**PCA Case No. 2023-23**

In the matter of an arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 1976

and

The Agreement between the Government of the Italian Republic and the Government of the Republic of Ecuador on the Promotion and Protection of Investment dated 25 October 2001

-between-

**1. SANTIAGO ROMERO BARST AND**
**2. MARÍA AUXILIADORA RODRÍGUEZ**
(ITALY)

Claimants

-and-

**THE REPUBLIC OF ECUADOR**

Respondent

# AWARD ON JURISDICTION

**ARBITRAL TRIBUNAL**

Mr. Luis O'Naghten (Arbitrator)
Prof. Laurence Boisson de Chazournes (Arbitrator)
Prof. Juan Fernández-Armesto (Presiding Arbitrator)

**REGISTRY - PERMANENT COURT OF ARBITRATION**

Mr. Julian Bordaçahar

**ADMINISTRATIVE SECRETARY**

Ms. Francisca Seara Cardoso

**3 December 2025**

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# GLOSSARY OF TERMS AND ABBREVIATIONS

| | |
|---|---|
| **2006 Draft Articles** | Draft Articles on Diplomatic Protection of 2006 |
| **2011 Executive Order** | "*Reglamento del Régimen de Transición de los Juegos de Azar Practicados en Casinos y Salas de Juego*" issued by President Correa on 9 September 2011 |
| **Administrative Secretary** | Administrative Secretary appointed by the Arbitral Tribunal according to paras. 21-29 of the Terms of Reference |
| **Art(s).** | Article(s) |
| **BITs** | Bilateral Investment Treaties |
| **C-PHB** | Claimants' Post-Hearing Brief dated 22 May 2025 |
| **C-SC** | Claimants' Statement of Fees and Costs dated 12 June 2025 |
| **CAITISA Report** | Commission for the Comprehensive Audit of the Reciprocal Investment Treaties and the Investment International Arbitration System Report created by President Correa |
| **CER-Bianchi** | Expert report of Prof. Andrea Bianchi |
| **CER-Cocuzza** | Expert report of Avv. Claudio Cocuzza |
| **CER-Seelhof** | Expert report of Mr. Michael Seelhof |
| **CER-Velázquez** | Expert report of Mr. Jacinto Velázquez Herrera |
| **Cooperation Agreement** | "*Convenio de Cooperación Económica, Industrial y Técnica entre la República de Italia y la República de Ecuador*" signed by Ecuador and Italy on 27 June 1978 |
| **Counter-Memorial on Jurisdiction** | Claimants' Counter-Memorial on Jurisdiction dated 10 February 2025 |
| **COPCI** | "*Código Orgánico de la Producción, Comercio e Inversiones*" enacted by Ecuador in December 2010 |
| **CWS-Romero** | Witness Statement of Mr. Santiago Romero Barst |
| **CWS-Rodríguez** | Witness Statement of Ms. María Auxiliadora Rodríguez |
| **Decision of Jurisdiction** | Procedural Order No. 3 dated 3 June 2024 |
| **Doc. C-** | Claimants' Factual Exhibit |
| **Doc. R-** | Respondent's Factual Exhibit |
| **Doc. CLA-** | Claimants' Legal Authority |
| **Doc. RLA-** | Respondent's Legal Authority |
| **Ecuador** or **Respondent** | Republic of Ecuador |
| **Hague Convention** | 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws |
| **Hearing** | Hearing on Jurisdictional Objections held on 31 March 2025 and 1 April 2025 |
| **Hilbert Family** | Panamanian family named Hilbert, who were involved with the Romero Family in its gaming business |
| **HT** | Hearing Transcript |
| **IBA** | International Bar Association |
| **ICJ** | International Court of Justice |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **ILC** | International Law Commission |
| **IUSCT** | Iran-United States Claims Tribunal |
| **Jurisdictional Objections** | Objections raised by Respondent by which the Tribunal lacks jurisdiction *ratione personae* and *ratione voluntatis* |
| **Jurisdictional Phase** | Arbitration phase aimed at resolving the Jurisdictional Objections |

| | |
|---|---|
| **Law 46** | "*Ley de Promoción y Garantía de Inversiones*" issued by Ecuador on 19 December 1997 |
| **Memorial on Jurisdiction** | Ecuador's Memorial on Jurisdiction dated 21 October 2024 |
| **Mr. Romero** | Mr. Santiago Romero Barst, Claimant 1 in this arbitration |
| **Mr. Romero Palomo** | Mr. Marcial Romero Palomo |
| **Ms. Rodríguez** | Ms. María Auxiliadora Rodríguez, Claimant 2 in this arbitration |
| **Notice of Arbitration** | Notice of Arbitration dated 6 September 2022 |
| **P(p).** | Page(s) |
| **Para(s).** | Paragraph(s) |
| **Parties** | Claimants and Respondent |
| **Participation Agreement** | Participation agreement on casinos operationalization signed between the Romero Family and the Hilbert Family on 1 December 2004 |
| **PCA** | Permanent Court of Arbitration |
| **PHC** | Pre-Hearing Conference held on 10 March 2025 |
| **President Correa** | President Rafael Correa |
| **Protocol** | Protocol to the Treaty dated 25 October 2001 |
| ***Proyecto*** | "*Proyecto de Ley Derogatoria en Materia de Casinos y Salas de Juego*" introduced as a draft law in the Ecuadorian National Assembly to revoke the Tourism Law |
| **R-PHB** | Respondent's Post-Hearing Brief dated 22 May 2025 |
| **R-SC** | Respondent's Statement of Costs dated 12 June 2025 |
| **Regulation of Law 46** | Executive Decree No. 1525 RO/346 issued by Ecuador on 24 June 1998 |
| **Regulation of Tourism Law** | "*Reglamento General de la Ley de Turismo*" issued by Ecuador on 5 January 2004 |
| **Request for Bifurcation** | Request for Bifurcation dated 5 April 2024 |
| **Response to Request for Bifurcation** | Response to Request for Bifurcation dated 1 May 2024 |
| **Response to Notice of Arbitration** | Response to Notice of Arbitration dated 28 November 2022 |
| **Romero Siblings** | Mr. Romero and Ms. María Fernanda Romero Barst |
| **Romero Casinos** | Seven casinos owned by the Romero Family by 2011 |
| **Romero Companies** | Series of companies through which the Romero Family owned the Romero Casinos |
| **Romero Family** or **Claimants** | Mr. Romero and Ms. Rodríguez |
| **SCC** | Stockholm Chamber of Commerce |
| **Terms of Appointment** | Terms of Appointment dated 26 July 2023 |
| **Treaty** or **Italy-Ecuador BIT** | Agreement between the Government of the Italian Republic and the Government of the Republic of Ecuador on the Promotion and Protection of Investment dated 25 October 2001 |
| **Tribunal** | The Arbitral Tribunal |
| **Tourism Law** | Law No. 2002-97, Official Gazette Supplement No. 733, enacted by Ecuador on 27 December 2002 |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNCITRAL Rules** | Arbitration Rules of the United Nations Commission on International Trade Law of 1976 |
| **USD** | United States Dollars |
| **VCLT** | Vienna Convention on the Law of Treaties of 1969 |

# TABLE OF CASES

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| ***Antonio del Valle*** | *Antonio del Valle and Others v. The Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023 |
| ***Bahgat*** | *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017 |
| ***Fernando Fraiz Trapote*** | *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022 |
| ***Littop*** | *Littop Enterprises Ltd., Bridgemont Ventures Ltd., and Bordo Management Ltd. v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 |
| ***Nottebohm*** | *Liechtenstein v. Guatemala* (second phase), Judgment, 6 April 1955, ICJ Reports 1955 |
| ***Mergé*** | Italy-United States Conciliation Commission, Decision No. 55, 10 June 1955 |
| ***Mihaljević*** | *Marko Mihaljević v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023 |
| ***Okuashvili*** | *Zaza Okuashvili v. Georgia*, SCC Case No. V 2019/058, Partial Final Award on Jurisdiction and Admissibility, 31 August 2022 |
| ***Oostergetel*** | *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010 |
| ***Phoenix*** | *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 |
| ***Raimundo Santamarta*** | *Raimundo Santamarta Devis v. The Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on *Ratione Personae* Jurisdiction, 26 July 2023 |

# REPRESENTATION OF THE PARTIES

*Representing Santiago Romero Barst and María Auxiliadora Rodríguez:*

Mr. José A. Ortiz
Mr. Anthony Diblasi
Ms. Raquel A. Toral
Ms. Sabrina M. Serber
Homer Bonner Jacobs Ortiz, PA
1200 Four Seasons Tower
Miami, Florida 33131
United States of America

and

Mr. Jorge A. Mestre
Mr. Andrés Rivero
Mr. Robert J. Kuntz Jr.
Rivero Mestre LLP
2525 Ponce de Leon Blvd., Suite 1000
Coral Gables, Florida 33134
United States of America

and

Mr. Ramón Echaíz
Echaíz y Asociados
La Piazza, Samborondon
4-C, 5-C
Guayaquil, Ecuador

*Representing the Republic of Ecuador*:

Dr. Juan Carlos Larrea Valencia
Procurador General del Estado
Dra. Ana María Larrea
Directora Nacional de Asuntos Internacionales
Ms. Lily Díaz-Granados Pienknagura
Mr. Gary López Vélez
Mr. Marco Terán Rodríguez
Ms. Julia Rovello Paredes
Dra. Geaninna Nogales
Procuraduría General del Estado
Av. Amazonas N39-123 y Arízaga
170102
Quito, Ecuador

and

Mr. Richard Lorenzo
Ms. María Eugenia Ramírez
Ms. Juliana De Valdenebro Garrido
Ms. María Lucía Echandía
Ms. Marta Urra
Hogan Lovells US LLP
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
U.S.A.

and

Ms. Iris Sauvagnac
Hogan Lovells International LLP
Atlantic House
Holborn Viaduct
London EC1A 2FG
United Kingdom

# I. INTRODUCTION

1. This is an *ad hoc* investment arbitration dispute subject to the Arbitration Rules of the United Nations Commission on International Trade Law ["**UNCITRAL**"] of 1976 [the "**UNCITRAL Rules**"] and to the Agreement between the Government of the Italian Republic and the Government of the Republic of Ecuador on the Promotion and Protection of Investment dated 25 October 2001 [the "**Treaty**" or "**Italy-Ecuador BIT**"].

2. The dispute revolves around claimants' alleged investments in Ecuador's gaming industry.

## 1. THE PARTIES

### A. Claimants

3. Claimants are SANTIAGO ROMERO BARST ["**Mr. Romero**"] and MARÍA AUXILIADORA RODRÍGUEZ ["**Ms. Rodríguez**"] [together the "**Romero Family**" or "**Claimants**"], with the following contact details:

13637 Deering Bay Dr. Apt 221
Coral Gables, Florida 33158
United States of America

4. Claimants are represented in these proceedings by:

Mr. José A. Ortiz
Mr. Anthony Diblasi
Ms. Sabrina M. Serber
Ms. Raquel A. Toral
HOMER BONNER JACOB ORTIZ, PA
1200 Four Seasons Tower
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Mr. Andrés Rivero
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Mr. Ramón Echaíz
ECHAÍZ Y ASOCIADOS
La Piazza, Samborondon
4-C, 5-C Guayaquil
Ecuador
Email: rechaiz@me.com

**B. Respondent**

5. Respondent is the REPUBLIC OF ECUADOR ["**Ecuador**" or "**Respondent**"].

6. Respondent is represented in these proceedings by:

Dr. Juan Carlos Larrea Valencia (Procurador General del Estado)
Dra. Ana María Larrea (Directora Nacional de Asuntos Internacionales)
Ms. Lily Díaz-Granados Pienknagura
Mr. Gary López Vélez
Ms. Julia Rovello Paredes
Mr. Marco Terán Rodríguez
Dra. Geaninna Nogales[1]
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Mr. Richard Lorenzo
Ms. María Eugenia Ramírez
Ms. Juliana de Valdenebro Garrido
Ms. María Lucía Echandía[2]
Ms. Marta Urra[3]
HOGAN LOVELLS US LLP[4]
600 Brickell Avenue
Suite 2700

[1] R-14.
[2] R-16.
[3] R-22.
[4] On 23 August 2024, Respondent notified that Hogan Lovells would be acting as co-counsel with the Procuraduría General del Estado in representation of Ecuador – R-14.

Miami, Florida 33131
United States of America
Emails: richard.lorenzo@hoganlovells.com
maria.ramirez@hoganlovells.com
juliana.devaldenebro@hoganlovells.com
marialucia.echandia@hoganlovells.com
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Ms. Iris Sauvagnac[5]
HOGAN LOVELLS INTERNATIONAL LLP
Atlantic House
Holborn Viaduct
London EC1A 2FG
United Kingdom
Email: iris.sauvagnac@hoganlovells.com

7. Claimants and Respondent shall be jointly referred to as the "**Parties**".

## 2. THE ARBITRAL TRIBUNAL

8. On 8 November 2022, Claimants appointed Mr. Luis O'Naghten as arbitrator[6], whose contact details are:

Mr. Luis O'Naghten
O'NAGHTEN BROTHERS
Miami, FL
United States of America
Email: luis@onaghtenbrothers.com

9. On 28 November 2022, Respondent appointed Prof. Laurence Boisson de Chazournes as arbitrator[7], whose contact details are:

Prof. Laurence Boisson de Chazournes
UNIVERSITY OF GENEVA, FACULTY OF LAW
40, boulevard de Pont-d'Arve
1211 Geneva 4
Switzerland
Email: laurence.boissondechazournes@unige.ch

10. On 7 March 2023, pursuant to Art. 7(1) of the UNCITRAL Rules, Mr. O'Naghten and Prof. Boisson de Chazournes appointed Prof. Juan Fernández-Armesto as Presiding Arbitrator. His contact details are:

[5] R-16.
[6] On 6 September 2022, in the Notice of Arbitration, Claimants appointed Mr. Adolfo E. Jiménez as arbitrator. However, on 24 October 2022 Claimants agreed to appoint a different arbitrator.
[7] Response to the Notice of Arbitration, para. 5.1.

Prof. Juan Fernández-Armesto
ARMESTO DISPUTE RESOLUTION
General Pardiñas 102, 8º izda.
28006 Madrid
Spain
Email: jfa@armestodr.com

11. In the Terms of Appointment dated 26 July 2023 ["**Terms of Appointment**"], the Parties confirmed that they had no objection to the appointment of the arbitrators in respect of matters known to them at the date of signature of the Terms of Appointment[8].

## 3. ADMINISTRATIVE SERVICES

### A. Registry and Depositary

12. In accordance with the Terms of Appointment[9], the Permanent Court of Arbitration ["**PCA**"] has provided administrative services in support of the Parties and the Arbitral Tribunal, including by acting as registry and as depositary of funds.

13. The contact details of the PCA are as follows:

Mr. Julian Bordaçahar, Senior Legal Counsel[10]
Ms. Sofía Boqué, Case Manager
PERMANENT COURT OF ARBITRATION
Peace Palace
Carnegieplein 2
The Hague, 2517 KJ
The Netherlands
Tel.: +31 70 302 4263
+54 11 5167-8077
Emails: jbordacahar@pca-cpa.org
sboque@pca-cpa.org

14. The PCA and its officials are bound by the same confidentiality duties applicable to the Parties and the Arbitral Tribunal in this arbitration[11].

### B. Administrative Secretaries

15. With the consent of the Parties, and in accordance with the terms of the Terms of Appointment[12], the Arbitral Tribunal appointed Ms. Francisca Seara Cardoso as

[8] Terms of Appointment, paras. 13 and 15.
[9] Terms of Appointment, para. 17.
[10] Mr. Markel Eguiluz Parte, Assistant Legal Counsel of the PCA, acted as Registry in this case until 18 March 2025.
[11] Terms of Appointment, para. 20.
[12] Terms of Appointment, paras. 21-29.

Administrative Secretary[13] [the "**Administrative Secretary**"], whose contact details are:

Ms. Francisca Seara Cardoso
ARMESTO DISPUTE RESOLUTION
General Pardiñas, 102, 8º izda.
28006 Madrid
Spain
Email: fsc@armestodr.com

16. The Administrative Secretary works for Armesto Dispute Resolution, the same firm to which the Presiding Arbitrator belongs. The Parties received the Administrative Secretary's *curriculum vitae*[14].

## 4. THE TREATY: DISPUTE RESOLUTION CLAUSE

17. Art. 9 of the Agreement between the Government of the Italian Republic and the Government of the Republic of Ecuador on the Promotion and Protection of Investment, dated 25 October 2001 [already defined as the "**Treaty**" or the "**Italy-Ecuador BIT**"][15] regulates the dispute settlement mechanism for any dispute that arises between investors and Contracting Parties:

> "Article 9
>
> SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND CONTRACTING PARTIES
>
> 1. Any dispute which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible, previous written application.
>
> 2. In case the Investor and one entity of one of the Parties have stipulated an investment agreement, the procedure foreseen in such investment agreement shall apply.
>
> 3. In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:
>
> (a) the Contracting Party's Court or Tribunal having territorial jurisdiction;
>
> (b) an ad hoc Arbitration Tribunal, in compliance with the arbitration regulation of the UN Commission on the International

[13] The Tribunal also appointed Ms. Andrea Pastana Ochoa as Deputy Administrative Secretary, who ceased her functions in May 2025.
[14] A-2.
[15] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**. The Treaty entered into force on 1 February 2005 and was denounced by Ecuador on 16 May 2017. The Treaty was deemed to be terminated on 1 February 2020.

> Trade law (UNCITRAL); and the host Contracting Party undertakes hereby to accept the reference to said arbitration;
>
> (c) the International Centre for Settlement of Investment Disputes, for the implementation of the arbitration procedures under the Washington Convention of 18 March, 1965, on the settlement of investment disputes between States and nationals of other States, if or as soon as both the Contracting Parties have acceded to it.
>
> 4. Both Contracting Parties shall refrain for negotiating through diplomatic channels any matter relating to an arbitration or judicial procedures underway until these procedures have been concluded, and one of the Contracting Parties has failed to comply with the ruling of the Arbitration Tribunal or the Court of law within the period envisaged by the ruling, or else within the period which can be determined on the basis of the international or domestic law provisions which can be applied to the case".

18. Furthermore, Art. 5 of the protocol which shall be deemed to form an integral part of the Treaty [the "**Protocol**"][16] provides that:

> "Under Article 9(3)(b) [of the Treaty], arbitration shall be conducted in accordance with the arbitration standards of the United Nations Commission on International Trade Law (UNCITRAL), as laid down in the UN General Assembly Resolution 31/98 of December 15, 1976 as well as pursuant to the following provisions: […]
>
> (a) The Arbitration Tribunal shall be composed of three arbitrators; if they are not nationals of either Contracting Party, they shall be nationals of States having diplomatic relations with both Contracting Parties. The appointment of arbitrators, when necessary pursuant to the UNCITRAL Rules, will be made by the President of the Arbitration Institute of the Stockholm Chamber, in his capacity as Appointing Authority. The arbitration will take place in Stockholm, unless the two parties in the arbitration have agreed otherwise.
>
> (b) When delivering its decision, the Arbitration Tribunal shall in any case apply also the provisions contained in this Agreement, as well as the principles of international law recognised by the two Contracting Parties. The recognition and implementation of the arbitration decision in the territory of the Contracting Parties shall be governed by their respective national legislation, in compliance with the relevant International Conventions they are parties to".

Language of the Treaty

19. The Arbitral Tribunal notes that the Treaty was signed in "Italian, Spanish and English languages, all texts being equally authentic". Nevertheless, in this Award the Arbitral Tribunal will refer to the English text – considering that the Contracting Parties agreed that "[i]n case of any divergence, the English text shall prevail"[17] –

[16] *Id.*
[17] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, p. 9 *in fine*.

unless it considers that referring to another version of the text is helpful to highlight a particular conclusion.

# II. APPLICABLE LAW

20. The dispute arises under Art. 9(3)(b) of the Treaty.

21. Art. 5(b) of the Protocol, which is applicable whenever an investor opts for dispute resolution through *ad hoc* arbitration under the UNCITRAL Rules, and para. 44 of the Terms of Appointment mandate the Arbitral Tribunal to decide this dispute[18]:

- not only in accordance with "the provisions contained" in the Treaty,

- but also applying "principles of international law recognized" by Ecuador and Italy.

Procedural rules

22. Pursuant to Art. 9(3)(b) of the Treaty and the Parties' agreement, the applicable procedural rules in this arbitration are the UNCITRAL Rules[19].

23. The Parties further agreed in the Terms of Appointment that the Arbitral Tribunal may use, as an additional guideline, (a) the International Bar Association ["**IBA**"] Rules on the Taking of Evidence in International Arbitration adopted by the IBA Council on 17 December 2020, when considering matters of evidence, and (b) the IBA Guidelines on Party Representation in International Arbitration adopted by the IBA Council on 25 May 2013[20].

[18] Terms of Appointment, para. 44. **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, Art. 9(3)(b) of the Treaty and Art. 5(b) of the Protocol.
[19] Terms of Appointment, para. 45.
[20] Terms of Appointment, para. 46.

# III. PROCEDURAL HISTORY

## 1. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

24. Claimants commenced these proceedings by Notice of Arbitration dated 6 September 2022 [the "**Notice of Arbitration**"], in accordance with Art. 9(3)(b) of the Treaty and Art. 3 of the UNCITRAL Rules[21]. According to Art. 3(2) of the UNCITRAL Rules, these arbitration proceedings are deemed to have commenced on that day[22].

25. On 28 November 2022, Respondent submitted a response to the Notice of Arbitration ["**Response to Notice of Arbitration**"][23].

26. Between September 2022 and March 2023, the Members of the Arbitral Tribunal [or the "**Tribunal**"] were appointed as described in paras. 8-10 *supra*.

## 2. TERMS OF APPOINTMENT AND PROCEDURAL ORDER NO. 1

27. By letter dated 9 May 2023, the Tribunal circulated a draft Terms of Appointment to the Parties for their comments, *inter alia* proposing the appointment of Ms. Seara Cardoso and Ms. Pastrana as Administrative Secretaries. The Tribunal also invited the Parties to confer and try to reach agreements on several procedural issues, including submitting a joint proposal of procedural calendar[24].

28. On 22 May 2023, the Parties informed the Tribunal of their availability to hold a case management conference on 13 June 2023. Furthermore, by e-mail dated 25 May 2023, the Parties jointly requested the Tribunal for an extension of the deadline to submit their comments on the draft Terms of Appointment circulated on 9 May 2023. On 7 June 2023, the Parties requested an additional extension. The Tribunal granted both extensions[25].

29. On 9 June 2023, the Parties submitted their agreements/proposals regarding the draft Terms of Appointment, the procedural calendar and other procedural issues[26].

30. On 13 June 2023, the Tribunal held the **First Procedural Meeting** to discuss any disagreements between the Parties regarding the draft Terms of Appointment, the procedural issues, and any other topics that the Parties wished to discuss[27]. In the

[21] Notice of Arbitration. The Tribunal notes that, on 6 September 2022 Claimants submitted, with their Notice of Arbitration, Docs. C-1 to C-11. Then on 22 December 2023, Claimants submitted with their Statement of Claim Docs. C-001 to C-088. This award refers to the exhibits filed with the Notice of Arbitration as Docs. C-1 to C-11, and to the same-numbered exhibits filed with the Statement of Claim as Docs. C-001 to C-011.
[22] Notice of Arbitration; Response to the Notice of Arbitration, para. 1.1.
[23] R-1.
[24] A-2.
[25] A-4; A-5.
[26] R-3.
[27] A-6.

First Procedural Meeting, the Parties agreed to the appointment of the Administrative Secretaries[28].

31. Following the First Procedural Meeting, the Tribunal circulated a revised draft Terms of Appointment, which incorporated the Parties' comments during the First Procedural Meeting, and a draft Procedural Order No. 1 and invited the Parties to present their comments[29].

32. By e-mails dated 23 and 30 June 2023, the Parties requested an extension to submit their comments on the revised draft Terms of Appointment and draft Procedural Order No. 1. The Tribunal granted both requests[30].

33. On 5 July 2023, the Parties submitted their comments to the draft Procedural Order No. 1 and informed that they had no further comments to the Terms of Appointment[31].

34. On 26 July 2023, the Tribunal circulated the Terms of Appointment which were deemed to have been signed by the Parties and the Members of the Tribunal on that date. The Terms of Appointment signed by the Parties and the Tribunal, *inter alia*:

- Determined that the language of the proceedings should be English and Spanish, subject to certain provisions – in particular, that the Tribunal's award will be issued in English[32];

- Fixed Paris, France, as the place of arbitration[33];

- Designated the PCA as Registry for the proceedings[34]; and

- Appointed Ms. Seara Cardoso as Administrative Secretary and Ms. Pastrana as Deputy Administrative Secretary[35].

35. That same day, the Tribunal further circulated a revised draft Procedural Order No. 1 incorporating the Parties' comments[36].

36. On 2 August 2023, the Parties confirmed that they had no additional comments to the revised draft[37] and, on the following day, the Tribunal issued **Procedural Order No. 1**, providing a Procedural Timetable[38] (*i.e.*, Annex I to Procedural Order No. 1) and the rules for the conduct of the arbitration.

[28] First Procedural Meeting recording, min. 6:00-6:22.
[29] A-7.
[30] A-9; A-11.
[31] Joint communication by the Parties dated 5 July 2023.
[32] Terms of Appointment, paras. 53, 63.
[33] Terms of Appointment, para. 65.
[34] Terms of Appointment, paras. 17-20.
[35] Terms of Appointment, paras. 21-22.
[36] A-12.
[37] C-7; R-5.
[38] The Procedural Timetable has been amended four times.

## 3. THIRD-PARTY FUNDING

37. On 15 June 2023, Respondent requested the Tribunal to order Claimants to disclose if they had third-party funding to bear the costs of the arbitration, and if so, to disclose its identity[39]. On 19 June 2023, the Tribunal granted Claimants the opportunity to react[40].

38. On 30 June 2023, Claimants informed Respondent and the Tribunal that they were negotiating with a funder and, if an agreement was reached, Claimants would disclose the funder's identity for conflict purposes only. Claimants further requested that the funder's identity be kept confidential[41].

39. On 21 July 2023, Claimants informed Respondent that they had reached a financing agreement with a funder but expressed their intention to negotiate the terms of confidentiality of the funder's identity, prior to disclosing such information[42]. Three days later, in response to this concern, Respondent agreed to maintain the funder's name confidential, but reserved the right to request additional information to safeguard the transparency and integrity of the process[43].

40. On 1 November 2023, Respondent requested the Tribunal to order Claimants to[44]:

- Disclose the identity of the funder;

- Provide a copy of the financing agreement and disclose whether it would cover the costs of the proceedings in the event of an unfavorable outcome for Claimants in the present arbitration; and

- Keep the Tribunal and Respondent informed about the status of the financing agreement on an ongoing basis.

41. On 15 November 2023, Claimants agreed to reveal the name of the funder but objected to the other requests[45]. On 8 December 2023, Respondent reiterated its requests of 1 November 2023[46]. On 15 January 2024, Claimants called again for the dismissal of Respondent's request for disclosure of the financing agreement[47].

42. On 28 February 2024, the Tribunal issued **Procedural Order No. 2** concerning the disclosure of third-party funding and decided to, *inter alia*, order Claimants to reveal the identity of the funder, to disclose the wording of the confidentiality clause in the agreement and to disclose whether the funder would be responsible for any potential adverse costs order[48].

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[39] R-4.
[40] A-8.
[41] C-5.
[42] C-13, Annex 6.
[43] C-13, Annex 6.
[44] R-6.
[45] C-10.
[46] R-8.
[47] C-13.
[48] A-19.

43. On 6 March 2024, Claimants submitted the information concerning the third-party funding, in accordance with Procedural Order No. 2[49].

## 4. CLAIMANTS' STATEMENT OF CLAIM

44. On 22 December 2023, Claimants submitted their Statement of Claim[50] together with:

- Factual exhibits C-1 through C-81;
- Legal exhibits CLA-1 through CLA-127;
- The witness statements of Mr. Romero ["**CWS-Romero**"][51] and Ms. Rodríguez ["**CWS-Rodríguez**"][52];
- The expert reports of Mr. Jacinto Velázquez Herrera ["**CER-Velázquez**"][53] and Mr. Michael Seelhof ["**CER-Seelhof**"][54].

## 5. BIFURCATION OF THE PROCEEDINGS

45. On 16 February 2024, Ecuador informed of its intention to request bifurcation of the jurisdictional questions from the merits and damages[55].

46. Therefore, on 5 April 2024, Ecuador submitted a request for bifurcation of seven objections to jurisdiction [the "**Request for Bifurcation**"][56], arguing that the Tribunal:

- lacks jurisdiction *ratione personae* and *ratione voluntatis*, because Claimants are Ecuadorians, and Ecuador has not consented to arbitrate disputes with Ecuadorian investors;
- lacks jurisdiction to decide on damages owed to non-claimant third parties;
- lacks jurisdiction *ratione materiae* because Claimants have not shown ownership or control over the investments,
- lacks jurisdiction *ratione materiae* because Claimants have not demonstrated that they were in control of the investments at the time of the alleged violations;
- lacks jurisdiction *ratione materiae* because there is no *prima facie* claim of denial of justice; and

[49] C-14.
[50] C-12.
[51] CWS-1.
[52] CWS-2.
[53] CER-1.
[54] CER-2.
[55] R-9.
[56] R-10.

- lacks jurisdiction to determine the existence of an alleged expropriation.

47. Together with the Request for Bifurcation, Respondent submitted:

- Factual exhibits R-1 through R-10; and

- Legal exhibits RLA-1 through RLA-31.

48. On 1 May 2024, Claimants presented their response to the Request for Bifurcation ["**Response to Request for Bifurcation**"][57], requesting that the Tribunal dismiss Respondent's application to bifurcate the proceedings, together with:

- Factual exhibit C-82; and

- Legal exhibits CLA-128 through CLA-160.

49. Pursuant to paras. 15 and 16 of Procedural Order No. 1, the Tribunal found that it was sufficiently briefed on the issue of bifurcation and, therefore, there was no need for further submissions from the Parties[58].

50. On 3 June 2024, the Tribunal issued **Procedural Order No. 3** deciding to bifurcate the proceedings in respect to two of the objections raised ["**Decision on Bifurcation**"], notably that the Tribunal lacks jurisdiction *ratione personae* and *ratione voluntatis* [the "**Jurisdictional Objections**"][59]. The arbitration then proceeded to the "**Jurisdictional Phase**".

## 6. JURISDICTIONAL PHASE

51. On 12 June 2024, Respondent requested to incorporate a document production phase before the submission of its memorial on objections to jurisdiction[60], which Claimants objected to on 19 June 2024[61].

52. On 26 June 2024, the Tribunal dismissed Respondent's request for a document production phase and decided that, if following Claimants' counter-memorial on objections to jurisdiction, Respondent still considered it necessary to request certain documents, the Tribunal would give Respondent the opportunity to file a request for specific documents – rather than categories of documents – pursuant to the requirements for document production established in Procedural Order No. 1[62].

### 6.1 WRITTEN SUBMISSIONS

53. On 21 October 2024, Respondent submitted its Memorial on Objections to Jurisdiction ["**Memorial on Jurisdiction**"][63], together with:

[57] C-15.
[58] A-21.
[59] A-22.
[60] R-11.
[61] C-17.
[62] A-25.
[63] Memorial on Jurisdiction.

- Factual exhibits R-11 through R-26;

- Legal exhibits RLA-32 through RLA-95; and

- The expert report of Dr. Yas Banifatemi ["**RER-Banifatemi**"][64].

54. On 10 February 2025, Claimants submitted their Counter-Memorial on Objections to Jurisdiction ["**Counter-Memorial on Jurisdiction**"][65], together with:

- Factual exhibits C-83 through C-88;

- Legal exhibits CLA-161 through CLA-187; and

- The expert reports of Prof. Andrea Bianchi ["**CER-Bianchi**"][66] and of Avv. Claudio Cocuzza ["**CER-Cocuzza**"][67].

### 6.2 HEARING ON JURISDICTION

Notification of witnesses and experts for cross-examination

55. On 24 February 2025, Respondent informed that it intended to call the following witnesses and experts of Claimants for cross-examination at the Hearing on Jurisdiction ["**Hearing**"][68]:

- Mr. Santiago Romero Barst;

- Ms. María Auxiliadora Rodríguez;

- Prof. Andrea Bianchi; and

- Avv. Claudio Cocuzza.

56. Claimants indicated that they did not intend to call Respondent's expert witness (Dr. Yas Banifatemi). On 28 February 2025, Respondent informed that it intended to present Dr. Banifatemi to provide a summary of her report and expert conclusions[69]. Claimants, however, objected to Respondent calling its own expert to the Hearing[70].

57. On 4 March 2025, after carefully weighing the Parties' positions, the Tribunal decided to call Dr. Banifatemi to the Hearing, pursuant to para. 152 of Procedural Order No. 1 and Art. 15(1) of the UNCITRAL Rules[71].

[64] RER-1.
[65] Counter-Memorial on Jurisdiction.
[66] CER-3.
[67] CER-4.
[68] R-18.
[69] R-19.
[70] C-20.
[71] A-32.

Pre-Hearing Conference

58. On 5 March 2025, the Tribunal circulated a draft Procedural Order No. 4 on the organization of the Hearing and invited the Parties to present their comments[72], which they did on 7 March 2025[73].

59. Subsequently, the Tribunal circulated an agenda for the pre-Hearing conference ["**PHC**"] which was held virtually on 10 March 2025[74].

60. Following the PHC, the Tribunal sent a revised draft Procedural Order No. 4 and invited the Parties to submit any additional comments[75]. On 13 March 2025, the Parties confirmed that they had no further substantive comments but left the discussions regarding the transcription and interpretation services open[76].

61. On 27 March 2025, following the Parties' agreements as to the transcription and interpretation services, the Tribunal issued **Procedural Order No. 4**.

Hearing on Jurisdiction

62. The Hearing took place virtually from 31 March to 1 April 2025.

63. The following witnesses and experts testified at the Hearing:

*Claimants' witnesses*

| Name | Position |
|---|---|
| Mr. Santiago Romero Barst | Claimant 1 and fact witness |
| Ms. María Auxiliadora Rodríguez | Claimant 2 and fact witness |

*Respondent's legal expert*

| Name | Company |
|---|---|
| Dr. Yas Banifatemi | Gaillard Banifatemi Shelbaya Disputes |

[72] A-33.
[73] Joint communication of the Parties dated 7 March 2025.
[74] A-34.
[75] A-35.
[76] C-22; R-21.

*Claimants' legal experts*

| Name | Company |
|---|---|
| Prof. Andrea Bianchi | Graduate Institute of International and Development Studies in Geneva |
| Avv. Claudio Cocuzza | Cocuzza Law Firm |

64. The Hearing was recorded and transcribed, and both the recordings and the transcripts ["**HT**"] were made available to the Parties.

### 6.3 POST-HEARING ISSUES

65. On 3 April 2025, the Tribunal circulated a draft of Procedural Order No. 5 on post-Hearing issues and invited the Parties' comments. The Tribunal also invited the Parties to submit their positions on the Tribunal's proposal of a possible submission to the Italian Republic asking whether Italy has any position regarding the interpretation of the Treaty in case of Home-Host States dual nationals, and whether the principle of dominant and effective nationality is relevant under the Treaty[77].

66. On 8 April 2025, the Parties informed that they had decided not to seek an interpretation from the Italian authorities regarding the Ecuador-Italy BIT, due to the potential delays this could cause in the arbitration[78].

67. On 11 April 2025, the Tribunal issued **Procedural Order No. 5**, with the Parties' agreements concerning the transcripts, post-hearing briefs and costs submissions.

Post-Hearing briefs

68. On 22 May 2025, Claimants and Respondent filed their post-Hearing briefs simultaneously ["**C-PHB**" and "**R-PHB**", respectively].

Statements of Costs

69. On 12 June 2025, the Parties filed their statements of costs.

## 7. EVIDENCE

70. The Parties have marshalled the following factual and legal authorities into the record:

[77] A-38.
[78] R-23; A-39.

| Party | Factual Exhibits | Legal Exhibits |
|---|---|---|
| Claimants | C-1 through C-11 and C-001 through C-088[79] | CLA-1 through CLA-187 |
| Respondent | R-1 through R-26 | RLA-1 through RLA-95 |

71. The Tribunal has reviewed and examined all the evidence marshalled by the Parties and discussed it at length throughout this Award.

[79] See footnote 21 *supra*.

# IV. REQUEST FOR RELIEF

## 1. RESPONDENT'S REQUEST FOR RELIEF

72. Ecuador requests that the Tribunal issue an award[80]:

> "a. Declaring that it lacks jurisdiction *ratione personae* over Claimants;
>
> b. Declaring that it lacks jurisdiction *ratione voluntatis* over the present dispute;
>
> c. Dismissing all of Claimants' claims; and
>
> d. Ordering that Claimants bear all the costs relating to the present arbitration proceedings, including all of Ecuador's attorneys' fees, expert costs and expenses".

## 2. CLAIMANTS' REQUEST FOR RELIEF

73. Claimants request that the Tribunal issue an award containing the following relief[81]:

> "a. A declaration that the dispute is within the jurisdiction and competence of the Arbitral Tribunal;
>
> b. A declaration summarily dismissing Respondent's jurisdictional challenges contained in its Memorial on Jurisdiction;
>
> c. An order directing that the dispute will immediately proceed to the merits phase;
>
> d. An award directing Respondent to pay all of Claimants' costs, with interest, relating to the present bifurcated and arbitration proceedings, including all of their attorneys' fees and expenses; and
>
> e. An award granting any further relief the Arbitral Tribunal deems just and proper under the circumstances".

[80] Memorial on Jurisdiction, para. 130; R-PHB, p. 20.
[81] Counter-Memorial on Jurisdiction, para. 87; C-PHB, p. 20.

# V. FACTUAL BACKGROUND

74. This arbitration was initiated by Claimants, two Ecuadorian-Italian dual nationals, against Ecuador, for alleged breaches of the Italy-Ecuador BIT, concerning Claimants' alleged investments in Ecuador's gaming industry.

75. Claimants argue that Ecuador took a series of measures that led to the elimination of their investments, breaching its obligations under the Treaty, including, among others, Ecuador's obligations[82]:

- to ensure just and fair treatment to the Romero Family's investments; and

- not to subject the Romero Family's investments to nationalization, expropriation, requisitioning, or any *de jure* or *de facto* measures having an equivalent effect.

76. Ecuador, in turn, rejects each of Claimants' allegations and further argues that the Tribunal lacks jurisdiction to hear the dispute.

77. This Jurisdictional Phase only addresses two of the Jurisdictional Objections raised by Ecuador, as determined in the Decision on Bifurcation. Therefore, the following summary is meant to give a general overview of the background relevant to the adjudication of the bifurcated Objections.

78. The Tribunal will first describe the investment outlook in Ecuador (**1.**) and explain who Claimants are (**2.**). Thereafter, the Tribunal will summarize Ecuador's gaming regulation (**3.**) and Claimants' alleged investments in Ecuador (**4.**). Finally, it will refer to the abolishment of gaming and the measures adopted by Ecuador that allegedly breached Claimants' rights under the Treaty (**5.**).

## 1. INVESTMENT OUTLOOK IN ECUADOR

79. During the 1990s, Ecuador entered into several bilateral investment treaties ["**BITs**"] to promote foreign investment[83]. Additionally, Ecuador issued various laws and regulations to attract, promote and protect investments in the country.

80. In this context, on 19 December 1997 Ecuador issued Law 46 titled "*Ley de Promoción y Garantía de Inversiones*" ["**Law 46**"] which established the rules for investors to develop their investments[84]. Arts. 12 and 18 of Law 46 differentiated between foreign and national investments:

- Art. 12 of Law 46 defined "foreign investment" as "[c]*ualquier clase de transferencia de capital al Ecuador, proveniente del exterior, efectuada por*

[82] Statement of Claim, para. 9.
[83] **Docs. C-082/R-11**, Informe Ejecutivo, *Auditoría integral ciudadana de los tratados de protección recíproca de inversiones y del sistema de arbitraje en materia de inversiones en Ecuador*.
[84] **Doc. RLA-32**, Law 46.

*personas naturales o jurídicas extranjeras, destinada a la producción de bienes y servicios*";

- Art. 18 of Law 46 defined "national investment" as "*[l]a [inversión] realizada mediante aportes de capital, bienes físicos tangibles y contribuciones intangibles, en los términos establecidos en el artículo 14 de la presente Ley, que realicen personas naturales o jurídicas ecuatorianas*".

81. Six months after the promulgation of Law 46, Ecuador issued Executive Decree No. 1525 RO/346, which regulates Law 46 ["**Regulation of Law 46**"][85]. Art. 29 expressly states that Ecuador consented to arbitrate disputes with foreign investors:

> "*En el caso de controversias que se susciten en el desarrollo de inversiones, efectuadas por inversionistas extranjeros y que estuvieren enmarcadas en las disposiciones de los convenios de protección a las inversiones suscritos por el Ecuador con terceros países o en el marco de su participación en organismos internacionales, así como en razón de la aplicación de la Ley de Promoción y Garantía de las Inversiones y del presente Reglamento, dichos inversionistas, aplicando lo dispuesto en el artículo 32 de la Ley, podrán someter las controversias a los procedimientos específicamente acordados o estipulados en los Convenios Bilaterales o Multilaterales firmados y ratificados por el país*" [Emphasis added].

82. It is against this background that on 25 October 2001 Ecuador and Italy executed the Treaty[86], which had been preceded by a "*Convenio de Cooperación Económica, Industrial y Técnica entre la República de Italia y la República de Ecuador*" [the "**Cooperation Agreement**"], signed more than 20 years before, under which both States had committed, *inter alia*, to[87]:

> "[…] *suscribir, lo antes posible, teniendo en cuenta la legislación vigente en cada país, un acuerdo que proteja las inversiones de entidades, empresas y ciudadanos de un Estado en el territorio del otro*" [Emphasis added].

83. Law 46 remained in force until the end of 2010, when Ecuador enacted the "*Código Orgánico de la Producción, Comercio e Inversiones*" ["**COPCI**"], replacing Law 46, to encourage, promote, and regulate investments in Ecuador. The COPCI redefined foreign and national investments as follows[88]:

- Art. 13(c) defined "foreign investment" as "[l]*a inversión que es de propiedad o que se encuentra controlada por personas naturales o jurídicas extranjeras domiciliadas en el extranjero, o que implique capital que no se hubiere generado en el Ecuador*";

- Art. 13(d) defined "national investment" as "[l]*a inversión que es de propiedad o que se encuentra controlada por personas naturales o jurídicas*

[85] **Doc. RLA-33**, Regulation of Law 46.
[86] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**.
[87] **Doc. RLA-34**, Cooperation Agreement, Art. VI.
[88] **Doc. RLA-37**, COPCI, Art. 13(c) and (d).

> *ecuatorianas, o por extranjeros residentes en el Ecuador, salvo que demuestren que se trate de capital no generado en* el Ecuador".

84. The COPCI expressly provides that Ecuadorian investors who are dual nationals will be considered as "national" investors[89]:

> "*Las personas naturales ecuatorianas que gocen de doble nacionalidad, o los extranjeros residentes en el país para los efectos de este Código se considerarán como inversionistas nacionales*".

85. The COPCI remains in force today.

## 2. ***DRAMATIS PERSONAE***

86. Claimants are Santiago Romero Barst ["**Mr. Romero**"] and María Auxiliadora Rodríguez ["**Ms. Rodríguez**"] [already referred to as the "**Romero Family**"].

87. Mr. Romero was born on 30 October 1949 in Guayaquil, Ecuador, to an Argentinian father and a Chilean mother, and due to his place of birth he acquired Ecuadorian nationality. Similarly, Ms. Rodríguez was born on 10 March 1955 in Guayaquil, Ecuador and, thus, she is also Ecuadorian by birth[90]. As Ecuadorian nationals, Claimants have periodically renewed their Ecuadorian identification cards and passports[91].

88. Mr. Romero and Ms. Rodríguez married on 19 June 1982 in Salinas, Ecuador[92]. They settled in Ecuador, where they raised their family and had three daughters[93]. Claimants still reside in Ecuador[94].

89. Ms. Rodríguez' Italian nationality was recognized on 20 May 2002[95] (*i.e.*, seven months after the signature of the Treaty). Ms. Rodríguez acquired her Italian nationality based on *jure sanguinis*, through her maternal great-grandparents, who were born in Italy (both Ms. Rodríguez parents and her grandparents were born in Ecuador)[96]. This recognition of nationality operates retroactively, as if she had been Italian from the moment of her birth[97], following the "recognition of citizenship perfected with the transmission of [her] birth certificate". She was registered as an Italian "residing abroad" on 14 April 2003[98] and obtained her first Italian passport on 10 June 2003, which she has renewed twice[99]. Ms. Rodríguez currently holds a passport valid until 20 October 2033[100].

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[89] **Doc. RLA-37**, COPCI, Art. 13(e).
[90] **Doc. R-1**; **CWS-Romero**, para. 1; **CWS-Rodríguez**, para. 1.
[91] **Doc. R-8**; **Doc. R-1**.
[92] **Doc. R-2**; **CWS-Romero**, para. 1; **CWS-Rodríguez**, para. 1.
[93] **Doc. R-22**; **Doc. R-3**.
[94] **CWS-Romero**, para. 5; **CWS-Rodríguez**, para. 3.
[95] **Doc. C-084**.
[96] HT, Day 2, p. 122, ll. 1-21 (Ms. Rodríguez).
[97] **Doc. C-084**; **CER-Cocuzza**, paras. 9, 27-29; HT, Day 1, p. 189, ll. 9-24 (Avv. Cocuzza).
[98] **Doc. C-084**.
[99] **Doc. C-085**; **Doc. C-86**; **Doc. C-087**.
[100] **Doc. C-087**.

90. Five years later, Mr. Romero applied for Italian nationality. Mr. Romero was granted the Italian citizenship on 6 September 2007, based on *jure matrimonii*, by decree of the Italian embassy in Quito[101]. Mr. Romero obtained his first Italian passport on 19 December 2007[102]. His current Italian passport is valid until 13 February 2029[103].

91. Furthermore, Mr. Romero is also a citizen of Spain[104].

### 3. ECUADOR'S GAMING REGULATION

92. For nearly 80 years, gaming was legal in Ecuador. The first law that regulated gaming in the country was the "Law for the Promotion of Tourism in Ecuador", published on 23 December 1930[105]. In the same vein, on 27 December 2002 Ecuador enacted Law No. 2002-97 [the "**Tourism Law**"] which recognized "casinos, arcades (bingo-machines), racetracks, and permanent amusement parks" as legal tourism activities[106].

93. On 5 January 2004, Ecuador published the "*Reglamento General a la Ley de Turismo*" ["**Regulation of Tourism Law**"], which also established that casinos were legal tourism activities[107].

### 4. CLAIMANTS' ALLEGED INVESTMENTS IN ECUADOR'S GAMING INDUSTRY

94. Mr. Marcial Romero Palomo ["**Mr. Romero Palomo**"], Mr. Romero's father, was an Argentinian citizen who in the 1920s entered the gaming industry in Argentina and Chile[108].

95. In late 1948, Mr. Romero Palomo relocated to Ecuador. In the following year, he opened his first casino, Casino del Hotel Tívoli, and subsequently established Casino Victoria. From that point onwards, he opened and operated several other casinos in Ecuador[109].

96. In 1976, Mr. Romero began working in his family's business as manager of the casino tables[110].

97. By 1998, the Romero Family had become one of the largest casino operators in Ecuador. To manage their business, Mr. Romero Palomo and his wife created seven entities[111].

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[101] **Doc. C-088**; **CER-Cocuzza**, paras. 11, 34-36.
[102] **Doc. C-001**.
[103] **Doc. C-083**.
[104] **CWS-Romero**, footnote 20; **Doc. R-22**, pp. 1-5 PDF.
[105] **CER-Velázquez**, para. 17.
[106] **Doc. C-017**, Tourism Law, Art. 5(f).
[107] **Doc. C-029**, Regulation of Tourism Law, Art. 43(f).
[108] **CWS-Romero**, para. 6; **Doc. C-006**, p. 8.
[109] **CWS-Romero**, paras. 9-19; **Doc. C-006**, pp. 8,10.
[110] **CWS-Romero**, para. 15.
[111] **CWS-Romero**, para. 19, referring to the following entities: Casinomar, S.A., Inversiones Rombar, S.A., Romeruno, S.A., Orotur, S.A., Hotel Casino Salinas, S.A., Turho, S.A. and Unicasino, S.A.

98. Before his passing in 2001, Mr. Romero Palomo transferred all his shares in those entities to his wife[112], who then transferred her interests in Inversiones Rombar to her two children, Mr. Romero and his sister, Ms. María Fernanda Romero Barst [the "**Romero Siblings**"] in 2004, who by virtue of that transfer, took ownership and control of all the operations[113].

99. On 1 December 2004, the Romero Siblings signed a participation agreement to run the operations of the casinos [the "**Participation Agreement**"] with a Panamanian family named Hilbert [the "**Hilbert Family**"][114], which gave the Hilbert Family full operational control of the casinos, allowing them to receive the revenues generated. In exchange, the Romero Family would receive monthly payments. The Participation Agreement had a renewable term of 20 years.

100. In 2006, Ms. Rodríguez (Mr. Romero's wife) established Bacarrat Plus Baplusa, S.A. to hold her interests in the Romero Family's gaming business[115].

101. By 2011, the Romero Family owned seven casinos [the "**Romero Casinos**"][116], through a series of companies [the "**Romero Companies**"][117].

Registration before the *Superintendencia*

102. Under Ecuadorian law, investments in corporations must be registered before the *Superintendencia de Compañias, Valores y Seguros* and in the registration the owner must declare whether the investments are "national" ("*nacional*"), "foreign" ("*extranjera*") or "foreign with residence in Ecuador" ("*extranjera residente*").

103. Mr. Romero Palomo (Claimant Mr. Romero's father and an Argentinian citizen) registered his investment in the Romero Companies as "foreign resident" in Ecuador ("*extranjera residente*")[118]. His son, Mr. Romero and his wife Ms. Rodríguez (Claimants in these proceedings) acted differently: they decided to register their investments in the Romero Companies as "national investments"[119].

## 5. ABOLISHMENT OF GAMING IN ECUADOR

104. For decades, gaming was considered a legitimate activity in Ecuador.

105. However, the gaming industry in Ecuador took a turn when President Rafael Correa ["**President Correa**"] assumed office in 2007. President Correa opined that gambling lowered the society's standard of living and, therefore, Ecuador should be free of gambling[120].

[112] **CWS-Romero**, para. 20; **Doc. C-002**, line 3.
[113] **CWS-Romero**, para. 20; **Doc. C-002**, lines 13-15.
[114] **Doc. C-003**; **CWS-Romero**, paras. 23-25.
[115] **CWS-Romero**, para. 21.
[116] **CWS-Romero**, para. 35.
[117] **CWS-Romero**, para. 34.
[118] **Doc. R-9**.
[119] **Doc. R-9**; **Doc. R-17**.
[120] **Doc. C-030**.

106. In 2011, President Correa intensified his efforts to limit gambling. On 17 January 2011, he requested the Constitutional Court to approve a popular referendum ("*Consulta Popular*") to abolish gaming in Ecuador as follows[121]:

> "*Con la finalidad de evitar que los juegos de azar con fines de lucro se conviertan en un problema social, especialmente en los segmentos más vulnerables de la población, ¿Está usted de acuerdo en prohibir en su respectiva jurisdicción cantonal los negocios dedicados a juegos de azar, tales como casinos y salas de juego*?".

107. On 15 February 2011, the Constitutional Court issued an opinion requiring that the question be revised to exclude emotionally charged expressions. As a result, the question was reformulated as follows[122]:

> "*¿Está usted de acuerdo que en el país se prohíban los negocios dedicados a juegos de azar, tales como casinos y salas de juegos*?".

108. On 7 May 2011, Ecuador voted in favor of abolishing gaming[123].

109. Accordingly, four months later, on 9 September 2011, President Correa issued an executive order titled "*Reglamento del Régimen de Transición de los Juegos de Azar Practicados en Casinos y Salas de Juego*" [the "**2011 Executive Order**"], ordering all gaming establishments to cease operations immediately[124].

110. For casinos in luxury and first-class hotels, however, the 2011 Executive Order allowed for a six-month transitory period to cease operations, close their establishments and fulfill their obligations[125]:

> "*Para el caso de casinos ubicados dentro de los hoteles de lujo y primera categoría, o en locales que tengan acceso directo o desde los hoteles formando una sola unidad turística, así como para el caso de las salas de juego (bingo -mecánicos) que se dediquen exclusivamente al juego mutual de bingo, que cuenten con registros vigentes y autorizados por el Ministerio de Turismo para su funcionamiento, tendrán el plazo máximo improrrogable de hasta seis meses, contados a partir de la publicación del presente decreto ejecutivo en el Registro Oficial, para el cese de sus actividades de negocio o comerciales y consiguiente cierre de sus establecimientos*" [Emphasis added].

111. Shortly after President Correa issued the 2011 Executive Order, an assemblywoman introduced a draft law in the National Assembly to revoke the Tourism Law (the "*Proyecto de Ley Derogatoria en Materia de Casinos y Salas de Juego*" [the "***Proyecto***"])[126]. The *Proyecto* was motivated by a concern that[127]:

[121] **Doc. C-108**, p. 17; **Doc. C-027**, p. 6.
[122] **Doc. C-027**, pp. 20 and 28.
[123] **CWS-Romero**, para. 44; **Doc. C-012**.
[124] **Doc. C-020**, Art. 1.
[125] **Doc. C-020**, Art. 2.
[126] **Doc. C-021**.
[127] **Doc. C-031**, min. 1:46- 2:38.

> "*La Ley de Turismo vigente jerárquicamente superior al referido decreto sigue contemplando la posibilidad de establecer este tipo de negocios en el Ecuador, lo cual causaría serias dificultades en el momento de aplicar las normas emitidas por el ejecutivo por cuanto algún empresario o algún trabajador que se sintiera perjudicado por la clausura obligatoria podría eventualmente presentar acciones constitucionales para que se aplique la ley por sobre el decreto vulnerando así la decisión del soberano con tecnicismo jurídicos*" [Emphasis added].

112. The *Proyecto* was initially referred to the Permanent Commission, which confirmed the National Assembly's authority to revoke laws, including the Tourism Law[128]. The *Proyecto* was then subject to a floor debate in the National Assembly, but ultimately was not approved. This means that the Tourism Law remained in force, coexisting with the 2011 Executive Order.

113. By the time the six-month period elapsed, the Romero Family had shut down all its casinos and paid severance to all its employees, as required by the 2011 Executive Order[129].

[128] **Doc. C-022**.
[129] **CWS-Romero**, paras. 50-52.

# VI. SUMMARY OF THE PARTIES' POSITIONS

114. Ecuador argues that the Tribunal lacks jurisdiction *ratione personae* and *ratione voluntatis*. They contend that Claimants, as Ecuadorian nationals whose dominant and effective nationality is Ecuadorian, are precluded from bringing a claim against their own State. Moreover, they assert that Claimants' reliance of their Italian nationality in order to resort to arbitration under the Treaty constitutes an abuse of rights (**VI.1**).

115. Claimants, in turn, submit that they are also Italian and the Treaty does not prohibit Home-Host States dual nationals from bringing claims against the host State. According to Claimants, accepting Ecuador's Jurisdictional Objections would require the Tribunal to rewrite the Treaty (**VI.2**).

116. The Tribunal will first summarize the Parties' positions and then adopt its decision on the Jurisdictional Objections (**VII**).

## VI.1. RESPONDENT'S POSITION

117. Ecuador submits that Claimants are prevented from invoking the protection of the Treaty because:

- They are Ecuadorian nationals and, thus, cannot sue Ecuador regarding alleged Ecuadorian investments under the Treaty (**1.**),

- Under the applicable principles of international law, Home-Host States dual nationals cannot sue the State of their dominant and effective nationality (**2.**), and

- Claimants' reliance on their Italian nationality to establish this Tribunal's jurisdiction amounts to an abuse of rights (**23.**).

118. Finally, Ecuador contends that decisions issued by the French courts with respect to dual nationals have no bearing on the Tribunal's jurisdiction (**4.**).

### 1. THE TREATY EXCLUDES HOME-HOST STATES DUAL NATIONALS FROM SEEKING PROTECTION

119. Ecuador argues that Claimants are Ecuadorian nationals and, therefore, are not entitled to bring a claim against Ecuador under the Treaty. Respondent submits that the Treaty should be interpreted in accordance with the principles of interpretation set out in the 1969 Vienna Convention on the Law of the Treaties ["**VCLT**"][130].

[130] Memorial on Jurisdiction, para. 73. The Tribunal notes that in the Memorial on Jurisdiction, Respondent argued that Claimants have failed to prove that they are Italian nationals. However, in Respondent's words, after Claimants "finally present[ed] passports from Italy that are no longer expired or annulled" (HT, Day

Ordinary meaning

120. Based on the ordinary meaning of the Treaty's provisions, Ecuadorian nationals cannot sue Ecuador regarding alleged investments made in Ecuador. According to Ecuador, this affects both the Tribunal's jurisdiction *ratione voluntatis* and *ratione personae*.

121. First, Ecuador argues that a State's consent to arbitrate is essential for a tribunal's jurisdiction. Consent cannot be presumed, it must be "certain" and expressed "in a voluntary and indisputable manner"[131]. In the present case, such consent is absent: it is clear from Art. 9 of the Treaty that Ecuador and Italy did not consent to arbitrate disputes involving their own nationals, but only consented to arbitrate disputes between *one* of the Contracting Parties and the investors of the *other* Contracting Party[132].

122. Second, the definition of protected investor under Art. 1(2) of the Treaty requires that 'investors'[133]:

- be a natural or legal person of one Contracting Party, and
- have made an investment in the territory of the other Contracting Party.

123. The term 'investing' requires that investors make a contribution of money or assets to the host State, not merely that they own or hold shares. Furthermore, this term requires that the investor qualifies as such at the time of making the investment[134].

124. In view of the above, Ecuador argues that Claimants are not protected investors under the Treaty, as[135]:

- Claimants are Ecuadorian nationals;
- Claimants have not made any investment in Ecuador, because they have made no contribution of assets:

1, p. 17, 23.25), Respondent abandoned this argument (*see*, for example, R-PHB, p. 7: "Here, there is no dispute that Claimants hold both Italian and Ecuadorian nationality"). This argument is therefore not addressed by the Tribunal in this award.

[131] Memorial on Jurisdiction, paras. 100-103, citing, *inter alia*, to **Doc. RLA-76**, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, (2009), para. 125; **Doc. RLA-77**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 175; **Doc. RLA-78**, *The Renco Group, Inc. v. Republic of Peru* [I], ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 71; **Doc. RLA-79**, *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment, ICJ Reports 2008, para. 62; **Doc. RLA-80**, *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, para. 21.

[132] Memorial on Jurisdiction, paras. 74, 104; **RER-Banifatemi**, para. 60.

[133] Memorial on Jurisdiction, paras. 75-77.

[134] Memorial on Jurisdiction, paras. 75-77.

[135] Memorial on Jurisdiction, paras. 86, 105-107.

- Mr. Romero inherited the Romero Casinos in 2004; since then, he has only acquired six patents in the United States for the benefit of a United States company;

- Ms. Rodríguez's alleged investments are limited to her shares in an Ecuadorian company (Bacarrat Plus Baplusa, S.A.) created with the sole purpose of holding her interest in the Romero Casinos; and

- Mr. Romero was not an Italian national at the time of his alleged investment (he only became a citizen of Italy in 2007).

Object and purpose

125. Ecuador contends that the object and purpose of the Treaty leads to the same conclusion. As stated in its preamble, the Treaty was intended to encourage and provide mutual protection for capital investments by investors of one Contracting Party in the territory of the other Contracting Party, aiming to foster the prosperity of both Contracting Parties[136].

Conduct of the State

126. After the Treaty was executed, contemporaneous memoranda issued by the Ecuadorian Government recognize that the purpose of the Treaty was to attract foreign investment[137].

127. Ecuador denies that it has publicly acknowledged that some of its treaties (including this Treaty) admit claims by Home-Host States dual nationals. Furthermore, Ecuador argues that the report drafted by the Commission, created by former President Correa, for the Comprehensive Audit of the Reciprocal Investment Treaties and the Investment International Arbitration System [the "**CAITISA Report**"[138]], which Claimants refer to, does not bind Ecuador. Be that as it may, the CAITISA Report merely indicates that some of Ecuador's BITs provide that foreign investors domiciled in Ecuador for more than two years from the date of their investment are not deemed foreign investors. The mere addition of a residency criterion in some BITs does not mean that Ecuador intended to protect Home-Host States dual nationals[139].

## 2. HOME-HOST STATES DUAL NATIONALS CANNOT SUE THE STATE OF THEIR DOMINANT AND EFFECTIVE NATIONALITY

128. Ecuador argues that even if Claimants were able to prove that they have made a protected investment in Ecuador (*quod non*), they are still barred from suing the State of their dominant and effective nationality, *i.e.*, Ecuador. This is because by agreeing to submit the dispute to UNCITRAL arbitration under Art. 9(3)(b) of the Treaty, Claimants accepted that the Tribunal, when delivering its decision, "shall"

[136] Memorial on Jurisdiction, paras. 78-79.
[137] Memorial on Jurisdiction, para. 20.
[138] **Doc. C-082/R-11**, Informe Ejecutivo, *Auditoría integral ciudadana de los tratados de protección recíproca de inversiones y del sistema de arbitraje en materia de inversiones en Ecuador*.
[139] Memorial on Jurisdiction, paras. 83-85.

apply international law principles recognized by Ecuador and Italy, such as the principle of dominant and effective nationality[140].

129. This principle, originally designed in the context of diplomatic protection but also applied in investment-treaty arbitration, prevents Home-Host States dual nationals from invoking the protection of an investment treaty against the State of their dominant and effective nationality[141].

130. Investment tribunals have assessed, case-by-case, all relevant circumstances demonstrating an investor's connection to a country, including its habitual residency, center of interests, family, social and business ties, and political rights[142]. In the present case, Ecuador claims that Claimants' dominant and effective nationality has always been Ecuadorian because[143]:

- Claimants were born and raised in Ecuador;
- Claimants were married in Ecuador;
- Claimants' children were born and raised in Ecuador;
- Claimants have maintained their primary and habitual residence in Ecuador;
- Claimants own movable and immovable property in Ecuador;
- Claimants have consistently exercised their right to vote in Ecuador;
- Claimants developed their professional careers in Ecuador, and Mr. Romero continues to receive a pension after working in Ecuador for several decades;
- Mr. Romero served as an Ecuadorian public official;
- Mr. Romero paid taxes in Ecuador for several decades;

[140] Memorial on Jurisdiction, paras. 80-82, 88, citing to **Doc. RLA-35**, Art. 5(b) of the Protocol; **RER-Banifatemi**, paras. 13, 22-28, 50-52, 63. Respondent further alleged that this mandate was confirmed by the Parties in the Terms of Appointment (HT, Day 1, p. 24, 12-25 to p. 26, 1.10).
[141] Memorial on Jurisdiction, paras. 89-91, citing to, *inter alia*, **Doc. RLA-21**, *Nottebohm Case* (Liechtenstein v. Guatemala) (second phase), Judgement, 6 April 1955, ICJ Reports 1955, p. 4, at p. 22; **Doc. RLA-66**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Ratione Personae Jurisdiction, 26 July 2023 ["***Raimundo Santamarta***"**]**, para. 486; **Doc. RLA-23**, *Islamic Republic of Iran v. United States of America*, IUSCT Case No. A/18, Judgment, 6 April 1984, p. 25; **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle y Otros v. El Reino de España*, PCA Case No. 2019-17, Award, 13 March 2023 ["***Antonio del Valle***"], para. 477; **Doc. RLA-18**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022 ["***Fernando Fraiz Trapote***"], paras. 389-398, 400; **RER-Banifatemi**, paras. 42-49.
[142] Memorial on Jurisdiction, para. 92, citing to **Doc. RLA-19**, *Manuel García Armas y Otros c. La República Bolivariana de Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 737; **Doc. RLA-66**, *Raimundo Santamarta*, para. 487; **Doc. RLA-15**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, para. 441; **Doc. RLA-64**, Commentary 5 to Art. 7 of the ILC'S Draft articles on Diplomatic Protection, Report of ILC on the work of its fifty-eighth session; **RER-Banifatemi**, para. 54.
[143] Memorial on Jurisdiction, para. 95; **RER-Banifatemi**, paras. 55-58.

- Claimants maintain substantial social ties in Ecuador; and

- Claimants have consistently presented themselves as national investors to Ecuadorian authorities and characterized the investments at issue as domestic investments[144].

### 3. CLAIMANTS' RELIANCE ON THEIR ITALIAN NATIONALITY IS AN ABUSE OF RIGHTS

131. According to Ecuador, Claimants' attempt to rely on their so-called Italian nationality to secure the jurisdiction of this Tribunal amounts to an abuse of rights "in circumstances where, as here, the Treaty's object and purpose is limited to protecting active investments made by foreign investors in the territory of the other Contracting Party"[145].

132. Furthermore, Ecuador argues that Claimants obtained Italian citizenship in an attempt to gain certain protections they would otherwise not be entitled to as Ecuadorian nationals – a practice that is contrary to the object and purpose of investment treaties and, therefore, constitutes an abuse of rights[146].

### 4. DECISIONS ISSUED BY THE FRENCH COURTS HAVE NO BEARING ON THE TRIBUNAL'S JURISDICTION

133. Ecuador submits that, under the *Kompetenz-Kompetenz* principle, tribunals have the power to determine their own jurisdiction[147]. Furthermore, it is a well-established principle of international law that the jurisdiction of arbitral tribunals should be assessed solely on the basis of the applicable treaty and international law. Therefore, domestic court decisions have no binding effect on investment tribunals[148].

134. In this case, the Tribunal's jurisdiction must be determined according to the Treaty and international law, as the Contracting Parties expressly prescribed in Art. 5(b) of the Protocol[149]. It follows that decisions of the French courts (as the jurisdiction of the seat) have no bearing on the Tribunal's jurisdiction[150].

135. Be that as it may, the French case law referred to by Claimants[151] is inapposite, because these cases involved:

[144] Memorial on Jurisdiction, para. 96.
[145] Memorial on Jurisdiction, paras. 8, 108, 129.
[146] R-PHB, p. 7.
[147] Memorial on Jurisdiction, para. 116.
[148] Memorial on Jurisdiction, paras. 111-112, 116.
[149] Memorial on Jurisdiction, para. 113; **RER-Banifatemi**, para. 64.
[150] Memorial on Jurisdiction, paras. 110, 114-117, 128; **RER-Banifatemi**, paras. 14,65.
[151] Notably, **Doc. CLA-141/RLA-89**, *Maya Dangelas v. the Socialist Republic of Vietnam*, Judgment of the Paris Court of Appeal 22/05075, 12 September 2023; **Doc. CLA-142/RLA-90**, *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, Judgment of the Paris Court of Appeal 22/02752, 27 June 2023; and **Doc. CLA-143/RLA-91**, *Ibrahim Aboukhalil v. Senegal*. Judgment of the Paris Court of Appeal 19/21625, 12 October 2021.

- Different BITs, without a choice of law provision similar to Art. 5(b) of the Protocol, which specifically mandates tribunals to apply principles of international law in UNCITRAL arbitrations such as this one[152];

- Different circumstances, since the claimants had arguably closer ties to the State of their claimed nationality or held the nationality of the other contracting party at the time of the investment (neither of which is the case here)[153].

*** * ***

136. In view of the above, Ecuador concludes that the Tribunal lacks jurisdiction *ratione personae* and *ratione voluntatis* and must, therefore, dismiss Claimants' claims entirely[154]. Ecuador submits that any other outcome allowing Claimants to rely on their alleged Italian nationality to secure the Tribunal's jurisdiction would constitute an abuse of rights[155].

## VI.2. CLAIMANTS' POSITION

137. Claimants, in turn, request that the Tribunal dismiss Ecuador's Jurisdictional Objections[156]. Claimants submit that the Treaty does not prohibit Home-Host States dual nationals from presenting claims against the host State (**1.**); that the principle of dominant and effective nationality cannot be invoked to neutralize the text, object and purpose of the Treaty (**2.**); that French courts' decisions corroborate this understanding (**3.**); and that they did not acquire Italian nationality for abusive purposes (**4.**). Claimants further argue that Ecuador's objections would deprive Claimants of their fundamental right to their Italian nationality (**5.**).

### 1. THE TREATY DOES NOT CONTAIN A PROHIBITION ON CLAIMS BY HOME-HOST STATES DUAL NATIONALS

138. Claimants submit that the Treaty does not exclude Home-Host States dual nationals from bringing a claim.

139. First, Claimants agree that to determine if Home-Host States dual nationals may bring claims under the Treaty, the Tribunal shall refer to the Treaty's own plain language, pursuant to Art. 31 of the VCLT[157]. However, according to Claimants, there is no express provision in the Treaty – as in other BITs concluded by Ecuador – excluding Home-Host States dual nationals from the Treaty's protection:

[152] Memorial on Jurisdiction, paras. 119-122.
[153] Memorial on Jurisdiction, paras. 125-126.
[154] Memorial on Jurisdiction, paras. 99, 109, 129.
[155] Memorial on Jurisdiction, paras. 8, 108, 129, citing to **Doc. CLA-176/RLA-53**, *Zaza Okuashvili v. Georgia*, SCC Case No. 2019/058, Partial Final Award on Jurisdiction and Admissibility, 31 August 2022 ["***Okuashvili***"], para. 272.
[156] Counter-Memorial on Jurisdiction, para. 87.
[157] Counter-Memorial on Jurisdiction, paras. 21-24; **CER-Bianchi**, para. 6.

- Art. 1(2) of the Treaty defines "investor" as "any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party";

- Art. 1(3) of the Treaty, in turn, defines "natural person" as those who possess the nationality of one of the Contracting Parties, in accordance with its laws.

140. Claimants contend that the Treaty only imposes the positive requirement that an investor be a national of the other Contracting Party. No additional conditions or limitations are attached, including the requirement that such an investor is not a national of the host State[158]. Therefore, Italy's recognition of Mr. Romero and Ms. Rodríguez as Italian nationals is sufficient to establish Claimants' standing under the Treaty[159].

141. Second, this conclusion is confirmed by the decisions of several investment tribunals, which have found that Home-Host States dual nationals are entitled to bring claims under BITs if they possess the nationality of the relevant contracting State, unless there is an express exclusion or limitation within the treaty[160].

142. Therefore, absent an additional requirement of nationality in the Treaty, Claimants are not excluded from protection of the Treaty[161]. Arguing otherwise would result in an illegitimate revision of the Treaty[162].

### 2. THE PRINCIPLE OF DOMINANT AND EFFECTIVE NATIONALITY IS IRRELEVANT AND MISPLACED

143. Claimants argue that the Tribunal should not apply the dominant and effective nationality test.

144. First, Ecuador deliberately excluded the dominant and effective nationality test from the Treaty[163]. While some of Ecuador's BITs require such a test[164], others – including the Treaty – do not impose any additional requirements beyond being a national of a treaty party, according to that nation's law[165].

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[158] Response to Request for Bifurcation, paras. 13, 20-22, citing to **Doc. CLA-21/CLA-148**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017 ["***Bahgat***"], paras. 222-224; Counter-Memorial on Jurisdiction, para. 25; **CER-Bianchi**, paras. 7-9.

[159] Counter-Memorial on Jurisdiction, paras. 49-58, 60; **CER-Cocuzza**, paras. 27-42.

[160] Counter-Memorial on Jurisdiction, para. 31, citing to **Doc. CLA-162**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 514.

[161] Counter-Memorial on Jurisdiction, paras. 30,32.

[162] Counter-Memorial on Jurisdiction, para. 27, citing to **Doc. CLA-161**, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 101; **CER-Bianchi**, para. 9.

[163] Counter-Memorial on Jurisdiction, paras. 36-43.

[164] Counter-Memorial on Jurisdiction, paras. 37-39, citing to **Doc. CLA-163**, Chile-Ecuador BIT, Art. I(2)(a) and (3); **Doc. CLA-164**, Venezuela-Ecuador BIT, Art. I(2)(a) and (3); **Doc. CLA-165**, Ecuador-Argentina BIT, Art. I(2)(a) and (3); **Doc. CLA-166**, Ecuador-El Salvador BIT, Art. I(2)(a) and (3); **Doc. CLA-167**, Nicaragua-Ecuador BIT, Art. I(2)(a) and (3).

[165] Counter-Memorial on Jurisdiction, paras. 40-41, citing to (**Doc. CLA-168**, US-Ecuador BIT, Art. I(c)); **Doc. CLA-169**, UK-Ecuador BIT, Art. I(c)(i)-(ii); **Doc. CLA-170**, Ecuador-Paraguay BIT, Art. I(2) and

145. Second, even if there were any doubts about this intended exclusion (*quod non*), Ecuador dispelled those doubts in the CAITISA Report, where it has expressly acknowledged that an effective nationality test was not imposed in Ecuador's BITs[166].

146. Third, investment tribunals have found that the dominant and effective nationality test is irrelevant to determine jurisdiction when the terms of the treaty are clear and do not explicitly exclude Home-Host States dual nationals[167].

147. Fourth, applying the dominant and effective nationality test would also contradict the object and purpose of the Treaty, which aims to protect investments and ensure fair and equitable treatment for investors from both States, irrespective of their Home-Host States dual national status[168].

### 3. DECISIONS ISSUED BY THE FRENCH COURTS

148. Claimants point out that the *Cour d'appel de Paris* has unequivocally held that Home-Host States dual nationals' claims are admissible in the absence of an express exclusion in the BIT. The French courts have also found that referring to suppletive means of interpretation of the VCLT, or to assess the dominant and effective nationality of the investor, would add a condition which has not been stipulated in the treaty's text[169].

### 4. ITALIAN NATIONALITY WAS ACQUIRED FOR LEGITIMATE PURPOSES

149. Claimants explain that their decision to obtain Italian citizenship stemmed from personal and legitimate reasons, not from any intention to benefit from protections under the Italy–Ecuador BIT or to prepare for a future dispute with Ecuador. They deny that their conduct was motivated by a potential "treaty-shopping"[170].

(5)(a); **Doc. CLA-171**, Spain-Ecuador BIT, Art. I(1); **Doc. CLA-172**, Honduras-Ecuador BIT, Art. I(2); **Doc. CLA-173**, Costa Rica-Ecuador BIT, Art. I(2); **Doc. CLA-174**, Ecuador-Guatemala BIT, Art. I(4); **Doc. CLA-175**, Cooperation and Investment Facilitation Agreement between Brazil and Ecuador, Art. 3(1.5).

[166] Response to Request for Bifurcation, para. 14; Counter-Memorial on Jurisdiction, paras. 44-48, 67, citing to **Doc. C-082/R-11**, CAITISA Report, p. 18.

[167] Response to Request for Bifurcation, paras. 23-26; Counter-Memorial on Jurisdiction, paras. 63-64, citing to, *inter alia*, **Doc. CLA-147**, *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Decision on Jurisdiction, 15 December 2014, paras. 174-175, 200, 206; **Doc. CLA-177**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 70; **Doc. CLA-25**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, para. 201; **Doc. CLA-153**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 415.

[168] Counter-Memorial on Jurisdiction, paras. 69-73; **CER-Bianchi**, paras. 11-12.

[169] Response to Request for Bifurcation, paras. 4, 15-18.

[170] HT, Day 1, p. 68, l. 22 to p. 69, l. 18.

## 5. ECUADOR'S OBJECTIONS WOULD DEPRIVE CLAIMANTS OF THEIR FUNDAMENTAL RIGHT TO ITALIAN NATIONALITY AND INTERFERE WITH ITALY'S RIGHT TO DETERMINE ITS OWN CITIZENSHIP LAWS

150. Finally, Claimants argue that Ecuador seeks to deprive them of their Italian nationality. The Tribunal should be careful not to override or diminish Claimants' fundamental human right to nationality when adjudicating the dispute[171]. Stripping Claimants of their Italian nationality would constitute an unlawful interference with Italy's sovereignty over its citizenship laws[172] and would introduce a level of uncertainty and arbitrariness into the international legal system[173].

151. Further, Claimants argue that divesting them of their Italian nationality would be an unlawful interference with Italian national sovereignty, since "it is entirely Italy's business to say who is an Italian and Italy considers these Claimants to be Italian"[174].

* * *

152. In view of the above, Claimants conclude that the Tribunal should dismiss Ecuador's Jurisdictional Objections[175].

[171] Counter-Memorial on Jurisdiction, paras. 74-80.
[172] Counter-Memorial on Jurisdiction, para. 81.
[173] Counter-Memorial on Jurisdiction, paras. 83-85.
[174] Counter-Memorial on Jurisdiction, paras. 81-82.
[175] Counter-Memorial on Jurisdiction, paras. 86-87.

# VII. DISCUSSION

153. After the Hearing, it became clear that the Parties agree that:

- Claimants are dual nationals, who have both the Ecuadorian and Italian nationalities[176];

- Claimants' dominant and effective nationality is Ecuadorian[177].

154. Respondent objects to the Tribunal's jurisdiction *ratione personae* and *ratione voluntatis* on the grounds that, as Ecuadorian nationals, Claimants do not qualify as protected "investors" under the Treaty because[178]:

- Claimants' dominant and effective nationality was and remains Ecuadorian[179]; and

- Claimants have not made any foreign investments in Ecuador for the purposes of the Treaty[180].

155. Furthermore, Respondent submits that Claimants' attempt to rely on their Italian nationality to secure the jurisdiction of this Tribunal would constitute an abuse of rights[181].

156. Claimants reject both Jurisdictional Objections, arguing that the only relevant issue that the Tribunal must determine is whether the Treaty allows claims by Home-Host States dual nationals such as Claimants to be brought against the host State – the answer, in their view, being clearly "yes"[182].

157. After duly considering the Parties' arguments, the Tribunal does find that it lacks jurisdiction over the present dispute. Ecuador did not consent to submit to UNCITRAL arbitration disputes with Home-Host States dual nationals whose effective and dominant nationality is Ecuadorian (**VII.1**). There is a second argument: Claimants' reliance on the protections of the Treaty constitutes an abuse of rights, which compels the Tribunal to decline jurisdiction over their claims (**VII.2**).

[176] C-PHB, p. 3. In its Memorial on Jurisdiction Respondent argued that Claimants had failed to prove that they were Italian nationals. Respondent abandoned this stance at the Hearing (HT, Day 1, p. 26, ll. 11-14 and p. 36, l. 23 to p. 37, l. 4) and did not address the matter in its PHB.
[177] Memorial on Jurisdiction, para. 95; R-PHB, p. 1; C-PHB, p. 2.
[178] Memorial on Jurisdiction, para. 86.
[179] Memorial on Jurisdiction, para. 95.
[180] Memorial on Jurisdiction, paras. 42-43, 96; R-PHB, pp. 14-15.
[181] Memorial on Jurisdiction, paras. 8, 108 and 129; R-PHB, p. 7.
[182] C-PHB, p. 2.

# VII.1. APPLICATION OF THE PRINCIPLE OF DOMINANT AND EFFECTIVE NATIONALITY

158. Respondent's Jurisdictional Objections lead to an essential question: can investors who are dual nationals with Italian and Ecuadorian nationalities, and whose dominant and effective nationality is Ecuadorian, assert claims under the Treaty?

159. To determine this question, the Parties agree that the Tribunal must construe the Treaty by interpreting the text as the authentic expression of the will of the Contracting Parties when they defined the term "investor" and gave their consent to arbitration[183].

160. It is worth highlighting that, at the close of the Hearing, the Tribunal inquired whether the Parties wished to approach the Italian Republic for its position on the Treaty's interpretation regarding Home-Host States dual nationals – and specifically, whether the principle of dominant and effective nationality is applicable[184]. In light of the potential delays such a request might entail, both Parties chose not to seek Italy's views[185]. Consequently, the Tribunal has been deprived of this piece of information. Additionally, neither Party has made any arguments, let alone submitted evidence, regarding the Treaty's official records of negotiations (the *travaux préparatoires*) between Ecuador and Italy.

161. The Tribunal will start by establishing the rules of interpretation (**1.**). It will then analyze the relevant norms (**2.**) and apply those norms to the facts (**3.**). Finally, the Tribunal will address certain counterarguments (**4.**) and reach its conclusion (**5.**).

## 1. THE RULES OF TREATY INTERPRETATION

162. Both Parties submit that, in its interpretative task, the Tribunal must be guided by Art. 31 of the VCLT[186], which provides[187]:

> "*Article 31*
>
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

[183] Memorial on Jurisdiction, paras. 20, 25-26, 73, 78-79; Counter-Memorial on Jurisdiction, paras. 21, 43; R-PHB, pp. 2, 14-16; C-PHB, pp. 7-8; H-2, slide 3.
[184] HT, Day 2, p. 130, l. 5 to p. 131, l. 23; A-38, para. 3.
[185] Respondent's communication of 8 April 2025, confirmed by Claimants' communication C-26.
[186] C-PHB, p. 7; R-PHB, p. 2.
[187] **Doc. RLA-17**, pp. 12-13.

> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended".

163. The Parties, however, disagree on the hierarchy of this rule:

- Respondent contends that Art. 31 of the VCLT requires a holistic interpretation of the Treaty; this involves giving effect to the Treaty's terms, considered in their context, in light of the Treaty's object and purpose, and in good faith, without granting priority or preference to any single element[188];
- On the other hand, Claimants maintain that if the Treaty text is unambiguous, it should be taken as the Contracting Parties' mutual understanding; should interpretation be required, its "ordinary meaning" is paramount, and the Tribunal cannot add language that does not appear in the Treaty[189].

164. On this point, the Tribunal partially agrees with both Parties: a treaty that is unambiguous requires no interpretation, and arbitral tribunals must not add language not agreed to by the Contracting Parties. However, where the treaty's meaning is not readily intelligible and interpretation is required, a tribunal must apply Art. 31 of the VCLT, which imposes no hierarchy among its various interpretative elements.

165. Art. 31 contains, as its title suggests, the "general rule" of treaty interpretation. As noted by the *Antonio del Valle* tribunal[190]:

> "The singular mode emphasizes that the provision contains one single rule."

166. Therefore, when interpreting the Treaty, the Tribunal must be guided by the principle of good faith, looking at:

[188] R-PHB, pp. 2-4.
[189] HT, Day 1, p. 46, 16. 21 to p. 47, l. 10; C-PHB, pp. 5-6.
[190] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 426.

- The ordinary meaning of the terms;

- Their context (which comprises, in addition to the text, the preamble and annexes, any agreement relating to the Treaty which was made between the Contracting Parties in connection with the conclusion of the Treaty, as well as any instrument which was made by one or more Contracting Parties in connection with the conclusion of the Treaty and accepted by the other Contracting Parties as an instrument related to the Treaty); and

- The Treaty's object and purpose.

167. Together with the context, the Tribunal shall also take into account, as additional interpretative means, any subsequent agreement or subsequent practice between the Contracting Parties regarding the interpretation of the Treaty, as well as any "relevant rules of international law applicable in the relations between the [Contracting Parties]".

168. Finally, if it is established that the Contracting Parties so intended, a special meaning shall be given to a term.

169. Having established these principles, the Tribunal will now turn to its analysis.

## 2. ANALYSIS

170. The Tribunal's jurisdiction stems from Art. 9 of the Treaty[191].

171. Art. 9(1) provides that "any dispute" which may arise between "one of the Contracting Parties and the investors of the other Contracting Party on investments"[192] shall, as far as possible, be settled amicably.

172. Art. 9(3) goes on to establish that in the event that the dispute cannot be settled amicably, the "investor in question" (*i.e.*, the "investor[] of the other Contracting Party") is authorized to submit the dispute to an adversarial method of settlement. Within the various options offered to investors (including resorting to the courts of the host State or to arbitration before the International Centre for Settlement of Investment Disputes ["**ICSID**"]), there is *ad hoc* arbitration under the UNCITRAL Rules[193]:

> "In the event that such dispute cannot be settled amicably within six months […], the investor in question may submit at his choice the dispute for settlement to:
>
> […] b) an ad hoc Arbitration Tribunal, in compliance with the arbitration regulation of the UN Commission on the International Trade law (UNCITRAL); and the host Contracting Party undertakes hereby to accept the reference to said arbitration; […]" [Emphasis added].

[191] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, Art. 9.
[192] Emphasis added.
[193] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, Art. 9(3).

173. This was the option chosen by Claimants in the present case[194].

The consequences of Claimants' choice

174. This choice has two important consequences:

175. First, the UNCITRAL Rules do not contain an express prohibition on claims being brought by Home-Host States dual nationals – contrary, for instance, to arbitration under the ICSID Convention, whose Art. 25(2)(a) expressly excludes claims by Home-Host States dual nationals[195]. In fact, the UNCITRAL Rules do not contain any definition of investor or any conditions to the State's consent to arbitration; in making its decision, the Tribunal must therefore look only at the Treaty.

176. Second, Claimant's choice of UNCITRAL arbitration also triggers the application of Art. 5 of the Protocol.

The Protocol

177. When signing the Treaty, the Contracting Parties also decided to execute a Protocol, which they expressly agreed would be "deemed to form an integral part of" the Treaty[196]:

> "On signing the Agreement between the Government of the Italian Republic and the Government of the Republic of Ecuador on the Promotion and Protection of Investments, the Contracting Parties also agreed to the following clauses, which shall be deemed to form an integral part of the Agreement" [Emphasis added].

178. As an integral part of the Treaty, the Tribunal is bound to apply (and, if necessary, interpret) the provisions of the Protocol[197].

Art. 5 of the Protocol

179. Art. 5 of the Protocol provides that in case an investor decides to pursue arbitration under the UNCITRAL Rules pursuant to Art. 9(3)(b) of the Treaty, the following provisions shall apply[198]:

> "5. With reference to Article 9
>
> Under Article 9(3)(b), arbitration shall be conducted in accordance with the arbitration standards of the [UNCITRAL], as laid down in the UN General

[194] Notice of Arbitration, paras. 26-27.
[195] See also **Doc. CLA-21/CLA-148**, *Bahgat*, para. 224; **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 444.
[196] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, p. 10.
[197] Even if this were not the case (*quod non*), the Protocol would be an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", as established in Art. 31(2) of the VCLT, and therefore form part of the context that the Tribunal must consider when interpreting the Treaty.
[198] **Doc. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, Art. 5 of the Protocol.

> Assembly Resolution 31/98 of December 15, 1976 as well as pursuant to the following provisions:
>
> (a) The Arbitration Tribunal shall be composed of three arbitrators; if they are not nationals of either Contracting Party, they shall be nationals of States having diplomatic relations with both Contracting Parties. The appointment of arbitrators, when necessary pursuant to the UNCITRAL Rules, will be made by the President of the Arbitration Institute of the Stockholm Chamber, in his capacity as Appointing Authority. The arbitration will take place in Stockholm, unless the two parties in the arbitration have agreed otherwise.
>
> (b) When delivering its decision, the Arbitration Tribunal shall in any case apply also the provisions contained in this Agreement, as well as the principles of international law recognised by the two Contracting Parties. The recognition and implementation of the arbitration decision in the territory of the Contracting Parties shall be governed by their respective national legislation, in compliance with the relevant International Conventions they are parties to" [Emphasis added].

180. It follows that the Contracting Parties agreed that:

- The 1976 UNCITRAL Rules would apply to the proceedings;
- The *ad hoc* arbitration would have its seat in Stockholm – unless the parties in the arbitration agreed otherwise;
- When delivering its decision, the Tribunal would be bound to ("shall in any case") apply:
  - The provisions contained in the Treaty (or "this Agreement"); as well as
  - "[T]he principles of international law recognized by the two Contracting Parties".

181. When the arbitration started, the Parties agreed that the legal place (seat) of the arbitration would be Paris, instead of Stockholm[199]. They also expressly ratified that the Tribunal should decide this dispute in accordance with the Treaty and the principles of international law recognized by the Contracting Parties[200]:

> "1. Applicable substantive rules
>
> 44. The Tribunal shall decide this dispute in accordance with the Treaty and the principles of international law recognized by Ecuador and Italy".

Counterarguments by Claimants' expert

182. In an effort to convince the Tribunal not to apply the "principles of international law recognized by Ecuador and Italy", Claimants' expert, Prof. Bianchi, has argued

[199] Terms of Appointment, para. 65.
[200] Terms of Appointment, para. 44.

that Art. 5(b) of the Protocol "is meant to govern the law applicable to the merits of the case, and not to the jurisdiction of the Tribunal"[201] – a position which was opposed by Respondent's expert, Dr. Banifatemi[202].

183. Nothing in the wording of Art. 5(b) suggests that the Tribunal is required to apply the provisions of the Treaty and the principles of international law recognized by the two Contracting Parties only to decisions on the merits. In fact, the wording is sufficiently broad to encompass any "decision" – whether on admissibility, jurisdiction or merits. This is in line with Art. 31 of the UNCITRAL Rules, which refers generally to "decisions" and equates "any award or other decision" of the tribunal[203].

184. The Tribunal also finds the different authorities cited by Claimants' expert unpersuasive[204]. Most of the cited decisions analyze Art. 42(1) of the ICSID Convention, which is not applicable in this case and can be easily differentiated: while Art. 5(b) of the Treaty uses sufficiently broad wording to encompass any "decision", Art. 42 of the ICSID Convention provides that tribunals "shall decide a dispute" applying, among others, rules of international law[205]. In any case, the Tribunal notes that this seems to be an unsettled matter in international arbitration, as other tribunals have found that applicable law provisions – such as Art. 5(b) –

[201] **CER-Bianchi**, paras. 10, 17, 107. See also HT, Day 1, p. 98, l. 18 to p. 99, l. 6: "In my opinion, Article 5(b) is a typical choice of law provision, which is meant to govern the law applicable to the merits of the case, and not to the jurisdiction of the Tribunal. In international investment law, the law applicable to jurisdictional arbitral tribunals and the law applicable to the merits of the dispute are traditionally distant, and the principle has found recognition in arbitral practice, which I counsel in my report. Regrettably, there are a few recent decisions that conflate the law applicable to jurisdictional issues and the law applicable to the merits of a dispute, in all likelihood to get around the constraints posed by the ordinary meaning of the relevant treaty provisions" and p. 105, ll. 10-17 (Prof. Bianchi).
[202] **RER-Banifatemi**, para. 25; HT, Day 2, p. 15, l. 5 to p. 17, l. 1 (Dr. Banifatemi).
[203] **Doc. RLA-1**, Art. 31: "SECTION IV. THE AWARD | Decisions | Article 31 | 1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. 2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal."
[204] **CER-Bianchi**, paras. 107-116, 165-166, citing to **Doc. CER-3-078**, Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, McGill Journal of Dispute Resolution, Vol. 1:1 (2014), p. 2; **CER-3-079**, *Jan de Nul NV and Dredging International NV v Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 114; **Doc. CER-3-080**, *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 88; **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 454, **Doc. RLA-15**, *Jorge Heemsen and Enrique Heemsen v. The Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, para. 438, **Doc. RLA-18 Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 361; **Doc. CER-3-081**, Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements. A Guide to the Key Issues* (2nd ed., Oxford University Press 2018), pp. 485-486, **Doc. CER-3-082**, *Ambiente Ufficio S.p.A. and Others v Argentina*, ICSID Case No ARB/08/09, Decision on jurisdiction and admissibility, 8 February 2013, para. 236; **Doc. CER-3-083**, *Pac Rimm Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Award, 14 October 2016, para. 5.68; **Doc. CER-3-084**, *Azurix Corp. v Argentina*, ICSID Case No ARB/01/12, Decision on jurisdiction, 8 December 2003, para. 48.
[205] ICSID Convention, Art. 42(1).

should not apply solely to the merits of the dispute but also to jurisdictional issues[206].

*** * ***

185. In sum, when making its decision on Ecuador's Jurisdictional Objections, the Tribunal must apply:

- The provisions of the Treaty (**A.**); "as well as"

- "[T]he principles of international law recognised by the two Contracting Parties" (**B.**).

## A. The Treaty provisions

186. Claimants and their expert, Prof. Bianchi, argue that the Treaty's Arts. 1(2) and 1(3) are the relevant Treaty provisions, and that they are clear and unambiguous: since they do not expressly exclude claims by Home-Host States dual nationals, such claims are permitted. In Claimants' view, this should be the end of the matter[207].

187. The Tribunal disagrees. The question of whether Home-Host States dual nationals are protected is not clear and unambiguous.

188. The jurisdiction of the Tribunal stems from Art. 9 of the Treaty. This must be the starting point of the Tribunal's analysis. Art. 9 provides that[208]:

> "1. Any dispute which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible, previous written application […]
>
> 3. In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to […]" [Emphasis added].

189. Therefore, Ecuador has consented to arbitrate disputes arising with "*investors* of the *other* Contracting Party on investments".

190. The adjective "other" implies that the investor must be of a Contracting Party *different* from Ecuador[209].

191. What does this requirement imply?

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[206] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 454, **Doc. RLA-15**, *Jorge Heemsen and Enrique Heemsen v. The Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, para. 438, **Doc. RLA-18 Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 361.
[207] C-PHB, pp. 5-6; HT, Day 1, p. 95, 9-24 (Prof. Bianchi).
[208] **Docs. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, Art. 9.
[209] The Merriam Webster Dictionary defines the adjective "other" as "being the one remaining or not included" or as "different".

192. One consequence is undisputed: an only-Ecuadorian investor cannot bring a claim against Ecuador under the Treaty.

193. What about an Ecuadorian investor who simultaneously holds Italian nationality?

194. The Republic says that the wording of Art. 9 automatically excludes claims from investors with Home-Host States dual nationality[210] – an averment which is disputed by Claimants.

195. The Tribunal thus disagrees with Claimants' submission that the question of whether Home-Host States dual nationals are protected is clear and unambiguous. The Treaty does not mention Home-Host States dual nationals or whether their claims are permitted or excluded. As will be seen in the following sections, the text simply does not provide a clear-cut answer. Therefore, the Tribunal finds that it must interpret the Treaty in accordance with Art. 31 of the VCLT, in good faith, in accordance with the ordinary meaning to be given to its terms (**a.**), in their context (**b.**) and in light of the Treaty's object and purpose (**c.**).

**a. Ordinary meaning to be given to the terms…**

196. The term "investor" is defined in Art. 1(2) of the Treaty as follows:

> "The term 'investor' shall be construed to mean any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates and branches controlled in anyway by the above natural and legal persons"[211],
>
> or, in its Spanish version: "*El término 'inversionista' designará a cualquier persona natural o jurídica de una de las Partes Contratantes que invierte en el territorio de la otra Parte Contratante así como sus subsidiarias extranjeras, filiales y sucursales controladas de cualquier forma por las personas naturales o jurídicas antes mencionadas*"[212].

197. It follows that the Tribunal's jurisdiction extends to a dispute involving:

- "any natural or legal person of a Contracting Party" ("*cualquier persona natural o jurídica de una de las Partes Contratantes*"),
- "investing in the territory of the other Contracting Party" ("*que invierte en el territorio de la otra Parte Contratante*").

Natural person of a Contracting Party

198. Art. 1(2) refers to "natural […] person of a Contracting Party". The Contracting Parties decided to give a specific meaning to the term "natural person", as set forth in Art. 1(3) of the Treaty:

[210] Memorial on Jurisdiction, para. 74.
[211] **Docs. CLA-1(ENG)/RLA-35(ENG)**, Art. 1(2).
[212] **Doc. RLA-36**, Art. 1(2).

> "The term 'natural person', in reference to either Contracting Party, shall be construed to mean any natural person holding the nationality of that State in accordance with its laws".

199. Therefore, the Contracting Parties defined an investor who is a natural person based on a criterion of nationality, rather than residency. They indicated that to determine whether a person could be considered a "national" of either Contracting Party, the laws of the State in question would be determinant – in other words, Italian law determines if a person is Italian and Ecuadorian law determines if a person is Ecuadorian. As noted by Respondent's expert, Dr. Banifatemi, this is the "classic approach to the determination of nationality"[213].

200. The ordinary meaning of the terms used in Art. 1(3) is not particularly helpful to discern whether the Contracting Parties wished to extend the Treaty protections to Home-Host States dual nationals, because it simply defines how nationality will be determined – not whether Home-Host States dual nationality situations are covered by or excluded from the Treaty's protection.

Investing in the territory of the other Contracting Party

201. But the interpretation of the ordinary meaning of the terms cannot end at Art. 1(3), because Art. 1(2) gives a second qualifier to the term investor: a natural person that has the nationality of a Contracting Party and who is "investing in the territory of the other Contracting Party"[214].

202. Therefore, to qualify as an investor, the natural person must invest not in the State of the nationality it relies on to bring the claim, but rather in the territory of the *other* Contracting Party. The ordinary meaning of the word "other" employed in Art. 1(2) (and also in Art. 9) of the Treaty requires diversity of nationality between the investor and the host State[215].

**b. … in their context**

203. Considering Arts. 1(2), 1(3) and 9 of the Treaty in their context – *i.e.*, the entire text of the Treaty – supports the conclusion that the Treaty requires diversity of nationality.

204. First, Art. 2(1) of the Treaty provides that both Contracting Parties shall encourage "investors of the other Contracting Party to invest in their territory", demonstrating that the Contracting Parties wanted to encourage foreign investment.

205. Second, Art. 3(1) establishes that:

> "Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other

[213] **RER-Banifatemi**, para. 16.
[214] Emphasis added.
[215] See also **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 429: "It is beyond dispute that, according to the ordinary meaning of the word, the term 'other' […] requires diversity of nationality between a putative claimant and the respondent State".

> Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States".

206. This national treatment provision proves that the Contracting Parties distinguished between "investors of the other Contracting Party" and their "own nationals" – indicating that the Treaty was intended to protect foreign investors, and not those who have the nationality of the host State.

207. Third, the same reasoning can apply to Art. 4(1) of the Treaty, which provides that "investors concerned shall receive the same treatment as the nationals of the other Contracting Party […]", again showing a clear distinction between investors and the host State's own nationals.

208. Finally, and more generally, almost all the Treaty provisions relate to the manner in which one Contracting Party is to treat the investors of the "*other* Contracting Party"[216].

### c. … in the light of the Treaty's object and purpose

209. Like most investment treaties, the Treaty's stated purpose is to foster a favorable environment for economic cooperation between Italy and Ecuador, primarily by facilitating capital investments across their respective territories. This is achieved through the Contracting Parties' commitment to promote and protect such investments. As articulated in the Preamble, Italy and Ecuador entered into the Treaty[217]:

> "Desiring to establish favourable conditions for improved economic cooperation between the two Countries, and especially in relation to capital investment by investors of one Contracting Party in the territory of the other Contracting Party;
>
> and
>
> Acknowledging that offering encouragement and mutual protection to such investment, based on International Agreements, will contribute to stimulating business ventures, which foster the prosperity of both Contracting Parties".

210. This stated purpose confirms the Contracting Parties' intent to promote and protect investments made by foreign investors. Indeed, the use of the adjectives "one" ("investors of *one* Contracting Party") and "other" (in the territory "of the *other* Contracting Party") demonstrates that the Treaty is designed to protect cross-border, rather than domestic, investments.

### d. Conclusion

211. In sum, the Contracting Parties consented to submit to arbitration disputes involving a natural person of a Contracting Party investing in the territory of the other

[216] **Docs. CLA-1(ENG)/RLA-35(ENG)/RLA-36(SP)**, Arts. 2 to 7, 12(2); Protocol, Art. 2(e).
[217] **Docs. CLA-1(ENG)/RLA-35(ENG)**, Preamble.

Contracting Party. The ordinary meaning of the terms, in their context and in light of the Treaty's object and purpose, indicates that there must be a diversity of nationality between the "investor" and the host State.

212. This interpretation aligns with the purpose of the majority of investment treaties, as explained by the tribunal in the *Antonio del Valle* case[218]:

> "As noted by one investor-State tribunal, diversity of nationality is the rule under the overwhelming majority of investment treaties, where nationals of the host state are normally not allowed to bring investment treaty claims against their home state. This rule is consistent with the well-established principle of international law that an individual or entity may not bring an international claim against its own State. In this sense, the investment treaty system is still based on traditional notions of nationality and reciprocity and can be contrasted with the evolution undergone in the field of human rights, where individuals are able to bring claims against the State regardless of their nationality. Indeed, under human rights law, even nationals of the respondent State and stateless individuals are able to bring claims against a State.
>
> In consequence, the requirement for diversity of nationality is the starting point of the Tribunal's inquiry into jurisdiction *ratione personae*" [Emphasis added].

Home-Host States dual nationals

213. While the Treaty indicates that the Contracting Parties consented to arbitrate disputes under the Treaty with foreign investors (and not with their own nationals), it does not, however, specifically address the situation in which an investor holds the nationality of both Contracting Parties – that is, when the investor is a Home-Host States dual national.

214. Based solely on a good-faith interpretation of the Treaty's terms in their context and in light of the Treaty's object and purpose, it is not possible to conclude that:

- As Respondent contends, Home-Host States dual nationals are automatically excluded from the Treaty's protection;

- As Claimants argue, Home-Host States dual nationals are clearly protected by the Treaty because no further conditions or limitations are imposed.

215. The Tribunal fully endorses the conclusions of the *Antonio del Valle* tribunal when interpreting a similarly worded treaty[219]:

> "In other words, the Treaty neither says that investors must possess 'at least one' nationality to have standing to claim nor does it state that they shall possess 'only one' nationality, and the Tribunal is not willing to read terms

[218] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, paras. 431-432.
[219] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 436. In the *Antonio del Valle* case, the BIT between Mexico and Spain defined "investors" as "[p]hysical persons who are nationals of one of the Contracting Parties in accordance with its laws […] which has made an investment in the territory of the other Contracting Party" (see para. 429).

> into the Treaty that are not there. Rather, the Treaty text requires that an investor have the nationality of 'one' Contracting Party ('*la nacionalidad de una Parte Contratante*') and is silent on dual nationality" [Emphasis added].

216. Moreover, as noted by the *Fernando Fraiz Trapote* tribunal, a Home-Host States dual national is distinct from a "national"[220]. It is not possible to affirm that a "natural person holding the nationality of that State" necessarily encompasses Home-Host States dual nationals, particularly considering that the ICSID Convention[221] – a forum that Claimants were entitled to choose under the Treaty – does not allow claims by Home-Host States dual nationals. In the words of the *Fernando Fraiz Trapote* tribunal[222]:

> "[…] *es claro que, también hoy, un doble nacional se encuentra en una situación jurídica particular con respecto a una persona con nacionalidad única. Por ejemplo, el Convenio CIADI no permite que un doble nacional demande a su propio Estado.*
>
> *265. De este modo, no es posible afirmar que el término nacional utilizado en el TBI incluya necesariamente a dobles nacionales, como alega el Demandante. Como se ha indicado* […], *de ello tampoco se sigue que las Partes Contratantes hayan excluido a los dobles nacionales, sino simplemente que un término no implica necesariamente el otro.*
>
> *266. En términos generales, como lo muestra la práctica de España, Venezuela y de terceros Estados, las Partes Contratantes tenían alternativas para definir el tratamiento aplicable a los dobles nacionales: (i) excluirlos de manera expresa y a todo evento* […]; *(ii) incluirlos sólo parcialmente, en función de un vínculo de domicilio o de residencia, o aplicando el principio de nacionalidad efectiva y dominante* […]; *(iii) incluirlos expresamente y a todo evento; o (iv) no regular la materia*" [Emphasis added].

217. As mentioned by the *Fernando Fraiz Trapote* tribunal, the Contracting Parties had various alternatives to address claims by Home-Host States dual nationals:

- They could have expressly excluded them from any protection;
- They could have expressly protected them partially, by reference to their residency or to the origin of their investments;
- They could have expressly protected them unconditionally; and
- They could simply have not regulated the issue – as in the present case.

218. Considering that the Treaty is silent on the issue of Home-Host States dual nationals, and an interpretation in accordance with Art. 31(1) of the VCLT does not clarify the Contracting Parties' will when they defined the term "investor" and gave

[220] **Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 264. See also **Doc. RLA-66**, *Raimundo Santamarta*, PCA Case No. 2020-56, Award on *Ratione Personae* Jurisdiction, 26 July 2023 ["***Raimundo Santamarta***"], para. 366.
[221] Art. 25(2)(a) of the ICSID Convention excludes claims by Home-Host States dual nationals.
[222] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 264-266.

their consent to arbitration, the Tribunal decides to rely on the principles of international law recognized by both Contracting Parties – which it is expressly mandated by the Contracting Parties to apply, pursuant to Art. 5(b) of the Protocol, *i.e.*, whenever an investor opts for dispute resolution through *ad hoc* arbitration under the UNCITRAL Rules.

## B. The principles of international law recognized by the two Contracting Parties

219. Respondent argues that the Tribunal should apply the principle of dominant and effective nationality, which is a principle of international law recognized by both Ecuador and Italy, adding that, because Claimants' dominant and effective nationality is Ecuadorian, they lack standing to bring their claims before this Tribunal[223].

220. Claimants, in turn, argue that the Contracting Parties did not agree to include the principle of dominant and effective nationality in the Treaty, and therefore the Tribunal should not consider it in its decision[224].

221. The Tribunal must first provide some context to the principle of dominant and effective nationality (**a.**), to then determine whether it is applicable in this case (**b.**).

### a. The principle of dominant and effective nationality

222. The principle of dominant and effective nationality arises in the context of diplomatic protection[225].

223. At the turn of the 20th century, the prevailing view was that a State could not exercise diplomatic protection on behalf of one of its nationals, if that person was also a national of the respondent State[226] (*i.e.*, if that person was a Home-Host States dual national). This view was reflected in Art. 4 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws[227] [the "**Hague Convention**"], which provides that[228]:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses" [Emphasis added].

224. However, if within a third State a person had more than one nationality (neither being that of the third State), it was accepted that the person would be treated as having "only one" of the nationalities: either that of the country in which the person "habitually and principally" resided, or that of the country with which the person

[223] R-PHB, p. 9.
[224] C-PHB, p. 5.
[225] **RER-Banifatemi**, para. 29.
[226] **RER-Banifatemi**, para. 29; **Doc. YB-20**, Commentary (2) to Art. 7 of the ILC's Draft Articles on Diplomatic Protection, Report of ILC on the work of its fifty-eighth session, p. 34.
[227] **Doc. RLA-63**, Hague Convention.
[228] **Doc. RLA-63**, p. 101.

appeared "most closely connected". This was reflected in Art. 5 of the Hague Convention[229]:

> "Within a third State, a person having more than one nationality shall be treated as if he had only one. […] a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected" [Emphasis added].

225. Although the rule of "non-responsibility" (according to which a State of nationality may not bring a claim in respect of a Home-Host States dual national against another State of nationality) was described by the International Court of Justice ["**ICJ**"] as the "ordinary practice" in 1949, support began to build for the position that the State of dominant or effective nationality could nonetheless bring an international claim against the other State of the person's nationality[230].

226. The ICJ applied this principle in its *Nottebohm* decision issued in 1955[231], even though that case did not deal directly with a dual national. Liechtenstein instituted proceedings before the ICJ claiming restitution and compensation on the ground that Guatemala had acted in a manner contrary to international law towards Mr. Nottebohm, a citizen of Liechtenstein[232]. Guatemala challenged the nationality of Mr. Nottebohm. The ICJ ultimately dismissed Liechtenstein's claim due to[233]:

> "[…] the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala".

227. A few months after *Nottebohm*, the Italy-United States Conciliation Commission issued its decision in *Mergé*, a case arising under the 1947 Peace Treaty between Italy and the United Nations[234]. The case had been brought by the United States against Italy on behalf of Mrs. Mergé, who held both nationalities. The Commission found that the Peace Treaty between Italy and the United Nations contained no provisions governing dual nationality; it therefore had to turn to the "general principles of international law"[235]. The Commission went on to determine that[236]:

> "In this connection two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals

[229] **Doc. RLA-63**, p. 101.
[230] **Doc. YB-20**, Commentaries (2) and (3) to Art. 7 of the ILC's Draft Articles on Diplomatic Protection, Report of ILC on the work of its fifty-eighth session, p. 34. See also **Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 376.
[231] **RER-Banifatemi**, paras. 31-33.
[232] **Doc. RLA-21/YB-10**, *Liechtenstein v. Guatemala* (second phase), Judgment, 6 April 1955, ICJ Reports 1955 ["***Nottebohm***"], pp. 6-7.
[233] **Doc. RLA-21/YB-10**, *Nottebohm*, p. 26.
[234] **RER-Banifatemi**, para. 34.
[235] **Doc. RLA-22/YB-11**, Italy-United States Conciliation Commission, Decision No. 55, 10 June 1955 ["***Mergé***"], pp. 239-241.
[236] **Doc. RLA-22/YB-11**, *Mergé*, p. 241.

> against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality".

228. After analyzing the Hague Convention, relevant arbitral and judicial decisions (including *Nottebohm*) and "legal literature", the Commission held that the bar against diplomatic protection for a Home-Host States dual national had to yield before the principle of effective nationality[237]:

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty".

229. Relying on an extensive list of precedents in international law, the International Law Commission ["**ILC**"] codified these rules in its Draft Articles on Diplomatic Protection of 2006 ["**2006 Draft Articles**"]. The principle of "predominant"[238] nationality was included in Art. 7, reflecting both the principle of non-responsibility as the general rule and that of dominant and effective nationality as the exception; a State of nationality may not exercise diplomatic protection against another State of nationality unless the former State's nationality is predominant[239]:

> "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim" [Emphasis added].

230. Significantly, the 2006 Draft Articles specify that they do not apply[240]:

> "[…] to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments" [Emphasis added].

231. Moreover, the ILC has established that the principle of dominant and effective nationality is customary international law. In the Commentary to Art. 7 of the 2006 Draft Articles, the Commission explained that[241]:

> "A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term 'predominant' when applied to nationality rather than either 'effective' or 'dominant'. It is moreover the term used by the Italian-

[237] **Doc. YB-11/RLA-22**, *Mergé*, p. 247.
[238] Dr. Yas Banifatemi explains that: "[…] the ILC adopted the concept of the 'predominant' nationality—rather than using the terms 'effective' or 'dominant', which it found to be used interchangeably and often together by international tribunals—as a rule of international law that captures more accurately the essence of the present customary rule of international law" (**RER-Banifatemi**, para. 37, footnotes omitted).
[239] **Doc. YB-20**, ILC's Draft Articles on Diplomatic Protection, Art. 7, p. 34.
[240] **Doc. YB-20**, ILC's Draft Articles on Diplomatic Protection, Art. 17, p. 51.
[241] **Doc. YB-20**, Commentary (4) to Art. 7 of the ILC's Draft Articles on Diplomatic Protection, Report of ILC on the work of its fifty-eighth session, p. 35.

> United States Conciliation Commission in the *Mergé* claim, which may be seen as the starting point for the development of the present customary rule." [Emphasis added].

232. Similarly, in the Report of the ILC on the work of its fifty-fourth session, it was established that[242]:

> "The Commission is of the opinion that the principle which allows a State of dominant or effective nationality to bring a claim against another State of nationality reflects the present position in customary international law." [Emphasis added].

233. In sum, the principle of dominant and effective nationality implies that when a person possesses the nationality of two States, tribunals may consider which nationality is dominant and effective (or predominant) in order to determine the standing of the party bringing the claim.

### b. Applicability of the principle of dominant and effective nationality

234. There is no consensus among arbitral tribunals about whether the principle of dominant and effective nationality – developed, as has been established *supra*, within the context of diplomatic protection – applies to cases based on investment protection treaties. Two main tendencies can be discerned:

- Several tribunals have accepted that this principle is applicable in the context of investor-State arbitration, particularly:
  - In instances where the treaty expressly provides for its application (often in treaties involving the United States)[243]; or
  - In cases where the tribunal deemed it to be a relevant rule of international law in the relations between the Contracting Parties, applicable either by virtue of the treaty's own provisions or pursuant to Art. 31(3)(c) of the VCLT[244];
- Other investment tribunals have rejected its application, particularly:

[242] **Doc. YB-19**, Commentary (4) to Art. 6 of the ILC's Draft Articles on Diplomatic Protection, Report of ILC on the work of its fifty-fourth session, p. 74.
[243] **Doc. CLA-162**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, paras. 513-514, 529; **Doc. RLA-49**, *Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, paras. 176-181.
[244] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 484-485; **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 340 *et seq*.; **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, paras. 448-455; **Doc. RLA-15**, *Jorge Heemsen and Enrique Heemsen v. The Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, paras. 421-442; **Doc RLA-19**, *Manuel García Armas v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, paras. 648, 691-704, 734-737.

- In cases where tribunals found that the rules of diplomatic protection do not apply in investment arbitration[245];

- In a case where the tribunal considered that international law principles cannot outweigh the explicit terms of the treaty[246]; or

- In cases applying the ICSID Convention, which explicitly excludes claims by dual nationals and thereby renders the application of the principle of dominant and effective nationality unnecessary[247].

235. Notwithstanding the differences in approach, there is consensus among tribunals that the starting point of the analysis must be the text of the treaty in question, guided by the principles of interpretation set forth in Art. 31 of the VCLT[248].

Mandatory guidance in the Treaty

236. In this case, the Treaty contains specific guidance, which the Tribunal is mandated to follow. The Contracting Parties, Italy and Ecuador, signed a Protocol, which "shall be deemed to form an integral part of the Agreement", and which contains an Art. 5, only applicable whenever an investor opts for dispute resolution through *ad hoc* arbitration under the UNCITRAL Rules (not if the investor opts for ICSID arbitration or municipal courts).

237. Art. 5 of the Protocol contains a mandatory provision for the Tribunal[249]:

> "[w]hen delivering its decision, the Arbitration Tribunal shall in any case apply […] the principles of international law recognised by the two Contracting Parties" [Emphasis added].

238. When Claimants opted to accept Respondent's standing offer to submit investment disputes for settlement by an UNCITRAL tribunal[250], they triggered the application of Art. 5(b) of the Protocol and accepted that the tribunal, when rendering its

[245] **Doc. CLA-147**, *Serafín García Armas Gruber and Karina García Armas Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, paras. 167-174; **Doc. CLA-177**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras. 69-70; **Doc. CLA-153**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, footnote 346. See also **CER-3-089**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 24 May 2007, para. 88.
[246] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 228-233.
[247] **Doc. CLA-177**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 72; **Doc. CLA-153**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, paras. 240-241; **Doc. CLA-161**, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, paras. 98-106.
[248] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 220-225; **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 247-248, 345, 399; **Doc. RLA-16 (SP)/YB-17**, *Antonio del Valle*, para. 246, 424-427.
[249] **Docs. CLA-1(ENG)/RLA-35(ENG)**, Protocol, Art. 5(b).
[250] Notice of Arbitration, paras. 26-27.

decision, would apply the principles of international law recognized by Ecuador and Italy[251].

A principle of international law

239. The Parties' experts concur that the principle of dominant and effective nationality has evolved into a principle of international law[252]. So, the question is: has this principle been recognized by Ecuador and Italy, and is thus applicable to this dispute by virtue of Art. 5(b) of the Protocol?

240. The record shows that:

- Ecuador has explicitly represented in this arbitration that it recognizes the principle of dominant and effective nationality[253];

- As for Italy, there is no evidence in the file – and not even an allegation by any of the Parties –, that Italy objects to the principle of dominant and effective nationality[254].

241. However, this is not sufficient to determine that the principle is "recognised by the two Contracting Parties", as per Art. 5(b) of the Protocol. Further analysis is required.

The function of the principles of international law

242. Principles of international law are meant to "fill possible gaps in the body of treaty and customary rules" or to help tribunals to "choose between two or more conflicting interpretations of a treaty or customary rule"[255]. This is precisely why the Contracting Parties included a reference to "principles of international law" in Art. 5(b) of the Protocol: because they were aware that the Treaty might contain certain gaps or lead to potentially conflicting interpretations.

243. Prof. Antonio Cassese illustrates the need to refer to principles of international law and identifies the sources from which they may be derived and filled with content[256]:

[251] See also **RER-Banifatemi**, paras. 13, 22-27.
[252] HT, Day 1, p. 118, l. 11 to p. 119, l. 25 (Prof. Bianchi): "**Dr. Ramirez**: And generally speaking, and in your experience, the field of international law encompasses many different rules, doctrines and principles; correct? **Prof. Bianchi**: That's correct. **Dr. Ramirez**: Some of these principles or doctrines include the doctrine of estoppel; correct? **Prof. Bianchi**: Indeed, yes. **Dr. Ramirez**: And they also include the principle of good faith, right? **Prof. Bianchi**: Indeed. **Dr. Ramirez**: And they also include the principle of dominant and effective nationality, right? […] **Dr. Ramirez**: Mr Chairman, I think that the answer to the question can be responded with a "yes" or "no", and then if he wants to add context, of course the professor can add whatever context he wants to add. **Prof. Bianchi**: I think I've actually done that. I said "yes", and then I've expressed my views about what legal prescriptions are qualified as principles in various domains of international law."; H-4, p. 3 (Dr. Banifatemi).
[253] Memorial on Jurisdiction, para. 94.
[254] As previously noted, the Parties decided not to seek Italy's views (see para. 160 *supra*).
[255] Antonio Cassese, *International Law*, Oxford University Press (2001), p. 152.
[256] Antonio Cassese, *International Law*, Oxford University Press (2001), p. 151.

> "No legal order can regulate with specific rules any possible conduct of legal subjects. Gaps are bound to exist in the normative network of any community. Hence the need to resort to general principles, that is, sweeping […] standards of conduct that can be deduced from the various rules [...].
>
> […] [P]rinciples of international law […] can be inferred or extracted by way of induction and generalization from conventional and customary rules of international law" [Emphasis added].

244. In other words, the system of sources in international law is far from inflexible: customary international law, with its more encompassing nature, can nourish and inform the principles of international law. As explained by Prof. Ian Brownlie[257]:

> "[Principles of international law] may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies. What is clear is the inappropriateness of rigid categorization of the sources" [Emphasis added].

245. Thus, if a State is bound by a rule of customary international law, it can also be said to recognize it as a principle of international law — *qui potest plus, potest minus*.

The binding nature of customary international law

246. When is a State bound by custom? Once a rule of customary international law has crystallized through consistent practice and *opinio juris*, it becomes binding on all States[258]. Thereafter, a State cannot exclude itself from the obligations or the legal effects that arise from such a rule or principle[259].

247. To avoid the applicability of a rule of customary international law, a State must be a "persistent objector". This means that a State will be bound by a customary rule once it has emerged, unless it clearly, publicly, and consistently objected to it during its process of formation[260].

248. Prof. Brownlie further explains that the burden of proof is on the Party that argues for a lack of acceptance or applicability of a given rule[261]:

> "Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted".

[257] Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 7th ed. (2008), p. 19.
[258] Antonio Cassese, *International Law*, Oxford University Press (2001), p. 119. Cassese posits that: "a [...] feature differentiating custom from treaties is that customary rules are normally binding upon all members of the world community [...], whereas treaties only bind those States that ratify or adhere to them."
[259] Elias Olufemi, Persistent Objector, Max Planck Encyclopedia of Public International Law. Oxford University Press (2004), section A.1.
[260] James A. Green, The Persistent Objector Rule in International Law, Oxford University Press (2016), p. 1.
[261] Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 7th ed. (2008), p. 11.

Application

249. Accordingly, since the principle of dominant and effective nationality has been recognized as customary international law – as explained above – both Ecuador and Italy are bound by it, unless it is shown that either State persistently objected to its formation.

250. There is no indication in the record of any objection that would excuse either Ecuador or Italy from being bound by the customary principle of dominant and effective nationality.

251. In view of this, the Tribunal concludes that both States are bound under customary international law by the principle of dominant and effective nationality and that, by virtue of *qui potest plus, potest minus*, they must be regarded as recognizing it as a principle of international law – a finding that renders the principle applicable to the present case by way of Art. 5(b) of the Protocol.

The experts' positions

252. The conclusion reached by the Tribunal is confirmed by Respondent's expert, Dr. Banifatemi[262]:

> "Given the recognition of the customary nature of the principle of effective and dominant nationality by the ILC, both Ecuador and Italy are bound by this principle, given that there is no indication of either State having ever objected persistently to the formation and applicability of a customary rule of international law in relation to effective and dominant nationality".

253. Claimants' expert, Prof. Bianchi, takes issue with the applicability of the rules of diplomatic protection to an investment arbitration[263]. He cites Art. 17 of the 2006 Draft Articles, which provides that such Articles do not apply "to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments"[264]. According to Prof. Bianchi, there is an "evident" inconsistency between the ordinary meaning of Art. 1(3) of the Treaty and the rules of diplomatic protection[265].

254. The Tribunal remains unconvinced.

255. It is correct that diplomatic protection rules cannot override or modify specific provisions of investment treaties, as clearly acknowledged by Art. 17 of the 2006 Draft Articles. Yet, as noted in the commentary to that article, to the extent that the diplomatic protection rules remain consistent with the investment treaty in question,

[262] **RER-Banifatemi**, para. 50.
[263] **CER-Bianchi**, para. 167.
[264] **CER-Bianchi**, para. 179.
[265] **CER-Bianchi**, para. 181.

they continue to apply – which is the case here[266]. As the Tribunal already determined:

- The Treaty does not have the "clear and unambiguous" meaning suggested by Prof. Bianchi; in fact, it simply does not regulate the issue of Home-Host States dual nationals – which is precisely why recourse must be had to principles of international law; therefore, there is no inconsistency between the Treaty and the principle of dominant and effective nationality[267]; and

- The Protocol explicitly provides that the Tribunal must apply the "[…] provisions contained in this Agreement, as well as the principles of international law recognised by the two Contracting Parties"; a mere application or interpretation of the Treaty alone does not yield any conclusion; this necessarily leads the Tribunal to rely on the principles of international law recognized by Ecuador and Italy.

256. In sum, the Tribunal does not purport to apply rules of diplomatic protection to supersede the Treaty or to introduce a requirement absent from its text. Rather, the Tribunal is giving effect to the clear terms agreed upon by the Contracting Parties in the Protocol, which require it to apply the principles of international law recognized by Italy and Ecuador.

## 3. APPLICATION TO THE FACTS

257. Having reached this point, the Tribunal's decision becomes straightforward: Claimants themselves have recognized that their dominant and effective nationality is Ecuadorian[268].

258. If there were any doubts, the facts unequivocally show that Claimants have the closest connection with Ecuador, which is their predominant nationality:

- Claimants were born and grew up in Ecuador[269];

- Claimants were married in Ecuador[270];

- Claimants' children were born and raised in Ecuador[271];

[266] **Doc. YB-20**, Commentary (3) to Art. 17 of the ILC's Draft Articles on Diplomatic Protection, Report of ILC on the work of its fifty-eighth session, p. 52.
[267] As observed by the *Antonio del Valle* tribunal, pursuant to Art. 17, the 2006 Draft Articles do not apply to the extent that they are inconsistent with special rules of international law: "There would for instance be an inconsistency if an investment treaty excluded dual nationals through a rule similar to Article 25(2)(a) of the ICSID Convention or, conversely, stipulated expressly that dual nationals do benefit from Treaty protection. Here, there is no inconsistency" (**Doc. RLA-16(SP)/YB-17**, *Antonio del Valle*, para. 462). See also **Doc. YB-11/RLA-22**.
[268] C-PHB, p. 2.
[269] **Doc. R-1**.
[270] **Doc. R-2**.
[271] **Doc. R-3**.

- Claimants have maintained their primary and habitual residence in Ecuador, and own movable and immovable property in Ecuador[272];

- Claimants developed their professional careers in Ecuador[273];

- Mr. Romero served as an Ecuadorian public official[274];

- Claimants have established and maintained substantial social ties in Ecuador[275];

- Claimants registered their investments in the Romero Companies as "national investments", reflecting that they considered themselves Ecuadorian citizens[276].

259. Claimants have not even attempted to prove that they have any ties whatsoever to Italy beyond their nationality and passport.

260. In view of the above, the Tribunal concludes that considering that Claimants' dominant and effective nationality is Ecuadorian, they are precluded from bringing a claim against Ecuador under the Treaty.

## 4. COUNTERARGUMENTS BY CLAIMANTS

261. The Tribunal will now address the counterarguments raised by Claimants in response to Respondent's Jurisdictional Objections.

### A. The Treaty does not exclude Home-Host States dual nationals

262. Claimants assert that the plain meaning of the Treaty is unambiguous: because it does not expressly exclude Home-Host States dual nationals, the Tribunal should not add language that is absent[277].

263. The Tribunal is not persuaded by Claimants' position.

264. Claimants' reasoning is based on two premises:

- That no interpretation is necessary because the Treaty is purportedly clear;

- That if the Tribunal is to interpret, it must rely primarily on the ordinary meaning of the terms of the Treaty.

265. But both premises are flawed:

[272] **Doc. R-9**.
[273] **Doc. R-20**; **Doc. R-21**.
[274] **Doc. R-23**, pp. 11 and 23.
[275] **Doc. R-15**; **Doc. R-16**.
[276] **Doc. R-9**; **Doc. R-17**.
[277] Counter-Memorial on Jurisdiction, para. 24; C-PHB, pp. 4-5.

266. First, the Treaty is not clear. A reading of the Treaty, without interpretation, does not permit the Tribunal to ascertain that claims by Home-Host States dual nationals are either allowed or prohibited (see paras. 214-218 *supra*).

267. Second, the rules of interpretation do not permit the Tribunal to stop its analysis at the ordinary meaning of the terms, when the ordinary meaning is unclear. The text, in any case, indicates that there must be a diversity of nationality between the investor and the host State – an indication which seems to support Respondent's position that the Contracting Parties did not intend to allow arbitration claims by nationals of the host State, thus excluding claims by Home-Host States dual nationals.

Other investment arbitration cases

268. Claimants cite several cases in which tribunals have allegedly concluded that the absence of an express exclusion of claims by Home-Host States dual nationals implies that the Contracting Parties consented to such claims[278].

269. First, as Claimants themselves acknowledge, there is no doctrine of *stare decisis* in investment arbitration[279]. The Tribunal recognizes that legal certainty and predictability in the international investment regime are enhanced when tribunals applying the same treaty to analogous factual circumstances endeavor to reach conclusions consistent with their predecessors. Conflicting decisions create uncertainty, heighten investment risks and undermine the fundamental purpose of investment treaties, which seek to provide a stable and predictable legal framework for international investment. However, none of the cases Claimants cite applied the Italy-Ecuador BIT.

270. Second, and in any case, the factual pattern of the cases mentioned by Claimants differs significantly from that of the present dispute.

271. For the sake of completeness, the Tribunal will analyze the most relevant cases identified by Claimants as allegedly supporting their position – *Zaza Okuashvili v. Georgia*[280] (**a.**), *Bahgat*[281] (**b.**) and *Oostergetel v. Slovak Republic*[282] (**c.**).

272. The Tribunal will refer, *a contrario*, to the *Fernando Fraiz Trapote* (**d.**), *Antonio del Valle* (**e.**) and *Raimundo Santamarta* (**f.**) UNCITRAL cases, which have found – consistent with this Tribunal's findings – that the silence of a BIT should not be

[278] H-2, slides 5-9, citing to **Doc. CLA-141/RLA-89**, *Maya Dangelas v. the Socialist Republic of Vietnam*, Judgment of the Paris Court of Appeal 22/05075, 12 September 2023, paras. 52, 54; **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 222, 224; **Doc. CLA-176/RLA-53**, *Okuashvili*, paras. 108, 110; **Doc. CLA-023/CLA-150**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010 ["***Oostergetel***"]., para. 130; **Doc. CLA-142/RLA-90**, *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, Judgment of the Paris Court of Appeal 22/02752, 27 June 2023, para. 76.
[279] C-PHB, p. 11.
[280] Counter-Memorial, para. 59; H-2, slide 7.
[281] Counter-Memorial, para. 28; H-2, slide 6.
[282] H-2, slide 8.

interpreted to mean that the contracting parties consented to arbitrate claims by Home-Host States dual nationals.

273. The Tribunal will address the *Dangelas v. Vietnam*, *Serafín García Armas v. Venezuela* and *Aboukhalil v. Senegal* cases in paras. 321-327 *infra*.

274. The Tribunal notes that Claimants have referred to other cases allegedly in support of their general position[283]. These cases are inapposite because they include:

- Several ICSID cases[284] where the tribunals' analysis differed significantly, not least because the ICSID system explicitly excludes claims by Home-Host States dual nationals; and

- Cases related to investors who are legal (and not natural) persons[285].

Therefore, the Tribunal will not address those additional cases.

**a. *Zaza Okuashvili v. Georgia***[286]

275. In this case, the claimant, Mr. Okuashvili, was a Georgian national by birth. He claimed that he was the ultimate beneficial owner of a group of companies with business interests in Georgia. After the premises of his companies were attacked, he left Georgia in 2004 for the United Kingdom. Although he maintained various businesses in Georgia, he also paid his taxes in the United Kingdom[287]. By 2011 he had been naturalized a British citizen. He owned real estate and other property in the United Kingdom, including his primary residence. His youngest son was born in the United Kingdom and was a British citizen. His two older sons, who also resided in London, were granted indefinite leave to remain in the United Kingdom[288].

276. A set of events beginning in 2015 led claimant to initiate arbitration against Georgia under the Georgia-United Kingdom BIT. Georgia objected to the tribunal's *ratione personae* jurisdiction on the grounds that, as a Home-Host States dual national,

[283] H-2, slides 4, 27-29.
[284] See, e.g., **Doc. CLA-153**, *Víctor Pey Casado y Fundación Presidente Allende v. The Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008; **Doc. CLA-152**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007; **Doc. CLA-51**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 27 September 2006; **Doc. CLA-161**, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2018; **Doc. CLA-177**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010; **Doc. CLA-178**, *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001; **Doc. CLA-179**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000; **Doc. CER-3-036**, *Accord Mr. Franck Charles Arif v. The Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013; **Doc. CER-3-071**, *Tza Yap Shum v. Peru*, ICSID Case No ARB/07/6, Decision on jurisdiction, 19 June 2009.
[285] See, e.g., **Doc. CLA-151**, *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006.
[286] **Doc. CLA-176/RLA-53**, *Okuashvili*.
[287] **Doc. CLA-176/RLA-53**, *Okuashvili*, paras. 55-58.
[288] **Doc. CLA-176/RLA-53**, *Okuashvili*, paras. 61-63.

claimant was excluded from the treaty protections; even if protected, his dominant and effective nationality was Georgian and not British; and, in any case, claimant's investments predated his acquisition of the British nationality[289].

277. The tribunal found that the relevant provision was Art. 1(c) of the Georgia-United Kingdom BIT, which provides that[290]:

> "For the purposes of this Agreement:
>
> (c) 'nationals' means:
>
> (i) in respect of the Republic of Georgia: Georgians within the meaning of the law of the Republic of Georgia;
>
> (ii) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom […]"

278. On 31 August 2022 the arbitral tribunal issued its partial final award, dismissing Georgia's objection after finding that:

- Art. 1(c) of the treaty was "plainly worded and unqualified" and that "a Georgian-British dual national may be regarded as being a 'national' of both of the Contracting Parties"[291]; however, the tribunal recognized that "only one of the two nationalities will be capable of being relied upon" based on the principle of dominant nationality[292];

- Georgia's investment treaty practice confirmed that it had in other occasions defined investors as those "who are not also nationals of the other Contracting Party" – but not in this treaty[293]; therefore, the tribunal was "unable in these circumstances to read into Article 1(c) a tacit, but far-reaching, limitation whereby the nationality of one Contracting Party would in effect be subject to the other Contracting Party's nationality law"[294].

279. The tribunal then found that claimant had a "genuine link" with the United Kingdom[295]. But the tribunal did not want to decide the issue of whether and to what extent BITs are to be seen as incorporating rules of diplomatic protection regarding nationality of claims, including the principle of dominant and effective nationality. Therefore, the tribunal decided[296]:

> "[…] to resolve the Respondent's objection on the facts of the case—that is to say, by assuming without deciding that the Claimant must clear the 'dominant

[289] **Doc. CLA-176/RLA-53**, *Okuashvili*, para. 97.
[290] **Doc. CLA-176/RLA-53**, *Okuashvili*, para. 101.
[291] **Doc. CLA-176/RLA-53**, *Okuashvili*, para. 108.
[292] **Doc. CLA-176/RLA-53**, *Okuashvili*, para. 109.
[293] **Doc. CLA-176/RLA-53**, *Okuashvili*, para. 111.
[294] **Doc. CLA-176/RLA-53**, *Okuashvili*, para. 112.
[295] **Doc. CLA-176/RLA-53**, *Okuashvili*, paras. 143-146.
[296] **Doc. CLA-176/RLA-53**, *Okuashvili*, paras. 151-152.

> and effective nationality' test as formulated in Article 7 of the ILC Draft Articles on Diplomatic Protection".

280. The tribunal ultimately concluded that claimant's dominant and effective nationality was British rather than Georgian[297].

281. This Tribunal finds that the *Okuashvili* case must be distinguished from the present one for at least three reasons:

- The factual circumstances are pointedly different: in *Okuashvili*, the claimant had significant ties to the United Kingdom; in fact, the tribunal concluded that his dominant nationality was British – whereas in this case, Claimants have no apparent ties to Italy beyond their nationality;

- The relevant treaty provisions differed from the relevant provisions in this case, including, importantly, that the applicable treaty in *Okuashvili* does not contain a mandate to apply principles of international law;

- The tribunal in *Okuashvili* considered Georgia's treaty practice (whereas, as will be explained below, Ecuador's treaty practice has no relevance in the present case).

282. In view of the above, the Tribunal considers that the *Okuashvili* case has no bearing on its decision in this arbitration.

**b. *Bahgat v. Egypt*[298]**

283. Mr. Mohamed Abdel Raouf Bahgat, born in Egypt in 1940, acquired Finnish nationality in 1971[299]. He started an arbitration against Egypt under two BITs: the 1980 Finland-Egypt BIT and the 2004 Finland-Egypt BIT. Both define protected "nationals" or "investors" by reference to the domestic nationality laws of each Contracting State.

284. Egypt objected to the UNCITRAL tribunal's jurisdiction *ratione personae*, arguing that Mr. Bahgat held Egyptian nationality at all relevant times, was not a Finnish national during the relevant period, and therefore did not qualify as a "national" under the 1980 BIT or an "investor" under the 2004 BIT[300].

285. The claimant left Egypt in 1963 and protested against certain Egyptian policies while living abroad. His Egyptian passport expired in 1970, and he declined to return to Egypt to renew it due to fear of apprehension[301]. He applied for Finnish nationality in 1970 and obtained it in 1971. From 1973 to 2003, he was domiciled in Finland and paid taxes there[302].

[297] **Doc. CLA-176/RLA-53**, *Okuashvili*, paras. 154-155.
[298] **Doc. CLA-21/CLA-148**, *Bahgat*.
[299] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 1, 81, 84.
[300] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 79.
[301] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 82-83.
[302] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 84.

286. The parties debated whether Mr. Bahgat had reacquired Egyptian nationality after 1971 and whether he had retained his Finnish nationality. The tribunal relied on the Finnish Supreme Administrative Court's ruling that Mr. Bahgat continuously held Finnish nationality from 1971 onward[303]. It further concluded that, even if he had reacquired Egyptian nationality in 1997 (thus becoming a Home-Host States dual national), he could still bring the arbitration[304].

287. First, the tribunal stressed that the relevant criteria for determining this issue were the treaty provisions themselves. Some investment treaties expressly prohibit Home-Host States dual nationals from asserting claims[305], but neither the 1980 BIT nor the 2004 BIT did so. Both treaties merely imposed "the positive requirement that an individual claimant be a national of the other contracting party, not the negative requirement that the individual claimant is also not a national of the host state"[306].

288. Second, the tribunal noted that "[w]hether a dual national is able to bring a claim under a treaty is also dependent on the legal framework governing the arbitral forum". Unlike the ICSID Convention, the UNCITRAL Rules do not prohibit dual nationals from bringing claims. Consequently, because neither BIT contained a dual-nationality exclusion, Mr. Bahgat needed only to establish his Finnish nationality[307].

289. Third, as to Egypt's contention that Mr. Bahgat's Egyptian nationality was "dominant and effective", the tribunal acknowledged that some academic writing indicated that "where an underlying BIT does not clarify whether dual nationals might bring claims, principles of international law on effective nationality might be considered" by the tribunal to determine its jurisdiction[308]. However, it concluded that "any developments in international law must yield to the *lex specialis* of the investment treaty"[309].

290. Because the relevant treaties did not impose a test of dominant and effective nationality, the tribunal declined to apply that principle. It reasoned that general international law principles concerning the consequences of Home-Host States dual nationality in respect of *ratione personae* jurisdiction could not "trump the explicit language" of the treaties[310]. The tribunal nevertheless recognized the following[311]:

> "Even if international law principles of effective nationality were to be considered in determining this Tribunal's jurisdiction, the Tribunal is satisfied that the record of this case, unlike those of prior cases, does not cast doubt upon the strength of that Claimant's ties to Finland or lead one to believe that Claimant is only asserting his Finnish nationality in order to bring this claim.

[303] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 186-187.
[304] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 220.
[305] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 220-221.
[306] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 222.
[307] **Doc. CLA-21/CLA-148**, *Bahgat*, paras. 223-224.
[308] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 231.
[309] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 231.
[310] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 232.
[311] **Doc. CLA-21/CLA-148**, *Bahgat*, para. 231.

> Claimant acquired Finnish nationality in 1971, long before this arbitration was brought, indeed even before he made any investments in the Project. Moreover, the record reflects a long history of Claimant's residence in Finland and consistent recognition by Finland of Claimant's residence in the nation. Finland considered Claimant to be a Finnish citizen while he was imprisoned in Egypt and although it knew that Respondent also considered him to be Egyptian. Upon the lifting of his travel ban from Egypt, Claimant relocated to Finland. Furthermore, that Claimant considered his ties to Finland genuine is evident in the fact that Claimant continued to pay taxes in Finland" [Emphasis added].

291. This Tribunal once again finds that the *Bahgat* case must be distinguished from the present case for at least two reasons:

- First, the Treaty obliges the Tribunal to apply the principles of international law recognized by the Contracting Parties whenever an investor opts for dispute resolution through *ad hoc* arbitration under the UNCITRAL Rules – which is why the Tribunal has applied the principle of dominant and effective nationality;

- Second, the factual circumstances are pointedly different: in *Bahgat*, the tribunal was satisfied about claimant's ties to Finland, whereas in this case the Tribunal is not satisfied that Claimants have any genuine links to Italy, beyond their nationality and passport.

292. In any case, this Tribunal is not convinced that the Treaty's silence must be interpreted as an indication that claims by Home-Host States dual nationals are permitted, considering that the Treaty clearly requires diversity of nationality between the investor and the host State.

**c. *Oostergetel v. Slovak Republic***[312]

293. This case concerned the 1991 BIT between the Netherlands and the Czech and Slovak Federal Republic. Claimants initiated a UNCITRAL arbitration against the Slovak Republic. The Slovak Republic raised a *ratione personae* jurisdictional objection on the ground that claimants had not proved the effectiveness of their Dutch nationality, noting that they had resided in Belgium for 40 years[313].

294. On this basis alone, the *Oostergetel* case can be distinguished from the present one: it did not address whether a dual national of both contracting States could bring claims against one of those States. Rather, it examined whether a person holding the nationality of one contracting State could still be considered a national under the treaty, despite having permanently resided in a third country for many years.

[312] **Doc. CLA-23/CLA-150**, *Oostergetel*.
[313] **Doc. CLA-23/CLA-150**, *Oostergetel*, paras. 42,110.

295. A similar reasoning can be applied to *Mr. Franck Charles Arif v. Moldova*[314], *Saba Fakes v. Turkey*[315], *Tza Yap Shum v. Peru*[316] and *Eudoro A. Olguín v. The Republic of Paraguay*[317], which Claimants represented at the Hearing as cases purportedly "in favor of the Romero Family's position"[318]. None of these cases concerned dual nationals of both contracting States, and therefore these cases are inapposite.

**d. *Fernando Fraiz Trapote***[319]

296. Mr. Fernando Fraiz Trapote was a dual Venezuelan-Spanish national, who sought to apply the Venezuela-Spain BIT for an alleged expropriation of his businesses in Venezuela[320].

297. Venezuela argued that the tribunal lacked jurisdiction *ratione personae* because, *inter alia*, the BIT does not allow dual nationals of both contracting parties to bring claims against the host state[321] and claimant's dominant and effective nationality was Venezuelan[322].

298. The tribunal found that the BIT was silent on whether Home-Host States dual nationals are protected[323]:

> "*El Tribunal Arbitral estima que la definición literal de inversor del artículo I.1.a) del TBI no incluye ni excluye a todo evento a dobles nacionales. A juicio del Tribunal, el silencio del Tratado no puede ser interpretado en uno ni otro sentido, con fundamento en solo el texto del artículo I.1.a) del TBI*".

299. Given the BIT's silence, the tribunal decided that, pursuant to Art. 31(3)(c) of the VCLT, it had to consider any relevant rules of international law applicable in the relations between the contracting parties[324]. The tribunal found that:

- The BIT is *lex specialis* between the contracting parties, but this does not mean that it is a "self-contained" regime and does not impede the tribunal from interpreting it in accordance with Art. 31(3)(c) of the VCLT[325];

[314] **Doc. CER-3-036**, *Mr. Franck Charles Arif v. The Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013. In this case, the tribunal held that "the effective nationality test has little support in ICSID proceedings and that there is a clear reluctance to apply the test where only one nationality is at issue. This is the case here and therefore the Tribunal is not persuaded that an effective nationality test is applicable" (para. 359).
[315] **Doc. CLA-177**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010.
[316] **Doc. CER-3-071**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No ARB/07/6, Decision on jurisdiction, 19 June 2009.
[317] **Doc. CLA-178**, *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001.
[318] H-2, slide 4.
[319] **Doc. RLA-18**, *Fernando Fraiz Trapote*.
[320] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 4, 62-77.
[321] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 93,98.
[322] **Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 189.
[323] **Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 299 (see also paras. 308,339).
[324] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 357.
[325] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 350, 363.

- The law on diplomatic protection, which includes the principle of dominant and effective nationality, is relevant for the interpretation of investment treaties[326];

- The principle is not limited to diplomatic protection contexts[327].

300. Thus, the tribunal concluded that the principle of dominant and effective nationality was applicable in order to interpret the term "investor" contained in the BIT[328].

301. After applying this principle to the facts, the tribunal concluded that claimant's dominant and effective nationality was Venezuelan and therefore, dismissed its jurisdiction *ratione personae*[329].

**e. *Antonio del Valle*[330]**

302. This case involved 54 claimants, who brought claims against the Kingdom of Spain under the Mexico-Spain BIT and pursuant to the 2013 UNCITRAL Rules[331]. Spain challenged the tribunal's jurisdiction *ratione personae* over eight claimants who held dual Mexican-Spanish nationality[332].

303. Analyzing the BIT under the VCLT, the tribunal concluded that the Mexico-Spain BIT requires "diversity of nationality between a putative claimant and the respondent State", explaining that[333]:

> "[…] the BIT does not establish an investment framework for domestic investors, but rather aims at protecting investors having a different nationality from the one of the host State".

304. The tribunal regarded this nationality-diversity requirement as its starting point for examining its jurisdiction *ratione personae*. However, it noted that[334]:

> "The situation where an investor of a Party possesses the nationality of the home State and the nationality of the respondent/host State, to which the Tribunal will refer as the 'dual national' situation, is not expressly addressed in the Treaty. The Tribunal cannot agree with either of the Parties' primary positions that dual nationals are included or respectively excluded by the Treaty text".

[326] **Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 392.
[327] **Doc. RLA-18**, *Fernando Fraiz Trapote*, para. 389.
[328] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 398.
[329] **Doc. RLA-18**, *Fernando Fraiz Trapote*, paras. 415,418.
[330] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*.
[331] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, paras. 1-2.
[332] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 225.
[333] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, paras. 429,431.
[334] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 433.

305. The tribunal refused to follow Spain's invitation to "import" the ICSID requirements on nationality, considering that the arbitration was not conducted under the ICSID Convention[335].

306. Concluding that the BIT was "silent on the question of dual nationals"[336], the tribunal turned to the other means of interpretation included in Art. 31 of the BIT. Considering that it had not been presented with any elements under Art. 31(2) of the VCLT, nor with any subsequent agreements between the parties or subsequent practice in the application of the treaty, the tribunal decided to rely on Art. 31(3)(c) of the VCLT[337]. The tribunal observed that[338]:

> "Of course, if the wording of the treaty provides a solution which is different from the one otherwise applicable in general international law, that solution must prevail based on Article 31(1) (subject to *jus cogens*). However, when the treaty is silent on a given issue, the answer may come from other rules of international law, including customary law".

307. The tribunal found that the "relevant" international rules applicable between the contracting parties in that case were the rules on nationality in the context of diplomatic protection. The tribunal clarified that it was not[339]:

> "[…] suggesting that all of the customary international law rules on diplomatic protection apply in the BIT context. Rather, as rightly observed by the tribunal in *Perenco v. Ecuador*, 'the field of diplomatic protection [] may, depending upon the issue, be relevant to the interpretation of a BIT'. One such issue is dual nationality, for which recourse to the rules of diplomatic protection may usefully fill the lacuna in the Treaty".

308. The tribunal noted that because the contracting parties had left the issue of Home-Host States dual nationality unaddressed, the BIT's silence required the tribunal to interpret "the definition of investor in light of the rules of diplomatic protection"[340], which provide that the tribunal had to take into account the predominant nationality of the investors[341].

309. The tribunal then analyzed the eight claimants' Home-Host States dual nationality, based on the elements established in the *Nottebohm* case, and concluded that their dominant nationality was Mexican – leading the tribunal to uphold jurisdiction *ratione personae* over the eight claimants[342].

[335] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, paras. 437 *et seq*.
[336] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 446.
[337] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 447.
[338] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 450.
[339] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 461.
[340] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 462.
[341] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, para. 477.
[342] **Doc. RLA-16 (SP)/YB-17 (ENG)**, *Antonio del Valle*, paras. 481-483.

### f. *Raimundo Santamarta*[343]

310. Claimant, Mr. Raimundo J. Santamarta, was a dual national of Venezuela and Spain, who resided in the United States, and who sought to apply the Venezuela-Spain BIT against Venezuela. He owned several pharmaceutical companies in Venezuela[344]. The dispute arose from the alleged actions taken by Venezuela between 2015 and 2018, which ultimately led to respondent's acquisition of claimant's pharmaceutical business[345].

311. Venezuela argued that the tribunal lacked jurisdiction *ratione personae* given that claimant's dominant and effective nationality was Venezuelan. As such, claimant did not qualify as an investor under the BIT[346]. Venezuela also invoked the application of the principle of dominant and effective nationality, on the basis both of Art. 31(3)(c) of the VCLT and Art. XI of the Venezuela-Spain BIT[347].

312. The tribunal noted, after making an interpretation in accordance with the VCLT, that the BIT was silent on Home-Host States dual nationality[348]:

> "*Lo único que el Tribunal puede desprender del texto del Tratado a la luz de su objeto y fin, es que el Tratado no prevé ni una exclusión ni una inclusión total de la protección de dobles nacionales. Es decir, confirma que el Tratado es silencioso con respecto al tratamiento de los dobles nacionales*".

313. It also found that the absence of an express exclusion of Home-Host States dual nationals did not imply that they were protected, considering that when the BIT was signed in 1995, there was no generalized practice of protecting Home-Host States dual nationals[349]:

> "*En todo caso, el distinto tratamiento que tradicionalmente se ha dado a dobles nacionales nunca ha implicado una práctica o reconocimiento generalizado según el cual, la ausencia de exclusión expresa de dobles nacionales implique una protección completa y en todo evento como si se tratasen de personas con una única nacionalidad. Esto es particularmente relevante al considerar que al momento de la celebración del Tratado no existía una práctica, ni generalizada ni incipiente, de otorgar plena protección a los dobles nacionales en ausencia de una exclusión expresa*".

314. Faced with the silence of the BIT, the tribunal decided to have recourse to the rules of international law applicable between the contracting parties, pursuant to Art. 31(3)(c) of the VCLT – an exercise which, in the tribunal's view, did not modify the treaty or add language which the contracting parties did not wish to

[343] **Doc. RLA-66**, *Raimundo Santamarta*.
[344] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 61-69.
[345] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 70-75.
[346] **Doc. RLA-66**, *Raimundo Santamarta*, para. 80.
[347] **Doc. RLA-66**, *Raimundo Santamarta*, para. 468. The Venezuela-Spain BIT provides in Art. XI(4) that the "arbitration shall be based on: […] c. The rules and principles of international law".
[348] **Doc. RLA-66**, *Raimundo Santamarta*, para. 415 (see also paras. 420, 424).
[349] **Doc. RLA-66**, *Raimundo Santamarta*, para. 367.

include, but rather gave meaning to the silence of the treaty, in harmony with international law[350].

315. The tribunal went on to analyze the application of the principle of dominant and effective nationality, finding that it was not limited to diplomatic protection[351] and had in fact been applied by numerous tribunals, including in cases under the Venezuela-Spain BIT[352].

316. The tribunal concluded that claimant was not protected under the Spain-Venezuela BIT, given that claimant's dominant and effective nationality was Venezuelan[353]. Among other elements, the tribunal considered that claimant had been forced to leave Venezuela for security reasons and had chosen to settle in the United States, rather than in Spain, demonstrating weak ties to Spain[354]. Therefore, the tribunal dismissed the claims for lack of jurisdiction *ratione personae*.

*** * ***

317. In sum, this Tribunal has examined numerous decisions by arbitral investment tribunals constituted under different treaties, which have addressed the issue of Home-Host States dual nationality. In some instances, tribunals have considered that the language of their treaties was sufficiently clear and there was no need to look into additional principles. In other cases, finding that the treaties were silent on Home-Host States dual nationality, tribunals have decided to apply the principle of dominant and effective nationality.

318. After analyzing the Treaty's provisions in accordance with the VCLT, this Tribunal has concluded that the Treaty is silent regarding Home-Host States dual nationality and that it is mandated to apply – pursuant to Art. 5(b) of the Protocol – the principle of dominant and effective nationality to determine whether Claimants are protected investors – a principle which, given the specific facts of this case, requires the Tribunal to dismiss its jurisdiction over Claimants' claims.

### B. The position of the French courts

319. Claimants rely on three decisions issued by French courts – the courts of the seat of the arbitration – to argue that there is a risk of this Award being annulled. According to Claimants, French courts have found that tribunals may not insert "phantom terms and conditions into BITs"[355]: when a treaty does not explicitly exclude dual nationals, French courts have held that a tribunal cannot rewrite the treaty to do that or impose an effective nationality test[356].

[350] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 426-427.
[351] **Doc. RLA-66**, *Raimundo Santamarta*, para. 480.
[352] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 484, 488-492.
[353] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 518-519.
[354] **Doc. RLA-66**, *Raimundo Santamarta*, paras. 513-516.
[355] C-PHB, p. 12. See also H-2, slides 30-31; Response to Request for Bifurcation, para. 4.
[356] Response to Request for Bifurcation, para. 4.

320. The three cases cited by Claimants are *Aboukhalil v. Senegal*, *Serafín García Armas v. Venezuela* and *Dangelas v. Vietnam*. The Tribunal will analyze these decisions.

**a. *Aboukhalil v. Senegal*[357]**

321. On 12 October 2021, the Paris *Cour d'appel*[358] rendered its decision on a request to annul an UNCITRAL award related to the France-Senegal BIT. Senegal asked the *Cour d'appel* to set aside the award on the grounds that the tribunal had wrongfully upheld jurisdiction *ratione personae* over an investor who held dual Senegalese-French (and Lebanese) nationality.

322. The *Cour d'appel* rejected Senegal's position, noting that the BIT contained no specific provision regarding Home-Host States dual nationals. It further held that, in the absence of clear treaty language, it would be inappropriate to impose further requirements – such as dominant and effective nationality or rules on diplomatic protection. The *Cour d'appel* emphasized that, given the substantial population of Home-Host States dual nationals between France and Senegal (estimated between three and five million), it could not have been the contracting parties' intention to exclude these individuals from the treaty's protections.

**b. *Serafín García Armas v. Venezuela*[359]**

323. This case involved a person born in Spain in 1944, who acquired Venezuelan nationality in 1972, as well as his daughter, who was born in Venezuela and obtained Spanish nationality in 2003. An UNCITRAL tribunal applying the Spain-Venezuela BIT found jurisdiction over the claimants, prompting Venezuela to request the annulment of the partial award before the *Cour d'appel*. Venezuela asserted that claimants were Home-Host States dual nationals and questioned the timing of the acquisition of Spanish nationality. Thereafter, the Paris *Cour d'appel* twice annulled (or partially annulled) the award, and the French *Cour de cassation* twice quashed (or partially quashed) the *Cour d'appel*'s decisions.

324. In a new decision rendered on 27 June 2023, the *Cour d'appel* (on remand) concluded that the contracting parties had not decided to exclude Home-Host States dual nationals from the treaty protection. Without clear language to that effect, the *Cour d'appel* found that there was no reason to interpret the treaty in light of the VCLT, to apply rules of diplomatic protection or to examine the dominant and effective nationality of the investor.

[357] **Doc. CLA-143/RLA-91**, *Ibrahim Aboukhalil v. Senegal*. Judgment of the Paris Court of Appeal 19/21625, 12 October 2021.
[358] In its Opening Statement presentation Claimants have identified the judgment as one of the French *Cour de Cassation*; however, **Doc. CLA-143/RLA-91** adduced to the record is a judgment by the Paris *Cour d'appel*.
[359] **Doc. CLA-142/RLA-90**, *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, Judgment of the Paris Court of Appeal 22/02752, 27 June 2023.

### c. *Dangelas v. Vietnam*[360]

325. In this case, the claimant, Ms. Dangelas, was a Vietnamese national who had naturalized as a United States citizen in 2014. She claimed that together with two American companies she created in Texas, she had invested in a power plant project in Vietnam. The UNCITRAL tribunal, constituted under the United States-Vietnam BIT, decided to uphold jurisdiction *ratione personae*, despite Vietnam's objections. Vietnam then sought to annul the award before the Paris *Cour d'appel*.

326. In its judgment rendered on 12 September 2023, the *Cour d'appel* determined that the treaty contained no provisions concerning Home-Host States dual nationals, as its Art. 1(9) required only "a natural person who is a national of Party under its applicable law". The *Cour* went on to find that none of the official documents produced by Vietnam contemporaneous with the negotiation of the BIT called into question the Court's reading. It further observed that "the position of the United States in relation to other treaties […] [is] inoperative to determine the intent of the contracting States".

327. The *Cour* also found that an interpretation under the VCLT would not deprive a Home-Host States dual national from the treaty's protection "since these rules do not lead to distinguishing where the text does not distinguish, nor to modifying the application or the terms of a treaty when the latter is clear". The *Cour* concluded that because the treaty contained no express reference to Home-Host States dual nationality:

> "[…] there is no need to add to the text a distinction that the contracting parties did not intend to include".

*** * ***

328. This Tribunal acknowledges both the interpretative authority of the French courts and their power to review this Award. Nevertheless, the Tribunal remains convinced that the factual and legal circumstances of this case are materially different from those in the three previous cases:

- First, none of the referenced cases involved the Italy-Ecuador BIT; as a result, the French courts had no opportunity to review the specific text at issue here;

- Second, the Italy-Ecuador BIT specifically directs the Tribunal whenever an investor opts for dispute resolution through *ad hoc* arbitration under the UNCITRAL Rules to apply the "principles of international law recognised by the two Contracting Parties" when making its decision; by virtue of this express obligation, the Tribunal has applied the principle of dominant and effective nationality; far from inventing "phantom terms" as argued by Claimants, the Tribunal is merely giving effect to the Contracting Parties' agreement; and

[360] **Doc. CLA-141/RLA-89**, *Maya Dangelas v. the Socialist Republic of Vietnam*, Judgment of the Paris Court of Appeal 22/05075, 12 September 2023.

- Third, each of the cited cases featured a specific factual pattern, where the investors had arguably some ties to their claimed nationality; Claimants in this case have no real or substantive connection (or no "genuine link", in the words of the tribunal in *Okuashvili*) to Italy beyond their nationality and holding an Italian passport; their center of gravity (economic, familial, social) is manifestly rooted in Ecuador.

### C. Ecuador's other treaty practice

329. Claimants argue that Ecuador has entered into multiple BITs in which it has included a "requirement that a claimant be able to demonstrate a dominant and effective nationality" – whereas, in this case, it has omitted such a requirement[361].

330. In this regard, Claimants point to a number of BITs concluded by Ecuador, namely the Chile-Ecuador BIT (1993)[362], the Ecuador-Venezuela BIT (1993)[363], the Argentina-Ecuador BIT (1994)[364], the Ecuador-El Salvador BIT (1994)[365] and the Ecuador-Nicaragua BIT (2000)[366].

331. Claimants also say that the BIT between Ecuador and Canada demonstrates Ecuador's "treaty practice and […] intentions" because Canada expressly excludes claims by Home-Host States dual nationals, whereas Ecuador does not[367].

332. The Tribunal does not find these arguments convincing.

333. First, the Tribunal notes that the BITs cited by Claimants focus on a residency requirement – *not* on a nationality requirement. These treaties exclude from protection any investment made by a foreign national who, at the time of the investment, had resided in the host State for a specific period. These treaties contain no reference whatsoever to Home-Host States dual nationality situations:

| Relevant BIT | Relevant provision (Emphasis added by the Tribunal) |
|---|---|
| **Chile-Ecuador BIT (1993)** | **Doc. CLA-163**, Art. I(3): "*Las disposiciones de este convenio no se aplicarán a las inversiones realizadas por personas físicas y que sean nacionales de una Parte Contratante en el territorio de la otra Parte Contratante, si tales personas, a la fecha de la inversión, han estado* ***domiciliadas*** *desde hace más de dos años en esta* |

[361] Counter-Memorial on Jurisdiction, paras. 37, 43. See also H-2, slides 10-20; HT, Day 1, p. 52, 1. 1 to p.55, 14. 21. The Tribunal notes that in the Hearing, Claimants appear to have soften this argument, and claimed that other BITs signed by Ecuador "recognize [] that there are dual nationals" but only "apply restrictions, conditions" to them, as opposed to implementing a "dominant nationality test" (Day 1, p. 52, 6-14). The Tribunal disagrees. The BITs that Claimants cited do not refer to Home-Host States dual nationals, but rather apply a residence criterion in their definition of "investor" (see para. 333 *infra*).
[362] **Doc. CLA-163**.
[363] **Doc. CLA-164**.
[364] **Doc. CLA-165**.
[365] **Doc. CLA-166**.
[366] **Doc. CLA-167**.
[367] H-2, slide 19; HT, Day 1, p. 55, ll. 4-21.

| | |
|---|---|
| | *última Parte Contratante, a menos que se pruebe que la inversión fue admitida en su territorio desde el exterior*". |
| **Ecuador-Venezuela BIT (1993)** | **Doc. CLA-164**, Art. I(3): "*Las disposiciones de este Convenio no se aplicarán a las inversiones realizadas en el territorio de una Parte Contratante por personas físicas que sean nacionales de la otra Parte Contratante, si tales personas, a la fecha de la inversión, han estado **domiciliadas** desde hace más de dos años en esta última Parte Contratante, a menos que se pruebe que la inversión fue admitida en su territorio desde el exterior*". |
| **Argentina-Ecuador BIT (1994)** | **Doc. CLA-165**, Art. I(3): "*Las disposiciones de este Convenio no se aplicarán a las inversiones realizadas por personas físicas que sean nacionales de una Parte Contratante en el territorio de la otra Parte Contratante, si tales personas, a la fecha de la inversión, han estado **domiciliadas** desde hace más de dos años en esta última Parte Contratante, a menos que se pruebe que la inversión fue admitida en su territorio desde el exterior*". |
| **Ecuador-El Salvador BIT (1994)** | **Doc. CLA-166**, Art. I(3): "*Las disposiciones de este Convenio no se aplicarán a las inversiones realizadas por personas naturales que sean nacionales de una Parte Contratante en el territorio de la otra Parte, si tales personas, a la fecha de la inversión han estado **domiciliadas** desde hace más de cinco años en esta última Parte, a menos que se pruebe que la inversión fue admitida en su territorio desde el exterior*". |
| **Ecuador-Nicaragua BIT (2000)** | **Doc. CLA-167**, Art. I(3): "*Las disposiciones de este Convenio no se aplicarán a las inversiones realizadas por personas naturales que sean nacionales de una Parte Contratante en el territorio de la otra Parte Contratante, si tales personas, a la fecha de la inversión, han estado **domiciliadas** desde hace más de cinco años en esta última Parte Contratante, a menos que se pruebe que la inversión fue admitida en su territorio desde el exterior*". |

334. Consequently, Claimants have not shown that Ecuador has expressly excluded Home-Host States dual nationals in these treaties; rather, these provisions address residency.

335. Second, the 1996 Canada-Ecuador BIT is an unusual treaty, since it includes separate definitions of investors who are natural persons[368]:

[368] **Doc. CLA-146**, p. 3, Art. I(h).

- Ecuador adopts a wide definition, and grants protection not only to "natural persons[s] possessing the citizenship" of Canada, but also to those "permanently residing in Canada";

- Canada, on the contrary, adopts a narrower definition, restricting protection to "national[s] of Ecuador" who "do [] not possess the citizenship of Canada".

336. This precedent is of limited relevance to the Italy-Ecuador BIT, which includes for both Contracting Parties the same definition of natural persons as investors. The Canada-Ecuador BIT represents an exceptional case in Ecuador's treaty practice precisely because of its asymmetric definitions – a feature that is absent from the Italy-Ecuador BIT (and from any of the other bilateral investment treaties mentioned above).

337. In sum, Ecuador's treaty practice does not appear sufficiently uniform or probative to ascertain Ecuador's intent under the Italy-Ecuador BIT.

### D. The CAITISA Report

338. Claimants further refer to a 2017 *Informe Ejecutivo: Auditoría integral ciudadana de los tratados de protección recíproca de inversiones y del sistema de arbitraje en materia de inversiones en Ecuador* [previously referred to as the "**CAITISA Report**"]. According to Claimants, the CAITISA Report clearly shows that Ecuador itself acknowledged that dual nationals could qualify as legitimate claimants under its BITs[369].

339. The Tribunal is unconvinced.

340. First, the CAITISA Report does not bind Ecuador or represent its official position. It was prepared by a commission composed of national and international experts, operating as an *ad hoc* independent body – not as a State entity[370].

341. Second, in reviewing the main clauses of Ecuador's BITs, the Commission made the following observations regarding the definition of "investor"[371]:

> "*Los TBI tienen como sujetos de protección a los inversionistas extranjeros; para determinar si un inversionista es extranjero se deberá identificar no sólo su nacionalidad, sino también el origen de su capital. Si un inversionista busca beneficiarse de un tratado, deberá demostrar que tiene la nacionalidad de uno de los Estados parte. Todos los TBI, salvo las excepciones de los firmados con Uruguay y con Egipto, poseen definiciones sobre qué se debe entender por "inversionista". En todos los casos, el concepto incluye tanto a las personas físicas como a las jurídicas que sean nacionales de uno de los dos Estados partes del tratado, o que tengan su sede en el territorio de uno de esos dos Estados, respectivamente. Algunos tratados (casos de los TBI con Venezuela, Chile, Argentina, El Salvador o Nicaragua), contemplan una excepción para aquellas personas que han estado domiciliadas más de dos*

[369] Counter-Memorial on Jurisdiction, paras. 44-46; C-PHB, pp. 9-10; H-2, slides 21-25.
[370] **Doc. C-082/R-11**, CAITISA Report, p. 12.
[371] **Doc. C-082/R-11**, CAITISA Report, p. 18.

> *años en el país, a la fecha en que se realizó la inversión, en esos casos, no se les considera inversionista extranjero. En el resto de los casos, y sobre todo con países desarrollados, tal excepción no existe, por lo que una persona física de nacionalidad, por ejemplo francesa, puede estar radicada en territorio ecuatoriano desde hace diez años y sin embargo, al realizar una inversión, ejercer el derecho a la protección a inversiones extranjeras por medio del TBI Ecuador-Francia*" [Emphasis added].

342. The above excerpt only refers to situations in which a foreign investor resides in the host State – not to investors who hold Home-Host States double nationality; in fact, nothing in the CAITISA Report refers to Home-Host States dual nationals[372]. More significantly, the CAITISA Report confirms that Ecuador's BITs aim to protect "foreign investors" (*inversionistas extranjeros*) and that the goal of Ecuador when signing its BITs was to attract "foreign" investment (*inversión extranjera*)[373].

343. Finally, to establish the Contracting Parties' intention the Tribunal must determine what both Ecuador and Italy agreed upon – not merely Ecuador's intention. Even if Ecuador's other BITs or the CAITISA Report supported Claimants' argument (*quod non*), they would only shed light on Ecuador's intention and not that of the Contracting Parties. Much more convincing evidence of Ecuador's position, in any event, is its national investment legislation. Under the COPCI, Ecuadorian investors who are dual nationals are expressly considered to be "national" investors[374]:

> "*Las personas naturales ecuatorianas que gocen de doble nacionalidad, o los extranjeros residentes en el país para los efectos de este Código se considerarán como inversionistas nacionales*".

### E. Claimants' fundamental right to their nationality and alleged interference with Italian sovereignty

344. Claimants contend that if the Tribunal concludes that it lacks jurisdiction over their claims, it will effectively deprive them of the fundamental right to their nationality[375]. According to Claimants, this would constitute an unlawful interference with Italian national sovereignty, because it would "interfere with Italy's absolute right to determine its own citizenship laws"[376].

345. This argument does not stand.

346. The Tribunal does not suggest that Claimants are not Italian nationals. The Tribunal acknowledges Claimants' Italian nationality (a point which is no longer disputed by Ecuador either) and Italy's right to determine its own citizenship laws. The Tribunal also recognizes the legitimacy of dual nationality – which is not in question.

[372] The excerpts of the CAITISA Report identified by Claimants in their Opening Presentation do not include a reference to Home-Host States dual nationals (see H-2, slides 21-25).
[373] **Doc. C-082/R-11**, CAITISA Report, *inter alia*, p. 17-18.
[374] **Doc. RLA-37**, COPCI, Art. 13(e).
[375] Counter-Memorial on Jurisdiction, paras. 36, 74-80.
[376] Counter-Memorial on Jurisdiction, paras. 81-82.

347. Rather, the Tribunal's position is that, under this *specific* Treaty, Ecuador did not consent to UNCITRAL arbitration with Home-Host States dual nationals whose effective and dominant nationality is Ecuadorian. This conclusion does not affect Claimants' right to their nationality or Italy's sovereign right to determine whether Claimants are Italian nationals. It simply means that Claimants are not permitted to initiate an UNCITRAL arbitration against Ecuador under this *specific* Treaty.

### 5. CONCLUSION

348. In light of the foregoing, the Tribunal concludes that Claimants, Mr. Romero and Ms. Rodríguez, lack standing under the Treaty to assert a claim against Ecuador. As dual nationals whose dominant and effective nationality is Ecuadorian, Claimants are precluded from bringing a claim in an UNCITRAL arbitration against Ecuador under the Treaty. Therefore, the Tribunal lacks jurisdiction over this case.

## VII.2. APPLICATION OF THE PRINCIPLE OF ABUSE OF RIGHTS

349. A second argument supports the previous conclusion: Mr. Romero and Ms. Rodríguez are precluded from asserting a claim against Ecuador under the Treaty because doing so would constitute an *abuse of procedural rights*.

350. In its Memorial on Jurisdiction and post-Hearing brief, Respondent has argued that Claimants' reliance on their Italian nationality to establish this Tribunal's jurisdiction amounts to an abuse of rights, given that the Treaty's purpose is to protect investments made by foreign investors in the other Contracting Party's territory[377].

351. The Tribunal agrees with Respondent. Claimants are Ecuadorian nationals who have officially registered their investments in Ecuador as national investments. Their effort to obtain additional protection by re-labeling themselves as Italian nationals making foreign investments – and, as such, deserving of international law protection – amounts to an abuse of rights, supporting the dismissal of their case.

The origin of the abuse of rights theory

352. Legal rights are not spaces of free will that give their holder complete discretion over how to exercise them[378]. On the contrary, their exercise is limited by the social purpose sought by the legislator when the right was conferred to its beneficiary[379]. A right is thus "power allocated for the purpose of satisfying *interests worth*

[377] Memorial on Jurisdiction, paras. 8, 108, 129; R-PHB, p. 7.
[378] Ahmed Mohsen El Far, *Abuse of Rights in International Arbitration*, Oxford University Press (2020), p. 84; A. N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New…*, Louisiana Law Review, Vol. 54, No. 5 (1994), p. 1195; Roscoe Pound, *Legal Rights*, Harvard Law Review (1915).
[379] James Harrington Boyd, *Socialization of the Law*, American Journal of Sociology, Vol. 22, No. 6 (1917), p. 824; Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, Harvard Law Review, Vol. 25, No. 2 (1911).

*protecting*"[380]. Prof. Josserand, in his classical monograph on abuse of rights, provided the following summary[381]:

> "Rights are bestowed by the State on a human being taking into consideration the satisfaction of his interests, not any interest, but legitimate [social] interests. If these rights are used to achieve that end, they will be legally protected, even if their exercise may harm other persons […]. It is only when the holder of the right exercises his right without any interest, or for the satisfaction of an illegitimate interest […] that it can be said that he abuses it and therefore ceases to have the power to request the protection of the law".

353. It is this definition of rights that gives rise to the doctrine of abuse of rights. Rights are limited by social interests, and the existence of limits entails the possibility of transgressing them – that is, the opportunity for abuse[382]. In Prof. Planiol's well-known phrase "*le droit cesse où l'abus commence*" ("the right ends where the abuse begins")[383].

354. This notion is not new. It follows from the Roman principle *sic utere iure tuo ut alterum non laedas*, which prohibits the exercise of individual privileges in such a way that others – or, in *latu sensu*, the community as a whole – would suffer harm[384]. Incidentally, it was under a version of this principle that French courts first articulated the doctrine of abuse of rights[385].

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[380] David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History*, Cambridge University Press (2013), p. 112, cited in Ahmed El Far, *Abuse of Rights in International Arbitration*, Oxford University Press (2020).

[381] Louis Josserand, *De l'esprit des droits et de leur relativité: Théorie dite de l'abus des droits*, 2nd ed. (1939), p. 388, cited in Julio Cueto-Rúa, *Abuse of Rights*, Louisiana Law Review, Vol. 35, No. 5 (1975), pp. 965-966. The author comments that, for Josserand, rights are not absolute, but relative, since they were conferred by the legislator with certain aims in mind; they are "means to achieve certain social objectives and were to be recognized and enforced only to the extent to which the exercise of the right was compatible with the social functions it has to perform." (p. 1001).

[382] A N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New*…, Louisiana Law Review, Vol. 54, No. 5 (1994), p. 1174. The author explains: "An utterly individualistic notion of right, such as the one maintained by Windscheid, leaves no room for abuse of right. […] Jhering's definition of right as interest protected by the law stresses purpose and sets outer limits for the exercise of rights […], leav[ing] room for the operation of an abuse of right doctrine." (p. 1195, footnote 114).

[383] Marcel Planiol, *Traité élémentaire de droit civil : conforme au programme officiel des Facultés de droit*, Vol. 2 (1931), pp. 312-313.

[384] Alexandre Kiss, *Abuse of Rights*, Oxford Public International Law, Oxford University Press (2023).

[385] A N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New*…, Louisiana Law Review, Vol. 54, No. 5 (1994), p. 1177, footnote 17; Ahmed Mohsen El Far, *Abuse of Rights in International Arbitration*, Oxford University Press (2020), p. 31; Julio Cueto-Rúa, *Abuse of Rights*, Louisiana Law Review, Vol. 35, No. 5 (1975), pp. 965, 966. The doctrine of abuse of rights was initially developed in France in the nineteenth and early twentieth centuries in the framework of vicinage law, on the understanding that property rights are "limited by the satisfaction of a serious and licit interest". Thus, if a landowner does not act under such an interest – for instance, he acts with the intention to harm – and causes damages to a neighbor, he is deemed to have "abused his right" and is liable for damages. Courts justified this principle in art. 1382 of the Code Civil, which provides that any act of a person causing harm to another obliges the one at fault to make reparations, underscoring the limited nature of rights vis-à-vis the community's interests.

355. Over time, the doctrine of abuse of rights has expanded beyond the confines of private law, encompassing other branches of law and extending its reach to both substantive and procedural rights[386]. As Judge Lauterpacht observed[387]:

> "[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".

356. However, he also warned that this doctrine should be limited to exceptional circumstances[388]:

> "[it] is […] an instrument which […] must be wielded with studied restraint".

357. The Tribunal will provide a brief account of how this doctrine has been applied in domestic legal systems (**1.**). It will then explain how the doctrine expanded into international law (**2.**) and, more specifically, into investment arbitration (**3.**). Finally, the Tribunal will apply these considerations to the present case (**4.**).

## 1. ABUSE OF RIGHTS IN DOMESTIC LEGAL SYSTEMS

358. The prohibition on the abuse of rights emerged in national laws and only later expanded to the international sphere[389].

359. In most civil law jurisdictions, abuse of rights is expressly prohibited by the legislator. Germany[390], Switzerland[391], the Netherlands[392], Greece[393], Portugal[394], Russia[395], Poland[396], Bolivia[397], Paraguay[398], and Mexico[399], among other civil law countries, have enacted legislation sanctioning the abuse of *substantive rights*, emphasizing that their exercise must conform to their purpose, be carried out in

[386] Ahmed Mohsen El Far, *Abuse of Rights in International Arbitration*, Oxford University Press (2020), pp. 91-95; Chris J. H. Brunner, *Abuse of Rights in Dutch Law*, Louisiana Law Review, Vol. 37, No. 3 (1977) , pp. 743-745. It is worth mentioning a landmark ruling of the Hoge Raad (the Supreme Court of the Netherlands) addressing whether the procedural right to appeal can be abused. In that case, a husband appealed a decree of separation not out of a genuine interest in overturning it, but solely to harm his wife. Had the appeal been admitted, Dutch law would have deprived the wife of alimony. The Court held that the right of appeal had been exercised abusively, as it was used for a purpose wholly different from that for which it was granted and in the absence of any legitimate interest.
[387] Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens & Sons Limited (1958), p. 164.
[388] Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens & Sons Limited (1958), p. 164.
[389] Byers, Michael (2002), *Abuse of rights: An Old Principle, A New Age*, McGill Law Journal, Vol. 47 (2002), p. 3891.
[390] Arts. 226 and 242 of the German Civil Code.
[391] Art. 2 of the Swiss Civil Code.
[392] Art. 3:13 of the Dutch Civil Code.
[393] Art. 281 of the Greek Civil Code.
[394] Art. 334 of the Portuguese Civil Code.
[395] Art. 10 of the Russian Civil Code.
[396] Art. 5 of the Polish Civil Code.
[397] Art. 107 of the Bolivian Civil Code.
[398] Art. 372 of the Paraguayan Civil Code.
[399] Art. 1912 of the Mexican Civil Code.

good faith, and respect the rights and legitimate interests of others. For example, Art. 36, paragraph 1, of the Ecuadorian Civil Code stipulates that[400]:

> "*Constituye abuso del derecho cuando su titular excede irrazonablemente y de modo manifiesto sus límites, de tal suerte que se perviertan o se desvíen, deliberada y voluntariamente, los fines del ordenamiento jurídico*".

360. This same principle has also been recognized by the Italian *Corte di Cassazione*, in a decision of 18 September 2009[401]:

> "Abuse of rights, therefore, far from presupposing a violation in the formal sense, outlines the distorted use of the formal framework of the law, aimed at achieving objectives that are additional and different from those indicated by the legislator. […]
>
> Today, the principles of objective good faith and abuse of rights must be selected and reconsidered in light of constitutional principles—social function pursuant to Article 42 of the Constitution—and the very qualification of absolute subjective rights.
>
> From this perspective, the two principles complement each other: good faith constitutes a general standard to which the conduct of the parties must be anchored, even within a private relationship and in the interpretation of acts of private autonomy; while the notion of abuse emphasizes the need for a correlation between the powers conferred and the purposes for which they are granted.
>
> Whenever the purpose pursued is not one permitted by the legal system, an abuse occurs. In such a case, exceeding the internal limits or certain external limits of the right results in its abusive exercise".

361. Some, if not most, of these civil law countries have accompanied the prohibition on abuse of *substantive rights* with a corresponding prohibition on abuse of *procedural rights*. For instance, Section 2 of Art. 247 of the Spanish Code of Civil Procedure provides that[402]:

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[400] "Abuse of rights occurs when the holder unreasonably and manifestly exceeds its limits, thereby deliberately and willfully distorting or diverting the purposes of the legal order." Ecuador. (2005). Código Civil [Ley]. Registro Oficial Suplemento 46 de 24 de junio de 2005.

[401] Italian Court of Cassation, Section III, 18 September 2009, Decision No. 20106, pp. 4-5: "*L'abuso del diritto, quindi, lungi dal presupporre una violazione in senso formale, delinea l'utilizzazione alterata dello schema formale del diritto, finalizzata al conseguimento di obiettivi ulteriori e diversi rispetto a quelli indicati dal Legislatore.* […] *Oggi, i principii della buona fede oggettiva, e dell'abuso del diritto, debbono essere selezionati e rivisitati alla luce dei principi costituzionali - funzione sociale ex art. 42 Cost. - e della stessa qualificazione dei diritti soggettivi assoluti. In questa prospettiva i due principii si integrano a vicenda, costituendo la buona fede un canone generale cui ancorare la condotta delle parti, anche di un rapporto privatistico e l'interpretazione dell'atto giuridico di autonomia privata e, prospettando l'abuso, la necessità di una correlazione tra i poteri conferiti e lo scopo per i quali essi sono conferiti. Qualora la finalità perseguita non sia quella consentita dall'ordinamento, si avrà abuso. In questo caso il superamento dei limiti interni o di alcuni limiti esterni del diritto ne determinerà il suo abusivo esercizio*".

[402] "The courts shall reject any claims filed in abuse of the law or that involve the abuse of procedural rules, stating the grounds for such decisions." España. (2000). Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil. Boletín Oficial del Estado, nº 7, de 8 de enero de 2000, art. 247(2).

> "*Los tribunales rechazarán fundadamente las peticiones e incidentes que se formulen con manifiesto abuso de derecho o entrañen fraude de ley o procesal*".

362. In contrast, common law jurisdictions do not directly recognize the principle of abuse of rights, but it is widely accepted that numerous common law principles and rules contain similar elements and may achieve the same purpose[403].

363. In sum, although civil law and common law use different doctrinal tools, they share the same underlying concern: rights are not absolute, and the law intervenes when their exercise becomes abusive. Comparative studies have identified four recurring scenarios, across all legal traditions, in which courts will recognize and bar abuse of rights: when a right is exercised[404]

- to cause harm,
- in bad faith,
- in an unreasonable manner, or
- in a way that departs from its social purpose.

## 2. ABUSE OF RIGHTS IN INTERNATIONAL LAW

364. The prohibition of abuse of rights has been recognized not only within most domestic legal systems but also in public international law[405].

365. This prohibition has often been regarded as a "general principle of law recognized by civilized nations" under Art. 38(1)(c) of the Statute of the ICJ. The *travaux préparatoires* of this provision record that a member of the Committee of Jurists expressly cited the "principle proscribing the abuse of rights" as an example of a general principle of law, alongside the principle of good faith and other legal institutions that are recognized across most jurisdictions and legal traditions[406].

366. Legal scholars have also examined municipal legal systems to determine whether the prohibition on abuse of rights can be considered "general" in the sense of Art. 38(1)(c). Most have concluded that said prohibition can be characterized as a general principle of law due to its extensive acceptance across jurisdictions[407].

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[403] John Antony Weir and Pierre Catala, *Delict and Torts: A Study in Parallel*, Tulane Law Review, Vol. 37, No. 4 (1963).
[404] Ahmed Mohsen El Far, *Abuse of Rights in International Arbitration,* Oxford University Press (2020), p. 31; A. N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New…*, Louisiana Law Review, Vol. 54, No. 5 (1994), p. 1196.
[405] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press (1953), p. 121.
[406] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press (1953), pp. 25-26.
[407] Alexandre Kiss, *Abuse of Rights*, Oxford Public International Law, Oxford University Press (2023), para. 9; Byers, Michael (2002), *Abuse of rights: An Old Principle, A New Age*. McGill Law Journal, Vol. 47 (2002), p. 396.

367. The doctrine of abuse of rights has also been expressly incorporated into various international treaties and accords. Art. 300 of the United Nations Convention on the Law of the Sea[408], Art. 17 of the European Convention of Human Rights[409], Art. 1.7 of the UNIDROIT Principles[410], among other dispositions, bar the abusive exercise of rights.

368. Perhaps most importantly, the doctrine of abuse of rights has been acknowledged by many international bodies, including the United Nations Commission on International Trade Law (UNCITRAL) and the ICJ. In particular, in the context of concurrent arbitration proceedings and the problems arising therefrom, UNCITRAL recognized that[411]:

> "A ground upon which an arbitral tribunal could dismiss abusive claims is the prohibition of abuse of process, a generally recognized international law principle".

369. Although the ICJ has not yet issued a decision based on abuse of rights, it has – on several occasions – acknowledged the principle's relevance and applicability within the sphere of international law. Chiefly, in the case of *Equatorial Guinea v. France* (*Immunities and Criminal Proceedings*), the ICJ distinguished "abuse of process" from "abuse of rights", specifying that[412]:

- the former is to be analyzed "at the preliminary phase" as an issue of jurisdiction, whereas

- the latter is to be studied "at the merits phase" as a matter of admissibility.

370. In its reasoning, the ICJ referred to three earlier cases[413] in which it had consistently ruled in accordance with this distinction, noting that objections related to abuse –

[408] "Good faith and abuse of rights. States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."
[409] "Prohibition of abuse of rights. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."
[410] "Good faith and fair dealing. (1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty." Comment 2: "Abuse of rights. A typical example of behaviour contrary to the principle of good faith and fair dealing is what in some legal systems is known as «abuse of rights». It is characterised by a party's malicious behaviour which occurs for instance when a party exercises a right merely to damage the other party or for a purpose other than the one for which it had been granted, or when the exercise of a right is disproportionate to the originally intended result."
[411] UNCITRAL, Note by the Secretariat, "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration", July 2017, p. 5/11.
[412] *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018, pp. 335-337.
[413] The cited cases were: *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), Merits, Judgment, 1926 P.C.I.J., Series A, No. 7, p. 30; *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment, 1991 I.C.J., p. 63, para 26; *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Preliminary Objections, Judgment, 1992 I.C.J. p. 255, para. 37. There are more cases in which the ICJ has referred to the principle of abuse of rights: *Fisheries case* (UK v. Norway), Judgment, I95I: I.C.J., p. 116, para. 142;

whether procedural or substantive – had always been dismissed. However, those dismissals were based on a lack of evidence or merit, not on a rejection of the doctrine of abuse itself. On the contrary, the ICJ recognized this doctrine by analyzing and determining whether one of the parties had or not abused their rights. And this recognition was evident in the *Equatorial Guinea v. France* case, not only in the Court's conceptual distinction for resolving abuse-related objections, but also in its formulation of a standard of review. As the ICJ stated[414]:

> "[…] it is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process".

## 3. ABUSE OF RIGHTS IN INTERNATIONAL INVESTMENT ARBITRATION

371. The prohibition on abuse of rights is a general principle that also finds application in investment arbitration[415]. Investment tribunals have applied the doctrine in various situations, which include treaty shopping (**A.**), parallel proceedings (**B.**) and situations of *allegans contraria non est audiendus* (**C.**)

### A. Treaty shopping

#### a. Abuse as to the corporate structure of the investment

372. Arbitral tribunals have held that when a corporate investor restructures its holdings with the sole purpose of securing the jurisdiction of an arbitral tribunal or gaining access to more favorable investment treaty protection, and such restructuring occurs when a dispute has already arisen or is foreseeable, this conduct may amount to an abuse of process. This practice is commonly referred to as "treaty shopping".

*Phoenix v. Czech Republic*

373. The first case in which an investment arbitral tribunal dismissed a claim on the ground of abuse of process was *Phoenix Action, Ltd. v. Czech Republic*[416]. This dispute arose when a Czech national incorporated Phoenix Action Ltd. in Israel and, shortly thereafter, transferred to it his two Czech companies, which were already involved in multiple criminal and civil disputes in the Czech Republic. Only two months after this restructuring, Phoenix commenced arbitration proceedings against the Czech Republic under the Czech Republic–Israel BIT.

374. The respondent contended that Phoenix was nothing more than a "sham Israeli entity" created *ex post facto* by a Czech fugitive for the sole purpose of transforming

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*Case Concerning Border and Transborder Armed Actions* (Nicaragua v. Honduras) Jurisdiction of the Court and Admissibility of the Application, 1988 I.C.J., para. 94; *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), Preliminary objections, 2019 I.C.J., para. 114.

[414] *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 336.

[415] Emmanuel Gaillard, *Abuse of Process in International Arbitration*, ICSID Review, Vol. 32, No. 1 (2017), pp. 17-37.

[416] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ["***Phoenix***"].

domestic disputes into international investment claims[417] – and the arbitral tribunal agreed, holding that[418]:

> "The Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration".

375. In reaching this conclusion, the tribunal examined the timing of the restructuring, the nature of the transactions, and the absence of any genuine economic activity, finding that the alleged investment was "an artificial transaction to gain access to ICSID"[419]. Because the investment was not made *bona fide*, it did not merit protection and, on this basis, the tribunal declined jurisdiction, thereby establishing that "treaty shopping" through artificial corporate restructuring may constitute an abuse of process.

*Mobil Corporation v. Venezuela*

376. A year after *Phoenix*, the tribunal in *Mobil Corporation v. Venezuela*[420] reinforced the doctrine of abuse of process in cases of "treaty shopping". The claimant, a U.S. company with investments in Venezuela, restructured its holdings by interposing a Dutch subsidiary, shortly after Venezuela had introduced a series of amendments to its tax regime. Subsequently, Venezuela nationalized the claimant's assets, which led Mobil to pursue arbitration under the Netherlands–Venezuela BIT.

377. Venezuela objected that the Dutch entity was a mere "corporation of convenience"[421], created in anticipation of litigation and solely to secure ICSID jurisdiction. The tribunal agreed in part: it recognized that corporate restructuring to obtain treaty protection is not inherently illegitimate; however, any restructuring undertaken after a dispute has already arisen or become foreseeable constitutes an abusive manipulation of the system of international investment protection. Applying this distinction, the tribunal declined jurisdiction over Mobil's tax-related claims, which predated the restructuring, but upheld jurisdiction over its expropriation claims, which arose afterward.

*Philip Morris v. Australia*

378. Later, in a similar case, the tribunal in *Philip Morris v. Australia*[422] confirmed the applicability of the abuse of process doctrine. This case concerned Australia's introduction of "plain packaging" rules for tobacco products. The government announced its intention to pass this legislation in April 2010, though the law was not enacted until November 2011. In the interim, in February 2011, Philip Morris reorganized its corporate structure so that its Hong Kong subsidiary directly owned its Australian operations. This restructuring gave the company access to the Hong

[417] *Phoenix*, para. 34.
[418] *Phoenix*, para. 144.
[419] *Phoenix*, para. 143.
[420] *Mobil Corporation, Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.
[421] *Mobil Corporation*, para. 9.
[422] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

Kong–Australia BIT. On the very day the new legislation entered into force, Philip Morris initiated arbitration.

379. Australia objected that this restructuring was an abuse of rights: it was carried out with the sole purpose of gaining treaty protection for a dispute that was already foreseeable. The tribunal agreed. It reaffirmed that restructuring is lawful if no dispute is on the horizon, but illegitimate once a specific dispute has become predictable. Because the plain packaging legislation had been clearly foreseeable from April 2010, the tribunal held that the February 2011 restructuring was abusive. Accordingly, it dismissed the claims for lack of jurisdiction[423].

Other cases

380. The doctrine of abuse of process was affirmed in other cases. Some examples are *Pac Rim Cayman v. Republic of El Salvador*[424], *Europe Cement Investment and Trade S.A. v. Republic of Turkey*[425], C*ementownia 'Nowa Huta' S.A. v. Republic of Turkey*[426], *Lao Holdings N.V. v. Lao People's Democratic Republic*[427], and *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*[428].

**b. Abuse as to the nationality of the investor**

381. The decisions mentioned above involve restructuring corporate assets to change the seat of the corporation. Changing the nationality of the investor, a natural person, to gain the right to qualify for treaty protection and access international arbitration can also be regarded as an abusive maneuver.

382. The classic instance of abusive change of nationality is the case of the *Princesse de Bauffremont*: a French princess acquired German nationality to obtain a divorce under German law, at a time when divorce was prohibited in France; the French courts saw this conduct as fraudulent, considering that nationality cannot be manipulated to evade rules or secure the benefits of more favorable ones[429].

[423] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras. 460, 588.
[424] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 1 June 2012.
[425] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009.
[426] **Doc. RLA-26**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009.
[427] *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014.
[428] *Renée Rose Levy & Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015.
[429] French Court of Cassation, Civil Chambre, 18 March 1878, *Princesse de Bauffremont v. Prince de Bauffremont*, referenced in Emmanuel Gaillard, *Abuse of Process in International Arbitration*, ICSID Review, Vol. 32, No. 1 (2017), p. 36.

*Marco Mihaljevic v. The Republic of Croatia*

383. A similar concern was also at the core of *Marco Mihaljevic v. The Republic of Croatia*[430]. In that case, the claimant held dual German and Croatian nationality when he submitted his request for arbitration. Yet the ICSID Convention expressly excludes claims by investors who also possess the nationality of the host State[431]. To supposedly overcome this bar, Mr. Mihaljevic applied to renounce his Croatian nationality and, subsequently, filed a second request for arbitration[432].

384. Croatia objected to jurisdiction on several grounds, including that the claimant's conduct amounted to an abuse of rights[433]. Particularly, it maintained that Mr. Mihaljevic had sought to renounce his Croatian nationality only after the dispute had arisen, and solely to evade the ICSID's nationality restriction[434].

385. In its award, the tribunal expressed that it was[435]:

> "[…] troubled by the Claimant's conduct, [as] the facts strongly suggest that the reason for the Claimant's application to relinquish his citizenship was so that he could pursue arbitration against the Respondent".

386. However, it stopped short of ruling on the abuse of rights claim; it dismissed the case for lack of jurisdiction on the grounds that, under Art. 25(2)(a) of the ICSID Convention, Mr. Mihaljevic remained a Home-Host States dual national at all relevant times[436].

387. Nevertheless, one of the arbitrators, Ms. María Viçien-Milburn, considered it necessary to address the question of abuse of rights in a concurring opinion. She observed that, as mentioned in *Phoenix v. Czech Republic*, tribunals have an obligation to prevent "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs"[437]. She contended[438]:

> "Such abuse may […] arise equally in the case of acquisition or renunciation of nationality, since both entail an alteration of form designed to obtain a right that would not otherwise exist. […] [T]he central holding of the tribunal in *Philip Morris v. Australia* applies equally in the case at hand: '[T]he initiation of a treaty based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an

[430] *Marko Mihaljević v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023 ["***Mihaljević***"].
[431] Art. 25(2)(a) provides that the Convention does not cover any person who had the nationality of the "State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration, as well as on the date on which the request was registered".
[432] *Mihaljević*.
[433] *Mihaljević*, paras. 53-54.
[434] *Mihaljević*, paras. 53-54.
[435] *Mihaljević*, para. 137.
[436] *Mihaljević*, para. 139.
[437] *Mihaljević*, Concurring Opinion of Arbitrator María Viçien-Milburn, 19 May 2023, para. 2.
[438] *Mihaljević*, Concurring Opinion of Arbitrator María Viçien-Milburn, 19 May 2023.

> investment treaty at a point in time when a specific dispute was foreseeable'. The only necessary adjustment to this well-known holding is to replace the words 'corporate structure' with 'nationality.' Yet even this adjustment does not represent a departure from the reasoning in a long line of cases, since in each instance the change in corporate structure entailed a change in the corporate nationality (*i.e.*, place of incorporation) of the entity holding the investment".

*Littop Enterprises and Others v. Ukraine*

388. Another case that hinged on the investor's nationality is *Littop Enterprises and Others v. Ukraine*[439]. The claimants were dual nationals of Ukraine and Israel, and they sought to bring a claim against Ukraine under the Energy Charter Treaty (ECT). They planned to rely on their Israeli nationality. However, Israel is not a contracting party to the ECT, and under Art. 17(1) of said treaty, Ukraine was entitled to deny the benefits of the ECT to a legal entity owned or controlled by nationals of a non-contracting party (in this case, Israel).

389. To avoid this, the claimants acquired Cypriot nationality, since Cyprus is a contracting party to the ECT. The arbitral tribunal stressed that nothing in the ECT prevents investors with multiple nationalities from invoking the ECT, provided one of those nationalities belongs to a contracting party[440]. However, it cautioned that "a problem arises when such nationality has been acquired only for the purpose of gaining access to the benefits of the said treaty"[441]. And it further explained that "[i]t would be an abuse of process" to allow claimants to rely on a newly acquired nationality as a shield against Art. 17, if that nationality had been obtained solely for this purpose once the dispute had already arisen[442]. Partly on this basis, the tribunal declined jurisdiction.

*** * ***

390. The cases discussed above address situations where the investor sought to create jurisdiction retroactively by restructuring its investment or altering its nationality after a dispute had already become foreseeable. In these cases, the abusive nature of the conduct lies in the exercise of a right for a purpose that falls outside its legitimate scope: namely, to obtain investment treaty protection, which otherwise would not have been available, for a dispute that was likely to materialize. As tribunals have explained, whilst seeking protection from future disputes falls within the legitimate scope of the right to restructure corporate holdings or change nationality, seeking protection from foreseeable disputes does not constitute a valid purpose for exercising those rights.

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[439] *Littop Enterprises Ltd., Bridgemont Ventures Ltd., and Bordo Management Ltd. v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 ["***Littop***"].
[440] *Littop*, para. 608.
[441] *Littop*, para. 608.
[442] *Littop*, para. 609.

391. However, this form of abuse is not the only one that arbitral tribunals may encounter. There are other manifestations of abusive conduct where the manner in which the investor exercises its rights contradicts their legitimate purpose.

### B. Initiating parallel proceedings to maximize chances of recovery

392. One example of abuse beyond the retroactive creation of jurisdiction is the initiation of multiple proceedings based on the same dispute. In these situations, different entities within the same corporate group file separate arbitrations – often under distinct investment treaties – arising from the same facts, in order to maximize their chances of success. This practice increases costs, creates a risk of double recovery, and exposes States to conflicting decisions.

393. In some instances, traditional mechanisms to address parallel litigation, such as fork-in-the-road clauses, waiver clauses, and consolidation clauses, have proven ineffective in preventing such behavior. In response, arbitral tribunals have turned to the doctrine of abuse of process as a remedial measure[443].

*Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*

394. In particular, in *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, the tribunal applied the doctrine of abuse of process to dismiss parallel investment claims brought by a single corporate group. Although the claims were filed by different entities under separate BITs, the tribunal found that they concerned the same investment, the same State measures, and the same harm – an exercise of procedural rights contrary to their legitimate purpose. The tribunal's line of reasoning was the following[444]:

> "The doctrine of abuse of rights prohibits the exercise of a right for purposes other than those for which the right was established. So far, the doctrine has found application in investment jurisprudence mainly in situations where an investment was restructured to attract BIT protection at a time when a dispute with the host state had arisen or was foreseeable. No such situation is present here […].
>
> However, as a 'general principle applicable in international law as well as in municipal law', the prohibition of abuse of rights may equally apply in contexts other than the one just mentioned […].
>
> [An] investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. It goes without saying that structuring an investment through several layers of corporate entities in

[443] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010; **Doc. RLA-50**, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, Egiseries Investments LLC, BSS-EMG Investors LLC, and Mr. David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016.

[444] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB /12/35, Award, 31 May 2017, paras. 540-543.

> different states is not illegitimate. Indeed, the structure may well pursue legitimate corporate, tax, or pre-dispute BIT nationality planning purposes. In the field of investment treaties, the existence of a vertical corporate chain and of treaty protection covering "indirect" investments implies that several entities in the chain may claim treaty protection, especially where a host state has entered into several investment treaties. […] This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm.
>
> […] [T]his conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm […]. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered" [Emphasis added].

### C. Contradicting the principle of *allegans contraria non est audiendus*

395. As the *Orascom* tribunal acknowledged, the doctrine of abuse of rights may be applied in various contexts. In his study on the *General Principles of Law as Applied by International Courts and Tribunals*, Prof. Bin Cheng identified several such contexts. Indeed, he exposed a series of "applications" of the theory of abuse of rights that international tribunals have recognized in decisions dating back to the nineteenth century. These include situations such as the malicious exercise of a right, the fictitious invocation of a right, the abuse of discretion, the duty to maintain the *status quo*, and the duty to notify a change in policy, among others.

396. For present purposes, however, the most relevant application of the theory of abuse of rights is the one Prof. Bin Cheng describes under the maxim of *allegans contraria non est audiendus*. He contends that[445]:

> "[A] man shall not be allowed to blow hot and cold – to affirm at one time and deny at another… Such principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted" [Emphasis added].

397. This reasoning is analogous to the maxim of *venire contra factum proprium non valet*, which rests on the idea that a party cannot act inconsistently with the position it has previously adopted. An abuse of rights occurs when a person adopts

[445] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press (1953), pp. 141-142.

contradictory positions, pretending to benefit from both, and using rights instrumentally rather than in accordance with their true purpose.

398. Arbitral tribunals have invoked such maxims to preclude parties from asserting claims or defenses that contradict their earlier behavior. For instance, in *Mobil Exploration and Development Argentina Inc. (MEDA) and Mobil Argentina S.A. (MASA) v. Argentine Republic*, the tribunal held that Argentina had consistently recognized MEDA and MASA as concessionaires, so it could not later repudiate that recognition to contest jurisdiction or the legality of the investment[446].

## 4. APPLICATION TO THE FACTS

399. As provided in Art. 5(b) of the Protocol, when delivering its decision, the Tribunal must apply not only the provisions of the Treaty, but also "the principles of international law recognized by both Contracting Parties". As discussed above (see paras. 359-366 *supra*), both Ecuador and Italy recognize the prohibition of abuse of rights, which has been repeatedly regarded as a "general principle of law recognized by civilized nations" under Art. 38(1)(c) of the Statute of the ICJ.

400. The Respondent challenges the right invoked by the Claimants, under Art. 9 of the Treaty, to initiate arbitral proceedings against the host State, saying that the Claimants are engaging in an abuse of rights[447].

401. The Tribunal concurs.

402. The record shows that Claimants *in tempore non suspecto* have formally represented to the Ecuadorian authorities that they were Ecuadorians undertaking domestic investments and, as such, were entitled to the protection afforded to domestic investments under Ecuadorian law. Having done so, they are now precluded by the maxims *allegans contraria non est audiendus* and *venire contra factum proprium non valet*, reflecting the wider principle that rights can never be abused, to come before this Tribunal and to invoke the international law protection awarded by the Treaty to Italian investors.

Facts

403. The evidence shows that Claimants formally and repeatedly represented to the Ecuadorian authorities that they should be considered Ecuadorian investors, undertaking purely domestic investments.

404. Indeed, when Mr. Romero registered the Romero Companies before the *Superintendencia de Compañías, Valores y Seguros* of Ecuador, he explicitly identified his nationality as "Ecuadorian", indicating he was making a "national" investment[448]:

[446] *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, para. 228.
[447] Counter-Memorial on Jurisdiction, para. 8.
[448] **Doc. R-9**, p. 9. See also **Doc. R-17**.

REPÚBLICA DEL ECUADOR

SUPERINTENDENCIA DE COMPAÑÍAS, VALORES Y SEGUROS DEL ECUADOR
REGISTRO DE SOCIEDADES

SOCIOS O ACCIONISTAS DE LA COMPAÑIA

No. de Expediente:
No. de RUC de la Compañía:
Nombre de la Compañía:
Situación Legal:
CANC. DE INSCRIPCION ANOTADA EN RM
Disposición judicial que afecta a la compañía: NINGUNA

| No. | IDENTIFICACIÓN | NOMBRE | NACIONALIDAD | TIPO DE INVERSIÓN | CAPITAL | MEDIDAS CAUTELARES |
|---|---|---|---|---|---|---|

405. Ms. Rodríguez did the same when she registered her company Baccarat Plus Baplusa, S.A.[449]:

REPÚBLICA DEL ECUADOR

SUPERINTENDENCIA DE COMPAÑÍAS, VALORES Y SEGUROS DEL ECUADOR
REGISTRO DE SOCIEDADES

SOCIOS O ACCIONISTAS DE LA COMPAÑIA

No. de Expediente: 122124
No. de RUC de la Compañía:
Nombre de la Compañía: BACCARAT PLUS BAPLUSA S.A.
Situación Legal: ACTIVA
Disposición judicial que afecta a la compañía: NINGUNA

| No. | IDENTIFICACIÓN | NOMBRE | NACIONALIDAD | TIPO DE INVERSIÓN | CAPITAL | MEDIDAS CAUTELARES |
|---|---|---|---|---|---|---|

406. These declarations show that, *in tempore non suspecto*, Mr. Romero and Ms. Rodríguez both regarded themselves as Ecuadorian investors undertaking purely domestic investments and were satisfied with the protection which Ecuadorian law grants to domestic investors.

407. Significantly, these registrations occurred after Ms. Rodríguez[450] and Mr. Romero[451] had acquired the Italian nationality – *i.e.*, at a time when they could have chosen to identify themselves as Italian (or at least as "foreign with residence in Ecuador"), undertaking a foreign investment.

408. There is a second, significant fact: the record shows that Mr. Romero Palomo (Mr. Romero's father and an Argentinian citizen) registered his investment in the Romero Companies as "*extranjera residente*", *i.e.*, as foreign with residence in Ecuador[452]. This demonstrates that the family clearly understood the distinction

[449] **Doc. R-9**, p. 7.
[450] Ms. Rodríguez' Italian nationality was recognized on 20 May 2002, whereas Baccarat Plus Baplusa S.A. was established in 2006 (**Doc. R-9**, p. 4. See also **Doc. R-17**, p. 5).
[451] Mr. Romero's Italian nationality was recognized on 6 September 2007, while he continued to identify his investments as national after that (for instance, in Inversiones Rombar S.A., see **Doc. R-9**, p. 3).
[452] **Doc. R-9**.

between domestic and foreign investment under Ecuadorian law. Had Mr. Romero and Ms. Rodríguez wished to characterize their own investments as foreign, as they now portray it before this Tribunal, they could have done so. Instead, they chose to declare themselves as "Ecuadorian" undertaking a "national" investment.

It "shall not be allowed to blow hot and cold"

409. Notwithstanding the above, Claimants come before this Tribunal and take the opposite stance: they now invoke their Italian nationality to obtain access to the Italy-Ecuador BIT and, in particular, to benefit from its procedural right to arbitration.

410. The act of registering an investment as national or foreign is not without its consequences: by choosing to label their investment as national, Mr. Romero and Ms. Rodríguez explicitly identified their investments within one of the categories provided for in Law 46 on the promotion and protection of investments, which clearly distinguishes between "foreign" and "national" investments[453]. They thus created an expectation *vis-à-vis* their counterparty – the State – that their investments were subject to the characteristics and rights inherent to domestic investments.

411. Law 46 only recognizes the possibility of resorting to international arbitration to *foreign* (and not to national) investors, in its Art. 32[454]:

> "*Art. 32.- El Estado y los inversionistas extranjeros podrán someter las controversias que se suscitaren por la aplicación de esta Ley a Tribunales Arbitrales constituidos en virtud de Tratados Internacionales de los cuales sea parte el Ecuador o a los procedimientos específicamente acordados o estipulados en los convenios bilaterales o multilaterales firmados y ratificados por el País*" [Emphasis added].

412. By registering their investments as "national", Mr. Romero and Ms. Rodríguez created an expectation that they would not avail themselves of the protections afforded by Ecuador to foreign investors, including the possibility of having recourse to international arbitration. And by now invoking the protections of the Italy-Ecuador BIT, Claimants attempt to benefit from two distinct sets of rights:

- those conferred upon national investors under Ecuadorian law, and
- those reserved for foreign investors under the Treaty,

a conduct that contravenes the principles of *allegans contraria non est audiendus* and *venire contra factum proprium non valet*, which preclude a party from affirming and denying the same fact to obtain inconsistent advantages.

413. As Prof. Bin Cheng would put it, by *blowing hot and cold at the same time* – that is, by shifting between two legal identities according to convenience – Claimants

[453] **Doc. RLA-32**, Law 46.
[454] **Doc. RLA-32**, Law 46, Art. 32.

blur the distinction between national and foreign investors that both domestic law[455] and this specific Treaty were designed to preserve. Such conduct distorts the underlying rationale of the Treaty and, therefore, constitutes an abuse of rights.

414. What is more, Claimants blur this distinction precisely to obtain the benefits given to foreign investors while being, in every sense, domestic investors. They have not only identified themselves as national investors but have also failed to prove a genuine link with Italy beyond their nationality. As established earlier, their personal, professional, and economic lives are entirely rooted in Ecuador. They were born, educated, and married there; their children were born and raised there; they own property there; and Mr. Romero even served as a public official of the Ecuadorian State. Conversely, they have accepted that there is no effective connection with Italy beyond holding Italian passports.

Cases in which the principle of *venire contra factum proprium* has been applied

415. The tribunal in *Mobil Exploration and Development Argentina Inc. (MEDA) and Mobil Argentina S.A. (MASA) v. Argentine Republic* applied the doctrine of *venire contra factum proprium* to dismiss Argentina's claim that the concessionaires lacked ownership title. The tribunal found that[456]:

> "[T]he principle of good faith and the doctrine of *venire contra factum proprium* prevent Argentina from denying the validity of the Claimants' acquisition or ownership of the above interests and others constituting its investment. Argentina has consistently and repeatedly, for about a decade recognised and acted on the basis of the validity of the Claimants' title. By its own actions and those of its provincial authorities, for which it clearly bears responsibility under international law, it has shown that it regards the Claimants as the rightful holders of title" [Emphasis added].

416. The tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* also applied this doctrine to dismiss Hungary's defense that the project agreements forming the basis of the investment were illegal or invalid under Hungarian law[457]:

> "These Agreements were entered into years ago and both parties have acted on the basis that all was in order. Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. Almost all systems of law prevent parties from blowing hot and cold. If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement. However when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These

[455] See para. 80 *supra*.
[456] *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, para. 228.
[457] **Doc. CLA-51**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 475.

> submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements. They are prevented from so doing by their own conduct" [Emphasis added].

417. The same principle prevents Claimants in this case from invoking protection under the Treaty.

418. In view of the above, the Tribunal reiterates its previous finding that it lacks jurisdiction over Claimants' claims.

# VIII. COSTS

419. Art. 38 of the UNCITRAL Rules provides that:

> "The arbitral tribunal shall fix the costs of arbitration in its award. […]".

420. On 11 April 2025, the Tribunal issued Procedural Order No. 5, providing the Parties with instructions on how to submit their respective statements of costs.

421. On 12 June 2025, Claimants submitted their Statement of Fees and Costs ["**C-SC**"][458] and Respondent submitted its Statement of Costs ["**R-SC**"][459]. Neither of the Parties challenged the items or the amounts claimed by the counterparty.

422. The Tribunal will summarize the Parties' positions on costs (**1.** and **2.**) and will then adopt its decision (**3.**).

## 1. RESPONDENT'S POSITION

423. Ecuador asks the Tribunal to order Claimants to pay the entire costs and expenses incurred by Ecuador in relation to the preparation for and conduct of the Jurisdictional Phase[460], in particular[461]:

| **Legal Fees and Expenses**[462] | | |
|---|---|---|
| | **Written Submissions** | **Hearing** |
| Hogan Lovells's legal fees | USD 457,680 | USD 302,670 |
| Procuraduría General del Estado's legal fees | USD 65,573 | USD 5,283 |
| Expert Dr. Yas Banifatemi's fees and expenses | USD 130,000 | USD 70,000 |
| **Total** | **USD 653,253** | **USD 377,953** |
| Unbilled fees and costs | USD 81,710 | |
| **Grand Total** | | |
| **USD 1,112,916** | | |

424. The total amount claimed by Respondent, excluding administrative costs, is **USD 1,112,916**.

## 2. CLAIMANTS' POSITION

425. Claimants request the Tribunal to order Respondent to bear all the costs and expenses, with interest, incurred by Claimants in relation to the preparation for and conduct of the Jurisdictional Phase[463], namely[464]:

[458] Communication by Claimants dated 12 June 2025.
[459] R-25.
[460] Request for Bifurcation, Chapter VI.c; Memorial on Jurisdiction, para. 130.d; R-PHB, Chapter III.d.
[461] R-SC.
[462] All amounts have been rounded.
[463] Counter-Memorial on Jurisdiction, para. 87.d; C-PHB, Chapter IV.d.
[464] C-SC, Exhibit A.

| **Legal Fees and Expenses**[465] | | |
|---|---|---|
| | **Written Submissions** | **Hearing** |
| Homer Bonner's legal fees | USD 606,499 | USD 316,568 |
| Experts Prof. Andrea Bianchi and Avv. Claudio Cocuzza's fees and expenses | USD 126,507 | USD 60,857 |
| Costs (travel expenses, graphics, etc.) | | USD 21,082 |
| **Total** | **USD 733,006** | **USD 398,507** |
| **Grand Total** | | |
| **USD 1,131,513** | | |

426. The total amount claimed by Claimants, excluding administrative fees, is **USD 1,131,513**. Claimants ask for interest over this amount.

## 3. DECISION OF THE TRIBUNAL

Costs of the arbitration

427. The Tribunal begins by fixing the costs of the arbitration pursuant to Art. 38 of the UNCITRAL Rules:

- Pursuant to the method of renumeration established in section XIII of the Terms of Appointment (*i.e.*, considering an hourly rate of USD 650 for all time spent and work carried out in connection with the arbitration), the fees and expenses of the Tribunal are as follows:
    - Prof. Juan Fernández Armesto (president of the Tribunal): USD 230,122.75 (fees) + USD 461.36 (expenses);
    - Mr. Luis O'Naghten: USD 137,780.50 (fees) + USD 2,752.09 (expenses);
    - Prof. Laurence Boisson de Chazournes: USD 97,618.95 (fees) + USD 2,631.93 (expenses).
- The PCA's fees and expenses for its services in administering the arbitration, including registry and secretarial support, amount to USD 58,583.36 (fees) + USD 1,705.30 (expenses).
- The other costs of the arbitration, including expenses related to the Hearing on Jurisdiction, as well as printing, telecommunications, banking charges, courier services, etc., amount to USD 18,343.76.

[465] All amounts have been rounded.

428. Accordingly, the total costs under these items of Art. 38 of the UNCITRAL Rules amount to USD 550,000.00. These costs were covered by the Parties' deposits to the PCA, equal to USD 275,000 from each Party, together USD 550,000.

Discussion

429. The Italy-Ecuador BIT and the French arbitration law are silent on the issue of allocation of costs.

430. In turn, Arts. 40(1) and (2) of the UNCITRAL Rules provide that:

> "1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable" [Emphasis added].

431. Art. 38(e) refers to:

> "The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable".

432. Even though the principle is that the "costs of the arbitration" – save for the costs for legal representation and assistance – should be "borne by the unsuccessful party", the Tribunal has ample discretion to decide how to apportion costs. Indeed, the Tribunal should do so in a manner that is "reasonable" and takes "into account the circumstances of the case".

433. In the present case, the Tribunal decides that costs should lie where they fall. Whilst Respondent is the successful party, the Tribunal finds that the particular circumstances of this case warrant a departure from the general principle that costs follow the event.

434. The jurisdictional issue at the heart of this Award concerned the determination of an issue on which the Treaty itself is silent, namely whether it protects Home-Host States dual nationals. To decide this, the Tribunal had to undertake an in-depth analysis of the Contracting Parties' intention and ultimately resort to general principles of international law. The Tribunal recognizes that this was a question on which legitimate arguments could be advanced on both sides: Claimants' position that the Treaty protects Home-Host States dual nationals, whilst ultimately unsuccessful, was not without legal foundation, just as Respondent's contrary position, which the Tribunal has accepted, was well-grounded in law.

435. The Tribunal does not find that Claimants acted in bad faith in advancing their jurisdictional arguments. Rather, they put forward an interpretation of the Treaty that required careful consideration and reasoned rejection – and, ultimately, one of the arbitrators was convinced by Claimant's position and dissented.

436. Whilst the Tribunal has also found that there was an abuse of rights on Claimant's part, the Tribunal does not regard this abuse as having been committed in bad faith or with an intent to harm. Rather, it constituted an exercise of procedural rights that exceeded their proper scope. This finding, whilst serious, does not in the circumstances of this case warrant a costs order against Claimants.

437. In view of the above, and taking into account all the circumstances of the case, the Tribunal determines that it is reasonable for each Party to bear its share of the costs of the arbitration (including the fees and expenses of the members of the Tribunal, as well as the costs of the PCA) and its own costs of legal representation and assistance.

# IX. DISPOSITIF

438. For the reasons set out herein, the Tribunal adopts the following decisions by majority (except for the decision on costs, which is unanimous), with arbitrator Mr. Luis O'Naghten dissenting and expressing his position in a Dissenting Opinion which is attached to this Award:

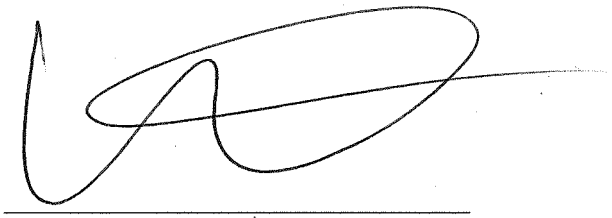
- **Declares** that it lacks jurisdiction over the claims of Mr. Santiago Romero Barst and Ms. María Auxiliadora Rodríguez.

- **Declares** that each Party shall bear its own costs incurred with the arbitration.

- Accordingly, **dismisses** any other prayers for relief advanced by Claimants and Respondent.

Place of Arbitration: Paris (France)
Date of issuance: 3 December 2025

Juan Fernández-Armesto
Presiding Arbitrator



Laurence Boisson de Chazournes
Arbitrator

Luis O'Naghten
Arbitrator
*-in dissent-*