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 Power delivered on the 11th day of November, 2022

Introduction

1. Every judge appointed in the manner provided for by the Constitution has '*solemnly and sincerely*' promised and declared in '*the presence of Almighty God*' to '*uphold the Constitution and the laws*' (Article 34.6.1°). Any case that asks of Ireland's Court of Final Appeal to rule on what the People intended when they adopted, enacted and gave to themselves the

Constitution of Ireland, is a case of significant moment. Constitutionally, how that question is answered is a matter of ultimate concern. This is such a case.

2. The subject matter of the appeal involves a detailed and complex international trade agreement styled the 'Comprehensive Economic Trade Agreement' ('CETA'), between Canada of the one part, and the European Union and its Member States of the other. Because it is a mixed agreement, member states have a say in determining whether they should ratify it. Many issues have been raised and interesting arguments canvassed but, essentially, the question before this Court comes down to whether it is permissible under the Constitution for the Government to execute and ratify CETA in the manner proposed. Complex as the trade agreement itself may be, the discrete question before the Court is a binary one.

3. I have read the judgments of my colleagues in draft form. All are agreed that the case raises an issue of fundamental principle. The majority has decided that it is not permissible for the Government to act as proposed. In its view, there are provisions within Chapter 8 of CETA which, if binding upon Ireland, would be incompatible with the sovereign nature of the State and its sovereign powers, whether executive, legislative or judicial. That being so the majority considers that ratification in the manner proposed by the Government would be unconstitutional and, for that reason, has determined that the appeal should be allowed.

4. Respectfully, I disagree. My position mirrors that of O'Donnell, C.J., and I agree with his views as articulated in the extensive and compelling judgment he has delivered in this matter. Without underestimating the importance of the issues that cause concern to the majority and whilst recognising that the case touches upon several important aspects of the State's sovereignty, I am firmly of the view that ratification of CETA in the manner proposed by the Government pursuant to Article 29.5.2° of the Constitution, falls squarely within the scope of the executive power of the State which, in or in connection with its external relations, the People have decided, is to be exercised by or on the authority of the Government (Article 29.4.1°).

5. That is not to say that I misjudge the potential and, possibly, significant *impact* that CETA *may* have within the State. It is, rather, to recognise that, subject to remaining within the constitutional constraints on the exercise of its executive powers, whether express or necessarily implied, there are wide-ranging decisions that may be taken in the conduct of the State's external relations that fall within the exclusive prerogative of the Government under Article 29.4.1° of the Constitution.

6. Of course, the powers exercised by the three organs of government within the State's constitutional architecture are not '*hermetically sealed*' as the Chief Justice points out. They do not operate in isolation, one from the other. The mere fact, however, that powers reserved to one organ of State may have an impact upon those of another, is not a sufficient basis, in my view, for declaring that the exercise of powers in such circumstances is unconstitutional.

Points of Divergence

7. All members of the Court agree that there are certain obligations necessitated by Ireland's membership of the European Union and that the ratification of CETA is not one of them. The Court of Justice of the European Union ('CJEU') in its Opinion 2/15 (EU/Singapore Free Trade Agreement) of 16 May 2017 EU:C:2017:376 has found that non-direct foreign investment falls beyond the scope of the European Union's common commercial policy as defined in Article 207(1) of the Treaty on the Functioning of the European Union ('TFEU') and, that, as such, it falls outside the Union's exclusive competence pursuant to Article 3(1)(e) of the TFEU. It held that non-direct investment and the EU-Singapore trade agreement's provisions pertaining to Investor-State dispute settlement, fell within a competence shared between the Union and the Members States. Being a mixed agreement and engaging as it does, the internal competence of the State, ratification of CETA falls to be determined as a matter of Irish constitutional law.

8. Apart from that, it seems to me that there are certain key issues upon which the Members of the Court differ in their views. The first concerns the nature of the agreement itself and

whether it can be said that CETA operates, exclusively, on the international plane and thus outside the Irish constitutional order or whether it, in fact, creates a '*parallel jurisdiction*' that removes certain disputes from the jurisdiction of the Irish courts in breach of Article 34 of the Constitution and/or that it is capable of calling into question the finality of decisions of the Irish courts. The second issue is whether the mechanism for enforcing an award made by a CETA tribunal engages and breaches judicial sovereignty by 'converting' an international ruling into an enforceable judgment required to be recognised, as such, at domestic level. A third issue concerns the jurisdictional limits of a CETA tribunal and whether its decisions would or could have the effect of undermining or destabilizing the 'constitutional identity' of the State. The argument goes that to the extent that a CETA award *could,* in effect, negate or undermine the validity of an otherwise lawful measure—whether legislative, executive or judicial—it would compromise Ireland's legislative and juridical sovereignty.

9. As I have already indicated my agreement with the position and reasoning of O'Donnell, C.J., I do not propose to express a view on every issue raised in the case or rehearse all of the arguments that lead me to conclude that the provisions of CETA do not infringe upon the essential sovereignty of the State, whether in its internal or external aspects. I propose only to outline the principal reasons for the conclusion I have reached. To a large extent, I am persuaded by the incontestable similarities that exist between the framework of CETA and that of the European Convention on Human Rights ('the Convention' or 'the ECHR'). Where there are differences between how those international instruments operate, in practice, such differences are not sufficient, in my view, to substantiate the contention that whilst the ECHR's ratification by the State did not infringe upon Ireland's sovereignty, the ratification of CETA in the manner proposed, would. To my mind, the differences have to be seen within the context of the respective agreements and, when viewed in this way, they are entirely coherent and consistent with the respective provisions thereof. I will also say a brief word about what I regard as the safeguarding provisions within the agreement which circumscribe the jurisdiction

of a CETA tribunal. These have been considered by the CJEU in *Opinion 1/17* (EU-Canada CETA) of 30 April 2019 EU:C:2019:341 on the compatibility of CETA with EU law ('*Opinion 1/17'*). The limited nature of a CETA tribunal's delineated jurisdiction further persuades me that the execution and ratification of this trade agreement by the Government in the manner proposed is constitutionally permissible.

10. A brief pause, at this point, might be apposite to reflect on the treaty-making power of the Executive within the context of Ireland's sovereignty as a nation and the stated objectives of the People.

Sovereignty

11. The nation of Ireland, by Article 1 of the Constitution, '*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*.' (Emphasis added here and throughout this judgment is mine, unless otherwise indicated.) The '*sovereign, independent and democratic*' nature of the State is guaranteed by Article 5. In exercise of their inalienable, indefeasible and sovereign right, the People have chosen their own form of Government and by Article 6 have declared that: -

> *"(1) All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*
>
> *(2) These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."*

12. Thus, the architecture of the Constitution is well defined. The People have vested the powers of government in separate institutions, each assigned its own distinct field of responsibility. To the Oireachtas, has been assigned the power to make laws for the State

(Article 15.2.1°). Its power is '*sole and exclusive*'. To Judges, has been assigned the administration of justice (Article 34.1) and, subject to the qualifying provisions of Article 37, no other adjudicatory body may carry out this function for the People within the State. To the Government, has been assigned the exercise of the State's executive power, such power to be exercised subject to the provisions of the Constitution (Article 28.2). Executive power is exercised both within the State and, externally, in the context of the State's conduct of its relations with other nations.

'Concord' With Other Nations

13. The establishment of 'concord' or the creation of harmony with other nations is one of the guiding principles that inspired the People to adopt and enact the Constitution. Just as membership of a natural family carries a shared genetic make-up, so, too, membership of the global or human family carries a shared imprint of value and this is recognized, implicitly, in the *Preamble* to the Constitution. In seeking to promote the *common* good, so that certain objectives may be achieved, the Constitution was adopted and enacted. Firmly among those objectives is the establishment of '*concord*' with other nations. Mindful that the State would, necessarily, takes its rightful place within the global community of nations and engage in a whole range of international relations, the People, under Articles 28 and 29 of the Constitution vested responsibility in the Government for conducting the State's foreign affairs (Article 29.4.1°) providing that the executive power of the State *'in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.'* O'Donnell C.J.'s recall of the particular historical circumstances that prevailed when the Constitution was being drafted underscores the fact that the State's membership of the global family and the implications flowing therefrom cannot but have been to the forefront of considerations when Article 29 of the Constitution was being drafted.

14. It is in and through its external relations with other nations and by its comportment and commitments on the international stage, that Ireland, as a sovereign State, demonstrates its adherence to the guiding principles of the Constitution. The *free* entry into international agreements—whether of a political, social or economic nature—with other nations for the mutual benefit of both constitutes the type of '*concord*' to be established and pursued as envisaged by the Constitution.

15. The Constitution confers a wide though not unlimited discretion on the Government in the conduct of the State's foreign affairs. I am grateful to those colleagues who have set out in some detail the relevant principles articulated in the seminal cases of *Boland v. An Taoiseach* [1974] I.R. 338 ('*Boland'*), *Crotty v. An Taoiseach* [1987] IESC 4, [1987] I.R. 713 ('*Crotty*') and *Pringle v. Government of Ireland and Others* [2012] IESC 47, [2013] 3 I.R. 1 ('*Pringle*'). What the jurisprudence indicates is that, in the ordinary course of affairs, treaties entered into by the State are considered to be the exercise of sovereignty rather than the alienation or transfer of same. The express limitations imposed on the Government are discussed by Clarke J. (as he then was) in *Pringle*. Article 29.5 and Article 29.6 provide several specific examples of the important oversight role played by Parliament. An over-riding constraint of a more general nature is that imposed by Article 28.2 which is *'the requirement that an international agreement not infringe the terms of the Constitution'.* Whether or not a particular treaty crosses constitutional boundaries is to be answered by reference to its specific terms.

16. It is fair to say that it is only in exceptional cases that the terms of a treaty would require that it be put before the People in a referendum. Respecting the exceptional nature of such a requirement is essential to the effective functioning of the State in its foreign relations. Ireland has significant standing and reputation, internationally. Small as the nation may be, it is recognised and respected for its contribution, impact and influence. This benefits not just the State but is a significant factor in establishing the concord or harmony with other nations that the People set out to achieve. It is, perhaps, when such '*concord*' with other nations is most at

risk that the importance of the State's power to engage in foreign relations is accentuated. The exercise of executive power in foreign relations would become entirely unworkable and thus, not in the best interests of the nation, if the Government were obliged to have its decisions in international affairs cross-checked, systematically, and sanctioned by the People. Such persistent second-guessing of the Government's exercise of executive power in the conduct of the State's foreign relations would be constitutionally impermissible.

17. Thus, it was for good reason that the courts have been slow to interfere with the exercise of executive power in this regard. This is not because of any special deference to the Government. It is respect for the Constitution that restrains such intrusion. Subject to express or necessarily implied constitutional constraints discussed in the case law above, the executive power of the democratically elected Government to discharge its constitutional functions ranks equal in importance to the sole and exclusive power of the Oireachtas to make laws for the State (Article 15.2) and the exclusive power of the courts to administer justice within it (Article 34.1).

Concerns over CETA

18. In the interests of its People and of the common good, Ireland has entered multiple international agreements through which the Irish State is bound, under penalty, to fulfil certain obligations. One of the principal concerns aired in this case is that, if executed and ratified, CETA will bind Ireland, as a matter of international law, to be liable for damages which an international adjudicatory body—and not an Irish court—deems payable where that body considers that a particular measure of a legislative, executive or judicial nature breaches CETA's terms. Concern is further fuelled by the fact that this *could* occur in circumstances where, as a matter of Irish law, the measure complained of would not give rise to any right to damages. Like any new treaty, the terms of CETA require close and careful consideration. However, in all of the issues and arguments raised by the appellant I have been unable to

discern anything which convinces me that CETA crosses a constitutional boundary, particularly, in circumstances where an analogous and far more extensive international treaty does not. That treaty is, of course, the ECHR and, as the most obvious comparator, consideration of its operation featured significantly during the oral hearing.

The ECHR – An Appropriate Comparator

19. It is said by my colleague Hogan J., in his considered and detailed judgment, that the ECHR represents something of an exception within the Irish legal system, something that stretches the '*pre-existing rules'* to their limits. That position, in my view, is rather difficult to reconcile with the major role that Ireland played in the drafting and adoption of the Convention. Nor is it consistent with the fact that, though not the first State to ratify the Convention, Ireland was the first to recognize the jurisdiction of the court established thereunder. No doubt, the draft provisions of the ECHR generated debate and attracted careful scrutiny and, in some quarters at least, concerns were expressed in terms and tones not altogether dissimilar to those articulated in this appeal. An observation in Egan, Thornton and Walsh, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014) recalls that the *Irish Independent's* editorial, marking the government's ratification of the Convention in Strasbourg, warned that it conferred on:

> *"an external judicial body the right to adjudicate on matters of purely Irish concern . . . It seems to us that this external court may even reverse or render nugatory a decision made by our Supreme Court".*

20. Whilst concerns about the scope or impact of a new treaty may be entirely appropriate they must arise, at least in my view, from the actual terms of the treaty under review and not from speculative apprehensions about what could or might go wrong. There was, in fact, no reality back in 1953 to the apprehension that the ECtHR could '*reverse*' or '*render nugatory*' a judgment of this Court because the terms of the Convention did not confer upon the ECtHR

the jurisdiction so to do. There may well have been surprise or even indignation to discover that the court's first case to be litigated was against Ireland, particularly, when an earlier memorandum to government, prepared in anticipation of ratification of that treaty, had advised that the likelihood of Ireland being brought before the court was '*very remote'*. (See Schabas, 'Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride*'* in Morison, McEvoy and Anthony, *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (OUP, 2006), 19). Surprised or not by that turn of events, there is, as O'Donnell, C.J. points out, nothing to suggest that Ireland regarded itself as operating at the very limits of its constitutional order by acceding to the ECHR. Almost seventy years on and dozens of judgments later, nobody contends that Ireland's sovereignty has been undermined or diluted by reason of it being a contracting party to the Convention.

21. It seems clear, from this vantage point, that CETA's operation, if ratified by Ireland, will resemble, generally, though more narrowly, the operation of the ECHR. The Convention is considerably more extensive in its scope and impact. The similarities between both systems are numerous. First, as with CETA, the ECHR involves an international adjudicatory body with power to decide that a measure taken (or not taken) by the organs of this State may breach or violate a term of a treaty to which Ireland is a signatory. Second, as with CETA, membership of that adjudicatory body is not confined to persons who are serving judges. Some members of the Strasbourg court may possess the qualifications required for appointment to judicial office but that is not mandatory. Being a 'jurisconsult' of recognised competence is sufficient for eligibility. Third, as with CETA, there is no requirement that persons appointed to serve on the court be answerable to any of the institutions of the State. On the contrary, all members are independent of the states in respect of which they are elected. Fourth, as with a CETA tribunal, the court's ruling may impugn a measure that is entirely lawful in Ireland. Fifth, the ECtHR may direct Ireland to pay damages to a successful complainant and, in certain instances, it may direct that general measures be taken by the State. Sixth, as under CETA, a judgment

of the Strasbourg is binding upon and enforceable against Ireland (see *Norris v. Ireland* (Application no. 10581/83) (1988) 13 EHRR 186; see also *O'Keeffe v. Ireland* [2014] ECHR 96, (2014) 59 EHRR 15).

22. Another similarity between the CETA and ECHR frameworks is that whereas neither adjudicatory body established thereunder has jurisdiction to declare upon the *validity* of Irish law, both may consider and review it in the context of deciding upon a claim. In several cases, the Strasbourg court has considered provisions of domestic legislation and reviewed final judgments of this Court for the purpose of determining whether, in their impact upon an applicant, a violation of the Convention had occurred (see *Norris, O'Keeffe, Donohoe v. Ireland* [2013] ECHR 1276 and *Keena and Kennedy v. Ireland* [2014] ECHR 1284). It is envisaged that a CETA tribunal will have similar powers of review for the purpose of determining whether a term of the trade agreement has been breached.

23. Notwithstanding the numerous structural similarities between CETA and the Convention, the appellant submits, and the majority agrees, that an aspect of the State's sovereignty is compromised by accession to the former but not to the latter. It seems to me that it is, precisely, at the points where those international frameworks differ, that the majority discerns a difficulty with CETA's constitutional compatibility. Those points of divergence concern, first, the conferral upon investors of a choice of forum without any requirement to exhaust domestic remedies and, second, the inclusion of a provision within CETA on the enforceability of awards within the domestic legal system. This latter provision is of particular concern to my colleague, Hogan J. He considers that the manner of enforceability of a CETA award is a critical distinction between CETA and the ECHR and one which, in his view, constitutes an essential point of principle where the constitutional line is crossed. He also expresses concern about the absence of any recourse which this State would have in the event that a CETA tribunal erred in its interpretation of our law even as a matter of fact. Both of these are matters to which I shall return, presently.

The Choice of Forum and 'Removal' of Disputes

24. Unlike the Convention, there is no requirement upon an investor whose investment is covered under CETA to exhaust domestic remedies within the state in which an investment has been made. Such an investor has a choice. Thus, a Canadian investor in Ireland *may* pursue Ireland before the Irish courts or, having met certain procedural criteria, may bring a claim before a CETA tribunal. If the latter option is chosen, then any domestic legal proceedings initiated in respect of an impugned measure must be withdrawn and the investor must waive the right to initiate such proceedings at domestic level (Article 8.22.1). It seems rather unlikely, in my view, that a Canadian investor in Ireland would engage in expensive international proceedings against the European Union and/or the State in which it had made significant investment, without seeking to resolve its grievances at local level. A complaint under CETA about 'a denial of justice' may be difficult to sustain if the judicial system for remedying and resolving injustices was never invoked. Nevertheless, the fact remains that there is a choice of forum under CETA and, if the covered investment is in Ireland, the option to bypass the Irish courts is there. Whether that constitutes an infringement of Article 34 must be confronted, squarely.

25. Article 34 confers upon judges appointed under the Constitution the duty to administer justice in courts established by law and, with limited exceptions, to do so in public. By conferring a right upon Canadian investors in Ireland to elect to bring a dispute before a CETA tribunal, the appellant contends that judicial sovereignty in the administration of justice is, thereby, diminished. Such sovereignty, it is argued, will be diluted as claims may be *'removed'* from the jurisdiction of the courts. It is said that the conferral of a choice of forum would preclude the Irish courts from determining a dispute in circumstances where it is the Irish courts and those alone who are charged with administering justice within the State. This, it is said, would constitute an alienation by the State of its sovereign immunity within the terms described by the Supreme Court in *Crotty*.

26. As I read the considered and weighty judgment to be delivered my colleague, Dunne J., it seems to me that this is where she locates the crux of the problem with CETA. Having discussed what was in issue in *Crotty* and regarding as '*relevant*' to the 'removal from the jurisdiction' issue what the CJEU determined in *Republic of Moldova v Komstroy LLC* Case C-741/19 ECLI:EU:C:2021:655 (in the context of the application of EU law), Dunne J. articulates, succinctly, the problem she discerns.

> *"[. . .], 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."*

27. The above finding is the principal point upon which I dissent, respectfully, from the decision of Dunne J. The finding reflects the argument made by the appellant that, as matters stand, a Canadian investor who has a problem with the Irish State is required to bring proceedings within this jurisdiction. That, it was submitted, is the '*regime*' before going off '*out into the international plane'*. This argument, to my mind, is flawed. There is no 'requirement' on any aggrieved individual or entity to litigate before the Irish courts. Litigation is a choice, and many choose other forms of dispute resolution. Thus, for example, under an international bilateral agreement, the parties may give prior consent to resolve, by way of

arbitration, any dispute that may arise and to do so without recourse to the courts. There is nothing unlawful or unconstitutional in that choice. Thus, there is not now, nor is there under CETA, any *a priori* requirement on a Canadian investor to resolve a dispute by bringing it before the Irish courts. There is a right of access to courts that administer justice within the State, but there is no obligation to exercise it.

28. If an investor whose investments are covered under CETA, elects to bring its grievance before the Irish courts in public law proceedings, the only complaint that may be made in respect of an impugned measure is that it constitutes a breach of Irish law. Any effort to rely upon the fact that an investment was covered by CETA would be to no avail. An alleged breach of an international agreement is not a justiciable dispute under Irish law, unless Irish law makes it so. If such an investor were successful in its claim before the Irish courts and were to obtain an award of damages against the State, then the legal liability upon which any such award would be made, is a liability in Irish law.

29. An investor who, on the other hand, elects to seek relief before a CETA Tribunal, may only complain that an impugned measure constitutes a breach of that international agreement. Any award obtained on foot of such a complaint would be based on a liability under international law. Although the same measure may be the subject of dispute, a different complaint will be framed, a different question will be posed, and a different basis of liability will be engaged, depending on the jurisdiction that is invoked.

30. A Canadian investor who elects to pursue a claim before a CETA tribunal does not subtract one jot from the jurisdiction of the Irish courts. In my view, the contention that CETA creates '*a parallel jurisdiction*' conflates, with respect, the nature of two distinctly and fundamentally different claims. A failure to distinguish between the different legal bases upon which liability could be imposed, forms part of the same error. An investor who alleges a breach of an international trade agreement and succeeds in obtaining an award of damages arising therefrom, does not, in any way, diminish or detract from the jurisdiction of the Irish

courts. Again, and respectfully, a claim before a CETA tribunal is not one which, had *that* claim not been taken, is one in respect of which the Irish courts '*would otherwise have had jurisdiction*'. One cannot lose what one does not have, and the Irish courts have no jurisdiction to determine a claim that involves an alleged breach of CETA.

31. If a Canadian investor operating within the State were to be *deprived* of an opportunity to litigate before the Irish courts and were obliged to present any complaint it may have only to a CETA tribunal, then that would be an altogether different scenario and one which would certainly raise an issue in respect of its constitutional compatibility. It was*, inter alia,* because the International Criminal Court could exercise a *direct* jurisdiction in respect of persons within the State for serious international crimes, that the Rome Statute was deemed to transfer (albeit in a limited way) an aspect of sovereignty such that a referendum was required prior to accession thereto.

32. At the level of *form*, there are certain similarities between a CETA tribunal and an Irish court but the same may be said of any other juridical body. At the level of substance, however, there is a world of a difference. That the same facts may generate fundamentally different disputes does not, in itself, mean that a parallel jurisdiction is, thereby, created. CETA offers an alternative jurisdiction, not a parallel one and, importantly, it is a jurisdiction that stands outside of the Irish constitutional order. Depending on the choice of jurisdiction invoked by a Canadian investor whose investment is covered, different claims will be made, different parties will present, different obligations will be disputed, different laws will apply, different rules will govern procedure, different juridical bodies will deliberate, different determinations will be delivered and, where a claim succeeds, a different legal basis will ground any liability in damages. This is a not a question of semantics. It is a matter of jurisdictional boundaries—national and international—and the consequences and competences that flow therefrom. That such a jurisdiction was not 'contemplated' by the Constitution (Charleton J. para. 61.3) is no more problematic from a constitutional perspective than was the non-contemplated jurisdiction

of the Strasbourg court which was recognised by Ireland on 21 April 1959 almost twenty-two years after the enactment of the Constitution.

Domestic Remedies

33. Nor does the absence within CETA of any requirement to exhaust domestic remedies create a problem in respect of any aspect of Ireland's sovereignty. Indeed, it is entirely consistent with the nature of CETA and the 'either/or' choice of jurisdiction provided, thereunder, that there is no requirement to exhaust domestic remedies. The Irish courts have neither power nor authority to interpret, apply or uphold the provisions of CETA or, indeed, to grant any remedy for a breach thereof. Since the Irish courts have no jurisdiction to rule on an alleged breach of CETA there is no obligation under that treaty for the State, as a party, to provide a remedy for any alleged breach thereof. A complaint about CETA is not one which could be made, properly, before an Irish court and, thus, it would make no sense at all for the agreement to require exhaustion of a remedy for a breach which the Irish courts have no jurisdiction to grant.

34. In contrast to CETA, the Convention provides, expressly, that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. Under the ECHR framework, therefore, remedies are required to be exhausted and that is entirely consistent with the nature of *that* agreement based, as it is, on the principle of subsidiarity. That is because, though not cast in identical terms, rights protected under the Convention are also protected as substantive rights at domestic level and, in some respects an enhanced level of protection is afforded under Irish law. By contrast, the range of claims in respect of which complaint may be made to a CETA tribunal is considerably narrower than, and of an altogether different nature to, the range of claims that could be brought before the Irish courts. The requirement to exhaust domestic remedies cannot be view in isolation

from the different nature of the claims in issue and the availability or otherwise of remedies in respect thereof appertaining to the different jurisdictions in question.

35. Although Dunne J. found the observations of the CJEU on the removal from the courts of Member States disputes concerning the application of EU law to be *relevant* to her analysis, they were not, at least in my view, entirely on point. The essential difference, of course, between CETA and the agreement under consideration in *Achmea* (C‑284/16, EU:C:2018:158) is that unlike that bilateral agreement, CETA is not an agreement *between two Member States within the Union* who agree to allow an independent tribunal, whose rulings are not subject to scrutiny by the CJEU, to determine the outcome of a dispute. It was, at least as I read it, the fact that such a tribunal was ruling on an application of EU law but in the absence of the safeguards and remedies provided, thereunder, that created the difficulty, in principle.

CETA's Interaction with Irish Law

36. Apart from the creation of a '*parallel*' jurisdiction, a further unease among some members of the majority concerns CETA's interaction with Irish law and the potential effect thereon which a ruling of a CETA tribunal may have upon the finality of judgments emanating from the Irish courts. Particular concern is expressed about the potential impact that a CETA award may have in circumstances where it would be enforceable within the domestic legal order. It is said that this could have the effect of '*going behind*' the finality of judgments of this Court. If CETA is executed and ratified, it has to be acknowledged that it could, potentially, have a significant impact upon Ireland, with positive and/or negative outcomes. A CETA tribunal, however, has no power to direct any change in Irish law or to reverse any final decision of an Irish court. The fact that an award of a CETA tribunal may have a significant impact or even inspire the future amendment or enactment of legislation does not compromise legislative or judicial sovereignty any more than did the rulings of the Strasbourg Court in *Norris* or in *McFarlane v Ireland* [2010] ECHR 1272 ('*McFarlane*') or in *O'Keeffe*.

37. A successful applicant before the ECtHR may consider, quite incorrectly, that a 'win' in Strasbourg constitutes an overruling of a final judgment of the Irish courts. That, of course, is to misunderstand, entirely, the nature of the Convention system. The ECtHR does not function as a court of appeal or a court of 'fourth instance'. It is a court of supervisory jurisdiction in respect of an international agreement to which Ireland is a contracting party. A 'win' for an applicant is a finding of non-compliance on the part of the State with an obligation it had undertaken to fulfil at international level. It is not an overruling or reversal of a final judgment of this Court which, irrespective of what the ECtHR may find, remains final and binding in domestic law. The same reality will prevail if CETA is ratified and a Canadian investor who fails in a claim brought under Irish law, goes on to secure a 'win' under the terms of CETA.

38. My colleague, Hogan J., has raised (at para. 112) the possibility and prospect of a CETA tribunal giving an erroneous interpretation of Irish law. In a passage expressing some concern, he says that:

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

39. In my view, the situation described by Hogan J. is not a novel phenomenon and has already occurred in the context of proceedings before the ECtHR without giving rise to the slightest concern that Ireland's sovereignty was at stake. In *McFarlane*, the Irish Government presented compelling expert evidence from one of Ireland's most distinguished constitutional lawyers which confirmed, unequivocally, that Irish law provided a remedy in damages for a

breach of constitutional rights. The right to a trial in due course of law (including the right to an expeditious trial) is such a right and, in *McFarlane*, the State argued that if this right were violated, then a remedy in damages could be sought. The fact that nobody had taken proceedings of this nature and, thus, a breach of this specific constitutional right *had not previously been adjudicated on in the Irish courts,* did not detract from the fact that, under Irish law, a remedy in damages existed for such a breach.

40. The Strasbourg court, nevertheless, concluded that there was no effective remedy for breach of the constitutional right to an expeditious trial or, in Convention terms, to a trial within a reasonable time. The Grand Chamber, in my view, had erred, fundamentally, in its rejection of the State's expert evidence and in its interpretation of Irish law and I explained why I took that view in the dissenting opinion I wrote on behalf of the minority. The State, in those circumstances, did not have any recourse and, indeed, was obliged to abide by the ruling of the court and to enforce the award at national level. All of this occurred without the slightest suggestion that Ireland's sovereignty as guaranteed under the Constitution was in any way compromised.

41. Hogan J. considers that to the extent that CETA permits disputes that involve public law in this State to be the subject of a binding adjudication by a CETA tribunal which is *prima facie* enforceable in the State, it is '*plainly incompatibl*e' with the juridical sovereignty of the State. He contemplates the possibility that a supra-national tribunal with power to make binding awards against the State might be constitutionally permissible if the disputed events took place *outside the State* (see para. 176). With respect, this overlooks the reality that, for several decades, the Strasbourg Court has been and remains empowered to make binding awards against the State in respect of disputed events and actions that take place *inside* the State and that engage a wide range of laws without the slightest hint that the exercise of its jurisdiction in this regard is, constitutionally, objectionable. (In this regard see *Airey v Ireland* [1979] ECHR 3, (1979-80) 2 EHRR 305, *Norris*, *O'Keeffe*, *McFarlane* and, as to the court's

power to resolve disputes involving the State's criminal laws see *MD v Ireland* (Application No. 50936/12, 16 September 2014), *Donohoe*, *Lynch and Whelan v Ireland* (Application Nos. 70495/10 and 74565/10, 8 July 2014) and *Boyce v Ireland* (2013) 56 EHRR SE11). This takes us to what must be regarded as the principal structural difference between the framework of a CETA tribunal and that of the ECtHR, namely, the mechanism for the enforcement of binding awards at domestic level.

The Enforcement of Awards

42. Pursuant to CETA's provisions, a claim may be submitted under the rules of the Conventions identified under Article 8.23.2 (a) to (c), namely, the ICSID (International Centre for Settlement of Investment Disputes) Convention and Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules or the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. A claim may also be brought under any rules on the agreement of the disputing parties (Article 8.23.2 (d)). It is common case that the ICSID and UNCITRAL Conventions provide for the execution of awards on foot of binding agreements.

43. The parties to CETA agree that an award issued shall be binding between the disputing parties (Article 8.41). They further agree that a disputing party shall, subject to certain procedural requirements, recognise and comply with an award without delay (Article 8.41.2) and that the execution of the award '*shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought'* (Article 8.41.4). In this jurisdiction, awards become binding through the Arbitration Act 2010 and, in particular, sections 24 and 25 thereof.

44. A number of colleagues consider that enforcement of a CETA tribunal award by means of the Arbitration Act 2010 creates a fundamental difficulty in terms of the agreement's constitutional compatibility. For Dunne J., it is CETA's creation of a '*parallel jurisdiction*'

together with the '*almost automatic enforcement*' provision that constitutes a breach of Article 34. She distinguishes CETA's enforcement mechanism from that of the ECHR framework and points to the fact that judgments of ECtHR are not enforceable through the domestic courts while those of CETA are. It is said by my colleague Hogan J. that the 2010 Act serves as '*a sort of makeshift pontoon bridge*' by which a CETA tribunal award '*crosses the legal Rubicon from the realm of international law into an enforceable judgment recognised under domestic law on a more or less automatic basis'*.

45. For my part, I cannot agree that the enforceability mechanism for awards issued by a CETA tribunal is of such distinction and significance as to constitute the decisive feature that makes CETA '*plainly incompatible*' with the juridical sovereignty of the State. First, the fact that an ECtHR ruling is not enforced through the Irish courts does not, in any way, diminish its binding nature upon and its enforceability within the State (see *Norris, O'Keeffe, MacFarlane*). The State has committed itself to abiding by decisions of the Strasbourg court and, under Article 46 §2 of the Convention, it is the Committee of Ministers of the Council of Europe that is entrusted with supervising the execution of court judgments. Those judgments leave to the contracting parties the choice of the means to be used to give effect to their obligation to abide by the court's decisions (see *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, §78; and *Scordino v. Italy* [GC], 29 March 2006, §233). Whether a ruling is issued by a CETA tribunal (assuming CETA's ratification) or the ECtHR, the outcome for the State is the same. If it is constitutionally permissible for the State to abide by and 'give effect to' a ruling of the Strasbourg court, then something more than a difference in the mechanism for achieving the same result is required if CETA is to be deemed constitutionally objectionable.

46. In my view, the difference in the mechanism for executing decisions under the ECtHR system and under the CETA framework cannot be sufficient, in and of itself, to establish a constitutional frailty. It is, as the Chief Justice puts it (at para. 164), a *difference* but not a *distinction* which justifies a different conclusion in law. Either way, under both frameworks

there is an obligation to abide by rulings of an international body that are binding upon the State. In *Norris*, the ECtHR held that the Irish government had adduced no evidence which would point to factors '*justifying the retention of the impugned laws*'. The court recognised that its decision would have effects extending beyond the confines of that particular case. It went on to state that it will be for Ireland *'to take the necessary measures in its domestic legal system'* to ensure the performance of its obligation to abide by the decision of the Court.

47. Under the terms of CETA it is envisaged that '*the necessary measures'* to be taken by the State *in the domestic legal system* are identified, not in the aftermath of an international ruling, but in advance and at an earlier stage. The fact that the Government decides to agree the method for executing a binding international decision *prior* to a treaty's ratification makes little, if any, difference to its constitutional compatibility. There is nothing at the level of principle which prevents the executive organ of the State from deciding, in advance of a treaty's ratification, how the State will fulfil or perform its obligation to abide by the terms thereof. If, as happens in this case, there is already a provision within Irish law which can accommodate the fulfilment of the obligation in question there is nothing that is constitutionally impermissible, as I see it, in deciding to deploy that mechanism.

48. The fact that the Irish courts may find themselves presented with applications for leave to enforce a CETA arbitral award made under ICSID or UNCITRAL rules, is precisely because, and only because, Irish law so permits it. Why the enforcement of a CETA tribunal arbitral award made under rules which are recognised and accepted in the State should be constitutionally objectional where the enforcement of awards made by other external arbitral bodies under the same rules is not, is a question that, at least in my view, has not been answered, convincingly, by the majority. It is Irish law that stipules that obligations imposed by awards made under ICSID or the New York Convention shall, by leave of the High Court, be enforceable in the same manner as a judgment or order of the High Court to the same effect. Thus, to the extent that CETA crosses any 'Rubicon' from international to national law – that

crossing is permitted only because Irish law provides an entry point for an identifiable category of entrants who have obtained awards under rules that are recognised under Irish law. Any 'conversion' of the international ruling, as Hogan J. puts it, arises by virtue of the operation of Irish law.

49. Reliance was placed by the appellant on *J.McD v. PL* [2010] 2 I.R. 199 wherein Murray C.J. made certain observations about the status of the ECHR and its effect at national level. In this regard, it is true that he observed that contracting states may, in principle, ignore the decisions of the Strasbourg court but it is equally clear that the former Chief Justice recognised that there was nothing that prohibited such decisions from being enforceable at national level. Such rulings, he stated, '*are not enforceable at national level unless national law makes them so*'.

50. Given the evolution of Irish constitutional law, for example, on the recovery of damages for delay in the court process and in the light of the ongoing judicial 'dialogue' between national and international courts, I am not at all convinced that, at least at the level of practice, the Irish courts would simply 'ignore' a ruling of the Strasbourg Court. But even if, in principle, they could do so, such an option is not permissible when it comes to an application for leave to enforce an award made by an arbitral tribunal under ICSID or UNCITRAL rules. Irish judges have promised, solemnly, to uphold the Constitution and the laws. In exercising his or her discretion on an application for leave, wide or limited as that discretion may be, an Irish judge is engaged in the administration of justice in Ireland and is discharging the solemn promise '*to uphold the Constitution and the laws*'. There is, therefore, at least in my view, no question of a CETA arbitral award crossing, impermissibly and unconstitutionally, any '*pontoon bridge*' and demanding of the Irish courts its '*almost automatic*' enforcement. Nor by issuing such an arbitral award does a CETA tribunal trespass upon any aspect of Ireland's juridical sovereignty any more than the Strasbourg court does when it delivers judgment against

the State. Neither body has any jurisdiction to direct the Irish courts to do anything. The Irish courts act only in accordance with the Constitution and the laws made thereunder.

51. As the Chief Justice points out, for over forty years provision has been made in Irish law under the Arbitration Act 1980 for the enforcement of awards made under the ICSID Convention or the New York Convention. For the sake of completeness, the argument that, in contrast to commercial arbitration agreements, third parties with no privity of contract may invoke and benefit from the terms of CETA makes no difference at the level of principle as to whether the agreement is constitutionally compatible. Third parties from across the globe may also be in a position to benefit from Ireland's ratification of the ECHR. In neither instance does the inability to name a potential beneficiary engage any aspect of the State sovereignty. I, too, consider it telling that no authority has been opened to the Court to say that executing an investor compensation agreement with enforcement provisions similar to those contained in CETA is an impermissible infringement of national sovereignty.

52. I am satisfied that CETA operates at the level of international law. In my view, the conferral upon investors of a choice of forum without a requirement to exhaust domestic remedies does not involve the creation of a parallel jurisdiction. The enforceability of a CETA arbitral award by reason of the operation of the provision of Irish law does not cross any boundary in terms of what is constitutionally permissible.

Jurisdictional Safeguards

53. As in life, the inability to predict the future may give rise to several potential 'doomsday' scenarios in terms of how CETA may operate, in practice. Neither Canada, the EU, Ireland or any other state party to CETA can immunise itself, absolutely, against the risk of a truly perverse ruling following a claim made under this multilateral trade agreement. As matters stand, however, there is nothing within the terms of CETA itself that suggests to me that such a scenario is likely to unfold. If, in the final analysis, an award issued by a CETA tribunal

were to be incompatible with the Constitution, then the reality is that no Irish judge would or could grant leave to enforce it.

54. There are several safeguarding provisions in the agreement that circumscribe the jurisdiction of a CETA tribunal. The agreement recognises that a party has the right to set, for example, environmental and labour priorities and to establish levels of protection in other important respects. Thus, for example, with regard to the environment, Article 24.3 provides that:-

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

55. I am grateful to my colleague, Dunne J., for her detailed and careful summary of the findings of the CJEU in *Opinion 1/17*. It is obvious that the Court was cognisant of the fact that awards of a CETA tribunal could have a chilling effect upon the European Union ***if*** the tribunal had jurisdiction to find that the treatment of a Canadian investor was incompatible with CETA because of the level of protection of a public interest established by the EU institutions. The CJEU recognized that, realistically, to avoid being compelled, repeatedly, to pay damages, the achievement of the level of protection would need to be abandoned by the Union. It also recognized that if the Union or a Member State had to amend or withdraw legislation because of an assessment made by a CETA tribunal of the level of protection of a public interest, that, too, would undermine the capacity of the Union to operate autonomously within its unique constitutional framework.

56. Crucially, however, the Court underscored the fact that there are several important areas which are expressly removed from CETA's jurisdiction. In *Opinion 1/17*, the CJEU concluded

that a CETA tribunal does not have jurisdiction '*to call into question*' or '*declare incompatible*' with the agreement the level of protection of a public interest established by EU measures and, on that basis, to order the Union to pay damages. It recalled the explicit right of the parties to the agreement *'to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'* (Article 8.9.1). Additionally, the Court also recognised that the jurisdiction of the CETA Tribunal to find infringements of the '*fair and equitable treatment*' obligation was specifically circumscribed in that Article 8.10.2 provides an exhaustive list of the situations in which such a finding can be made.

57. After a lengthy reasoning process the CJEU (at para. 160) concluded:

> *"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."*

58. Although this Court considers this appeal only from the perspective of the Irish constitutional law, I find the CJEU's analysis, reasoning and conclusion in *Opinion 1/17* to be helpful, by analogy. The CJEU observed that CETA tribunals could only be compatible with EU law if they had no adverse effect on the autonomy of the EU legal order. It noted that a CETA tribunal does not operate as part of the judicial system of either of the parties and that such a body cannot interpret or apply EU law or make awards that have the effect of preventing the EU institutions from operating in accordance with their own constitutional framework.

59. As the CJEU was satisfied that CETA does not interfere with the constitutional structure of the European Union, I consider that the same conclusion may be drawn, with equal validity, in respect of the constitutional structure and identity of the State. CETA cannot be directly invoked in the domestic legal system of a Party. A CETA Tribunal stands outside the Irish constitutional order. It does not operate at national level, does not determine the legality of a measure under the domestic law of a Party. In weighing the respective interests of the parties, a CETA tribunal does not have jurisdiction to make awards that '*call into question'* or '*declare incompatible*' with the agreement the level of protection of a public interest established by the EU or a Member State. On the contrary, it expressly recognises a Party's right to regulate within its territory so that it can achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. The mere fact that a Party regulates in a manner which negatively affects an investment or interferes with an investor's expectations, including, its expectations of profits, does not amount to a breach of the agreement.

60. Furthermore, CETA makes provision for an application, at appellate level, to annul an award on the basis that a tribunal has exceeded its jurisdiction. In addition to the grounds set for modifying or reversing an award as stipulated under Article 8.28.2 (a) and (b) of CETA, the grounds as set out in Article 52 (1) (a) through (e) of the ICSID Convention apply. Those grounds expressly include '*that the Tribunal has manifestly exceeded its powers'.*

61. There is nothing, at this point, to indicate or suggest to me that the essential character of the Irish Constitutional order would be affected by an award of a CETA tribunal. If a CETA tribunal were to exceed the limits of its jurisdiction as identified by CJEU in *Opinion 1/17* and were to deliver a perverse ruling that was, manifestly, in excess of its powers, then it seems to me that, at that point, the submission of counsel for the respondents would take on a particular significance. In such an event, it was submitted that the *Greendale* jurisdiction (*Greendale Developments Ltd, Re,* (No. 3) [2000] 2 I.R. 514) could be used to resist an application for

enforcement because ICSID allows for defences that would be available in respect of judgments in the national courts, to be applied in respect of CETA arbitral award and that this was permitted under *Micula's* interpretation of Article 54 of ICSID (see *Micula v. Romania* [2021] WLR 1033).

62. I agree with the Chief Justice that the obligation to seek the leave of an Irish court is a matter of real legal and constitutional significance. In the administration of justice, all applications to the High Court merit careful judicial attention and an application made under the Arbitration Act 2010 seeking leave to enforce an arbitral award is no exception. If the High Court were to refuse leave because a CETA tribunal arbitral award was manifestly incompatible with the Constitution or, indeed, with a fundamental aspect of EU law—and certainly in excess of the jurisdiction identified by the CJEU in *Opinion 1/17*—then the likelihood is that the matter would be appealed to this Court. At that point, and faced with the facts of a live dispute, consideration might well be given to making a reference to the CJEU. If this were to transpire, it might well be anticipated that the agreement itself was in danger of unravelling, presenting a need for the parties to return to 'the drawing board'. All of this is, of course, entirely speculative but it is indicative of a path that may be pursued if a 'doomsday' scenario were to unfold.

Summary

63. This Court is not called upon to determine whether the ratification of CETA by the State is a good idea or a positive move. That is not its judgment call to make. As matters stand, the respondents consider that CETA will bring enormous benefits regarding trade and investment. That may be so. Equally, time may change the Government's view of the prudence or otherwise of ratifying CETA. In recent times, several EU Member States that ratified the Energy Charter Treaty ('ECT') have announced an intention to withdraw therefrom based on the view that it is not in line with commitments made under the Paris Agreement (UN

Framework Convention on Climate Change). If CETA is ratified by the State it may transpire that in years to come Ireland may wish to withdraw therefrom but decisions concerning the ratification of or the withdrawal from an international treaty, such as, this one, are decisions for the Government to take, falling, as they do, within the remit of the executive power of the State under Article 29.4.1° of the Constitution.

64. The Court is called upon to review the provisions of CETA in order to determine whether its ratification by the Government in the manner proposed would offend any provision of the Irish Constitution. In my view, there is nothing within CETA's terms that undermines the capacity of Ireland to operate autonomously within its unique constitutional framework. I do not consider that the ratification of CETA in the manner proposed by the Government would in any way compromise the sovereign, democratic and independent nature of the State as stated in Article 5 of the Constitution.

65. Nor, in my view, would the exercise of powers by the Joint Committee under Article 26 of CETA encroach upon the sole and exclusive power of the Oireachtas to make laws for the State. Neither a proposal made by a select committee nor a binding interpretation of CETA issued by the Joint Committee involves the act of legislating for the State and thus it cannot be said to contravene Article 15.2.1° of the Constitution.

66. As the rights conferred and the obligations imposed under CETA are those created by the Parties under public international law (Article 30.6.1), the ratification of CETA in the manner proposed would not infringe upon the judicial sovereignty of the State's legal system. CETA does not create a '*parallel*' jurisdiction operating alongside the Irish courts in breach of Article 34 of the Constitution. Nor would an arbitral award of a CETA tribunal displace, in any way, the finality of judgments of the Irish courts as a matter of Irish law. CETA would not, if ratified, subtract in any way from the jurisdiction of the Irish Courts.

67. As matters stand, I cannot say that there is anything in the agreement that fetters or encroaches upon the State's sovereignty. I find the observations of O'Donnell C.J.. in *Pringle* to be particularly apt in this case:

> *"... 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".*

68. In my view, the ratification of CETA in the manner proposed by the Government would constitute a lawful exercise of State sovereignty and would be permissible under the Constitution.

Conclusion

69. For the reasons set out above, I would dismiss the appeal.

70. However, as I am in the minority in finding that ratification of CETA in the manner currently proposed would be constitutionally permissible, I would have to accept that, to the extent that the majority perceives any constitutional frailty in the agreement, such frailty as it identifies would be 'cured' by amending the Arbitration Act 2010 in the manner suggested by Hogan J. in his judgment.

71. As to the issues identified by Dunne J. at para. 13 of her judgment, my position is as follows.

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

No.

(ii) Is CETA a breach of Article 15. 2 of the Constitution?

No.

(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?

No.

(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?

I do not regard enforcement as being 'automatic' and, in any event, No.

(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?

The interpretative role of the Joint Committee has no effect in Irish law and its role does not constitute 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 Part XIII of the judgment to be delivered herein by Hogan J. alter the position in relation to the ratification of CETA?

I see no constitutional impediment to the ratification of CETA in the manner currently proposed as its enforcement provisions do not, in my view, breach

Article 34 of the Constitution. Ratification of CETA following an amendment of the Arbitration Act 2010 in the manner envisaged by Hogan J. would also be constitutionally permissible.