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Irish Courts as a Forum for Resolution of Disputes under the Energy Charter Treaty by É. Conlon SC

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Irish Courts as a Forum for Resolution of Disputes under the Energy Charter Treaty

Éamonn Conlon SC[1]

Abstract

The Energy Charter Treaty is part of European Union law. Article 26(2)(a) seems to meet the test for direct effect. Therefore, it should be possible to invoke it before the Irish courts. Part III ECT would supply the applicable substantive law for such a claim. The most apt remedy is Francovich damages. Several practical issues would need to be worked out, complicated by the need to identify the extent to which they are procedural or substantive, and therefore governed by Irish (forum) law or the ECT itself and international law respectively.

I. Concepts

a. International Treaties in Irish law

Although its economy is highly globalised with the third highest inward and outward foreign direct investment stock in the OECD,[2] Ireland has no bilateral investment treaties.[3] Investors who consider that the Government has treated them unfairly have to rely on domestic and European Union law in domestic courts.[4]

But Ireland is an original signatory to the ECT[5] and is party to the Washington ICSID Convention.[6] There seem to have been no cases against Ireland under the ECT or other investment treaties in any forum.

Ireland is a dualist state with a 'strict separation' between the realms of international and domestic law.[7] Article 29.6 of the Constitution of Ireland, *Bunreacht na hÉireann*, provides: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]'. This reinforces article 15.2.1º, which vests in the Oireachtas the 'sole and exclusive power of making laws for the State'.

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[2] As a percentage of GDP in 2022 (or latest available). OECD, 'FDI Stocks' <https://data.oecd.org/fdi/fdi-stocks.htm#indicator-chart>. All URLs last accessed 31 May 2023.

[3] A 1996 investment treaty with Czechia was terminated by agreement in 2011. Agreement between Ireland and the Czech Republic on the Amendments to the Agreement between Ireland and the Czech Republic for the Promotion and Reciprocal Protection of Investments signed on 28 June 1996 in Dublin [2079 UNTS 36088] and on Termination thereof (6 January 2008, 16 February 2011, 1 November 2011, entered into force on 1 December 2011) 2892 UNTS 36088. Therefore, Ireland did not sign the plurilateral Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (signed 5 May 2020, entered into force 29 August 2020) [2020] OJ L 169/1.

[4] For example, *BUPA Ireland Ltd v Health Insurance Authority* [2008] IESC 42.

[5] Signed 17 December 1994, entered into force 16 April 1998, 2080 UNTS 95. Ireland ratified the ECT on 15 April 1999. It entered into force with respect to Ireland on 14 July 1999.

[6] Convention on the Settlement of Investment Disputes between States and Nationals of other States (signed 18 March 1965, entered into force 14 October 1966, for Ireland on 7 May 1981) 575 UNTS 8359. Incorporated into Irish law by Arbitration Act 2010 s 25(3).

[7] *Costello v Government of Ireland* [2022] IESC 44, Hogan J, para 153; see generally David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014) chs 1 & 2.

This conception of legislative sovereignty is qualified in two respects. Most importantly, Ireland has been a member of the European Union[8] since 1 January 1973. EU law has a special place in Ireland's constitutional order.[9] The Third Amendment to the Constitution, approved by popular referendum in 1972, authorised accession to the founding European Communities Treaties. There have been later amendments, again by referendum, for each major reforming treaty.[10] These amendments now add article 29.4.6° to the Constitution which immunises (from constitutional challenge) laws, acts, and measures that are 'necessitated' by the obligations of EU membership. The European Communities Act 1972, s 2(1) (as amended) provides that the Treaties governing the EU and acts of its institutions 'shall be binding on the State and part of the domestic law thereof'.[11]

Thus, Ireland's domestic legal system opens to EU law in a very different way from how it opens to other international law. Union law can apply directly in Ireland without further action by the Irish authorities.[12] Other international treaties do not, but may apply indirectly. That is a second qualification to Ireland's dualism.

b. Article 26 ECT and Komstroy

Against this background we turn to article 26 ECT, which provides for settlement of disputes when a national of one state party, who is an investor in another's area, claims that the latter state party breached an obligation under part III ECT. Article 26(2) gives the investor a choice to submit the dispute for resolution: (a) 'to the courts or administrative tribunals of the Contracting Party party to the dispute'; (b) in accordance with any procedure previously agreed, or (c) by international arbitration.

In *Komstroy*[13] the Court of Justice of the European Union (CJEU or ECJ) seemed[14] to eliminate the third option in intra-Union disputes (and probably the second also, if it applies). The Court said that article 26(2)(c) ECT 'must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by

[8] In general, references to the European Union (EU) include its predecessors and Euratom.

[9] See generally Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart 2019) ch 2 I and Madeleine Reid, *The Impact of Community Law on the Irish Constitution* (Irish Centre for European Law 1990).

[10] In *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713, [1987] 2 CMLR 666, the Supreme Court held that the Constitution, as amended in 1972, did not authorise the Single European Act's provisions committing the Government to joint action in the framework of European Political Co-operation. It therefore needed authorisation by a separate amendment. Subsequent constitutional amendments have been made by referendum to authorise the Maastricht, Amsterdam, Nice, and Lisbon treaties (also the Belfast British-Irish (Good Friday) Agreement in 1998, the Rome Statute of the International Criminal Court in 2002, and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union in 2012). In *Pringle v Government* [2012] IESC 47, [2013] 3 IR 1, the Supreme Court seemed to narrow the scope of *Crotty* when it refused a request to interfere with accession to the Treaty Establishing the European Stability Mechanism. O'Donnell J called acceding to the treaty 'an exercise of sovereignty rather than an alienation of it' (para 20).

[11] Foreign and security policy acts are excluded.

[12] In practice, EU law, especially directives, often need to be 'transposed' by domestic legislation. European Communities Act 1972 s 3 empowers ministers to make regulations for this. Therefore, much EU law takes effect in Ireland as domestic secondary legislation.

[13] *Komstroy v Moldova* (C-741/19) EU:C:2021:655.

[14] 'seemed' because this was not one of the issues referred by the Paris Cour d'appel; and it did not arise in an arbitration between a Ukrainian investor and Moldova. See Alan Dashwood, 'Republic of Moldova v Komstroy LCC: arbitration under Article 26 ECT outlawed in intra-EU disputes by obiter dictum' (2022) 47(1) Eur L Rev 127.

the latter in the first Member State'.[15] This to preserve the Court's exclusive jurisdiction to definitively interpret EU law,[16] which includes the ECT, which 'itself is an act of European Union law'.[17] The Court said:

> It is apparent from the Court's settled case-law that an agreement concluded by the Council, pursuant to Articles 217 and 218 TFEU[18] constitutes, as regards the European Union, an act of one of its institutions, that the provisions of such an agreement form an integral part of the legal order of the European Union from the time it enters into force ….[19]

As the Court noted in *Komstroy*, the ECT is a 'mixed' agreement,[20] covering matters within and without Union competence. Foreign direct investment is an exclusive competence of the Union, but indirect investment is a competence shared between the Union and member states, said the Court.[21] It could be added that energy is also a shared competence.[22]

So, in general, EU law does not apply outside the Union competencies, and does not apply where competence is shared and the EU has not legislated. In those areas, member states accede to mixed international treaties like the ECT in their individual capacities and in compliance with their own domestic constitutional procedures. The Court of Justice has cited different bases to give itself wide jurisdiction to interpret mixed agreements.[23] In *Komstroy* the Court relied on the value of uniform interpretation:

> the Court has held that, where a provision of an international agreement can apply both to situations falling within the scope of EU law and to situations not covered by that law, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.[24]

The Court said that this applied to both article 1(6) (definition of 'investment') and article 26(1) ECT.[25]

With article 26(2)(a) arbitration apparently closed for intra-Union disputes, and usually no agreed alternative under article 26(2)(b)—and if there were, it would probably be closed too—

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[15] *Komstroy*, paras 62–66. It was, as Dashwood says (n 14, p 138), misleading to call this interpretation. Put simply, the court disapplied a treaty provision, giving EU law precedence.
[16] Para 42, citing *Achmea v Slovakia* (C-284/16) EU:C:2018:158, paras 35 and 36 and the case-law cited, and Opinion 1/17 (*EU-Canada CETA*) EU:C:2019:341, para 111 and the case-law cited there.
[17] Para 23.
[18] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/01. Also referred to as the FEU Treaty.
[19] Komstroy, para 23 (citing *Haegeman* (181/73) [1979] ECR 449, paras 3-6; *Lesoochranárske zoskupenie* (C-240/09) [2011] ECR I-01255 (*Slovak brown bears*), para 30; *Aebtri* (C-224/16) EU:C:2017:880, para 50) and para 49.
[20] *Komstroy*, para. 24; see also *Anie* (joined C-798 & 799/18) EU:C:2021:280, para 67 ('in the light of Article 216(2) TFEU, the Energy Charter, being a mixed agreement, is binding upon the EU institutions and the Member States').
[21] Para 26 citing art 207 TFEU and Opinion 2/15 (*EU-Singapore Free Trade Agreement*) EU:C:2017:376 paras 82, 238 and 243.
[22] Arts 4.2(i) & 288 TFEU.
[23] Lucidly described in AG Sharpston's opinion in the *Slovak brown bears* case (n 19), paras 43-81.
[24] Para 29.
[25] Para 30. Presumably art 26(2) as well.

that leaves court (or administrative tribunal where available) litigation under article 26(2)(a) ECT. As Ireland has not enacted the ECT into its domestic legal system, how would an Irish court deal with such a claim?

c. How Irish Courts have Dealt with Mixed Agreements: Aarhus as an example

The Aarhus Convention,[26] also a mixed international agreement, has come before the Irish courts many times. Ireland claims to have 'fully implemented' the Convention (and related EU Directives) into national law before ratifying it.[27] More accurately, 'the Oireachtas has in some contexts and for some purposes sought to approximate our domestic law to the requirements of the Aarhus Convention, but … without saying that the Convention is, in fact, part of our domestic law.'[28]In *Conway v Ireland*, Clarke J, speaking for the Supreme Court, described how Aarhus works in Irish law—

> [I]t is insufficient in Ireland simply to mount a claim based on an alleged breach of the Aarhus Convention. It is necessary to demonstrate that a relevant provision of the Aarhus Convention is material either because it has the potential to be directly effective itself as a matter of European Union law, because the Convention may be relevant in interpreting measures of the European institutions designed to give effect to its provisions or because it is said that, in some other way, Union law requires the application of the Convention in Ireland. A simple claim based on an allegation of a breach of the Aarhus Convention must necessarily fail as a matter of Irish law. A claim that a relevant provision of the Aarhus Convention may be applicable or influence the proper interpretation or application in Ireland of EU measures as a matter of European law is a different matter which needs to be considered on its merits.[29]

Article 9 of the Aarhus Convention is entitled 'Access to Justice'. Paragraph (1) requires remedies for those refused access to information. Paragraph (2) requires review procedures for environmental decisions. Paragraph (3) is more general:

> In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

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[26] United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (signed 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

[27] The Aarhus Convention: Third National Implementation Report 2021 - Final version (25 May 2021), <https://www.gov.ie/en/publication/a85dc-aarhus-convention-national-implementation-reports/#2021> pp 3-4. The Directives referred to (made before the EU ratified the Convention in 2005) are Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [2003] OJ L 41/26 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment [2003] OJ L 156/17. For a detailed account of Ireland's reception of the Aarhus Convention see Áine Ryall, 'The relationship between Irish law and international environmental law: a study of the Aarhus Convention' (2018) 41(2) Dub ULJ 163.

[28] *Byrne v Ó Conbhuí* [2018] IECA 57 (Hogan J, referring to the Environment (Miscellaneous Provisions) Act 2011), para 32.

[29] [2017] IESC 13, [2008] 2 IR 302, para 2.5

Paragraph (4) requires that procedures under paragraphs (1) to (3) provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive. Neither paragraphs (3) nor (4) have been given effect (or approximated) in Irish or, vis-à-vis member states,[30] Union legislation.

In the *Slovak brown bears* case, a non-governmental organisation concerned with protection of forests claimed that article 9(3) gave it a right to be a party to administrative proceedings in Slovakia about hunting brown bears, a species protected by the habitats Directive.[31] The Court of Justice held that it has jurisdiction to interpret the treaty provision and, in particular, to rule on whether it has direct effect.[32] The rationale was the same as in *Komstroy.* The Aarhus Convention 'is an integral part of the legal order of the European Union', concluded on the basis of 'joint competence', and 'the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention'.[33] Uniform interpretation of provisions that can apply to both national and EU law situations is in the EU law interest.[34]

Using this jurisdiction, the Court held that article 9(3) did *not* have direct effect because it was conditional on national law laying down criteria for public access to challenge procedures.[35] But, when Union law (in that case the habitats Directive) is engaged—

> it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9 (3) of the Aarhus Convention.[36]

Applying this, Clarke J said in *Conway*:

> It seems to follow, therefore, that it is at least possible in principle that provisions of the Aarhus Convention may be directly effective in member states or be required to be implemented as far as practicable by a conforming interpretation of national procedural rules but it is also clear that not every provision of the Convention is directly effective or capable of such implementation.[37]

In *Jennings v An Bord Pleanála*, Holland J in the High Court said that a litigant cannot invoke Aarhus directly: not as an international treaty because of dualism (article 29.6 of the Constitution); and not as EU law because 'likely Aarhus generally, but in any event all of

[30] There is a measure for Union institutions. Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13, arts 10-13. As interpreted in *Vereniging Milieudefensie* (joined C-401–403/12 P) EU:C:2015:4, para 58 and *Mellifera* (C-784/18 P) EU:C:2020:630, the Regulation is more an approximation of EU law to Article 9(3) than a direct implementation of it.
[31] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ 1992 L 206/7.
[32] *Slovak brown bears* case (n 19), para 43
[33] Paras 30 & 31.
[34] Para 42.
[35] Para 45.
[36] Para 50.
[37] Para 2.18.

Aarhus Article 9 does not have direct effect in EU law'.[38] He described two 'distinct, but not entirely separate, routes whereby Aarhus may influence the interpretation of domestic legislation.' First, as a matter of EU law, member states must interpret national environmental legislation, within the sphere of EU environmental law, in accordance with the objectives of Aarhus.[39] Second, Irish law presumes that legislation is consistent with the state's international treaty obligations, and courts interpret legislation accordingly.[40]

Holland J said that EU law links these 'interpretive routes' when dealing with a mixed agreement.[41] Some of his citations to the Court of Justice might be read as lacking the deference usually shown by one court to another's rulings by which it is bound: 'the CJEU does *assert* the jurisdiction to rule on the interpretation of Aarhus to ensure it is interpreted uniformly in all circumstances'; 'the CJEU *asserts* the right to interpret Aarhus such that it will be interpreted uniformly whatever the circumstances in which it is to apply'.[42] But when the judgment is read in its entirety, it is undoubtedly written from a standpoint that the Court of Justice's rulings in these subjects are indeed binding on the Irish court.[43]

But the Court of Justice is skating on thin ice when it claims power to definitively interpret mixed international treaties in areas outside the Union's competence, as it claimed in *Komstroy*. Arguably this oversteps into member states' constitutional architecture (articles 15.2.1º and 29.6 of the Constitution in Ireland's case).[44] If an Irish court were to pick a field on which make a stand against the Court of Justice's claim to *Kompetenz Kompetenz*, this might be it.[45]

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[38] [2022] IEHC 249, para 84.
[39] Para 79.
[40] *Ibid*, also paras 136-137.
[41] Para 80.
[42] Paras 81, 88 (citing *Slovak brown bears* case), 143. My italics.
[43] For context, Holland J also disagreed with a Court of Appeal judgment by which he acknowledged he was bound, and applied it. Para 302.
[44] Fennelly (n 7), ¶¶ 3-43 & 3-44.
[45] A Supreme Court dissent suggests another. *Dwyer v Commissioner of An Garda Síochána* [2020] IESC 4 arose from a murder trial in which the prosecution used telephony data in evidence. The issues in the later civil case included whether the Irish regime for using such data was consistent with EU law. The Supreme Court referred issues to the Court of Justice under art 267 TFEU, finding that the reference was required in the circumstances. Paras 6.29-6.30. Charleton J disagreed, for two reasons. 'The second reason relates to the competence of the Court of Justice of the European Union in criminal litigation. Any issue of Kompetenz-kompetenz is not lightly to be engaged whereby this Court should rule on its own and exclusive jurisdiction in the field of criminal law. The duty of sincere cooperation requires an analysis of the extent and limits of national and European Union competence in ruling on the recovery of evidence in criminal cases and the presentation of evidence as part of a criminal prosecution.' Para 10 (Charleton J dissenting). The CJEU preliminary ruling was given as *GD v Commissioner of An Garda Síochána* (C-140/20) EU:C:2022:258.) There have been a very few other instances of Irish judicial resistance to the CJEU's competence to define the scope of EU law supremacy. In *Society for the Protection of Unborn Children Ireland v Grogan*, Walsh J (joined by Hedeman J and concurring with the Supreme Court) criticised the High Court judge for not acting on an application for interlocutory injunction to restrain student leaders from distributing information about abortion services in Britain, pending a referral of issues to the Court of Justice for a preliminary ruling. He pointed out that the Eighth Amendment to the Constitution (1983, inserting art 40.3.3º which recognised the right to life of the unborn, repealed in 2018 by the Thirty-sixth Amendment) came after the Third Amendment and only the Supreme Court could decide on the interaction of the two amendments. He said: 'it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.' [1989] IR 753, [1990] ILRM 350, 361. Soon afterwards, the late Thomas F O'Higgins, then a recently retired judge of the Court of Justice and previously chief justice of Ireland, wrote in a *Festschrift* for Mr Justice Walsh that whether a national legal measure is 'necessitated' by membership seemed to him exclusively a matter for the High Court. 'The Constitution and the Communities: Scope for Stress' in James O'Reilly (ed) *Human Rights and Constitutional Law: Essays in Honour*

But that is unlikely. Since accession, Irish courts have loyally and diligently implemented Union law as pronounced by the Court of Justice: *'plus royaliste que le roi'*.[46]

d. Giving Article 26 ECT Direct Effect in Ireland as EU law

Komstroy holds that the ECT is an integral part of the Union legal order, as we have seen. From an Irish perspective, as the ECT is an act of an EU institution it is part of the domestic law of the state under s 2(1) European Communities Act 1972. But like with article 9(3) Aarhus Convention, to mount a claim in an Irish court based on article 26(2)(a) ECT, it would be necessary to show that that provision is either directly effective as a matter of European Union law or has some indirect effect, either as EU law or as a treaty.

Otherwise, even if it is a part of Union (therefore Irish) law in a theoretical sense, it will be of no use—a closed book that no one is allowed to read.

Hogan J observed in *MacFhlannchadha v Minister for Agriculture*: 'The development of the doctrine of direct effect has been one of the greatest jurisprudential innovations of the Court of Justice.'[47] This judicial innovation, 60 years old,[48] identifies those provisions of European Union law—the founding Treaties, other international agreements made by the Union, secondary legislation—that are directly enforceable by individuals against member states.

If a treaty provision says that it has, or has not, direct effect, that is conclusive; otherwise it has to be interpreted. In *Milieudefensie* the Court of Justice said:

> EU institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effects the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is for the courts having jurisdiction in the matter and in particular the Court of Justice, within the framework of its jurisdiction under the FEU Treaty to decide it, in the same manner as any other question of interpretation relating to the application of the agreement in question in the European Union on the basis in particular of the agreement's spirit, general scheme or terms.[49]

The reference to the 'agreement's spirit, general scheme or terms' is one aspect of how the Court of Justice decides on whether it has direct effect. In the *Slovak brown bears* case, the Court of Justice applied (what seems to be) the standard recent formulation of the test for direct effect of treaties:

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of Brian Walsh (Round Hall 1992) p 229. Paul Gallagher, subsequently Attorney General of Ireland, disagreed, saying that what is necessitated by membership almost certainly would involve an interpretation of the Treaty or a Directive, which would be a matter for referral to the Court of Justice under the predecessor to art 267 TFEU. 'The Constitution and the Community' (1993) 2 (1) Ir J Eur Law 129, 130-131.

[46] David O'Keefe, 'Appeals against an order to refer under Article 177 of the EEC Treaty' (1984) Eur LR 87, 87, commenting on the Supreme Court's decision in *Campus Oil v Minister for Industry* [1983] IR 82 that a decision to refer to the CJEU under the predecessor to art 267 TFEU was unappealable under EU law, overriding the right of appeal in art 34 Constitution.

[47] [2022] IECA 1, para 1.

[48] *Van Gend en Loos* (26/62) [1963] ECR 1.

[49] *Milieudefensie* (n 30), para 53. Citations omitted.

> according to well-established case-law, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[50]

Article 26(2)(a) comes very close to stating that it has direct effect. It states that if a dispute 'between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern[s] an alleged breach of an obligation of the former under Part III' cannot be settled amicably under paragraph (1) in 3 months, 'the Investor party may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party party to the dispute…'

This provision is written in terms conferring a remedy on individual investors—not just requiring the state parties to do so. It really cannot be construed any other way. It is clear, precise, and unconditional. Unlike article 9(3) Aarhus, it does not leave gaps for legislation to fill.

e. Part III ECT: The Substantive Investor Protection Provisions

Do the substantive investor protections in part III ECT have direct effect in Ireland's domestic legal system?

In *Komstroy*, Advocate General Szpunar hinted that the substantive provisions might not have direct effect. He said that taking away intra-EU arbitration does not imply that article 26 ECT is never applicable within the EU legal order.

> Investors from one Member State might still, in principle, bring proceedings against another Member State before its courts in a dispute covered by that provision. Such a possibility depends, however, on whether the substantive provisions of the ECT can form the basis of such claims and, therefore, whether they are, in turn, applicable in the EU legal order.[51]

He left that open[52], noting:

> While the judgment in Achmea has not settled that issue, it did reveal certain doubts as to the possibility of applying, within the European Union, the substantive provisions of investment promotion and protection treaties in general and of the ECT in particular.[53]

In *Anie*, Advocate General Saugmandsgaard Øe said: 'it does not seem to me that that [article 10 ECT] can be relied on by investors of the Union as against institutions of the Union or

[50] Note 19, para 44, citing *Simutenkov* (C-265/03) [2005] ECR I-2579, para 21 and *Asda Stores* (C-372/06) [2007] ECR I-11223, para 8; cited in *Swords v Minister for Communications* [2016] IEHC 503, para 79. Notwithstanding the term 'directly applicable' the court referred to 'direct effect' throughout the judgment, including in the dispositive ruling.
[51] Note 13, Opinion, para 90, footnote omitted.
[52] Para 97.
[53] Para 94, see also para 49. In support of this, AG Szpunar cites, not the Court of Justice decision in *Achmea* where doubts are said to have been expressed, but the Communication from the Commission to the European Parliament and the Council of 19 July 2018 on the protection of intra-EU investment, COM(2018) 547 final.

Member States', but it was not necessary to examine that issue because the claim was by investors against their own member state.[54] On one view, the obligations in Part III ECT are sufficiently clear, precise, and unconditional to be enforced in arbitration. Gabrielle Kaufmann-Kohler and Michele Potestà say that it would be—

> astonishing that domestic courts could not apply treaty standards, for instance because they would be regarded as insufficiently clear or precise, when the same standards are expected to be applied—and are routinely applied—by arbitral tribunals.[55]

But courts and investment arbitral tribunals inhabit different worlds. Not all courts would agree that the obligations in article 10(1) ECT to 'encourage and create, stable, equitable, favourable and transparent conditions' for investors and accord them fair and equitable treatment (FET) are clear and precise. One commentator described FET as 'maddeningly vague, frustratingly general, and treacherously elastic.'[56] In *Costello v Government of Ireland*, Charleton J said that the (more narrowly drawn) investment protection provisions in the Comprehensive Economic and Trade Agreement (CETA)[57] between Canada and the EU and its member states are 'only vague principles' to be developed by the CETA Tribunal's awards and the Joint Committee's interpretive rulings.[58]

We must also consider the 'wording' and 'purpose' aspect, the 'agreement's spirit, general scheme or terms.' As we have seen, ascertaining whether a treaty has direct effect is an exercise in interpretation.

Included in the final act of the conference at which the ECT was concluded were several 'understandings'. Understanding 16 states: 'Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.'[59] Anna de Luca argues:

> Understanding 16 does not refer to the possible direct effect of Part III of the treaty in the domestic systems of the Contracting Parties. Rather, it states that Article 26(2)(a) should not be interpreted as implicitly including an obligation upon the Parties under the treaty to adopt (further) domestic measures implementing Part III. Accordingly,

[54] Note 20, Opinion, paras 92 & 93 & footnote 55.
[55] *Investor-state dispute settlement and national courts: Current framework and reform options* (Springer 2020) p 39. Referring to international investment agreements generally. The authors argue, on this basis, that domestic courts should be in a position to apply such agreements 'even when the treaty does not expressly provide for the possibility to submit claims arising out of the treaty to national courts'. *Ibid.*
[56] Jeswald Salacuse, *The Law of Investment Treaties* (OUP 3rd ed 2021) p 294.
[57] Signed 30 October 2016, partial provisional application 21 September 2017 [2017] OJ L11/23.
[58] Note 7, para 5. Charleton J concurred with the majority decision that ratification of CETA would infringe the (near) exclusive role of Irish courts under art 34.1 of the Constitution, and dissented from the decision that it would not infringe the legislature's role under art 15.2.1º. He was the sole dissenter from the court's view that the impediment could be cured by a change to the Arbitration Act increasing the High Court's jurisdiction to refuse leave to enforce CETA awards.
[59] Final act of the European energy conference, annexed to Decision 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1998] OJ L 69/1.

> Understanding 16 seems to assume that Part III has direct effect within the domestic legal systems of the Contracting Parties, rather than the opposite.[60]

With respect to Advocates General Szpunar and Saugmandsgaard Øe, the 'opposite' meaning is difficult to accept: states have given (or undertaken to give) investors a domestic litigation remedy for breach of part III, but can make that remedy empty, meaningless, by precluding them from relying on part III when they invoke the remedy. *Remedium sine jus*.

But it is an oversimplification to say that the ECT state parties thought that part III would have automatic direct effect within all their home legal systems. We need a different way to look at it.

If an ECT state party incorporates article 26(2)(a) into its legal system (through the portal of EU law in Ireland's case), it provides for a procedural remedy for an alleged breach of part III. Part III's role in the domestic legal system may be limited to *supplying the applicable substantive law when this remedy is invoked*.

Furthermore, when that remedy is invoked, the court applies part III *as international law,* applicable under European Union law. This can be compared with a court applying foreign law when its private international law requires it to do so, for example under a choice of law clause in a contract. The court does not pause to ponder whether the foreign law was incorporated into the domestic legal system.[61] Domestic law makes foreign law govern the particular situation.

In *Costello*,[62] the High and Supreme Courts, and indeed the parties,[63] recognised that the permanent investment tribunal set up by CETA would be applying international law. The Supreme Court, by a 4-3 majority held that ratification would infringe the exclusive jurisdiction of Irish courts because, although CETA Tribunals operate on the international plane, enforcement would be almost automatic under Ireland's Arbitration Act 2010, which gives domestic legal effect to the ICSID and New York[64] Conventions. 'This takes a CETA award back from the international plain to the domestic legal system', said Dunne J in her lead judgment.[65] Hogan J said that the Arbitration Act was 'conscripted into service…as a sort of makeshift pontoon bridge by which a CETA Tribunal award is enabled to cross that legal Rubicon from the realm of international law into an enforceable judgment recognised as such by our own legal system on a more or less automatic basis.'[66]

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[60] 'Direct effect of EU Investment Agreements and the Energy Charter Treaty in the EU' *Eurojus.it rivista*, 15 November 2016 <http://rivista.eurojus.it/direct-effect-of-eus-investment-agreements-and-the-energy-charter-treaty-in-the-eu/>

[61] This is similar to a comparison Butler J made in in the High Court in *Costello*. She held that the CETA Tribunal would not be administering justice in the sense in which art 34(1) of the Constitution of Ireland entrusts administration of justice solely to the Irish courts, because the tribunal would be dealing with international law, not Irish law. The CETA Tribunal would no more be trespassing on the exclusive competence of the Irish courts to administer justice than would a German court dealing with an all-German case. [2021] IEHC 600 paras 151-156, decision reversed [2022] IESC 44.

[62] Note 7.

[63] See judgment of Dunne J, paras 171 & 172.

[64] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.

[65] Para 247.

[66] Para 84.

In the case of the ECT, article 26(2) can be seen as the bridge by which part III ECT, without losing its character as international law, is the applicable substantive law in domestic legal proceedings.

Irish courts recognise the distinct character of international law. In *Crilly v TJ Farrington*, Fennelly J said obiter: 'Treaties are interpreted in accordance with special rules, long recognised in international law and now expressed in the Vienna Convention on the Law of Treaties of 1969.'[67] Likewise in *McGimpsey v Ireland*, Barrington J said: 'An international treaty has only one meaning and that is its meaning in international law… For guidance on this subject one must look to the general principles of international law and in particular to the rules of interpretation set out in article 31 of the Vienna Convention on the Law of Treaties.'[68]

Having regard to understanding 16, supplying the substantive applicable law in an article 16(2)(a) ECT claim may be the limited extent to which giving direct effect to part III ECT is 'necessitated' by European Union law.

On that basis, article 26(2)(a) ECT would have direct effect in Ireland, and part III ECT would supply the applicable law for the purpose of adjudicating a claim under article 26.

f. Legislative Sovereignty

While the plaintiff in *Costello*[69] prevailed in his claim that ratification of CETA would infringe Ireland's judicial sovereignty, a majority of the Supreme Court rejected his claim that legislative sovereignty would also be infringed. Dunne J said that CETA Tribunal being enforceable *via* the Arbitration Act 'does not mean that CETA is making laws for the State and this trespasses upon the constitutional powers of the Oireachtas'.[70] O'Donnell CJ (with whom Baker and Power JJ concurred on this) said that the basis of CETA is agreement and therefore consent, including consent to its dispute settlement process, not law.[71]

There is of course a difference between how CETA awards are enforced in Ireland and the ECT's judicial remedy. CETA awards get their domestic enforceability from domestic law (as several of the judges in *Costello* pointed out). But the judicial remedy in article 26(2)(a) comes from *the ECT itself*.

If ratification of the ECT created a judicial remedy in the Irish courts for infringement of part III, *with no underpinning by domestic legislation*, did that not trespass on the 'sole and exclusive' legislative power of the Oireachtas?

One answer is: that bridge has now been crossed and may have been burned. In *Costello*, Butler J in the High Court said:

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[67] [2001] IESC 60, [2001] 3 IR 251, 307; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[68] [1988] IR 567 (HC) 582; applied in *Kinsella v Revenue Commissioners* [2007] IEHC 250, [2011] 2 IR 417 (HC) & *O'Brien v Quigley* [2013] IEHC 398, paras 6-19.
[69] Note 7.
[70] Paragraph 186.
[71] Paragraphs 75–77. This contractual take is from a domestic law perspective. CETA is a source of international law.

> there is a very narrow window within which the proposed ratification of CETA can be challenged and if that window closes without a challenge having been brought, then it will most likely be impossible for anyone to challenge ratification of CETA thereafter.[72]

The Supreme Court majority seems to have agreed.[73] The judges in both courts unanimously rejected the Government's assertion that Ireland had an EU law obligation to ratify CETA. Charleton[74] and Hogan[75] JJ considered that, since, if ratified, CETA would become an integral part of EU law (as we have seen), Irish courts would be bound to recognise and enforce its awards. This would be necessitated by the obligations of EU membership and, under article 29.4.6º of the Constitution, beyond constitutional challenge. That seems to be the decision of the Supreme Court majority.[76]

Applying that logic, Ireland had no EU law obligation to ratify the ECT and may have done so in breach of the Constitution. But having been ratified, the ECT is now an integral part of EU law. Compliance with its terms is an obligation 'necessitated' by EU membership and immune from challenge under the constitution.

If that is correct, it would dispose of any legislative sovereignty objection to giving direct effect to article 26(2)(a) ECT in Ireland.

g. Indirect Effect

If the Irish courts found that the ECT, like Aarhus, could not be invoked before them directly, there are at least three potential indirect routes.

First, we have already seen that, even when the Court of Justice denies direct effect it still mandates member state courts to use the more subtle and flexible technique[77] of harmonious interpretation. We saw that in *Jennings*[78] Holland J drew attention to two lanes in this route when the Union law is an international agreement: the (EU law) obligation to interpret domestic law as consistent with Union law to the fullest extent possible, and the (Irish law) presumption that legislation is consistent with the state's obligations under international treaties.[79]

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[72] Note 61, para 165.
[73] Dunne J seemed to adopt what Butler J said: (n 7) para 12. Baker J also seems to have agreed, as she disagreed with MacMenamin J's view that the claim was premature. Para 20.
[74] Paras 6, 12, 13, 50, & 51.
[75] Para 62 & 86.
[76] O'Donnell CJ (para 166), MacMenamin J (para 163), and Power J (para 53) disagreed, and considered that an Irish court would be bound to refuse enforcement an award fundamentally incompatible with the Constitution.
[77] Ioanna Hadjiyianni, 'The CJEU as the gatekeeper of international law: the cases of WTO law and the Aarhus Convention' [2021] 70(4) ICLQ 895, 904.
[78] Notes 38-41.
[79] The international treaty principle of interpretation seems to apply only to legislation enacted after the treaty was ratified. *Domhnaill v Merrick* [1984] IR 151: 'one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations' (Henchy J); *Dos Santos v Minister for Justice* [2013] IEHC 237. It may also apply to common law, public policy, and customary international law. Fennelly (n 7) para 2-98. But these are interpretative principles and they are limited by the terms of the text being interpreted. The EU obligation of conforming interpretation 'could not serve as a basis for interpretation as national law *contra legem*, or to a result which was incompatible with national law.' *Minister for Justice v Campbell* [2022] IESC 21, Baker J, para 76 (Charleton J concurring, paras 8 & 9). Likewise, 'principles of international law enter domestic law only to the extent that no constitutional, statutory or judge made law is

On the first lane—

> the case law shows that the Irish courts have adopted *Marleasing* principles to ensure that national law is interpreted in a manner compatible with Union law, even where this may mean that some occasional violence is done to national legislation. There are, however, some limits to this approach, as the courts will not interpret national law in a manner which is *contra legem*.[80]

In *Costello*, O'Donnell CJ drew parallels between the grounds for impugning State action in domestic law and those giving rise to CETA liability.[81] The matching ECT provisions likewise have domestic law parallels. An investor bringing an ECT claim in an Irish court may be able to rely on the ECT as informing the applicable Irish domestic law, to the point that any uncertainty in domestic law would be resolved to conform to ECT part III.

Second, direct effect or not, article 26(2)(a) is binding on Ireland under article 216(2) TFEU. If the remedy is not available in Ireland, that is a breach by Ireland of international and (more relevant for this purpose) EU law.[82] The state could potentially be liable to an investor whose court claim was frustrated by Ireland's failure to implement the remedy.[83] The conditions for award of such damages are discussed below.

Third, parties harmed by the state's failure to implement its international obligations have sometimes made claims on the basis of the legitimate expectation. This domestic common law doctrine is not very mature in Irish law,[84] but, it seems, can be founded on the state departing from a position it adopted in the international sphere.[85] Whether it can ground compensation claims has not been resolved.[86] Courts have been cautious about allowing this route to liability

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inconsistent with the principle in question. Where a conflict arises, the rule of international law must, in every case, yield to domestic law on the international law rule of interpretation.' *Horgan v An Taoiseach* [2003] IEHC 64, [2003] 2 IR 468 (Kearns J).

[80] *Kelly: The Irish Constitution* (5th ed Bloomsbury Professional 2018), para 5.3.96, footnotes omitted. Referring to *Marleasing v La Comercial Internacional de Alimentacion* (C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305. The quoted passage was cited in *Dún Laoghaire Rathdown County Council v West Wood Club* [2019] IESC 43, McKechnie J, para 52.

[81] Note 7, O'Donnell CJ, paras 10, 41, & 147. He considered the domestic grounds broader in general. See also Butler J (n 61) paras 28-33.

[82] See eg *Commission v Ireland (Berne Convention)* (C-13/00) [2002] ECR I-2943. Wolfgang Weiß makes this point of binding decisions under CETA in 'Delegation to treaty bodies in EU agreements: constitutional constraints and proposals for strengthening the European Parliament' (2018) 14(3) Eur Const L Rev 532, 542.

[83] *Francovich v Italy* (joined C-6 & 9/90) [1991] ECR I-5357; *Brasserie du Pêcheur SA v Germany*; *R v Secretary of State for Transport ex p Factortame Ltd* (joined C-46 & 48/93) [1996] ECR I-1029.

[84] Gerard Hogan, David Gwynn Morgan, & Paul Daly, *Administrative Law in Ireland,* (5th ed Roundhall 2010) ch 21; see generally Redmond Arigho, 'Legitimate expectations in Irish and EU law: Lessons for Ireland? (2016) 19(1) Ir J Eur L 76.

[85] *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13, [2002] 3 IR 97 and *Commission to Inquire into Child Abuse v Meenan* [2003] IESC 52, Hardiman J concurring, para 73; but in *Glencar Exploration v Mayo County Council (No 2)* Fennelly J said that it must be based on a representation 'addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation'. [2002] 1 IR 84, 162.

[86] *Webb v Ireland* [1987] IESC 2, [1988] IR 353; *Atlantic Marine Supplies v Rogers* [2010] IEHC 104, para 7.6; *Perrigo Pharma International v McNamara* [2020] IEHC 552, paras 23 & 269.

infringe the Constitution's dualism.[87] In applying this domestic common law doctrine, an Irish court will likely need to consider its application to FET under article 10(1) ECT.[88]

h. Validity

Irish courts quash administrative decisions and disapply legislation infringing Union law. If article 26(2)(a) ECT has direct effect, a court should do likewise with a domestic measure that detracts from the effectiveness of this remedy, or its equivalence to similar domestic remedies.

What of administrative action or legislation infringing part III ECT? It should have a limited role in Irish law—as the applicable substantive law for article 26 claims—and should not be a basis for adjudicating on the *validity* of domestic law or administrative action. As we have discussed, that would be consistent with Understanding 16 to the ECT. It would also more closely align the court's jurisdiction in a claim under article 26(2)(a) with that of an arbitral tribunal under article 26(2)(c), which could never pronounce *erga omnes* on public law matters.[89]

If that is correct, an investor bringing an article 26(2)(a) ECT could claim damages, but not challenge the validity of an administrative decision or law for non-conformance with part III ECT.[90]

i. Liability for Damages

Again we start a section with *Costello*, where Hogan J said that a CETA Tribunal's award of damages 'will be based on strict liability without considerations of fault.'[91] He contrasted that with Irish law, which takes a more deferential approach to damages liability and allows a margin of appreciation. Public bodies are not liable for damages for *ultra vires* or even unconstitutional acts unless they commit a recognised tort, act maliciously, or knowingly exceed their powers.[92] Hogan J noted that the CJEU takes a similar approach to the EU's own liability under article 240 TFEU for damage caused in performance of duties.[93]

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[87] *Kavanagh* (n 85); *Sofineti v Judge Anderson* [2004] IEHC 440, [2003] 4 IR 35. See Fennelly (n 7) ¶¶2-91 to 2-97.

[88] See for example *Renergy v Spain* ICSID Case No ARB/14/18, Award, 6 May 2022, paras 606 & 611. See generally Frederico Ortino, 'The obligation of regulatory stability in the fair and equitable treatment standard: How far have we come?' (2022) 21(4) J Intl Econ L 845).

[89] In *Minister for Justice v Commissioner of An Garda Síochána* (C-378/17) EU:C:2018:698, AG Wahl noted that 'as a matter of EU law, the distinction between the obligation to refrain from applying a provision of national law (because that provision is contrary to EU law) *in a specific case* and the obligation to set aside such a provision, with the broader effect that that provision is no longer valid for any purpose (*ex tunc* or *ex nunc*), is an important one'. Para 45. This distinction was also noted in *Costelo* (n 7) by O'Donnell CJ at paras 48 & 84 and Hogan J at para 63l; also in a different context in *Dún Laoghaire Rathdown County Council v West Wood Club*[2017] IECA 213, para 11, upheld (n 80) see para 65.

[90] This might raise a question of equivalence, as administrative action can be declared invalid for noncompliance with domestic law (or, indeed, other EU law). The lack of such a remedy for ECT infringements may simply be a necessary part of the architecture.

[91] Note 7, Hogan J, para 118.

[92] Pages 118–126.

[93] Para 127 & 128, citing *FIAMM* (joined C-120 & 121/06P) [2008] ECR I-6513.

He might have added that the CJEU also takes a similar approach to member state (*Francovich* [94]) liability for failure to implement EU law.[95] In *Brasserie du Pêcheur* the Court of Justice set three conditions:

> the rule of law infringed must be intended to confer rights on individuals; *the breach must be sufficiently serious*; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[96]

As to the second condition:

> the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
>
> The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.[97]

In *Ogieriakhi v Minister for Justice*[98] the plaintiff lost his job because state officials had misinterpreted regulations implementing a directive giving him the right to reside permanently in the State.[99] The Supreme Court held that, as the mistake was honest and excusable, it was not sufficiently serious for *Francovich* damages. It also held that there could be no separate domestic law right to recover damages for a breach of Union law. *Francovich* damages are the only remedy necessitated by Union membership.

O'Donnell CJ in *Costello* thought that Hogan J's reference to strict liability was somewhat misleading. He compared treaty liability to contractual liability. In another case and another context, Hogan J referred to the 'chasm' between the *Francovich* remedy and the remedy of damages for breach of contract[100]. O'Donnell CJ noted too that a finding that administrative action is invalid can lead to State liability without intentional wrongdoing, for example an obligation to reimburse a tax invalidly levied.[101]

But there is a difference, a chasm. There is no *Francovich*-like gravity filter between treaty breach and damages liability to be found in the ECT—either on its terms or as interpreted. Like most investment treaties, the ECT says little about damages (other than principles of

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[94] Note 83.
[95] Note 83.
[96] Note 66, para 51, emphasis added.
[97] Paras 55 & 56.
[98] [2017] IESC 52.
[99] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2007] OJ L 158/77. The CJEU corrected the misinterpretation in *Secretary of State for Work v Lassal* (C-162/09) [2010] E.C.R. I-9217.
[100] *Word Perfect Translation Services v Minister for Public Expenditure* [2018] IECA 35, para 56.
[101] *Costello*, para 163.

compensation for expropriation[102]). Arbitral tribunals do apply a degree of deference when considering, in particular, whether state regulatory action complies with treaty obligations.[103] But if a state action is found to be unlawful, liability for full reparation follows. Tribunals[104] look to customary international law, as stated in the *Chorzów Factory* case[105] and codified in articles 31 and 36(1) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).[106] In *Burlington Resources v Ecuador*, the tribunal wrote:

> While Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts and to which Article 31 belongs, is not applicable to the international responsibility of States vis-à-vis non-States, it is generally accepted that the ILC Articles can be transposed to the context of investor-State disputes.[107]

In considering an ECT claim, would an Irish court find the conditions of liability for damages in Irish law, the *lex fori*, or international law? Irish private international law does not give an answer.[108] It is one thing to say that the ECT is an integral part of the European Union legal order, that therefore article 26(2)(a) must be given direct effect in member states' domestic legal systems, and that it must be construed in accordance with international law. It is another to say that the whole corpus of international law on state responsibility slides on the ECT's slipstream into members states' legal systems. Since such direct effect as the ECT has in the Irish domestic legal system derives from EU law, it seems more likely that an Irish court would find the conditions of liability for damages in EU law. If so, it would likely give rise to *Francovich* type damages for which an investor would have to prove manifest and grave disregard of an obligation under part III ECT.

j. Substance and Procedure

In *Brasserie du Pêcheur*, the Court of Justice said that, if the national court finds that the conditions of *Francovich* liability are established—

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[102] Article 13(1) ECT.
[103] See generally, Caroline Henkels, *Proportionality and Deference in Investor–State Arbitration* (CUP 2015)
[104] For example in *Renergy* (n 88), para 1029.
[105] *The Factory at Chorzów (Germany v Poland)*, Claim for indemnity, judgment on merits (1928) PCIJ ser. A, No. 17, para 125.
[106] Noted by the UN General Assembly on 12 December 2001, UN doc A/RES/56/83; published with commentary in *YB of the ILC*, 2001, vol. II (Part Two), p 30.
[107] ICSID Case No ARB/08/5, Decision on Reconsideration and Award (7 February 2017) para 177 (citations omitted). In truth, arbitral tribunals generally apply Part Two ILC Articles without referring to their non-applicability to liability to nonstates. But that is still open to question. The *Chorzów Factory* case was between states, and the court referred to the differences between rights of individuals and states: (n 105) para 68. And art 33 ILC Articles states that Part Two applies only to obligations owed by states to other states or the international community as a whole, and it is without prejudice to rights accruing to not non-state actors arising from states' international responsibility. The late Judge James Crawford, ILC Special Rapporteur for the second reading of the Articles, made this point in 2010: 'the ILC Articles make no attempt to regulate questions of breach between a state and a private party such as a foreign investor. Those rules must be found elsewhere in the corpus of international law, to the extent that they exist at all.' James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Rev 127, 130. In that article, Crawford famously criticised how some arbitral tribunals applied the ILC Articles, 'a bit like a drowning man might grab a stick at sea in the hope of having certainty' (p 128). See also James Crawford and Freya Baetens, 'The ILC Articles on State Responsibility: More than a "Plank in a Shipwreck"? (2022) 37 (1–2) ICSID Rev 13.
[108] William Binchy, *Irish Conflicts of Law* (1988 Butterworth), pp 642-646; *Cheshire, North & Fawcett: Private International Law* (15th ed OUP 2017), pp 91-104.

> the State would have to make good the consequences of the damage caused within the framework of its domestic law on liability. Substantive and procedural conditions laid down by national law on reparation of damage … may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.[109]

Thus European Union law leaves the substantive and procedural conditions on the reparation of damage to national law. Irish law requires an Irish court to apply Irish procedural law[110] but (as a sort of *renvoi*), the substantive law is (as suggested above) part III of the ECT itself, interpreted in accordance with principles of international law.

Of course, the procedure–substance divide is not always straightforward.[111] We turn next to some practical issues, and examine them through that lens. We do so on the basis that the Rome II Regulation does not apply because the claim is against the State under a treaty, therefore in its capacity as a state.[112]

II. Practical Issues

a. Court and Procedure

It need hardly be said that the law of the forum says what court to bring the claim to, and its procedures.

Ireland is a common law country with a unified court structure. The High Court has 'full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.'[113] Thus, if article 26(2)(a) ECT can be invoked in an Irish court, and there is no legislation assigning another, that court is the High Court.[114]

Within the High Court, there are specialised 'lists' with assigned judges for several types of disputes, including commercial, arbitration, competition, and strategic infrastructure. The Commercial Court (effectively a division of the High Court) would be the likely venue for an ECT claim.[115] There are no separate administrative courts. But there is a specific procedure for challenging the validity of administrative action, known as judicial review, which has much shorter time limits than those for ordinary civil claims (as discussed below). An investor would have to decide whether to frame an ECT claim as an application for judicial review of administrative action or as an ordinary civil action.

In *O'Donnell v Dun Laoghaire Corporation* the High Court held that the validity of an administrative decision could be challenged in a civil claim (or, as in that case, defence), but the short time limits for judicial review still apply.[116] The courts have consistently held that the

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[109] Note 82, paras 98-99, citing *Francovich*, para 43.
[110] *Salinas de Gortiari v. Smithwick* [1999] 4 IR 223, Denham J, 231, Keane J, 239.
[111] As observed by Hogan J in *ADM Londis v Raznett* [2013] IEHC 63, para 97.
[112] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 1.1.
[113] Art 34.3.1º Constitution of Ireland. There are other courts of local and limited jurisdiction.
[114] Certainly if the amount claimed exceeds €75,000 or judicial review is sought.
[115] 'commercial proceedings' include a 'business dispute where the value of the claim or counterclaim is not less than €1,000,000'. Rules of the Superior Courts, Ord 36A, rule 1.
[116] [1991] ILRM 301 (HC).

judicial review time limits apply to such 'collateral' challenges to validity.[117] In *Express Bus v National Transport Authority*, Hogan J said that the plaintiff, who sought *Francovich* damages for an alleged infringement of European Union law in allowing changes to a competing bus service, could not hope to show that the infringement was 'grave and manifest' or 'inexcusable' without challenging its validity.[118] But the Supreme Court has at least twice signalled that it has yet to rule on when such a challenge is permitted in ordinary civil proceedings, and whether there are circumstances in which the challenge to validity must be made by judicial review.[119]

But judicial review may not be the appropriate remedy for an ECT claim. As discussed above, judicial review is a remedy to challenge the validity of administrative action, and would not seem to be appropriate if nonconformance with the ECT does not affect validity. In reality, however, an ECT claim is likely to be combined with other heads of claim under domestic and perhaps EU law, at least some of which would go to validity. As noted above, many of the ECT's substantive investor protections have parallel provisions in domestic and EU law.

To apply for judicial review the applicant must first apply for and obtain the High Court's 'leave'.[120] While leave does not automatically stay the challenged administrative action, the court may order a stay of that action pending hearing.[121] If leave is granted, the judicial review proceedings are usually heard on sworn written affidavit without oral evidence, but cross-examination can be ordered exceptionally.[122] The remedies in judicial review include an order quashing the action of a public body or person (*certiorari*) or directing that actions be taken (*mandamus*) or not taken (prohibition). The court can also award damages, declarations, and injunction.

A civil damages claim is usually brought by plenary action, which would entail exchange of written pleadings, possible discovery (disclosure) of documents, written witness statements and legal submissions, and a trial with live witness evidence (including cross-examination) and oral submissions. In addition to damages (discussed below), the available remedies include declarations and injunction, including interim and interlocutory injunctions[123] pending trial.

For either type of claim, before issuing proceedings lawyers must advise their clients about mediation as a means of attempting to resolve the dispute. A lawyer acting for a client commencing proceedings must include, with the document originating the proceedings, a statutory declaration evidencing that she has complied with this obligation; failing which the court must adjourn the proceedings to allow time for it to be done.[124] A court may invite the parties to proceedings to consider mediation, and adjourn the proceedings and extend time

[117] *Shell E&P Ireland v McGrath* [2013] IESC 1, [2013] 1 IR 247; *BAM PPP Ireland v National Roads Authority* [2017] IEHC 157; *Express Bus v National Transport Authority* [2018] IECA 236; *Browne v Minister for Agriculture* [2020] IECA 186.
[118] Note 117, para 9.
[119] *Shell E&P Ireland* (n 117), para 7.9-7.12; *Dún Laoghaire Rathdown County Council v West Wood Club* (n 80), McKechnie J, para 76.
[120] Rules of the Superior Court, Ord 84, rule 20. The application for leave is usually made *ex parte* but the court may, and often does, direct that notice of it be given to the respondent.
[121] For example, *O'Donovan v Bunni* [2020] IEHC 623; *Sweetman v Cork County Council* [2021] IEHC 350.
[122] *Somague Engenharia v Transport Infrastructure Ireland* [2015] IEHC 723.
[123] Known in some jurisdictions as temporary restraining orders and preliminary injunctions. In *Allied Irish Bank v Diamond* the court granted an interlocutory 'springboard' injunction before deciding what was the applicable law, on the basis of Irish procedural law and a finding that the plaintiff had made out a strong arguable case that Irish substantive law was also applicable. [2011] IEHC 505, paras 4.4 to 4.20.
[124] Mediation Act 2017, ss 14 & 15.

limits to facilitate mediation.[125] However there is no obligation to enter into mediation or any other form of alternative dispute resolution.

b. Parties

The ECT itself identifies who can make the claim: an investor, being a natural person with citizenship or nationality of, or residing in, another ECT state party or 'a company or other organisation' organised in accordance with the law of another ECT state party. The ECT also identifies against whom a claim can be made: the host state. Forum law governs the sorts of entities that can be proper parties to proceedings.

In Irish law, when a company's interests are adversely affected, the company itself is the party who can bring the claim.[126] Ordinarily, a party must be a natural or legal person. Therefore, an unincorporated body cannot sue, but the court would have to consider whether an exception must be made because article 1 ECT defines investor as including 'a company or other organisation'.[127] A dissolved corporation cannot sue, or continue to sue, unless its status has been reinstated.[128] The existence of a legal person is a matter of the law of its place of incorporation.[129]

As for the defendant, the 'capacity of the State to be sued (ie as "Ireland") is now beyond doubt'.[130] In general, Ireland does not enjoy sovereign immunity in its courts.[131]

c. Time Limits

European Union law leaves time limits for commencing proceedings (statutes of limitations) to domestic law, subject to the principles of effectiveness and equivalence.[132] Here too, Irish law should begin with whether this is a substantive or procedural issue. That appears to depend on whether the passing of time extinguishes the right (substantive) or merely bars the remedy (procedural).[133]

There is no limitation period in the ECT, and international law reads no limitation period into it.[134] Two limitation periods in Irish law need to be considered. First, the Statute of Limitations Act 1957, s 11(2)(a) (as amended) provides that 'an action founded on tort' may not be brought more than 6 years from the date on which the cause of action accrued.[135] Second, court rules

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[125] Mediation Act 2017, s 16.
[126] *Galutier v Revenue Commissioners* [2022] IECA 120, para 3
[127] *Sandymount & Merrion Residents Association v An Bord Pleanála* [2013] IESC 51: unincorporated bodies with standing can seek judicial review of planning appeal decisions, having regard to Aarhus Convention and Directive 2003/35/EC.
[128] See *Lasta Mara v Minister for Communications* [2019] IEHC 468, para 19.
[129] *Quigley v Harris* [2008] IEHC 403.
[130] Kelly (n 80) para 3.2.27.
[131] *Byrne v Ireland* [1972] IR 241.
[132] *Palmisani v INPS* (C-261/95) [1997] ECR I-4025.
[133] Binchy (n 108) pp 639-641; *Dicey, Morris & Collins on Conflict of Laws* (15th edn, Sweet & Maxwell 2012) paras 7-054 to 7.057; *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), para 298. Recent Canadian and Australian court decisions rejected this distinction and treated limitation periods in general as substantive. See Dicey, para 7-057.
[134] Pedro Martinez-Fraga & Joaquin Moreno Pampín, 'Reconceptualizing the statute of limitations doctrine in the international law of foreign investment protection: Reform beyond historical legacies' (2017) 50 NYU J Intl L & Pol 789.
[135] Defamation and personal injuries actions have shorter limitation periods.

require that an application for leave to apply for judicial review be made within 3 months from the date on which the grounds for the application first arose. The High Court may extend the period for good and sufficient reason, when the applicant satisfies the court that failure to apply on time was due to circumstances outside the applicant's control and which the applicant could not reasonably have anticipated.[136] As noted above, this 3-month time limit applies also to an ordinary civil action that necessarily depends on a challenge to the validity of an administrative action.[137]

If the claim for damages does not involve a challenge to validity it is likely to be regarded as a tort claim, subject to the 6-year limitation period.[138]

Both limitation periods probably bar the remedy rather than extinguish the claim. That is especially likely with the 3-month judicial review limit, as the court can extend it. On that basis, being part of forum law, these time limits would apply to a claim in an Irish court under article 26(2)(a) ECT.

d. Parallel Arbitral Proceedings

If an investor commenced arbitration under article 26(2)(c) ECT, an arbitration agreement would be formed.[139] If the investor subsequently commenced proceedings in the High Court (with or without abandoning the arbitration), Irish arbitration law would require the court to refer the parties to arbitration at the request of any of them[140] and stay the court proceedings or strike them out as abusive.[141] However, if the arbitration failed because either the arbitral tribunal or the court found it contrary to EU law, it is likely that an Irish court would accept jurisdiction under article 26(2)(a).

Likewise, for Ireland, initiation of court proceedings under article 26(2)(a) is a fork in the road, as Ireland has not consented to arbitration following such proceedings.[142]

e. Counterclaim

By bringing proceedings in an Irish court the investor will have submitted to its jurisdiction.[143] This jurisdiction should extend to any counterclaim the State might raise against the plaintiff. The court rules allow the plaintiff to apply to have a counterclaim excluded on the basis that 'the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action'.[144] The plaintiff in *McCarthy v McNulty* relied in part on this rule to resist a counterclaim by way of amendment. The Supreme Court upheld the High Court decision

[136] Rules of the Superior Courts, Ord 84, rule 21.
[137] Note 117.
[138] In *Express Bus* (n 116) the plaintiff argued that the 6-year limitation period applied. Para 8.
[139] By the state's unconditional consent (art 26(3) ECT) and the investor's consent as a condition of submitting the dispute to arbitration (art 26(4) ECT).
[140] Art 8(2) UNCITRAL Model Law on International Commercial Arbitration, adopted in Ireland by s 6 Arbitration Act 2010.
[141] See *George v Ava Trade (UK)* [2019] IEHC 187 on relitigating a matter decided in parallel court proceedings in another jurisdiction.
[142] ECT article 26(3)(b)(i) and Annex ID. This helps ECT *arbitration* meet one of the objections to CETA mentioned in *Costello*: that it offends the finality of Supreme Court judgments provided for in Article 34.4.3º of the Constitution.
[143] *Scofish International v Owners of the MV 'Anton Lopatin'* (HC, 18 October 1994).
[144] Rules of the Superior Courts, Ord 21, rule 14.

permitting the counterclaim, on the basis that it is desirable to have finality in litigation, avoid multiple suits, and reduce the costs of litigation; 'it appears that the matters can be conveniently disposed of in the pending action and that the justice of the situation favours such an approach.'[145] In *the Anton Lopatin*[146] the High Court allowed counterclaims for breach of contract and wrongful arrest of the ship, but disallowed a counterclaim for defamation. Although the claim and counterclaim were closely related, it was better for the defamation claim (on which the plaintiff was entitled to a jury trial) to follow in a separate action after the plaintiff's claim was determined.[147]

Thus, while the court has discretion to disallow a counterclaim, its jurisdiction is not limited as is that of an arbitral tribunal, for example under the ICSID Convention and Arbitration Rules.[148] Indeed, if a party does not raise a claim by way of counterclaim when it could have done so, that may prevent it from raising the same claim in separate proceedings.[149]

If the counterclaim prevails and overtops any recovery on the claim, the State would be entitled to judgment for the balance against the investor plaintiff.[150]

f. Evidence and Burden of Proof

The Irish courts routinely take judicial notice of modern treaties.[151] While forum law provides the rules of evidence, as we have seen, interpretation of the treaty is governed by international law.[152]

There is English authority that questions relating to the burden of proof are matters of forum law, but English[153] and Irish[154] commentators suggest that there is much to be said for treating them as substantive when they determine the outcome.

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[145] [1999] IESC 70, para 12.
[146] Note 143.
[147] The plaintiffs claimed that they were entitled, under an agreement, to a cargo of fish which the defendant had sold. The plaintiffs had written to the defendant's buyer claiming that the fish was stolen property. Whether this was defamatory turned on whether the plaintiff's claim succeeded. An alternative would have been to try the counterclaim as a separate module within the same proceedings. Had the plaintiff been outside the court's general jurisdiction, the court would probably have done that instead.
[148] ICSID Convention, art 46; ICSID Arbitration Rules (2022) rule 48. On recent investment arbitration cases considering counterclaim jurisdiction, see Patricia Cruz Trabanino, 'State counterclaims and the "legitimacy crisis" in investment treaty arbitration' in Jelena Bäumler & others (eds) *Eur YB Inl L 2021* (Springer 2022) pp 203-227.
[149] *Celtic Atlantic Salmon v Aller Acqua* [2014] IEHC 421, [2014] 3 IR 214, 235-236, paras 66 & 67.
[150] Rules of the Superior Courts, Ord 21, rule 16.
[151] Legislation incorporating treaties into domestic law usually requires the court to take judicial notice of the treaty (eg European Convention on Human Rights Act 2003, s 4) but courts take judicial notice of treaties even when this is not required by legislation, for example the Vienna Convention of the Law on Treaties (n 67)
[152] In *Vendever v Rainsford*, Quinn J applied the distinction made by Dicey, Morris & Collins (n 133) ¶7-024: admissibility of extrinsic evidence to interpret a written document is a question of interpretation, governed by the applicable substantive law, whereas admissibility of extrinsic evidence to add to, vary, or contradict a document's terms is a question of evidence, governed by forum law. [2021] IEHC 685 paras 147 & 148. Likewise in *Analog Devices v Zurich Insurance Company*, Fennelly J said that 'the *lex fori* would appear to apply to' the admissibility of witness evidence concerned with the negotiation of a contract. [2002] IESC 1.
[153] Dicey, Morris & Collins (n 133) ¶7-034; Cheshire, North & Fawcett (n 108) p85.
[154] Binchy (n 133), p 627.

g. Assessment of Damages

If damages are *Francovich* damages, European Union law leaves the precise rules for assessing them to national law as long as they satisfy the effectiveness and equivalence principles.[155]

As already noted, it is not clear whether Irish private international law requires courts to apply forum (Irish) law or applicable substantive (international) law in assessing damages.[156] The question may be theoretical in most cases, because (apart from conditions of liability discussed above atIi)) there is likely to be little or no practical difference between how damages would be assessed under Irish law and by an arbitral tribunal in an ECT case. For example, Irish courts consider expert evidence of losses using, for example, discounted cash flow.[157] They assess damages for loss of chance.[158] Courts have stated the principles in straightforward terms: 'The purpose of damages is compensatory.'[159] 'A party who suffers damage is required to be put in the same position as he would be if he did not suffer the damage: *restitutio in integrum*.'[160]

h. Costs, Security for Costs, Funding

Costs normally follow the event in Irish courts.[161] If costs are awarded and the amount is not agreed, a legal costs adjudicator adjudicates.[162] A party who is successful in Irish civil proceedings would normally expect to recover a substantial portion of its legal costs from the unsuccessful party.

Irish courts have jurisdiction to require corporate plaintiffs (and foreign-domiciled individuals) to provide security for costs.[163] To obtain an order that the defendant provide security for costs, the State would have to establish that it has a *bona fide* defence and that the plaintiff would not be able to pay if it was unsuccessful and ordered to pay the State's costs. If the court is satisfied that both of those conditions are present, it will require the plaintiff to pay security for costs into court unless there are 'special circumstances' to tilt the balance of justice against requiring that.[164] The grounds most frequently relied on are: (a) that the defendant's wrongdoing *prima facie* caused the plaintiff's inability to pay the costs and (b) public importance of the issues.[165] The Supreme Court has suggested that when proceedings are likely to be very expensive and protracted it may be sensible to direct security on a phased basis.[166] In a competition law

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[155] *Brasserie du Pêcheur*, paras 98-99; citing *Francovich*, para 43: 'Substantive and procedural conditions laid down by national law on reparation of damage … may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation'.
[156] Note 108.
[157] For example, in *Donegal Investment Group v Danbywiske* [2017] IESC 14.
[158] For example, in *Minister for Communications v Figary Water Sports Development Co* [2015] IESC 74, paras 147-153.
[159] *Durkan New Homes v Minister for the Environment* [2012] IEHC 265.
[160] *Callinan v Voluntary Health Insurance Board* (SC 28 July 1994, O'Flaherty J); cited in *Minister for Communications v Figary Water Sports Development Co* (n 158) p 145.
[161] Legal Services Regulation Act 2015 s 169.
[162] *Id* part 10 ch 4.
[163] Rules of the Superior Courts, Ord 29. If the plaintiff is an Irish company, s 52 Companies Act 2014 applies.
[164] *Quinn Insurance v PricewaterhouseCoopers* [2021] IESC 15, Clarke J, para 3.1.
[165] *Quinn* (n 164); *Protegé Intl Group v Irish Distillers* [2021] IESC 16. In *Protegé* the Supreme Court rejected an argument that requiring security for costs deprived the plaintiff of an effective remedy for a claimed breach of EU (competition) law. Para 7.1 to 7.21 & 8.4.
[166] *Quinn* (n 164), Clarke J, para 7.21.

dispute, the Court of Appeal fixed security for costs at €1 million. The parties' estimates of the recoverable (party and party) costs ranged from €704,750 to €1.22 million.[167]

Third party litigation funding (as it is generally understood) is currently not permitted in Ireland.[168] This prohibition does not extend to a third party with an interest in the outcome, such as a shareholder of a party. However, a non-party funding the litigation may become liable for costs.[169]

i. Appeal

Unless there is a statutory restriction, High Court decisions can be appealed to the Court of Appeal.[170] There can be a further appeal to the Supreme Court if it is satisfied that the decision involves a matter of general public importance, or the interests of justice so require; the Supreme Court can also authorise a 'leapfrog' appeal directly from the High Court in exceptional circumstances.[171]

j. Enforcement

How is a judgment against the State enforced? Enforcement is necessarily for forum law: the machinery that comes with the forum. In *Byrne v Ireland*, Budd J said:

> If the plaintiff is successful, in the ordinary way the damages would be assessed during the course of the trial; there would seem to be no reason to believe that the necessary moneys to meet the decree would not be voted. That would only be what would be normally expected in a State governed according to the rule of law, and there would seem to be no reason to believe that the State would not honour its legal obligations … The event of the amount of the decree not being provided for in this case by the State where the rule of law prevails seems so remote that I feel it safe to say that no real difficulty of the kind envisaged has been shown to my satisfaction to exist. Therefore, it is unnecessary to come to a final decision on the ways and means of enforcing such a decree beyond remarking that *prima facie* the ordinary procedure of execution by way of levy or enforcement by mandamus would both seem to be appropriate.[172]

What if a judgment creditor sought enforcement of a foreign court judgment against a foreign state's property in Ireland? An Irish court would be unlikely to authorise it. Both Irish[173] and

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[167] *Protegé Intl Group v Irish Distillers* [2020] IECA 80, paras 58 to 74.

[168] *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27. The Courts and Civil Law (Miscellaneous Provisions) Bill 2022 s 98 would exempt international commercial arbitration from this prohibition.

[169] *Moorview Developments v First Active* [2018] IESC 33.

[170] Constitution of Ireland, art 34.4.1º

[171] Constitution of Ireland, art 34.5.3º & 4º

[172] [1972] IR 241, 306-307. Walsh J said in the same case: 'It is unnecessary at this juncture to consider how such a decree would be executed or enforced but it is sufficient to say that an order for mandamus to compel compliance with the judgment would be an appropriate step and not without precedent.' Page 289. Cited in *Gairy v Attorney General of Granada* [2001] UKPC 30, [2002] 1 AC 167. According to a report in the Irish Times on 20 October 2000, the High Court refused to contemplate substituting Ireland for various ministers in a threatened contempt of court order, on the basis that such an order could not be enforced against Ireland. Kelly (n 80), page 111, footnote 50.

[173] *Government of Canada v Employment Appeals Tribunal* [1992] 2 IR 484, 500, SC, O'Flaherty J: 'I doubt if the doctrine of absolute sovereign immunity was ever conclusively established in our jurisdiction. Assuming that it was, I believe that it is a doctrine that has now expired. The doctrine flourished at a time when a sovereign state

European Union[174] law recognise foreign state sovereign immunity, or immunity in respect of state acts, as principles derived from international law. Execution against property used for commercial purposes or to enforce a judgment in a dispute arising from commercial activity might be an exception.[175] Although the ECT parties have consented to being sued in their own courts, there is no consent to execution, much less execution abroad.[176]

III. Conclusion

The ECT remedy should be justiciable in an Irish court, as EU law with direct effect. An energy investor from another ECT state party with a grievance against the State may have ECT claims to include in its quiver, alongside claims founded on obligations under Irish and (other) EU law. In the absence of legislation, the task of working out several practical issues will fall to the parties to the first ECT claims in Ireland and the court in which they are brought.

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was concerned only with the conduct of its armed forces, foreign affairs and the operation of its currency. Now with so many states engaged in the business of trade, direct or indirect, the rule of absolute immunity is not appropriate to such conditions. However, if the activity called in question truly touches the actual business or policy of the foreign government then immunity should still be accorded to such activity.' McCarthy J said at 491: 'It is a generally recognised principle of international law that foreign states and their agents at one time enjoyed sovereign immunity from being impleaded before any court or administrative tribunal in the domestic arena. The history of that immunity is detailed in the judgment about to be read by O'Flaherty J. I accept his conclusion that it is now clear that the general principles of international law have so developed as to depart radically from the absolute state immunity doctrine to a much more restrictive view of sovereign immunity. It is, still, immunity but its application is restricted. I adopt the observations of Lord Wilberforce in *Congreso del Partido* [1983] AC 244 at p 267 as being a correct statement of the current generally recognised principles of international law - one must decide 'whether the relevant acts upon which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character . . . or whether' it 'should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.' See also *Balmer v Minister for Justice* [2016] IESC 25 'sovereign immunity is a common law principle (albeit derived from international law)', O'Donnell J, para 40 and *McElhinney v Ireland* (2002) 34 EHRR 13, para 27. Diplomatic and consular premises are 'inviolable' under art 22 Vienna Convention on Diplomatic Relations (signed 18 April 1961, entered into force 24 April 1961) 500 UNTS 7310 and art 31 Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 19 March 1967) 596 UNTS 8638, both incorporated into Irish law by ss 5 & 6 Diplomatic Relations and Immunities Act 1967.

[174] *Apostolides v Orams* (C-420/07) [2009] ECR I-3571, para 44; *LG v Rina* (C-641/18) EU:C:2020:349, paras 54 & 56: exercise of public powers by a party excludes the case from 'civil and commercial matters' and therefore from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2012] OJ L 351/1.

[175] Notes 173 & 174.

[176] Unlike the bonds in *NML Capital v Argentina* [2011] UKSC 31, see paras 57 & 58 (Lord Phillips). Arts 54 & 55 ICSID Convention, which is incorporated into Irish law by the Arbitration Act 2010, recognise the possibility of a separate immunity from execution, reserved when submitting to adjudication.