

DISPUTES & INVESTIGATIONS

## Irish Supreme Court: *Irish government's proposed approach to ratifying CETA unconstitutional*

In *Patrick Costello v The Government of Ireland, Ireland and the Attorney General [2022] IESC 4*, the Irish Supreme Court, by a 4-3 majority, ruled that the Irish government's proposed approach to ratifying the EU-Canada Comprehensive Economic Trade Agreement (**CETA**) is unconstitutional.

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## Introduction

By a 4-3 majority, the Irish Supreme Court has ruled that the Irish government's proposed approach to ratifying CETA is unconstitutional. A comprehensive 6-1 majority ruled that certain amendments to the Irish Arbitration Act 2010 could cure the unconstitutionality. More specifically, the court suggested that altering the "automatic enforcement" of a CETA award by expanding the grounds of review of CETA awards under Irish law should cure any unconstitutionality.

The court unanimously ruled that the state was not obligated to ratify CETA arising out of its EU membership. Further, five of the seven Justices ruled that Chapter 8 of CETA would not lead to a transfer of judicial sovereignty that would conflict with article 15.2 of the Irish Constitution. Four of the seven Justices also:

- Ruled that CETA tribunals do not establish a parallel jurisdiction in breach of the Irish court's jurisdiction to administer justice (in line with article 34 of the Constitution).
- Ruled that CETA arbitral awards would be automatically enforceable in Irish courts and would therefore breach article 34 of the Constitution.
- Rejected the claim that the interpretative powers of the CETA Joint Committee, that is, its ability to adopt recommendations on interpretation of CETA, amounted to the making of domestic law.

The importance of this judgment is evidenced in both the unusual circumstance of all seven Justices issuing judgments (with each disagreeing in some respect) and in the decision by the court to offer legislative guidance to the Executive on how to respond to their finding of unconstitutionality. To put this into context, Hogan J stated in his judgment that "the present appeal may yet be regarded as among the most important which this Court has been required to hear and determine in its almost 100-year history." It has also been described by commentators as "Ireland's Achmea moment"<sup>1</sup>. The effects of the decision on Irish law and international relations remain to be seen.

<sup>1</sup> Achmea is a reference to the jurisprudence arising from the Court of Justice of the European Union (CJEU) in *Slovak Republic v Achmea B.V. (Case C-284/16)*. The CJEU ruled that the arbitration clause in the bilateral investment treaty (BIT) between the Netherlands and Slovakia was incompatible with EU law, because it removed disputes from the judicial review framework under EU law.



## Background

In light of the backlash against investor-state dispute settlement (**ISDS**) and the perceived lack of transparency, in 2015, the EU put forward a proposal for reformed ISDS provisions, including the creation of an Investment Court System (**ICS**), to replace the existing ISDS mechanism in all ongoing and future trade and investment negotiations between the EU and other states. The ICS distinguishes itself in that the judges are publicly appointed rather than being appointed by the parties or by an arbitral institution.

The EU is now at various stages of establishing free trade agreements with the new ICS, which includes CETA.

Chapter 8 of CETA provides for Canadian investors to bring claims against EU member states (and vice versa) where the investor has not been treated fairly by the relevant government.

## Facts

In March 2021, Mr Patrick Costello, a member of the Irish parliament sought an order from the High Court that would prevent the respondents, the Irish government, from ratifying CETA, arguing, among other things, that the provisions of Chapter 8 of CETA on dispute settlement were unconstitutional and that the manner in which the government had proposed to ratify CETA was also unconstitutional.

At the heart of his opposition to CETA was Mr Costello's contention that its terms would, in effect, transfer important elements of sovereign power to the institutions created by the agreement. Mr Costello argued that ratifying CETA would also transfer judicial power to CETA tribunals, which would settle disputes that ought to be determined by Irish Courts in line with article 34.1 of the Irish Constitution. His position was that the only way Ireland could ratify CETA would be by means of a constitutional referendum.

## The decision of the High Court

The trial judge, Butler J, conducted a thorough review of CETA and several articles of the Irish Constitution and found in favour of the respondents. Among other things, Butler J discussed the European Convention on Human Rights Act 2003 and considered that, by analogy, CETA could also be ratified to create rights and obligations at an international level for Ireland, without having legal effect in Irish law. Butler J analysed the decision in *Crotty v An Taoiseach [1987] I.R. 713*, delivering a finding that entering international agreements is an important expression of state sovereignty, and to limit the ability of the Executive to enter such agreements would restrict rather than protect state sovereignty.

Mr Costello also argued on the basis that CETA is a "mixed agreement" under EU law that is an agreement which covers matters within the exclusive competence of the EU and some matters which are shared competences between the EU and member states. Since regulation of indirect foreign

investment is a shared competence that the EU has not previously exercised competence over, the effect of ratification would vest a new competence in the European Union.

This ratification, according to Mr Costello, had the potential consequence of binding Ireland to the project to establish a Multilateral Investment Tribunal (**MIT**) in the EU. This in turn would prohibit Ireland from opposing the proposal to establish a MIT in the future, leading to a loss of state sovereignty. Butler J again sided with the respondents on this point, holding that if a MIT were to be established, this could only be done by way of further international agreement requiring further ratification.

As to Mr Costello's argument that the CETA tribunal would be 'administering justice' in breach of article 34 of the Irish Constitution, Butler J held that the disputes that would be determined by the CETA tribunal are not justiciable under Irish law. She noted that 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.

The claimant was granted leave to appeal the decision on 11 January 2022 and subsequently appealed the High Court decision to the Supreme Court.

### Decision

By a 4-3 majority, the Irish Supreme Court ruled that the Irish government's proposed approach to ratifying the CETA is unconstitutional.

In her lead judgment, Dunne J summarised the issues, which crystallised in the appeal as follows:

- Is ratification of CETA necessitated by the obligations of membership of the EU?
- Is CETA a breach of article 15.2 of the Constitution? That is, would ratification of CETA compromise the legislative autonomy of the Oireachtas (National Parliament)?
- 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?

- Does the "automatic enforcement" of a CETA award, provided for under CETA by virtue of the enforcement provisions of CETA, together with the provisions of the Irish Arbitration Act 2010 (AA 2010), constitute a breach of article 34 of the Constitution?
- 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?
- Would an amendment of the AA 2010 to alter the "automatic enforcement" of a CETA award as proposed in the judgment to be delivered herein by Hogan J, alter the position in relation to the ratification of CETA?

### No legal obligation to ratify CETA under EU law

On the necessity to ratify CETA, arising from Ireland's obligations as part of membership of the EU, the court agreed unanimously that there is no existing legal obligation on the part of the state. As a result, the court held that the ratification of CETA must be judged by reference to ordinary constitutional criteria.

### No transfer of judicial sovereignty under article 15.2

On the issue regarding article 15.2 of the Irish Constitution, and whether Chapter 8 of CETA would lead to a transfer of judicial sovereignty repugnant to the Constitution, five out of seven Justices were not convinced by Mr Costello's' submissions.

In the lead judgement, Dunne J revisited some of the arguments from the High Court decision and agreed with Butler J in her finding that CETA could be compared by analogy to the ECHR. She concluded that the distinction between the nature of the rights and obligations established under both treaties, and the fact that ECHR decisions are not legally binding on the Irish state, was irrelevant. The fact that CETA awards could be enforced within the Irish jurisdiction does not equate to CETA provisions becoming part of domestic law.

### **Establishment of parallel jurisdiction does not breach Irish Constitution**

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Three of the seven Justices, including Dunne J in the lead judgment of this case, sided with the appellant on the issue of CETA Tribunals establishing a parallel jurisdiction in breach of the Irish Court's jurisdiction to administer justice, by constitutionally appointed judges, in public (in line with article 34 of the Constitution).

Dunne J summarised her reasoning on this point with a hypothetical argument:

"[...], 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." (*paragraph 242, judgment.*)

### **Automatic enforcement of CETA awards would breach the Irish Constitution**

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Hogan J conducted a thorough analysis of the grounds of review of arbitral awards available under the New York Convention and ICSID Convention, both of which could govern the enforceability of CETA awards. In the case of the latter instrument, all of the Justices who formed the majority agreed that awards issued in line with the ICSID Convention would be automatically enforceable in Irish Courts, therefore giving rise to a breach of article 34 of the Constitution.

On this point, it is worth noting some statements made by the lead dissent judgment by O'Donnell CJ, who noted that applications for leave to enforce an award under Irish law do involve a process which allows for the possibility of refusal of

enforcement "at least in some situations". O'Donnell CJ continued to state that "It appears that if ratification of CETA is impermissible then the Energy Charter Treaty must be equally forbidden".

### **CETA Joint Committee's powers of interpretation do not amount to making of domestic law**

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Three out of four Justices upheld this claim of the appellant, however the majority of the court dismissed the claim that the interpretative powers of the CETA Joint Committee, that is, its ability to adopt recommendations on interpretation of CETA, amounted to the making of domestic law.

### Curing the unconstitutionality

In the final section of his decision, Hogan J addressed the effect of the judgments on the government's current plans to ratify CETA. He stressed that it is entirely a matter for the government or the Oireachtas to decide how to respond to the decision and also to decide not to ratify the agreement at all. However, he also made a number of suggestions on how the manner of ratification of CETA, and the current legislative framework, could be changed to allow for lawful ratification. Five out of six Justices upheld that his proposal would align the government's plans to ratify CETA with the Constitution.

First, with regards to enforceability of CETA awards under Irish law, he explained that the "more or less automatic" enforcement by means of section 25 of the AA 2010 could not go ahead, as the law stands. This section was enacted to facilitate enforcement of commercial arbitration awards where there are broader grounds of review available. Therefore, in order for this section to be applicable to CETA awards, appropriate

legislation needs to be enacted to modify or supplement this section.

With regards to the constitutionality of CETA, Hogan J stated that the Constitution "does not permit the Government to ratify CETA nor the Oireachtas to enact the appropriate legislation giving effect to that decision" while the defences to enforcement are extremely limited. Since the law, as it stands, leaves the High Court powerless to refuse to enforce a CETA award, this needs to be reviewed. Hogan J suggested that the law should allow for challenges to these awards based on Ireland's general constitutional identity and fundamental constitutional values, as well as general EU law obligations. Hogan J proposed minimum amendments which would be needed to be brought in (see *paragraph 233H*). In essence, he proposed for a limited expansion of review grounds for the High Court, when an application to enforce a CETA award is submitted which may clash with fundamental values under the Irish Constitution or Ireland's obligations under EU law.



### Comment

Ultimately, the court ruled that ratification of CETA might only progress with certain amendments to the AA 2010, as in its current form, it interferes with Ireland's judicial sovereignty. The importance of this judgment is evidenced in both the unusual circumstance of all seven Justices issuing their judgments (with each disagreeing in some respect), and in the decision by the court to offer legislative guidance to the Executive on how to respond to their finding of unconstitutionality. To put this into context, Hogan J stated in his judgment that, "the present appeal may yet be regarded as among the most important which this Court has been required to hear and determine in its almost 100-year history." It has also been described by commentators as "Ireland's Achmea moment".

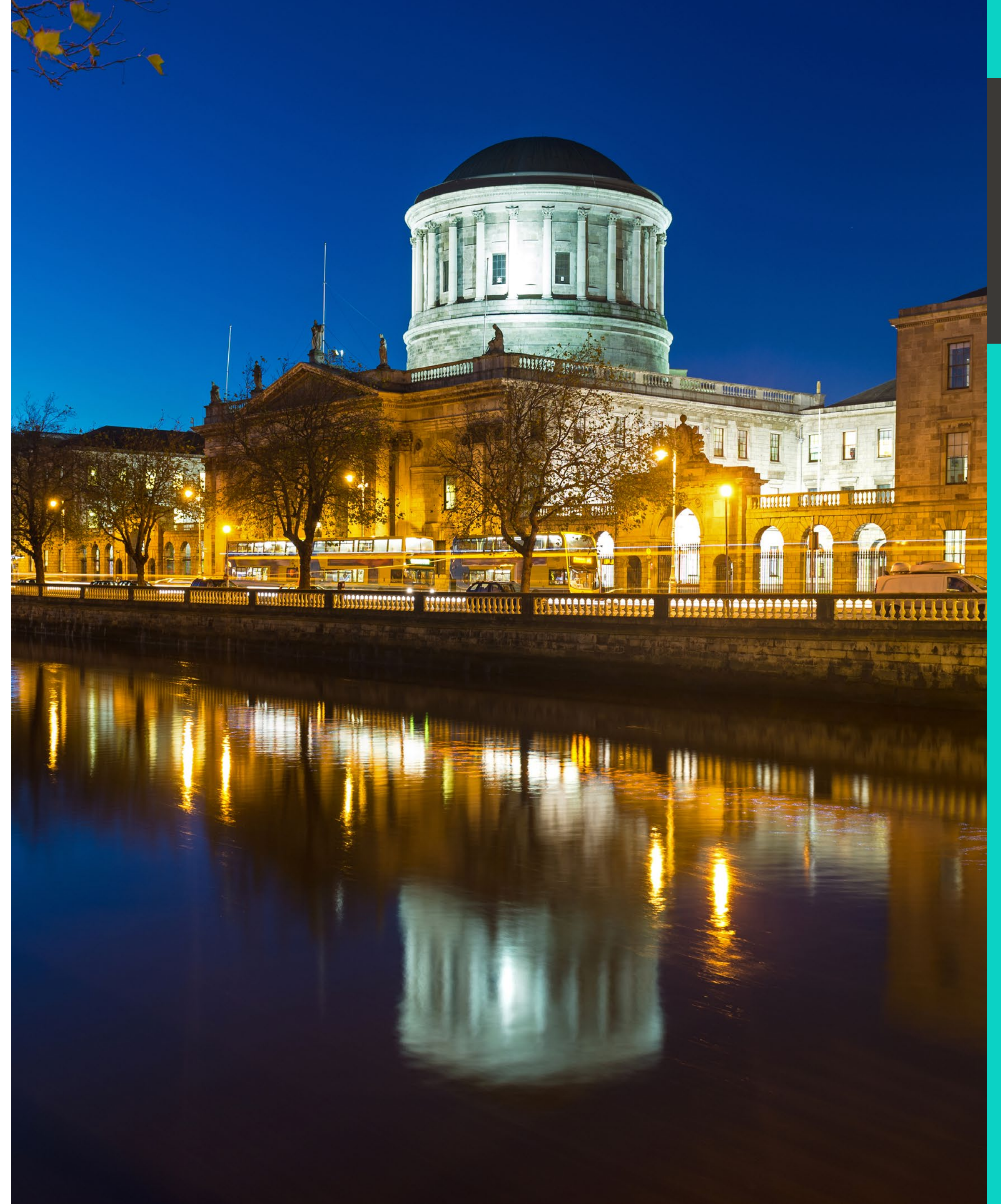
The effects of the decision on Irish law and international relations remain to be seen.

### Case

**Patrick Costello v The Government of Ireland, Ireland and the Attorney General [2022] IESC 4 (11 November 2022)**  
(O'Donnell CJ; Mac Menamin J; Dunne J; Charleton J; Baker J; Hogan J; and Power J).

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