

Ireland's Supreme Court Withholds Green Light on CETA

December 8, 2022

Ireland's Supreme Court has ruled, in *Costello v Government of Ireland*¹ (“*Costello*”), that: (i) a referendum would be required to ratify the Comprehensive Economic Trade Agreement (“CETA”) between the European Union (“EU”) and Canada; but that (ii) changing Ireland's arbitration law to enable supervision of CETA tribunal awards at the enforcement stage would obviate the need for a referendum. Commentators have likened *Costello* to the Court of Justice of the European Union's (“CJEU”) landmark ruling in *Achmea* that an arbitration clause in an intra-EU bilateral investment treaty is inconsistent with EU law.

CETA's unsteady journey towards full ratification has been beset by EU Member State concerns regarding its investor-State dispute mechanism and its impact on State sovereignty. *Costello* is a new obstacle that might galvanise EU Member State opposition to CETA's ratification and undermine CETA's effectiveness if other EU Member States elect to legislate around its primacy.

Background—CETA. CETA entered into force provisionally on 21 September 2017. As at 21 September 2022, the European Commission reports that 16 of 27 Member States have ratified CETA. The Commission describes CETA as a central pillar of the political, trade and economic partnership between the EU and Canada that has boosted EU-Canada trade and provided the EU with a solid, trusted source of supply for key resources like energy and raw materials.² For example, the Commission reports that CETA has helped increase EU goods exports to Canada by 26% and EU energy imports from Canada by 70%.³

CETA has, however, stimulated controversy in the investment community, primarily due to its establishment of a standing tribunal (the “CETA Tribunal”) composed of adjudicators drawn equally from EU Member States, Canada and third countries to

¹ [2022] IESC 44.

² European Commission Press Release, “[CETA turns 5: a privileged partnership for sustainable growth and secure supplies](#)”, 21 September 2022.

³ European Commission General Factsheet, “[The First Five Years of CETA: Sustainable and Reliable Trade in Uncertain Times](#)”, 21 September 2022.

determine investor-State disputes and render binding awards concerning CETA breaches. CETA Tribunal awards are subject to appeal to a three-member delegation of a standing appellate tribunal. CETA's standing two-tier tribunal system is a move away from tried and tested arbitral practice, as provided for in most international treaties. CETA further provides that CETA Tribunal awards are enforceable if they are awards rendered under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (the "**ICSID Convention**").

In September 2017, Belgium requested that the CJEU opine on the CETA Tribunal provisions' compatibility with EU law. In April 2019, the CJEU held that those provisions are compatible with EU law, primarily because they do not allow EU law's interpretation beyond CETA, nor do they empower the CETA Tribunal to make decisions that would prevent EU institutions from operating according to the EU's constitutional framework. Nonetheless, certain EU Member States, such as Bulgaria, Hungary and Poland, have been slow to ratify CETA due to concerns to preserve their own State sovereignty.

These developments occur in an already unstable atmosphere for EU investment protection, as the European Commission's campaign to end treaty arbitration between EU investors and EU Member States, which we last reported on [here](#), continues.

The Costello Judgment. Mr. Patrick Costello, a Green Party member of the Dáil Éireann (Ireland's House of Representatives), brought proceedings in 2021 seeking an order restraining the Irish government from ratifying CETA on the basis that its CETA Tribunal provisions are unconstitutional.

The Irish High Court dismissed Mr. Costello's claim in September 2021, ruling that CETA "*does not entail an unconstitutional transfer of the State's sovereignty*" and that whether it is "*politically desirable*" to ratify CETA is a matter for Ireland's House of Representatives to decide.⁴ The High Court permitted Mr. Costello to appeal directly to the Supreme Court, pursuant to a provision of Ireland's Constitution that allows "leapfrog" appeals on matters of general public importance. The Supreme Court allowed the "leapfrog" appeal in January 2022, recognising "*that it raised important matters of domestic and EU law*".⁵

The Supreme Court, by majority, reached the opposite conclusion to the High Court on 11 November 2022. It issued seven separate judgments indicating a 4/3 divide over

⁴ [2021] IEHC 600, at [179].

⁵ [2022] IESC 44, per Dunne J, at [12].

whether a referendum was required to ratify CETA and a 6/1 divide over whether a referendum could be avoided by amending Ireland's arbitration law to enable supervision of CETA Tribunal awards at the enforcement stage. This underscores Mr. Costello's claim's constitutional importance and the scale of the underlying controversy.

The suite of judgments appears to take an informal lead from Mr. Justice Hogan's judgment, which identified at the outset the "*ultimate question*" of whether CETA's ratification "*is constitutionally permissible or whether the ratification of an agreement providing for the establishment of a tribunal with a binding jurisdiction to pronounce on State liability arising from the general public law of this State would compromise our judicial sovereignty*".⁶ He summarised his conclusions by reference to six key issues identified in Ms. Justice Dunne's (formal) leading judgment:⁷

- **Issue 1 (majority finding).** Ireland's ratification of CETA is not "*necessitated*" by its EU law obligations, which are protected by Article 29.4.6 of the Constitution.
- **Issue 2 (minority finding).** CETA's ratification would compromise the Oireachtas's (Ireland's Parliament) legislative autonomy, contrary to its "*sole and exclusive power of making laws*" protected by Article 15.2 of the Constitution, even though CETA Tribunal awards against Ireland "*are likely to be at least relatively rare*".⁸ The findings on this issue focused on the effective strict liability in respect of validly enacted Irish legislation that could be determined by the CETA Tribunal to be contrary to CETA, including because CETA does not designate any good faith defences that Ireland could invoke.
- **Issue 3 (majority finding).** CETA's ratification would detract from Irish courts' jurisdiction to administer justice, which is protected by Article 34.1 of the Constitution.
- **Issue 4 (majority finding).** CETA's ratification would further contravene Article 34.1 of the Constitution because the Irish courts would have no power to refuse enforcement of CETA Tribunal awards, even where those awards fundamentally compromise Irish constitutional identity or values or where the Irish courts consider the awards to be incompatible with EU law.
- **Issue 5 (minority finding).** CETA's ratification would compromise Ireland's democracy (protected by Article 5 of the Constitution) insofar as CETA Article 25 allows a "Joint Committee" to render interpretative decisions, "*really a form of quasi-*

⁶ [2022] IESC 44, per Dunne J, at [13]; Hogan J, at [7].

⁷ [2022] IESC 44, per Hogan J, at [13]-[18].

⁸ [2022] IESC 44, per Hogan J, at [131].

legislation”, binding on CETA Tribunals without the prior consent of Ireland’s House of Representatives as required by Article 29.5.2 of the Constitution. The powers of the “Joint Committee” were considered to be subject to “*insufficient checks and balances to ensure that the key constitutional objective of democratic legitimacy—a cornerstone of the Article 5 guarantee—is assured.*”⁹

- **Issue 6 (majority finding).** Ireland’s Parliament could, in principle, “cure the unconstitutionality identified in this judgment” by amending Ireland’s 2010 Arbitration Act to allow the Irish courts to refuse to enforce a CETA Tribunal award if it materially compromised: (i) Ireland’s constitutional identity or fundamental principles of Ireland’s constitutional order; or (ii) Ireland’s obligation to give effect to EU law and to preserve EU law’s coherence and integrity. This would solve the problem that CETA Tribunal awards would otherwise be almost “*automatically enforceable*”, since Ireland’s 2010 Arbitration Act provides for enforcement of New York Convention and ICSID Convention awards (subject to very narrow exceptions), and CETA provides that CETA Tribunal awards are enforceable as if they are New York Convention or ICSID Convention awards.

Chief Justice O’Donnell, who delivered the leading dissent, considered in summary that “*CETA may undoubtedly have effect within the domestic sphere, and may also affect the exercise of powers by the other organs of State within areas assigned to them by the Constitution, but is not such as to have the effect of usurping or purporting to alienate the functions assigned to another organ of government.*”¹⁰ He further stated that upholding Mr. Costello’s appeal would impose “*very significant constraints upon the exercise of the external affairs of the State*” and prevent Ireland “*from entering into agreements which are commonplace in the international order, and which many other countries have executed, without it being considered that the execution of such agreements infringes the same sovereignty which Ireland asserts.*”¹¹

Mr. Justice Charlton, the only judge to dissent on the possibility of “curing the unconstitutionality” by amending Ireland’s arbitration law to enable supervision of CETA Tribunal awards at the enforcement stage, considered that to do so “*would be so far reaching as to fundamentally contradict the CETA treaty itself; something impossible under the Vienna Convention on the Law of Treaties.*”¹²

Looking forward. Ireland’s Deputy Prime Minister (and incoming Prime Minister) Leo Varadkar expressed disappointment regarding the *Costello* verdict but nonetheless stated

⁹ [2022] IESC 44, per Hogan J, at [219].

¹⁰ [2022] IESC 44, per O’Donnell CJ, at [5(x)].

¹¹ [2022] IESC 44, per O’Donnell CJ, at [5(xii)].

¹² [2022] IESC 44, per Charleton J, at [12].

Ireland's commitment to CETA's full ratification, and the government's initial assessment that changes to Ireland's domestic arbitration law would be sufficient to achieve this.

While Ireland may well yet ratify CETA, the *Costello* decision, notwithstanding the slim majority by which much of it was reached, gives impetus to other EU Member States delaying CETA's ratification over State sovereignty concerns. It may also call into question CETA's legitimacy, particularly if signatory States consider that they can simply legislate around the intended primacy of CETA Tribunal judgments, notwithstanding the wider EU and international law implications of such a workaround (as highlighted by Mr. Justice Charlton).

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Please do not hesitate to contact us with any questions.

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