nature of a treaty.

*(v) Thus, the Constitution empowers the Government to exercise executive policy, which includes a decision to enter into a treaty as a matter of policy. However, in *Crotty v An Taoiseach* [1987] I.R. 713 there was a specific aspect of the treaty in issue which took it outside the norm. As was stated in *Crotty*, the Government may not abdicate its power as the executive organ of the State. If such a decision is required it may be taken only by the people, as the ultimate authority in the State. If a treaty involves a fundamental transformation, such as a ceding of sovereignty, then it would require a mandate of the people.*

(vi) As Hederman J. pointed out, the organs of State, including the Government, cannot enter into an agreement to subordinate its powers to another. The

Government may not qualify sovereign power to formulate foreign policy by abdicating such decisions to a foreign institution.

(vii) In the Crotty v An Taoiseach [1987] I.R. 713 case the Court held that Title III of the SEA would bind the State to concede part of its sovereignty in foreign policy by conducting foreign policy in the future, future decisions on foreign policy, without reference to the common good, and that such a step required authorisation by the People through a referendum.”

67. Having set out those principles, Denham C.J. then proceeded to consider the terms of the ESM, and whether, having regard to the principles set out in *Crotty*, the ESM Treaty was one that was required to be ratified by the People. As she noted in para. 98 of her judgment:

“At issue in Crotty v. An Taoiseach [1987] I.R. 713 was the future conduct of external relations of the State, i.e. the executive power of the sovereign State to decide future external relations. ... Thus, if such a decision is required to be taken to relinquish the powers of an organ of State it must be taken by the people.”

68. In the course of her judgment, she noted that, insofar as there was a decision to potentially increase the liability of Ireland’s capital subscription, such a decision required to be made by a unanimous decision of the Board of Governors appointed under the Treaty, and further required certain national procedures to be complied with, including the approval of Dáil Éireann, and an amendment of the 2012 Act. Insofar as receiving financial support, she noted that Ireland could request financial assistance and that, if it applied for such funding, the terms of such funding would be required to be within the constitutional ambit. She noted that “[t]he Government has a duty to ensure that by its decisions and actions the terms of the Constitution are not infringed.” Therefore, she concluded that neither of the

above functions, i.e., the possibility of increasing the financial liability of Ireland, and the terms that might be applicable to any financial assistance obtained by Ireland, impinged upon the economic or monetary sovereignty of the State. She concluded, at para. 109 of her judgment, as follows:

“Thus, in relation to this limb of the appeal, it is clear that the relevant policy was determined by the Irish executive and legislature. The State has not ceded policy making for the future. The State has not ceded power to another institution to enable the creation of policy in the future. Nor has the State ceded to elsewhere the power to increase the State’s financial contributions. Consequently, there has been no transfer of sovereignty to any degree which is incompatible with the Constitution. To refer to the analysis by Walsh J. in Crotty v. An Taoiseach [1987] I.R. 713, there has not been an abdication of freedom of action or to bind the State in its freedom of action in its formulation of foreign policy. Nor, in reference to the judgment of Henchy J. in Crotty has there been any attempt by the Government to make a binding commitment to alienate to other States the conduct of foreign relations. Nor has there been any attempt at a fundamental transformation or diminution of sovereignty, such as arose in Crotty. Nor, in reference to the judgment of Hederman J. in Crotty is this an agreement to subordinate or submit the exercise of the powers bestowed by the Constitution to the interests of other States. Rather, it is an election by the Government of a policy in union with other States in pursuit of an identical policy.”

69. She concluded that aspect of her judgment by observing that the role of the Court was only to determine whether powers exercised under the Constitution have been exceeded, and she further added that the Court has no role in relation to the policy itself, which was a matter for the government. (see para. 110 of her judgment)

70. Murray J. agreed with the judgment of Denham C.J. in a brief concurrence, and observed that:

“The essence of the distinction between the issues considered in Crotty and those in the present case, as explained fully in the judgments of my colleagues, is that in substance the ESM Treaty is a mechanism for the implementation of policies already determined and freely agreed to and for the achievement of objectives within the defined ambit of those policies. The SEA, on the other hand, was found in Crotty to commit the State to being bound by undetermined policies to be formulated and decided upon in the future by a body or organs other than those of the State. That is the fundamental distinction.”

71. He added that:

“The decision to become a party to the ESM Treaty is a constitutionally permissible example, as Hederman J. put it at p. 794 in Crotty, of the State “electing from time to time to pursue its own particular policies in union or in concert with other states in their pursuit of their own similar or even identical policies.””

72. Hardiman J. in his dissenting judgment also relied on the decision of this Court in *Crotty*. Having referred to certain passages from the judgments of the other members of the Court in *Pringle*, he stated, at page 77, as follows:

“At para. 312 of his judgment in this case, O’Donnell J. declares:-

“In my view the words ‘abdicate’, ‘alienate’, ‘subordinate’ and indeed also ‘transfer’ contain the essence of what was considered impermissible in Crotty v. An Taoiseach [1987] I.R. 713.”

This seems to me quite consistent with what is said by Clarke J. at para. 425 of his judgment, quoting from Walsh J. in Crotty v. An Taoiseach [1987] I.R. 713, he

identified the substance of the limitation on the executive power in the relevant area to be one which did not permit the government “to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way ...” (per Walsh J. at p. 783). Similarly, he cites Henchy J. for the proposition that Government is not permitted “to alienate in whole or part to other states the conduct of foreign relations” (per Henchy J. at p. 787), nor to “subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other states” (per Hederman J. at p. 794).

*Even viewing the phrases quoted above as being exhaustively descriptive of the limitations on executive power in connection with external relations, I would consider, for the reasons given elsewhere in this judgment, that adherence to the ESM Treaty would trespass on those limitations. But I do not consider that those limitations are exhaustively stated in the passages quoted. In the first place, I consider that, to adopt the words of Henchy J. at p. 786 in *Crotty v. An Taoiseach* [1987] I.R. 713 ... “a purely national approach to foreign policy is incompatible with accession to this Treaty”. To similar effect is the statement of that learned judge at p. 787 that:*

“in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under [the Treaty] the point of reference is required to be the common position determined by the Member States” (emphasis supplied).”

73. He added, at page 77:

*“I do not consider that the essence of what is impermissible by virtue of *Crotty v. An Taoiseach* [1987] I.R. 713 is comprehensibly epitomised in the word of “abdicate”, or the other words cited by O’Donnell J. These words, it appears to*

me, are firstly not exhaustive of what is impermissible under the regime set out in Crotty v. An Taoiseach; they are also somewhat vague and open to interpretation. Thus, the word “abdicate” is classically used of a monarch resigning his crown, and its other usages are by analogy from that. The judgments in Crotty certainly preclude abdication but also precludes more specific acts such as “to make a binding commitment to alienate in whole or in part to other states the conduct of foreign relations”. More, and very significantly “to enter into binding agreements with other States to exercise that power in a particular way, or to refrain from exercising it save by particular procedures”. ...”

74. He went on to say that the prohibitions contained in *Crotty* extended not merely to substantive decisions, but to the procedures whereby such a decision could be taken (see para. 209).

75. Hardiman J. then went on to consider in detail the provisions of the ESM Treaty, and the manner by which it was intended to operate and work, and also had regard to the manner in which funding for the ESM Treaty would be provided. He concluded, having done so, that the Treaty involved a change to the fundamental values and procedures enshrined in the Constitution, in that:

“(a) A significant sum of money subscribed by Irish taxpayers would be given “irrevocably and unconditionally” to a body which exists outside the Irish, and the European, legal and constitutional order.

(b) that body would be obliged by its constitution to expend these monies, or monies raised on the basis of them, in the interests of the euro zone or its Member States, as opposed to devoting them, as the Irish Government would have been obliged to do, to the common good of the Irish People.”

76. For that reason, he concluded that the ESM Treaty required a referendum amending the Constitution, in order to permit the State to ratify the ESM Treaty on behalf of Ireland.

77. O'Donnell J. in his judgment also recognised the importance of the decision in *Crotty*, for the purpose of determining the issues in *Pringle*, referring specifically to the passage from the judgment of Walsh J., where he opined that:

“The essence of sovereignty is the right to say yes or to say no.”

78. That passage, it had been argued, was the essence of the decision in *Crotty*. O'Donnell J., however, cautioned against reliance on a single sentence in the judgment, saying:

“A single sentence in a judgment rarely encapsulates the essence of a lengthy judgment, and a judgment of one judge, even one as eminent and influential as Walsh J., is not to be taken, in isolation, as stating the ratio decidendi of a case. There is always a danger of substituting the invocation of a vivid and memorable phrase for the analysis of the substance of a judgment.”

79. He concluded in that respect that the plaintiff's arguments involved a clear misunderstanding and misinterpretation of *Crotty*, and indeed of the Constitution (see page 102, para. 306 of the judgment).

80. Having referred to a number of provisions of the Constitution, he observed at para. 308 as follows:

“It can be deduced from these constitutional provisions, at a minimum, that the Constitution clearly anticipated the executive power could and would involve the making of binding agreements with other nations, and that Ireland might become involved in disputes which themselves might be resolved by a process involving a binding determination by which Ireland would be obliged to abide.”

81. Having referred to a number of passages from the judgments of Henchy J., Hederman J., and Walsh J., he observed, at para. 312, as follows:

“In my view, the words “abdicate”, “alienate”, “subordinate” and indeed also “transfer” contain the essence of what was considered impermissible in Crotty v. An Taoiseach [1987] I.R. 713.”

82. He went on to observe, at para. 315, as follows:

“The issue which divided the parties in Crotty was whether or not the courts could enforce any limitation on governmental activity in the field of foreign affairs. The issue which divided the court was not whether the creation of a European wide foreign policy would be an alienation of Irish sovereignty, but rather whether such a development had occurred.

Second, as Clarke J. points out in his judgment, any agreement made by a country or an individual almost necessarily limits the freedom of the parties. It certainly restrains the party from saying no to what has been agreed. Furthermore, in many cases the entry into an agreement may also create restraints on the freedom to enter into any inconsistent agreement.”

83. He continued:

“There is no sense in which Ireland or any other state can remain completely free to say no, once it has entered into any such agreement, alliance, grouping or body. It is the decision to enter into an agreement or alliance which is the exercise of sovereignty.”

84. He went on to add, at para. 317, as follows:

“The understanding of Crotty v. An Taoiseach [1987] I.R. 713, contained in the judgments of Denham C.J. and Clarke J., is, I think, fortified by a consideration of

the underlying concept of sovereignty, and particularly the manner in which such sovereignty is expressed in the Constitution. The concept of sovereignty was traditionally defined as containing not just the positive requirement of a political superior to whom the population was in the habit of obedience, but also, and importantly for present purposes, the negative requirement that such superior owe no obligation of obedience to the dictates of any other body.”

85. He added, at para. 318:

“Sovereignty, as being a condition of owing no allegiance or duty of obedience to any other entity, is, in my view, asserted very deliberately by the Constitution and for obvious reasons, once the historical context is recalled. The new polity being established, in essence although not in name a republic, was one that consciously asserted all the attributes of sovereignty. This was a very deliberate contrast with even the expanded dominion status which had existed prior to 1937. The Constitution reflected a fundamental truth as to the source of the sovereignty of the State, namely the People. The legal source of the Constitution was to be the decision of the People rather than a grant by a foreign parliament. The preamble to the Constitution records that it came into being by virtue of the declaration that the People “[d]o hereby adopt, enact, and give to ourselves this Constitution.” Accordingly, Article 1 states that “[t]he Irish nation hereby affirms its ... sovereign right to choose its own form of Government. ...” Consistent with this assertion of sovereignty, Article 6 declares that “[a]ll powers of government, legislative, executive and judicial” derive from the People. Among the key attributes of such sovereignty was the right to conduct international relations on an equal basis with other countries and the exclusive exercise by the organs of government of the powers of government.”

86. He then considered why it was that the majority considered that the SEA was a “subordination” of Irish sovereignty in the case of *Crotty*. He said:

“In the first place it is plain that the provision affected the entirety of the foreign policy of the State and not simply one area of agreed cooperation. Once enacted, such foreign policy would no longer be made by the Government alone but would be arrived at under a requirement of convergence with the policy of other member states. Seen in this way it is perhaps easy to see why it was claimed that the executive power of the State in relation to the entirety of its foreign policy was being subordinated, and at least to some extent alienated and transferred, and to that extent abdicated. Ireland would no longer make its own determination of its relationship with other states, to use the language of Article 1 of the Constitution, but would make decisions in the light of an embryonic collective foreign policy into which other countries would necessarily have an input. There would therefore have been, to that degree, a diminution of the sovereignty asserted and established under the Constitution, and effected without the assent of the People.”

87. He took the view, therefore, that the ESM was markedly less significant in its effect than the provisions of the SEA, and was distinct from those provisions. It did not concern Ireland’s foreign policy as a whole, but related solely to a decision to invest, along with other Member States, in an institution which could make funds available in accordance with the terms and criteria established by the Treaty to States, including Ireland. He expressed the view that:

“The decision to participate in the ESM was in my view an exercise in sovereignty rather than an alienation of it, and was taken by the organ of government to which such decisions are consigned by the Constitution.”

88. He went on to say:

“It is no more a breach of Irish sovereignty asserted under the Constitution and defended in Crotty v. An Taoiseach [1987] I.R. 713, than a person who decides to invest a large portion of his or her wealth in a limited company with a defined investment objective could be said to lose his or her status as a citizen.”

89. He made a number of further observations at page 112 of the judgment, in relation to Crotty, and it would be helpful to set out in full the comments in that regard:

“In my view this approach also demonstrates why it is not possible to read the majority decision in Crotty v. An Taoiseach [1987] I.R. 713 as requiring that individual decisions made by the Government in the field of foreign policy must, if they are to be valid, make provision for future decisions to be made by unanimity or alternatively, accord to Ireland alone a veto over any such future decision. First, it is plain that no such individual decision was in issue in Crotty: on the contrary, the case concerned the requirement to bend Ireland’s foreign policy in general towards a common European policy. For the reasons already set out, I do not consider that any such supposed principle could be required by the Constitution, and in my view it is not required by Crotty. There is nothing in Crotty, or indeed in logic, to suggest that the concept of sovereignty contained in the Constitution of Ireland 1937, requires that Ireland, while it may enter into agreements, must insist that it retain the capacity to change its mind. Even if the judgment of Walsh J. in Crotty v. An Taoiseach could be interpreted differently (and for the reasons already set out, I do not accept that that is the case), there is in my view no basis for attributing to that judgment, still less a phrase from it, a position of primacy within the case. The ratio decidendi of a decision made by a collegiate court is in my view to be determined by that proposition, or reason, which decides the particular case

and on which, it can be said, a majority of the court is agreed. In my view that ratio decidendi is that already set out above, and as addressed in the judgments of Denham C.J. and Clarke J.”

90. One of the other points that was raised in that case was that the commitment by Ireland of large funds to be expended by another body outside Ireland was incompatible with the Constitution. In that regard, O’Donnell J. made the point (page 113) that it was commonplace for public funds to be expended by bodies outside the Irish legal order under the guise of overseas aid, specific grants in cases of national emergencies, or subscriptions to international bodies such as the IMF, the World Bank or any other international body. He went on to say:

“...what the Constitution requires is that the decision to subscribe such funds should be taken by the correct organ of government on its own, and not in subordination to any other body. That decision cannot be transferred, alienated or abdicated to another body. The relevant decision however is the decision to subscribe the funds for an identified purpose.”

91. He then observed that that decision had been made by the appropriate organ of government, in accordance with the procedures, and accountability, provided for in the Constitution. Accordingly, the approach of O’Donnell J. was to dismiss the appeal on the issue of sovereignty.

92. McKechnie J. in the course of his judgment also considered in detail the decision of this Court in *Crotty v. An Taoiseach*. At para. 354 of his judgment, he noted the description of the conclusions in that case by the other members of the Court in *Pringle*, and adopted what they said. However, he added a few comments of his own, and it seems to me that it would be helpful to refer to those in some detail. He stated:

“(i) Walsh J., in a passage referred to at p.781 of the report, states that the essential nature of sovereignty is the right to say “yes or no”. Sovereignty in this context can only mean that as provided for and as intended by the Constitution. It is said by the plaintiff that this right encapsulates the very heart, not only of the majority decision but of sovereignty itself. Without qualification or context I cannot agree with this proposition, either at a particular or general level. Given the extensive observations of the judge on this issue, to take such a phrase and to treat it in isolation, as founding the essence of his decision is, in my view, to misread his judgment. To suggest that the criteria for determining the instant challenge, to the exercise by the Executive of its power to ratify the ESM Treaty, can be determined on such a basis is simply not sustainable. In fairness, I should immediately say, lest I appear to do an injustice to the plaintiff, that his reference to and reliance upon this phrase may have been intended as a shorthand expression of his more general argument under this heading. Therefore, whilst the point has to be addressed, the overall case has to be determined on the entirety of what the majority said, and not simply on this passage;

(ii) reverting to the particular argument for a moment, the reason why I reject the suggested significance of the expression is that in the first place, the judge himself expressly acknowledged that Finlay C.J. was the source of such phrase, when giving the court’s judgment on the challenge to the SEA, save for Title III thereof. That remark, as originally made, was entirely appropriate to the context then under discussion by Finlay C.J. At p. 769 of the report the context appears where Finlay C.J. stated:

“[t]he capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was

one of the reasons why the Third Amendment to the Constitution was necessary.

Sovereignty in this context is the unfettered right to decide: to say yes or no”.

Therefore, having transposed such remark, it is not appropriate to assign or ascribe to it, the determinative importance which has been suggested;

(iii) a much more representative version of the judgment of Walsh J. is to be found at the end of p.780, and on pp. 782 and 783 of the report. What is stated there has been set out in the other judgments delivered and therefore I will not repeat them: everyone is familiar with the key expressions from that and the other majority judgments, such as the impermissibility of “abdicating”, “alienating”, “surrendering”, or “transferring” such powers, save as allowed by the Constitution;

(iv) it is clear from these passages that Walsh J. was very much focusing on the freedom which the Constitution bestowed on the Government in deciding matters of foreign policy. That freedom was to develop, formulate and pursue policy and to change or adjust that policy as occasion required. That freedom to exercise, or not to exercise as the case may be, in a particular way, could not be abridged by the terms of an agreement binding on the Government and reached with a third party country or other entity;

(v) it is true to say that some excerpts from his judgment may be capable of an interpretation consistent only with Ireland having an overriding control, within the terms of any such agreement, being one capable of exercise at all times and on all issues. For the reasons given by O’Donnell and Clarke JJ., I do not agree that such an interpretation is the correct one. In fact, Walsh J. pointed out several

agreements to which Ireland was a signatory, where no such control existed and therefore could not be exerted;

(vi) in addition however, if there should be ambiguity in this regard, the words or expressions in question, must be looked at and measured against the terms of Title III, of the SEA, which were the subject matter of the challenge. Given the scope, breadth, and skeleton nature of the aspirations envisaged by that treaty and the demanded level of cooperation necessary to give effect to them, it is understandable how it could be said that the core constitutional freedom in question, at least in part, was being surrendered. Furthermore, when a comparative analysis is conducted between Title III of the SEA and the provisions of the ESM Treaty, the seismic distinction between both, becomes instantly demonstrable.”

93. That, in my view, is a very useful overview of the judgment of Walsh J. in *Crotty*, and its full import.

94. He also considered the views of Henchy J. in *Crotty*, noting that Henchy J. viewed Title III as a vehicle to move foreign policy from a national to a European Community level, and that it constituted a “fundamental transformation” in the relations between participating states. He also referred to the views of Hederman J. (see para. 356).

95. At para. 362, McKechnie J. observed:

“This brief survey of its provisions do not do immediate justice to a comparative analysis with Crotty v. An Taoiseach [1987] I.R. 713. If time and space permitted, the laying out of its terms in full, would immediately convey the disparity between it and Title III of the SEA. In effect the fundamental difference between both is the fact that the ESM Treaty is essentially policy implementing and not policy making.

Therefore, it cannot be said that there is any fundamental transfer of sovereign power to the institution or to the other subscribing states.”

He concluded his judgment by rejecting the argument that the State by entering into the ESM Treaty had acted impermissibly in the manner identified in *Crotty v. An Taoiseach*. He expressed the view that when the benefits of the ESM Treaty were accounted for, it could be said that its ratification, in the full knowledge of the commitments undertaken, was in itself an act of sovereign power and not a subjection of it. Accordingly, he too dismissed that aspect of the plaintiff's claim.

96. Clarke J., in the course of his judgment, also carefully analysed the judgments in *Crotty*. It is unnecessary to repeat at length the passages from that judgment, cited by Clarke J. in his judgment, as many of those passages have been set out above. Clarke J. made the point that, on a narrow reading of some of the passages cited, it might be said that the Court in *Crotty* came to the conclusion that the overall architecture of the Constitution does not permit the government, in exercise of its power to conduct the foreign policy of the State, to enter into binding arrangements with other countries which would have the effect of circumscribing Ireland's freedom of action in the area of foreign policy. However, he took the view that that was not a conclusion that could be found in the judgments of the court in *Crotty*. And if that were the view of the court in *Crotty*, he disagreed with it (see para. 417).

97. He went on to say, at para. 418, as follows:

“The backdrop to Crotty v. An Taoiseach [1987] I.R. 713 is, of course, the constitutional architecture relating to executive power and the conduct of international relations. Article 29.4.1° of the Constitution provides that the executive power of the State “in or in connection with its external relations” is to be in accordance with Article 28, exercised “by or on the authority of the Government”. Article 28.2, of course,

provides that the executive power of the State is to be, subject to the provisions of the Constitution, exercised by or on the authority of the Government. Thus, the Constitution is explicit that, in the conduct of the foreign policy of the State, the Government is constrained by the provisions of the Constitution.”

98. He went on to give a number of examples of such constitutional constraints, expressly provided in the Constitution. He added (at para. 420) that it was important to note that the Constitution did not require, as a matter of principle, that all international agreements be put to the People for approval through a referendum. He said *“It is only where an international agreement (either indirectly or by design) breaches the terms of the Constitution as it then stands that there is a requirement for an appropriate amendment to be made to the Constitution. The question of whether an international agreement infringes the Constitution is ultimately a matter for the determination of the courts ...”*.

99. He went on to note that the government is given a very wide discretion as to how to conduct the foreign policy of the State under the Constitution, citing the decision in *Horgan v. Ireland* [2003] 2 I.R. 468. He said, at para. 423:

“It would be a strange conclusion indeed if that broad discretion was to mean that the Government could not, as a means of exercising that discretion and, thus, exercising its sovereignty, enter into what must be the most usual way in which sovereign states exercise their sovereignty, i.e. by agreeing with other sovereign states to pursue a specified policy in a specified way.”

100. As he observed, the government, in pursuit of its legitimate policy objectives in relation to foreign policy, as a matter of practicality, would have to do so by entering into bilateral or multilateral treaty arrangements with other countries, with a view to giving effect to such legitimate policy objectives.

101. Referring to the observations of Walsh J. and Henchy J. as to the limitations on a government in entering into binding agreements with other states, where they use the language of abdication and alienation of the State's freedom of action in foreign policy, while Hederman J. spoke of subordinating or submitting the exercise of the powers of the State conferred by the Constitution to the advice or interest of other states (see para. 425) and he went on to say, at para. 426, as follows:

“On that basis it seems to me that the overall position is quite clear. The Government enjoys a wide discretion, under Article 29.4, to enter into international treaties subject only to the obligation to obtain the approval of the Dáil, if there is a commitment to financial expenditure, or that of the Oireachtas, if it is considered necessary to change domestic Irish law so as to comply with obligations undertaken by the treaty concerned. The limit on the discretion which the Government holds arises where the relevant treaty involves Ireland in committing itself to undefined policies not specified in the treaty and in circumstances where those policies, which Ireland will be required to support, are to be determined not by the Government but by institutions or bodies specified in the treaty. It is an abdication, alienation or subordination of policy formation and adoption which is not permitted. A transference of the means of implementing a policy agreed by the Government, and specified in the treaty concerned, to an appropriate implementation institution or body may be permitted provided that it does not go so far as to amount, in substance, to an abdication, alienation or subordination of the role of government under the Constitution.”

102. It is worth bearing in mind that the State enters into many treaties with other countries as a matter of fact. The Law Reform Commission has published a draft inventory of international obligations (LRC IP 14-2018) setting out a list of such international obligations

under a variety of headings containing some 1400 entries. They cover a wide range of topics, including civil and commercial matters, culture and education, employment and labour, international trade, technical and scientific co-operation, to name but a few. Key to the power of the government to do so is whether or not, in doing so, the treaty entered into does not “*go so far as to amount, in substance, to an abdication, alienation or subordination of the role of government under the Constitution*”.

103. Clarke J. went on to observe, at para. 443, as follows:

“There are many circumstances in which both the Government and the Oireachtas may come under significant practical political pressure, either domestically or internationally, to adopt certain measures. That is the way of the world. However, the architecture of the Constitution is concerned with where the final decision lies. The fact that institutions of government may, as a matter of practical politics, from time to time have to make decisions or bend their policies in the direction of the wishes of other countries does not, of itself, breach that model. That constitutional architecture may be interfered with when the institutions of government enter into commitments which amount to an abdication, alienation or subordination of the powers which the Constitution gives to those institutions.”

104. He went on to consider the question of sovereignty further, at para. 458 of his judgment, having considered the details of the ESM Treaty, and he observed as follows:

“However, the Constitution is, in many respects, quite specific about the model of sovereignty adopted. Article 15.2 confers on the Oireachtas “the sole and exclusive power” of law making. Article 34.1 requires that justice only be administered in courts established by law by judges appointed under the Constitution itself. As already noted the power of conducting foreign policy is conferred exclusively on

the Government (Article 29.4.1°) as is the executive power of the State (Article 28.2). The constitutional regime is clear. The judicial, legislative and executive organs of government are given exclusive power in their respective domains. The Constitution does not, by its clear terms, permit those powers to be given away or significantly shared with others. That constitutional restriction does not, of course, mean, for the reasons set out by O'Donnell J. in his judgment in this case, that there may not be an interaction between the way in which those organs of government may operate. However, that interaction is itself specified expressly by the terms of the Constitution.”

105. He went on to comment, at para. 460, as follows:

“But in international relations, as in very many other areas of public and private life, freedom to act will often, as a matter of practicality, involve freedom to make commitments which will, to a greater or lesser extent, limit ones freedom of action in the future. Persons are free to enter into lawful contracts. However by so doing the person concerned may restrict their ability to enter into other contracts in the future. It is inherent in certain types of decision that the decision in question will have a reach into the future to a greater or lesser extent. It seems to me to follow that the mere fact that decisions taken now can have such a reach cannot mean, on any proper analysis, that the relevant decision is necessarily taken to amount to an impermissible restriction on freedom to act in the future. If it were to be otherwise, parties, both in the private, public and international spheres would, in truth, be deprived of a significant freedom of action.”

106. That seems to me to be an important observation. The fact that an agreement or treaty may have an effect into the future and may indeed limit freedom of action or choice in the

future, is not, *per se*, to take a course of action which is prohibited by the Constitution. He went on to consider and to conclude that the ESM Treaty could be distinguished from the SEA, which was at issue in *Crotty*. As he observed, it did not involve a transference of the power to make policy into the future in any material way to other countries or institutions. Nor did it involve a permanent commitment to a set of policies so far reaching as to amount to an effective transference of sovereignty. Accordingly, on that basis, he did not consider that it was necessary for a referendum in order to ratify the ESM Treaty.

107. What conclusions can be drawn from this detailed consideration of the judgments of this Court in *Crotty* and *Pringle*? It seems to me that a number of observations can be made. First of all, the government, under the Constitution, (Article 28), is authorised to exercise the executive power of the State. Part of the role of the government in that context relates to the conduct of foreign affairs. The government, in the exercise of those powers, is authorised to enter into treaties or agreements with other states or institutions in the course of its conduct of external relations on behalf of the State. The method for doing so depends on the nature of the treaty or agreement at issue. As has been seen, a treaty containing a financial obligation must be approved by the Dáil, (Article 29.5.2° and Article 29.5.1° requires that every international agreement must be laid before the Dáil). What emerges from a consideration of the judgments is that the government cannot give away the powers conferred upon it under the Constitution by entering into an international treaty or agreement with another body. As we have seen from *Crotty* itself, the SEA in that case involved a situation where the government proposed to enter into an agreement which would have the effect of significantly reducing its freedom of operation in the area of foreign policy to an extent that was found to be impermissible. If a treaty or agreement amounts to an abdication, alienation or subordination of the organs of state under the Constitution, then such treaty or agreement must, to be effective, be ratified by an amendment to the Constitution by the

People. As Denham C.J. put it succinctly at para. 98 of her judgment in *Pringle*, if a decision is required to be taken to relinquish the powers of an organ of state, it must be taken by the People.

108. Ireland has signed up to many treaties and joined various international bodies which have created obligations for Ireland and, no doubt, benefits for Ireland, such as our membership of the United Nations and the Council of Europe. Clearly, not every such treaty or agreement entered into by Ireland operates in a way which has the effect that the SEA would have had on the constitutional powers provided for the government in the Constitution in relation to external affairs. The headnote in *Pringle* sums up the position that has to be adhered to by the State in relation to the conduct of external relations. At Headnote 3 it is said:

“That, notwithstanding its wide discretion in foreign policy, the Government could not abdicate, alienate, subordinate, or transfer its power to formulate or adopt policy, or habitually act in obedience to the wishes of another body or person. Whether it had done so would depend on the nature of the commitments entered into.”

109. In looking at the cases of *Crotty* and *Pringle*, it is interesting to observe some of the commentary to be found about these two important cases in Kelly, *The Irish Constitution*, referred to previously. At para. 5.3.65, the authors say:

“In some respects, the Supreme Court’s decision in Pringle v. Government of Ireland has presaged a significant change in direction. While the reasoning and ultimate decision in Crotty remains controversial, it has been nonetheless accepted by successive governments of the day. ... In practice, this means that the ratification of every Treaty change involving any further appreciable transfer of sovereignty or the

creation of new competences for the Union has required – or at least has been thought to require – a referendum.”

110. The authors went on to say that a more nuanced view emerged from the decision in *Pringle v. Government of Ireland*. Having noted the approach of the court in that case, the following observation was made, at para. 5.3.67:

“It is hard to disagree with the conclusion of many observers that the effect of Pringle has been to neutralise at least that part of Crotty which dealt with restrictions on the executive power of the State. One should not, however, deduce from this that the Government now has a free hand, because the other aspect of Crotty – namely, that a proposal to amend an EU Treaty does not enjoy constitutional immunity for the purposes of Article 29.4.6° of the Constitution because it is not (yet) an obligation of EU law – continues to hold sway. There will thus continue to be constitutional objections where an EU Treaty imposes specific obligations on Member States over and above any perceived restrictions on the right to conduct foreign policy. Accordingly, even if the decision in Pringle had been delivered before the dates of both the Lisbon Treaty and the Fiscal & Stability Treaty, it is hard to see how a referendum would still not have been required in both instances. In the case of the Lisbon Treaty, the decision to accord Treaty status to the Charter of Fundamental Rights would probably have required a constitutional amendment, given the uncertain reach and scope of the Charter and the manner in which it might potentially overreach some of the corresponding fundamental rights provisions of the Irish Constitution. The same is true in respect of the Fiscal Treaty: the specific obligations in relation to fiscal discipline and budget deficits would cut across the autonomy of Dáil Éireann in relation to such matters granted by the Constitution.”

111. Finally, reference should be made to the submissions filed by the parties in relation to this issue. So far as the appellant is concerned, the position arising from *Crotty* and *Pringle* is that those cases involved questions of whether executive powers were being ceded or used by the government. The point was also made on behalf of the appellant that, insofar as the question of whether CETA laws would be binding on the State, it was observed that there was no provision in the Constitution for international law to evade Article 15.2.1°, simply because the law was made on an international plain. They referred to O’Donnell J.’s judgment in *Pringle*, saying that the Constitution was specifically designed to guard against any law applying within the State, other than those laws made through the powers given by the People to the Oireachtas. By contrast, the submissions on behalf of the respondents deal at more length in relation to the decisions in *Crotty* and *Pringle*, noting that the majority in *Pringle* underscore the wide freedom of the State, and the Executive, on its behalf, to enter into international agreements. Reference was made to para. 308 of the judgment of O’Donnell J., which I have already cited above at para 77.

112. The respondents emphasised that CETA is such an agreement, and the Tribunal envisaged under CETA is such a “process”. They take issue with the assertion of the appellant to the effect that “*the creation of rules with binding sanctions for breaches of an international treaty is prohibited by the Constitution*”, saying that there is no authority for this, other than a definition to be found in Murdoch’s Dictionary in relation to the definition of law, and make the point that that does not support the submission. Finally, they contend that the appellant nowhere explains what elements of sovereignty are supposedly alienated if Canadian investors have a right to damages, should they be able to prove certain losses. They also make the point that there is no analogy between CETA and Title III of the Single European Act, which was at issue in *Crotty*. They emphasise that *Crotty* was, as O’Donnell J. had noted in his judgment (at para. 34) a truly exceptional case. Finally, they refer to a

quotation from Doyle & Hickey, *Constitutional Law: Text, Cases and Materials* (2nd Ed., Clarus Press, 2019) in relation to the judgment in *Pringle*, where the authors say as follows:

“The overall effect of Pringle is to leave the government with considerably more freedom of action in the field of foreign policy, particularly in respect of multilateral treaties that establish competences for international institutions, than many people may have thought since Crotty.”

113. It is certainly apparent from academic commentary that there is a view that the judgments in *Pringle* moved some distance from the position taken in *Crotty*. I have to say that it is not entirely clear to me what the extent of the change since *Crotty* exemplified by *Pringle* may be. It is apparent that, in *Crotty*, there was a clear interference with a constitutional power expressly conferred on the State to conduct the external affairs of the State. That authority was diminished significantly as a result of the SEA. In *Pringle*, there was no such obvious diminution of any sovereignty or power of any organ of the State. The ESM Treaty had clear and defined limits, and, as such, did not appear to impinge on matters such as the legislative organ of the State, or the judicial organ of the State. Neither did it involve control over public funds. It required a contribution to the stability fund, albeit of a very large amount, but of a defined amount bearing in mind that further sums could be required from Ireland but any such sums could not be provided without further legislation. To my mind, what was at issue in *Pringle* is somewhat different from that which was at issue in *Crotty*. It is fair to say that *Pringle*, as reflected in the comments of Doyle & Hickey set out above, acknowledges that one of the functions of government is to enter into international agreements and treaties, and that such treaties may create through international institutions obligations binding on the State. That is one of the features of modern international trade and relations.

114. To summarise my views on the distinction between *Crotty* and *Pringle*, I would observe that in 1937, the People of Ireland adopted the Constitution. The historical background to the enactment of Article 29.4.1° of the Constitution which gives the power of the State in relation to external affairs to the Government has been well described in the judgment of O'Donnell J. in one of the passages in *Pringle* to which I have already referred, and it is not necessary for me to repeat what he said there. Suffice it to say, in 1937, the People gave power to conduct external relations to the Government. The SEA at issue in *Crotty* removed that power from the Government, thus trenching on the power given to the Government by the People. Not surprisingly, the Supreme Court found in *Crotty* that what had been given by the People could only be taken away by the People and could not be taken by the Government entering into the SEA. No such issue arose in *Pringle*. While the ESM Treaty involved the payment of significant funds into the Stability Fund, it was not demonstrated that the ESM Treaty trenched on any specific powers or functions of any organ of the State. It should be borne in mind that Ireland had been a member of the Eurozone since 2002 having previously been a participant in the ESM which had been created to provide currency stability in Europe following a series of treaties, starting with the Maastricht Treaty. However, it is relevant that the ESM Treaty was a continuation of steps in the area of currency stability and it did not in any way interfere with any organ of the State in the exercise of powers conferred by the People in the Constitution. Sums of money could only be provided to the Stability Fund after legislation by the Oireachtas. In the circumstances a referendum was not required to amend the Constitution.

115. The State, in the exercise of its powers under the Constitution, can enter into international agreements. As has been pointed out above, this State has entered into a multiplicity of such agreements. That cannot be a diminution of sovereignty but is, on the contrary, the exercise of sovereignty. Undoubtedly, as Clarke J. pointed out in his judgment

in *Pringle* and referred to above, the entry into such agreements may limit for the future the freedom to act contrary to any such agreement but that is inherent in the nature of such agreements, designed as they are to indicate how a country will act in the future in the circumstances covered by the agreement (see para 460 of his judgment). What one can say at this stage is that a proposed treaty or agreement that restrains or diminishes the exercise by the organs of the State of the powers conferred on them under the Constitution will require a referendum. The academic debate as to the differences in emphasis that may exist as between the decisions of this Court in *Crotty* and *Pringle* is interesting but, ultimately, the question to be determined in this case is whether or not CETA, in respect of the matters contended for by Mr. Costello, particularly in relation to the legislative power of the Oireachtas, and the powers of the Courts in relation to the administration of justice, has the effect of going so far as to require a referendum in order to ratify CETA.

116. For completeness, it would also be helpful to refer to the observations of the trial judge on the distinctions between the treaty at issue in *Crotty* and CETA. At para 97 of her judgment, she said:

“At a very basic level it seems to me that there is a significant difference between the type of treaty at issue in Crotty which required the future coordination of foreign-policy and an agreement such as CETA which is a detailed and technical trade agreement. The commitment to joint action within the framework of European Political Cooperation considered in Crotty potentially covered an unlimited range of issues that might arise concerning unspecified third parties in undefined circumstances into the future and would deprive the Irish Government of the right to formulate an independent policy on those issues. In contrast, the scope of CETA and the policies it pursues are clearly set out in CETA itself. The subject matter of CETA cannot be said to be either undefined or unspecified and,

consequently, the limit on the Government's discretion under Article 29.4 of the Constitution identified by Clarke J has not been exceeded. The plaintiff complains of the rule making powers of the CETA joint committee, but it is clear from CETA that the Joint Committee's function is to be responsible for (Article 26.1.3) and to supervise and facilitate (Article 26.1.4) the "implementation and application" of CETA and it has power to make decisions only for the purpose of "attaining the objectives" of CETA. Thus, insofar as ratification of CETA would commit the State to certain policies and objectives into the future, these policies are neither undefined at present nor to be determined by the institutions established by CETA to the exclusion of the parties themselves. Further, as previously noted, the decision making power of the CETA Joint Committee is not self-executing, being subject to the completion by the parties of their internal requirements and procedures."

It is certainly the case that CETA is a detailed and technical trade agreement, far removed from the type of treaty envisaged in *Crotty*. How far that assists in dealing with the issues in this case remains to be seen and whether it trespasses on the powers of the Oireachtas and the functions of the Courts has to be considered.

Some Observations on CETA, Similar Agreements and Relevant Case Law of the CJEU

117. At this point, I propose to look at some relevant case law from elsewhere. At the outset, it would be useful to make a few observations about trade agreements. Bungenberg and Reinisch in their commentary in *CETA Investment Law* (Bloomsbury Professional, 2022) made the observation in their introduction to the commentary as follows:

"With the entry into force of the Treaty of Lisbon, the European Union (EU) has gained new competences in the area of international investment law and politics. Article 207 Treaty on the Functioning of the European Union (TFEU) provides for an external treaty making power in the field of foreign direct investment. Overall,

the inclusion of investment protection in the common commercial policy is seen as a “step forward” from an EU law perspective.

After the entry into force of the Treaty of Lisbon on 1 December 2009, investment protection chapters have become part of the negotiation of new economic agreements with third countries. A negotiating mandate was promptly issued on investment protection for the agreements with Canada, India and Singapore. Until the Court of Justice in the European Union’s (CJEU) Singapore Opinion...it was a matter of debate whether the EU had the exclusive competence to negotiate and conclude ‘standalone investment agreements’ – comparable to international investment agreements (IIAs) that were concluded by the EU Member States ‘before’ the entry into force of the Treaty of Lisbon on 1 December 2009 – as well as Free Trade Agreements (FTAs) comprising chapters on investment law. In its Singapore Opinion, the CJEU found a fairly clear answer to this question, insisting on the limit of the EU’s power to foreign ‘direct’ investment (FDI) and holding that agreements comprising portfolio investment and disputes settlement fall under the shared powers of the EU and its Member States. The EU – Canada Comprehensive Economic & Trade Agreement (CETA) is an exception to this, as this agreement was already signed before the Singapore Opinion was rendered.”

118. As an example of the fact that such agreements are now more common place, the authors noted that investment agreements are currently being negotiated with China and Myanmar, and other negotiations are taking place with India, Libya, Egypt, Jordan, Morocco, Tunisia, Malaysia, and Thailand, which will include investment chapters as part of the larger free trade agreements being negotiated. The authors further note that agreements have been concluded, apart from CETA, with Singapore, as referred to already, Vietnam and Mexico. Thus, one can see that such agreements are becoming part and parcel

of international trade, and taking place on a more frequent basis, on a multilateral basis involving the EU and third-party countries.

119. The questions at issue in respect of CETA and similar trade agreements focus on the provisions of those agreements in respect of investor protection. There is no objection, and it is hard to see how there could be, to trade agreements in general terms. The issues that tend to arise relate to the operation of tribunals created under the trade agreements for the purpose of resolving issues between individual investors and the states in which the trade agreement is operative. For that reason, it would be helpful to refer to some case law in regard to such trade agreements, and, indeed, CETA. A further issue that arises relates to the competence of the EU to enter into such agreements, and whether it can do so without the involvement of the Member States.

120. The first such case I want to mention is a decision of the CJEU, *Opinion 2/15* ECLI:EU:C:2017:376 in relation to the Singapore Free Trade Agreement (“Singapore Opinion”). That Opinion focused on the respective competences of the EU and the Member States. The question at issue was whether the agreement could be signed by the EU alone, or whether it was a “mixed” agreement required to be signed by the EU and the Member States, or whether it was required to be signed by the Member States alone (see para. 31). Specific aspects of the Singapore Agreement were found to come within the exclusive competence of the EU. Having considered the terms of the Agreement at length, the CJEU expressed the view that certain provisions of the Singapore Agreement in Chapter 9 of the Agreement, and Chapter 14, fell within the competence of the Member States. The views of the CJEU on the dispute resolution mechanisms within the Agreement are of particular interest, insofar as they involve disputes between investors and states. The Court opined, at para. 291, as follows:

“291. *The claimant investor may indeed decide, pursuant to Article 9.16 of the envisaged agreement, to submit the dispute to arbitration, without that Member State being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 of the agreement.*

292. *Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States’ consent.*

293. *It follows that approval of Section B of Chapter 9 of the envisaged agreement falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States.”*

121. It is interesting to observe the sentence in those paragraphs to the effect that the reason why the Member States have to give their consent is because the regime envisaged under the Singapore Agreement “*removes disputes from the jurisdiction of the courts of the member states*”. This is a comment to which I will return in due course.

122. It is also relevant to note that, at para. 303 of the Opinion, the Court pointed out that a different position obtained in relation to dispute settlement between the parties, and it noted, at para. 303, that:

“Since that regime relates to disputes between the European Union and the Republic of Singapore, it, unlike the investor-State dispute settlement regime laid down in Section B of Chapter 9 of the envisaged agreement, is not liable to remove disputes from the jurisdiction of the courts of the Member States or of the European Union.”

123. Ultimately, the CJEU concluded that certain aspects of the Singapore Agreement were in some respects not within the exclusive competence of the European Union, and those provisions included the provisions of Section A of Chapter 9, insofar as they related to non-direct investment between the European Union and the Republic of Singapore, and the provisions of Section B in relation to investor-State settlement of Chapter 9, and certain other provisions. As they involved a shared competence, it followed that the Agreement had to be signed both by the EU and the Member States.

124. Thus, as one can see, because of the findings of the CJEU in that case, it is clear that, in similar agreements, certain provisions found as a general proposition in such trade agreements, particularly in relation to the area of investor protection and dispute resolution, create a shared competence between the EU and the Member States requiring each state to ratify in accordance with its own national law.

125. The trial judge herein, at para. 177 of her judgment, had regard to the Singapore Opinion and accepted that Ireland had to ratify CETA by reason of the dispute resolution mechanism contained therein. She concluded, at para. 179, as follows:

“The subject matter of the entire of CETA falls within the competence of the EU being either a matter of exclusive EU competence (under the common commercial policy) or a matter of shared competence (under free movement of capital). However, the CJEU has held as regards a similar free trade agreement that ratification by Member States was required not just because of the fact that part of the subject matter fell within an area of shared competence, but because of a dispute resolution mechanism contained within that agreement. In those circumstances it is difficult to construe ratification of CETA as something that is “necessitated” by virtue of obligations of membership of the EU for the purposes of Article 29.4.6 of the Constitution.”

126. The respondents disagreed with her conclusions in this regard and sought to argue that the ratification of CETA was necessitated by our membership of the EU (see Article 29.4.6° of the Constitution). This is based on an argument that CETA does not remove disputes from the jurisdiction of the courts of the Member States and does not involve a subtraction of jurisdiction from the Irish courts. CETA provides for the ratification of the Agreement and until this is done, CETA will not be approved (see paras. 144-155 of the respondents written submissions). I cannot see how the respondents' arguments in this regard could be correct. The fact that large parts of the Agreement are within the EU's competence is no answer to the fact that CETA requires to be signed by both the EU and the Member States, given that it contains similar clauses to those at issue in the Singapore Opinion, and is, undoubtedly, a mixed agreement. That being so, it is impossible, in my view, to see how it could be said that the duty of co-operation necessitates the signing of CETA. Each Member State has to ratify CETA, and what is at issue in this case is whether the method proposed by the State is sufficient. Thus, I agree with the trial judge in this regard that ratification of CETA cannot be viewed as something that is "necessitated" by virtue of obligations of membership of the EU. Accordingly, so far as I am concerned, I am satisfied that the question as to whether ratification is necessitated by the obligations of membership of the EU can be answered by saying no.

Opinion 1/17 of the CJEU

127. The second decision of the CJEU to which I wish to refer emanated from a request by Belgium to the CJEU for an opinion regarding CETA itself and asking whether the provisions of Chapter 8 of CETA were compatible with treaties of the European Union, including those dealing with fundamental rights. A number of issues had been raised by Belgium in respect of CETA. The first of those was whether the proposed ISDS (Investor-State Dispute Mechanism) by means of the CETA Tribunal, particularly where the CETA

Tribunal was not enabled to refer a question of EU law to the CJEU, was compatible with the principle of exclusive jurisdiction of the CJEU over the definitive interpretation of EU law. The second issue concerned a question as to the compatibility of the envisaged ISDS mechanism with the general principle of equal treatment, and the requirement of effectiveness, in circumstances where enterprises constituted under Canadian law, and natural persons who were Canadian nationals, could bring a dispute before the CETA Tribunal, whereas enterprises constituted under the law of an EU Member State would not have that possibility, thus raising a question as to whether such a situation was compatible with Article 20 of the Charter in relation to the question of equality before the law, and the requirement under Article 21, to the effect that discrimination on grounds of nationality shall be prohibited. The third issue raised was whether or not the provisions of Chapter 8 of CETA were compatible with the fundamental right of access to an independent tribunal enshrined in Article 47 of the Charter. It was noted in that context that there was no legal aid available in relation to a claim, and further that, under the provisions of CETA, the fees and expenses of members of that tribunal hearing a claim would have to be borne by the parties to the dispute and, in particular, save in exceptional circumstances, should be borne by the unsuccessful party. Belgium contended that the risk of having to bear the entire costs might deter investors with limited resources from lodging a claim. Further reference was made to the method provided within CETA for the remuneration of members of the Tribunal, and therefore an issue of concern was raised in relation to, first of all, the remuneration of members of the Tribunal, and, secondly, in relation to the rules concerning the appointment of the members of the Tribunal, and of the Appellate Tribunal.

128. The next issue in relation to which doubts were raised concerned the conditions for removal of members of the Tribunal, and Appellate Tribunal, which, in accordance with the rules under CETA, provide that removal of a member of those bodies could be made by the

CETA Joint Committee. This was in contrast with the recommendations of the CJEU to the effect that any decision to remove a judge must involve an independent body. The final issue concerned a requirement that members of the Tribunal would have to comply with IBA (International Bar Association) guidelines pending the adoption of a Code of Conduct. It was pointed out that the IBA guidelines were intended for arbiters and not for judges, and therefore an issue was raised in that regard also.

129. A number of points were made by the CJEU, the first of which was 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 (see para. 106 of the Opinion). It observed that the competence and capacity of the European Union to conclude international agreements necessarily entails the power to submit to the decisions of a court that is “*created or designated by such agreements as regards the interpretation and application of their provisions*”. It observed that such an international agreement could affect the powers of the EU, provided, however, that there was no adverse effect on the autonomy of the EU legal order. Therefore, it expressed the view that CETA, insofar as it provided for a process of judicial adjudication of the resolution of disputes by means of the CETA Tribunal and Appellate Tribunal, “*may be compatible with EU law only if it has no adverse effect on the autonomy of the EU legal order*” (para. 108). In the course of its consideration, the CJEU noted that the courts envisaged by CETA were separate from the domestic courts of Canada, the Union, and its Member States, and could not, therefore, be considered to form part of the judicial system of the parties to CETA. The proposed tribunals stood outside the EU legal system. Ultimately, the Court expressed the view that, in order to determine the compatibility of the mechanism provided for under CETA, it was necessary to be satisfied that Section F of Chapter 8 of CETA did not confer on the proposed tribunals any power to interpret or apply EU law, other than the power to

interpret and apply the provisions of the Agreement, having regard to the rules and principles of international law applicable between the parties, and, further, that Section F of Chapter 8 does not confer or structure the powers of the tribunals in such a way that they could issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU national framework (see para. 119).

130. In considering the questions at issue, the CJEU distinguished CETA from the draft agreement in relation to the creation of a unified patent litigation system, which was found to be incompatible with EU law in *Opinion 1/09*. In that context, the Agreement provided that the applicable law included “*directly applicable Community law, in particular Council Regulation ... on the Community patent, and national law of the Contracting States implementing Community law ...*” As such, it was considered by the CJEU that the court envisaged under that particular agreement could be called upon to interpret not just the terms of the Agreement, but also European Union law, and thus it was concluded that that court “*may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union*”. Thus, the CJEU observed, at para. 125, as follows:

“Those considerations led to the Court’s finding that the conclusion of that draft agreement would have altered the essential character of the powers that the Treaties confer on the EU institutions and on the Member States and that are indispensable to the preservation of the very nature of EU law ...”

131. The CJEU also considered that Section F of Chapter 8 of CETA had to be distinguished from the investment agreement at issue in the case of *Achmea* Case C-284/16, EU:C:2018:158 on the basis that, as stated in the judgment in that case, “*that agreement established a tribunal that would be called upon to give rulings on disputes that might*

concern the interpretation or application of EU law". I will refer to *Achmea* in more detail shortly in the course of this judgment.

132. Ultimately, the CJEU concluded that the CETA Tribunal had no jurisdiction to interpret the rules of EU law, and the same applied in relation to the Appellate Tribunal. It was concluded that:

"Since the CETA Tribunal and Appellate Tribunal stand outside the EU judicial system and since their powers of interpretation are confined to the provisions of the CETA in the light of the rules and principles of international law applicable between the Parties, it is, moreover, consistent that the CETA makes no provision for the prior involvement of the Court that would permit or oblige that Tribunal or Appellate Tribunal to make a reference for a preliminary ruling to the Court."

133. Thus, the Court concluded that Section F of Chapter 8 did not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law and was limited to the interpretation of the provisions of CETA itself.

134. On the next issue, namely, the effect of CETA on the operation of EU institutions, the CJEU observed, at para. 149, as follows:

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

135. The CJEU accepted that, were such a situation to arise, *"it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously*

within its unique constitutional framework” (see para. 150). However, the CJEU noted that, having regard to the possibility that the envisaged tribunals could declare infringements of the obligations contained in Section C of Chapter 8 of CETA, it was noted that the agreement states that the provisions of Section C “*cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health*”, subject only to the requirement that such measures would not be applied in an arbitrary or unjustifiable discriminatory way between the parties. In those circumstances, the Court concluded:

“It follows from the foregoing that, in those circumstances, the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152 of the present Opinion and, on that basis, to order the Union to pay damages”.

136. Therefore, the CJEU concluded, at para. 160, as follows:

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

Therefore, the ultimate conclusion of the CJEU was that Section F of Chapter 8 did not adversely affect the autonomy of the EU legal order (it should be borne in mind that the issue raised in this respect mirrors an argument made in these proceedings to the effect that CETA and the possibility of an award of damages against a Member State and in this instance, Ireland, could have a chilling effect on legislative proposals). One might raise the question as to what would happen if the CETA Tribunal did, in fact, go further than envisaged by the CJEU in exercising its jurisdiction. What would happen then is not entirely clear. Perhaps one could take the view that the CJEU is somewhat sanguine in this respect, but one does have to accept that it has expressed itself clearly in this regard.

137. The CJEU then considered and rejected concerns raised as to the compatibility of CETA with the principle of equal treatment and with the requirement of effectiveness (see, in particular, paras. 162 to 188 of the Opinion). Insofar as a question had been raised as to the difference between Canadian enterprises and natural persons that invest within the Union, as opposed to enterprises, and natural persons of Member States that invest within the Union, the comment was made that their situation is not comparable. Equally, the Court rejected the suggestion that there was any incompatibility with the requirement of effectiveness in relation to EU competition law.

138. Consideration was then given to the right of access to an independent tribunal. In that regard, it was noted that the tribunals envisaged under CETA would exercise judicial functions (see para. 197). It was noted that the tribunals would be permanent and established by law in the form of Acts approving CETA, adopted by the parties. It was further noted that they would apply, following an adversarial procedure, rules of law, and would be required to exercise their functions autonomously, and to issue decisions that are final and binding (see para. 197). Regard was had to the financial burden that might be imposed on

parties seeking to access the CETA Tribunal. It was noted that provisions of CETA obliged the Joint Committee to “*consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises*”. Some concerns were expressed by the CJEU in that regard, but the CJEU noted that:

“...Statement No 36 states that ‘there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals’ and provides, to that end, that the ‘adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA ... will be expedited so that these additional rules can be adopted as soon as possible’ and that, ‘irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court’.” (para. 217)

139. The CJEU notes, therefore, that, by means of that statement referred to, the Commission and the Council have given a commitment to implement, rapidly and adequately, Article 8.39.6 and, therefore, to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises. Therefore, the commitment given was seen as being sufficient to ensure that CETA was compatible with the requirement that the tribunals set up thereunder should be accessible. Accordingly, it was concluded, at para. 222:

“Taking into consideration this connection that is made, by the Union, between the financial accessibility of those tribunals and the conclusion of the CETA, it must be held that the agreement envisaged is not incompatible, from that perspective, with Article 47 of the Charter.”

140. The question of compatibility with the requirement of independence was also considered. In this regard, it was noted that members of the Tribunal, and the Appellate

Tribunal, would be appointed for a fixed term, and have relevant specific expertise. The Agreement further provides that members will receive a level of remuneration commensurate with the importance of their duties. It was also noted that there was a prohibition on taking instructions from others or being in a position of conflict of interest. Having regard to the provisions contained in CETA as to fees and expenses of the members of the tribunals, the comment was made that *“the fact that those provisions concerning the remuneration of Members of the CETA Tribunal and Appellate Tribunal are intended to evolve cannot be perceived as constituting a threat to the independence of those Tribunals, but conversely permits the gradual establishment of a court composed of Members who will be employed full-time”*. It was also observed, at para. 233:

“It is neither illegitimate nor unusual, under international law, for provision to be made that the Parties to an international agreement may clarify, as their joint wishes concerning the effect of that agreement develop, the interpretation of that agreement. Such clarification may be introduced by the Parties themselves or by a body set up by the Parties on which they confer a power to adopt decisions that will be binding on them”.

141. It was also noted that, insofar as the independence of the Tribunal was concerned that interpretations of CETA determined by the CETA Joint Committee have no effect on disputes that had been resolved or brought prior to those interpretations (see para. 236). Therefore, it was viewed by the CJEU that the provisions of Article 8.31.3 of CETA could not be interpreted, having regard to Article 47 of the Charter, as permitting the Union to consent to decisions on interpretation of the CETA Joint Committee that would produce effects on the handling of disputes that have been dealt with, or are pending. Accordingly, having regard to all of the issues raised in respect of the issue of independence, the CJEU concluded *“that the agreement envisaged is compatible with the requirement of*

independence” (see para. 244). In the circumstances, the Court concluded that Section F of Chapter 8 of CETA was compatible with EU primary law.

142. It will be apparent, as already mentioned, that some of the issues considered by the CJEU in that *Opinion* reflect some of the concerns raised by the plaintiff in these proceedings. I will deal with the arguments of the appellant in this regard subsequently. However, it is clear, that so far as the CJEU is concerned, Section F of Chapter 8 of CETA is not incompatible with EU law.

Achmea

143. As will have been seen from the discussion above, the CJEU in its Opinion on CETA, distinguished the case of *Slowakische Republik (Slovak Republic) v. Achmea BV*, Case C-284/16 ECLI:EU:2018:158 of the 6 March 2018.

144. The background to this case concerned a bilateral trade agreement between The Netherlands and the Czech and Slovak Republic. It provided for an arbitral tribunal under UNCITRAL rules in the event of a dispute. The Slovak Republic, which emerged subsequently, remained a party to the BIT, and, subsequently, it opened up its sickness insurance market as part of a reform of its health system. Achmea, part of a Dutch insurance group, set up a subsidiary in the Slovak market. Shortly afterwards, the Slovak Republic reversed its policy of liberalisation of its sickness insurance market and prohibited the distribution of profits in relation to sickness insurance. This position was challenged, and subsequently the constitutional court of the Slovak Republic found that the prohibition was contrary to the Constitution, and, as a result, Slovak law was changed to reflect that finding. Achmea contended that the initial legislative change found to be unconstitutional had caused it damage. It brought proceedings by way of arbitration against the Slovak Republic, pursuant to Article 8 of the BIT. Frankfurt in Germany was chosen as the place of arbitration, and thus German law applied to the arbitration proceedings concerned. The

Slovak Republic raised an issue as to the jurisdiction of the arbitral tribunal. It was contended that recourse to an arbitral tribunal as provided for in Article 8(2) of the BIT was incompatible with EU law. That objection was dismissed by the arbitral tribunal. The arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the amount of €22.1 million. The Slovak Republic then brought an action to set aside that arbitral award before the Higher Regional Court of Frankfurt. That court dismissed the action, and the matter was then appealed to the Federal Court of Justice, Germany. That court referred a question for a preliminary ruling under Article 267 of TFEU, in circumstances where, since the accession of the Slovak Republic to the European Union in 2004, the BIT has constituted an agreement between Member States, such that, in the event of conflict, the provisions of EU law takes precedence over the provisions of the BIT. Doubts were raised by the Slovak Republic as to the compatibility of the arbitration clause in Article 8 of the BIT with Articles 18, 267 and 344 TFEU.

145. The CJEU identified the questions being posed by the referring court as whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept. In respect of the question as thus posed, the CJEU had a number of observations to make. First of all, it noted that *“an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the*

interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.”

146. The CJEU went on to say that the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU, and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. The CJEU went on:

“EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”.

147. It went on to say that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. It further said that the judicial system, as thus conceived, *“has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties ...”.*

148. Bearing all of that in mind, the court went on to consider whether the arbitral tribunal at issue in the main proceedings could be viewed as a court or tribunal of a Member State within the meaning of Article 267. It was noted that the arbitral tribunal was not part of the judicial system of the Netherlands or Slovakia. It was thus concluded that a tribunal, such

as that referred to in Article 8 of the BIT, could not be regarded as a “*court or tribunal of a Member State*”, within the meaning of Article 267 TFEU, and is therefore not entitled to make a reference to the court for a preliminary ruling.

149. Accordingly, the question had to be asked whether a ruling of such a tribunal was subject to review by a court of a Member State, ensuring that any questions of EU law which the tribunal had to address could be submitted to the CJEU by means of a reference for a preliminary ruling. One of the points made by the CJEU in that case was that, insofar as a preliminary ruling could be requested by a court asked to consider the enforcement of an arbitration award depended on the law applicable to the jurisdiction of the court concerned. As was noted, the arbitral tribunal chosen by Achmea sat in Frankfurt, which made German law applicable to the procedure governing judicial review of the validity of the arbitral award. It was that which enabled judicial review of the arbitral award to be brought before a competent court in Germany. Therefore, it is only if national law permits such judicial review that a national court could, ultimately, and if necessary, be the subject of a reference to the CJEU for a preliminary ruling.

150. The CJEU made an interesting observation then. It noted:

“However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law ... disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to

commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.

Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law”.

151. The CJEU went on to conclude as follows:

“In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above”.

152. Thus, the Court concluded that Article 8 of the BIT had an adverse effect on the autonomy of EU law. In those circumstances, it was concluded that Articles 267 and 344 of the TFEU must be interpreted as precluding a provision in an international agreement

concluded between Member States, such as Article 8 of the agreement at issue here, under which an investor from one of those Member States could, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before a tribunal whose jurisdiction that Member State has undertaken to accept.

153. I think it is important to note in respect of the decision in *Achmea* that the investment treaty at issue in that case was one entered into by two states, one of which was not originally a member of the EU but which became a member subsequently. The principal point is that it was an agreement between Member States. The effect of the agreement was such that a dispute, which could have involved the interpretation of EU law, was agreed by the Member States to be submitted to an arbitral tribunal. That tribunal, of itself, could not refer a question in relation to EU law to the CJEU. In certain Member States, the enforcement of the arbitral award could be subject to a form of judicial review, and, in the event that an issue of EU law arose whereby it was contended that the tribunal had wrongly interpreted EU law, it would appear to follow that, if the Member State in which the award was made permitted such judicial review, then a question could be referred under Article 267. However, because that was not necessarily the case in all Member States, this called into question the concept of sincere co-operation under the treaties, leading to the finding of incompatibility.

154. As will be recalled, the CJEU in its *Opinion I/17* distinguished CETA from the investment agreement at issue in *Achmea*, given that that agreement established a tribunal that could give rulings on disputes concerning the interpretation or application of EU law. As has been seen, the CJEU, in *Opinion I/17*, also noted that the BIT Agreement was an agreement between Member States as such. As has been seen, in *Opinion I/17* the CJEU, at para. 129, observed “*that principle of mutual trust, with respect to, inter alia, compliance*

with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State". The CJEU in that case also emphasised the fact that the CETA Tribunal, whilst it could take into account domestic law of a party, was precluded from interpreting that law, and furthermore noted that CETA expressly provided that there was no jurisdiction to interpret the rules of EU law, other than the provisions of CETA. Thus, the Court in *Opinion 1/17* had concluded that the exclusive jurisdiction of the CJEU to give rulings on the division of power between the Union and its Member States was preserved. At a very simple level, it would appear that the distinction between the two decisions is that the decision in *Achmea* concerned an arbitration tribunal which could give interpretations of the agreement and of EU law, and in giving an interpretation of EU law, was not in a position to avail of the procedure provided for in Article 267, whereas CETA expressly excludes the possibility of the CETA Tribunal from interpreting the rules of EU law. Thus, the CJEU was led to conclude that the CETA Tribunal and its Appellate Tribunal stood outside the EU judicial system, and that being so, and having regard to the limitation on their powers of interpretation, the CJEU was satisfied that the fact that CETA could not make a reference for a preliminary ruling was not inconsistent with that position. It may appear to be difficult to reconcile these two views but what the CJEU has done in *Opinion 1/17* is to make it clear that it considers that CETA operates outside the EU legal system and is precluded from giving rulings as to the interpretation of EU law and therefore the absence of a power to make a preliminary reference is not fatal to CETA. Thus, the CJEU was of the view that CETA did not interfere with the autonomy of EU law.

Opinion 1/19 on the Istanbul Convention

155. Finally, for completeness, I want to refer to the Opinion of Advocate General Hogan in *Opinion 1/19* on the Istanbul Convention. The Convention relates to preventing and

combatting violence against women and domestic violence. The Convention was adopted by the Committee of Ministers of the Council of Europe on the 7th April, 2011 and the Council of the European Union invited the Member States to sign, conclude and implement the Convention. A number of issues arose in relation to that and, ultimately, the opinion of the CJEU was sought. For the purposes of this case, I merely wish to refer to two passages from the Opinion of AG Hogan, dealing with the consequences of a decision by a Member State to “*denounce that Convention*”, or withdraw from the Convention. He opined at paras. 224 to 225 as follows:

“224. Last, although it is not necessary to do so, I propose to address the situation mentioned during the course of the oral hearing, namely, what might arise if a Member State were to denounce that convention once it had been concluded by the Member States and the Union.

225. In those circumstances, although the duty of sincere cooperation would doubtless impose an obligation to inform the Union in advance on the part of the Member State concerned, it cannot go so far as to prevent a Member State from withdrawing from an international agreement. Indeed, the logical and inescapable consequence of the principle of attribution of competences 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 the shared competences, or because certain parts of the agreement fall within the exclusive competence of the Member States. That possibility would not, however, oblige the Union to leave the agreement as well. Here again, in my opinion, it would simply fall to the Council, if necessary, to assess the trade-off between the importance of the agreement in question and the risks generated by its imperfect conclusion by the Union and the Member States.”

156. I mention that passage solely for the purpose of highlighting the effect of denunciation or withdrawal from an agreement. The position may vary from Convention to Convention, or agreement to agreement, depending on the terms of such an agreement, but this is an issue that has been mentioned in the context of CETA which has specific terms as to the effect of a denunciation/withdrawal, assuming that CETA is ultimately ratified by the State, and that subsequently a decision to withdraw was taken. The important point to bear in mind is that, in the opinion of AG Hogan, the duty of sincere co-operation does not go so far as to prevent a Member State from withdrawing from an international agreement.

The issues in these proceedings

157. I now wish to consider the principal arguments raised by the appellant. First of all, the question arises as to the place of CETA, if any, within the domestic legal framework. The appellant contends that CETA purports to have legal effect within the State although the legal framework created by CETA is not part of the domestic legal system. Reference is made by the appellant in this context to “CETA laws”, a term with which the respondents take issue. Thus, the status and role of CETA within the State has to be considered. In this respect, it is contended by the appellant that CETA must be transposed into domestic legislation absent which, it is of no effect in this jurisdiction. It cannot operate or have effect in this jurisdiction on an international plain as contended for by the respondents. I then propose to focus on the arguments that CETA cannot be ratified by the means chosen by the government as CETA amounts to a diminution of sovereignty by interfering with the constitutional powers contained in Article 15 of the Constitution and further, that the CETA Tribunal would be engaged in the administration of justice contrary to Article 34 of the Constitution. The latter issue may raise an issue as to the possible application of Article 37 of the Constitution and whether or not the CETA Tribunal’s “administration of law” could

be saved by coming under the provisions of Article 37. A further issue that requires to be considered is the question of “regulatory chill”.

The role of CETA in Ireland

158. As has previously been described, CETA is a trade agreement between Canada and the European Union. Some of its provisions have already entered into force on a provisional basis. At the heart of the issues in this case are certain provisions of Chapter 8 of CETA, which concern investors in a Member State in what are defined as “covered investments”. Chapter 8, as has been mentioned previously, creates protections for investors in Member States. For example, Articles 8.10.1 and 8.10.2 provides as follows:

“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.”

159. Article 8.10.3 is also of interest in that it provides as follows:

“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.”

160. As one can see, therefore, it is possible to expand or vary that which amounts to the obligation of fair and equitable treatment, if the CETA Joint Committee concludes that that is appropriate following a review of the obligation to provide fair and equitable treatment.

161. Article 8.11 requires that, in respect of compensation for losses to covered investments as a result of conflict, natural disasters etc., the investor shall be treated no less favourably than the state’s own investors. In a number of other situations, it can be seen from CETA that the measure of fair and equitable treatment requires that the Canadian investor is to be treated no less favourably than the investor of the Member State concerned.

162. There is a further provision which bears mention at this stage, and that is the provision against expropriation of a covered investment, and it is provided that there cannot be expropriations save in specific circumstances and on payment of adequate compensation (see Article 8.12).

163. Procedures are set out in Chapter 8 of CETA for the resolution of disputes between investors and states or with the EU. It is open to the EU to determine that it is the appropriate respondent rather than the Member State (see Article 8.21). A claim can be made by the investor to the Tribunal constituted under Section F of Chapter 8. It is not necessary to set

out the details in relation to the submission of a claim to the Tribunal here. Article 8.27 provides for the constitution of the Tribunal, and Article 8.28 provides for an appellate tribunal. Of note is Article 8.27.2, which provides as follows:

“The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.”

164. A similar provision is contained in Article 8.28 in relation to the Appellate Tribunal. Article 8.29 goes on to provide for the establishment of a Multilateral Investment Tribunal. It provides that, upon establishment of such a multilateral mechanism, the CETA Joint Committee *“shall adopt a decision providing that investment disputes”* will be decided pursuant to that mechanism and will thereafter make appropriate transitional arrangements.

165. I think it is relevant to note that, insofar as the MIT is concerned, it is clearly intended that the parties to CETA will *“pursue”* the establishment of such a tribunal and appellate mechanism for the resolution of investment disputes. However, it has to be said that there is no suggestion that the establishment of such a Multilateral Investment Tribunal is, in any shape or form, imminent. Further, the fact that it is an object to be pursued does not necessarily mean that it will come into being.

166. Of particular importance to the issues in this case are the provisions of Article 8.31, which was the subject of much discussion in the course of the hearing. It provides as follows:

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

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

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

167. It was noted previously that the CETA Joint Committee could make decisions in relation to the extent of the content of the obligation to provide fair and equitable treatment and, as has just been seen, Article 8.31 also contains a provision to permit the CETA Joint Committee to make decisions as to the interpretation of the agreement.

168. Reference should also be made to Article 8.41 dealing with the enforcement of awards. It provides, *inter alia*, that an award made shall be binding between the disputing parties and that a disputing party shall recognise and comply with an award without delay, subject to certain provisions contained in Article 8.41.3, and further that execution of the award shall be governed by the laws concerning the execution of judgments or awards in force

where the execution is sought. Further provisions of Article 8.41 deem the final award to be an arbitral award for the purposes of Article 1 of the New York Convention, and in certain circumstances it is further provided that a final award shall qualify as an award under the ICSID Convention.

169. Further, Article 26.1 sets out provisions in relation to the CETA Joint Committee. It can, *inter alia*, make decisions as set out in Article 26.3, and consider or agree on amendments as provided for in the course of the agreement (Article 26.1.5(c)). It is further provided that the CETA Joint Committee shall be comprised of representatives of EU and Canada and will be co-chaired by a Canadian Minister for International Trade and the EU Commissioner responsible for trade.

170. For completeness, I should also refer to Article 30.6, which provides as follows:

“1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.”

171. It is contended by the appellant herein that CETA, if ratified, will impose obligations on every organ of the State to provide fair and equitable treatment, not to breach legitimate expectations, to protect the physical security of investments and investors, and not to directly or indirectly expropriate the investments, as each such obligation is defined and understood in international law. It was pointed out that, if it is believed that the State or an organ of the State has breached the rights of the investor in Ireland, thus creating a dispute,

the investor may elect to issue proceedings either in the Irish courts, where Irish and EU law will apply to the dispute, or alternatively in the CETA Tribunal under the terms of CETA. The contention of the appellant is that, if the investor brings its dispute to the CETA Tribunal, the dispute is removed from the jurisdiction of the Irish courts and Irish law will no longer apply to the dispute. It points out that, unlike awards of the European Court of Human Rights, awards of the CETA Tribunal must be recognised and enforced as if they were awards of the Irish courts. Thus, it is contended that by ratifying CETA the government would effectively disregard the separation of powers enshrined in the Constitution, fetter and usurp the power of the Oireachtas to legislate for the State, and transfer to CETA the power to administer justice in respect of disputes arising within the territory of the State. It is contended, therefore, that the government intends to abdicate, alienate, subordinate and dispose of the sovereign powers of the People. At the heart of the appellant's case is the contention that only the Oireachtas may make laws for the State which apply within the territory of the State and only the Irish courts may administer justice in respect of disputes arising within the State. The appellant points out that he does not contend that CETA will form part of the domestic legal system. He then claims that the respondents have not disputed that the CETA laws, as they describe them, will apply within the territory of the State. It should be noted that this observation is challenged by the respondents in their submissions in circumstances where they had previously stated in their submissions before the High Court that CETA does not involve the making of laws applicable within the territory of Ireland. The respondents go on to point out that there is no such thing as "CETA laws", and that the use of this term merely serves to create confusion.

172. The respondents, for their part, maintain that CETA is not part of the domestic legal system, does not have direct effect in our legal system, and only creates rights and

obligations as a matter of international law, as was found by the trial judge at para. 90, where it was stated as follows:

“...I accept the argument made on behalf of the defendants that as an international agreement, CETA creates rights and obligations as a matter of international law but does not form part of or have direct effect in our domestic legal system. This is so not solely because of Article 29.6 of the Constitution but also because of the terms of CETA itself. In principle it should follow that entering into CETA is a constitutionally compatible exercise of executive powers as would be its ratification were it to be approved by the Oireachtas under Article 29.5.2 of the Constitution. Consequently, if ratified there would be no breach of Article 15.2.1 of the Constitution because the CETA rules do not apply in the territory of the State or of Article 34 because the CETA Tribunal, if it is administering justice, is doing so only at an international level and is not usurping the jurisdiction of the courts established under the Constitution within Ireland.”

173. I will consider this conclusion further in the course of this judgment.

Does CETA create laws for the State?

174. Article 15.2.1^o of the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas, and that no other legislative authority has powers to make laws for the State. The appellant contends that CETA is in breach of Article 15.2, in that it makes laws for the State. Even though it is accepted by the appellant that CETA will not form part of the domestic legal system, and will only apply at an international level, nevertheless it is contended that the CETA Tribunal will determine disputes against the State which are enforceable within the State, in contrast to other treaties which are said to operate solely at an international level and have no domestic effect. In

truth, the appellant places great reliance on the fact that, if an award is made against the State by the CETA Tribunal, it can be enforced within the State. The position under CETA is contrasted with the position that applies to awards made by the European Court of Human Rights. If a person recovers damages against Ireland from the ECtHR, the award is not enforceable here or elsewhere.

175. Reference was made to the decision in the case of *JMcD v. PL* [2010] I.R. 199, where Murray C.J. made a number of observations as to the role of the European Convention on Human Rights. He noted, at para. 27, as follows:

“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.

...

[31] The European Court of Human Rights 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. This is so even though a contracting state may be in breach of its obligations under Article 13 if it fails to ensure that everyone whose rights and freedoms as set out in the Convention have any effective remedy for their breach by the state.

...

[35] Thus contracting states may in principle, so far as the effect of the Convention at national level is concerned, ignore the decisions of the court. They do of course have an express obligation under the Convention itself to abide by any judgment of the Court (article 46.1).

...

[36] It is in the context of the foregoing perspective of the Convention that an international instrument binding on states as a matter of international law at international level rather than national level that this court has held, at least prior to the coming into force of the European Convention on Human Rights Act 2003, could not be invoked by an individual as having a normative value or a direct legal effect in Irish law.”

176. As Murray C.J. went on to point out, at para. 37, as a result, “no claim could be made before a court in Ireland for a breach as such of any provision of the Convention. To admit such a claim would have been to treat the Convention as directly applicable in Irish law.”

As he pointed out, that remained the position save in respect of a claim against an “organ of the State” as defined in s. 3 of the Act, or a claim for a declaration of incompatibility pursuant to s. 5 of that Act.

177. Essentially, the point is made that, even if the obligations to an investor arise under an international agreement, and are not part of the domestic legal system, the awards of CETA will be enforceable in Ireland through the Irish courts, a position which is not the same as the position that arises under the ECHR, as the awards of the ECtHR are not enforceable. In that sense, it is said, that the ECHR is a truly international agreement, but that cannot be said of CETA. It is said that the rights of private citizens and obligations of the State set out under the ECHR, not being enforceable in Ireland, do not attain the status of law.

178. A number of further points were made by the appellant in relation to the removal of disputes from the Irish courts. Essentially, the point made is that the ratification of CETA means that disputes arising within the territory of the State, against the State, will be litigated before the CETA Tribunal instead of the Irish courts, applying CETA provisions rather than Irish law. Therefore, it is contended that CETA trespasses on, and usurps, the jurisdiction of the Irish courts and the powers of the Oireachtas without becoming part of the domestic legal system, contrary to the sovereignty asserted by the People through the Constitution. I propose to deal separately with the issue as to whether or not CETA does, in fact, usurp the jurisdiction of the Irish courts as contended.

179. The respondents for their part point out that CETA expressly provides that the rights created under CETA arise under public international law and cannot be directly invoked in the domestic legal system (see Article 30.6.1 of CETA referred to above). It is said that CETA, a trade agreement, does not create laws for the State. The respondents say that the appellant has confused domestic law with public international law. They also make the point that the appellant has failed to explain how the arguments in this case can explain the views expressed in *Pringle*, as to the entry into various treaties including trade agreements (see, for example, para. 316 of O'Donnell J.'s judgment in that case). The respondents make the case that it is important to consider the use of the phrase "*laws for the State*" in Article 15.2.1°, and what it does not mean. They contend that the manner in which the trial judge dealt with this issue at para. 91 of her judgment as to what "*law*" entails is sufficient to explain what is meant by the phrase "*laws*". In her judgment, Butler J. said:

"... it is probably appropriate to note that the arguments made by the plaintiff under Article 15.2 of the Constitution to the effect that the CETA rules constitute "laws" which will have effect in Ireland and that the CETA Joint Committee has a power to make decisions which will have legal effect in Ireland, are fully answered by both the

above analysis and the observations made at paragraphs 62 and 63 of this judgment. Whilst it has proved surprisingly difficult for academics and philosophers to define exactly what is meant by “law”, the legislative context of Article 15 of the Constitution assumes some element of general application and enforceability of the rules to be made by the elected representatives of the People. In that context it is integral to the notion of a “law” that it is directly effective in our legal system and capable of being recognised by our courts. Article 30.6 of CETA precludes its terms from having any direct effect in the domestic legal systems of the parties and precludes its invocation before the courts of the parties. Thus, as neither CETA itself nor any decisions taken by the CETA Joint Committee have legal effect in Ireland they cannot be characterised as “laws for the State” made in breach of the exclusive law-making power of the Oireachtas under Article 15.2.”

As I have said, the respondents rely heavily on that passage to support their arguments.

180. Further reliance is placed by the respondents on the observations of O’Donnell J. in the case of *Barlow v. Minister for Agriculture* [2017] 2 I.R. 440, at paras. 35 to 36, where he stated:

“If there is a dispute as to compliance with any treaty, convention, agreement or even arrangement between this State and another country, then that is a matter to be resolved at the level of international law.

In many cases however, the terms of an international agreement, to use the broadest term, may require implementation in domestic law. In a dualist system however, an international agreement may bind the State at the level of international law, but it has no impact within the State unless implemented by domestic legislation. If not implemented or imperfectly implemented, that may mean that the State is in breach of

its obligations at the level of international law, but that does not itself give rise to any duties or liabilities at the level of domestic law.”

181. The respondents go on to refer to the precise terms of Article 29.6 of the Constitution. It is argued, relying on that, that as there is no statute passed in relation to CETA, nothing is, or can be, incorporated into domestic law, and the Oireachtas’s constitutional function to make laws for the State is not usurped. One of the points made by the respondents is that the appellant in his submissions places particular emphasis on the fact that an award made by a CETA Tribunal would be enforceable in Irish law by virtue of the provisions of the Arbitration Act, 2010. The appellant has distinguished the position under CETA with that which applies in relation to the ECHR which, as has been seen earlier, are not enforceable in the State.

Observations

182. At this stage, it would be helpful to make some general observations. At a general level, it is argued by the respondents that CETA is an international agreement which operates at the level of international law, is not part of the domestic legal system and, therefore, cannot have any impact on Ireland’s sovereignty, either by reference to the powers of the State under Article 15.2, or Article 34 of the Constitution. It is not disputed by the appellant that CETA will not form part of the domestic legal system, but it is disputed that it will only apply at an international level. What makes CETA different from other international treaties, according to the appellant, is that an individual investor will be able to enforce an award within the jurisdiction of the State. It is claimed that CETA makes laws for Ireland, insofar as it creates rights and obligations within Ireland. There is no doubt that Article 30.6 of CETA expressly provides that the terms of CETA are precluded from having direct effect in the domestic legal system of the State. However, it is also the case that CETA

provides at Article 8.10 that the State, “*in its territory, shall accord to investors fair and equitable treatment ...*”.

183. Does this mean that CETA rules are binding in the State without being incorporated into national law? I think that the answer to this question must be yes, in a general sense. Once Ireland has ratified CETA, it is bound by its terms and a breach of its terms could give rise to an award made by a CETA Tribunal.

184. Does the fact that such an award is enforceable within the State mean that there is a breach of Article 15.2 of the Constitution? The argument of the appellant in this regard is somewhat circular. It is said that because the award would be enforceable within Ireland, CETA is a law applying within the State and thus is, in reality, a part of domestic law, although not made by the Oireachtas. Reliance is placed on Article 29.6 of the Constitution in this regard. Reference was also made to some observations of Clarke J. in *Conway v. Ireland & The Attorney General* [2017] 1 I.R. 53, at para. 8, where it was said:

“To allow the Government to change the domestic law of the State by means of an international treaty would, in effect, be to permit the Government to legislate by the backdoor without reference to the Oireachtas.”

185. The point, however, it seems to me, is that CETA rules are not part of the domestic legal system and cannot be invoked before the Irish courts. That they create rights and obligations so far as the State is concerned cannot be in issue. The point is that CETA, *per se*, does not change the domestic law of the State. The fact that enforcement can occur in Ireland by means of the national courts does not, in my view, alter this fact. CETA provides for the method of enforcement by the means set out in Article 8.41, to which reference has been made previously, and which provides for enforcement by reference to the New York Convention and the ICSID Convention, as set out previously. The Arbitration Act, 2010 has provided that the New York Convention and the ICSID Convention, (subject to certain

provisions set out in s. 25 of the 2010 Act), have the force of law in the State. It is the combination of Article 8.41 of CETA and the provisions of the 2010 Act that render awards made by a CETA Tribunal enforceable within the State. Absent the Act of 2010, there would be no mechanism to enable an award of the CETA Tribunal to be enforceable within the State. This position is clearly in contrast with the position that pertains in respect of awards of the ECtHR which are not enforceable within the State.

186. It is evident that both CETA and the ECHR create rights and obligations within the State. While the ECHR is concerned with the protection of human rights, and CETA is concerned with the protection of investors, the difference between the two provisions relied on by the appellant is the lack of enforcement in respect of decisions of the ECtHR as contrasted with the method of enforcement available in respect of CETA awards. The fact that such an award may be enforceable within the State does not, in my view, mean that CETA is making laws for the State and thus trespasses upon the constitutional powers of the Oireachtas.

187. I have discussed at length previously in the context of sovereignty a number of decisions of this Court and, in particular, the decisions in *Crotty* and *Pringle*. I do not propose to reiterate what was said in those cases now. However, as has been seen from the discussion in relation to those cases, they deal extensively with the constitutional power of the Executive to enter into treaties. There are, of course, limits on the exercise of such powers in relation to the applicability of such treaties so far as the domestic law of the State is concerned. As was noted previously, this State has entered into many such treaties. Investment trade agreements have been part of the international business world for many years. In the context of the EU, the possibility of entering into such agreements has been permitted by the Treaty of Lisbon. Each treaty, be it an investment treaty or otherwise, entered into by the State involves some element of give and take. There cannot be benefits

for one party without benefits for the other. Such agreements may create obligations for the State. Disputes may occur, and it is not surprising therefore that mechanisms will be created for the purpose of resolving such disputes. Thus, to give one example, having agreed to sign the ECHR, Ireland has put itself in the position that, if a dispute arises over an alleged breach of the Convention, the party concerned may bring Ireland to the European Court of Human Rights and, if a breach is found, an award can be made. The fact that the award may not be enforceable is neither here nor there. Rights and obligations have been created under the ECHR, just as they will be under CETA. The fact that enforcement can take place within the jurisdiction does not make CETA part of domestic law and, to that extent, I agree with the views of the trial judge as expressed in para. 90 of her judgment in relation to whether or not CETA amounts to a breach of Article 15.2.1°.

The CETA Joint Committee

188. Before leaving the question of whether CETA is a breach of Article 15.2 of the Constitution, I wish to examine a further argument made by the appellant in relation to the role of the CETA Joint Committee. The point was made that, even if CETA in its current terms was not a breach of Article 15.2.1°, the fact that the CETA Joint Committee was, by means of Article 8.10.3, empowered to review the content of the obligation to provide fair and equitable treatment and to make a decision to give effect to recommendations in this regard is said to amount to a breach. It was suggested by the appellant that any such decision must be agreed between Canada and the EU, and the point was made that Ireland would be bound by any such decision. Equally, a complaint was made as to the interpretative role of the Joint Committee, and it was argued that such powers amount to the power to create and amend laws. Finally, reference was made to the terms of Article 8.29 in relation to the creation of a Multilateral Investment Tribunal, and it was contended that the trial judge erred

when she concluded that further consent from Ireland would be required in order to establish the MIT.

189. The respondents in submissions made the point that, insofar as interpretations of the agreement were concerned, Article 8.44.3 provides:

“The Committee Services and Investment may, on agreement of the Parties, and after completion of their respective internal requirements and procedures:

(a) recommend to the CETA Joint Committee the adoption of interpretations of this Agreement pursuant to Article 8.31.3;

.....

(d) recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article 8.10.3.”

190. The first point made by the respondents is that it was wrong to suggest that only Canada and the EU, to the exclusion of the Member States, could be involved in making recommendations to the CETA Joint Committee on questions of interpretation and the adoption of further elements of the fair and equitable treatment obligation. This is clearly correct, as the definition of parties in CETA provides that parties mean the European Union or its Member States, on the one hand, or the European Union and its Member States within the respective areas of competence and, on the other hand, Canada. The respondents take issue with the use of the term “*laws*” by the appellant in this context and make the point that any recommendations made in respect of changes to the definition of fair and equitable treatment can only be made on the agreement of the parties. It is said that this does not involve any breach of Article 15.2.1°. So far as the issue in relation to the MIT is concerned, it is pointed out that the obligation under Article 8.29 is “*to pursue*” the MIT’s

establishment. Second, it is apparent that no new jurisdiction can be conferred on the MIT, as it can only adjudicate “*investment disputes under this section*”. What is provided for by the provision is transitional arrangements in the event that an MIT is established. Thirdly, it is contended that the establishment of the MIT would be, in effect, similar to the establishment of the Court of First Instance in the Court of Justice, as was an issue in *Crotty*, and that no further constitutional issue would be created by the establishment of the MIT, just as no further constitutional difficulty was created by the establishment of the Court of First Instance discussed in *Crotty*. The trial judge rejected the arguments of the appellant in this regard (see para. 91 to 93 of the judgment). At para. 91, the trial judge comments succinctly that:

“Thus, as neither CETA itself nor any decisions taken by the CETA Joint Committee have legal effect in Ireland they cannot be characterised as “laws for the State” made in breach of the exclusive law-making power of the Oireachtas under Article 15.2.”

191. For my part, I agree with her conclusions. I am not convinced that the role of the CETA Joint Committee in relation to Article 8.10 or in any other respect such as the adoption of recommendations on interpretation, as provided for in Article 8.44.3 amounts to the making of laws for the State. In each case, any decision can only be made following a recommendation which, in turn, can only be made on the agreement of the parties. I cannot see how any such interpretation of CETA can amount to the making of laws for the State. The job of interpretation of CETA must surely be lodged within the bodies established by CETA itself, including the CETA Tribunal, the Appellate Tribunal, and the Joint Committee, which only acts on recommendations of other committees and on agreement by the parties. It is inevitable that the terms of any agreement such as CETA, in common with any piece of domestic legislation will require interpretation. The job of interpretation is that of the CETA Tribunal in the first instance and thereafter, the Appellate Tribunal. The CETA

Joint Committee has a role, as well, as has been seen, to provide interpretative decisions but only within defined parameters. I fail to see how this can be characterised as creating laws for the State.

192. Insofar as the issue of the MIT is concerned, I note that the obligation contained in Article 8.29 is to pursue the establishment of a Multilateral Investment Tribunal for the resolution of investment disputes and that, once established, investment disputes will be decided in the multilateral mechanism. However, the point is that, as was noted by the trial judge at para. 122 of her judgment, the establishment of an MIT could only be done by way of further international agreement. I agree with her conclusion in that regard, and for that reason the obligation to pursue the establishment of an MIT does not, in and of itself, establish an MIT. In my view, as the learned trial judge observed, that can only be done by way of further international agreement. Thus, in that regard, it seems to me that, once more, the appellant has not established that there is any breach of Article 15.2.1° by reference to the provisions of Article 8.29 of CETA.

193. Therefore, for the reasons I have referred to above, I am not satisfied that CETA is an interference with the sovereignty of Ireland by reference to the provisions of Article 15.2 of the Constitution.

A Breach of Article 34?

194. Article 34.1 of the Constitution provides as follows:

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

195. The administration of justice, as understood by Article 34.1, is a concept which has been the subject of much litigation and discussion, starting with the case of *Lynham v. Butler* (No. 2) [1933] I.R. 74, which considered the precursor of Article 34.1, namely, Article 64

of the Irish Free State Constitution of 1922. The concept has been further considered in cases such as *The State (Shanahan) v. Attorney General* [1964] I.R. 239 and, perhaps more notably, in *McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217, a decision which has been the basis of much of the discussion on this subject over the years on what is or is not the administration of justice, culminating in the recent case of *Zalewski v. WRC & Others* [2021] IESC 24.

196. If the CETA Tribunal and the Appellate Tribunal are involved in the administration of justice, as that term is understood in the context of Article 34.1, then it would seem to follow that CETA is a breach of Article 34.1, in that the administration of justice by the CETA Tribunal is not in “*a court established by law by judges appointed in the manner provided by this Constitution.*”

197. It would be useful to embark on a discussion of this aspect of the case by setting out the role of the courts from the point of view of the sovereignty of the State. This was described by Kennedy C.J. in *Lynham v. Butler (No. 2)* at page 99 of the judgment, in the following terms:

“In the first place, the Judicial Power of the State is, like the Legislative Power and the Executive Power, one of the attributes of sovereignty, and a function of government. ... It is one of the activities of the government of a civilised state by which it fulfils its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over person and property. The controversies which fall to it for determination may be divided into two classes, criminal and civil. In relation to the former class of controversy, the Judicial Power is exercised in determining the guilt or innocence of persons charged with offences against the State itself and in determining the

punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of the Executive Department of Government to carry into effect. In relation to justiciable controversies of the civil class, the Judicial Power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens and the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in asserting or resisting claims alleged or denied.

It follows from its nature as I have described it that the exercise of the Judicial Power, which is coercive and must frequently act against the will of one of the parties to enforce its decision adverse to that party, requires of necessity that the Judicial Department of Government have compulsive authority over persons as, for instance, it must have authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property.”

198. At issue in that case was the status of the Land Commission, and whether or not it was engaged, in the course of its operations, in the administration of justice. Ultimately, it was held that the Land Commission was not engaged in the administration of justice.

199. The straightforward proposition put forward by the appellant is that, in any case where a justiciable dispute arises in Ireland, Article 34 requires that any such dispute must be determined by the Irish courts, and Article 34 must be understood as prohibiting anybody, other than the Irish courts, from administering justice by resolving any such dispute. Relying

on the decision in *Crotty v. An Taoiseach*, the point is made that ceding judicial power to a body outside the State (in that case the European Court) required constitutional authorisation (see para. 770 of the judgment therein). It will be recalled that in that case it was found, *inter alia*, that the possible establishment of a Court of First Instance which would be subject to appeal to the European Court of Justice did not require a further constitutional amendment, given the extent to which judicial power under the Constitution had already been ceded to the CJEU by previous constitutional amendments. Obviously, a question is raised in this case as to what is meant by “the administration of justice”. It is the appellant’s case that the resolution of disputes by the CETA Tribunal involves the administration of justice as that term is understood in Irish constitutional law, while the respondents disagree with that proposition.

200. Much of the discussion in this context focused on the judgment of this Court in the case of *Zalewski*, referred to above, and the application in that case of the five limbs of the test as to what is or is not the administration of justice as set out in *McDonald v. Bord na gCon*. It will be recalled that in that case Kelly J. in the High Court identified what were described as the “*characteristic features*” of the administration of justice, as follows:

- “(i) *a dispute or controversy as to the existence of legal rights or a violation of the law;*
- “(ii) *the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;*
- “(iii) *the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;*
- “(iv) *the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;*

(v) *the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.*”

201. In *Zalewski*, there was no disagreement between the parties to that case that the first three limbs of the test were fulfilled by the WRC. It is contended by the appellant in this case that those three limbs are likewise fulfilled by the CETA Tribunal. O’Donnell J. in his judgment, at para. 94, observed:

“The first, second, and third features are closely related since they identify a dispute about legal rights, its resolution, and determination. The fourth is a logical extension of the third, since the resolution of the dispute must not be dependent upon the agreement of the parties but must be capable of enforcement in cases of refusal of the losing party to comply.”

202. He expanded on this at para. 105 of the judgment, where he stated:

“An unsuccessful party who had received an adverse decision from the W.R.C. would, I think, consider themselves in no different a position to a party emerging from the District Court or Circuit Court having lost a case. They would consider that, unless appealed, they would have to comply with the decision, and nearly all would. ... A losing party would know that if they did not comply of their own volition, they could be forced to do so by the power of the State. Most importantly of all, they would know that the legal consequences of their actions had been determined and that, unless appealed, that determination was the definitive decision by a body provided by the State and backed by it and which, as a matter of law, had determined their rights and responsibilities in respect of the matter in dispute. ...”

203. The circumstances of the enforcement mechanism provided for in respect of the WRC allowed a successful party to pursue the losing party by means of an enforcement procedure

provided through the District Court. However, the form of enforcement was one which gave the District Court little or no discretion as to the enforcement of an award of the WRC. The appellant makes the point that the position in relation to the enforcement mechanisms of an award of the CETA Tribunal is that it is enforceable depending on the manner in which the investor brings the case to the CETA Tribunal under either the New York Convention or the Washington Convention, which have been given force of law in Ireland by the Arbitration Act of 2010, as previously noted. In that context, the trial judge observed at para. 149 of her judgment as follows:

“Even accepting the potential existence of some limited and undefined grounds upon which a court might refuse to enforce a Washington Convention award, it is difficult to see a substantial difference between the enforcement mechanisms at issue in Zalewski and those under s. 25 of the Arbitration Act, 2010. Logically, if there is a residual discretion vested in the High Court to refuse enforcement of an award under the Washington Convention on constitutional grounds, then the same residual discretion must exist in respect of the enforcement of WRC determinations. Of course, as the application to enforce a WRC determination was made without notice to the party against whom enforcement was sought, there would be nobody before the court to seek the exercise of such discretion. Further, the availability of an appeal to the Labour Court and of judicial review of a WRC determination (as had occurred in Zalewski itself) would no doubt mean that the need to invoke a residual discretion to refuse enforcement on constitutional grounds would almost never arise. However, in terms of the issues under discussion in O’Donnell J.’s judgment, the difference between the two enforcement mechanisms is at best marginal. In both cases, enforcement is almost automatic and the losing party would know that if they did not comply with the award of their own volition, they could be forced to do so by power of the State.”

204. It was on that analysis that the trial judge concluded that the exercise of jurisdiction by the CETA Tribunal does, “*in principle, involve an administration of justice*”. She went on to conclude that the award was, for all practical purposes, enforceable (see para. 150). One final issue considered in the context of the question of enforceability was a contrast between the ECtHR and the award that could be made under CETA. It was argued by the appellant that an award from the ECtHR is not enforceable and, as such, does not come within the *McDonald v. Bord na gCon* test as to the administration of justice. The argument made on behalf of the appellant was that the European Court of Human Rights, in making unenforceable awards, does not administer justice at all. I will return to that argument shortly.

205. Essentially, the appellant makes the case that from the point of view of the first four limbs of the test in *McDonald v. Bord na gCon*, the CETA Tribunal and its Appellate Tribunal meet the criteria laid down in the first four limbs of the test.

206. So far as the fifth limb of the test is concerned, the appellant relies on an observation of O’Donnell J. in considering the novelty of a new provision:

“I think this feature is best understood in a broader sense and as emphasising the importance of the existing jurisdiction of the courts, and that any provision subtracting from that jurisdiction, or creating a parallel jurisdiction which might render the courts’ traditional jurisdiction defunct, is one which should be closely scrutinised by the courts for compatibility with the Constitution. A distinctive feature of the courts system established by the Irish Constitution is that there is no structural distinction between administrative courts and the ordinary courts.”

207. Not surprisingly, the appellant places emphasis on that part of the passage in which O’Donnell J. spoke of provisions creating a parallel jurisdiction that might render the courts’

traditional jurisdiction defunct. It is argued, in that context, that the CETA Tribunal amounts to a parallel jurisdiction, and a clear subtraction from the jurisdiction of the Irish courts.

208. The point is made that a Canadian investor who has a complaint against the State in respect of an alleged interference with his property rights in relation to an investment in Ireland could bring proceedings against the State in the courts of this jurisdiction and could, if appropriate, recover damages here from the courts which would be enforceable in the same way as any other judgment of the courts of this jurisdiction. The appellant makes the point that there is no material difference between the rights protected in Irish law, and the protections conferred on the Canadian investor by CETA. In fairness, it is difficult to disagree with that contention. The point, however, is that, as the appellant has said, the choice of venue for the resolution of any such dispute will be at the election of the investor. It should be noted, in this context, that Article 8.22(1)(f) and (g) require an investor who wishes to submit a claim to the CETA Tribunal to withdraw or discontinue a claim before a court under the domestic law of that state with respect to a measure alleged to constitute a breach referred to in its claim, or if no such proceedings have been commenced, the investor must waive its right to initiate such a claim. No doubt, it would also be possible for the dissatisfied investor to submit a claim to the CETA Tribunal if it was contended that a decision of the Irish courts in proceedings brought by a Canadian investor was in itself a breach of CETA.

209. It is undoubtedly the case, therefore, that there is an identity of purpose between any such proceedings arising from an alleged breach of the investor's property rights, be it proceedings under Irish law in an Irish court, or proceedings before the CETA Tribunal under the rules of CETA. This issue was considered at para. 152, *et sequendi*, by the trial judge where she observed:

“Justiciability is a difficult concept. It refers to the extent to which a dispute is capable of being decided judicially in accordance with law. Consequently, justiciability is not necessarily inherent but can depend on the extent to which the law has intervened to create or to recognise rights and liabilities which may then fall to be adjudicated on in accordance with law. The fact that a dispute is of such a nature that common sense would suggest it should be capable of judicial determination, does not mean that the courts will necessarily have jurisdiction to determine it. Justiciability may have a territorial aspect. A dispute about a contract made under German law between German undertakings, a breach of which occurred in Germany is not justiciable before the Irish courts, not because the dispute itself is inherently non-justiciable but because the law under which it is to be determined is not that applicable to, nor that applied by, the Irish courts.”

210. She went on to say, having referred to the full original jurisdiction of the High Court under Article 34.3.1° of the Constitution, as follows:

“However, that jurisdiction although full is not unlimited. The Irish Constitution does not and, indeed, could not confer on the Irish courts jurisdiction over disputes occurring outside of Ireland and which do not arise under Irish law. Thus, the defendants’ submission that international law is non-justiciable unless expressly made so by the Oireachtas is, in my view, correct. The disputes to be determined by the CETA Tribunal are non-justiciable, not because they are inherently incapable or unsuited to judicial resolution but because the Irish courts do not have jurisdiction to apply the law to which they are subject. The administration of justice referred to in Article 34.1 of the Constitution and entrusted to the Irish courts is necessarily territorially limited to the resolution in Ireland of disputes under the law created by or under the Constitution. This includes the law as enacted by the Oireachtas or, by virtue of Article 29.4, the EU

institutions and the law carried forward pursuant to Article 50 of the Constitution. It does not include the terms of an international treaty such as CETA which has not been given force of law in the State. My conclusions in this regard are similar to those reached by the CJEU in the Belgian Opinion 1/17. Even though there are significant differences between the EU legal order and the Irish Constitution, the fact that CETA is expressly framed so as not to have direct effect within the legal systems of the parties and the fact that the CETA Tribunal is separate from and outside the judicial systems of the parties means that disputes arising under CETA which the CETA Tribunal may determine are non-justiciable as a matter of Irish law.”

211. The appellant contends that this conclusion is not correct. Relying on an observation of Kennedy C.J. in *Lynham*, where he cited with approval the opinion of the United States Supreme Court in *Kansas v. Colorado* [1907] 206 US 46, judicial power “*must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties*”. It is said, therefore, that if bodies other than Irish courts were permitted to administer justice in respect of justiciable disputes arising in Ireland, and have their determinations enforced as if they were judgments of the High Court, this would fundamentally undermine the rule of Irish law in Ireland. Further, it is noted by the appellant that the fact that a claim to the CETA Tribunal precludes any claim before the Irish courts is an illustration of the fact that the respective processes occupy the same ground and are both justiciable.

212. The respondents take the view that the provisions of CETA are not captured by the test set out in *McDonald v. Bord na gCon*. In the first place, they make the point that it is not any “*dispute or controversy*” that can satisfy the first limb of the test. They say that there must be a controversy of a justiciable nature, as that term was used in *Lynham v. Butler*. But they say that disputes under CETA are not justiciable within that meaning, because the Irish

courts do not have jurisdiction over disputes which do not arise under Irish law. In this regard, they rely on a comment of the trial judge at para. 152, which is set out above. They point out that the jurisdiction of CETA is limited by Article 8.31, which makes it clear that CETA applies at an international level. It does not create “*legal rights*” under national law. Further, the respondents point out that, according to Article 8.31.2, the Tribunal has no jurisdiction to “*determine the legality of a measure ... under the domestic law of a Party*”. Reliance is also placed by the respondents on the fact that the decision by an investor to pursue its claim in the CETA Tribunal is a matter of choice. If preferred, the Canadian investor can choose to bring proceedings in the Irish courts. It is pointed out that, in doing so, the Irish courts would not apply the provisions of CETA. Thus, in practical terms, an investor has two options, either to bring proceedings in the Irish courts, or to avail of the possibility of making a claim to the CETA Tribunal. In essence, the respondents say that the first limb of the test set out in *McDonald* is not met, because the legal rights at issue before the CETA Tribunal are those created by CETA and are not the same as those that would apply in domestic law, and further that the Irish courts have no jurisdiction to apply the provisions of CETA in any dispute before the Irish courts.

213. So far as the second and third limbs of *McDonald* are concerned, the respondents reiterate the point that the CETA Tribunal will not determine any rights/liabilities under Irish law, but only under CETA itself. The point is made that the CETA Tribunal could not, and would not, determine any matters of law, but can only make decisions based on the terms of the Agreement. Thus, it is contended that the second and third limbs of CETA are not met.

214. Turning to the fourth limb of the *McDonald* test, relating to enforcement, the respondents emphasise the requirement that an award made by the CETA Tribunal requires an order of the High Court for the purpose of enforcement. They contrast the position in

relation to enforcement of an arbitral award with the role of the District Court in enforcing an award of the WRC, as was considered in the case of *Zalewski*, referred to above. In that case, it was stated, at para. 103, by O'Donnell J. as follows:

“The question of enforceability of a decision is, indeed, a significant clue to its legal nature, since a decision which depends for its enforcement on the agreement of the parties, or on the decision of another body (indeed, a court) which can, moreover, decide whether or not to enforce it depending on whether it is, itself, satisfied that the decision is correct is a significant distance from the type of automatic enforceability a litigant achieves when they succeed in court.”

215. Reference was made by the respondents to the provisions of the New York Convention, which provides:

“Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that:

...

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

216. The question of enforcement under the Washington Convention/ICSID is not so clear cut. Reference was made in that context to the decision in the case of *Micula v. Romania* [2021] W.L.R. 1033, a decision of the UK Supreme Court. It was suggested, arising from the decision of the UK Supreme Court in that case, that, although there may not be an express defence to enforcement as such, that this could be understood from the terms of the Washington Convention. The joint judgment of Lords Lloyd-Jones and Sales noted at para. 73 as follows:

“The fact that the specific qualification of the obligation to enforce an award like a final court judgment relating to state immunity was expressly dealt with in article 55 for the avoidance of doubt indicates that article 54(1) was itself understood to have the effect of allowing the possibility of certain other defences to enforcement if national law recognised them in respect of final judgments of local courts.”

Thus, the respondents contend, contrary to the views of the appellant, that enforcement of an arbitral award under CETA would not be “*almost automatic*”.

217. There is no doubt that there is a difference between the enforcement of an arbitral award under the New York Convention and an award under ICSID, in terms of the defences available. However, the respondents emphasise the fact that, under the terms of the 2010 Act, leave is required from the High Court before the award can be enforced, and the suggestion is made that the requirement for leave involves the possibility that enforcement would not necessarily be automatic. The argument is made that, if the High Court was called upon to enforce an award under ICSID, which gave rise to a significant constitutional difficulty, the High Court would refuse “*leave*”. However, as the respondents accept, it is difficult to envisage how that situation could arise, particularly in the light of the fact that an award from the CETA Tribunal would, in effect, be in respect of monetary relief. Essentially the respondents say that the appellant is wrong to characterise the enforcement process as almost automatic.

218. The respondents then dealt with the fifth limb of the *McDonald* test, which concerned “*the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country*”. It is suggested that there is no basis whatsoever upon which this test could be satisfied. The point was made that the adjudication of disputes under an international trade agreement could never have been characteristic of the courts of this country, or indeed, as it is said, of any country, because the enforcement mechanisms under

such trade agreements are intended to be forum neutral. The respondents rely on *Opinion 1/17* where it was said, at para. 200, “*the independence of the envisaged tribunals from the host State and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade that is stated in Article 3(5) TEU and that is pursued by the CETA.*”

219. Insofar as the appellant relies on para. 95 of the judgment of O’Donnell J. in *Zalewski*, where he discussed the concept of subtracting from the jurisdiction of the courts, or indeed rendering defunct the Irish courts’ jurisdiction, the respondents point out that the CETA Tribunal is prohibited from applying Irish law, other than as a matter of fact; secondly, it only applies CETA , and, thirdly, CETA cannot be applied or invoked by the Irish courts because CETA expressly provides that it is not capable of being invoked in domestic law.

220. In this context, it is interesting to look again at the views of the trial judge as to the question of whether or not the creation of the CETA Tribunal amounts to a subtraction of jurisdiction from the Irish courts. She said as follows at para. 155:

“155. Equally, the fact that a Canadian investor may choose to make a claim under CETA rather than to frame a claim under Irish law does not represent a subtraction of jurisdiction from the Irish courts. In the context of international business, litigants will frequently have a choice of jurisdiction in respect of any disputes which arise. Under EU law, these issues are governed by the Brussels Regulation 1215/2012 (also called the Recast Regulation). The fact that a litigant may opt to sue in the jurisdiction of one state in preference to suing in another does not, in my view, mean that there has been a subtraction of jurisdiction from the courts of the state which will not be determining the dispute. I do not accept that Article 30.6 of CETA is either a legal fiction or a stratagem designed to remove CETA and disputes under CETA from the domestic courts, as suggested by the plaintiff. ...

156. *For all of these reasons, in my view, if CETA is ratified, the creation of the CETA Tribunal and the conferral of jurisdiction on it to resolve investment disputes is not an unconstitutional alienation of the judicial power of the State. Although the task to be carried out by the CETA Tribunal can, in principle, be characterised as an administration of justice, it is not the administration of justice under Article 34 of the Constitution as the disputes over which it will have jurisdiction are not justiciable under Irish law even where the State is involved as a party. The jurisdiction to be exercised by the CETA Tribunal exists at the level of international law and, thus, does not reduce the power of the Irish courts to administer justice in the State.”*

An overview of the arguments in relation to McDonald v. Bord na gCon

221. Broadly speaking, I agree with the conclusion of the trial judge that the work to be carried out by the CETA Tribunal is the administration of justice. I fail to see how it could be described as anything else. Whether or not it can be characterised as the administration of justice within the meaning of Article 34 of the Constitution is another issue, and one which is at the heart of this aspect of the case. If it does come within Article 34 of the Constitution, then I cannot see how CETA could operate in compliance with the terms of the Constitution, without a referendum conferring jurisdiction on the CETA Tribunal.

222. I have to say that I find it somewhat difficult to view this case through the prism of *McDonald*, and the five-limb test set out in that case. The principal decisions in relation to Article 34, and its predecessor, concern domestic law bodies. *Lynham v. Butler* was concerned with the role of the Land Commission, *McDonald* was concerned with the role of Bord na gCon, and *Zalewski* was concerned with the WRC. It is difficult to equate a body such as the CETA Tribunal with a domestic body or tribunal, bearing in mind that the CETA Tribunal is an international body set up under an international treaty. Reference has been made to the power of the State to enter into international treaties previously in the course of

this judgment and to the number of such international treaties to which this State has become a party. In the case of a number of EU treaties, referendums have been necessary to give effect to the terms of the treaties. In some cases, international treaties have been given the force of law in the State, and in the context of this case, we have seen how international agreements, such as the New York Convention and the Washington Convention (ICSID), have been given force of law in the State by the 2010 Act.

223. The questions at issue in this case in relation to the power of the Executive to enter into international agreements, the effect of those international agreements on the sovereignty of the State, why some international treaties can be effective simply by being laid before Dáil Éireann, and why some involve an interference with sovereignty, such that a referendum of the People is required in order to give effect to such a treaty, and whether there are other parallels that can be of assistance in resolving the issues in this case, are all matters of great complexity. Given the complexity of issues in this case, the Court took the unusual course of posing a number of questions for the parties following the initial hearing of the case. Following the written responses to the questions, a further hearing took place to enable the parties to provide further submissions to the Court.

224. I do not propose to set out the questions and answers, or indeed the submissions in detail, but some description of the issues raised is necessary. The first question concerned the role of a bespoke arbitration agreement with a particular investor in similar terms as would apply to an investor under CETA, and whether such a bespoke agreement, assuming it could consider whether Irish law or measures were a breach of the arbitration agreement, and award damages enforceable in Ireland, could be an interference with sovereignty and a breach of Article 34. The respondents saw no particular difficulty with the concept of such a bespoke agreement. The appellant pointed out that any such agreement would be one based on mutual consent, defined by contract, relating to one State party only, and that any such

agreement would be temporally limited and would arise in the context of a private law dispute. This was contrasted with CETA where the investor may unilaterally elect to bypass the domestic courts in respect of any dispute arising under CETA, and they pointed out that the remedy sought under CETA against the State arise in the realm of public law. They contended that the State by entering into CETA was divesting itself in a generalised and forward-looking manner of what would be its sovereign Article 34 jurisdiction to determine public law disputes in its courts. They pointed out that the Executive cannot by resolution divest the Irish courts of the function and jurisdiction that they enjoy to determine public law disputes and to scrutinise the lawfulness of public measures, including Acts of the Oireachtas. It was accepted that investment issues arising from a contract where the State acts as a private party could be submitted to arbitration.

225. It seems to me that the most telling point made by the appellant in this context is that once CETA is ratified, Ireland is obliged, on a permanent basis, to submit to the jurisdiction of the CETA Tribunal at the option of the investor who has the freedom to decide whether to go down the route of pursuing the State in the Irish courts or submitting a claim to the CETA Tribunal. This is a significant difference between the position of parties acting by mutual consent to resolve a dispute arising from the terms of a specific contract.

226. Given that the objection to CETA was based on basic concepts of sovereignty, the question was posed as to whether the same objection should not arise in every other Member State and the EU itself, and in any other country that enters an investor agreement under a similar system? The respondents agreed that was so and pointed to the absence of any such judgments in Member States or elsewhere as being significant. They referred to the fact that in *Opinion 1/17* it was noted by the CJEU that “*Section F of Chapter 8 does not adversely affect the autonomy of the EU legal order*”. In response to this question, the appellant made the point that so far as the EU itself is concerned, the CJEU in an Opinion of Advocate

General Kokott in the case of *Republic of Poland v PL Holdings Sarl* Case C-109/20 ECLI:EU:C:2021:321 expressed the view that Member States may not remove disputes relating to the sovereign application of EU law and the EU judicial system. The appellant sought to extrapolate from that statement that similar objections could arise in other Member States in relation to concerns of Member States as to the compatibility of CETA with their constitutional framework. Reference was also made in that context to the fact that the Bundesverfassungsgericht, in dismissing certain complaints directed against the provisional application of CETA, made comments about the CETA Joint Committee, saying as follows:

“It may appear doubtful whether the level of democratic legitimation and oversight required under Article 20(1) and (2) is met regarding decisions of the CETA Joint Committee.” (BVerfG, Order of the Second Senate of 9 February 2022 - 2 BvR 1368/16 -, paras. 1-197 at para. 190)

227. Thus, the appellant contends there are question marks over the role of the Joint Committee. It appears that while some concerns have been raised as to the role of the Joint Committee, that issue has not yet been determined in Germany.

228. It should be noted before leaving this issue that the Bundesverfassungsgericht in its judgment on the provisional application of CETA made the observation at para. 191 in relation to the CETA Joint Committee as follows:

“Yet these concerns need ultimately not be resolved in the present case. The reservations laid down in declaration no. 18 and statement no. 19 to the Council minutes, which limit the scope of the Council Decision of 29 October 2016 on provisional application, rule out an encroachment on the principle of democracy. Firstly, in declaration no. 18 the European Commission provided assurances that the Commission does not intend to make any proposal under Article 218(9) TFEU with a

view to amending CETA or with a view to adopting a binding interpretation of CETA during the period of provisional application, at least not before the Federal Constitutional Court has rendered a final decision in this regard. Secondly, it follows from the drafting history and context of statement no. 19 that any position to be taken by the European Union and its Member States within the Joint Committee regarding a decision of said Committee must be adopted by common accord. This means that the consent of the German representative in the Council is required, which rules out the risk that the competences of the CETA committee system or its procedures will encroach on the Basic Law's constitutional identity ... during the stage of provisional application.”

229. Obviously, what occurs in the future in relation to CETA and the Joint Committee remains to be seen, but as yet there is no definitive decision in any other European court which has raised a concern as to compatibility with its country's sovereignty.

230. A series of questions were raised in relation to the issue of enforceability.

231. On the question as to whether CETA requires that awards be enforceable in the national legal systems, both sides are in agreement that this is required (see Article 8.41.2). In Ireland, the Act of 2010 will be applicable to the enforcement of an award. As to the possibility of an award being refused enforcement in Irish law under either the New York Convention or the Washington Convention, the respondents expressed the view that, given that awards can only be enforced with leave, the courts have discretion in relation to the enforceability of awards. Both are agreed that in relation to the New York Convention there is a public policy ground for refusal of awards. Further, it is noted that in relation to the Washington Convention both parties are agreed that the only circumstances in which enforcement could be refused are circumstances in which a final judgment would not be enforced if that was provided for by local law. So, for example, the situation that could arise

in a *Greendale* type application would similarly apply to the enforcement of an award under the Washington Convention. The appellant makes the point that, while a public policy exception is envisaged under the New York Convention, Kelly J., in the case of *Bröstrom Tankers AB v. Factorias Vulcano SA* [2004] 2 I.R. 191, noted at para. 28, that s. 9 of the 1980 Act provides a very restricted basis for refusing enforcement of a Convention award. He said at para 30:

“I am of the opinion that I would be justified in refusing enforcement only if there was (as is stated in Cheshire and North’s Private International Law, 13th ed.):

“Some element of illegality, or that the enforcement of the award would be clearly injurious to public good, or possibly that the enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public.”

31. This case comes nowhere near that position. There is no illegality or even suggestion of illegality nor are there any other elements even remotely demonstrated. I am satisfied that there is no aspect of Irish public policy which could justify a refusal of an enforcement order even assuming that all of the foreign legal questions are decided in favour of the defendant.”

I think it can be safely said that, as a matter of principle, it is clear that the courts in considering whether to grant leave to enforce an arbitral award will not do so on the basis of any issue as to the merits, and will only do so if the award is, in fact, in breach of public policy or an issue of the *Greendale* kind occurs. To that extent, it can be said, as discussed previously, that enforcement is “almost automatic”.

232. A further question raised was in respect of enforcement other than in Ireland, and it was pointed out by the appellant that insofar as the public policy defence arises under the New York Convention that it refers to the public policy of the state in which enforcement is

sought. This view was not disputed by the respondents. However, the respondents did raise an issue to the effect that some jurisdictions might raise a public policy issue in relation to foreign sovereign immunity from execution as part of their domestic law.

233. Again, both parties were broadly in agreement that enforcement could be sought in any country which was a party to either the New York Convention or the Washington Convention.

234. A question was raised as to whether or not Ireland would be bound irrevocably and permanently by CETA if ratified by all Member States and binding in the EU? From the point of view of the respondents it was noted that CETA was drafted with full knowledge of EU law, including the duty of sincere co-operation. It was suggested that Member States could denounce the agreement within their areas of competence. For their part, counsel on behalf of the appellant suggested that the duty of sincere co-operation would not permit Ireland to denounce CETA unless the CJEU concluded that its implementation was incompatible with EU law. Even in the event of termination, it was suggested that CETA would be effective pursuant to Article 39.2 for a period of 20 years. I have previously referred to *Opinion 1/19* of Advocate General Hogan in relation to the Istanbul Convention. It appears from that Opinion that it is possible to denounce or withdraw from an agreement. However, as pointed out by the appellant, there is a lengthy run-out period before the obligations under CETA would cease, notwithstanding withdrawal from the agreement.

235. A question was raised as to the extent of the duty of sincere co-operation, assuming that CETA is ratified by all Member States and is in force, as to whether or not the duty of sincere co-operation under Article 4(3) of TEU would impose an obligation on Irish courts to enforce CETA Tribunal determinations and override any residual potential judicial function under national law which might otherwise exist? The State respondents replied no to this question and pointed out that Article 4(3) applies as between the Union and the

Member States, but that the CETA Tribunal, not being an EU entity, does not benefit from Article 4(3). It points out that Article 8.41.4 of CETA provides that execution is governed by the law where execution is sought, recognising that enforcement may be refused. The appellant disagrees with that characterisation of the duty of sincere co-operation, and suggests that post-ratification, EU law, including the duty of sincere co-operation, would require Ireland to enforce CETA Tribunal awards in the manner envisaged by the Washington Convention. It was stated that no residual potential judicial function would arise, other than those that would arise under national law, such as *Greendale* type applications. Whilst the parties have disagreed in relation to the answer to this question, at the end of the day, it is clear from the previous discussion as to enforcement that, whatever about the duty of sincere co-operation, once the agreement is ratified then enforcement can take place within the jurisdiction in accordance with the provisions of the Act of 2010 and that the basis for resisting enforcement under either the New York Convention and/or the Washington Convention/ICSID are extremely limited as previously discussed.

236. An issue was also raised concerning the different outcomes in cases such as *Achmea, Micula v. Romania, Komstroy LLC v. Republic of Moldova*, all of which involved BITs which were found to be contrary to EU law and how was it that a different outcome was the result in respect of CETA as set out in *Opinion I/17*? The appellant observed that the case law is difficult to reconcile. Reference is made to what is described as a benevolent reading of CETA by the CJEU to conclude that it did not interfere with EU autonomy. That may be so but it is difficult to predict how the CETA Tribunal will manage its jurisdiction in the future and whether it would go beyond its jurisdiction so as to interfere with EU autonomy. For their part, the respondents make the point that, unlike the agreements in the cases referred to involving BITs, the provisions of Article 8.31.2 of CETA ensure that the CETA Tribunal does not have any role in resolving disputes relating to the

interpretation/application of EU law. I have already, in the course of this judgment, set out in some detail a description of the cases referred to above, and I think it can be seen that that appears to be a critical distinction between the BITs at issue and CETA. It will be recalled, for example, that in *Opinion I/17*, the CJEU distinguished its Opinion in that case with the investor agreement at issue in the case of *Achmea*, the point being that “*that agreement established a tribunal that would be called upon to give rulings on disputes that might concern the interpretation or application of EU law*” (see the discussion of those cases commencing at para. 117 of this judgment). It seems to me that the critical factor is the express finding by the CJEU in *Opinion I/17* that a decision of the CETA Tribunal does not interfere with EU autonomy.

237. The question was then asked as to whether Ireland has bound itself to accept as binding upon the State the determinations of other external bodies that do not fall within the Irish courts system; so far as the appellant is concerned, the response was that the only similar treaty to which Ireland is a party is the Energy Charter Treaty (“ECT”). The appellant stated that in the case of *Republic of Moldova v Komstroy LLC* Case C-741/19 ECLI:EU:C:2021:655 the CJEU held that the ECT dispute resolution mechanism breached EU law. It was further pointed out that determinations of the ECT arbitral panels are enforceable pursuant to the Act of 2010. The respondents for their part indicated that a number of external bodies determine international level obligations binding the State. In that context, reference was made to a number of such bodies referred to in the judgment in *Pringle* at paras. 316 and 417. Thus, for example, at para. 316 of the judgment of O’Donnell J. in *Pringle*, reference is made to a number of international bodies to which Ireland has either become a member or has subscribed to in one manner or another. I have referred to this previously in the course of this judgment and it is not necessary to do so again here. Reference was also made by the respondents to the ECT. Finally, the respondents made

reference to decisions of the European Court of Human Rights which have some effects in domestic law by reference to the provisions of the 2003 Act. It was pointed out by the respondents that the Act of 2010 was the only basis upon which CETA determinations might have domestic effect. Undoubtedly, as the respondents say, it is only through the enforcement mechanism provided under the Act of 2010 that an award of the CETA Tribunal could be said to have domestic effect. However, the critical consideration has to be whether an international agreement operates at an international level only or can have domestic effect. Clearly, the enforcement mechanism gives rise to an element of domestic effect.

238. A further question raised concerned the role of the European Court of Human Rights and its jurisdiction. It was asked, on the basis that it is contended that adherence to CETA infringed Article 34.5.6° of the Constitution, why was that not the case in relation to the jurisdiction of the European Court of Human Rights. In that context, the appellant responded by pointing out that the CETA Tribunal would be in a position to make an award to a Canadian investor in respect of a breach of CETA, notwithstanding that that breach was as a result of a valid Irish law, court decision, or lawful administrative action. Any such award would then have to be enforced by the Irish courts and possibly the courts of other jurisdictions. It was pointed out that this contrasts with the position of awards made by the European Court of Human Rights which are not enforceable in the Irish courts or anywhere else. It was observed in the case of *JMcD v. PL*, concerning the ECHR, that orders or declarations of the ECtHR are not enforceable at national level unless national law makes them so, and it was further observed that contracting states may, in principle, so far as the effect of the Convention at national level is concerned, ignore the decisions of the European Court of Human Rights (see paras. 31 to 35 of the judgment of Murray C.J. in that case to which I have referred previously). Accordingly, the appellant observes that compliance is

voluntary unlike the “*almost automatic*” enforcement of CETA determinations, as was pointed out by the trial judge at para. 149 of her judgment.

239. The respondents make the point that the scope of CETA is narrower than that of the ECHR. Murray C.J. in the case of *J.McD v PL*, referred to previously, explained the status of decisions and awards of the ECtHR. Decisions of that Court operate only at an international level and cannot be enforced here or elsewhere. A decision of the ECtHR does not have the effect of overturning a valid Irish law or a decision of the Courts including a final and conclusive decision of the Courts. In the same way, the CETA Tribunal cannot make a decision striking down a valid Irish law or a final decision of the Irish courts. Each body can reach a conclusion that a particular law or decision is not in conformity with either the ECHR or CETA. All that either body can do is to award damages to the aggrieved party.

240. Obviously, as pointed out previously, the enforceability of awards is different as between the two bodies. Does the issue of enforceability mean that a decision of the ECtHR is not a breach of Art. 34.5.6° while a decision of the CETA Tribunal would be in breach of that provision by reason of the power to enforce its award? The question of enforceability is a critical factor in reaching a conclusion that decisions of the ECtHR do not offend the provisions of the Constitution given that those decisions can be said to operate only at an international level. It may well be said that Ireland does not, in practice, refuse to pay awards made by the ECtHR notwithstanding the lack of enforceability of such awards. I am conscious of the fact that Ireland will as a general rule give effect to decisions of the ECtHR. The point is that where the decisions of the ECtHR are concerned, Ireland has a choice in the matter. It could decline to pay an award of the ECtHR and could decline to change any legislation found to be in conflict with the ECHR which, to my mind, explains why the decisions of the ECHR do not offend against the provisions of the Constitution. Presumably, if a decision of the ECtHR resulted in a conflict, for example, with an express provision of

the Constitution, the State might be inclined to disregard the decision. This is very much a hypothetical argument, but it does illustrate the distinction between the two bodies. By contrast, a decision of the CETA Tribunal leading to an award of damages is “almost automatically” enforceable. It is also important to bear in mind a further distinction, namely leading to a view that those decisions operate only at an international level. Of importance, to my mind, is that the ECtHR only becomes engaged with a dispute following the conclusion of proceedings in the domestic legal system. By contrast, the CETA Tribunal can become involved long before domestic remedies have been exhausted albeit with the requirement that no further proceedings take place in the domestic legal system. This does not mean that a Canadian investor could not bring a claim to a CETA Tribunal notwithstanding that proceedings in this jurisdiction had been brought in respect of the dispute concerned and rejected by all the courts in this jurisdiction. All of this leads to the conclusion that there is a significant difference between a decision of the ECtHR and a decision of a CETA Tribunal and the key difference is enforceability.

241. The final questions concern the powers of the CETA Joint Committee. I have previously dealt with this issue in some detail, and I do not think it is necessary to reiterate what has previously been said in this regard. I have set out in some detail the questions that were raised by the Court and the responses thereto in order to assist in the clarification of the issues before this Court. Nevertheless, the key question I have to consider at this point in time is whether or not CETA is a breach of Article 34 of the Constitution. At the outset of the discussion on this aspect of the case, I commenced by setting out the provisions of Article 34.1 of the Constitution. As we have seen, that refers to the administration of justice. The trial judge in this case accepted that the CETA Tribunal would be engaged in the administration of justice but concluded that the administration of justice as that term is understood in Irish constitutional terms did not include the administration of justice by a

body at an international level outside the jurisdiction of the courts and pursuant to an agreement which is not part of the domestic law of the State. That much is so, but is that a complete answer to this appeal?

Conclusions on the Issues under Article 34

242. In this context, I think it would be helpful to refer back to a passage in the judgment of O'Donnell J. in the *Zalewski* case. I have already set out the terms of para. 95 of the judgment of O'Donnell J. in that case where he spoke of any provision that subtracted from the existing jurisdiction of the courts or created a parallel jurisdiction which might render the courts' traditional jurisdiction defunct, as being something that would require careful scrutiny for compatibility with the Constitution. In that context, it is perhaps worth thinking for a moment about what is envisaged by CETA in the event that a Canadian investor has a claim against Ireland. Assuming, on the one hand, that there has been a breach of the fair and equitable treatment requirement contained in CETA, the Canadian investor in those circumstances can submit a claim to the CETA Tribunal, as we have seen. On the other hand, it is also clear that the circumstances that could give rise to such a claim would inevitably also give rise to a claim for damages against the State in the courts of this country. Take one example. Suppose for the sake of argument, that a Canadian investor had invested funds to build and develop a factory producing medicine in Ireland and at some stage the Irish government, for whatever reason, passed a law expropriating the factory and the land the factory was built on. In any such scenario, the investor would have a legitimate claim against the State for compensation. It is clearly envisaged by CETA that an investor could bring proceedings both before the national courts or the CETA Tribunal. As discussed previously, if an investor had commenced or wished to initiate proceedings in the national jurisdiction but went on to submit a claim to the CETA Tribunal, it could not proceed before the CETA Tribunal without terminating the national proceedings. That to me suggests that

what is provided for is a parallel jurisdiction. Admittedly, the claim before the national courts would be made in accordance with national law, whilst the claim before the CETA Tribunal would be made in accordance with the terms of CETA. However, the same facts would give rise to the claim in either jurisdiction and presumably the same damages would be claimed and, if the case is made out, the same damages would be awarded, be it in the national courts or by the CETA Tribunal. An interesting observation was made in the decision in *Komstroy* to which reference was made previously. That judgment of the CJEU concerned the ECT. However, its terms are similar to those at issue here in relation to the resolution of disputes. At para. 59, the CJEU said in its judgment:

“However, arbitration proceedings such as those referred to in Article 26 ECT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties concerned, the former derives from a treaty whereby, in accordance with Article 26(3)(a) ECT, Member States agree to remove from the jurisdiction of their own courts and, hence, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law ... disputes which may concern the application or interpretation of that law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration do not apply to arbitration proceedings such as those referred to in Article 26(2)(c) ECT” (see also para. 292 of the *Singapore Opinion* referred to at para. 120 above and the passage from *Achmea* set out at para. 147 above to like effect).

The Court added in para. 60:

“Having regard to all the characteristics of the arbitral tribunal set out in paragraphs 48 to 59 of the present judgment, it must be considered that, if the provisions of Article

26 ECT allowing such a tribunal to be entrusted with the resolution of the dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Members States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the act that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law (see, by analogy, judgement of 6 March 2018, Achmea, Paragraph 56).”

243. Reliance is placed by the Court for that conclusion on the judgment in *Achmea*, in particular at para. 55. The Court went on in that case to make two further comments, which I think it might be helpful to refer to. At paras. 61 and 62 it was stated as follows:

“It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the EU institutions, including the Court of Justice of the European Union, is not in principle incompatible with EU law. The competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the European Union and its legal order is respected.”

Again, *Achmea*, and paragraph 57 of the judgment in that case is cited as authority for that proposition.

244. The court went on to say:

“However, 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.”

245. The Court went on to conclude that that would call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU (see para. 63).

246. What is striking about that part of the judgment in *Komstroy* (and the passages from the other judgments to like effect cited previously) is the observation that, by reference to Article 26(3)(a) ECT, Member States agreed to remove from the jurisdiction of their own courts, disputes concerning the application of EU law. The CJEU in that case had concluded that the arbitral tribunal provided for in Article 26(6) ECT was required to interpret and even apply EU law (see para. 50). While that touches on the application of EU law, it is relevant to the question of the removal from the jurisdiction of the Irish courts, disputes concerning not just the application of EU law, but also Irish law. That being so, I find it extremely difficult to see how the ratification of CETA as contemplated by a resolution of the Dáil can withstand constitutional scrutiny. This is an international treaty by which the jurisdiction of the Irish courts to rule on a dispute between an entity operating in Ireland against the Irish State can be removed and, in effect, will be removed from the jurisdiction of the Irish courts. I cannot see how that is permissible. In practical terms, there will be two parallel jurisdictions open to the Canadian investor, either to bring proceedings before the Irish Courts or to submit a claim to the CETA Tribunal. If the latter option is taken, the dispute is removed from the jurisdiction of the Irish courts which would otherwise have had jurisdiction to deal with the matter. What’s more, the award of the CETA Tribunal then has

the benefit of almost automatic enforcement in this jurisdiction. In *Crotty*, the issue concerned the removal of the constitutional function of the State in relation to international relations. That was a function conferred on the Executive by the Constitution through the People. Here, the jurisdiction of the courts is removed by an agreement entered into by the Executive whereby the jurisdiction of the courts is cut down. I do not see how this cannot involve a breach of Article 34. Indeed, it is, to my mind, difficult to reconcile the approach of the respondents to the ratification of CETA and the approach to the ratification process in respect of the International Criminal Court. In that instance, a referendum took place precisely because it was understood that ratification of the Rome Statute establishing the International Criminal Court had an impact on Irish sovereignty by allowing someone to be arrested in this jurisdiction and to be put on trial before the International Criminal Court (see in that context the Twenty-Third Referendum on the Constitution and Art. 29.9).

247. Much has been said about the differences between the role of the ECtHR and the CETA Tribunal. It can be said of the ECtHR that it operates on an international plain. Its awards are not enforceable within the jurisdiction while those of CETA are enforceable in the jurisdiction. The fact that a parallel jurisdiction has been created which results in disputes arising in Ireland being dealt with either in the Irish courts or before the CETA Tribunal is a very important factor. However, as explained previously, a party seeking to bring a dispute to the ECtHR must first exhaust domestic remedies while the Canadian investor has no such obligation. Of particular significance is the “almost automatic” enforceability of CETA awards. This is the principal difference between awards of the ECtHR and a CETA Tribunal. This takes a CETA award back from the international plain to the domestic legal system. To my mind, that is why it is necessary to have CETA ratified by the People, given that it cuts down the jurisdiction of the courts and involves the creation of a parallel jurisdiction whose awards are enforceable in this jurisdiction. This would be so even though the claim arose

out of a breach of CETA, which breach was itself a consequence of a valid Irish law, court decision, or lawful administrative action.

Regulatory Chill

248. It may not be strictly speaking necessary to deal with the arguments under this heading. The argument of the appellant in regard to regulatory chill is simply this: if the CETA Tribunal was to find an Irish measure or law incompatible with CETA, it could make an award against the State. As any such award would be enforceable in the State, it could be that the State would be exposed to further claims while the offending measure remained in place. This, it is said, would create a chill on the operation of Irish law and policy.

249. It was further suggested that Ireland would be deterred from fulfilling its obligations in relation to taking environmental measures for fear that they might have detrimental effects on investments, given that in the case of Canadian investors a claim might be brought to the CETA Tribunal if any such measures had a detrimental effect on a Canadian investment.

250. The respondents take issue with this line of argument on the basis that CETA makes it clear that a claim will not arise in respect of measures to achieve legitimate policy objectives. Article 8.9.1 of CETA describes this as including measures relating to the protection of public health, safety, the environment, or public morals, social or consumer protection, or the promotion and protection of cultural diversity. This is also reflected in the preamble to CETA. The point is also made on behalf of the respondents that in order for this argument to succeed the appellant would have to identify extra rights which it is contended CETA gives Canadian investors beyond those already enjoyed under Irish law. This is because it would be difficult to identify whether the chilling effect applied as a result of CETA, or indeed as a result of Irish law or measures or ECHR provisions, or EU law. To my mind, there is some merit in this argument. Insofar as the concept of regulatory chill is concerned, Ireland's freedom to act in certain areas is already curtailed by measures

contained in the Constitution, the European Convention on Human Rights, and indeed EU law. To take one extreme example: say, for the sake of argument, that Ireland introduced a law that said that all property owned by Canadian investors in the State was to be subject to an additional tax over and above the tax paid on property by Irish citizens, or other non-Canadian citizens who owned property in the State. It is inconceivable that the State could introduce such a tax because it would fall foul of the provisions of the Constitution, it would be a form of discrimination that would fall foul of the ECHR and could presumably also give rise to issues under EU law. In such a scenario, the regulatory chill would be created not just by CETA but by domestic law and other international agreements which are applicable in this jurisdiction. How then does one say that it is CETA that is causing such a regulatory chill? In truth, as is stated by the respondents, the argument made by the appellant in this regard is to a large extent hypothetical. It is difficult to imagine a provision or measure of Irish law which would amount to a breach of CETA, giving rise to a claim which would not, of itself, give rise to a claim before the Irish courts, arising out of the same circumstances. The comment was made by the respondents that to put forward an argument on a basis that is hypothetical is not permissible and, in that context, reference was made to a passage from *Irwin v. Deasy* [2010] IESC 35, in which Murray C.J. stated:

“The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable.”

251. Reference was also made to a comment made by MacMenamin J. in the case of *Kennedy v. DPP* [2007] IEHC 3, in which he commented to the effect that, in that case, the evidential basis for relief had not been established, such that the court was “*invited to deliver*

a judgment upon a hypothesis or a moot". I agree with those statements in relation to an argument based upon a hypothesis.

252. Further, the point was made that the argument of the appellant in this regard was not so much a legal argument as a political argument, and it was pointed out that there were no legal standards by which this Court could assess whether a chilling effect would ensue.

253. The respondents then made a point based on the concept of the separation of powers, to the effect that, even if there was to be a chilling effect in the future, that would not justify this Court in intervening to prevent a decision which falls to be taken by the Executive. Reference was made to an observation of O'Donnell J. in *Pringle*, at para. 346, as follows:

"In the plaintiff's determination to challenge the wisdom and legality of the Government's decision, he appears to give no weight to the fact that it is a decision made by the Government. That is the body to which the Constitution has allocated the task of making such decisions whether trivial, important, wise, or profoundly misguided. Here the court is invited to restrain the exercise of constitutional function by a body authorised to carry out that function, and in respect of which function the Constitution imposes little in the way of express limitation, and contemplates direct accountability to the Dáil and indirectly the People, rather than to the courts. Governments are elected to make decisions whether trivial or momentous successful or catastrophic, and for those decisions they are answerable to the Dáil, and through it to the People".

254. I agree with the observations made by O'Donnell J. in that passage.

255. The respondents also referred to a passage from the judgment of the High Court in which the concept of the chilling effect was considered by comparison with the views of the CJEU in *Opinion I/17*. It was noted at para. 138 as follows:

“Consequently, it is argued that the potential for monetary awards against the State under CETA might have a chilling effect on the actions of public authorities in order to avoid such actions sounding in damages. However, the CJEU did not accept that the operation of the CETA Tribunal was capable of having such an effect. It emphasised the lack of jurisdiction in the CETA Tribunal to declare any level of protection afforded by the EU to a public interest to be incompatible with CETA as reflected in Article 28.3.2, Article 8.9.1 and Article 8.9.2 of CETA itself. ... Reading these provisions together, the CJEU concluded that the powers of the CETA Tribunal “do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process.””

256. The trial judge concluded that there was a parallel with the domestic legal system of each of the parties (see para. 139).

257. She added:

“It follows, and the CJEU has so concluded, that the mere fact that interests of an investor are adversely affected by measures taken to protect those interests will not amount to a breach of the fair and equitable treatment principle. It is the added element of abusive treatment, manifest arbitrariness, targeted discrimination or some equivalent behaviour on the part of a party that would bring a claim within the scope of Section C or Section D and thus potentially result in liability for party concerned.”

258. Thus, it can be seen that she rejected the argument in the terms put forward by the appellant. I agree with her views in that respect.

259. Finally, the respondents made the point that, insofar as the appellant had suggested that the CETA Tribunal might award damages in circumstances beyond those contemplated in *Glencar v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, it is said that it is far from clear

that a different result from *Glencar* would ensue under CETA, and it has not been demonstrated by the appellant how this would occur. It was pointed out that there is a relatively high bar for a breach of CETA provisions to occur, such as, for example, “*manifest arbitrariness*”, or “*targeted discrimination*”. It is argued on behalf of the respondents that this is more than, for example, acting *ultra vires* or negligently. Given the fact that there are express protections contained in CETA for the various parties to CETA to regulate in the public interest, it is said that this acts as a further constraint on the circumstances in which damages might be awarded. Indeed, that is precisely the point that was made in the passage referred to from the judgment of the High Court herein.

260. It seems to me that one of the difficulties in respect of the arguments of the appellant in the context of regulatory chill is that the appellant has not been able to identify how it is said that CETA goes beyond any other measure or law already in effect in the State that could have the effect of creating regulatory chill. Any laws or measures introduced by the State may be subject to “*regulatory chill*” by measures of domestic law, as I have just said. Apart from the Constitution, the State in introducing laws and measures must also take account of the provisions of the European Convention on Human Rights and EU law. What then is different about CETA?

261. The State will, as a matter of logic, hesitate to pass laws which run the risk of unconstitutionality. In the environmental field, the State will, one presumes, carefully consider the potential effect of a measure on those who may be affected by any such proposed measure. For example, it may be necessary to consider the effect on a particular industry if a decision was taken to prevent the continuation of that industry on environmental grounds. Equally, one presumes, consideration would have to be given to the risk of not taking any such action: in such circumstances, is that not a chilling effect that applies in the context of much legislation? One has to consider and balance the respective rights of those

affected by particular legislation, or indeed the failure to legislate in a particular area. I find it difficult on the basis of the arguments before this Court to say that CETA will give rise to a regulatory chill on the Irish State in taking steps or measures that may be necessary simply because of the potential for a claim to be made by a Canadian investor to the CETA Tribunal. I, therefore, reject the appellant's arguments on the basis of regulatory chill.

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262. I now want to turn to a further argument raised by the appellant in relation to a decision in respect of an award made by ICSID in the case referred to above which is said to have implications for the decision of the CJEU in *Opinion 1/17*. The decision in that arbitration was delivered on the 9th September, 2021 very shortly before the delivery of the judgment by the trial judge in the High Court and obviously was not before the trial judge.

263. It is contended by the appellant that the decision of the ICSID Tribunal in *Eco-Oro* shows that the interpretation by the CJEU of the CETA Tribunal's jurisdiction in *Opinion 1/17* was "flawed", and that *Eco-Oro* shows that the terms of CETA are incompatible with EU law. The agreement at issue in *Eco-Oro* was a trade agreement between Columbia and Canada (FTA). It is said that the approach of Canada in the submissions to the ICSID Tribunal demonstrates that it disagrees with the logic subtending *Opinion 1/17*. On that basis it is said that there could not be a binding interpretation of CETA by the CETA Joint Committee consistent with *Opinion 1/17* because, presumably, Canada would not agree with such an approach.

264. Certain aspects of *Opinion 1/17* have been highlighted by the appellant. First of all, it is said that in order to render CETA compatible with EU law the CJEU had to be satisfied that the CETA Tribunal would not have jurisdiction to impugn public interest measures or the power to award damages in respect of same. Otherwise, it is said that this would undermine the capacity of the Union to operate autonomously.

265. It is said that the CJEU concluded that the mere jurisdiction to assess a public interest measure would render CETA incompatible with EU law and reliance is placed on the following passage from *Opinion I/17* at para. 148:

“... the jurisdiction of those tribunals would adversely affect the autonomy of the EU legal order if ... those tribunals might ... call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union ...”

It was acknowledged by the appellant that the CJEU went on to say at paras. 152 to 153 as follows:

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

153. It follows from the foregoing that in those circumstances, the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152 of the present Opinion and, on that basis, to order the Union to pay damages.”

266. The appellant complains that the analysis of Article 28.3.2 does not address the jurisdiction of the Tribunal nor does it address the Tribunal’s power to award damages. It is complained that the CJEU implied these limitations into Article 28.3.2. However, it seems

to me that the CJEU was making it clear that CETA cannot operate to provide damages to an investor who complains of a measure which falls within the general exceptions referred to in Article 28.3.2 save and unless those measures “*constitute a means of arbitrary or unjustifiable discrimination between the parties*”. That, after all, is what CETA is designed to protect the parties from – arbitrary or unjustifiable discrimination in the operation of CETA.

267. The appellant goes further however and argues that the CETA Tribunal can assert jurisdiction to second guess national public interest measures, to assess their legality and to award compensation and contends that this was done in *Eco-Oro*.

268. In dealing with Article 8.9.1-2 the appellant contends that the view of the CJEU to the effect that that provision limits the “*jurisdiction of the envisaged Tribunals to declare infringements of obligations contained in Section D and contends that these provisions do not in fact prevent the CETA Tribunal from having jurisdiction to ‘call into question the level of public interest determined by the Union following a democratic process’ of a measure or to deem such a measure a breach of Article 8.10 or 8.12.*” Thus, it is contended that the CJEU wrongly inferred a restriction on the jurisdiction of the CETA Tribunal where no justification for such an inference existed. Article 8.9.1 and 2 have been referred to previously and I do not propose to repeat those provisions again. However, it does seem to me that it would be appropriate to set out in full the passage which is said by the appellant to be an erroneous interpretation or assumption by the CJEU. It said at paragraph 160 as follows:

“It is accordingly apparent from all those provisions, contained in the CETA, that, by expressly restricting the scope of Sections C and D of Chapter Eight of that agreement, which are the only sections that can be relied upon in claims before the envisaged tribunals by means of Section F of that Chapter, the Parties have taken care to ensure

that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.”

269. It was on that basis that the CJEU concluded that Section F of Chapter 8 did not adversely affect the autonomy of the EU legal order.

270. It now falls to be considered whether or not anything in the decision of the ICSID Tribunal in *Eco-Oro* casts doubt on the decision of the CJEU in *Opinion I/17*. As mentioned previously the dispute in that case arose out of an FTA between Canada and Columbia. The particular dispute related to measures adopted by Columbia in connection with an ecosystem in an area of Columbia called San Turban, which allegedly deprived Eco Oro of its mining rights under a concession contract for the exploration and exploitation of a deposit of gold, silver and other minerals. It was contended that Columbia had breached its obligations under the FTA by means of *“the unlawful, creeping and indirect expropriation of its investment and by failing to accord Eco Oro’s investment the minimum standard of treatment.”* *Eco-Oro* sought compensation for damage caused as a result of Columbia’s alleged breaches and violations of the FTA and Columbia sought to have the claim dismissed on the basis that the Tribunal lacked jurisdiction over the dispute and there was no basis of liability accruing to Columbia under the FTA.

271. The appellant in the course of his submissions on this issue has referred to the submissions of Canada furnished to the ICSID Tribunal in the course of the hearing of the dispute between Eco Oro and Columbia. Thus, the following comments were made by the appellant. It was stated that Canada confirmed that the general exceptions to be found in the FTA are repeated in all of Canada’s treaties. Perhaps more accurately what was stated was

that the general exceptions contained in paras. 1 – 3 of the FTA were standard in Canada’s trade agreements and that the language used was generally similar across Canada’s agreements. I do not doubt for a moment that such terms as are comprised in the general exception provisions of CETA and which are to be found in agreements such as the FTA are expressed in similar terms and are understood to have the same general purpose. It was said then by the appellant that Canada did not support the Columbian argument that the general exceptions affected jurisdiction. The appellant contended that Canada submitted that the general exceptions provided that an environmental measure which would otherwise breach investor protection rules, might be saved by the general exceptions, but only if the ICSID Tribunal deemed the measure necessary to achieve the environmental aim. In this context it may be useful to set out para. 16 of the submission of Canada in full. It says:

“Importantly, the general exceptions in Article 2201 only apply once there has been a determination of breach of an obligation in the Agreement. In the context of investment obligations, the exception in Article 2201(3) only applies once there has been a determination that there is a breach of a primary obligation in Chapter Eight (Investment) of the Agreement. For the general exception in Article 2201(3) to apply, the measure must (1) not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment; (2) relate to one of the policy objectives set out in paragraphs (a) - (c) (which includes the protection of the environment) and (3) be ‘necessary’ to achieve these objectives. If the general exception applies, then there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required.”

272. Leaving aside for a moment the fact that this is a submission by Canada as to the interpretation of the FTA in *Eco-Oro*, it is noteworthy that the requirement of necessity is also to be found in Article 28.3.2 of CETA. In other words, the measures at issue must be necessary for the purposes set out in Article 28.3.2. On the basis of the submission referred to by the appellant, it is suggested that the position of Canada in relation to the jurisdiction and powers of the Tribunal to award damages contradicted *Opinion 1/17*. I have to say that I cannot see the force of that argument. Nevertheless, it is necessary to look at the other arguments made by the appellant relying on the decision of ICSID in *Eco-Oro*. It is a principal tenet of the argument put forward by the appellant in this regard that the ICSID Tribunal in that case found that general exemptions did not bar jurisdiction to impugn environmental measures. On the basis that there was such a finding, the majority went on to consider whether or not the environmental measure at issue breached fair and equitable treatment obligations and it is argued that the Tribunal found that the general exceptions provided no bar to compensation, even if an environmental measure was necessary. Directions were then made in relation to the assessment of damages.

273. It must be remembered that what was at issue before ICSID was the question of jurisdiction. Columbia had argued simpliciter that the provisions as to ‘general exceptions’ meant that ICSID had no jurisdiction to deal with a matter once the impugned measure was one that came under one of the headings including the heading of environmental measures. What the ICSID Tribunal did was to find that the exceptions only apply ‘once there has been a determination that there is a breach of a primary obligation in Chapter 8’ (see para. 380). That finding does not appear to me to be in conflict with anything to be found in *Opinion 1/17*. It may be useful to refer once more to *Opinion 1/17* and to a number of paragraphs in that Opinion starting at para. 156. Having referred to the particular provisions already referred to it is apparent from reading those provisions together that the discretionary powers

of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process:

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

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

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

274. In other words, for the jurisdiction to be exercised by the CETA Tribunal and result in a finding against a State party or the EU, there has to be *“abusive treatment, manifest arbitrariness and targeted discrimination”* and thus it is clear that the CJEU is not saying that there is no jurisdiction whatsoever but rather, that it is only in those limited circumstances that the jurisdiction to award damages could arise. The appellant has

suggested that any lack of clarity between the decision of the ICSID Tribunal and of the CJEU should be resolved by a reference to the CJEU. I note in passing that while the ICSID Tribunal as a whole rejected the arguments of Columbia on the question of jurisdiction, there was a dissent from one of the panel of the Tribunal, Professor Philippe Sands QC, on the question of whether or not the fair and equitable treatment criterion had been met. He was of the view that it had not been met in that case.

275. I now want to look briefly at the submissions of the respondents on this issue. Leaving aside the point that was made to the effect that the decision of the ICSID Tribunal in that case concerned the question of jurisdiction only and had not resolved any issue as to whether or not compensation would be payable under the FTA in that case the point is made that the decision of the ICSID Tribunal is not binding on anyone nor is it persuasive and did not concern EU law nor CETA but a trade agreement phrased in different terms. It was pointed out that as the authors of *Redfern and Hunter on International Arbitration* (6th Edn., Sweet & Maxwell, 2015) stated:

“There is no system of binding precedents in international arbitration – that is, no rule that means that an award on a particular issue, or a particular set of facts, is binding on arbitrate is confronted with similar issues or similar facts. Each award stands on its own.”

The point is made that the assertion that the ICSID Tribunal’s decision “*reflects international law*” is not supported by any authority. Thus, the respondents rejected the suggestion that that decision requires the CJEU to revisit *Opinion 1/17* lacks any merit.

276. Having referred to the failure of the jurisdictional argument made by Columbia before the ICSID Tribunal it was said that even if similar reasoning applied to the CETA Tribunal and assuming that the CETA Tribunal had jurisdiction to arbitrate disputes relating to

environmental or other matters, it was contended that the appellant had failed to demonstrate how that would be incompatible with EU Law. It was pointed out that *Opinion 1/17* expressed concern about something quite different, namely a scenario where a breach of CETA might be found to exist on account of “*the level of protection of a public interest established by the EU institutions*”. It was asserted, relying both on the terms of CETA and *Opinion 1/17* that no breach of CETA can ensue on that basis and therefore it is said, no right to damages could arise on that basis. It was further noted that Columbia had not complied with a judgment of its own constitutional court (see para. 820) and that certain conduct “*was arbitrary and disproportionate, and which has inflicted damage on Eco-Oro without serving any apparent purpose.*” Thus, it is said that even bearing that in mind the appellant has failed to explain what incompatibility with EU law could arise even if the CETA Tribunal were to adopt similar reasoning.

277. At the risk of repeating what I have already said, I think it is important to bear in mind the observations I have previously made in this context. As I have pointed out the ICSID Tribunal in *Eco-Oro* was first and foremost considering the question of its jurisdiction to deal with the matter under the FTA. It rejected the submission made by Columbia in that regard which I have set out above. That is what it decided. As can be seen, it went on to consider the question of whether or not there was a breach of the obligation of fair and equitable treatment. As noted earlier, the panel was divided on that issue with the majority holding that there had been a breach of that requirement. As I understand the decision of the CJEU in *Opinion 1/17*, the Court’s principle concern in that case was not to question the jurisdiction of the CETA Tribunal as such but whether or not the CETA Tribunal “*might, in the course of its examination of the relevant facts, which may include the primary law on the basis of which the contested measure was adopted, weigh the interest constituted by the freedom to conduct business, relied on by the investor bringing the claim, against public*

interests, set out in the EU and FEU Treaty's and in the Charter, relied on by the Union in support of its defence" (see para. 137). That is the context in which the discussion took place as to the role of the CETA Tribunal and its jurisdiction. What is apparent from the terms of *Opinion 1/17* and in particular the discussion to which reference has been made previously in paras. 148 *et seq.* is that the parties are entitled to regulate within their territories for the protection of the matters referred to previously such as public health, the environment and so on. I have already referred to para. 158 which notes the jurisdiction of the CETA Tribunal to find infringements of the obligation of fair and equitable treatment as set out in Article 8.10 but the CJEU also pointed out that the circumstances in which that can be done are specifically circumscribed given that Article 8.10.2 lists exhaustively the situations in which such a finding can be made. For this reason, I accept the submissions of the respondents to the effect that even if one accepted what has been said by the ICSID Tribunal, there is still no clear incompatibility demonstrated by the appellant between the approach of the CJEU and EU law.

278. Reference was also made in the course of the submissions from the respondents to material differences between the FTA at issue in *Eco-Oro* and CETA. It was pointed out that CETA contains additional protections to those contained in the FTA and to that extent refers to Articles 8.9.1 and Article 8.9.2. It is noted for example that the fact that a measure negatively affects an investment or interferes with an investor's expectations does not of itself amount to a breach of an obligation. It was suggested that the reference by the appellant in his submissions to, *inter alia*, para. 830 of *Eco-Oro*, in which it was held that the fact that Columbia could adopt environmental measures did not mean that an investor was not entitled to compensation. However., it was pointed out that Article 8.9.2 of CETA concerns what will not constitute a breach of CETA obligations and therefore it is said that if there is no breach, there can be no right to compensation. Finally, the point was made that *Eco-Oro*

did not decide in general terms that “*general exceptions did not bar jurisdiction to impugn environmental issues*” as contended by the appellant. In any event it was contended by the respondents that “*impugning*” of environmental measures is quite different from the measures breaching CETA.

279. Having considered the arguments of the appellant in this regard, I am satisfied that the decision in *Eco-Oro*, leaving aside the question of its precedential value, does not demonstrate in any way that *Opinion 1/17* requires to be revisited. I cannot see any basis upon which it would be necessary in the circumstances of this case to request a further view on CETA from the CJEU on the issues that have been raised. The position of the CJEU is clear. For that reason, I cannot see any point in seeking a preliminary reference under Article 267 TFEU.

Conclusions

280. It will be recalled that at para. 13 of this judgment I identified the issues to be determined in this case as follows:

- i. Is ratification of CETA necessitated by the obligations of membership of the EU?
- ii. Is CETA a breach of Article 15. 2 of the Constitution?
- iii. 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?
- iv. Does the “automatic enforcement” of a CETA tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 constitute a breach of Article 34 of the Constitution?

- v. What is the effect of the interpretative role of the Joint Committee created by CETA and does its role amount to a breach of Article 15.2 of the Constitution?
- vi. Would an amendment of the Arbitration Act 2010 to alter the “automatic enforcement” of a CETA tribunal award as proposed in the judgment to be delivered herein by Hogan J. alter the position in relation to the ratification of CETA?

For my part, as has been seen, I would determine the issues as follows:

- i. Ratification of CETA is not necessitated by the obligations of membership of the EU.
- ii. CETA is not a breach of Article 15.2 of the Constitution.
- iii. The creation of the CETA Tribunal is the creation of a parallel jurisdiction or a subtraction from the jurisdiction of the Courts in this jurisdiction. It is this element coupled with the answer to the fourth issue which creates a conflict with Article 34 of the Constitution.
- iv. It is the element of “automatic enforcement” of a CETA tribunal award provided for under CETA by virtue of the enforcement provisions of CETA together with the provisions of the Arbitration Act 2010 which to my mind constitutes a breach of Article 34 of the Constitution. As can be seen from my answer to the third issue, it is the combination of a parallel jurisdiction together with “automatic enforcement” in this jurisdiction under the provisions of the Arbitration Act 2010 that gives rise to this breach.
- v. Insofar as the Joint Committee is concerned, I am of the view that its role does not amount to a breach of Article 15.2 of the Constitution.
- vi. I have had the advantage of reading the judgment of Hogan J. in draft and accept that an amendment of the Arbitration Act 2010 to alter the “automatic

enforcement” of a CETA tribunal award as proposed in the judgment to be delivered herein by Hogan J. would alter the position in relation to the ratification of CETA. As I have explained previously, it is the creation of a parallel jurisdiction combined with “automatic enforcement” of a CETA tribunal award that has led me to the conclusion that the ratification of CETA would amount to a breach of Article 34. Were the position in relation to automatic enforcement to be altered as envisaged by Hogan J., the position would be different, and in those circumstances, CETA could be ratified without the necessity for a referendum.

For completeness, I should add that I have rejected the arguments of the appellant in relation to regulatory chill. I would therefore allow the appeal on the basis that the ratification of CETA would breach the judicial sovereignty of the State, contrary to Article 34 of the Constitution.