INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SODEXO PASS INTERNATIONAL SAS

Claimant

v.

REPUBLIC OF HUNGARY

Respondent

ICSID Case No. ARB/14/20

Separate and Dissenting Opinion of J. C. Thomas QC

Introduction

1. I begin by thanking to my colleagues for their patience and collegiality during the course of an extensive exchange of views.

2. This separate opinion focuses on a narrow issue of law. I concur in the result reached by my colleagues, and in their findings on the principal facts, but not with their analysis of breach.

3. I agree with much of what my colleagues have said and in particular their observation that: " *a thin line exists between indirect expropriation and non-expropriatory abusive conduct that has an adverse effect on the economic value of the investment*."[1] My objective is to attempt to properly situate that line on the facts of this case, having regard to the terms of the Treaty.

4. My concerns are that in finding that SPI suffered an indirect expropriation[2], the majority has given insufficient weight to both: (i) SPI's admissions that neither it, nor its Hungarian subsidiary, had any right to a particular taxation treatment of the meal vouchers on which

[1] Award, ¶ 319.

[2] Award, ¶ 328.

its Hungarian business was based; and (ii) the effect of a judgment of the Court of Justice of the European Union (CJEU) which condemned the same measures as are at issue in this arbitration.

The Facts

5. [redacted]

[redacted] [redacted]

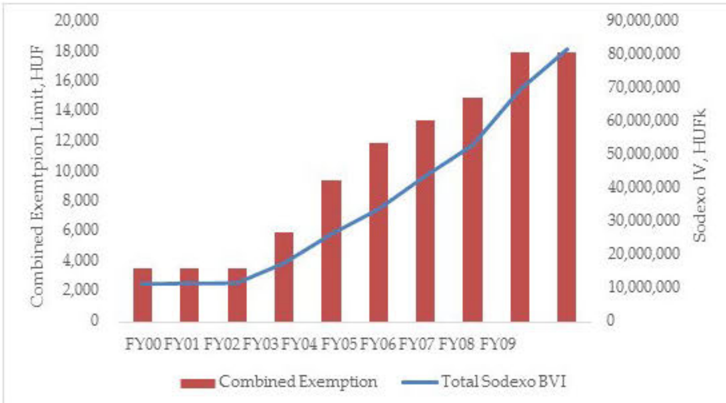
[redacted] [redacted]

[3] The Claimant acknowledged that its voucher business is derived from a country's tax regime. See its business plans (at Exhibits R-0048 and NAV-0034) which contain references to the Hungarian tax regime and possible changes thereto. (Sodexo's Strategic Plan Hungary, 2009-2012, Paris, 6 May 2009 (Exhibit R-048),slide 2: "The legal situation is unstable, risk of significant reduction of the tax advantages for fringe benefits" [Emphasis in original.]; slide 9: "Strategy [...] implement new services in motivation, not requiring tax advantages & not depending on legal situation"; slide 42: threats included "Risk of tax reform to reduce/cancel fringe benefits".) Hungary's Expert, [redacted], showed how reforms to other countries' tax regimes in the United Kingdom and Argentina did away with tax incentives for meal vouchers with a commensurate impact on the providers thereof [redacted] First Expert Report, 29 January 2016 [redacted] First Expert Report"), pp. 15-17).

[4] [redacted] First Expert Report, ¶ 32: "[redacted]

8. [redacted]

Figure 2: Historic Sodexo Issued Volumes and Tax Cap Increases, FY2000 – FY2001[50]



[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[5] Noted in the First Expert Report of [redacted] ("First Expert Report of [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

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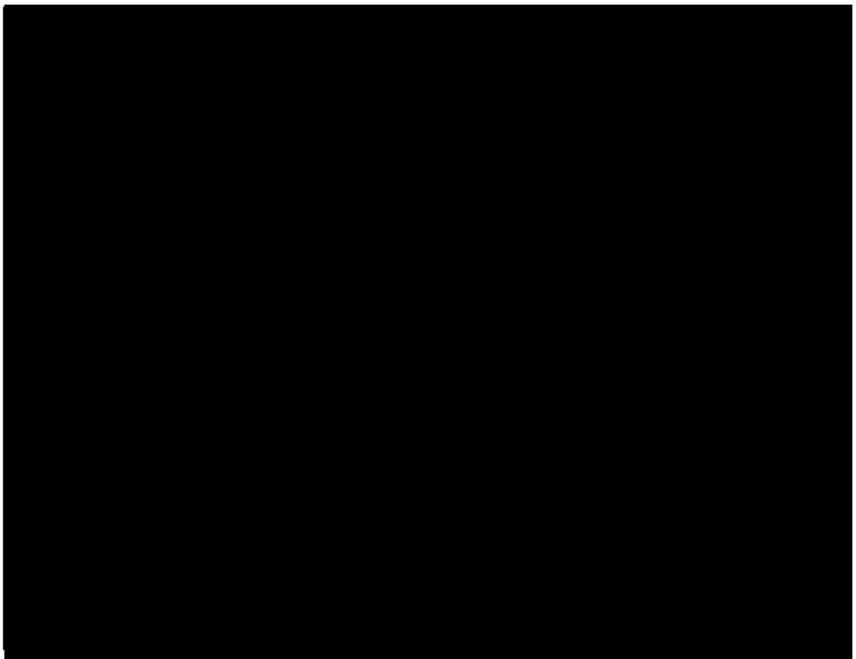
[6] Sodexo's Strategic Plan, Hungary, 2009-2012, Paris, 6 May 2009 (Exhibit R-0048), slide 2.

[7] Claimant's Memorial ("Memorial"), ¶ 71 and p. 53, Graph 1.

[8] Deloitte, "Hungary – 2010 Tax Law Changes", *GES NewsFlash*, 3 November 2009 (Exhibit NAV-16).

[9] Ministry for National Economy, "Hungary's flat-rate personal income tax," 16 November 2010, p. 3 (Exhibit NAV-17).



13. [redacted]

- [redacted]

- [redacted]

From 2009 onwards, due to the financial crisis and the change in taxation [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[10] First Expert Report of [redacted].

[11] *Id.*, ¶ 5.9.

[12] Memorial, ¶ 65.

[13] Claimant's Reply ("Reply"), ¶ 253.

[14] First Expert Report of [redacted].

20. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[15] Memorial, ¶¶ 72-92; Reply, ¶¶ 35-64, 73-77.

[16] Memorial, ¶¶ 96-103, 129-136; Reply, ¶¶ 65-70, 97-101.

[17] Claimant's Post-Hearing Brief, ¶ 76: [redacted] (Memorial, ¶¶ 95, 107, 135-136, 173-175, 220, 222; Reply, ¶¶ 98, 117, 137-138, 141; Claimant's Post-Hearing Brief, ¶ 75.)

[18] Claimant's Post-Hearing Brief, ¶ 22.

[redacted]

[19] Press Release of the European Commission, *November infringements package: main decisions* (21 November 2012), *available at* http://europa.eu/rapid/press-release_MEMO-12-876_en htm. Cited in the Memorial, at footnote 24; Official Journal of the European Union, Case C-179/14 (30 June 2014) (Exhibit C-0012).

[20] Advocate General Yves Bot's Opinion, *Commission v. Hungary*, Case C-179/14 (17 September 2015) ("AG Bot's Opinion") (CL-0012).

[21] *Id*., ¶ 245 (Claimant's free translation).

[redacted]

[22] *Commission v. Hungary*, Judgment of the Court (Grand Chamber) C-179/14 (23 February 2016) ("*Commission v. Hungary*"), ¶¶ 116, 165-166, 170-174 (CL-0127).

[23] *Id.*, ¶¶ 64-67.

[24] *Id.*, ¶¶ 107-114.

[25] *Id.*, ¶¶ 66-70.

[26] *Id.*, ¶¶ 87-88.

[27] *Id.*, ¶ 91.

[28] *Id.*, ¶¶ 153-162.

[29] *Id.*, ¶ 164.

[30] *Id.*, ¶¶ 166-172.

30. [redacted]

The Issue

31. As noted in paragraph 4, I see two weaknesses with labelling what the Respondent did as effecting an *indirect* expropriation. The first weakness is the fact that neither SPI nor its subsidiary had any legal right to a particular taxation treatment of their voucher offerings. SPI freely acknowledged this to be the case:

- "SPI does not claim […] that it had any 'contract or any other type of commitment guaranteeing […] access to a market, market share, a particular volume of business, let alone guaranteed returns.'"[32]

- "Claimant does not allege that it had a vested right to the continuance of certain tax treatment."[33]

- Indeed, SPI conceded that no expropriation claim would lie if the regime were to be done away with entirely. To be sure, SPI qualified this concession by stating that to constitute a "lawful regulation" the tax benefits would have to be eliminated "entirely" or limited "equally" and such reform would have to be justified by "a proven public purpose that was proportionate to its aims, and not imbued with improper intent against Claimant".[34] In principle, however, it accepted that it had no legal right to an expectation that the voucher business would continue.

32. My colleagues do not share my view that this weakens the indirect expropriation claim. They consider that SPI's shareholding in SPH suffices to establish a property right capable

[31] Reply, ¶ 199.

[32] Reply", ¶ 253.

[33] Claimant's Post-Hearing Brief, ¶ 23.

[34] Claimant's Post-Hearing Brief, ¶ 21: "Had Respondent eliminated the tax benefits granted to meal voucher [*sic*] entirely or elected to regulate all meal voucher issuers equally by limiting commission levels that could be charged to employers and affiliates, and such reform was justified by a proven public purpose that was proportionate to its aims, and not imbued with improper intent against Claimant, it would have been a lawful regulation." [internal footnote removed].

of supporting a finding of indirect expropriation.[35] They rely upon the CJEU's findings of disproportionality and inadequate justification of the measures in arriving at their finding:

> 323. In *Commissioner v. Hungary*, the CJEU found that the SZÉP and Erszébet regulations [*sic*] were disproportionate to Hungary's stated aims of protecting users and creditors, not justified by these stated aims, and discriminated against foreign issuers. While the EU regulations at issue in that case differ from the BIT provisions, the CJEU's analysis of discrimination, proportionality, and the alleged public purpose of the tax reforms are highly relevant to this case.[36]

33. I do not think that the CJEU's findings on discrimination and disproportionality, *etc.* gets the Tribunal home on indirect expropriation and I shall seek to explain why I do not agree that proof of ownership of shares suffices to demonstrate an indirect expropriation on the facts of this case.

34. *First*, proof of discriminatory or unjustifiable acts does not convert something that is not an expropriation into an expropriation, even if substantial losses result from such measures.[37] This can be seen in the *Fireman's Fund* and *Feldman* cases.[38] In those cases, the value of the claimant's investment was either rendered worthless by the State's measure(s) (*Fireman's Fund*) or substantially diminished due to the loss of the company's principal business (*Feldman*). Nevertheless, in both cases the tribunals rejected the argument that an expropriation had been effected.

35. *Second*, attempts to argue that ownership of shares suffices to justify an indirect expropriation claim in circumstances similar to the present case have been rejected by tribunals for reasons that I will review below.

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[35] Award, ¶¶ 60-61.

[36] Award, ¶ 323.

[37] The *Fireman's Fund Insurance Company v. United Mexican States* tribunal made this point in precise terms at ¶ 205 of its Award: "First, discriminatory treatment is used to determine whether the expropriation was unlawful. In the *LIAMCO* case, quoted by FFIC, the tribunal considered that "a purely discriminatory nationalization is illegal and wrongful" under international law. However, it presupposes the presence of a nationalization (or expropriation). In the present case, the question is whether there was expropriation. It cannot be argued that because there is discrimination, there is expropriation." [Emphasis added.] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006 ("*Fireman's Fund*").

[38] *Marvin Roy Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 ("*Feldman v. Mexico*" / "*Feldman*") (CL-0097).

36. To be clear, shares in a company are a species of property protected by the Treaty. A State can directly expropriate an investor's shares or take measures short of that which cause such an impairment of the normal incidents of ownership and control as to amount to an indirect expropriation of the shares.

37. To illustrate the distinction, if a State takes the investor's shares away from it, it has expropriated them (or nationalized them if the taking is part of a larger set of measures aimed at other investors). It might also take measures against the exercise of rights relating to the shares which impair the rights of ownership and control. In addition, a State might take measures that do not interfere with the rights of ownership and control over a subsidiary, but which interfere with other legal rights held by the investor or its subsidiary. A common example is where an investor incorporates a company to hold a concession granted by the host State and the State later takes measures that destroy the concession, thereby depriving the local company of its reason for being and thereby substantially diminishing or eliminating the value of the investor's shareholding in the local company. That can support a finding of indirect expropriation.

38. Thus, the cases first look for measures relating to the ownership and control of the shares. If, as in the present case, the State takes no action directed towards the shares themselves, the analysis then turns to whether measures were taken in relation to *other* legal rights, belonging either to the investor or to the company in which it holds the shares, which rights have been impaired.

39. In *Feldman*, the claimant owned and controlled a Mexican company, CEMSA. The company's business of buying cigarettes and then exporting them and claiming VAT rebates was shut down by Mexico's finance authorities. The claimant alleged among other things that Mexico's measures had resulted in an indirect or "creeping" expropriation of his investment and were tantamount to expropriation.[39] The tribunal rejected the argument, holding:

> 152. Given that the Claimant here has lost the effective ability to export cigarettes, and any profits derived therefrom, application of the *Pope &*

[39] *Feldman*, ¶ 89.

> *Talbot* standard might suggest the possibility of an expropriation. However, as with *S.D. Myers*, it may be questioned as to whether the Claimant ever possessed a "right" to export that has been "taken" by the Mexican government. Also, here, as in *Pope & Talbot*, the regulatory action (enforcement of long-standing provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no "taking" under this standard articulated in *Pope & Talbot*, in the present case.[40] [Emphasis added.]

40. The same distinction was drawn in *Emmis v. Hungary*[41] and *Accession Mezzanine v. Hungary*[42], where the tribunals held that if no measures were taken against the shares themselves, the claimants had to establish that they, or their Hungarian subsidiaries, held other rights or assets that had been taken or so interfered with such as to support a finding of expropriation of the shares. [43]

41. Both tribunals considered whether claims could be advanced in relation to actions taken by the respondent in respect of two Hungarian broadcasting companies. Each company had held a broadcasting licence for a specified period, which licence was extended in accordance with its terms, after which it expired. In each case, the licence was put out to tender and awarded to another company. The claimants alleged that the tendering process was not conducted lawfully or fairly and failed to accord them an "incumbent advantage" in the bidding process. The claimants in both cases argued that they or their subsidiaries held extant rights that, if honoured, would have led to the granting of licences. In order to

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[40] *Feldman*, ¶ 152.

[41] *Emmis International Holding, B.V. and others v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (Exhibit RL-0012) ("*Emmis v. Hungary*, Award" / "*Emmis*"). I was a member of this tribunal. The applicable treaties were the Netherlands-Hungary and the Switzerland-Hungary bilateral investment treaties; both had narrow arbitration clauses.

[42] *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Republic of Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 ("*Accession Mezzanine*").

[43] In *Emmis* the claimants continued to own shares in their Hungarian enterprise, Sláger Rádió Műsorszolgáltató Zrt. ("Sláger"), and in *Accession Mezzanine* the claimants continued to own shares in their Hungarian enterprise, Danubius Rádió Műsorzolgáltató Zrt. ("Danubius").

determine whether an alleged interference with these claimed rights could give rise to an indirect expropriation of the claimants' shares in their Hungarian companies, the tribunals had first to determine whether the claimed rights actually existed under Hungarian law.[44]

42. My colleagues distinguish *Emmis* on the ground that:

> 212. The majority of the Tribunal considers as particularly misplaced Respondent's reference to *Emmis v. Hungary*, on which the separate and dissenting opinion also relies. Respondent has cited the case for the proposition that the claimant must have a vested property right or asset in order to justify a claim of indirect expropriation. *Emmis v. Hungary* concerned a national FM-radio frequency broadcasting license which allegedly constituted rights under Hungarian property law created by a broadcasting agreement. In *Emmis v. Hungary*, the action was to protect contract rights, not to seek compensation for shareholding interests as such. By contrast, the present arbitration implicates rights related to the taking of shares.
>
> 213. The contractual rights at stake in *Emmis v. Hungary* did not exist at the time relevant to the claim. At the time in question, all that the claimants had was an invitation to tender for a possible renewal of the license. The measures taken by the state affected rights that had already expired. Even if the value of the property was greatly diminished, the acts of the state could not cause such effect as they did not affect rights that were in force at the time the measures were taken.
>
> 213. Unlike in *Emmis v. Hungary*, in the instant arbitration, SPI owned shareholdings in SPH at the time of the PIT reforms and the alleged expropriation. The facts of *Emmis v. Hungary* are thus sufficiently distinct from the instant case that it is not applicable here.[45] [Emphasis added; footnote references omitted]

43. I respectfully disagree, particularly with the underlined text in the pages just quoted. As in the present case, the applicable treaties in *Emmis* and *Accession Mezzanine* each defined shares as an "asset" falling within the definition of an "investment".[46] Also, as in the

[44] *Accession Mezzanine*, ¶¶ 53, 107, 116-129; *Emmis*, ¶¶ 222-240.

[45] Award, ¶¶ 213-215.

[46] *Emmis*, ¶ 135, citing the Bilateral Investment Treaty between the Netherlands and Hungary dated 2 September 1987 ("Netherlands-Hungary BIT"), Article 1(1) and the Bilateral Investment Treaty between Switzerland and Hungary dated 5 October 1988 ("Swiss-Hungary BIT"), Article 1(2); *Accession Mezzanine*, ¶ 24 citing the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987 ("UK-Hungary BIT"), Article 1(1).

present case, both cases involved Hungarian enterprises in which the claimants held shares and the claimants contended that their ownership of shares sufficed to constitute vested rights.[47] Taking the approach generally taken in the cases which I have already described, in both cases the mere ownership of shares in a subsidiary was *not* accepted as sufficient to ground an indirect expropriation claim.[48] *Accession Mezzanine* held:

> In the present case, the property rights said to be the object of the Claimants' first expropriation claim are the shares in and loans to Danubius. <u>There is no allegation in these proceedings that a measure of the State of Hungary has interfered with the Claimants' right of use in respect of these property rights</u>.[49] [Emphasis added.]

44. And further:

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[47] In *Accession Mezzanine*, the Claimants advanced two arguments: "First, Claimants contend that Hungary indirectly expropriated the full value of the shares of Danubius and destroyed its ability to repay loans from Claimants. Second, Claimants contend that Hungary also expropriated the bundle of proprietary and contractual rights that Danubius enjoyed by virtue of the Contract Framework that Hungary created in the 1990s to encourage and protect investors in the newly-privatized broadcast industry." (*Accession Mezzanine* Award, ¶ 61). Further, the Claimants "assessed their loss in respect of the first expropriation claim as the value of Danubius as a going concern as a radio operator" (¶ 171).

In *Emmis*, the Claimants similarly submitted that they "jointly hold 100 percent of the shares in Sláger, and those shares are "assets" that qualify as a covered "investment" under both the applicable BITs and the ICSID Convention", and that "indirect expropriation may affect a broad range of intangible assets with economic value, including inter alia shares in a company, and tangible and intangible rights held by an investment vehicle" (*Emmis v. Hungary*, Award, ¶ 47).

[48] In *Accession Mezzanine*, the tribunal found at ¶ 171 of the Award:

"Whilst the object of the expropriation is said to be the value of the shares in and the loans to Danubius, that value has been assessed by the Claimants as reflecting the value of Danubius as a going concern. But to continue as a going concern, Danubius needed a right to broadcast."

In that respect, the tribunal found at ¶¶ 187-188 that "no legislative provision or provision of any other normative act relating to the conduct of the 2009 Tender was incorporated into the Broadcasting Agreement such that Danubius would have a contractual right to enforce any such provision against the ORTT or any other party", that the Claimants' expropriation claim was "contingent upon establishing a right to a new broadcasting agreement under Hungarian law", and therefore it had no jurisdiction because "the true object of the expropriation claim is not part of the Claimants' investment in Hungary".

Similarly, in *Emmis*, the tribunal stated at ¶¶ 159-161 that: "[i]n view of the fact that the only cause of action within the Tribunal's jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived", and that the "need to identify a proprietary interest that has been taken [was] confirmed by the definition of 'investment' in the Treaties" which referred to "every kind of asset".

Further, the tribunal found at ¶ 219 that on the facts, although "Claimants' contemporaneous accounting treatment of the Broadcasting Right confirms that it was indeed a valuable asset during the period of the licence and its first renewal", the Claimants "attributed a nil value to that asset in respect of the period after 18 November 2009". Thus, it concluded at ¶ 221 "that the 2007 Broadcasting Agreement conferred in general no rights in respect of the period after 18 November 2009 constituting valuable assets capable of expropriation".

[49] *Accession Mezzanine*, ¶ 179.

> The Tribunal thus affirms, following an analysis of the precedents relied upon by the Claimants, that their first expropriation claim is, like their second expropriation claim, contingent upon procuring a new broadcasting agreement from the ORTT. The dispute concerning the first expropriation claim does not, therefore, arise out of the Claimants' investment in shares and loans but rather out of an alleged investment right that the Claimants never had. The Tribunal thus upholds the Respondent's objection [B2] in respect of the Claimants' first expropriation claim.[50] [Emphasis added.]

45. The tribunal concluded that the claimants never had any rights to the alleged object of the expropriation.[51] Their ownership of shares did not suffice. Hence the claimants were in the same position as the present Claimant. My colleagues contrast the present case to the situation in *Emmis* because it is said to "implicate[] rights related to the taking of shares". But what rights related to the taking of shares have been "implicated"? As already seen, the Claimant has forthrightly and correctly conceded that it had no rights beyond its ownership of its shares and there was no measure taken in relation to SPI's shareholding in SPH. It was thus in precisely the same position as the *Emmis* and *Accession Mezzanine* claimants.

46. For example, in *Emmis*, the claimants asserted that it "is well-established as a matter of international law that indirect expropriation may affect a broad range of intangible assets with economic value, including *inter alia* shares in a company, and tangible and intangible rights held by an investment vehicle."[52] But the tribunal held that there was no expropriation (direct or indirect) of the shares in the claimants' Hungarian company and therefore "the only way that the expropriation claim can be held to be within the Tribunal's jurisdiction is if Sláger [the subsidiary] had a proprietary right that survived the expiry of its broadcasting right under that Agreement."[53] This could not be shown.

47. These two cases are, in my respectful opinion, directly on point. Applying their reasoning to the instant case, if the Claimant cannot identify a right to a particular taxation treatment

[50] *Id.*, ¶ 185.

[51] *Id.*, ¶ ¶ 188-189.

[52] Claimants' submissions quoted at ¶ 47 of the *Emmis* Award.

[53] *Id.*, ¶ 144.

that would constitute an "asset" or a "right" under the France-Hungary Treaty, it has no claim for indirect expropriation.

48. I turn to what I see as the second weakness in the finding that Hungary indirectly expropriated SPI's shares in SPH. This arises out of events following the Court of Justice's condemnation of the restrictions imposed with respect to the SZÉP card and the Erzsébet voucher.

49. To set this in its proper context, it is necessary to briefly summarize the relevant facts:

50. It is striking that although the *Edenred* tribunal ruled in December 2016 that Edenred had suffered an expropriation, one month *before* that finding the Respondent's expert in our proceeding, [redacted] filed its Second Expert Report showing that Edenred had developed a new card that it was advertising in Hungary would provide "all benefits in one place" and

[54] Memorial, ¶167.

be accepted by approximately 100,000 affiliates in Hungary.[55] An image of the new card was adduced as Exhibit [redacted] in [redacted] Second Expert Report.[56]

51. There was no dispute between the Parties about Edenred's competing in Hungary by the time of our hearing in May 2017. SPI's damages expert, [redacted], acknowledged that he was aware of this fact.[57]

52. Thus, the company that the *Edenred* tribunal held had been expropriated was advertising a new card in Hungary *before* the expropriation finding was made.[58] As in the present case, the ownership and control of Edenred's shares in its Hungarian subsidiary had never been touched by any measure taken by Hungary. Therefore, after the CJEU held that the terms of competition must be restored, Edenred resumed competing in the Hungarian voucher market.[59]

53. This fact not only raises serious doubts as to whether Edenred suffered a permanent taking of its shares in its Hungarian subsidiary (since the subsidiary was able to resume

[55] [redacted] Second Expert Report; DLA Piper, "Simplify cafeteria and incentive systems with Edenred", 2016-2017 (Exhibit [redacted]), p. 6.

[56] *Id.*, p. 6.

[57] Transcript, Day 3, p. 606, lines 20-22; p. 607, lines 1-12.

[58] *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21 Award, ¶¶ 419-420. [Emphasis added.] I hold the members of this Tribunal in high regard. It appears to me that although the Tribunal, like me, differentiated between three categories of measures (at ¶ 316 of the award and as discussed in this opinion), it then equated dispossession with indirect expropriation. I believe that they are different concepts.

[59] The Respondent noted in its Post-Hearing Brief, at ¶¶ 28-29, [redacted]

business)[60], but also points to a key issue of quantum: If, having found an expropriation, a tribunal awards damages based on lost cash flows projected into the future – as in the present case, where they are projected in perpetuity by the Claimant's expert[61]– what happens when the conditions that formed the basis for the expropriation finding no longer exist and the company can resume business? [62] Assuming that an expropriation finding can even be made, it must follow that a claimant is overcompensated when what was assumed to be a permanent taking turns out at its highest to be a temporary one.[63]

My Approach

54. The highly unusual facts of this case led me to initially view the present claim as a fair and equitable treatment / discrimination claim that was being "shoehorned" into an expropriation claim (because the Tribunal only has jurisdiction over measures of dispossession under the Treaty). Whatever had been done to SPI's Hungarian business, it

[60] The Respondent pointed this out repeatedly. See, for example, its Post-Hearing Brief at footnote 37, where it criticized the *Edenred* tribunal as follows; "It is for this reason too that the *Edenred* tribunal reached the wrong conclusion in finding that the right impacted was the "enterprise." The tribunal erred in its conclusion that Edenred was deprived of its enterprise given, in particular, that Edenred continued to operate profitably at the time of the award, and continues to do so in Hungary today. Edenred, paras. 308, 381and 05/02/17 Tr. 266:22 (Sedlák) acknowledging that Edenred is still in the market)."

[61] [redacted] First Expert Report, ¶ 127; Second Expert Report of [redacted], Appendix 10.

[62] [redacted]

[63] A small number of tribunals have contemplated the possibility of finding a temporary expropriation, but to the best of my knowledge, the only two that have deviated from the weight of the case law which requires the showing of a permanent taking are *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, and *Les Laboratoires Servier S.A.S., et al v. Republic of Poland*, UNCITRAL, Final Award, 14 February 2012 ("*Les Laboratoires Servier*") (CL-0055). (The tribunal's discussion of the applicable provision's reaching a temporary dispossession is followed by a redacted passage in the publicly available version of the award, so it is not possible to see what the balance of the tribunal's thinking was on this important point.) When tribunals consider the temporary versus permanent point, they have generally found that it must be permanent. In its detailed summary of the case law on expropriation, the *Fireman's Fund* tribunal stated at ¶ 176(d): "The taking must be permanent, and not ephemeral or temporary"; *Tecmed v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 116; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 313; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 193; *Archer Daniel Midland Company and Tate & Lyle Ingredients (Americas) Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 243; *Unglaube v. Costa Rica,* ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶¶ 226-227; *Achmea v. Slovak Republic I,* PCA Case No. 2008-13, Final Award, 7 December 2012, ¶¶ 289-293; *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 516; *Busta v. Czech Republic,* SCC Case No. V 2015/014, Final Award, 10 March 2017, ¶ 389.

did not for the reasons given appear to me to be an indirect expropriation of SPI's shareholding in SPH.

55. But having reflected on the unusual wording of Article 5, I concluded that the Parties' use of the term "expropriation" rather than "dispossession" had led me (wrongly) to equate the two concepts. Labelling Article 5(2) as the Treaty's "expropriation clause" is misconceived because Article 9(2), from which the Tribunal derives its jurisdiction, speaks *not* of "disputes relating to measures of expropriation", but rather to "disputes relating to the measures of dispossession referred to in Article 5(2)". I thus concluded that I had given insufficient attention to the clause's structure and breadth.

56. Article 5(2) of the France-Hungary Treaty encompasses more than measures of expropriation and nationalization. It provides in its opening words:

> The Contracting Parties shall not take expropriation or nationalization measures or any other measures the effect of which is to deprive, directly or indirectly, investors of the other Party of investments belonging to them in its territory and in its maritime zones…[64] [Underlining added.]

57. In its Post-Hearing Brief SPI asserted that this phrasing *extends* the reach of the clause beyond measures of expropriation or nationalization. [65] I agree that that is the correct reading of the clause. While many other treaties include language to clarify that measures "*equivalent to*" or "*having the same nature as*" measures of expropriation or

[64] Treaty, Article 5(2). Throughout this proceeding, the Parties have employed an English translation of the Treaty which is authentic in the French and Magyar versions. Since there was no dispute between the Parties concerning the Treaty's use of three types of measures (*i.e.*, expropriation, nationalization, or any other measures the effect of which is to dispossess, directly or indirectly, investors of their investments…), I have proceeded on the basis that the English translation accurately reflects not only the French version (which is freely available) but the Magyar version as well.

[65] In its Post-Hearing Brief, at ¶¶ 27-28, the Claimant took issue with the Respondent's attempt to use the verb "*dispossess*" to *narrow* the scope of Article 5(2): "27. …Respondent latches on to the BIT reference to 'dispossess' to argue that "although largely similar to expropriation, the requirement to demonstrate dispossession imposes a higher standard." According to Respondent, France and Hungary specifically intended to protect only against dispossession measures, which Respondent referred to as "the kind of big ones," which cause claimant to lose control or management over its investment." This led the Claimant to assert in response that: "28. Not only does Respondent fail to provide any support of specific intent by France and Hungary to narrow the scope of BIT protection, its argument is also irreconcilable with the plain language of the BIT. For one, as the BIT prohibits 'measures of [expropriation] or nationalization or any other measures which have the effect of dispossessing,' France and Hungary extended BIT protection against 'measures which have the effect of dispossessing' *in addition* to expropriation and nationalization. Second, the BIT is broadly worded to protect against 'any other measures which have the effect of dispossessing,' *not* 'measures which dispossess by taking over control or management,' as Hungary would like." [Italics in original; footnote references omitted.]

nationalization will also fall within the ambit of the clause, the Treaty in the instant case goes further to introduce a third category of measures that is not tied to equivalency to or having the same nature as expropriation or nationalization but rather reaches measures the effect of which is to deprive, directly or indirectly, investors of the other Party of investments belonging to them.

58. Given that different words used in a treaty are generally taken to mean different things, the use of the word "*deprive*" in Article 5(2) must be taken as intended to reach measures that are not expropriations or nationalizations (either direct or indirect). The article includes, but is not limited to, measures of expropriation and nationalization, and in my opinion reaches measures that although not "*equivalent to*" expropriation or nationalization would nevertheless have the effect of dispossessing an investor of its investment. On this approach, a dispossession could occur if it were to be of such a nature as to deprive the investor of the value or utility of its investment without actually interfering with its legal rights. Accordingly, on the facts of this case I would hold that the impugned measures dispossessed SPI of its subsidiary's Hungarian voucher business, on which most of SPH's business, and hence, most of SPH's value to SPI, in turn, depended.

59. I would therefore hold that for the period of market disruption (which ended around the time of Edenred's introduction of a new card – showing Edenred's belief that the terms of competition were being restored) the Respondent marginalized the formerly dominant market players and effectively deprived SPI of the value of SPH's participation in the voucher business. While neither SPI or SPH had a proprietary right to such business under Hungarian law, they had a reasonable expectation to continued participation in that business if the State continued to permit vouchers to be used to supplement employee remuneration.

60. But the absence of any legal right to such continued participation surely has to reduce the degree of certainty of that participation (in contrast to a situation in which the investor or its investment has a defined legal right that has been impaired or taken away). As noted above at paragraphs 11 to 15, the evidence shows that the uncontested changes made to the voucher taxation regime in 2010-2011 led to an approximately 11% and 5% reduction in

the volume of issued vouchers, respectively, for those two years. The voucher taxation preferences could be done away completely with in appropriate conditions. This puts the valuation of the meal voucher business in a very different position than that of other businesses which do not depend upon the continued existence of a government regime that is susceptible to change and in respect of which the State has given no commitments to the investor as to the regime's continuance.

61. In the end, three factors give rise to a right to compensation for this temporary dispossession: (i) the rapidity with which Hungary intentionally tilted the terms of competition away from the dominant market players; (ii) the virtually immediate, serious and predictable impact of the measures on SPH's existing business; and (iii) the obviously serious questions as to the measures' consistency with EU law which were, or should have been, evident to the Respondent at the time.

62. In sum, the wording of Article 5(2) is capacious enough to permit the Tribunal to find a breach, not because Hungary directly or indirectly expropriated SPI's shares in SPH, but rather because through design and effect, Hungary engineered a dispossession of the voucher business from which SPI's subsidiary derived most of its value. This was done without taking away or interfering with any of SPI's or SPH's legal rights.

63. I therefore agree with the result, but respectfully disagree with the finding of an indirect expropriation. I would allow the claim on the narrower basis described above, with due recognition that the measure was of a temporary nature and thus would adjust the damages to be awarded to reflect that fact.

The *Achmea* Issue

64. A few words about the *Achmea* judgment. I agree with the majority that the *Achmea* judgment does not deprive this Tribunal of jurisdiction over the claim. While Hungary's accession to the European Union might have raised questions of incompatibility with the EU's legal system of a bilateral treaty which originally applied between an EU Member State and a third State, in my opinion it is difficult to sustain the argument that the CJEU's judgment operates to deprive an ICSID tribunal of a jurisdiction which by all relevant criteria (under the ICSID system) existed at the time that the dispute was submitted to

ICSID arbitration. I understand the argument to be that under EU law the two Contracting Parties' consents to ICSID arbitration became invalid as of the date of Hungary's accession to the EU. This raises the question of how legal developments within the EU can affect the operation of a separate and autonomous international treaty.

65. The ICSID Convention is of course a multilateral treaty to which both Hungary and France are Contracting States. Article 9(2) of the BIT designated ICSID as the forum for investor-State disputes if both Contracting Parties acceded to the Convention.[66] France ratified the Convention on 21 August 1967 and Hungary on 4 February 1987; it entered into force for the former on 20 September 1967 and for the latter on 6 May 1987.[67] Accordingly, both Contracting Parties gave their treaty-based consents to ICSID arbitration well before Hungary joined the European Union.

66. With their prior offers in writing never withdrawn or modified by the two Contracting Parties when Hungary became a Member State, insofar as the ICSID system was concerned, it remained only for a French or Hungarian investor to match the other State's prior consent by giving its own consent in writing in the terms specified by the BIT for an agreement to arbitrate to be formed under Article 25 of the Convention.[68] At that point, insofar as the ICSID Convention was concerned, a valid and enforceable arbitration agreement would come into effect. So far as I can see, nothing in the Convention recognizes that a judgment of a court having jurisdiction within an ICSID Contracting State that has already given its consent to ICSID arbitration can undo such an arbitration agreement, even if that court plays a supranational role within a regional legal system.

[66] Article 9(2), third paragraph, states in this regard: "When each of the Contracting Parties becomes a party to the Convention on the Settlement of Disputes Concerning Investments Between States and Nationals of Other States, done at Washington on March 18th, 1965, such a dispute shall, if it cannot be settled amicably within six months from the time it was raised by one of the parties to the dispute, be submitted to the International Centre for the Settlement of Investment Disputes for settlement by arbitration."

[67] https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx

[68] Article 25(1) states in this regard: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre…" It is well established that under the Convention, it is not necessary that the parties' consents be given at the same time.

67. Had France and Hungary agreed that their respective investors' rights to claim under the BIT would cease to exist once Hungary became an EU Member State – a limitation on their prior treaty-based consents that could easily comport with the ICSID Convention – the situation would be different. They would have provided in advance for the withdrawal of their respective consents upon the occurrence of a specified event (the accession of Hungary to the EU). But this was not done.

68. On well-established principle, the Convention contemplates that jurisdiction is to be established at the time that a claim is submitted to arbitration. If both parties have given their consent in writing, the agreement is formed and the final sentence of Article 25(1) makes clear that: "When the parties have given their consent, no party may withdraw its consent unilaterally."[69] Therefore, I do not think that a consent given by an EU Member State to an investor of another Member State which was valid in ICSID terms at the time of the submission of the dispute to arbitration can be varied or nullified by a subsequent development in EU law which declares intra-EU BITs' arbitration clauses to be inconsistent with the EU regime, even if that judgment operates *ex tunc* within that regime.

69. On a separate point, I note that the stated policy concern in *Achmea* was that an arbitral tribunal with no power to refer questions of EU law to the CJEU might err in its application of EU law. That concern does not arise on the facts of the present case. The Tribunal has in fact given full effect to the Court of Justice's ruling in *Commissioner v. Hungary*, by relying upon the Court's findings on the various restrictions pertaining to the SZÉP card and Erzsébet voucher frameworks. In this way, the Award is congruent with what the Court found in respect of the very measures at issue in this case and no inconsistency with *substantive* EU law appears to exist.

70. I recognize that there is an additional concern that the existence of intra-EU investor-State arbitration poses issues in relation to the "duty of loyalty" that EU law imposes on each Member State. The remedy granted by this Tribunal is not the remedy that the Court

[69] I realize that it can be argued that strictly speaking the Respondent is not seeking to "withdraw its consent *unilaterally*" because it can be said to be acting pursuant to a binding determination made by the CJEU which has binding effect within all EU Member States. But in terms of the present arbitration, the CJEU's decision as articulated by and through the agency of the Respondent would, if accepted, have the same effect.

granted and the idea that different remedies can be granted by different adjudicative bodies considering the same measures might give rise to concern. But that is for the EU and its Member States to sort out. It is not for an ICSID tribunal to resolve within a particular case where jurisdiction was established at the time that the claim was submitted to arbitration.

71. In the end, I do not think that the CJEU's judgment can vary the obligations of two EU Member States that are also ICSID Contracting States. The Convention is a separate treaty which established an autonomous arbitral regime that operates purely at the level of international law, disconnected from the national legal systems of its Contracting States.[70] It is to be construed and applied on its own terms.

[70] Except insofar as the courts of each Contracting States are obliged to enforce ICSID awards as if they are a final judgment of the courts of that State, See Article 54(1).

J. Christopher Thomas, QC

Date: 19 January 2019