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

PCA Case No. 2023-23

In a dispute between

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

Claimants

-and-

THE REPUBLIC OF ECUADOR

Respondent.

DISSENTING OPINION OF LUIS O'NAGHTEN

Arbitral Tribunal

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

REGISTRY - PERMANENT COURT OF ARBITRATION

Mr. Julian Bordaçahar

ADMINISTRATIVE SECRETARY

Ms. Francisca Seara Cardoso

December 3, 2025

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I. INTRODUCTION

1. I respectfully dissent from the majority's conclusion in the Award on Jurisdiction (the "**Award**") that Claimants, dual nationals of Ecuador and Italy, are barred from invoking the protections 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* (the "**Italy–Ecuador BIT**") due to the dominance of their Ecuadorian nationality.

2. In their comprehensive and thoughtful majority opinion, my learned colleagues continue the recent trend of ruling that dual nationals cannot invoke the protections of a bilateral investment treaty against the nation with which they have an "effective and dominant nationality". Although this is a recent trend, it remains a minority in the universe of decisions dealing with this issue. I disagree with the majority's reliance on the doctrine of "effective and dominant nationality" because *(i)* this doctrine is not a rule of customary international law, nor is it a principle of international law, as the majority erroneously asserts by confusing these two legal concepts; *(ii)* neither the Italy–Ecuador BIT, which is *lex specialis,* nor the domestic law of the State party to the dispute —supplementarily applicable— regulate dual nationality either as a penalty or as an impediment to access international justice, and *(iii)* nationality is a human right that cannot be arbitrarily suppressed, consequently, the international and domestic norms that restrict its scope or effectiveness must be explicit and cannot be presumed, applied by analogy, or through extensive interpretations.

3. My disagreement with the majority, at bottom, relates to whether the protections afforded to Claimants in a treaty as Italian citizens can be denied by simply invoking ambiguous and disputed principles of international law or

whether the denial of such protections must be explicitly set out in the treaty and not inferred by the Tribunal. In my view, the doctrine of "*dominant and effective nationality*", nowhere contained in the Italy-Ecuador BIT, is erroneously inserted into the treaty by the Award.

4. I also respectfully dissent from the majority's conclusion that the Claimants' attempt to benefit from two distinct sets of rights —those conferred upon them as national investors under Ecuadorian law and those conferred upon them as Italian investors under the Italy–Ecuador Bilateral Investment Treaty (BIT)—is an abuse of rights. I disagree with the Award because unless an express rule states otherwise, it is not an abuse of rights for a dual national to benefit from the rights of each nationality.

II. THE ARBITRAL TRIBUNAL CONFUSES THE CONCEPT OF CUSTOMARY INTERNATIONAL LAW WITH A PRINCIPLE OF INTERNATIONAL LAW

5. The majority's opinion is based on Article 5(b) of the Italy–Ecuador BIT Protocol ("**Protocol Art. 5(b)**"), which requires the application of "*principles of international law recognized by the two Contracting Parties*."

6. The majority of the Tribunal asserts that this case differs from others, because under the Italy–Ecuador BIT the Tribunal, by virtue of this express obligation, is bound to apply the principles of international law recognized by the two Contracting Parties.[1] However, the majority does not explain what these *principles of international law* are, and confuses them with *customary international law*, which is a different concept. With respect to the doctrine of dominant and effective nationality (which arises in the very different arena of diplomatic protection), customary international law is being equated with a principle of international law. But as discussed below,

[1] Award, ¶¶ 291 and 328.

customary international law cannot be equated with principles of international law, nor does the doctrine of dominant and effective nationality constitute either customary international law or a principle of international law.

7. Regarding this issue, the majority recognizes that the "principle" of dominant and effective nationality arises in the context of diplomatic protection.[2] The majority also states that the ILC (in the context of diplomatic protection) has determined that this principle is "*customary international law*."[3]
8. The Tribunal acknowledges that there is no consensus among arbitral tribunals regarding the application of the principle of dominant and effective nationality to cases based on investment protection treaties.[4]
9. It remains unexplained how a doctrine that has been challenged by several investment tribunals became customary law and then transformed into a principle of international law within the investment protection system. Simply put, the doctrine of dominant and effective nationality is not a principle of international law.
10. The Award asserts that the Parties' experts agree that the principle of dominant and effective nationality has evolved into a principle of international law.[5] The Award overstates the Parties' experts' representations. Regarding Claimants' expert, *first*, Prof. Bianchi refers to the principle of dominant and effective nationality in the context of diplomatic protection, not in the investment protection system. *Second*, Prof. Bianchi explicitly addresses the confusion between "doctrine," "rules," and

[2] Award, ¶ 222.

[3] Award, ¶¶231-232.

[4] Award, ¶ 234.

[5] Award, ¶ 239

"principles," which can be misleading.[6] Regarding Respondent's expert, the Award cites to the conclusion that "*Such principles include the principle of effective and dominant nationality, which has acquired the status of a customary rule of international law and is therefore binding on both Ecuador and Italy*."[7] The citation does not refer to principles of international law.

11. The Award appears to merge the concepts of "customary law" and "principle of international law," creating a mixed category called the "customary principle of dominant and effective nationality." [8]

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[6] HT, Day 1, p. 117, l. 22 to p. 120, l. 1 (Prof. Bianchi). Prof. Binachi's testimony, in relevant part states:

Q. Thank you, Professor. Professor Bianchi, in your expert report you provide your opinion with regards to various topics that are related to the field of international law; correct?
A. That's correct.
Q. And generally speaking, and in your experience, the field of international law encompasses many different rules, doctrines and principles; correct?
A. That's correct.
Q. Some of these principles or doctrines include the doctrine of estoppel; correct?
A. Indeed, yes.
Q. And they also include the principle of good faith, right?
A. Indeed.
Q. And they also include the principle of dominant and effective nationality, right?
A. As many other principles of international law in many different areas of international law. "Principles" is a tag which is attached to many rules, and sometimes it's a bit misleading because we don't quite know whether "principle" connotes something different than "rule" or "doctrine". But in the terminology of public international law, this "principle" is widely used, and one can speak about principles in various domains. You've got principles of international environmental law, you've got principles of international human rights law, humanitarian law, you name it. ***So in the field of diplomatic protection, there are what I would call "rules" about nationality****, but I heard, and read also in the literature, that they're often referred to as "principles".*
Q. Thank you, Professor. So the answer to my prior question is "yes"?
A. I suppose I provided the necessary context to qualify my answer and to make it accurate.
** * **
A. With respect, counsel, I have a responsibility to provide an honest and accurate response to the Tribunal. So whenever an answer fashioned in a "yes" or "no" kind of note might mislead the Tribunal, I honestly feel bound to provide context before answering.
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.
A. 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****. So I think that I responded the way you wanted, counsel. (emphasis added.)*

[7] H-4, p. 3 (Dr. Banifatemi).

[8] Award, ¶¶ 250.

12. I disagree that customary law can be equated with the principles of international law. Similarly, as discussed below, I disagree that the rules of the diplomatic protection system can be adopted as a principle of international law in the investment protection system.
13. Furthermore, I consider that the Award confuses the specific requirement in the Italy-Ecuador BIT with the broader implications of international law principles. It is incorrect to claim that Ecuador and Italy are both bound by the principle of dominant and effective nationality unless proof exists that either state consistently opposed the establishment and application of this "customary rule."[9]
14. Protocol Art. 5(b) mandates the application of "*principles of international law **recognized** by the two Contracting Parties*." It is undisputed that, in order for a principle of international law to arise, it must be recognized by the majority of states. These principles are the foundational rules that govern the conduct of states and international bodies.[10] Nowhere has the doctrine of dominant and effective nationality been described as one of these foundational rules that govern the conduct of states.
15. As the majority acknowledges, some states may persistently object to a principle of international law. In that case, the principle in question would not apply to them.[11]

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[9] Award, ¶ 250.

[10] Mihai Gogauru*, "Fundamental Principles of International Law",* in the Journal of Law and Administrative Sciences, No. 21/2024; *see also the "*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ('Friendly Relations)" (UN General Assembly Declaration 2625 (XXV) of 1970). UN General Assembly Declaration 2625 established seven (7) specific principles: (i) prohibition of the threat or use of force, (ii) peaceful settlement of disputes; (iii) non-intervention; (iv) duty to cooperate; (v) self-determination; (vi) sovereign equality; and (vii) good faith fulfilment of obligations (*pacta sunt servanda)*.

[11] Award, ¶ 247.

16. Significantly, Protocol Art. 5(b) requires not only that the principle exist but also that it be *recognized by both Contracting Parties*. If the principle is recognized by most States but only by one of the contracting parties, it would not be applicable in the context of the Italy–Ecuador BIT.
17. Some States may not have taken a position on the principle. In general, it could be said that a principle of international law could apply to a State that has not objected to it. However, the Italy–Ecuador BIT does not refer to any such principles. The treaty expressly refers to principles "recognized" by both contracting parties.
18. Apart from the fact that a doctrine upheld by some investment tribunals and rejected by others is not a principle of international law, I disagree that the existence of the principle alone fulfills the Italy–Ecuador BIT's specific requirement that both Contracting Parties recognize it.

19. The Award does not show that the dominant and effective nationality doctrine has been *recognized* by *both* Italy and Ecuador. In fact, the only evidence points to the contrary. As discussed below, both States recognize dual citizenship. Neither country's legislation nor constitution limits the effect of citizenship when an individual has more than one. There is nothing that could be deemed recognition of the dominant and effective nationality doctrine by either State, let alone both.

20. To overcome the fact that there is no direct evidence of either Ecuador or Italy having recognized the doctrine of dominant and effective nationality, the majority attempts to find this recognition by implication. However, its efforts in this regard fall short.

21. As to Ecuador, the Award states that "*Ecuador has explicitly represented that it recognizes the principle of dominant and effective nationality*." (Award, ¶

240.) The only basis for this statement is the citation to Respondent's Memorial on Objections to Jurisdiction, ¶ 94. A statement by Respondent's counsel in the present arbitration is insufficient to demonstrate that Ecuador has recognized the doctrine as a principle of international law. But, reviewing the Memorial, it is evident that Respondent in that paragraph does not make the simple declarative statement that it recognizes the doctrine, it simply cites to its expert arguing that neither State persistently objected to the doctrine.[12] There is absolutely no authority cited in that paragraph that references Ecuador recognizing the doctrine.

22. With respect to Italy, the Award simply states that "*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 .*" (Award, ¶ 240.) Significantly, the Award recognizes that "*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*". . ." (Award, ¶ 241.) The majority concludes that Italy "recognized" the doctrine by simply not being a persistent objector to the doctrine. (Award, ¶ 250.) Consistent with my argument here, the fact that the Award can point to no specific statement from Italy confirming its recognition is conclusive that the requirements of Protocol Art. 5(b) have not been met as the doctrine of dominant and effective nationality has not been recognized by Italy.

[12] Memorial on Objections to Jurisdiction, ¶ 94 states:

> *The principle of dominant and effective nationality—as part of customary international law—applies to both Ecuador and Italy. As explained in the Banifatemi Legal Opinion, this is because "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." In fact, Ecuador and Italy do not appear to have "at any moment question[ed] the customary nature of the principle of effective and dominant nationality."*

23. There is no evidence of either Ecuador or Italy recognizing the doctrine of dominant and effective nationality. In my view, it is incorrect to presume such recognition, especially in States that expressly accept dual nationality in their domestic legislation. The Award effectively renders the phrase "*recognized by the two Contracting Parties"* meaningless, wrongfully making it irrelevant and superfluous to the treaty.

24. Therefore, it is wrong to argue that the burden of proof is on the party arguing for a lack of acceptance or applicability of the principle in this case.[13]

III. THE DOCTRINE OF "EFFECTIVE AND DOMINANT NATIONALITY" IS NOT CUSTOMARY INTERNATIONAL LAW NOR IS IT A PRINCIPLE OF INTERNATIONAL LAW

25. The Award notes that "*Claimants themselves have recognized that their dominant and effective nationality is Ecuadorian*." (Award, ¶ 257). It also notes that "*Claimants have not even attempted to prove that they have any ties whatsoever to Italy beyond their nationality and passport*." (Award, ¶ 259). I do not dispute these facts. However, these facts are irrelevant because there is no hierarchy of nationalities, and so "*dominant and effective nationality"* is an inappropriate concept. Nationality is determined by the law of the State that grants it. It is within the competence of each sovereign State to determine in its internal legislation the terms under which nationality is acquired, retained, or lost. Likewise, each State sovereignly decides whether to recognize more than one nationality.[14] [15] From a strictly

[13] Award, ¶ 248.

[14] As the Ecuadorian Constitution does in Articles 6 (the political and legal link to the Ecuadorian state exists without prejudice to a person's belonging to one of the indigenous nationalities that coexist within the plurinational state of Ecuador) and 8 (explicitly recognizing dual nationality as individuals who acquire Ecuadorian nationality are not required to renounce their nationality of origin).

[15] In 1960, 62% of countries had restrictive policies that led to automatic loss of citizenship upon acquiring another. By 2020, 76% of countries had adopted more tolerant policies, allowing individuals to retain their

legal point of view, there is no such thing as *"most effective nationality."* Nationalities are either acquired —and are valid and effective— or they are renounced or lost and therefore cease to be effective.[16]

26. This Tribunal is concerned with whether Claimants, as dual nationals, can assert a claim under the Italy-Ecuador BIT against Ecuador, the country of their "*dominant and effective nationality*". In this regard, the only relevant fact is that the Claimants have both Ecuadorian and Italian citizenship.

27. The Award acknowledges the Claimants' Italian nationality, a point no longer disputed by Ecuador, and Italy's right to determine its citizenship laws and genuine links. The Award also recognizes the legitimacy of dual nationality, which is not in question.[17]

28. However, the Award contradicts itself by later calling into question the efficacy of their nationality by arguing that Claimants have "*failed to prove a genuine link with Italy beyond their nationality"*.[18] But the Italy-Ecuador BIT simply defines "investor" as a national of the other contracting party. Italy-Ecuador BIT, Art. 1.3. The treaty neither references nor requires any additional "genuine links". The Award is improperly adding an undefined and ambiguous "genuine links" requirement nowhere present in the BIT.

29. As noted by the *Olguín v. Paraguay* tribunal:

> *There has been no dispute that Mr. Olguin has both nationalities, and that both are effective. What one or the other,*

original nationality when acquiring a new one. Over the past two decades, nearly all changes in policy have been towards a tolerant approach. *See MACIMIDE Global Expatriate Dual Citizenship Dataset.*, Global Dual Citizenship Database

[16] Andres Mezgravis, "*The arbitrary deprivation of dual nationality in investment arbitration"*, in *Arbitration International*, volume 39, Issue 4, December 2023, pp. 553-554.

[17] Award, ¶ 346.

[18] Award, ¶ 414.

> *or perhaps both, of his two home states may understand about, for example, the exercise by that person of political rights, civil rights, responsibility for his diplomatic protection, and the importance of domicile in determining such rights is irrelevant in the face of the legitimate legal fact that Mr. Olguín does indeed have both nationalities. The Tribunal is satisfied with the effectiveness of his Peruvian nationality to judge that he cannot be excluded from the regime of protection of the BIT.* [19]

30. The Award states that "*There is consensus among tribunals that the starting point... must be the text of the treaty... guided by Art. 31 of the VCLT*." (Award, ¶ 235). On this point, there is no disagreement. Article 31 provides that "*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*."

31. Regarding the concept of good faith, interpretations must be honest and fair. In terms of the concept of "ordinary meaning", words are given their usual, natural meaning unless the treaty defines them differently. In terms of context, consideration must be given to the full treaty text, preamble, annexes, and related documents. As for object and purpose, the treaty's goals help to clarify ambiguous terms. However, the Award stretches the interpretive aspects of Article 31 to such an extent that the ordinary meaning of the words in the Italy-Ecuador BIT no longer matter. The Italy-Ecuador BIT does not expressly address the question of whether or not dual nationals are covered by its scope of application. In my view, it is not justified, based on purported rules of customary international law, to add an

[19] *Eudoro A. Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5), Award, July 26, 2001, § 61. (Free translation into English).

application requirement that does not follow from its letter or its spirit. Interpretive techniques do not permit arbitrators to insert their policy preferences wherever they deem appropriate.

32. As already mentioned, Protocol Art. 5(b) mandates the application of "*principles of international law recognized by the two Contracting Parties*." Although the majority recognizes that "*There is no consensus among arbitral tribunals... but several tribunals have accepted that this principle is applicable*..." (Award, ¶ 234), the majority then asserts that the doctrine of dominant and effective nationality is a "*relevant rule of international law*." I disagree.

33. The Award correctly traces the origin of the principle to diplomatic protection, citing:

- Art. 4 & 5 of the 1930 Hague Convention (Award, ¶ 222-223).
- ICJ's *Nottebohm* decision (1955): "*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*." (Award, ¶ 226).
- *Mergé* decision (1955): "*The principle... must yield before the principle of effective nationality whenever such nationality is that of the claiming State*." (Award, ¶ 227).
- ILC's 2006 Draft Articles on Diplomatic Protection, especially Art. 7: "*A State of nationality may not exercise diplomatic protection... unless the nationality of the former State is predominant...*" (Award, ¶ 229-232).

34. As a point of departure, it should be noted that interpreting specific treaties using rules or principles of diplomatic protection constitutes a category error. Diplomatic protection is a state-to-state mechanism, not applicable to investor-state arbitration, which is a direct rights-based system.

Investment treaties represented a significant innovation in that they completely replaced the reliance of investors on the willingness of their home country to plead their case to the host country in which they had invested with the right to bring a claim against the host state in their individual capacity based on the protections afforded in the relevant treaty. The ICJ in *Ahmadou Sadio Diallo* confirmed that diplomatic protection is now rarely used due to the rise of investment treaties. Nowhere is it explained, either in the Award or in the other decisions that discuss this issue, how or why a doctrine applicable to the principles of diplomatic protection becomes applicable to investor-state arbitrations.

35. The Award, citing the commentary to Art. 17 of the 2006 Draft Articles, states that

> *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, they continue to apply – which is the case here.*
>
> *Award, ¶ 255.*

But that is exactly the point at issue here: the diplomatic protection rules are not consistent with the Italy-Ecuador BIT. As previously mentioned, the treaty at its Art. 1.3 defines "investor" as a national of the other contracting party. According to this "specific provision" of the treaty, dual nationals, including those whose dominant nationality is Ecuadorian, are afforded the protections of the treaty. But contrary to the admonition of the ILC, the Award is using "*diplomatic protection*

rules [to] override or modify specific provisions of [the] investment treat[y].” I cannot agree with the Award in this regard as I believe this constitutes an impermissible rewriting of the treaty.

36. Every national of a state has the right to invoke the protections afforded by a treaty ratified by the country of citizenship, unless the treaty specifically excludes this possibility. Ultimately, the Award errs in inverting the burden of proof: the Award requires investors to prove that a treaty specifically permits dual nationals to assert claims against the state of their effective and dominant nationality. In contrast, the traditional and proper rule is that a treaty must explicitly deny citizens of the protection afforded by a treaty to prohibit such claims. Otherwise, arbitrators will be free to substitute their policy preferences for what the parties actually negotiated when signing the applicable treaty.

37. Some academic writing addresses this very issue. Customary international law requires both widespread state practice and *opinio juris*.[20] The doctrine of effective and dominant nationality as it relates to the interpretation of investment treaties fails on both counts:

- The Hague Convention of 1930, often cited as foundational, including by the majority, has only 20 ratifications and cannot be analogously applied to non-signatory states. Significantly, neither Italy nor Ecuador ratified the Hague Convention of 1930.
- The *Nottebohm* case did not involve dual nationality and used the term “real and effective,” not “dominant.” Importantly, it was a diplomatic protection case, not investment arbitration, consequently it is completely inapposite to the current circumstance.

[20] Mezgravis, supra note 2, pages 549-570; *see also* Draft Conclusions on the Identification of Customary International Law (2018).

- The *Mergé* case, also dealing with the issue of diplomatic protection, introduced "dominant nationality," but its findings were not universally adopted and were later contradicted by the *Flegenheimer* case in which the doctrine of "apparent nationality" was rejected and emphasized the formal legal status of nationality over its effectiveness. It refused to apply the effective nationality test to determine whether Albert Flegenheimer was a "United Nations national" under Article 78 of the Peace Treaty with Italy. Too, *Flegenheimer* explicitly rejected the doctrine of estoppel (*non concedit venire contra factum proprium*), which would prevent a claimant from invoking a nationality for temporary advantage.
- Finally, the ILC's 2006 Draft Articles on Diplomatic Protection, as is evident from its title, is also directed at *diplomatic protection* and not the investment protection system, thus also inapposite. After almost two decades, these draft articles have not been adopted by any treaty, and therefore, can be no more than that: a draft of rules which are a non-binding statement of international law. It is not a surprise that it has not been adopted by any treaty because this Draft on Diplomatic Protection simply regulated a subject that has lost its relevance. Diplomatic protection lost the importance and validity it had in the last century precisely because of the emergence and dominance of the investment protection system.[21] As the ICJ itself stated, "*in practice, diplomatic protection is only resorted to in the rare cases where the investment protection treaty regime does not exist or has become inoperative."*[22]

38. The reliance on these sources does not establish a rule of customary international law applicable to investment arbitration. Customary

[21] Mezgravis, supra note 2, at 560.

[22] *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), International Court of Justice, Judgment, May 24, 2007, § 88.

international law is composed of rules that result from "a general practice accepted as law." The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio iuris*) means that the practice in question must be followed in the belief of the existence of a legal obligation or right. As Draft Conclusion 2 of the Draft Conclusions on the Identification of Customary International Law (2018) clarifies, the presence of a single constituent element is not sufficient to identify a rule of customary international law. Practice without acceptance as law (*opinio iuris*), even if widespread and constant, can only have a non-binding habit or usage, whereas the conviction that something is —or should be— law, without support in practice, is a mere aspiration. Both conditions must be met to establish the existence of a rule of customary international law. The Award is an example of the latter: a conviction/aspiration that "effective and dominant nationality" should be the law, even though not supported in practice.

IV. THE ICSID CONVENTION DOES NOT SUPPORT THE DOCTRINE

39. The Award notes that Article 25(2)(a) of the ICSID Convention explicitly excludes dual nationals from bringing claims against their own State; in contrast, the UNCITRAL Rules, under which the arbitration was conducted, do not contain any prohibition on claims by dual nationals. (Award, ¶ 175)

40. The majority argues that the ICSID Convention's exclusion of dual nationals reflects a broader principle in international law: a person cannot bring a claim against their own State.

> *The ICSID Convention does not allow claims by dual nationals. In the words of the Fernando Fraiz Trapote tribunal: "It is clear that*

> *a dual national is in a particular legal situation compared to a person with a single nationality*." (Award, ¶ 216)

41. The Award further argues that this principle is echoed in customary international law, particularly in the *Nottebohm* and *Mergé* cases, and codified in Article 7 of the ILC's 2006 Draft Articles on Diplomatic Protection. (Award, ¶ 229.) It bears repeating, each of these authorities involves diplomatic protection, and are improperly being used to interpret a BIT and the Draft Articles have not been adopted by any treaty.

42. The majority uses the ICSID Convention to show that States have consistently excluded dual nationals from investment protection when drafting treaties or choosing arbitration forums. This, purportedly, supports the conclusion that dominant and effective nationality is a recognized principle of international law, especially when the treaty is silent.

> *… the ICSID Convention, which explicitly excludes claims by dual nationals and thereby renders the application of the principle of dominant and effective nationality unnecessary*. (Award, ¶ 234)

43. The Award contrasts the explicit exclusion in ICSID with the Italy–Ecuador BIT, which is silent on dual nationality. Because the Italy–Ecuador BIT is silent regarding dual nationality, the Award finds that it must interpret the Treaty in accordance with Art. 31 of the VCLT and apply the principles of international law recognized by Ecuador and Italy. (Award, ¶ 238) It concludes that the BIT's mandate to apply international law principles requires it to apply the dominant and effective nationality test.

44. I find the Award's invocation of the ICSID Convention unpersuasive and the logic on this point flawed. Article 25(2)(a) of the ICSID Convention demonstrates that when states want to limit dual nationals

access to the investment dispute system, they do so explicitly. Further, the ICSID drafters considered and explicitly rejected the inclusion of an "effective nationality" requirement, *see Saba Fakes v Turkey ("The drafters of the ICSID Convention explicitly rejected the inclusion of an 'effective nationality' requirement. The only nationality-related jurisdictional bar under Article 25 is the exclusion of dual nationals who also hold the nationality of the host State.")*. The tribunal in *Saba Fakes v Turkey* went so far as to state that: "*Reading an effective nationality test into Article 25 would amount to rewriting the Convention, contrary to the clear intent of its drafters."* This position aligns with ICSID's textual approach to nationality and contrasts with the customary international law principle of dominant and effective nationality, which is more appropriately applied in diplomatic protection.

45. Furthermore, the Award's invocation of the ICSID Convention obscures the clear distinction between the ICSID Convention, the Italy-Ecuador BIT, and the UNCITRAL Rules. The majority reasons that UNCITRAL's silence on the issue implies the inclusion of the effective and dominant nationality doctrine in such Rules. This reasoning brings to mind the famous aphorism regarding flipping coins: *Heads I win; tails you lose*.

46. UNCITRAL's silence does not allow arbitrators to impose their preferred policy. UNCITRAL's silence on the matter must be respected, and the applicability of the effective and dominant nationality doctrine must be considered on a treaty-by-treaty basis.

V. BIT INTERPRETATION MUST BE BASED ON TEXT, NOT IMPORTED DOCTRINES

47. As correctly noted by the majority, Protocol Art. 5(b) requires the Tribunal to apply the provisions contained in the treaty, as well as the principles of

international law recognized by the two Contracting Parties. And "*When Claimants opted to accept Respondent's standing offer... they triggered the application of Art. 5(b)..."* (Award, ¶ 238).

48. However, the applicable BIT does not exclude dual nationals. It defines "investor" as a national of the other contracting party, regardless of dominant nationality. Italy-Ecuador BIT, Art. 1.3. The Award's interpretation introduces a doctrine that is not present in the treaty text, thereby violating the principle of legality and the VCLT. As Mezgravis notes, "*the norms that deprive rights must be typified and cannot be presumed or created by analogy or broad interpretation*." The Award's approach undermines legal certainty. Indeed, the Award's method of treaty interpretation is akin to a maze of interpretive techniques through which the arbitrators navigate at the end of which allows them to declare their own policy preferences as the basis for deciding what constitutes international law.

49. The Award cites recent cases that support the finding that the effective and dominant nationality is the applicable doctrine. It cites (i) *Antonio del Valle v. Spain* (PCA Case No. 2019-17) (Award, ¶¶ 212, 302-309) ("*Diversity of nationality is the rule under the overwhelming majority of investment treaties*..."; "*The Treaty neither says... 'only one' nationality... the Tribunal is not willing to read terms into the Treaty*..."); (ii) *Fernando Fraiz Trapote v. Venezuela* (PCA Case No. 2019-11) (Award, ¶ 216, 296-301) ("*A dual national is distinct from a 'national'*"); (iii) *Raimundo Santamarta v. Venezuela* (PCA Case No. 2020-56) (Award, ¶¶ 310-318) (Tribunal applied the principle and dismissed the claim due to Venezuelan dominant nationality.)

50. It is fair to say that the cases cited by the majority show a recent trend toward accepting the concept of effective and dominant nationality in

investment arbitration. But it is also fair to note that these cases remain in the minority as most cases to have considered the issue have declined to follow that rule. *See (i) Pey Casado v. Chile* (ICSID Case No. ARB/98/2) (held that dual nationals are protected unless the treaty explicitly excludes them. "*It would not be justified to add an application requirement that does not follow from its letter or its spirit*."); *(ii) Bahgat v. Egypt* (PCA Case No. 2012-07) (Found no general principle of international law prohibiting dual nationals from bringing claims. "*General international law principles... do not trump the explicit language of the BIT*."); *(iii) Saba Fakes v. Turkey* (ICSID Case No. ARB/07/20) (Rejected the dominant nationality test where the BIT was clear. "*Had the Contracting Parties intended additional limitations... they would have expressly stated them*."); *(iv) Zaza Okuashvili v. Georgia* (SCC Case No. V 2019/058) (Found that the treaty text was "*plainly worded and unqualified*," and did not exclude dual nationals.); *(v) Serafín García Armas v. Venezuela* (PCA Case No. 2013-03) (Tribunal and French courts upheld that dual nationals are protected unless explicitly excluded.); *(vi) Oostergetel v. Slovak Republic* (UNCITRAL, Decision on Jurisdiction 30 April 2010) (The tribunal did not apply the dominant and effective nationality test. The tribunal found that the applicable BIT (Netherlands–Slovakia) defined "investor" simply as a person holding the nationality of one of the contracting states under its law. It emphasized that the BIT did not require the nationality to be dominant or effective. The tribunal held that dual nationals are not excluded from protection under the BIT unless the treaty explicitly says so. It rejected Slovakia's argument that the claimants' Slovak ties should disqualify them.)

51. These decisions affirm that dual nationals are protected under BITs unless expressly excluded.

VI. FRENCH COURTS UNIFORMLY REJECT THE EFFECTIVE AND DOMINANT DOCTRINE

52. The French courts within the past four years have had three occasions to address whether the doctrine of effective and dominant nationality precludes dual nationals from asserting claims against countries in which they have their effective and dominant nationality, and all three times the French courts have rejected the claim.

53. The holdings of the French court decisions are relevant insofar as the French courts are entitled to review any annulment request of the decision this Tribunal makes on jurisdiction.

54. This issue has been addressed *(i)* in *Dangelas v. Vietnam* (PCA Case No. 2020-05) by the Paris Court of Appeal, International Commercial Chamber, Division 5 – Chamber 16 on September 12, 2023, *(ii)* in *Serafín García v. Venezuela* (PCA Case No. 2013-3) by the Paris Court of Appeal, International Commercial Chamber, Division 5 – Chamber 16 on June 27, 2023, and *(iii)* in *Aboukhalil v. Senegal* (RG 19/21625 – Portalis No. 35L7-V-B7GDCBBL2) by Paris Court of Appeal on October 12, 2021 (collectively referred to as the "**French Decisions**")**.** As already mentioned, each of these decisions rejected the effective and dominant doctrine as applied to investment arbitration unless expressly incorporated into the Treaty. I shall briefly address each decision in turn.

55. In *Dangelas v. Vietnam*, the Paris Court of Appeal rejected Vietnam's argument that the arbitral tribunal lacked jurisdiction *ratione personae* due to Ms. Dangelas's dual nationality (Vietnamese and American). Vietnam had argued that the treaty should be interpreted to exclude dual nationals unless their dominant and effective nationality is that of the other contracting state and that Ms. Dangelas's center of life was in Vietnam, making her effectively

Vietnamese. Significantly, in its Chapter IV, Art. 3 the Treaty provides that "*Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable* ***than that required by applicable rules of customary international law***." (Emphasis added.)

56. The Paris Court of Appeal held that the treaty (U.S.–Vietnam Bilateral Trade Agreement of 2000) does not contain any provision excluding dual nationals. Article 1(9) defines a "national" simply as a person who is a national under the applicable law of a Party. Applying a dominant and effective nationality test would add a condition not stipulated in the treaty, violating the Vienna Convention on the Law of Treaties. Customary international law and diplomatic notes (e.g., from the U.S. Embassy) cannot override the clear text of the treaty.

57. In *Serafín García v. Venezuela*, the Paris Court of Appeal rejected the doctrine of effective and dominant nationality. Venezuela argued that the Spain–Venezuela BIT (1995) should exclude dual nationals (Spanish-Venezuelan) based on customary international law principles, including dominant and effective nationality, the Treaty of Amity between Spain and Venezuela (1990), which allegedly supports exclusion, and The Vienna Convention's interpretive principles. Again, significantly, in its Art. XI(4), the BIT provides explicitly that: *"The arbitration shall be based on (a) The provisions of this Agreement and the other agreements concluded between the Contracting parties; (b)* ***the rules and principles of international law****; (c) the national law of the Contracting Party in whose territory the investment was made, including the rules on conflicts of law*." (Emphasis added.)

58. The court rejected Venezuela's arguments, stating: the BIT does not contain any express exclusion of dual nationals. Article I(1)(a) of the BIT defines "investor" as a person with the nationality of one of the contracting parties under its national law. The Vienna Convention's interpretive rules do not allow courts to add conditions not present in the treaty text. The BIT is a *lex specialis* and prevails over general principles of diplomatic protection or dominant nationality. The court concluded that the arbitral tribunal correctly asserted jurisdiction over the Spanish-Venezuelan claimants and dismissed Venezuela's annulment request.

59. In *Aboukhalil v. Senegal*, the Paris Court of Appeal also rejected the doctrine. Senegal argued that Mr. Aboukhalil, a dual national (Senegalese and French), could not invoke the France–Senegal BIT because *(i)* customary international law prohibits dual nationals from bringing claims against their own state, *(ii)* only those whose dominant and effective nationality is foreign to the host state should be protected, and *(iii)* Mr. Aboukhalil had stronger ties to Senegal than France.

60. The Paris Court of Appeal rejected these arguments, holding that the BIT does not exclude dual nationals; Article 1.2 defines "investor" as any person possessing the nationality of one of the contracting parties. Applying a dominant and effective nationality test would add a condition not present in the treaty, violating the interpretive principles of the Vienna Convention; the BIT's silence on dual nationals is not a gap but a deliberate choice not to distinguish. The court emphasized the principle of non-distinction: where the treaty does not distinguish, courts should not; and references to "foreign investor" or "investor of the other contracting party" in the BIT do not override the broad definition of "national." Finally, the court also noted the historical and demographic context—millions of Franco-Senegalese dual

nationals—and concluded that excluding them would undermine the BIT's purpose of promoting investment.

61. The Award incorrectly distinguishes the French Decisions by:

- Using the presence of Protocol Art. 5(b) as a decisive factor. The majority notes that the French Decisions involved different BITs, which did not contain a choice of law provision like Protocol Art. 5(b), which mandates the application of "*principles of international law recognized by the two Contracting Parties*." (Award, ¶ 328)
- Overemphasizing the different factual circumstances: the claimants in the French cases had a genuine connection with the State of their alleged nationality or held the nationality of the other contracting party at the time of the investment, which the Tribunal claims is not the case for the Romero claimants. (Award, ¶ 328)

62. The Award mistakenly argues that the French Decisions did not contain a choice of law provision similar to that in Protocol Art. 5(b). As quoted above, the Spain-Venezuela BIT at issue in the *Serafín García v. Venezuela* decision has a substantially identical provision in its Art. XI(4), which states that the arbitrations conducted under that treaty would be based on "***the rules and principles of international law … .***" Although not identical, the US-Vietnam Treaty at issue in the *Dangelas v. Vietnam* decision invoked customary international law. Consequently, the distinction the majority seeks to make with the French Decisions does not exist. Aside from this correction, the majority's analysis is flawed.

63. The Award fails to engage with the French courts' methodological approach under the VCLT, which emphasizes: the ordinary meaning of treaty terms, no interpretation where the text is clear, and no addition of unstated conditions (like dominant nationality) unless the treaty expressly includes

them. This approach is universally applicable and not limited to French jurisdiction or specific BITs.

64. The majority exhibits an overreliance on Article 5(b): the Award treats the presence of a clause requiring application of international law as a decisive difference, but the dominant and effective nationality is not international law; it is just a controversial doctrine. The French courts applied the correct VCLT interpretation. The French courts—especially in *Dangelas* and *Serafín García*—did not rely on the absence of a choice of law clause to determine jurisdiction (indeed, as discussed above the *Serafín García* case involved such a provision). Instead, they applied VCLT principles to interpret the BITs and concluded that *(i)* dual nationals are not excluded unless the treaty explicitly says so and *(ii)* the dominant and effective nationality test is not applicable unless expressly incorporated into the treaty.

65. The Award's reliance on Protocol Art. 5(b) fails to recognize two critical elements. The Protocol requires this Tribunal to apply the "*principles of international law recognised by the two Contracting Parties."* First, as previously mentioned, the applicable principles of international law are those *recognized* by both Italy and Ecuador. Second, the Award bypasses the distinction between principles of international law and customary international law.

66. As discussed earlier, I disagree that the dominant and effective nationality is a matter of customary international law in the investment protection system.[23] However, in an attempt to distinguish the French Decisions, the Award specifically references Protocol Art. 5(b)'s mandate to use "*principles of international law*" as opposed to the treaties involved in the French

[23] See supra ¶¶ 25-37.

Decisions. Yet, when analyzing this issue, the Award only cites decisions discussing customary international law, not principles of international law. Consequently, the Award's analysis does not involve principles of international law to distinguish the French Decisions, nor does it support the distinction it seeks to make.

67. Both the French Decisions and the present case involve BITs that do not address the issue of dual nationality. The legal question — whether this silence permits or bars claims by dual nationals — remains the same. The reasoning of the French courts is unaffected by the presence of a clause such as Article 5(b) in the Italy–Ecuador BIT. The French courts emphasized that adding such a test would amount to rewriting the treaty, which is impermissible under VCLT Article 31. However, the Award strips the French Decisions of their plain meaning and is directly at odds with the French courts' explicit holdings.

68. The Award implies that the French courts upheld jurisdiction only because the claimants in those cases had strong ties to the non-host State. In fact, the French courts upheld jurisdiction based on treaty text alone. In *Serafín García*, the claimant had strong ties to Venezuela, yet the French court still upheld jurisdiction because the BIT did not exclude dual nationals. In *Dangelas*, the claimant had Vietnamese nationality and lived in Vietnam, but the court still found that her U.S. nationality sufficed under the treaty. Indeed, the significance of the French Decisions is that they explicitly allowed dual nationals to invoke the protections of a treaty even though they asserted claims against a host state which was also the dominant nationality of the respective claimants.

69. Thus, the dominant nationality was not decisive in those cases because the treaty text did not require it.

70. While not binding, the French Decisions reflect a consistent judicial approach to dual nationality in investment arbitration. Their reasoning is persuasive, and because of the implications they have for the present case should have been considered more seriously.

VII. ECUADOR SPECIFICALLY INCLUDES RESTRICTIONS ON DUAL NATIONALS IN ITS BILATERAL INVESTMENT TREATIES WHEN THIS IS ITS INTENTION

71. Ecuador has placed restrictions on individuals asserting claims in several of its Bilateral Investment Treaties (BITs). These restrictions typically apply when an individual has been domiciled in Ecuador for a certain period prior to the investment, unless the investment was admitted from abroad. For example,

- Ecuador's BIT with Venezuela provides no protection if the investor is domiciled in Ecuador for more than two years at time of investment, unless the investment is admitted from abroad;
- Ecuador's BIT with Argentina similarly provides no protection if the investor is domiciled in Ecuador for more than two years at time of investment, unless the investment is admitted from abroad;
- Ecuador's BIT with El Salvador provides no protection if the investor is domiciled in Ecuador for more than five years at time of investment, unless the investment is admitted from abroad;
- Ecuador's BIT with Nicaragua similarly provides no protection if the investor is domiciled in Ecuador for more than five years at time of investment, unless the investment is admitted from abroad;

- Ecuador's BIT with Canada provides that Canada expressly excludes claims by dual nationals, whereas Ecuador does not[24]; and
- Ecuador's BIT with Cuba provides that only Cuban citizens that have permanent residency in Cuba may invoke the treaty while there is no such residency requirement imposed on Ecuadorian citizens to invoke the treaty.[25]

72. The Award emphasizes that "*These treaties contain no reference whatsoever to Home-Host States dual nationality situations … .*" (Award, ¶ 333.) The Award then concludes that "*Claimants have not shown that Ecuador has expressly excluded Home-Host States dual nationals in these treaties; rather, these provisions address residency.*" (Award, ¶ 334.) However, the Award is making a distinction without much difference. These treaties demonstrate that Ecuador knew precisely how to exclude individuals, including dual nationals, from the benefits of a treaty if they resided in Ecuador for a certain period of time. The absence of a reference to "Home-Host State dual nationals" does not negate the effect of the included restrictions. Indeed, the CAITISA report (commissioned by Ecuador), discussed below, rejects the Award's narrow reading of these treaties.

73. However, the clearest evidence that Ecuador consciously decided on a treaty-by-treaty basis whether to allow dual nationals to invoke the

[24] The Award inexplicably states that "*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)*". (Award, ¶ 336)

[25] In the context of this arbitration, it is worth noting that Ecuador's treaties with Chile, Venezuela, Argentina, El Salvador, Canada, Cuba, and Nicaragua all contain choice-of-law provisions that are substantially identical to Protocol 5(b). These provisions require the application of international law principles. Based on the majority's interpretation of these provisions, Ecuador's inclusion of restrictions on individuals in these treaties appears unnecessary and redundant. This is further evidence that, when Ecuador entered into these treaties, it did not consider the dominant and effective nationality doctrine to be part of the principles of international law.

protections of a treaty, even if their "dominant and effective nationality" was Ecuadorian, is the Canada-Ecuador BIT.

74. The Canada-Ecuador BIT is of utmost relevance. The treaty explicitly shows that Ecuador does not accept that the "dominant and effective nationality" is a principle of international law which precludes invoking a treaty's protection when a dual national's dominant and effective nationality is Ecuadorian.

75. In the Canada-Ecuador BIT, Canada explicitly rejected the possibility of dual nationals from asserting claims and restricted the protection of the treaty to "*any natural person who is a national of Ecuador pursuant to its legislation … who makes the investment in the territory of Canada and* ***who does not possess the citizenship of Canada***". Ecuador rejected such a narrow definition as it granted protection to "***any natural person possessing the citizenship of*** *or permanently residing in* ***Canada in accordance with its laws*** *…* ." Consequently, Ecuador knowingly allowed *all* natural persons possessing Canadian citizenship to bring claims against Ecuador, and in no manner did it restrict those having dominant and effective Ecuadorian nationality from asserting such clams.

76. The fact that the Canada-Ecuador BIT allows dual citizens whose dominant nationality is Ecuadorian to invoke the protections of the treaty is all the more relevant as the treaty, in its Art. XIII(7) provides that: "*A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement* ***and the applicable rules of international law****.*" (Emphasis added.) As this language does not contain the qualifier "*principles of international law* ***recognized by the two Contracting Parties,***" the Canada-Ecuador BIT's language is broader than the Italy-Ecuador BIT. This is conclusive proof that Ecuador's requirement of using the "*applicable rules of international*

law" to resolve treaty disputes is not an indirect method of adopting the dominant and effective nationality doctrine. However, under the majority's analysis, the inclusion of the choice of law principle in Art. XIII(7) of the Canada-Ecuador BIT would preclude those whose "dominant and effective nationality" is Ecuadorian from invoking the treaty's protection despite the fact that this would be counter to Ecuador's clear intent. Ecuador did not preclude dual national from bringing claims in the Italy-Ecuador BIT, and Protocol Art. 5(b)'s mandate to use "*principles of international law recognized by the two Contracting Parties* " does not change this fact.

77. As is evident, even in the circumstances in which Ecuador has placed explicit limits on individuals bringing claims against it, Ecuador permits such claims in the event the investor has been domiciled in Ecuador for less than two or five years or the investment has come from abroad.

78. But under the guise of a non-existent "relevant rule of international law", the Award is seeking to incorporate a limit on the ability of dual nationals to assert a claim more restrictive than the explicit provisions that Ecuador has adopted in other BITs. In other BITs, Ecuador has typically included a specific timeframe for individuals — for example, a period of two or five years of domicile in Ecuador — and has limited its application to investments from abroad. However, the Award contains no such timeframe or limitation. According to the Award's reasoning, the moment an investor is deemed to have effective and dominant Ecuadorian nationality, whether for one day or one year and regardless of whether the investment came from abroad, they are precluded from bringing a claim under the Italy-Ecuador BIT, despite there being no such provision in the agreement.

79. Ecuador commissioned a "*Comprehensive citizen audit of reciprocal investment protection treaties and the investment arbitration system in Ecuador*" (the "**CAITISA Report**"). This audit contains the following passage:

> *Definition of investor: The BITs protect foreign investors; to determine whether an investor is a former farmer, not only their nationality must be identified, but also the origin of their capital. If an investor seeks to benefit from a treaty, they must demonstrate that they are a national of one of the States party. All BITs, with the exception of those signed with Uruguay and Egypt, contain definitions of what is meant by "investor." In all cases, the term includes both natural persons and legal entities that are nationals of one of the two States party to the treaty or that have their registered office in the territory of one of those two States, respectively. Some treaties (such as the BITs with Venezuela, Chile, Argentina, El Salvador, and Nicaragua) provide an exception for individuals who have been domiciled in the country for more than two years on the date the investment was made. In such cases, they are not considered foreign investors.* ***In all other cases, and especially with developed countries, no such exception exists, meaning that a natural person of French nationality, for example, may have been resident in Ecuador for ten years and yet, when making an investment, exercise the right to protection of foreign investments through the Ecuador-France BIT.*** (emphasis added.)

80. This CAITISA Report, commissioned by Ecuador to review the status of its various BITs, was received by Ecuador, and there is no evidence that Ecuador disagreed with this conclusion.

81. Ecuador's history of drafting BITs demonstrates that it made treaty-by-treaty decisions as to whether to allow dual nationals to assert the protections afforded treaties. Ecuador did not include an effective and dominant nationality requirement in the Italy-Ecuador BIT, and it is wrong for this Tribunal to do so.

VIII. APPLICATION OF THE PRINCIPLE OF ABUSE OF RIGHTS

82. The Award notes that prohibiting investors and states from committing abuses of rights and process is one of the general principles applicable to investment arbitration. Tribunals have invoked these principles when investors have exercised their rights in different factual situations. [26]
83. Specifically, the Award states that arbitral tribunals have held that restructuring corporate holdings with the sole aim of securing the jurisdiction of an arbitral tribunal or gaining access to more favorable investment treaties — a practice known as "treaty shopping" — can constitute an abuse of process.[27]
84. The Award concludes that changing the nationality of the investor to gain the right to qualify for treaty protection and access to international arbitration can also be considered an abusive maneuver.[28]
85. However, numerous investment tribunals have concluded that corporate restructuring or acquiring a new investor's nationality before the dispute becomes foreseeable is lawful.
86. Additionally, in this case, the Claimants did not change their nationality; rather, prior to a dispute arising with Ecuador, they acquired another

[26] Award, ¶ 371. Emmanuel Gaillard, Abuse of Process in International Arbitration, 46 ICSID Rev. – FILJ 1 (2011).

[27] Award, ¶ 372.

[28] Award, ¶ 381.

nationality to which they were legitimately entitled due to their genuine links to Italy.

87. There is consensus that the doctrine of abuse of rights and abuse of process is subject to a high threshold.[29] The Award concedes that "*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*".[30] Indeed, "*the standard of proof should be appropriately high considering […] that as a general matter bona fide conduct must be presumed in principle*."[31]

88. The Claimants obtained Italian citizenship in 2002 and 2007.[32] The dispute underlying this arbitration was not foreseeable until 2011, when President Correa intensified his efforts to limit gambling (Award, ¶ 106). Foreseeable means the "*moment when things have started to deteriorate so that a dispute is highly probable*."[33] The Award fails to meet this exacting standard.

89. As observed by the tribunal in *Philip Morris v. Australia*, to which the Award refers, *"[i]t is uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits is not per se illegitimate*."[34] The *Philip Morris* tribunal also explained that "*the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment*

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[29] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award (Dec. 21, 2008), ¶ 143.

[30] Award, ¶ 370.

[31] *UAB Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award (Dec. 22, 2017), ¶ 541.

[32] Award, ¶¶ 89 and 90.

[33] *Lao Holdings N.V. v. The Lao People's Democratic Republic,* ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (Feb. 21, 2014), ¶ 76; *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, ¶ 339

[34] *Philip Morris Asia Limited v. The Commonwealth of Australia,* PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015), ¶ 540. *See also*, *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (Feb. 8, 2013), ¶ 184. *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010), ¶ 204; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (Jan. 9, 2015), ¶ 184.

treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty ***in view of a specific foreseeable dispute***."[35] (Emphasis added.)

90. In other words, as the tribunal in *Lao Holdings v. Laos* stated: "*the question could have been* ***discussed whether a dispute was foreseeable before the change of nationality****, if an objection had been raised on the basis of an abuse of process. […] If that moment – "the critical date" – is before the change of nationality, then the Tribunal enjoys no jurisdiction; if, to the contrary, the critical date is after the change of nationality, then the Tribunal can assert jurisdiction.*"[36] (Emphasis added.)

91. A natural person's acquisition of a nationality to which they are objectively entitled due to genuine links cannot, in and of itself, constitute an abuse of rights or process. Unlike corporations, natural persons cannot obtain the nationality they desire. For example, one's ancestry (*jure sanguinis*) or place of birth are not circumstances left to free will. One either has these prerequisites or one does not. Ms. Rodríguez acquired Italian nationality through *jure sanguinis* based on her maternal great-grandparents, who were born in Italy.[37] This is a genuine link recognized by Italy that the Award cannot ignore.

92. Acquiring nationality carries with it a set of rights and obligations for a natural person.[38] The majority cannot deny Claimants of these benefits. Investment protection is just one of those benefits. However, the majority

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[35] *Philip Morris Asia Limited v. The Commonwealth of Australia,* PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015), ¶ 539 (emphasis added).

[36] *Lao Holdings N.V. v. The Lao People's Democratic Republic,* ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (Feb. 21, 2014), ¶ 83.

[37] Award, ¶ 89.

[38] The right to vote, enter the respective country without a visa, and obtain social security are other benefits. Paying taxes or performing military service could be obligations arising from the acquisition of the new nationality.

singles out Italian citizens' ability to seek protection under the Italy-Ecuador BIT and strips Claimants of this right. It is unreasonable to argue that a person is abusing his or her rights simply because they applied for a new nationality to obtain benefits, including investment protection.

93. Abuse of procedural rights may occur if a new nationality is acquired for the sole purpose of gaining access to a jurisdiction that was not previously available, *once the dispute has already become foreseeable*. The foreseeability analysis is a critical element in an abuse of process inquiry.[39]

94. This has not happened in the present case. When the Claimants acquired Italian nationality in 2002 and 2007, a dispute with the state of Ecuador was not foreseeable. Mr. Romero and Ms. Rodríguez's deliberate acquisition of Italian nationality to gain access to the protections of the treaty prior to the dispute becoming foreseeable is lawful. Such prudence cannot be confused with abuse.

95. Therefore, the questions the Tribunal should have considered are: (a) Whether the underlying dispute was foreseeable when the Claimants acquired Italian nationality. (b) If so, whether the acquisitions of Italian nationality were in response to "*events that had negatively affected Claimants' investment and may lead to arbitration*."[40] The answers to these questions are in the negative. Consequently, I am compelled to disagree with my esteemed colleagues.

96. The Award refers to the case *Marco Mihaljevic v. The Republic of Croatia.*[41] In that case, the claimant held dual German and Croatian nationality when he submitted his request for arbitration. Yet the ICSID Convention expressly

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[39] *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, ¶ 340.

[40] *Lao Holdings N.V. v. The Lao People's Democratic Republic,* ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (Feb. 21, 2014), ¶ 70.

[41] *Marko Mihaljević v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023. See Award ¶¶ 368-372.

excludes claims by investors who also possess the nationality of the host State. To supposedly overcome this bar, Mr. Mihaljevic applied to renounce his Croatian nationality and, subsequently, filed a second request for arbitration.[42]

97. Croatia objected to jurisdiction on several grounds, including that the claimant's conduct amounted to an abuse of rights.[43] 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.[44] The Award also quoted the concurring opinion that addresses the question of abuse of rights.[45]

98. In this regard, it is important to clarify that, in contrast to the applicable arbitration treaty in this case, Article 25(2)(a) of the ICSID Convention expressly excludes any natural person who, at the time of consent or registration of the arbitration request, held the nationality of a state party to the dispute. As Prof. Schreuer points out, an investor's ineligibility applies regardless of which nationality is effective, as long as the investor holds the nationality of the host state on either of these two critical dates.[46]

99. An investor who is a national of a state party to the dispute may have access to ICSID jurisdiction if he or she renounces such nationality before executing the consent and before registering the request for arbitration. The possibility

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[42] *Mihaljević*.

[43] *Mihaljević*, paras. 53-54.

[44] *Mihaljević*, paras. 53-54.

[45] Award ¶ 387.

[46] SCHREUER, Christoph, Loretta MALINTOPPI, August REINISCH y Anthony SINCLAIR. "The ICSID Convention: A Commentary. Second Edition. Cambridge University Press, 2009, p. 272, § 668. Similarly, *Saba Fakes c. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, July 14, 2010, § 72.

of relinquishing host state nationality before these critical dates has been recognized by the most authoritative scholars and ICSID tribunals.[47]

100. These two critical dates demonstrate that the restriction on the nationality of the state party to the dispute is not absolute, nor is there a basis for arguing that the nationality with the closest ties should prevail. Indeed, the investment could have been made by a dual national with close ties to the host state; a dispute could have arisen. Yet, the dual national holding the nationality of the state party to the dispute could renounce that nationality before the critical dates and proceed with an international claim under the nationality with which he had the fewest ties. In this scenario, the nationality with the fewest links would be the only "*effective nationality*."
101. Under the application of the doctrine of "*effective and dominant nationality,*" this solution —perfectly licit— would not be feasible.
102. As seen, the application of the doctrine of "effective and dominant nationality" marks a dangerous trend that would end up being more burdensome than the application of Article 25(2)(a) of the ICSID Convention itself. And without an express regulation or without this being provided for in the respective BIT, this would simply not seem to be reasonable or lawful.
103. Furthermore, the Award applies the doctrine of abuse of rights based on at least two incorrect premises: First, it assumes that a dual national is a domestic investor rather than a foreign one. Second, it assumes that a dual national does not face the same risks as a foreign investor. The doctrine of

[47] In this regard, Prof. SCHREUER, together with Loretta MALINTOPPI, August REINISCH and Anthony SINCLAIR, points out that: *"The individual investor's only chance to gain access to the Centre may be to relinquish the nationality of the host State's nationality before consent to ICSID's jurisdiction is perfected […]. Also, the investor would have to ensure that the renunciation of nationality is valid under the host State's law."* The tribunal in *Victor Pey Casado and Fundación Presidente Allende v. Chile* also recognized the lawful possibility of renunciation of nationality. See ICSID Case No. ARB/98/2 Award of May 8, 2008, §§ 314-322. Likewise, the Hague Convention on Certain Questions Relating to Conflicts of Nationality Laws itself, in its Art. 6, enshrines the possibility of renunciation, as well as do all Human Rights Conventions, including Article 15 of the Universal Declaration of Human Rights.

dominant and effective nationality appears to lead the majority of the Tribunal to these errors. Having two nationalities does not mean that an investor must be a national of only one state, nor does it mean that he or she cannot obtain the benefits of both nationalities and exercise the rights offered by each. Otherwise, acquiring a new nationality to benefit from its rights would always constitute an abuse of rights.[48]

104. Furthermore, lacking international standards to justify the decision, the Award attempts to reinforce it by appealing to the maxims "*allegans contraria non est audiendus"* and "*venire contra factum proprium non valet"*.[49]

105. The Award's reasoning is unfair and erroneous. It is natural, lawful, and prudent for investors to protect their investments before disputes with host states arise. This foresight is even more important when authoritarian, dictatorial, or other governments that could threaten private property take office in the host state. Under these circumstances, it is only natural for citizens who have the option of acquiring another nationality through genuine links to do so, especially if they find themselves needing to emigrate in the future and take their investments with them. There is nothing reprehensible about this. On the contrary, it is wrong to ignore this difficult humanitarian situation.

106. One of the main contradictions of the Award is that, on the one hand, it maintains that the Claimants' acquisition of Italian nationality is legitimate,[50]

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[48] For example, someone who acquires a new nationality would not be able to exercise the right to vote because it could then be argued that they acquired the new nationality in order to exercise a political right that they did not previously have, and when they always previously vote in another country with closest links. Or they could not, for example, receive certain social security benefits, because it could be argued that the individual acquired citizenship in order to obtain those benefits that they did not previously have.

[49] Award ¶ 402.

[50] Award ¶ 346.

admitting also that it was acquired long before the dispute became foreseeable but concludes that the Claimants do not have genuine ties to Italy. The Award states that Claimants *"do not have 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"*.[51]

107. But if the Claimants did not have a real or substantive connection to Italy, they would not have been able to acquire Italian nationality. The majority mentions, but at the end ignores that each State is sovereign in establishing what those genuine ties are. A Tribunal is not entitled to impose its preferences on what those genuine ties should be. Hence, the requirement that the center of gravity of the Claimants must be established in Italy in order for the Claimants to be considered Italian is arbitrary and wrong.

108. It is also wrong to infer that when a dual national makes use of one nationality, he or she necessarily renounces the rights conferred by the other nationality. According to the Award, by exercising their Ecuadorian nationality, the Claimants could not subsequently exercise the rights conferred by Italian nationality. The Award states that "*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*".[52] I disagree. There is no rule establishing such a consequence or waiver. On the contrary, when Mr. and Ms. Romero registered their Companies before the *Superintendencia de Compañías, Valores y Seguros* of Ecuador, and they explicitly identified their nationality

[51] Award ¶ 328 (iii).

[52] Award ¶ 412.

as "Ecuadorian," they weren't lying. However, they weren't renouncing their Italian nationality either. With that statement, Mr. and Ms. Romero were exercising the rights conferred upon them by their Ecuadorian nationality and the domestic law, but they were not renouncing their international rights granted to them by the Italy-Ecuador BIT, according to their Italian nationality.

109. Contrary to the majority's findings, Claimants have the right to benefit from two distinct sets of rights: those conferred under Ecuadorian law and those reserved for foreign investors under the Italy-Ecuador BIT. Therefore, it is not a matter of "*blowing hot and cold at the same time*".[53] Rather, it is about those who have dual nationality being able to exercise the rights of both nationalities without this constituting any kind of abuse or going against their own acts. The possibility to conveniently choose when to use one nationality or the other is not an abuse. Having two nationalities gives one the lawful possibility of exercising the rights of both nationalities at one's discretion.

110. Those without dual nationality obviously do not have this advantage. However, this is not a matter of abusing rights, but rather of the natural advantages offered by dual nationality.

111. Only if an express rule establishes the consequence explained above could the Tribunal reach that conclusion. However, there is no rule in the Italy-Ecuador BIT, nor has any rule been indicated in Italian legislation, establishing that an investor loses Italian nationality or Italian rights for having exercised Ecuadorian nationality. Nor was it indicated that under Ecuadorian law, Ecuadorian rights contemplated in the domestic law cannot be exercised if one possesses another nationality.

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[53] Award ¶ 413.

112. Despite their good intentions, the majority does not protect the international investment system. Authoritarian regimes are actually the ones benefiting from these types of decisions, which disregard the legitimate human right to acquire another nationality and enjoy the rights that come with it, including access to international justice.
113. Lastly, the Award fails to acknowledge that, unlike the doctrine of effective and dominant nationality, which has no place in the investment protection system, dual nationality is currently recognized as a true principle of international law by three-quarters of states worldwide. This reality cannot be ignored. Adhering to circumstances from the first half of the last century, when dual nationality was abhorred, is completely unjustifiable today. This is especially true given that both Italy and Ecuador recognize dual nationality in their legal systems.

IX. NATIONALITY IS A HUMAN RIGHT

114. Nationality is not merely a state concession—it is a fundamental human right, protected under:
    - Article 15 of the Universal Declaration of Human Rights.
    - Article 20 of the American Convention on Human Rights.
115. Arbitrarily depriving an individual of the legal effects of one of their nationalities violates these rights. Deprivation or denial of nationality can lead to loss of property rights, economic interests, and international defenselessness. The majority's decision effectively denies the claimant access to international justice and protection under the Italy-Ecuador BIT, without a legitimate legal basis.
116. Mezgravis outlines the international law conditions for lawful deprivation of nationality:
    - Must serve a legitimate purpose.

- Must be the least intrusive means to achieve that purpose.
- Must be proportional.
- Must have a firm legal basis, clearly articulated in law.
- Cannot be presumed or imposed by analogy or broad interpretation.

117. He persuasively writes that *"Nationality may only be deprived as prescribed by law. Loss and deprivation provisions must be predictable."* Individuals with dual nationalities are more vulnerable to loss or deprivation than those with a single nationality. Although statelessness is a much more serious condition, the fact that a person is deprived of or denied one of his or her nationalities is not without serious consequences, since it could result not only in the loss of property rights or economic interests but also cause defenselessness in the international arena.[54]

118. In applying the doctrine of effective and dominant nationality to the instant case, the Award violates the principle of legality by imposing a requirement not found in the treaty or domestic law. The Award disregards the legitimately acquired nationality of Claimants. In my view, this is arbitrary and punitive and confuses procedural jurisdiction with substantive nationality rights. Simply put, when the majority applies the doctrine of effective and dominant nationality, it is depriving the Claimants of rights attributable to their Italian nationality.

X. CONCLUSION

119. The Tribunal's conclusion that silence in the BIT implies exclusion of dual nationals contradicts a substantial body of comparative jurisprudence which holds that absent express exclusion, dual nationals may invoke treaty protection. The Tribunal's reliance on the principle of dominant and effective

[54] Mezgravis, supra note 2, at 565.

nationality is grounded in diplomatic protection which is inapposite in the context of investment treaty arbitration. Indeed, the Award improperly overrides the plain text and purpose of the Italy-Ecuador BIT and misinterprets international law principles in treaty interpretation. The majority's application of the "effective and dominant nationality" doctrine is contrary to the intentions of Ecuador and Italy when they entered into the treaty, is legally flawed, unsupported by customary international law, inconsistent with the BIT, and contrary to fundamental human rights. The Claimants, as nationals of Italy and Ecuador, are entitled to invoke the protections of the Italy-Ecuador BIT. Denying this right based on an unexpressed and outdated doctrine constitutes an arbitrary deprivation of nationality and access to justice.

I therefore dissent.

Luis O'Naghten
Arbitrator