IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

B E T W E E N:

(1) PING AN LIFE INSURANCE COMPANY OF CHINA, LIMITED

and

(2) PING AN INSURANCE (GROUP) COMPANY OF CHINA, LIMITED

Claimants

and

KINGDOM OF BELGIUM

Respondent

(ICSID Case No. ARB/12/29)

AWARD

Members of the Tribunal
Lord Collins of Mapesbury, President
Professor Philippe Sands QC, Arbitrator
Mr. David A.R. Williams QC, Arbitrator

Secretary of the Tribunal
Martina Polasek

Date of dispatch to the Parties: April 30, 2015

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ABBREVIATIONS

1986 BIT	Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments dated June 4, 1984
2009 BIT	Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments dated June 6, 2005
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Belgium or Respondent	The Kingdom of Belgium
BNB	Belgian National Bank
CBFA	*Commission Bancaire, Financière et des Assurances*
Claimants	Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) of China, Limited
Cl. Exh. C-[number]	Claimants' Exhibit
Cl. Mem.	Claimants' Memorial
Cl. C-Mem. Jur.	Claimants' Counter-Memorial on Jurisdiction
Cl. Rej. Jur.	Claimants' Rejoinder on Jurisdiction
CSSF	*Commission de Surveillance du Secteur Financier*
DNB	Dutch Central Bank
FBB	Fortis Bank SA/NV
Fortis	Fortis SA/NV and Fortis N.V.
Fortis Group	The group of companies constituted by Fortis and their direct and indirect subsidiaries
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Request	Claimants' Request for Arbitration dated August 27, 2012
Resp. Mem. Jur.	Respondent's Memorial on Jurisdiction
Resp. Rep. Jur.	Respondent's Reply on Jurisdiction
SFPI	*La Société Fédérale de Participations et d'Investissement*
Tornberg Statement	Witness Statement of Mr. Martin Tornberg
Tr. [J.]/[day]/[page]	Transcript of the hearing on jurisdiction held November 10 to 11, 2014

I. Introduction and Parties

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of: the Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments dated June 4, 1984, which entered into force on October 5, 1986 (the "1986 BIT"); the Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments dated June 6, 2005, which entered into force on December 1, 2009 (the "2009 BIT"); and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

2. The Claimants are Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) of China, Limited (the "Claimants"). The Claimants are companies incorporated under the laws of the People's Republic of China with their registered offices in Shenzhen, Guang Dong Province.

3. The Claimants are represented by Messrs. Chris Colbridge, Phillip Kurek and Chiraag Shah of the law firm Kirkland & Ellis International LLP, London, Mr. John Hartman of Kirkland & Ellis International LLP, Chicago, Professor James Crawford AC SC, The Hague, and Mr. Paul Key QC of Essex Court Chambers, London.

4. The Respondent is the Kingdom of Belgium (the "Respondent" or "Belgium").

5. Belgium is represented by Messrs. Thierry Tilquin, Nicolas Angelet, Arnaud Nuyts and Mmes. Mathilde Rousseau, Valérie Meeus and Thérèse Loffet of the law firm Liedekerke Wolters Waelbroeck Kirkpatrick, Brussels, and Messrs. Ronald E. M. Goodman and Pierre d'Argent of the law firm Foley Hoag LLP, Washington, D.C.

6. The Claimants and Belgium are hereinafter collectively referred to as the "Parties."

II. Procedural History

7. On September 7, 2012, the Claimants filed a request for arbitration against Belgium dated August 27, 2012 (the "Request") with ICSID. In accordance with Rule 5 of the ICSID

Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), ICSID acknowledged receipt of the Request on September 7, 2012 and transmitted a copy to Belgium on September 10, 2012.

8. Following questions posed by the ICSID Secretariat, the Claimants supplemented the Request by a letter dated September 13, 2012.

9. On September 19, 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the Institution Rules.

10. On October 12, 2012, pursuant to Rule 2(1)(a) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), the Claimants made a proposal as to the number of arbitrators and the method of their appointment, and invited Belgium to accept this proposal.

11. On November 19, 2012, the Claimants advised Belgium that they had not yet received Belgium's acceptance of their proposal on the method of appointment of the Tribunal and indicated that they would also be willing to discuss other possible methods of appointment.

12. On November 26, 2012, Belgium notified the Centre that it had engaged Messrs. Thierry Tilquin, Nicolas Angelet, and Arnaud Nuyts of the law firm Liedekerke Wolters Waelbroeck Kirkpatrick in Brussels and Messrs. Ronald E. M. Goodman and Pierre d'Argent of the law firm Foley Hoag LLP in Washington, D.C. as counsel in this case.

13. On December 10, 2012, the Claimants informed the Centre that the Parties had agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each party and the third, presiding arbitrator to be appointed by agreement of the Parties. On the same day, Belgium confirmed the Parties' agreement.

14. On December 12, 2012, the Claimants appointed Mr. David A. R. Williams QC, a national of New Zealand, as arbitrator pursuant to the Parties' agreement. On December

18, 2012, ICSID informed the Parties that Mr. Williams had accepted his appointment and provided the Parties with Mr. Williams' declaration.

15. On December 21, 2012, Belgium appointed Professor Philippe Sands QC, a national of the United Kingdom and France, as arbitrator. On January 2, 2013, ICSID informed the Parties that Professor Sands had accepted his appointment. Attached to the acceptance was Professor Sands' declaration, statement and *curriculum vitae*.

16. On January 17, 2013, the Claimants requested clarification from Professor Sands in relation to his statement and *curriculum vitae*. In particular, they sought information on Professor Sands' links with the law firm of Foley Hoag LLP. Professor Sands submitted his response to the Claimants' request on January 28, 2013. Professor Sands also prepared a supplementary statement to his declaration, which ICSID transmitted to the Parties on January 30, 2013. On February 6, 2013, the Claimants requested Professor Sands to provide further clarification to his response of January 28, 2013. Professor Sands responded by letter of February 15, 2013.

17. On February 5, 2013, the Claimants notified the Centre that the Parties had agreed that the appointment of the presiding arbitrator would be made by the co-arbitrators, in consultation with the Parties. By letter of February 6, 2013, the Centre informed the Parties that the co-arbitrators had accepted the terms of the Parties' revised agreement on the method of appointing the presiding arbitrator.

18. On February 13, 2013, the Centre informed the Parties that the co-arbitrators had agreed to appoint Lord (Lawrence) Collins of Mapesbury, LL.D., F.B.A., a national of the United Kingdom, as the President of the Tribunal. The Parties were invited to indicate if they had any joint objections to the appointment.

19. On February 22, 2013, the Parties informed the Centre that they had no objections to the appointment of Lord Collins as President of the Tribunal.

20. In accordance with Rule 6(1) of the ICSID Arbitration Rules, on February 26, 2013, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Martina Polasek, ICSID, Team Leader/Legal Counsel, was designated to serve as Secretary of the Tribunal.

21. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on April 13, 2013 in London, England.

22. Following the first session, on April 29, 2013, the President of the Tribunal issued Procedural Order No.1. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English and French and that the place of proceeding would be The Hague. Procedural Order No. 1 also set out a timetable for the filing of the Parties' written submissions, which included two alternate scenarios: Scenario A to apply if Belgium were to raise objections to jurisdiction and Scenario B to apply if no such objections were to be raised.

23. In accordance with Procedural Order No. 1, the Claimants filed their memorial on the merits, together with expert reports of Professor Alan D. Morrison and Dr. Pablo T. Spiller, on November 11, 2013.

24. On December 20, 2013, Belgium filed its notice of intent to file objections to jurisdiction. As contemplated in Procedural Order No. 1, the proceeding on the merits was suspended under Rule 41(3) of the Arbitration Rules, and Scenario A of the procedural calendar was adopted.

25. On February 10, 2014, Belgium filed its memorial on jurisdiction.

26. On March 19, 2014, the Claimants informed the Centre that they had engaged Professor James Crawford AC SC of Matrix Chambers in London as additional co-counsel. The Claimants noted that Professor Crawford and Professor Sands practised at the same barristers' chamber, namely Matrix Chambers.

27. On March 24, 2014, Professor Sands disclosed to the Parties that he was currently acting as co-counsel with Professor Crawford in several cases. The Parties did not raise any objections on Professor Sands' disclosure.

28. On May 12, 2014, the Claimants filed their counter-memorial on jurisdiction, and on July 11, 2014, Belgium filed its reply on jurisdiction.

29. On September 9, 2014, the Claimants filed their rejoinder on jurisdiction, together with the witness statement of Mr. Martin Tornberg (the "Tornberg Statement").

30. On September 22, 2014, Professor Sands submitted an additional disclosure concerning Professor Crawford.

31. By letter of September 29, 2014, Belgium contested the admissibility of the Tornberg Statement, arguing that it should have been filed with the Claimants' counter-memorial on jurisdiction. The same day, the Tribunal invited the Claimants' comments on Belgium's letter, which the Claimants then submitted on October 2, 2014.

32. On October 7, 2014, the Tribunal issued Procedural Order No. 2 dismissing Belgium's objections to the admissibility of the Tornberg Statement. By the same order, the Tribunal invited Belgium to file a written response to the Tornberg Statement, and Belgium filed such response on October 31, 2014.

33. A hearing on jurisdiction took place in London from November 10 to 11, 2014. In addition to the Members of the Tribunal and the Acting Secretary of the Tribunal, Ms. Lindsay Gastrell, present at the hearing were:

For the Claimants:

Professor James Crawford AC SC	Matrix Chambers
Mr. Chris Colbridge	Kirkland & Ellis International LLP
Mr. Chiraag Shah	Kirkland & Ellis International LLP
Mr. Philipp Kurek	Kirkland & Ellis International LLP
Mr. Sean Adams	Kirkland & Ellis International LLP
Ms. Naomi Tarawali	Kirkland & Ellis International LLP
Mr. Wayne LeBlanc	Kirkland & Ellis International LLP

For Belgium:

Dr. Ronald E.M. Goodman	Foley Hoag LLP
Prof. Dr. Nicolas Angelet	Liedekerke Wolters Waelbroeck Kirkpatrick
Prof. Dr. Arnaud Nuyts	Liedekerke Wolters Waelbroeck Kirkpatrick
Mr. Thierry Tilquin	Liedekerke Wolters Waelbroeck Kirkpatrick
Prof. Dr. Pierre d'Argent	Foley Hoag LLP
Mr. Judes Abboud	Liedekerke Wolters Waelbroeck Kirkpatrick
Mrs. Thérèse Loffet	Liedekerke Wolters Waelbroeck Kirkpatrick
Ms. Mathilde Rousseau	Liedekerke Wolters Waelbroeck Kirkpatrick

Ms. Angelynn Meya	Foley Hoag LLP
Mr. Yuri Parkhomenko	Foley Hoag LLP
Dr. Constantinos Salonidis	Foley Hoag LLP
Mr. Pedro Ramirez	Foley Hoag LLP
Ms. Angélica Villagrán	Foley Hoag LLP

34. Following the hearing, the Parties agreed on amendments to the transcript and filed an agreed chronology of events on November 25, 2014.

35. The Parties filed their submissions on costs on February 3, 2015 (Belgium) and February 20, 2015 (Claimants).

36. The proceeding was closed on April 30, 2015 and the Parties were informed that the Award would be rendered on that date.

III. The BITs

37. As indicated above, there are two relevant Bilateral Investment Treaties in the present case: the 1986 BIT, which entered into force on October 5, 1986, and the 2009 BIT, which entered into force on December 1, 2009.

38. For reasons to be developed below, the Claimants rely on the 1986 BIT for the substance of their claim and on the 2009 BIT for the jurisdiction of this Tribunal.[1] This section will set out the main provisions of the 1986 BIT and the 2009 BIT relevant to the jurisdictional issues. The substantive provisions of the 1986 BIT on which the Claimants rely will be set out in the section summarising their claims.

A. 1986 BIT

39. The equally authoritative language versions of the 1986 BIT are the French, Dutch and Chinese versions.

40. The preamble states (in English translation)[2] that the governments have agreed the terms of the 1986 BIT:

> "*Wishing* to create favourable conditions for the development of economic cooperation between the Contracting States, and, in particular, for the

[1] Request for Arbitration, ¶¶54-80; Cl. Mem., ¶¶135-239.
[2] An English translation of the Treaty was filed by the Claimants as Exh. C-1(a).

> realization of investments by the nationals of one State in the territory of the other State,
> *Satisfied* that the conclusion, on the basis of equality and mutual interest, of an agreement on the promotion and protection of investments will stimulate the initiatives of investors and will thus contribute to the increased economic prosperity of the Contracting Parties"

41. The substantive obligations of the 1986 BIT are set out primarily in Articles 2-9, 11 and especially in Articles 3 and 4, which contain the obligations of protection and equitable treatment, and the normal conditions for expropriation and nationalisation or other similar measures.

42. The investor-State dispute settlement provisions are Article 10 of the 1986 BIT and Article 6 of the Protocol to the 1986 BIT. Article 10 of the 1986 BIT provides:

> "1. All disputes relating to investments shall be notified in writing, accompanied by a sufficiently detailed memorandum, by the investor of one Contracting Party to the other Contracting Party.
>
> To the extent possible, disputes will be resolved amicably, respecting the laws and regulations of the Contracting Party in whose territory the investment will have been made.
>
> 2. Disputes referred to in the first paragraph of the present Article shall be within the domestic jurisdiction of the country where the investment will have been made.
>
> 3. By way of exception to paragraph 2 and in default of amicable resolution, after six months from the date of the written notification referred to in the first paragraph of this Article, disputes relating to the amount of compensation payable in case of expropriation, nationalisation or any other measure similarly affecting investments, may be, at the option of the investor:
>
> (a) either be submitted to the domestic jurisdiction of the Contracting Party in whose territory the investment will have been made;
>
> (b) or be submitted directly, to the exclusion of any other recourse, to international arbitration."

43. The Protocol, Article 6, provides that a dispute on an amount of compensation for expropriation, etc. may under Article 10(1) of the 1986 BIT be submitted to an arbitral three person tribunal, with the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce making necessary appointments in the default of party-appointed arbitrators or an agreed chairman. The tribunal is to determine its own procedure but may

take as guidance the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce or the ICSID Arbitration Rules.

44. Article 14 of the 1986 BIT provides:

> "1. This Agreement enters into force on the thirtieth day from the date on which the Contracting Parties will notify each other of the completion of the required national procedures in their respective countries. It will remain in force for a period of ten years.
>
> 2. This Agreement will continue for an indeterminate period of time, if none of the Contracting Parties has communicated to the other Party, in writing, its intention to bring it to an end no less than one year before the expiry of the period referred to in the first paragraph of this Article.
>
> 3. After the expiry of the initial period of validity of this Agreement, each of the Contracting Parties may, at any time, decide to bring it to an end, provided it informs the other Contracting Party in writing through a minimum one year's notice.
>
> 4. In respect of investments made before the date of expiry of this Agreement, the provisions of this Agreement will remain in force for ten years from the date of expiry."

B. 2009 BIT

45. The 2009 BIT was executed in French, Dutch, Chinese and English, which are equally authentic, but in case of difference of interpretation the text in the English language is to prevail.[3]

46. The preamble states that the governments have agreed its terms:

> **"DESIRING** to strengthen their economic cooperation by creating favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;
>
> **RECOGNIZING** that the reciprocal encouragement, promotion and protection of such investments will be conductive to stimulating business initiative of the investors and will increase prosperity in both Contracting Parties;
>
> **DESIRING** to intensify the cooperation of both Contracting Parties on the basis of equality and mutual benefits;"

[3] Cl. Exh. C-2.

47. The substantive obligations are primarily in Articles 2 to 5, including fair and equitable treatment, constant protection and security, and conditions for expropriation or nationalisation or other measures having the effect of dispossession.

48. Article 8 is headed "Settlement of investment disputes" and provides:

> "1. When a legal dispute arises between an investor of one Contracting Party and the other Contracting Party, either party to the dispute shall notify the other party to the dispute in writing.
>
> As far as possible, the parties to the dispute shall endeavour to settle the dispute through consultations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels.
>
> 2. If the dispute cannot be settled through consultations within six months from the date it has been notified by the party to the dispute, each Contracting Party consents to the submission of the dispute, at the investor's choice:[[4]]
>
> (a) to the competent court of the Contracting Party that is a party to the dispute;
>
> (b) to the International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965.
>
> Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final.…"

49. Article 10 is headed "Transition" and provides:

> "1. This Agreement substitutes and replaces the Agreement between the Government of the People's Republic of China and the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, signed on 4th June, 1984 in Brussels.
>
> 2. The present Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force. Such disputes and claims shall

[4] The Protocol to the 2009 BIT states that it was mutually understood that a Belgian/Luxembourgeois investor must exhaust the domestic administrative review procedure under Chinese law before submission of a dispute to international arbitration under Article 8(2).

continue to be settled according to the provisions of the Agreement of 1984 mentioned in paragraph 1 of this Article."

50. Article 11 provides:

> "1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and remain in force for a period of ten years.
>
> 2. This Agreement shall continue to be in force unless either Contracting Party has given a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of the initial ten year period or at any time thereafter.
>
> 3. With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 9 shall continue to be effective tor a further period of ten years from such date of termination.
>
> 4. This Agreement may be amended by written agreement between the Contracting Parties. Any amendment shall enter into force under the same procedures required for entry into force of the present Agreement."

IV. The Nature of the Claims

A. The Factual Background

51. This summary of the principal factual matters on which the Claimants rely is (except where specifically referenced to Belgium's Memorial on Jurisdiction) derived from the Request for Arbitration and the Memorial and is intended (at the risk of over-simplification) to give the background to the jurisdictional issues and is not in any way intended to deal with the merits of the claim or to constitute any finding of fact.

52. The Fortis group was headed by two companies: Fortis SA/NV, a Belgian *société anonyme/naamloze vennootschap*, and Fortis N.V., a Dutch *naamloze vennootscap*[5] (together with Fortis SA/NV being referred to as "Fortis," and the group of companies constituted by Fortis and their direct and indirect subsidiaries from time to time being referred to as the "Fortis Group").

[5] Cl. Mem., ¶23; Resp. Mem. Jur., ¶24.

53. At the material times, the Fortis Group was held (in the Claimants' formulation) via a "twinned share" dual holding company structure. These were, according to Belgium, "Fortis Units," each of which represented an ordinary share of Fortis SA/NV (Belgium) and, at the same time, an ordinary share of Fortis N.V. (Netherlands), so that when a shareholder purchased a "Fortis Unit," it purchased a share of a Dutch company and a share of a Belgian company, with each share representing 50% of the same business activities through cross-shareholdings.[6]

54. Fortis was listed on the Euronext Brussels, Euronext Amsterdam, and Luxembourg stock exchanges, and was active in retail banking, asset management, merchant banking and insurance. In 2007, when the Claimants first invested in the Fortis Group, it was the 20th largest business in the world by revenue, and the third largest commercial and savings bank in the world, with 65,000 employees.

55. Fortis was divided into two subdivisions, banking and insurance. The banking business was carried on by Fortis Bank SA/NV ("FBB"), a Belgian company, and its subsidiaries Fortis Banque Luxembourg SA and Fortis Bank Nederland (Holding) NV.

56. Fortis was subject to regulatory supervision by (i) the *Commission Bancaire, Financière et des Assurances* (the "CBFA") and the Belgian National Bank (the "BNB") in Belgium; (ii) the Dutch Central Bank, ("DNB") in the Netherlands; and (iii) the *Commission de Surveillance du Secteur Financier* ("CSSF") in Luxembourg.[7]

57. Between October 2007 and July 2008, the Claimants acquired shares in Fortis in the open market for an aggregate sum of more than €2 billion, and became Fortis' single largest shareholder. From July 2008, the Fortis shares held by the Claimants represented approximately 4.81% of Fortis' issued shares.[8] The Claimants also entered into an agreement with Fortis in November 2007 whereby, among other things, they were given the right to appoint a director to the Fortis Board of Directors ("the Fortis Board").[9]

58. On September 15, 2008 Lehman Brothers collapsed, and the interbank lending market dried up. On September 16, 2008, there were rumours that Fortis might launch a new

[6] Resp. Mem. Jur., ¶¶30-31.
[7] Cl. Mem., ¶32; Resp. Mem. Jur., ¶¶33-41.
[8] Cl. Mem., ¶38; Resp. Mem. Jur., ¶¶60-64.
[9] Cl. Mem., ¶39.

rights issue to raise extra capital. These rumours gave rise to concerns as to Fortis' solvency, thereby discouraging other banks from lending to FBB, and posed a substantial risk to FBB's funding liquidity position.[10]

59. On September 25 and 26, 2008 the CBFA advised Fortis that it should take immediate action, including seeking support from a strategic partner, and told Fortis that unless it found a strategic partner over the weekend, FBB's liquidity position meant that it would not survive the weekend. By September 26, 2008, Fortis had lost access to the overnight interbank market, its institutional clients had begun to withdraw sizeable deposits, and it had had to resort to the marginal lending facility offered by the BNB at punitive interest rates.[11]

60. On September 28, 2008 Belgium agreed with the Netherlands and Luxembourg to carry out the following operations on the next day: (1) Belgium would acquire a 49.93% stake in FBB, via Belgium's sovereign investment vehicle, *La Société Fédérale de Participations et d'Investissement* ("SFPI"), through an increase in FBB's share capital in return for a payment of €4.7 billion; (2) the Netherlands would acquire a 49.9% stake in FBB's Dutch subsidiary, FBN, for €4 billion; and (3) Luxembourg would make a €2.5 billion mandatorily convertible loan to FBB's Luxembourg subsidiary, FBL, through conversion of which Luxembourg would hold a stake of 49.9% in FBL. At the same time, the BNB agreed to provide emergency liquidity assistance to FBB in the amount of €14.8 billion. The Boards of Fortis and FBB accepted the plans agreed by the governments. The capital increase by FBB in favour of Belgium was implemented on September 29, 2008. The Claimants say that their indirect interest in FBB was effectively halved from 4.81% to approximately 2.41%. Those transactions are described by the Parties as "the First Intervention."[12]

61. These measures did not resolve FBB's liquidity crisis. On October 3, 2008, Belgium informed Fortis that: (1) Belgium and the Netherlands had agreed that the Netherlands would acquire all of Fortis' Dutch assets for € 16.8 billion; (2) that the Netherlands would guarantee the immediate reimbursement of €34 billion of short-term debt owed by FBN to FBB and convert, within one month, long-term debt of €16 billion owed

[10] Cl. Mem., ¶¶40-41.
[11] Cl. Mem., ¶¶44-47.
[12] Cl. Mem., ¶¶48-54.

by FBN and its subsidiaries to FBB into negotiable financial instruments which the Netherlands would guarantee; (3) Luxembourg would increase its stake in FBL from 49% to 51%; (4) Belgium would acquire the remainder of FBB for a nominal amount.

62. At the same time, Belgium entered into negotiations with the French bank, BNP Paribas, with a view to selling a substantial stake in FBB. On October 6, 2008 Belgium issued a press release stating that it would take the remaining shares in FBB for €4.7 billion and that it would then transfer, back-to-back, 75% of the shares in FBB to BNP Paribas in exchange for new shares to be issued in the latter, valued at €8.25 billion. Fortis' remaining 50% + 1 share stake in FBB was transferred to Belgium on October 10, 2008. This is described as "the Second Intervention." The Claimants say that, as a result of these transactions, their investment in FBB was completely expropriated.[13]

63. Belgium subsequently announced a scheme to compensate shareholders, which was only open to small shareholders who were natural persons of Belgian (or other EU) nationality or residence. Proceedings were brought by Fortis shareholders in the Belgian courts, which decided that some of the transactions had required shareholder approval and suspended their operation pending shareholder approval.

64. The shareholders' meeting on February 11, 2009 rejected the transactions. A committee of experts formed by order of the Belgian court reported that the transactions were in the interests of Fortis. Belgium revised the terms of the transactions so as to make them more attractive to Fortis' shareholders. Fortis' shareholders ultimately voted in favour of, *inter alia*, the transfer of 75% of FBB from Belgium to BNP Paribas at shareholders' meetings on April 28 and 29, 2009, and the transaction with BNP Paribas was completed in May 2009.[14]

65. Since then, the Fortis Group has been engaged purely in the business of insurance. In the year 2012, its total income was approximately €15.7 billion, which the Claimants say is almost 90% less than when they first made their investment in 2007.

B. The Allegations

66. The Claimants submit that: (a) Belgium failed to afford the Claimants' investments the required standard of protection, with respect to the Claimants' legitimate expectations

[13] Cl. Mem., ¶¶65-73.
[14] Cl. Mem., ¶¶74-83.

as to the stability, transparency and predictability of Belgium's legal and business environment (including in particular, Belgium's banking sector); (b) Belgium failed to adopt more reasonable and/or effective alternatives to the Interventions (which were extremely harmful to the Claimants), and instead coerced Fortis into accepting Belgium's expropriation of a substantial and significant part of the Claimants' investment; (c) Belgium failed fairly and fully to compensate the Claimants in connection with the Interventions, and unjustly enriched itself in the process; and (d) Belgium failed to afford the Claimants and their investments due process in its administrative decision-making, and arbitrarily and unreasonably discriminated against the Claimants and their investments by failing to provide the same assistance it provided to one of Fortis' competitors, and to the Claimants' expropriated investment itself, but only once it had been nationalised.[15]

67. In particular, the Claimants say[16] that Belgium failed to provide a stable and secure business environment for their investment, and also failed to implement proper measures, protections and solutions to prevent, mitigate and/or resolve Fortis' liquidity crisis. The Belgian regulators had a wealth of data, resources and powers at their disposal to assess the systemic risks in the Belgian banking sector from which liquidity problems stem, should have used the data to identify growing systemic strains in the banking sector, and should have urged banks with a significant funding gap, such as Fortis, to seek more reliable funding sources or business partners.

68. The Belgian regulators should have intervened as soon as Fortis' liquidity problems first arose, as any delay in providing state assistance to liquidity-shocked banks is likely to cause substantial and unnecessary destruction of economic value. Belgium then put Fortis under intolerable pressure and effectively strong-armed it into accepting the terms of the intervention, whereby Belgium acquired 49.93% of FBB in return for an equity injection of just €4.7 billion.

69. The First Intervention was unnecessary, unfair, unreasonable, inequitable and ineffective. The €4.7 billion provided by Belgium could not address FBB's underlying liquidity needs, which by the end of the week had reached approximately

[15] Cl. Mem., ¶160.
[16] Cl. Mem., ¶¶209-238.

€130 billion. The form of rescue was fundamentally inadequate, because Fortis was not insolvent, and a capital injection could not resolve its funding problems.

70. Instead Belgium should have provided a guarantee of interbank lending, which would have allowed Fortis sufficient time to resolve the structural problems on the liability side of its balance sheet without impairing its loan assets.

71. In October 2008, when another Belgian bank, Dexia, experienced a severe liquidity crisis at almost the same time as Fortis, Belgium (with France and Luxembourg) provided a guarantee of interbank lending to Dexia in the amount of €150 billion, which was sufficient to ensure that Dexia weathered the immediate financial storm, and as a result Dexia's problems could be addressed. Only in November 2008, after Belgium had expropriated FBB, did it provide a guarantee to FBB of its interbank lending.

72. Belgium's arbitrary refusal and failure to provide a guarantee discriminated against Fortis and thus the Claimants, Dexia and Fortis were comparable in all material respects, and there was therefore no basis for any differential treatment by Belgium.

73. Belgium could also have strengthened Fortis' position significantly by increasing Belgium's deposit insurance cover.

74. Belgium failed fairly to compensate the Claimants. Belgium coerced FBB into increasing its capital by almost doubling the number of its shares, and then allotting Belgium 49.93% of the enlarged total in return for an equity injection of only €4.7 billion. This implies that prior to the capital increase, Belgium valued 100% of FBB at €4.7 billion, when its fair market value prior to the capital increase was between €18.82 and €22.84 billion.

75. Belgium held a 49.93% interest in FBB (whose value increased by reason of Belgium's capital injection of €4.7 billion from €23.52 to €27.54 billion). Accordingly, by coercing Fortis and FBB into accepting the terms of the First Intervention, Belgium obtained a 49.93% interest in FBB, worth between €11.75 and €13.75 billion, in return for a payment of only €4.7 billion.

76. Belgium then acquired the remaining 50% + 1 share in FBB with a view to a quick (and profitable) back-to-back sale to BNP Paribas. This stripped enormous value from

the Fortis Group, which in turn significantly harmed Fortis and thus Fortis' shareholders, including the Claimants.

77. Belgium failed fairly and equitably to compensate Fortis (and thus the Claimants) for the remaining 50% + 1 share stake in FBB which Belgium acquired in this Second Intervention. The remaining shares in FBB were worth at least €11.76 to €13.77 billion. Accordingly, by coercing Fortis into selling its remaining interest in FBB for only €4.7 billion, Belgium effectively underpaid by €7.06 to 9.07 billion.

78. Belgium made an immediate profit of approximately €1.2 billion upon selling its 75% stake in FBB to BNP Paribas.

C. Legal Basis

79. In bringing these proceedings the Claimants rely on the following provisions of the 1986 BIT.[17]

80. First, the provision in Article 3(1) that:

> "Direct or indirect investments, made by the investors of one of the Contracting Parties, enjoy, in the territory of the other Contracting Party, equitable treatment."

81. Second, the provision in Article 3(2) that:

> "Save for measures necessary to maintain public order and respect for law, such investments enjoy protection and equitable treatment with regard to their administration, management, use or their liquidation."

82. Third, the provision in Article 4 that:

> "1. If requirements of security or public interest so demand, each Contracting Party may take, with regard to investments in its territory by investors of the other Party, measures of expropriation, nationalization or any other measures having similar effect, if the following conditions are met:
>
> (a) the measures will be taken in accordance with domestic legal procedure;
>
> (b) they will not be discriminatory compared to measures taken with regard to investors and investments of third States;
>
> (c) they will be accompanied by provisions for the payment of compensation.

[17] Cl. Mem., ¶¶161-162; 186-187; 194-197; 206-208.

2. The compensation foreseen in paragraph (c) in the preceding paragraph of the present Article will be paid to investors in convertible currency, freely transferrable and paid without unjustified delay.

3. If one of the Contracting Parties expropriates the property and assets of an enterprise established in its territory, in which the investors of the other Contracting Party own shares or other forms of ownership interest, the first Contracting Party will apply the provisions of paragraphs 1 and 2 of this article to investors of the second Contracting Party in proportion to the shares or other forms of ownership interest held by those investors."

Together with Article 2 of the Protocol:

> "The compensation referred to in Article 4 of the Agreement will correspond to the value of the property and assets invested on the date immediately preceding the expropriation, or on the date on which the expropriation was made public."

83. Fourth, the provision in Article 3(3) that:

> "The treatment and protection under paragraphs 1 and 2 of the present Article will at least equal that enjoyed by investors of third countries."

and in Article 11 that:

> "In respect of all matters governed by this Agreement, the investors of each Contracting Party will benefit, in the territory of the other Party, from most favoured nation treatment."

84. The Claimants reserve the right to rely, to the extent necessary, on both Articles 3(3) and 11 of the 1986 BIT as requiring Belgium to afford them and their investments no less favourable treatment than was afforded by Belgium to the investors of other States and their investments. This includes the treatment and substantive protections afforded by Belgium under the BITs between the Belgo-Luxembourg Economic Union and, respectively, Bangladesh, Albania, Algeria, Croatia, and Burundi.

85. The Claimants say that Belgium breached the following terms of the 1986 BIT:[18]

"(a) Article 3(1) (and/or Article 3(1) in conjunction with Articles 3(3) and/or 11) by, *inter alia*:

(i) failing to afford the Claimants' investments the required standard of protection, especially as regards their legitimate expectations as to the stability, transparency and predictability of

[18] Cl. Mem., ¶239.

Belgium's legal and business environment, and in particular as regards Belgium's banking sector;

(ii) failing to adopt more reasonable and more effective alternatives to the Interventions, which were extremely harmful to the Claimants, and instead coercing Fortis into accepting the terms of a transaction whereby Belgium deprived the Claimants of a substantial and significant part of their investment without fully and fairly compensating the Claimants for the taking, unjustly enriching itself in the process; and

(iii) failing to afford the Claimants and their investments due process in its administrative decision-making, and arbitrarily and unreasonably discriminating against the Claimants and their investments by failing to provide the same assistance provided to one of Fortis' competitors, providing this assistance to the Claimants' investment itself only once it had been nationalised.

(b) Article 3(2) (and/or Article 3(2) in conjunction with Articles 3(3) and/or 11) by, *inter alia*:

(i) failing to afford the Claimants' investments full and constant protection and security and equitable treatment; and

(ii) hampering, by arbitrary, unreasonable, unjustified and/or discriminatory measures, the development, management, maintenance, use, enjoyment, sale and/or liquidation of those investments (…).

(c) Article 4, as supplemented by Article 2 of the Protocol thereto (and/or Article 4, as supplemented by Article 2 of the Protocol thereto, in conjunction with Article 11), by coercing Fortis into accepting the terms of the Interventions, and expropriating the Claimants' investments without payment of compensation equivalent to the fair market value of the Claimants' expropriated investments on the date immediately preceding the expropriation, or on the date on which the expropriation was made public."

D. Relief Sought

86. The Claimants say that under the 1986 BIT Belgium is required fully to compensate the Claimants for the expropriation of their investment in FBB.

87. In particular, Article 4 of the 1986 BIT, as supplemented by Article 2 of the Protocol thereto, imposes an obligation on Belgium to pay compensation in an amount equal to the fair market value of the Claimants' expropriated investment as at the date immediately preceding the expropriation, or the date on which the expropriation was made public.

88. The fair market value of FBB, immediately prior the Interventions, was between €18.82 to €22.84 billion, and for their 4.81% stake in Fortis, the Claimants were

entitled to compensation of €904 to €1,097 million in relation to the expropriation of their interest in FBB. Belgium only provided Fortis with compensation of €4.7 billion, of which €226 million was linked to the Claimants by virtue of their 4.81% shareholding.

89. Accordingly, as at the date of expropriation, the compensation provided by Belgium was between €678 and €871 million below the value of the compensation that Belgium should fairly and equitably have paid in connection with the Interventions. With interest, the compensation due to the Claimants in relation to Belgium's breach of Article 4 of the 1986 BIT, as supplemented by Article 2 of the Protocol, is between €786 and €1,009 million.

90. Further or alternatively, the Claimants submit that, had Belgium complied with its obligations under the 1986 BIT, and:

(a) provided a stable and secure business environment for the Claimants' investment;

(b) promptly and timeously responded to the liquidity crisis of September 2008; and

(c) provided adequate liquidity support to Fortis, including by offering a guarantee of interbank lending to Fortis of at least €150 billion and by increasing Belgium's deposit insurance cover,

this would have resolved FBB's liquidity problems immediately, allowing it to emerge from its liquidity crisis without the need to dismember the Fortis Group or dispose of FBB (or any of Fortis' other subsidiaries).

91. Had Belgium not breached its obligations under the 1986 BIT, the Claimants' investment in Fortis would be worth between €817 and €826 million, but is currently worth only €424 million.

92. Accordingly, the Claimants are entitled to damages arising out of Belgium's breaches of the 1986 BIT for failing to deal properly with the liquidity crisis, at between €393 and €402 million.

93. The Claimants alternatively seek a sum by way of restitution equivalent in value to Belgium's unjust enrichment as a result of the Interventions.

94. By coercing Fortis into accepting a series of transactions that resulted in Belgium acquiring Fortis' entire interest in FBB for only €4.7 billion, Belgium unjustly enriched itself in the amount of €14.11 to € 18.12 billion.

95. Belgium is liable to make restitution of the benefit obtained, of which the Claimants' *pro rata* share is between €678 to €871 million. With interest, Belgium is under an obligation to make restitution to the Claimants in the amount of €786 to €1,009 million.

96. The Claimants submit that: (1) Belgium failed fairly and fully to compensate the Claimants for the expropriation of their entire investment in FBB; (2) Belgium failed to afford the Claimants' investments fair, just and equitable treatment and full and constant protection and security; and (3) Belgium unjustly enriched itself to the detriment of the Claimants.

97. The Claimants request the Tribunal to grant, without limitation, the following relief: (1) orders declaring that Belgium has violated Articles 3(1), 3(2), 4 and/or 3(3) and/or 11 of the 1986 BIT; (2) compensation under Article 4 of the 1986 BIT and Article 2 of the Protocol thereto, and/or damages for breach of the 1986 BIT equivalent to the financial loss and damage which the Claimants have suffered as a result of Belgium's breaches; (3) alternatively, a sum by way of restitution equivalent in value to the Claimants' pro-rata share of Belgium's unjust enrichment; (4) an order that Belgium pay all costs incurred in connection with these arbitral proceedings, including the costs of the Tribunal and of ICSID, as well as any legal and other expenses incurred by the Claimants including fees of their legal counsel, experts and consultants and in respect of the time spent by the Claimants' own employees on a full indemnity basis; (5) an order that Belgium pay interest on all sums awarded at the maximum permitted rate until payment in full; and (6) such other relief as the Tribunal may deem appropriate.[19]

E. Belgium's Position

98. Because of its objections to jurisdiction, Belgium has not formally responded to the Claimants' case, except to the extent that it has set out its own account of the facts in its

[19] Cl. Mem., ¶¶240-259.

Memorial on Jurisdiction, and in particular in the objection that the Claimants have not established a prima facie case.[20]

99. These are some of the principal points made by Belgium on the merits of the claim. The two Interventions, and their subsequent amendment, were realised through capital increases and shares purchases; that is, by normal corporate operations and based upon contracts that were freely decided and entered into. The First Intervention consisted of a capital increase pursuant to Belgian corporate law, and the Second Intervention consisted of share purchase contracts. If Fortis had only limited choice but to accept the terms of the two Interventions, this was because it was facing extraordinary and dramatic circumstances, coupled with extreme urgency. Fortis representatives were significantly involved in the negotiations surrounding their transactions with Belgium, and their influence on the outcome, especially on the agreed price, was decisive. The Fortis Board considered the transactions to be in the best interest of, and necessary to preserve value for, Fortis and its shareholders, a view which was echoed by Morgan Stanley, Fortis' financial advisers.[21]

100. In a decision in December 2008, the European Commission qualified Belgium's interventions of September 29, 2008 and October 6, 2008 as State aid, and decided that Belgium had paid more than a private company possessing the same information would have paid.[22]

101. The First Intervention was part of the Benelux plan, a co-ordinated action by Belgium, the Netherlands and Luxembourg to restore confidence in the Fortis Group and maintain the continuity of its activities in the best interests of its stakeholders and depositors. It was approved by the Fortis Board, and only the member appointed by the Claimants abstained. Fortis representatives were heavily involved in negotiations in relation to the capital injections. At the time, the Claimants issued a press release welcoming the capital injection. In 2009 FBB's statutory auditor considered that Belgium's payment of €4.7 billion for its participation in FBB was proper compared with the value of FBB's

[20] Resp. Mem. Jur., ¶¶69-140, 253-274.
[21] Resp. Mem. Jur., ¶¶273-284.
[22] Resp. Mem. Jur., ¶134.

shares, and the European Commission found that no private investor would have paid the same price in such circumstances.[23]

102. The Second Intervention became necessary because (contrary to the Claimants' suggestion) FBB's situation remained critical. Market trust in FBB continued to deteriorate and there was a persistent run on customer deposits, which was compounded by liquidity problems. In the absence of a new intervention, FBB would not meet its commitments and risked discontinuing operations by October 6, 2008. Belgium sought a market-based solution, which meant aligning FBB with a strong European bank. Intense discussions with BNP Paribas regarding the sale of the remaining shares of FBB took place throughout the weekend of October 4-5, 2008, at which (contrary to the Claimants' allegations) Fortis was represented. The Board reviewed the terms of the principal agreements between the Belgium, Fortis, and BNP Paribas, which provided in substance for the acquisition by Belgium of the remaining 50% + 1 share of FBB for €4.7 billion and the subsequent contribution by Belgium of 75% of FBB shares to BNP Paribas. The deal ensured that residual value would remain for Fortis' existing shareholders. The Board approved the transaction with two abstentions, one of which was the Claimants' appointed non-executive director.[24]

103. After the shareholders had rejected the BNP Paribas plan, the Fortis Board decided to continue to negotiate, and following a new round of negotiations between Belgium, Fortis, and BNP Paribas, the parties reached a new agreement on revised terms of October 10, 2009, subject to shareholders' approval, which was given.

104. The Claimants' interests have not been expropriated, for which they would have to show that their investment was destroyed or rendered worthless. They retain their shareholding in Fortis. The price of the Fortis shares on September 26, 2008, immediately preceding the First Intervention was €5.20. On September 26, 2013, it was €3.02, which is 58% of the value five years before.[25]

[23] Resp. Mem. Jur., ¶¶98-104.
[24] Resp. Mem. Jur., ¶¶120 et seq.
[25] Resp. Mem. Jur., ¶¶301 et seq.

V. The Dispute in Correspondence

105. This section sets out the correspondence in which the dispute was initiated and came to fruition, from which it is common ground that the dispute arose before the 2009 BIT came into force.

106. On October 14, 2008 the Claimants wrote to the Belgian authorities, via the Chinese Embassy in Brussels, expressing their strong dissatisfaction over (1) Belgium's intervention to nationalize Fortis and subsequent deployment of a non-transparent process to sell off the assets at a very low price to BNP Paribas, without providing the Claimants, as the largest shareholder, with sufficient information regarding Fortis' making of major decisions and the assets disposal plan, and without proper approval by its Board in accordance with corporate governance principles; (2) Belgium's acquisition of Fortis at an extremely low price, and sale of its interest with a premium immediately after the acquisition at a low price, which had seriously prejudiced the interests of the shareholders; and (3) Belgium's compensation scheme, which was aimed towards individual shareholders and shareholders who resided in Belgium or member States of the EU, and was accordingly unfair towards other foreign corporate shareholders. The Claimants said that they were currently formulating their specific compensatory requests after consultations with legal advisers, and asked that the Belgian government pay respect to and protect the interest of the Claimants' investment in Belgium and deal with Fortis' assets in an equitable and non-discriminatory manner.[26]

107. On October 30, 2008, Belgium responded that it had been brought into the situation of Fortis, along with the Dutch and Luxembourg governments, so as to avoid an unacceptable level of risk as to the continuity of the Fortis activities, and in light of the exhaustion of Fortis' liquidity and its failure to find a private partner on the market. Belgium's letter denied the Claimants' claim that they had been provided with insufficient information regarding Fortis' making of major decisions and its assets disposal plan. The letter also denied the Claimants' contention that the shares in FBB were sold "at a very low price." Belgium also refused the compensatory request.[27]

[26] Cl. Exh. C-4.
[27] Cl. Exh. C-5.

108. On October 14, 2009, the Claimants wrote to the Belgian ambassador in Beijing following a meeting on September 28, 2009. In the letter the Claimants described their October 14, 2008 letter as a "Notice, pursuant to Article 10(1) of the [1986 BIT]." They said that it "gave the Belgian government notice of a dispute under the [1986 BIT] concerning certain measures adopted by the Belgian government in September and October 2008 with respect to Fortis SA/NV [...] and Fortis Bank."[28]

109. The Claimants went on to say in the October 14, 2009 letter that:

> "Ping An informed the Belgian Government that Ping An considered that such measures constituted an expropriation without payment of adequate compensation and effected without due process, that the measures were unfair, unreasonable, and in violation of principles of transparency, and that these measures were highly prejudicial to the interests of shareholders in Fortis and Fortis Bank, including Ping An. Ping An also informed the Belgian Government that it would seek compensation for the losses which it sustained as a result of the measures adopted by Belgium."[29]

110. In the later letter the Claimants attached a memorandum, also dated October 14, 2009, setting out their claims for breach of Articles 3 (obligation to accord fair and equitable treatment) and 4 (protection against unlawful expropriation) of the 1986 BIT. The letter stated that the Claimants looked forward to discussing the letter and the memorandum and to continuing to explore whether an amicable solution to the dispute might be found in accordance with Article 10(1) of the 1986 BIT. But the Claimants also stated in the letter that should "no amicable solution of this dispute be offered, Ping An may be forced to file, officially and publicly, a claim in accordance with Article 10 of the [1986] Treaty and/or to resort to other legal action available to it" and that "[a]ny such legal action no doubt would attract significant media attention and public scrutiny in Belgium, China and elsewhere."[30]

111. On July 3, 2012 the Claimants wrote to the Belgian Ambassador in Beijing, referring to (and enclosing) the letters of October 14, 2008 and October 14, 2009, "to confirm that Ping An's letter of 14 October 2009 constituted a notice of dispute in satisfaction of Article 8.1" of the 2009 BIT.[31]

[28] Cl. Exh. C-6.
[29] Cl. Exh. C-6.
[30] Cl. Exh. C-6.
[31] Cl. Exh. C-7.

VI. The Objections to Jurisdiction

112. Belgium raises five objections to the jurisdiction of the Tribunal.

A. *First Objection: Objection* Ratione Temporis

113. Belgium's first objection is that the Tribunal lacks jurisdiction *ratione temporis* because the dispute between the parties arose before the entry into force of the 2009 BIT on December 1, 2009. In accordance with Article 8 of the 2009 BIT, it says, Belgium's offer of consent to arbitration is limited to disputes arising after the BIT's entry into force. The legal dispute between the Parties is thus excluded from the Tribunal's jurisdiction *ratione temporis*.[32]

114. The Claimants' answer is that Belgium's interpretation of Article 8 of the 2009 BIT is unduly narrow and contrary to the principle contained in the Vienna Convention on the Law of Treaties that a treaty provision must be interpreted in its proper context and in light of the overall object and purpose of the treaty. Belgium's approach is not justified by authority or principle. Article 8, read in the context of the 2009 BIT's transitional provisions and in light of the object and purpose of the 2009 BIT as a whole, clearly confers jurisdiction on the Tribunal to hear disputes irrespective of whether such disputes arose prior to the entry into force of the 2009 BIT.

B. *Second Objection: Objection* Ratione Materiae

115. Belgium's second objection is that the Tribunal lacks jurisdiction *ratione materiae*, because it follows from Articles 7 and 8(1) of the 2009 BIT that the Tribunal has jurisdiction only over claims which find their cause of action in the 2009 BIT substantive provisions or in "national legislation of one Contracting Party" or "international conventions, existing or to be subscribed to by the Contracting Parties in the future." Since the Claimants' claims are based on a terminated treaty (the 1986 BIT), in customary international law and in general principles of law, none of which are included in Belgium's consent to arbitration under the 2009 BIT, the legal dispute between the Parties is excluded from the Tribunal's jurisdiction *ratione materiae*.

116. The Claimants' answer is that the terms of the 2009 BIT do not in any way restrict the Tribunal's jurisdiction to disputes concerning alleged violations of the 2009 BIT. Article

8, read in context, clearly also confers jurisdiction over disputes based on substantive standards other than those contained in the 2009 BIT itself, including those of the 1986 BIT, customary international law and general principles of law. Arbitral practice clearly supports the view that broadly worded, comprehensive and unrestricted jurisdiction clauses such as Article 8 of the 2009 BIT also confer jurisdiction over disputes concerning alleged violations of substantive standards derived from treaties such as the 1986 BIT, as well as the rules of customary international law and general principles of law.

C. Third Objection: Objection Ratione Voluntatis

117. Belgium's third objection is that the Tribunal lacks jurisdiction *ratione voluntatis*. The Claimants failed to comply with the jurisdictional requirements set out in Article 8 of the 2009 BIT by failing to give proper notice of a dispute over the alleged breaches of full and constant protection and security as well as unjust enrichment under customary international law or general principles of law. Moreover, the Claimants failed to allow for a six-month period for amicable settlement by commencing this arbitration less than two months after serving the alleged notice of the dispute under the 2009 BIT. All the claims are thus excluded from the Tribunal's jurisdiction *ratione voluntatis*.

118. The Claimants' answer is that their notification of the dispute was timely and sufficiently detailed to satisfy the requirements of Article 8 of the 2009 BIT, and that they fully complied with all requirements of Article 8 at the time of filing the Request for Arbitration. The Tribunal therefore has jurisdiction over all of the claims, including those in relation to Belgium's alleged breaches of Article 3(2) of the 1986 BIT (full and constant protection and security) and customary international law and/or general principles of law relating to unjust enrichment.

119. It is completely irrelevant for the purposes of Article 8, the Claimants say, whether or not the Claimants first notified Belgium of the dispute, and whether settlement negotiations took place, before or after the entry into force of the 2009 BIT.

120. Furthermore, even if the six-month consultation period under Article 8 was only triggered upon service of the Claimants' notice in July 2012 (which is denied), the obvious futility of any further settlement attempts at that late stage of the dispute

meant that the Claimants were entitled to commence proceedings without having to wait idly for another six months.

121. In addition, even if it were held that the Claimants did not comply with the requirements of Article 8 at the time the Request for Arbitration was filed (which is denied), any outstanding requirements were subsequently met. Accordingly, the Tribunal should in any event accept jurisdiction, if necessary dispensing with any non-compliance with the requirements of Article 8, which are merely procedural and directory.

D. Fourth Objection: No Prima Facie *Case*

122. Belgium's fourth objection is that, assuming that the claims fall under the Tribunal's jurisdiction pursuant to the 2009 BIT and that the Claimants' participation in Fortis entitled them to any or some rights under the 1986 BIT, the Claimants fail to show *prima facie* that Belgium has violated any provision of the 1986 BIT or that, alternatively, they would be entitled to bring a claim on the basis of unjust enrichment.

123. The Claimants' allegation that Belgium breached Article 4 of the 1986 BIT (expropriation) is manifestly without merit. First, Belgium's interventions to rescue the Fortis Group were realized by corporate and contractual operations validly decided upon and entered into by Fortis. Second, the Claimants have not been deprived, or all but deprived, of the value of their shareholding. Third, the Claimants have failed entirely to establish the legal foundations of the expropriation claim. The Claimants' allegation that Belgium breached Article 3(1) of the 1986 BIT (fair and equitable treatment) is also manifestly without merit. The Claimants argue that Belgium failed to accord fair and equitable treatment because Belgium should have taken more appropriate and reasonable measures, because Belgium coerced the Fortis Group into accepting the interventions to rescue it and because Belgium discriminated against one of the Fortis entities by not providing it with a guarantee. The adoption of allegedly more appropriate and reasonable measures is manifestly not an obligation under the 1986 BIT, Belgium says, and the Claimants have not established *prima facie* that the fair and equitable treatment standard has been breached. There is manifestly no factual basis to the Claimants' allegations of coercion or discrimination.

124. The Claimants' allegation that Belgium breached Article 3(2) of the 1986 BIT (full protection and security) is also manifestly without merit since the Claimants fail to discuss in any way how the facts they rely upon are susceptible of provoking the alleged breach.

125. The Claimants' alternative allegation that Belgium unjustly enriched itself to the detriment of the Claimants is manifestly without merit. In the event that the treaty claims are rejected, this Tribunal could only consider the claim of unjust enrichment after it first found that the interventions did not constitute a breach of the 1986 BIT, including the finding that they were valid and not the result of coercion. In that case, any alleged enrichment by Belgium would be legally justified and could, therefore, not be considered "unjust."

126. The Claimants' answer is that Belgium mischaracterises the nature of the *prima facie* test, and seeks to convert these jurisdictional proceedings into a summary determination of whether the claims are meritorious. The *prima facie* test does not require the Tribunal to consider whether the facts and legal arguments presented by the Claimants are correct or well-founded, or whether they are likely to succeed. The *prima facie* test is purely jurisdictional in character and merely requires the Tribunal to determine whether, based on the facts as pleaded by the Claimants, the claims might, if established, constitute possible violations of at least some of the obligations invoked by it, and all of the claims clearly meet that test. However stringently the *prima facie* test is defined, the Claimants have adduced clear and compelling evidence that Belgium has: (1) breached Article 3(1) of the 1986 BIT by failing to accord the Claimants' investment fair, just and equitable treatment; (2) breached Article 3(2) of the 1986 BIT by failing to accord the investment full and constant protection and security; (3) breached Article 4 of the 1986 BIT by expropriating the investment without payment of compensation equivalent to the fair market value of the expropriated investment; and (4) unjustly enriched itself contrary to the rules of customary international law and general principles of law.

E. Fifth Objection: Monetary Gold Case Principle

127. Belgium's fifth objection is that if the Claimants' claims fall under the Tribunal's jurisdiction as determined by the 2009 BIT and are not dismissed due to their being manifestly without merit, the Tribunal should decline to exercise its jurisdiction to avoid

determining the rights and obligations of a third party, the Netherlands, which is not and cannot be a party to the present proceedings. In accordance with the *Monetary Gold* principle (see *Case of the Monetary Gold Removed from Rome in 1943* (*Italy v. France, and others*), 1954 ICJ Rep 19), an international tribunal should refuse to exercise its jurisdiction over a dispute if the resolution of such dispute involves the determination of the rights and obligations of a non-party to the proceedings. Due to the long-term cooperation between Dutch and Belgian regulators with respect to the supervision of the Fortis Group and due to the intervention of both the Dutch and Belgian regulators and governments to avert the bankruptcy of the Fortis Group, the claims against Belgium implicate the rights and obligations of the Netherlands, a State absent in these proceedings, and require the Tribunal to make factual and legal determinations affecting the Dutch government. Moreover, the absence of the Dutch government in this case will impermissibly impair Belgium's due process rights. For reasons of consent and due process, the Tribunal in the present case should decline to exercise its jurisdiction.

128. The Claimants' answer is that the *Monetary Gold* principle represents a narrow doctrine of judicial restraint developed by the International Court in the context of inter-State disputes, and its application is subject to strict limits. The principle only applies if the rights and interests of an absent State are a pre-requisite for, and form the very subject-matter of, the claimant's claim and the decision to be rendered. Jurisdiction should not be declined if the finding involving an absent third party is merely a finding of fact, or the decision might affect the legal interests of a non-party State, or the decision could well have practical effects for such State. Nor is it sufficient to establish that such legal interests may be indirectly determined. The principle does not apply in the present case, in which the only breaches asserted are breaches by Belgium of its own treaty obligations with respect to an investment in Belgium.

VII. The Objection *Ratione Temporis*

129. The objection *ratione temporis* is the first objection, and, as will appear, in the opinion of the Tribunal decisive.

130. At the outset it should be emphasised that all of the facts or matters on which the Claimants rely occurred while the 1986 BIT was in force. The Claimants rely exclusively on the 1986 BIT and general principles of international law for the substance of their

claim, and not on the substantive provisions of the 2009 BIT. It is also common ground that the dispute crystallised while the 1986 BIT was in force.[33] However, this Tribunal has been constituted under the 2009 BIT, as the 1986 BIT did not contemplate ICSID arbitration as such, although any tribunal established under the earlier BIT would have had the power to adopt (*inter alia*) the ICSID Rules.

A. The Claimants' Memorial

131. The Claimants' Memorial explained the jurisdictional bases of their claims. So far as material to the question of jurisdiction *ratione temporis,* the Claimants said that they were bringing the claim pursuant to the 1986 BIT as regards the substantive obligations and pursuant to the 2009 BIT as regards the procedural remedy.[34]

132. The Claimants' case in their Memorial is that the effect of Articles 8 and 10 of the 2009 BIT is that the Tribunal has jurisdiction under the 2009 BIT because (a) the 2009 BIT applies to investments made before it came into force; (b) the only disputes excluded by Article 10 are those which were already under judicial or arbitral process before December 1, 2009, when the 2009 BIT came into force; (c) there is a legal dispute between an investor of one Contracting Party (the Claimants) and the other Contracting Party (Belgium); and (d) the Claimants have notified Belgium of the legal dispute, and the parties were unable to settle the dispute within six months, for the purposes of Article 8(1) and Article 8(2) of the 2009 BIT.[35]

133. The difference between jurisdiction *ratione tempori*s and the non-retroactivity of substantive obligations is well-established: *Société Générale de Surveillance v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, January 29, 2004 (El-Kosheri, Crawford, Crivellaro) at [165]-[168] (hereinafter "*SGS v. Philippines*"*)*; *Salini Costruttori SpA v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, November 9, 2004 (Guillaume, Cremades, Sinclair) at [176] (hereinafter "*Salini v. Jordan*"); *Impregilo SpA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, April 22, 2005 (Guillaume, Cremades, Landau) at [308] *et seq* (hereinafter "*Impregilo v. Pakistan*").

[33] Tr. [J.]/1/123.
[34] Cl. Mem., ¶86.
[35] Cl. Mem., ¶¶92-111; Tr. [J.]/1/124.

134. As regards the substantive law, the Claimants' case is that the law applicable to the acts which are the subject of the claim is the law which was in force at the time the acts were committed, i.e. the substantive provisions of the 1986 BIT, customary international law and general principles of law.[36] In particular, the Claimants rely on Belgium's obligation to afford the Claimants' investments fair, just and equitable treatment; to afford full and constant protection and security; and not to expropriate their investments unless it complies with conditions, including full compensation for any taking.[37]

135. The applicability of the 1986 BIT to the substance of the claim flows from the principle of non-retroactivity: Vienna Convention, Article 28; ILC Articles on State Responsibility, Article 13; *Island of Palmas Case (United States of America v. Netherlands)*, Award, January 23, 1928, 2 UNRIAA 829 at p 845; *Tradex Hellas SA v. Republic of Albania* (ICSID Case No. ARB/94/2), Decision on Jurisdiction, December 24, 1996 (Böckstiegel, Fielding, Giardina) at p 191 (hereinafter "*Tradex v. Albania*"); *Impregilo v. Pakistan*, at [311].[38] The fact that the 1986 BIT was superseded by the 2009 BIT does not affect the illegality of acts which took place while the 1986 BIT was in force: ILC Articles on State Responsibility, Article 13.[39]

136. Competence under the 2009 BIT, the Claimants say, is not affected by the fact that it was not in force at the time of the relevant events, since it applies to any legal dispute between an investor and the host State. Article 10(2) makes it clear that the dispute resolution procedures of the 2009 BIT apply to disputes which have arisen before it came into force, provided that they were not already under judicial or arbitral process.[40]

137. Consequently, there is jurisdiction under the 2009 BIT to decide disputes on the basis of the substantive provisions of the 1986 BIT: *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, November 6, 2008 (Kaufmann-Kohler, Mayer, Stern) at [131]-[141] (hereinafter "*Jan de Nul v. Egypt*").[41]

[36] Cl. Mem., ¶135; Tr. [J.]/1/123.
[37] Cl. Mem., ¶159.
[38] Cl. Mem., ¶¶136-137, 139-142.
[39] Cl. Mem., ¶144.
[40] Cl. Mem., ¶147.
[41] *ibid*.

B. Belgium's Objection to Jurisdiction Ratione Temporis

138. In its Memorial on Jurisdiction, Belgium argued that the dispute is excluded from the temporal scope of Belgium's offer to consent to arbitration under Article 8 of the 2009 BIT. The dispute arose prior to December 1, 2009, when the 2009 BIT came into force, and Belgium's offer to consent to ICSID arbitration under Article 8 of the 2009 BIT is limited to disputes arising after its entry into force, consistent with its wording and with established principles of international law.[42] Arbitration under the 1986 BIT was institutionally different from arbitration under the 2009 BIT and also limited on matters of substance to disputes over the amount of compensation for expropriation.[43]

139. All of the events of which complaint is made in the Request for Arbitration precede the entry into force of the 2009 BIT. The formal exchanges make it clear that the dispute arose before then, and the Claimants' letter of July 12, 2012 does not affect that conclusion.[44] The substantive provisions of the 2009 BIT do not apply in this case.[45]

140. Belgium's offer to consent to investor-State arbitration under Article 8(1) of the 2009 BIT is limited to disputes arising after it came into force by virtue of its ordinary meaning (Article 31(1), Vienna Convention). The expression "When a legal dispute arises" shows that it is not intended to cover disputes before it came into force: *Impregilo v. Pakistan* at [300]; *ABCI Investments Ltd. v. Republic of Tunisia* (ICSID Case No. ARB/04/12), Decision on Jurisdiction, February 18, 2011 (Orrego Vicuña, Bernardini, Stern) at [169] (hereinafter "*ABCI Investments v. Tunisia*"); *Salini v. Jordan* at [170]; *Walter Bau AG (in liquidation) v. Thailand* (UNCITRAL), Award, July 1, 2009 (Barker, Lalonde, Bunnag) at [9.67], [9.72]-[9.73] (hereinafter "*Walter Bau v. Thailand*"); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, April 28, 2011 (Lalonde, Grigera Naón, Stern) at [467] (hereinafter "*Paushok v. Mongolia*"); contrast *Tradex v. Albania* at p 189.[46]

141. This is confirmed by general international law and Article 28 of the Vienna Convention, applied in *Paushok v. Mongolia*, at [468]; *MCI Power Group LC and New Turbine Inc*

[42] Resp. Mem. Jur., ¶142.
[43] Tr. [J.]/1/27; Tr. [J.]/2/3.
[44] Resp. Rep. Jur., ¶¶150-155; Tr. [J.]/1/7.
[45] Tr. [J.]/1/7.
[46] Resp. Rep. Jur., ¶¶156-171; Resp. Rep. Jur., ¶¶77-86; Tr. [J.]/1/29; Tr. [J.]/2/23.

v. Republic of Ecuador (ICSID Case No. ARB/03/6), Award, July 31, 2007 (Vinuesa, Greenberg, Irarrázabal) at [61] (hereinafter "*MCI Power v. Ecuador*").[47]

142. The Belgian BITs with Yemen and Egypt relied on by the Claimants[48] merely show that pre-existing disputes have been excluded under an abundance of caution: *Walter Bau v. Thailand* at [9.70].[49]

143. The objection is not affected by Article 10 of the 2009 BIT. The substitution and replacement of the 1986 BIT does not occur retrospectively. Article 10 ensures the application of the 2009 BIT to investments made before it came into force. The fact that it applies to investments prior to its entry into force does not mean that it applies to disputes before it came into force: *Société Générale In respect of DR Energy Holdings Ltd and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic* (UNCITRAL, LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction, September 19, 2008 (Orrego Vicuña, Bishop, Cremades) at [81] (hereinafter "*Société Générale v. Dominican Republic*"); *MCI Power v. Ecuador* at [59]; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008 (Lalive, Chemloul, Gaillard) at [579] (hereinafter "*Pey Casado v. Chile*"); *Jan de Nul v. Egypt*, Decision on Jurisdiction, June 16, 2006 at [111]; *Walter Bau v. Thailand* at [9.68].[50] The exception for *sub judice* disputes in Article 10(2) codifies the principle that the jurisdiction of a tribunal established on the basis of an extinct treaty persists.[51]

144. There must be a clear and unequivocal expression of intention to dispense with the principle of non-retroactivity: *Case Concerning Elettronica Sicula SpA (ELSI*) (*United States of America v. Italy),* 1989 ICJ Rep 15 at 42; *Société Générale v. Dominican Republic* at [83]. The silence of the text of the BIT with respect to disputes prior to its entry into force does not alter the effect of the non-retroactivity principle: *MCI Power v. Ecuador* at [61].[52]

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[47] Resp. Mem. Jur., ¶¶172-177.
[48] Cl. C-Mem. Jur., ¶¶72-73.
[49] Resp. Rep. Jur., ¶¶89-91.
[50] Resp. Mem. Jur., ¶¶179-189; Tr. [J.]/2/11-20.
[51] Resp. Mem. Jur., ¶190; Tr. [J.]/1/20-21.
[52] Resp. Mem. Jur., ¶¶191-192; Resp. Rep. Jur., ¶¶21-22.

145. The Claimants' interpretation is retroactive because it purports to extend to earlier disputes the benefit of an arbitration clause which entered into force on December 1, 2009.[53]

146. Article 10(2) does not necessarily imply that disputes which were not *sub judice* at the time of the entry into force of the 2009 BIT fall under the jurisdiction of the Tribunal under the 2009 BIT. The wording of Article 8(1) shows that the parties intended to act consistently with the principle of non-retroactivity. If they had intended a different result, they could have used the expressions "has arisen" or "arisen" or expressly extended temporal jurisdiction over pre-existing disputes which were not *sub judice*.[54] Article 8 must be read as a whole, and Article 8(2) cannot be read in isolation as containing the Contracting State's offer of consent to arbitration.[55]

147. To read into Article 10(2) what it does not contain would be contrary to the fundamental principle that consent by a State to international arbitration must be clear and unambiguous.[56] If the Claimants were right, a Belgian investor would now be able to arbitrate under the 1986 BIT a dispute which arose and was notified under the 1986 BIT even before China became a party to the ICSID Convention.[57]

148. It is likely that neither China nor Belgium contemplated the case of an investor which notified a dispute under the 1986 BIT and then waited much longer than 6 months to make a choice between recourse to domestic courts and to international arbitration. If such a situation had been contemplated, express provision would have been made for it. Arbitration under the 1986 BIT was not only institutionally different, but was also limited to disputes over the amount of compensation for expropriation.[58]

149. Belgium's interpretation of Articles 8(1) and 10(2) is consistent with the object and purpose of the 2009 BIT. There is nothing inconsistent with the 2009 BIT in interpreting it to exclude pre-existing disputes which were not *sub judice.* The text is the definitive guide as to how the parties have chosen to protect and promote investment: Yb ILC, 1966, vol II, at 220; *Daimler Financial Services AG v. Argentine Republic* (ICSID Case

[53] Tr. [J.]/1/36.
[54] Resp. Rep. Jur., ¶¶13-20; Tr. [J.]/1/9.
[55] Tr. [J.]/1/12-16.
[56] Tr. [J.]/1/23.
[57] Tr. [J.]/1/32.
[58] Tr. [J.]/1/25-27; Tr. [J.]/2/3-5.

No. ARB/05/1), Award, August 22, 2012 (Dupuy, Brower, Janeiro) at [164] (hereinafter "*Daimler Financial Services v. Argentina*"); *Wintershall AG v. Argentine Republic* (ICSID Case No. ARB/04/14), Award, December 8, 2008 (Nariman, Bernárdez, Bernardini) at [88] (hereinafter "*Wintershall v. Argentina*"); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award, August 16, 2007 (Fortier, Cremades, Reisman) at [340] (hereinafter "*Fraport v. Philippines*").[59]

150. To allow the Claimants to bring claims which they had asserted since October 2008 under the 2009 BIT would be to sanction abusive treaty-shopping: *Lao Holdings NV v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction, February 21, 2014 (Binnie, Hanotiau, Stern) at [115], [117] (hereinafter "*Lao Holdings v. Laos*").[60]

151. Nor does it follow that the Claimants have no remedy under the 1986 BIT. The sunset clause in Article 14(1) of the 1986 BIT provides for the continued effect of the 1986 BIT for 10 years after its expiration, and the Claimants can therefore invoke the dispute settlement provisions of Article 10 of the 1986 BIT, which by virtue of Article 14(4) would be available for 10 years from expiration: *Walter Bau v. Thailand* at [9.5(c)], [9.69].[61]

152. The Claimants could also have asserted their rights in the Belgian courts (subject to time bars under Belgian law) even after the termination of the 1986 BIT. Under the 1986 BIT the domestic courts are the primary forum for the settlement of disputes, and only by derogation from that primacy is international arbitration provided for disputes over the amount of compensation in case of expropriation or of measures with equivalent effect. The Belgian courts have jurisdiction, and there is nothing in the 2009 BIT which limits the right to recourse to Belgian courts.[62]

C. The Claimants' Arguments in Response

153. Article 8(1) of the 2009 BIT, interpreted in the light of the transitional provisions, and in the light of the object and purpose of the 2009 BIT, establishes that the Tribunal has

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[59] Resp. Rep. Jur., ¶¶68-72.
[60] Resp. Rep. Jur., ¶¶54-60; Tr. [J.]/2/32-33.
[61] Resp. Rep. Jur., ¶¶26-29. The Claimants suggest that Belgium has changed its position on this point: cf. Resp. Mem. Jur., ¶¶190, 193: Cl. Rej. Jur., ¶¶58-62.
[62] Resp. Rep. Jur., ¶¶40-47; Tr. [J.]/1/27.

jurisdiction irrespective of whether the disputes have arisen before or after the entry into force of the 2009 BIT.[63]

154. Articles 8 of the 2009 BIT must be interpreted in the light of Article 10: (1) the 2009 BIT emphasises the continuity of investor protection as between Belgium and China, and each of the words in "substitutes and replaces" must be given effect; (2) the 2009 BIT covers pre-existing investments, and does not exclude pre-existing disputes; and (3) the 2009 BIT extends to any legal dispute and excludes only those which were already under judicial or arbitral process.[64]

155. In Article 8, jurisdiction *ratione temporis* is not determined by Article 8(1), which deals with the notification of disputes, but by Article 8(2), which provides that "if" (and not "when") the dispute cannot be settled etc.[65]

156. Article 10(2) necessarily implies that any dispute or claim not already under judicial or arbitral process falls within the scope of the dispute resolution mechanism of the 2009 BIT. Article 10(2) only distinguishes between two classes of dispute: (a) those disputes which were already under judicial or arbitral process before the entry into force of the 2009 BIT, which would continue to be settled according to the 1986 BIT; and (b) all other disputes, which fall within the scope of the 2009 BIT. Article 10(2) is declaratory of the legal position. If Belgium were right, it would be impossible to hold the Contracting States accountable for any breaches of the 1986 BIT unless they were already the subject of judicial or arbitral process, even if the investor had served a notice under the 1986 BIT and was engaged in pre-action settlement discussions. There is no evidence that such a result was contemplated. The Belgian Senate Bill relating to the ratification of the 2009 BIT does not mention depriving investors of their right to bring proceedings in relation to existing breaches and disputes under the 1986 BIT. An interpretation which would allow a State to avoid responsibility for breaches of the 1986 BIT by denying investors recourse to any form of dispute settlement cannot be reconciled with the object and purpose of the 2009 BIT.[66]

63 Cl. C-Mem. Jur., ¶¶33-35. The Claimants accept that Article 8 must be interpreted as a whole: Tr. [J.]/1/136.
64 Cl. C-Mem. Jur., ¶¶36-39.
65 Cl. Rej. Jur., ¶¶89-90.
66 Cl. C-Mem. Jur., ¶¶41-50; Cl. Rej. Jur., ¶¶46-48; Tr. [J.]/1/129-131.

157. The Claimants' claims are being brought under the 2009 BIT, and not under the 1986 BIT. The procedural requirements under the 1986 BIT are irrelevant. Article 8 of the 2009 BIT spells out the procedural requirements. It does not require that the notification of a dispute be made, or that the period for consultations may only start running, after entry into force of the 2009 BIT. What matters is whether the Claimants notified Belgium of the existence of a dispute and whether the dispute was capable of being settled within six months of notification.[67]

158. The arbitral decisions do not support Belgium's narrow interpretation of the expression "when a legal dispute arises." They deal with entirely different clauses (*Walter Bau v. Thailand*; *Tradex v. Albania*) or clauses which expressly exclude jurisdiction in relation to disputes which arose before the BIT (*ABCI Investments v. Tunisia*), or cases which did not involve successive BITs and which did not contain transitional provisions (*Impregilo v. Pakistan*; *Salini v. Jordan*). In any event, the expression "arises" does not necessarily connote disputes arising after the entry into force of the treaty: *Mavrommatis Palestine Concessions Case (Greece v. United Kingdom)*, Judgment (Merits), August 30, 1924, PCIJ, 1924, Ser A, No 2 at 35 (hereinafter "*Mavrommatis*"). Other Belgian treaties (with Yemen and Egypt) make it clear, by expressly excluding jurisdiction over pre-existing disputes, that the word "arise" does not itself exclude pre-existing disputes.[68]

159. The principle of non-retroactivity is not engaged by granting jurisdiction to tribunals in respect of substantive obligations which are not retrospective: International Law Commission, Yb ILC, 1966, Vol II, at p 212; *ibid* 1964, Vol II at 11; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzogovina v. Yugoslavia)*, Preliminary Objections, Judgment, July 11, 1996, 1996 ICJ Rep 595, at [34] (hereinafter "*Bosnia Genocide*"); *Salini v. Jordan* at [176]; *Impregilo v. Pakistan* at [309]; *SGS v. Philippines* at [167]; *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, September 24, 2008 (Lévy, Alexandrov, Abi-Saab) at [157] (hereinafter "*Micula v. Romania*"); Schreuer, *The ICSID Convention, A Commentary*, 2nd ed 2009 at 228.[69] It is a common feature of all legal systems that

[67] Cl. Rej. Jur., ¶¶71-72.
[68] Cl. C-Mem. Jur., ¶¶51-74; Cl. Rej. Jur., ¶¶85-92.
[69] Cl. C-Mem. Jur., ¶¶91-99.

procedural provisions, including those governing the resolution of disputes, are amended and updated from time to time.[70]

160. Belgium's argument results in there being no remedy at all. The sunset clause in Article 14(1) of the 1986 BIT does not, contrary to Belgium's argument, provide for the continued effect of the 1986 BIT for 10 years after its expiration, so that the Claimants can therefore invoke the dispute settlement provisions of Article 10 of the 1986 BIT. It only applies in the case of unilateral termination or expiry of the 1986 BIT and not to mutual substitution and replacement with a successor BIT. *Walter Bau v. Thailand* concerned a sunset clause operating on termination.[71]

161. Belgium's argument that the Claimants could have asserted their rights in the Belgian courts even after the termination of the 1986 BIT ignores the fundamental principle that BITs give a right to independent international arbitration: *Gas Natural SDG, SA v. Argentine Republic* (ICSID Case No. ARB/03/10), Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005 (Lowenfeld, Álvarez, Nikken) at [29].[72]

162. The Claimants are not treaty-shopping, by contrast with cases where the nationality of a shell company subsidiary is manipulated (as in *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Jurisdiction, June 1, 2012 (Veeder, Stern, Tawil) at [2.100], or *Lao Holding v. Laos* at [56]), and the definition of investments in the 2009 BIT is irrelevant and has nothing to do with treaty-shopping.[73]

163. An interpretation of the 2009 BIT which would result in investors no longer being able to submit to arbitration any disputes which would have arisen before December 1, 2009 would be contrary to the object and purpose of the 2009 BIT. There is no retroactive application of the procedural provisions of the 2009 BIT. The Claimants have submitted an existing dispute to the procedural provisions in force at the time of submission. Applying dispute resolution clauses to pre-existing disputes does not involve the retroactive application of a treaty (Yb ILC, 1966, II, pp 11, 212 (CLA-94)) where the disputes relate to pre-existing obligations. Even if did involve retroactive application,

[70] Cl. Rej. Jur., ¶73.
[71] Cl. Rej. Jur., ¶¶58-63; Tr. [J.]/1/134-135.
[72] Cl. Rej. Jur., ¶¶67-69.
[73] Cl. Rej. Jur., ¶¶79-84; Tr. [J.]/1/136.

Article 10(2) is clear evidence of an intention to displace the presumption of non-retroactivity.[74]

VIII. Discussion

A. Principles of Treaty Interpretation

164. The starting point is clear. The question is one of interpretation of the two BITs. The general principle is that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (including the preamble and annexes) and in the light of its object and purpose (Vienna Convention, Article 31(1), (2)) and also the circumstances of its conclusion (Article 32).

165. Article 31 of the Vienna Convention reflects the primacy of the text as the basis for the interpretation of a treaty, while also giving a role to extrinsic evidence of the circumstances of its conclusion and to the objects and purposes of a treaty as a means of interpretation. It is based on the view that the text is presumed to be the authentic expression of the intentions of the parties, and that in consequence the starting point of interpretation is the elucidation of the meaning of the text by reference to the intention of the drafters: International Law Commission, Yb ILC, 1966, vol II, pp 218, 220.

166. The ordinary meaning approach has been adopted in many investor-State arbitrations to confirm that the presumed intentions of the parties should not be used to override the explicit language of a BIT (*Fraport v. Philippines* at [340]) or to override the agreed-upon framework (*Daimler Financial Services v. Argentina* at [164]), or be used as an independent basis of interpretation (*Wintershall v. Argentina* at [88]).

B. The Principle of Non-Retroactivity

167. There is no doubt, and it is common ground, that as regards substantive obligations the general principle in international law, in the absence of provision to the contrary, is one of non-retroactivity.

168. The general principle (perhaps more accurately described as a presumption) of non-retroactivity of treaties is enshrined in Article 28 of the Vienna Convention:

[74] Cl. Rej. Jur., ¶¶101-106; Tr. [J.]/1/131-134.

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

169. Judge Huber said in the *Island of Palmas* case, 2 UNRIAA 829, at 845: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." The principle is also codified in Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001): "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

170. As the commentary on the draft articles of what became the Vienna Convention underlines (ILC Yb 1966, II, pp 211-212), whether a treaty, or some of its provisions, is given retroactive effect is essentially a question of the intention of the parties, citing and contrasting the *Ambatielos Case (Greece v. United Kingdom)*, Preliminary Objections, 1952 ICJ Rep, at 40 and the *Mavrommatis* case at 34.

171. The presumption has been applied in many investor-State arbitrations to confirm that substantive provisions of a BIT have no retrospective effect. In *Impregilo v. Pakistan* (Guillaume, Cremades, Landau), the Italy-Pakistan BIT entered into force in June 2001, and applied to investments after September 1, 1954. The tribunal said (at [311]): "Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance." See also *SGS v. Philippines* (El-Kosheri, Crawford, Crivellaro), at [166], applied in *Salini v. Jordan* (Guillaume, Cremades, Sinclair), at [177].

172. The effect is that, unless a different intention appears, the substantive provisions of a BIT may not be relied on in relation to acts and omissions occurring before its entry into force (unless they are continuing or composite acts) even where (as here) the BIT applies to investments made prior to the entry into force of the BIT, or where the dispute arose after the entry into force of the BIT: *MCI Power v. Ecuador* (Vinuesa, Greenberg, Irarrázabal), at [62]; *Pey Casado v. Chile* (Lalive, Chemloul, Gaillard), at [579]-[582]; *Société Générale v. Dominican Republic* (Orrego Vicuña, Bishop, Cremades), at [82]-[83]; *Micula v. Romania* (Lévy, Alexandrov, Ehlermann), at [157]; *Paushok v. Mongolia*

(Lalonde, Grigera Naón, Stern), at [467]. *Cf.* ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 13, and Commentary on Article 13 of Draft Articles, 2001. Contrast the *Bosnia Genocide* case at [34].

173. It hardly needs to be pointed out that whether obligations have retroactive effect is a quite different question from the question whether a BIT applies to investments made prior to its entry into force (which are very commonly included within the scope of application of a BIT, as in the 1986 BIT, Article 13 and the 2009 BIT, Article 10(2)).

C. The Mavrommatis Case

174. Considerable attention was devoted in the arguments of the parties to the majority decision of the Permanent Court of International Justice in the *Mavrommatis* case.

175. For present purposes, it is only necessary to point out that the claim was made by Greece against the United Kingdom for the United Kingdom's failure, as Mandatory for Palestine, to recognise the 40-year concession rights granted by the Ottoman authorities in Palestine to Mr Mavrommatis, a Greek national, for the construction and working of tramways, and the supply of electricity and drinking water, in Jerusalem (granted in 1914) and Jaffa (granted in 1916). In 1918 British forces overran Palestine, and were in military occupation until 1920, when it became a civil occupation. Concessions had been granted in 1921 by the Administration of Palestine to Mr Rutenberg which Mr Mavrommatis complained were in conflict with his concessions, and the Greek Government took up his complaint.

176. The Mandate for Palestine was granted to the United Kingdom by the Council of the League of Nations in July 1922, and came into force in September 1923. The claim was brought by Greece under Article 26 of the Mandate, which provided:

> "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

177. The claim was that the Government of Palestine, and consequently also the British Government, had since 1921 wrongfully refused to recognise Mr Mavrommatis' rights.

For reasons which are not presently relevant, the claim in relation to the Jaffa concession was held to be outside the scope of the obligations in the Mandate.

178. The application by Greece to the Permanent Court was made in April 1924. The Court decided that there was a dispute between Greece and the United Kingdom, applying the now famous test: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (at 11). The Court dealt with what is described as the question of retrospective effect raised by the British Government, that "if the Court's jurisdiction is based on Article 11 of the Mandate, this clause must be applicable to the dispute, not merely *ratione materiae*, but also *ratione temporis*." Article 11 was a substantive provision giving the Palestine Government power to provide for public ownership or control of public works etc subject to international obligations accepted by the Mandatory.

179. The Court said (at 35-36):

> "It must in the first place be remembered that at the time when the opposing views of the two Governments took definite shape (April 1924), and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever […] which may arise' shall be submitted to the Court. The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above. The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether as regards tests of time, jurisdiction exists, whereas any definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of the dispute.
>
> Nevertheless, even supposing that it were admitted as essential that the act alleged by the Applicant to be contrary to the provisions of the Mandate should have taken place at a period when the Mandate was in force, the Court believes that this condition is fulfilled in the present case. If the grant of the Rutenberg Concessions, in so far as they may be regarded as incompatible, at least in part, with those of Mavrommatis, constitutes the alleged breach of the terms of the Mandate, this breach, no matter on what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it. There is no doubt that the Mandatory régime was in force when the British Government, in its letter of April 1st, 1924, adopted the attitude which, in the opinion of the Greek Government,

> rendered it impossible to continue negotiations with a view to a settlement and, by so doing, imparted to the breach of the Mandate, alleged by Greece to have occurred, a definitive character.
>
> For these reasons the Court does not feel called to consider whether the provisions of the Mandate, once they are in force, apply retrospectively […]"

180. This passage has been the subject of debate in these proceedings. The Claimants have used it to suggest that the word "arises" is not limited to disputes arising after the entry into force of a treaty, and retroactivity for dispute settlement clauses is the default position (by contrast with substantive provisions).[75] Belgium says that the dispute resolution clause in *Mavrommatis* was different because it used the words "if" and "may arise" and not "when" and "arises," that the decision was concerned with the applicability of the clause to facts, rather than disputes, preceding the treaty's entry into force; and that, if it stood for the default position being retrospective application of treaties to disputes before entry into force, it had been almost universally rejected in investment arbitrations, which had either simply applied Article 28 of the Vienna Convention, or specifically rejected *Mavrommatis*.[76]

181. Sir Humphrey Waldock said in his third report on what became the Vienna Convention (Yb ILC, 1964, II, p 11):

> "[I]t needs to be emphasised that the Court [in the *Mavrommatis* case] was not, strictly speaking, correct in implying that a treaty which provides for acceptance of jurisdiction with respect to 'disputes' between the parties is one which has 'retroactive effects'; because the treaty, for the very reason that it cannot have retroactive effects, applies only to *disputes* arising or *continuing to exist* after its entry into force. What the limitation clauses really do is to limit the acceptance of jurisdiction to 'new' disputes rather than to deprive the treaty of 'retroactive effects.'
>
> […] On the other hand, when a jurisdictional clause is […] attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause."

182. The essence of this criticism was repeated in the Report of the International Law Commission to the General Assembly. In the commentary on what became Article 28,

[75] Cl. C-Mem. Jur., ¶¶69-71, 91-92.
[76] Resp. Rep. Jur., ¶¶87-88, 93-98.

the Report, after quoting part of the passage from the *Mavrommatis* decision, said (Yb ILC, 1966, II, p 212):

> "This is not to give retroactive effect to the agreement because, by using the word 'disputes' without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement. On the other hand, when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause. Thus in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question."[77]

183. It is clear from the quoted passages in the *Mavrommatis* case that the Permanent Court took the view that the dispute between Greece and the United Kingdom had arisen after the Mandate came into force, and that Greece was complaining of continuing breaches.[78] The present Claimants do not claim that the alleged breaches of the 1986 BIT by Belgium were continuing breaches as of the entry into force of the 2009 BIT on December 1, 2009.

184. If (which is doubtful) the *Mavrommatis* case stands for a principle that there is a presumption that the jurisdiction of a tribunal extends to disputes which arose prior to its establishment, such a principle finds almost no support in investor-State arbitration.

185. In *Walter Bau v. Thailand* (Barker, Lalonde, Bunnag) the tribunal did not find the decision helpful (see [9.74]-[9.75]) and in *ABCI Investments v. Tunisia* (Orrego Vicuña, Bernardini, Stern), the tribunal specifically rejected such a presumption: [171].

[77] Yearbook of the International Law Commission, 1966, Vol. II, p. 212. This passage is substantially derived from the Third Report of Sir Humphrey Waldock, the Special Rapporteur: *ibid*, 1964, Vol. II, at 11.

[78] That is confirmed by the pleadings. The United Kingdom's original objection was that the Greek Government's complaint was that the Palestine Government had refused since 1921 to recognise Mr Mavrommatis' rights, but there was nothing in Article 26 of the Mandate to indicate that any retrospective operation was to be given to it, and that it was to be held to cover complaints against acts of the British or Palestine Governments dating from a period not only before the Mandate came into force, but before its terms were defined: Preliminary Counter-Case, PCIJ, Ser C No 5-I, at 445. But this was not pursued before the Permanent Court. At the hearing, Sir Cecil Hurst for the British Government said that the written pleadings by the British Government had argued that, because the Greek case was that the British Government had done or failed to do something since 1921, there was no reason to give Article 26 of the Mandate retrospective effect. But, since the Greek reply was that there was no dispute between Greece and the United Kingdom until 1924, the question whether Article 26 had retrospective effect did not arise: *ibid*. at 39.

D. Dispute Resolution and Retroactivity

186. What is clear is that the temporal application of jurisdictional provisions is a question separate from the retroactivity of substantive provisions.

187. In *Salini v. Jordan* (Guillaume, Cremades, Sinclair), at [176], the tribunal said: "[…] one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT." See also *SGS v. Philippines* (El-Kosheri, Crawford, Crivellaro), at [167]; *Micula v. Romania* (Lévy, Alexandrov, Ehlermann), at [157].

188. Sometimes there is an express exclusion of disputes arising prior to the entry into force of the treaty, as in *Jan de Nul v. Egypt*, Decision on Jurisdiction, June 16, 2006 (Kaufmann-Kohler, Mayer, Stern), in which one of the BITs at issue provided that it would apply to investments prior to or after its entry into force, but would "not be applicable to disputes having arisen prior to its entry into force" (Art 12). The tribunal said (at [116]): "The purpose of Article 12 of the 2002 BIT is to exclude disputes which have crystallised before the entry into force of the BIT […]" That decision will be considered further below. The tribunal in that case found on the facts that the dispute which had arisen prior to the entry into force of the BIT was not the same dispute as that which was the subject of the claim. See also *Micula v. Romania* at [153] (BIT not to apply to any dispute concerning an investment which arose before its entry into force).

189. Where there is no express provision, tribunals in investor-State arbitrations have sometimes applied a presumption of non-retroactivity (with or without reference to Article 28, Vienna Convention) to deny jurisdiction in cases where the dispute arose before the BIT came into force.

190. In *Impregilo v. Pakistan* (Guillaume, Cremades, Landau), the Italy-Pakistan BIT entered into force in June 2001, and applied to investments after September 1, 1954. The tribunal decided that the wording of the dispute resolution provision, and the absence of specific language for retroactivity, led to an inference that disputes which may have arisen before the entry into force of the BIT were not covered, but concluded on the facts that the claimant had presented its claims after the BIT entered into force: [300], [308]. See also *MCI Power v. Ecuador* (Vinuesa, Greenberg, Irarrázabal), at [61], where it was also said that "the silence of the text of the BIT with respect to its scope in relation to disputes

prior to its entry into force does not alter the effect of the principle of the non-retroactivity of treaties"; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2), Award, May 18, 2010 (Fortier, El-Kosheri, Reisman) at [95], [98]; *Paushok v. Mongolia* (Lalonde, Grigera Naón, Stern), at [468].

191. In *Tradex v. Albania* (Böckstiegel, Fielding, Giardina), at p 194, the tribunal said that it was not convinced that there was a presumption in international arbitration that a submission to arbitration must be presumed to be meant for future disputes unless otherwise expressed. And some tribunals have decided the question of retroactivity without any resort to presumptions. Thus in *Salini v. Jordan* (Guillaume, Cremades, Sinclair), the Italy-Jordan BIT entered into force on January 17, 2000, and covered "any dispute which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments." The tribunal said (at [170]) that: "Such language does not cover disputes which may have arisen before the entry into force of the BIT, but only disputes arising after 17 January 2000."

E. Successive BITs

192. Irrespective of whether there is a presumption, the question is ultimately one of interpretation of the BIT or BITs in issue. In the present case the 2009 BIT does endeavour in some respects to deal with disputes under the 1986 BIT, and for that reason considerable attention was devoted in the written and oral arguments to arbitral decisions which dealt with the relationship between successive BITs, or the relationship between a BIT and a later amendment, including one decision (*Walter Bau v. Thailand* (Barker, Lalonde, Bunnag)) which dealt with it in some detail.

193. In *Jan de Nul v. Egypt*, above, there were two successive BITs between the Belgium-Luxembourg Economic Union and Egypt in 1977 and 2002. The 2002 BIT replaced the 1977 BIT and provided (Article 12) that it would apply to investments made prior to its entry into force, but would "not be applicable to disputes having arisen prior to its entry into force." It also provided that upon its entry into force the 1977 BIT would be replaced by the 2002 BIT (Article 13(2)). The 1977 BIT provided (Article XII) that its provisions would "continue to be effective for a period of validity of contracts concluded […] prior to notification of termination" of the 1977 BIT.

194. In the Decision on Jurisdiction, the tribunal decided that the dispute before it dealt with violations of the provisions of the two BITs, and was different from the disputes previously before the Egyptian courts, and therefore arose after the 2002 BIT came into force. Accordingly there was jurisdiction under the 2002 BIT: [114]-[122]. In the Award on the merits, the tribunal applied the non-retroactivity principle in Article 28 of the Vienna Convention and Article 13 of the ILC Articles on State Responsibility to find that the substantive provisions of the 2002 BIT were to be applied to the judgment of the Egyptian court which was rendered after the 2002 BIT came into force and that the provisions of the 1977 BIT were to be applied to conduct which took place prior to the entry into force of the 2002 BIT, although the tribunal recognised that in practical terms it would make no difference because the protections under the two BITs were essentially identical: [132]-[134]. The tribunal recognised that: "As a result, the substantive provisions of both treaties will apply, while […] the jurisdiction over the dispute is based on the 2002 BIT only": [135]. This decision illustrates the point that in theory a claim may be made under a later BIT in respect of breaches of an earlier BIT, where the dispute arises after the later BIT has come into force.

195. In *Walter Bau v. Thailand* there were two successive BITs between Germany and Thailand, a 1961 treaty (in force 1965) and a 2002 treaty (in force 2004). The 1961 BIT did not give investors the right to make investor-State claims, but provided only for inter-State claims, and the 2002 BIT contained no express restriction against claims which arose before its commencement: [9.5]. The sunset clause in the 1961 BIT provided that as regards investments made prior to its termination, its provisions would apply for 10 years after termination. The 2002 BIT expressly terminated the 1961 BIT.

196. The claim was brought under the 2002 BIT, the dispute-resolution provision of which provided (in the circumstances which occurred) that "disputes concerning investments between a Contracting Party and an investor of the other Contracting Party" could be submitted to ICSID arbitration. In a partial award in 2007 the tribunal found that it had jurisdiction *ratione materiae* because the 2002 BIT applied to investments made before its entry into force.

197. Subsequently, the tribunal decided that the dispute-resolution provision of the 2002 BIT did not give the tribunal jurisdiction *ratione temporis* to consider disputes which had come into existence before the treaty came into force: at [9.67]-[9.68], [9.72]-[9.73]. The

following matters were, according to the tribunal, to be taken into account: (a) the presumption against retroactivity: Article 28, Vienna Convention, and Commentary on Article 24, ILC Final Draft Articles on Law of Treaties; (b) the fact that the treaty applied to investments made before it came into force did not mean that investors could claim damages for matters which had given rise to disputes prior to that date; (c) Germany could possibly have made (and could still make, because the 1961 treaty continued until 2014) an inter-State claim; (d) the fact that there was no express provision against retroactivity was not relevant, since such provisions could be seen as States acting under an abundance of caution, particularly where the treaty which was replaced had no provision for investor-State claims; (e) the clear intention of the 2002 BIT was to provide better future protection for investors than had previously existed, by increasing the protection from liability for expropriation to a requirement of fair and equitable treatment, and to make it easier for investors to seek redress by providing for investor-State arbitration; (f) the provision of investor-State arbitration was a substantive provision which could not be seen as merely procedural so as to justify a reversal of the Article 28, Vienna Convention, presumption against retroactivity; and (g) general language relating to "any dispute" did not apply to disputes prior to entry into force (citing *Impregilo v. Pakistan* at [300] and *Société Générale v. Dominican Republic* at [87]).

198. The essence of that decision was that the general language of the dispute resolution settlement provision of the subsequent BIT did not displace the presumption against retroactivity, particularly because, by allowing for investor-State arbitration, it was substantively different from the earlier BIT provision.

199. In *ABCI Investments v. Tunisia* (Orrego Vicuña, Bernardini, Stern), there were successive treaties between the Netherlands and Tunisia in 1963 and 1998. The 1998 BIT superseded the 1963 treaty. The question was whether claims could be brought by investors under the 1998 BIT in respect of matters which had arisen before it came into force. The 1998 BIT provided: "Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the [ICSID Convention]."

200. The 1998 BIT also provided that "disputes arisen before the entry into force of the [1998] BIT shall continue to be ruled by the [1963 treaty]." The tribunal found (at [162]-[163], [169]-[170]) that the 1998 BIT applied only to disputes which commenced after it came into force. In the context of the 1998 BIT, the word "arising" related ("*se rattache*") to disputes which arose after its entry into force ("*nés après son entrée en vigueur*"), referring to *Impregilo v. Pakistan*, in which the phrase was "any disputes arising […]"). That was confirmed ("*une considération supplémentaire*") by the fact that when the BIT wanted to deal with a dispute in the past, it used the term "arisen" for disputes which were governed by the 1963 BIT.

201. Finally, for the sake of completeness, a decision relied upon by the Claimants should be mentioned. In *Nordzucker AG v. Poland* (UNCITRAL), Partial Award, December 10, 2008 (Vera Van Houtte, Bucher, Tomaszewskia) a 1991 BIT between Germany and Poland contained a dispute-resolution provision limited to expropriation and capital transfer provisions, which was then amended by a 2005 Protocol, which extended jurisdiction to any disputes pertaining to investments "as regards the rights and obligations" under the 1991 BIT. Poland argued that the 2005 Protocol did not apply to disputes concerning events which occurred before it came into force. This was not, therefore, a case about the applicability of a dispute-settlement provision to pre-existing disputes.

202. The tribunal noted: (1) Article 28 of the Vienna Convention applied both to procedural obligations and substantive obligations; (2) unless a different intention was established, the immediate applicability of a jurisdictional clause of a Treaty implied that it could also be applied to "old" events, provided that they constituted a breach of the Treaty when they occurred (citing, in particular, *Mavrommatis* at p 35; *Bosnia Genocide* at [34], and *Tradex v. Albania* at p 194); and (3) there appeared to be a majority of authority to the effect that the application of a new treaty jurisdiction clause to pre-existing substantive breaches was possible unless it was explicitly excluded, but the decisions depended upon an analysis of the individual provisions [105(iv)], [110]-[112]. The tribunal then decided that the extended jurisdiction under the 2005 protocol applied to pre-existing breaches.

F. Overall Conclusion

203. The Tribunal will approach the question before it in accordance with well-established principle of treaty interpretation, which are codified in the Vienna Convention and confirmed by subsequent practice.

204. The essential difference between the 1986 BIT and the 2009 BIT for present purposes is that:

(1) the combined effect of the 1986 BIT, Article 10, and the Protocol, Article 6, is that by way of exception to the jurisdiction of national courts, disputes "relating to the amount of compensation payable in case of expropriation, nationalisation or any other measure similarly affecting investments" may (at the option of the investor) be submitted to the national courts of the place of the investment or be submitted directly to international arbitration under (at the option of the investor) Stockholm Chamber of Commerce Rules or ICSID Rules, whereas all other disputes may not be so submitted; and

(2) the effect of the 2009 BIT, Article 8, is that a much wider range of disputes (not limited to the amount of compensation for expropriation and analogous measures[79]) may be submitted to ICSID arbitration.

205. As indicated above, it is common ground that the dispute arose before the 2009 BIT came into force. The Request for Arbitration[80] treats the dispute as having arisen at the latest by October 14, 2009, and Belgium also relies on the fact that the dispute arose before the 2009 BIT came into force.[81] It is also clear that the 2009 BIT does not expressly deal with the fate of disputes arising before December 1, 2009 which had been notified under the 1986 BIT but were not then the subject of judicial or arbitral process (in the sense of such proceedings having been formally initiated).

[79] For present purposes it is not necessary to consider the well-known question whether in such an arbitration the tribunal could consider whether there has been an expropriation, etc. as an incidental or preliminary question to the determination of compensation: cf. e.g. *Renta 4 SVSA and others v. The Russian Federation* (SCC No. 24/2007), Award on Preliminary Objections, March 20, 2009 (Paulsson, Brower, Landau) at ¶¶44 et seq.; *ST-AD GmbH v. Bulgaria* (UNCITRAL, PCA Case No. 2011-06), Award on Jurisdiction, July 18, 2013 (Stern, Klein, Thomas) at ¶¶353 et seq.
[80] ¶101.
[81] Resp. Mem. Jur., ¶152.

206. Article 8(1) of the 2009 BIT refers to "a legal dispute" and, if it is applicable, could encompass breaches of the 1986 BIT. The question for the Tribunal is whether the 2009 BIT can be interpreted to mean that the expanded subject-matter jurisdiction under the 2009 BIT was to apply to existing pre-December 1, 2009 disputes which were based on breach of the 1986 BIT and which had already been notified under that BIT.

207. The Tribunal recognises that if the 2009 BIT cannot be so interpreted, then there is a real risk that disputes arising prior to the 2009 BIT but not the subject of judicial or arbitral process might fall into some "black hole" or "arbitration gap" between the two BITs. That is because there is at least a doubt about whether the Claimants have any other remedy.

208. First, as regards the availability of an arbitral remedy under the 1986 BIT, the Claimants' position is that their only remedy is under the 2009 BIT, because there was no judicial or arbitral process commenced before the 2009 BIT came into force.[82] In their view, the 1986 BIT continues to apply only by virtue of Article 10(2) of the 2009 BIT to those disputes for which judicial or arbitral proceedings had been commenced under the 1986 BIT, and therefore could not apply to the present dispute. Belgium's position was initially equivocal,[83] but its final position was that if the dispute was properly notified under Article 10 of the 1986 BIT (which it denies to be the case for notification under the 2009 BIT by reference to Article 8(1) of the 2009 BIT), then the process had started, and the claim may continue to be brought under the 1986 BIT.[84]

209. The question whether the Claimants still have a remedy under Article 8 of the 1986 BIT is not, and cannot be, before this Tribunal, but it should be observed that: (1) under the 1986 BIT disputes may be submitted to national courts or international arbitration after 6 months from notification of the dispute, but only disputes "relating to the amount of compensation payable in case of expropriation" (Article 10(3)); (2) the sunset clause of the 1986 BIT preserves the BIT in respect of investments for 10 years, but only those investments made "before the date of expiry" of the 1986 BIT and only for 10 years "from the date of expiry" (Article 14(4), which was to be 10 years from entry into force, subject to extension if not brought to an end by notification) (Article 14(1), (2), (3)); (3)

[82] Tr. [J.]/2/107.
[83] Tr. [J.]/1/29-30; Tr. [J.]/2/28-30.
[84] Tr. [J.]/2/31.

the 1986 BIT did not expire but was substituted and replaced by the 2009 BIT (Article 10(1)).

210. Second, the parties disagree on whether the Claimants may still be able to bring claims in the Belgian courts. Belgium says that the Belgian courts are still available[85] and the Claimants deny it.[86] This also is a matter upon which this Tribunal is not called to express a view.

211. In the light of the Claimants' concentration of their argument in the Rejoinder[87] on the wording of Article 8(2) of the 2009 BIT as the basis of Belgium's consent to jurisdiction, the first question which the Tribunal should address is the question of which is, or are, the relevant provision, or provisions, of the 2009 BIT. The Tribunal does not accept the Claimants' argument that jurisdiction *ratione temporis* is to be determined by Article 8(2), which provides that "if" (and not "when") the dispute cannot be settled etc.

212. As the Claimants correctly recognise in other parts of the Rejoinder,[88] Article 8(1) is the crucial provision. On this question the Tribunal considers that there can be no doubt, that the essential question is one of interpretation of Article 8(1). Articles 8(2) and 10(2) of the 2009 BIT are to be read together with Article 8(1), and in the light of the 2009 BIT as a whole. Article 8(2), in particular, cannot be read in isolation from Article 8(1), since Article 8(2) expressly refers to "the dispute," which is plainly a reference back to "a legal dispute" in Article 8(1) and could not be anything else.

213. These provisions have to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in the context of the 1986 BIT and the 2009 BIT (including its preamble), in the light of the object and purpose of the 2009 BIT and against the background of the 1986 BIT.

214. Some tribunals have found the answer to similar questions through a linguistic analysis. In *Impregilo v. Pakistan* (Guillaume, Cremades, Landau), the dispute resolution clause (Article 9) referred to "any dispute *arising* between a contracting Party and the investors of the other" (emphasis added). The Tribunal decided that: "[s]uch language – and the

[85] Resp. Rep. Jur., ¶¶26-29; Tr. [J.]/1/27.
[86] Cl. Rej. Jur.,¶¶58-62.
[87] Cl. Rej. Jur., ¶¶89-90.
[88] Cl. Rej. Jur., ¶¶112-113.

absence of specific language for retroactivity – infers that disputes which may have arisen before the entry into force of the BIT are not covered."

215. In *ABCI Investments v. Tunisia*, above, the tribunal (Orrego Vicuña, Bernardini, Stern) found (at [162]-[163], [169]-[170]) that the 1998 BIT applied only to disputes which commenced after it came into force. As stated above (paragraph 200), the word "arising" related to disputes which arose after its entry into force. That was confirmed by the fact that when the BIT wanted to deal with a dispute in the past, it used the term "arisen" for disputes which were governed by the 1963 BIT.

216. In *Salini v. Jordan*, at [170], where the phrase was "any dispute which may arise," the tribunal (Guillaume, Cremades, Sinclair) said that "such language" does not cover disputes which may have arisen before the entry into force of the BIT.

217. In *Tradex v. Albania*, at p 189-190, the tribunal (Böckstiegel, Fielding, Giardina) was concerned with the expression "if a foreign investment dispute arises" in an Albanian law which gave the investor an option to proceed by way of ICSID arbitration. It was held to apply to disputes arising before the promulgation of the law. The tribunal considered that the word "arises" would seem to indicate a time in the future, but the word "if" could denote either a conditional or a time element, while the word "when" would have introduced only a time element. But in its context the tribunal found that the word "if" connoted a condition, so that the dispute need not have arisen after the entry into force of the Law: at 189. The tribunal was not convinced by Albania's argument that a submission to arbitration must be presumed to be only meant for future disputes unless otherwise expressed. Submissions to arbitration were found in practice both in relation to existing and future disputes, and it was necessary to interpret the instrument at issue without the guidance of a presumption. But because Albania had confirmed its commitment to investor protection, the Law should be interpreted in favour of investor protection and ICSID jurisdiction in case of doubt: at 194.

218. In the present case the Tribunal will not employ any presumption against retroactivity, because in its view the application of a new dispute settlement mechanism to acts which may have been unlawful when they were committed is not in itself the retroactive application of law. Nor, while recognising that the starting point is the plain meaning of the text, does this Tribunal consider that a narrow and purely linguistic exercise is appropriate for the interpretation of an international treaty.

219. The contracting parties would have known that disputes often take time to mature into judicial or arbitral proceedings, even after they have been notified. Is it possible to infer the intention of the parties with regard to disputes which had been notified under the 1986 BIT but which had not matured into judicial or arbitral proceedings?

220. The possibilities are at least four: (1) the contracting parties considered or intended that such disputes would fall under the 1986 BIT, notwithstanding that the 2009 BIT "substitutes and replaces" the 1986 BIT; (2) they considered that the language of Articles 8 and 10 together were sufficient to encompass such disputes so as to bring them within the scope of the 2009 BIT; (3) they simply forgot to deal with the problem of such disputes; or (4) the parties deliberately chose not to deal with them.

221. It is not likely that the parties forgot to address the issue, for two reasons. First, they did deal with the question of pre-2009 BIT disputes which had been notified and matured into judicial or arbitral proceedings; and it is unlikely that the other category of pre-2009 BIT disputes would have escaped their attention, especially as this is a problem which always arises in cases of successive treaties, with which the negotiators would have been familiar.

222. Second, in particular, it is very likely that the negotiators of the 2009 BIT for Belgium and Luxembourg would have been aware that there might be an issue about the fate of disputes which had arisen prior to its entry into force, which may or may not have been notified, but which had not been the subject of arbitral or judicial proceedings. Thus the 2002 Belgium/Luxembourg-Egypt BIT which entered into force and replaced the 1977 Belgium/Luxembourg-Egypt BIT provided that such disputes were excluded: "*il ne s'appliquera pas aux différends survenus avant son entrée en vigueur*" (Art. 12). The 1977 Treaty was terminated, but it had an express provision (Art XII) that in the case of its termination its provisions were to continue to be effective for a period of validity of contracts concluded prior to notification of termination of the Treaty: see *Jan de Nul v. Egypt*, Decision on Jurisdiction, June 16, 2006, [29], [33].

223. There are several indicators that the 2009 BIT does not cover disputes which arose before it came into force but whose disposition was not (by contrast with those subject to judicial or arbitral process) expressly provided for under the 2009 BIT.

224. First, the plain meaning of the text of Article 8(1), read together with Article 8(2) and Article 10(2), refers only to disputes which arise after the 2009 BIT comes into force. The language "[w]hen a legal dispute arises between an investor of one Contracting Party and the other Contracting Party, either party to the dispute shall notify the other party to the dispute in writing" in Article 8(1) cannot be read on its face to mean "[w]hen a legal dispute arises ***or has arisen*** […] either party to the dispute shall notify, ***or shall have notified***, the other party to the dispute." The plain language of Article 8(1) thus appears to exclude on its face the expansive interpretation for which the Claimants have advocated.

225. Second, there is nothing in the preamble to the 2009 BIT which assists. The preamble to the 2009 BIT, like any BIT, can only have limited interpretative effects. This preamble makes clear that its object is to strengthen economic co-operation between the parties by creating favourable conditions for investments of investors of one party in the territory of the other party. The fact that the 2009 BIT is intended to strengthen economic co-operation by creating favourable conditions for investments, or is intended to encourage, promote and protect investments (in common with all BITs) cannot lead to an inference that, if there is an arbitration gap for pre-2009 BIT disputes, it should be filled by creative interpretation. The preamble cannot offer assistance on the question the Tribunal must answer.

226. Third, the common provision in Article 10(2) that the 2009 BIT applies to all investments, made before or after its entry into force, does not assist in any way on the question of the effect of a dispute arising before entry into force.

227. Fourth, the provision in Article 10(2) of the 2009 BIT that it is not to apply to disputes which were already under judicial or arbitral process before it came into force cannot, by itself, support an inference that pre-2009 BIT disputes which were notified under the earlier BIT but not under judicial or arbitral process must come within the scope of the 2009 BIT. As the Claimants accepted at the hearing, Article 10(2) is simply silent on the disposition of such disputes.[89]

228. Nor, fifth, does the fact that Article 10 also makes it clear that the intention was to substitute and replace the 1986 BIT justify an inference that disputes which had been

[89] Tr. [J.]/1/124.

notified but not matured into judicial or arbitral proceedings under the 1986 BIT would survive under the 2009 BIT.

229. Sixth, a most important indicator against an inference, or expansive interpretation, is that it would have the effect of allowing the use of the much wider dispute resolution provisions of the 2009 BIT to bring claims already notified under the 1986 BIT, with its far more limited substantive scope for the purposes of dispute-settlement jurisdiction. The effect of Article 10(2) of the 2009 BIT is that any dispute or claim concerning an investment which was already under judicial or arbitral process before December 1, 2009 is to be settled according to the 1986 BIT, which means that such claims in international arbitration would continue to be limited to disputes relating to the amount of compensation for expropriation, etc.

230. If the Claimants were right, the parties, without actually expressly so providing, would have agreed that disputes or claims which relate to events prior to December 1, 2009 and which were notified before that date (but not the subject of judicial or arbitral process as at that date) would be subject not only to ICSID arbitration but would also not be limited to issues relating to the amount of compensation for expropriation, etc. This is not just a technical or procedural question, because if jurisdiction is upheld under the 2009 BIT, the Claimants would gain access to a significantly broader dispute-settlement mechanism than if they had pursued their remedies under the 1986 BIT at any time prior to December 1, 2009. In other words, on the Claimants' interpretation, the effect would be to extend the range of disputes which could be referred to arbitration, rather than the national courts, under the 1986 BIT. On the Claimants' approach, a dispute so notified becomes automatically subject to enhanced dispute settlement merely because of the coming into force of the 2009 BIT.

231. For all these reasons, in the view of the Tribunal there is nothing in the wording of the 2009 BIT to justify on the basis of its express language, or on the basis of an implication or inferences, that the more extensive remedies under the 2009 BIT would be available to pre-existing disputes that had been notified under the 1986 BIT but not yet subject to arbitral or judicial process.

232. It would, of course, be regrettable, if the Claimants had valid claims (on which there is a sharp difference of view between the parties) for which they had no effective remedy. But the Tribunal has, for the reasons given, come to the conclusion that there is no

legitimate method of interpretation, having regard to the requirements and the Vienna Convention and the rules reflected therein, which gives the Claimants the remedy which they seek in this arbitration under the 2009 BIT. It should be emphasised, however, that the Tribunal takes no position on whether remedies may remain available to the Claimants either under the 1986 BIT or through Belgium's domestic courts.

233. Belgium's objection to the jurisdiction *ratione temporis* therefore prevails, and there is accordingly no reason for the Tribunal to address the other objections.

IX. Costs

234. Article 61(2) of the ICSID Convention grants to the Tribunal a wide discretion on how the costs of the arbitration should be borne.

235. Belgium submitted in its costs submission of February 3, 2015 that should it succeed in its jurisdictional challenge, Belgium ought to receive its legal and associated administrative costs, and its share of the fees and expenses of the Tribunal and the charges of the Centre.

236. The Claimants in their costs submission of February 20, 2015 submitted: (1) if the Tribunal were to find that it had jurisdiction, the Tribunal should defer a decision on costs until after the conclusion of the merits phase; (2) if the Tribunal were to find that it did not have jurisdiction, each party should bear its own costs and share the fees and expenses of the Tribunal and the Centre equally.

237. The Parties have referred the Tribunal to decisions of ICSID tribunals which have (1) ordered unsuccessful parties to pay the costs of ICSID and the fees and expenses of the arbitrators; or (2) ordered the unsuccessful party to pay in addition the successful party's legal costs, or a reasonable proportion thereof; or (3) ordered each party to bear its own legal costs and expenses and share equally in the costs and charges of the Tribunal and the Centre.

238. In addition, the Claimants say: (1) because the merits have not been reached there is no "successful party"; (2) in exercising its discretion under Article 61(2) of the ICSID Convention the Tribunal should take into account (a) the complexity and novelty of the issues; (b) Belgium's refusal at the first procedural hearing to confirm whether it would

raise any jurisdictional objections, demanding that the Claimants first submit a full Memorial on the facts, which significantly increased the Claimants' costs and the costs of the arbitration; (c) Belgium's election, communicated only at the start of the oral hearings, that it would not pursue the fifth objection (the *Monetary Gold* principle) at the hearing, which the Claimants say was the effective abandonment of the objection.[90]

239. In the exercise of its discretion, the Tribunal has taken account of the following matters: (a) there is a division of practice on the question whether a prevailing State is entitled to its costs and expenses, or whether the parties should bear their own legal costs and expenses and be equally liable for the costs of the Tribunal and the Centre;[91] (b) Belgium has ultimately prevailed; (c) the question of jurisdiction *ratione temporis* was a complex and difficult one; (d) none of the other four objections (all of which were the subject of extensive written argument and much oral argument) was the subject of a decision; and (e) the merits of the claim were not reached. In the light of all these matters, the Tribunal has decided that the Claimants and Belgium should bear their own fees and expenses of the proceedings, and that each side should bear equally the fees and expenses of the members of the Tribunal and the charges of the Centre.[92]

[90] Belgium stated that it would not address the fifth objection at the hearing for reasons of time (Tr. [J.]/1/5). The objection was fully addressed by the Claimants.

[91] There is considerable precedent in ICSID cases for ordering the parties to bear their own legal costs and share the costs of the tribunal equally, especially (among other circumstances) where a Respondent State has succeeded at the jurisdictional phase and/or where the issues were novel or difficult: see, e.g. among many others: *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (ICSID Case No ARB/97/3) Award, November 21, 2000 (Rezek, Buergenthal, Trooboff) at [95]; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* (ICSID Case No ARB/09/11) Award, December 1, 2010 (Berman, Gaillard, Thomas) at [59]; *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8) Award, October 17, 2013 (Kaufmann-Kohler, Glick, Thomas) at [227]-[228].

[92] The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final. Any remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

X. Award

240. For the reasons set out above, the Tribunal decides as follows:

(1) The Claimants' claims are dismissed for lack of jurisdiction.

(2) The Parties shall bear equally the fees and expenses of the members of the Tribunal and the charges of the Centre.

(3) Each Party shall bear its own legal fees and expenses.

(signed)

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Professor Philippe Sands QC

Arbitrator

Date: April 30, 2015

(signed)

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Mr. David A.R. Williams QC

Arbitrator

Date: April 30, 2015

(signed)

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Lord Collins of Mapesbury

President

Date: April 30, 2015