

Affection and affectation in one's sense of home: A comment on Joaquín Moreno Pampín's Dual citizenship of natural persons in international investment arbitration

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Resumen: El trabajo comenta críticamente el artículo de Joaquín Moreno Pampín sobre la determinación de la nacionalidad dominante y efectiva en el arbitraje internacional de inversiones cuando concurren situaciones de doble nacionalidad. A partir de una perspectiva histórica, filosófica y práctica, el texto destaca la insuficiencia de los enfoques que privilegian casi exclusivamente la residencia física y defiende la adopción de un test multifactorial que incorpore vínculos sociales, culturales, económicos, familiares y, especialmente, el componente afectivo del “sentido de hogar”. Mediante paralelos con debates históricos sobre justicia procesal y pertenencia jurídica, el comentario subraya que una aproximación más holística permitiría decisiones más justas y precisas, al tiempo que ayudaría a distinguir entre una nacionalidad genuinamente asumida y meras estrategias de afectación o treaty shopping en el arbitraje de inversiones.

Abstract: The paper offers a critical commentary on Joaquín Moreno Pampín's analysis of dominant and effective nationality in international investment arbitration involving dual nationals. Drawing on historical, philosophical, and procedural perspectives, it challenges approaches that give near-exclusive weight to physical residence and argues instead for a multifactor test. Such a test should account not only for residence, but also for social, cultural, economic, familial, and especially affective ties reflecting an individual's genuine sense of home. By situating Moreno Pampín's proposal within broader debates on procedural justice and legal belonging, the paper contends that a more holistic approach would lead to fairer and more accurate determinations of nationality, while also helping adjudicators distinguish between genuine nationality claims and strategic affectation or treaty shopping in investment arbitration.

Palabras Claves: Doble nacionalidad | Nacionalidad dominante y efectiva | Arbitraje internacional de inversiones | Sentido afectivo de hogar | Test multifactorial

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In *Dual Citizenship of National Persons in International Investment Arbitration*, Joaquín Moreno Pampín considers the legal conflicts that arise in dual nationality of natural persons from the perspective of the 21st century, and in the specific arena of international investment arbitration¹. He promotes a multi-factor test to determine “dominant and effective nationality” within the framework of history, both the more recent procedural history of adjudicator-applied tests for determining nationality, and the longer philosophical history of how we understand nationality and the relationship between our claims of nationality and the rights and obligations those claims entail.

Moreno Pampín prompts us to take seriously the need for procedural clarity in the factors utilized by adjudicators to determine the dominant and effective nationality of persons with dual nationality, alongside our need to seriously consider not only place of physical residence, but also—and equally so—a variety of other factors related to one's affective sense of home and its relationship to the rights and obligations the individual has undertaken as a result.

In making these arguments, Moreno Pampín is entering into long-running debates about process justice in arbitra-

tion and the relationship between one's affective sense of home and one's relationship to the law. Two debates in early America, one between merchants in antebellum Massachusetts, and one between colonial leaders in Massachusetts Bay Colony, provide a discursive backdrop for Moreno Pampín's claims, highlighting the perennial nature of our desire for process justice in arbitration and the perceptual impact of our affective sense of home in our understanding of our rights and obligations under the law.

Process questions in the practice of arbitration arose early in the new United States. Massachusetts, with its longstanding merchant community, provides a rich example. In 1786, a Boston, Massachusetts newspaper published an ongoing debate between Benjamin Austin, a leading merchant, writing under the pen name of *Honestus*, and a fellow merchant, writing under the pen name of *Merchant*². The issue at hand was the efficacy of arbitration versus courts for the resolution of disputes between merchants. Austin argued that resolution of one's dispute by arbitration was superior to adjudication by litigation in the courts of law, since arbitration was speedier, more cost-effective, and would be more likely to result in justice, as merchant arbitrators were best equipped to know

¹ Joaquín Moreno Pampín, “Dual Citizenship of Natural Persons in International Investment Arbitration”

² For the following discussion of Benjamin Austin's efforts to promote arbitration in antebellum Massachusetts, see generally Carli N. Conklin, “Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America,” *Ohio State Journal on Dispute Resolution* 28 (2013): 581.

and to apply the commercial law to the dispute at hand. In contrast, Merchant argued that disputing merchants would be better served through the law courts, where judges and lawyers were increasingly well-versed in the commercial law, where the processes were increasingly efficient, and where, as a result, litigation was increasingly capable of justly resolving the merchants' disputes.

Austin compiled his arguments into a pamphlet, titled *Observations on the Pernicious Practice of the Law*, which he published later that same year. The pamphlet is instructive not only as a window into early American arbitration, but also as a window into the prevailing philosophies of law—and issues in law—that helped structure debates about the efficacy of arbitration in early America³. In 1814, Austin re-issued his pamphlet, including a Preface that hailed the improvements in law that had worked to alleviate so many of the concerns he had voiced about the law courts decades prior.

To read Austin's original 1786 pamphlet alongside its 1814 reissue is to see how process issues in arbitration can arise from or find resolution in changing circumstances, as the response to one process issue raises others, or as issues that were resolved in one context arise anew as the context changes. The wide-ranging debate between Honestus and Merchant about the efficacy of arbitration to resolve commercial disputes in eighteenth-century Massachusetts is not so different from the ongoing debates we have about arbitration processes today. These debates often are centered on a desire for a process of justice that is speedy, affordable, and accessible, and an outcome of justice that is determined by an adjudicator who is capable and well-informed on the issues in dispute⁴.

Although the time period, field of conflict, applicable rules of law, and specificities of the arbitral model explored in Moreno Pampín's article differ from those that formed the backdrop of the debate between Honestus and Mer-

³ For a general overview of arbitration in antebellum America, see Carli N. Conklin, "A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America," *Journal of Dispute Resolution* (2016); Carli N. Conklin, "Introduction: Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective," *Journal of Dispute Resolution* (2016): 1; Carli N. Conklin, "A Robust History of Arbitration in Early America: Commentary on *The New Federal Arbitration Law*," in *Discussions in Dispute Resolution: The Foundational Articles*, ed. Art Hinshaw, Andrea Kupfer Schneider, and Sarah Rudolph Cole (Oxford: Oxford University Press, 2021); Eben Moglen, "Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law," *Yale Law Journal* 93 (1983): 135; James Oldham and Su Jin Kim, "Arbitration in America: The Early History," *Law and History Review* 31 (2013): 241–266; Carli N. Conklin, "Transformed, Not Transcended: Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey," *American Journal of Legal History* 48 (2006): 87; and Conklin, "Lost Options for Mutual Gain?," 581.

⁴ For an overview of process issues in arbitration, see Thomas J. Stipanowich, "Arbitration the 'New Litigation,'" *University of Illinois Law Review* (2010): 1.

chant, many of the underlying questions are the same:

1. What institution or entity has or ought to have jurisdiction over this dispute?
2. What law applies to the parties in this dispute?
3. What process is most likely to secure justice for these disputants?
4. What protections might we need to put in place to ensure justice?

Moreno Pampín seeks to address issues like these specifically as they have arisen in the context of the dual nationality of natural persons in international investment arbitration.

Moreno Pampín begins his work by providing an historical survey of the rise of dual nationality, the problem of determining dominant and effective nationality in international investment arbitration, and how the field has attempted to navigate these conflicts over time. As Moreno Pampín describes, the problem of determining the nationality of a person with dual nationality whose dispute falls under a bilateral or multilateral investment treaty is complicated by (1) the various means by which nation states grant citizenship (most commonly *ius soli* or place of birth, *ius sanguinis* or by inheritance through one's parent or parents, and/or through state-sanctioned

naturalization processes); (2) the methods by which arbitrators and the courts have determined which factor or factors are to be of fundamental value in the determination of one's nationality for such purposes; and (3) the shifting nature of those methods over time⁵. Moreno Pampín then argues for a revamping of the existing analytical frameworks in light of increases in “the mobility and speed of communications, as well as remote work,” arguing that the resulting changes in work habits and locations necessitate a movement away from the prevailing paradigms, which give “greater value to the residence factor, over any other...⁶”

Underlying Moreno Pampín's discussion of dual nationality—both the claims one makes about their own nationality and the factors the various adjudicators consider in determining the applicable nationality in the issue at hand—are questions of affection and affectation. In fact, it is perhaps our long-held presuppositions about affection and affectation, their impact on the rights and duties of nationality, and their connection to our sense of home, that not only have made one's place of residence the prevailing factor for these determinations, but also have made a paradigm shift toward the

⁵ See Moreno Pampín, “Dual Citizenship”

⁶ See Moreno Pampín, “Dual Citizenship”

prevalence of other factors so challenging to realize⁷.

Our sense of home is often connected to a specific geographic location. When one's residence, business interests, and social, cultural, religious, educational, and community ties are integrated within a specific geographic location, a preference for physical residence as a prevailing factor in determining nationality may make sense. The physical address of one's residence may, in such cases, serve as a clear and convenient shorthand that encapsulates all other ties. Moreno Pampín suggests this analysis loses its efficacy in a world where remote work is ubiquitous, and in a field where locating one's business interests within multiple States is not only a norm, but increasingly a necessity⁸. In such circumstances, the place of one's residence—or residences—is not necessarily synonymous with one's sense of home—the place of one's greatest social, cultural, religious, educational, and community ties⁹. In such a world, Moreno Pampín argues, preferencing residence over other factors, instead of alongside them, makes less sense. It is an argument that urges us to take more seriously a totality

of factors that tap into the affective nature of one's claim to nationality.

Moreno Pampín surveys a variety of factors adjudicators have considered in attempting to resolve these disputes over nationality. Perhaps, as Moreno Pampín suggests, it is the seemingly clear-cut convenience or efficiency of utilizing a single factor such as residence that makes preferencing residence so appealing. Multi-factor tests ultimately require a more subjective discussion of how nationality is expressed by “the whole life of the person¹⁰.” Adjudicators have seemed to recognize the benefits of moving beyond the primacy of residence, first by expanding the factors beyond residence to include cultural, social, familial, emotional, religious, educational, and economic ties, and then by stating that even this broader list of factors is not finite¹¹. In considering this multiplicity of factors, adjudicators have created space for a more holistic analysis, one that considers an individual's affective sense of home, that is then articulated by identification with a specific nationality¹². It is a feeling of commitment toward one place over another, that expresses itself in confirming actions and behaviors.

⁷ As Moreno Pampín highlights, “The legal community has always analyzed nationality as a concept with political, legal, and social connotations, which is defined as ‘a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.’” See Moreno Pampín, citing *Nottebohm Case* at 23, April 6, 1955.

⁸ See Moreno Pampín, “Dual Citizenship”

⁹ See Moreno Pampín, “Dual Citizenship”

¹⁰ See Moreno Pampín, “Dual Citizenship”

¹¹ See Moreno Pampín, “Dual Citizenship”, (citing to the *Nottebohm Case* (*Liechtenstein v. Guatemala*), I.C.J. Reports, Second Phase (April 6, 1955), 4-23), 37-38, 40-41.

¹² See Moreno Pampín, “Dual Citizenship”

Instead of preferencing physical residence, multi-factor tests attempt to uncover how our affective sense of home relates to our understanding of our own nationality, the actions we take within that understanding, the ties these actions create to our communities, as well as the place we physically reside¹³.

The *Oxford English Dictionary* defines “affection” as “[f]avourable or kindly disposition towards a person or thing¹⁴.” Affection is what the courts seemed to be getting at first with the primacy, and then preferencing, of residence in determinations of nationality. The multi-factor tests adjudicators have adopted in times of increased migration and the proliferation of dual and triple nationality suggest an effort to get to the affective nature of nationality in the changed circumstances of today, where one's physical residence may be less central. To what extent is this person genuinely attached to the place of claimed nationality—with its rights and responsibilities, privileges and obligations?¹⁵ It is a reference to the affective nature of nationality that we see so prevalent in another time of heightened mo-

bility, changes in technology, and shifting landscapes of residence, business, and community: mid-eighteenth century colonial British North America.

In their debates about the applicability of the law of England in the British colonies in North America, the colonists regularly couched their arguments in terms of the rights they held as British subjects and the rights they held as colonists, especially the right to exercise domestic legislative authority. They wove together themes of nationality that pulled from the common law and civil law traditions, advocating for their rights based on ancestry or parentage, home or residence, and a holistic view of what it meant, to them, to be British subjects, and no less so due to their physical location not in England, but as colonists in British North America. We see these themes come out strongly in one of the most influential speeches in early America, James Otis's speech, *Against Writs of Assistance* (1761)¹⁶. While the subject of dispute is the applicability of a what we would today call a search warrant, Otis's framing of the argument is around the idea of

¹³ See Moreno Pampín, “Dual Citizenship”

¹⁴ *Oxford English Dictionary*, s.v. “affection (n.1),” September 2025, <https://doi.org/10.1093/OED/5020883494>

¹⁵ See Moreno Pampín, “Dual Citizenship” (stating that the Nottebohm case involved “a (i) qualitative inquiry into the (ii) ‘genuineness’ of the citizenship status at issue during (iii) a relevant timeframe.” Quoting from *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA case No. 2018-56, at 130 at ¶217).

¹⁶ For the following discussion, see John Adams, “Adams' ‘Abstract of the Argument’: ca. April 1761,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Adams/05-02-02-0006-0002-0003>. Original source: *The Adams Papers, Legal Papers of John Adams*, vol. 2, *Cases 31–62*, ed. L. Kinvin Wroth and Hiller B. Zobel (Cambridge, MA: Harvard University Press, 1965), 134–144.

home—the place of one’s residence—and how ideas of home are intertwined with our sense of the rights and obligations we hold both within our nationality and within our place of residence.

In 1761, James Otis, former Advocate General for Massachusetts Bay Colony in the British colonies of North America, was faced with the task of arguing on behalf of the government in favor of an open-ended search warrant known as the general writ of assistance. Unlike a special writ of assistance, granted under oath for the search of a specific location for specific goods believed to be concealed therein, the general writ was open-ended, so that, as Otis described it, “a person with this writ, in the day time may enter all houses, shops, &c. at will, and command all to assist¹⁷.”

Rather than argue on behalf of the general writ, Otis resigned his position as Advocate General and took up the position of the other side, arguing on behalf of the people of Boston that, while special writs were legal, general writs were not. He claimed the general writ, “appears to me... the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of the constitution, that ever was found in an English law-book¹⁸.”

Otis couched his arguments in the rights he believed the colonists held as British subjects, claiming his position of advocacy on behalf of the people of Boston was “in favour of British liberty, at a time, when we hear the greatest monarch upon earth [King George III] declaring from his throne, that he glories in the name of Briton, and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown¹⁹.” That Otis believed the privileges of the British people extended to the British colonists in North America was clear. And among these privileges most dear to those subjects, according to Otis, was the privilege of one’s home:

Now one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege²⁰.

Otis argued for the essentiality of home in one’s conception of English liberty, and from that foundation argued for the rights British North American colonists had, and believed they ought to have had, as British subjects living outside of England. Home, for the colonists, was both a physical residence and an affective sense of what it meant to be British. John Adams described Otis’s speech as “[a] dissertation on the Rights of Man in a State

¹⁷ Adams, “Abstract of the Argument.”

¹⁸ Adams, “Abstract of the Argument.”

¹⁹ Adams, “Abstract of the Argument.”

²⁰ Adams, “Abstract of the Argument.”

of Nature,” stating not only that “these Rights [to life, liberty, and property] were inherent and inalienable” but also that they were the natural consequence of the Massachusetts Bay colonists’ legal standing as British subjects²¹. It was an argument that highlighted both common law and civil law traditions. Adams summarized it as follows:

[Otis] asserted that our Ancestors as British Subjects, and We their descendants as British Subjects were intitled to all those Rights by the British Constitution as well as by the Law of Nature, and our Provincial Charter as much as any Inhabitant of London or Bristol or any Part of England²²...

Otis emphasized the interrelationship of the rights and duties of the colonists as British subjects and the relationship of those rights to the colonists’ physical home or place of residence in British North America²³. Neither obviated the other. His speech highlights how our affective sense of home relates to how we define our attachment to, and our conception of, our rights and responsibilities within a given community, which may or may not fully align with the location of our physical residence.

In James Otis’ description as one’s home as one’s castle, and in the fervency with which Otis argued that the British colonists in North America had retained the rights of British subjects, even though they were separated from England geographically, we see an affective argument for determining nationality. In arguing for a multi-factor test that does not preference residence over other factors, Moreno Pampín suggests this more affective feeling of nationality matters—it matters for how we conceive of ourselves and the country we call home, it matters for the decisions we make in terms of physical residence and the location of our business interests, and it matters for adjudicators engaged in decision-making about one’s nationality under international investment law and the consequences of those decisions for the individuals whose nationality is at issue. To adopt Moreno Pampín’s argument that the changing circumstances of increased dual citizenship, heightened mobility, and remote work necessitate a change in how questions of nationality in international investment arbitration are adjudicated would be to give weight to individuals’ arguments about the affective nature of their nationality²⁴. It would require adjudicators to consider the com-

²¹ John Adams to William Tudor Sr., June 1, 1818, *Founders Online*, National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-6901>

²² Adams to Tudor, June 1, 1818.

²³ From John Adams to William Tudor Sr., June 1, 1818; John Adams to William Tudor Sr., March 29, 1817, *Founders Online*, National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-6735>; Thomas Jefferson, *A Summary View of the Rights of British America* (Williamsburg, VA, 1774).

²⁴ See Moreno Pampín, “Dual Citizenship”

plications of a more holistic view, weighing a multiplicity of factors alongside physical residence, and to perhaps come to a greater accuracy in decision making, as a result.

At the same time, if adjudicators are to take Moreno Pampín's argument seriously and move away from either primacy of or preference for physical residence as the prevailing factor in determining nationality in these cases, a key challenge will be how to guard against cases where one's claim of nationality is not one of affection, but one of affectation. *The Oxford English Dictionary* defines "affectation" as: "The artificial or studied assumption of behaviour; artificiality (of manner); putting on of airs; (also) an instance of this²⁵" It is affectation that adjudicators seem to be most concerned with as they seek to resolve conflicts of nationality in international investment disputes. Is the person whose nationality is in conflict genuinely attached to the country of their claimed nationality (affection), or are their claims to that end merely an affectation—an "artificial" appearance of nationality, manufactured for the purposes of treaty shopping²⁶?

Historically, adjudicators have looked askance at one's attempt to unilaterally divest oneself from the duties and obliga-

tions of nationality for the benefit of oneself and to the potential harm of the community²⁷. But in a time of increasing dual nationality, mobility, remote work, and international investments, Moreno Pampín suggests the greater risk may be that preferencing residence over other factors could strip someone of the rights and protections they believed they held and that their perceived dominant and effective nationality would entail. What test is best suited to justly determine nationality in international investment involves process questions, like those raised by Benjamin Austin, that continually crop up in the ever-changing landscape of arbitration.

While the multi-factor test Moreno Pampín promotes to answer these questions may be complex and time consuming to implement, it would, as Moreno Pampín argues, enable adjudicators to take a more holistic view, and one that already seems to exist beneath the surface of the adjudicators' current case-by-case approach and their reluctance to lay out an exhaustive list of factors to be considered when nationality is in dispute²⁸. It would allow adjudicators to account more fully for the role of affection and its relationship to one's sense of home in the broadest terms, without narrowing that sense

²⁵ *Oxford English Dictionary*, s.v. "affectation (n.)," September 2025, <https://doi.org/10.1093/OED/6433756355>

²⁶ Samuel Johnson, *A Dictionary of the English Language*, s.v. "affectation" (London, 1755), <https://johnsonsdictionaryonline.com/views/search.php?term=affectation>; See Joaquín Moreno Pampín, Dual Citizenship of Natural Persons in International Investment Arbitration

²⁷ See Moreno Pampín, "Dual Citizenship"

²⁸ See Moreno Pampín, "Dual Citizenship"

of home to physical residence. In addition, a more comprehensive analysis could protect against affectation—treaty shopping disguised as affection—in cases of dual citizenship, as adjudicators could consider more fully if the claimant's proclaimed nationality was actually evidenced not only by physical place of residence, but also in confirming actions and behaviors across the whole of the claimant's life²⁹.

What an individual claims to be their “dominant and effective” nationality—whether such a claim is real or affected—may or may not line up with the individual's place of physical residence or the adjudicator's ultimate determination of that individual's nationality for purposes of international investment arbitration³⁰. But a paradigm, like that promoted by Moreno Pampín, that allows adjudicators to consider the sum total of an individual's affective, cultural, social, commercial, educational, religious, and residential ties would merge our affective sense of home, and the rights and responsibilities it entails, as highlighted by James Otis, with Benjamin's Austin's insistence that in arbitration, as in litigation, just processes and just outcomes are intrinsically intertwined. As Moreno Pampín argues, the multi-factor processes utilized by adjudicators for analyzing conflicts of nationality may bring us closer to those just ends amidst today's

concurrency of increasing claims of dual (or triple) citizenship, heightened mobility, and the ubiquitousness of remote work in the realm of international investment.

²⁹ See Moreno Pampín, “Dual Citizenship”

³⁰ See Moreno Pampín, “Dual Citizenship”