CITIZENSHIP AND DENIZENSHIP IN THE INTERNATIONAL TAX CONTEXT IN AN ERA OF GLOBAL ECONOMY

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INTRODUCTION 121

I. DEFINING CITIZENSHIP AND DENIZENSHIP 122

II. THE DECLINE OF NATIONALISM AND THE RISE OF GLOBALISM 133
A. *Numbers* 133
B. *Economic Impacts of Cross-Border Migration* 135
C. *Economic Aspects of Investor Citizenship Plans* 136
D. *The Nomadism Phenomenon* 137

III. CROSS-BORDER TAX ASPECTS 138
A. *Introduction* 138
B. *The Dominant Personal Connecting Factors in Determining Fiscal Residency Among the OECD Member States* 139
C. *Fiscal Residency Determination Under the Model Tax Conventions* 144

IV. CITIZENSHIP/DENIZENSHIP BASED TAX SYSTEMS 145

CONCLUSION...149

INTRODUCTION

This Article addresses a fundamental issue underlying the international tax system in the 21st century: the use of citizenship as a jurisdictional basis for imposing income tax liability. As a general matter, the United States is the only developed country that allegedly taxes its citizens living overseas on their worldwide income. However, even the

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United States does not, de facto, tax the vast majority of its citizens living abroad as it offers a generous exclusion for their foreign source income.

This Article analyzes how modern developments in the global economy affect the case for citizenship-based taxation. Though citizenship is closely connected to state sovereignty, is based on the concept of nationalism, and may seem to contradict the globalization trend that is based on the concept of cosmopolitanism, we conclude that the increase of cross-border human capital mobility strengthens the relevance of citizenship-based taxation in the international tax setting.

However, since citizenship-based taxation in its current form does not gain widespread support as it may lead to unjust results, we offer a novel concept of a denizesnhip-based tax regime that would be easily administered and more economically meaningful.

We also argue that recent developments in international taxation[1] weaken the case for giving preferential tax treatment to income earned by citizens working abroad.

For these reasons, we propose revising the mechanisms that would eliminate double-taxation under the new regime and to incorporate a novel mechanism that would turn double-non-taxation impractical.

Part I explores the significance of citizenship and the ways it is acquired.[2] Part II presents the magnitude of this phenomenon, the number of cross-border migrants, and its economic impact. Part III then explores the existing rules (criteria) that determine fiscal residency for tax purposes in 38 Organization for Economic Co-operation and Development (OECD) member states, the manner in which fiscal residency is determined according to all three model tax conventions, and the way in which tax residency is determined when a taxpayer is deemed to have dual or even multiple tax residencies. Part IV explores the only true citizenship-based tax system that was set in the United States, the main voices that find it unjustified and call for abandoning it altogether, and the main voices that advocate in favor of such a system. Lastly, Part V proposes our model, explains the necessary adjustments that must be made to better enforce it, and concludes our findings.

I. DEFINING CITIZENSHIP AND DENIZENSHIP

Before discussing the different tax aspects that may arise if the international tax regime is no longer based on the personal connecting

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1. Recent developments being the signing of a multilateral instrument by more than one hundred countries and the spread of exchange of information agreements and protocols among countries.

2. Acquiring the status of "citizenship" is often different from one country to another. *See* Thom Brooks, *Citizenship Tests*, *in* ROUTLEDGE HANDBOOK ON THE ETHICS OF IMMIGRATION (Sahar Akhtar ed., 2023) (forthcoming 2023) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390135 [https://perma.cc/7BZH-QXTN].

factors, but rather based on citizenship instead to enable states to tax their nationals on a worldwide basis, it is first necessary to understand what constitutes "citizenship."[3]

Citizenship is one of the most important legal statuses,[4] alongside marriage, parentage, and title of property, as it determines rights, duties, and opportunities or the lack thereof.[5] Citizenship is a legal status that arguably indicates a legal allegiance between an individual and the state in which he or she is a citizen. As Hannah Arendt noted, "[C]itizenship is man's basic right for it is nothing less than the right to have rights."[6] Citizenship is also viewed by some scholars as a basis to justify states' decision to adopt "legalized discrimination"[7] in favor of its citizens over its aliens.

The word "citizen" is tied to both ancient and modern concepts of self-governance through representative institutions, and it fits nicely within the framework of modern republics, which generally treat all citizens as legal equals. However, its meaning can be convoluted in the context of historical monarchies and modern governments that do not recognize formal legal equality among their people.[8]

For these reasons, citizenship policy is clearly tied to immigration policy as it determines what makes an individual a member in one society, and not in another. Traditionally, citizenship has been acquired through three main routes: by descendent (*jus sanguinis*); by birth (*jus soli*); and by naturalization.[9] Despite the common characteristics of

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3. *See* Jo Shaw, *Introduction*, *in* CITIZENSHIP AND CONSTITUTIONAL LAW 1, 8 (Jo Shaw ed., 2018) ("Even in the face of challenges of globalization in the neo-liberal world, the model of national citizenship is remaining remarkably resilient, adjusting to allow space for new models of affinity and legal belonging, without fading away.").

4. *See* David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RIGHTS Q. 245 (2006), http://www.jstor.org/stable/20072730 [https://perma.cc/98FM-PRNW] ("Article 15 of the Universal Declaration of Human Rights (the Universal Declaration) states that '[e]veryone has the right to a nationality' and that 'no one shall be arbitrarily deprived of his nationality.'").

5. Scott Titshaw, *Inheriting Citizenship*, 58 STAN. J. INT'L L. 1, 6–9 (2022). *See The Functionality of Citizenship*, 110 HARV. L. REV. 1814 (1997); DIMITRY KOCHENOV, CITIZENSHIP 8–15 (2019); *see also* SYLVIA DE MARS ET AL., BORDERING TWO UNIONS: NORTHERN IRELAND AND BREXIT 61 (1st ed. 2018) ("For those who have the 'right' citizenship status, belonging to the group of rights holders who enjoy the broadest range of legal protections available in a country, the significance of citizenship can be frequently overlooked.").

6. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (2d ed. 1958) ("However, as we would explain below other scholars oppose to this concept and believe that at an era of globalization, global standards and common practices force states to care about human rights of their nationals and aliens.").

7. *See The Functionality of Citizenship*, *supra* note 5, at 1814.

8. Titshaw, *supra* note 5, at 7.

9. Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 198–218 (2010). *See also* Kristin A. Collins, *Illegitimate Borders: 'Jus Sanguinis' Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

different citizenship legislation, each state sets its own citizenship and immigration policies as it is an inseparable element of sovereignty.[10] However, such immigration policies are clearly influenced and related directly to the economic impacts they entail.[11]

The literature identifies several models and justifications for citizenship, including:[12]

> (1) citizenship as "legal status," which focuses on the meaning of such status and what may be the implications when an individual has an exclusive citizenship status versus dual or multiple citizenship statuses;[13]
>
> (2) citizenship as "rights approach" (also referred to as the Tiebout/Purchase model), which focuses on the enjoyment of certain important rights and entitlements, and duties;[14]
>
> (3) citizenship as a "political activity" approach (also referred to as the minimalist model), which considers the term citizenship as active engagement in the life of the political community;[15] and
>
> (4) citizenship as "identity" or "solidarity" (also referred to as the psychological model), which focuses on the psychological dimension and the solidarity of the individual with groups in a particular state or possibly with groups of other people in the world.[16]

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10. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 695 (2011). *See* Brooks, *supra* note 2, at 1; *see also* RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 17 (2d ed. 1994) ("[n]ationality may only be handled as a problem of the choice of law, when a tribunal has to decide what nationality law to apply").

11. Leila Adim, *Between Benefit and Abuse: Immigrant Investment Programs*, 62 ST. LOUIS U. L.J. 121 (2017).

12. Peter H. Schuck, *Three Models of Citizenship*, 151, 151–52 (Yale L. Sch. Pub. L., Working Paper No. 168, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267356#paper-citations-widget [https://perma.cc/R3LF-9KS6] (discussing their division of citizenship into the following three categories: nationalistic, human rights, and Marshallian; analyzing each model along three normative dimensions: justification, territoriality, and entitlements). *See also* Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 447–49 (2000).

13. Bosniak, *supra* note 12, at 456–63.

14. *Id.* at 463–70. The "rights" approach is generally associated with the work of the British sociologist T.H. Marshall during the post-world wars period, *see also* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1307–08 (2011). However, as we indicated previously, cosmopolitans find this model unconvincing as globalism forces states to care about and protect the human rights of its nationals and aliens while dictatorships that do not care about human rights at all are also entitled to tax their nationals regardless.

15. Bosniak, *supra* note 12, at 470–79; Zelinsky, *supra* note 14, at 1303–10.

16. Bosniak, *supra* note 12, at 479–88; Zelinsky, *supra* note 14, at 1310–11; *see also* Engin F. Isin & Patricia K. Wood, CITIZENSHIP & IDENTITY 14–24 (1999).

The notion of citizenship can be traced back to classical time (the Greek-Polites and its Athenians or the Roman res publica and its Roman Latin Civis) when most individuals' economic relations existed within the boundaries of their locality or domestic state and were associated/identified with the nationalist perception and with the concept of state sovereignty.[17] Nowadays, the economic reality is very different. While individuals are still likely to have a dominant set of domestic affiliations, many of them are also likely to have multiple foreign affiliations. In such an era of economic globalization, massive cross-border flows of assets, services, and ideas that undermine state sovereignty, fertility rates diminishing in high GDP countries, and fertility rates rising in countries with low GDP, countries are relaxing their immigration policies to attract foreign nationals, which to a certain extent comes at the immigrants' countries of origin expense.[18]

Accordingly, the literature in the past two decades identifies two spheres of citizenship: the traditional national (including local) sphere and the cosmopolitan or global sphere.[19] To a certain degree, the spheres are contradictory, and in such contradiction, many scholars contend that citizenship is, for various reasons, of less importance today than it was several decades ago, and even more so a century ago.[20] Furthermore, and as we elaborate in Part II, a growing number of states relaxed the requirement of an exclusive relationship between the state and its citizens and allowed their subjects to have dual and even multiple citizenships.[21]

Accordingly, as countries realized the contribution of migration in boosting their economies,[22] investor citizenship programs became

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17. *See* J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, *in* THEORIZING CITIZENSHIP 29, 29–30 (R. Beiner ed., 1995).

18. *Cf.* Yariv Brauner, *Brain Drain Taxation as Development Policy*, 55 ST. LOUIS U. L.J. 221, 237 (2010); *see also* DEVESH KAPUR & JOHN MCHALE, GIVE US YOUR BEST AND BRIGHTEST: THE GLOBAL HUNT FOR TALENT AND ITS IMPACT ON THE DEVELOPING WORLD 37 (2005); Tamir Shanan & Doron Narotzki, *Reevaluating the Allocation of Tax Collection of Immigrants Between Home Country and Host Country*, *in* FAIRNESS IN INTERNATIONAL TAXATION (Ira Lindsay & Matthew Benita Rose eds., forthcoming 2025).

19. *Cf.* Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES IN LAW 411, 411, 413 (2007) (explaining that there are 3 spheres of citizenship: the local, national, and the cosmopolitan/global, and distinguishing between the territoriality of the local and national citizenships and the universal of the global citizenship).

20. Lister, *supra* note 9, at 181. *See also* DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008); Richard Falk, *The Decline of Citizenship in an Era of Globalization*, 4 CITIZENSHIP STUD. 5 (2000).

21. Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979, 980 (2005); Maarten Vink et al., *The International Diffusion of Expatriate Dual Citizenship*, 7 MIGRATION STUD. 362 (2019); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997).

22. Countries like Australia and Canada are a clear example of that given their long standing pro-immigration policies.

increasingly commonplace in states' practices. As such, before exploring a novel conceptual international tax framework that would be solely based on citizenship in determining fiscal residency for tax purposes, it is imperative to examine the ways in which citizenship is acquired and the territorial relations between the state and its citizens.[23]

The most common route to acquire citizenship is *jus soli*,[24] which offers citizenship based on location of birth.[25] Acquisition of citizenship via *jus soli* means that anyone born on the state's territory is entitled to citizenship regardless of the status of his or her parents in that state. Additionally, citizenship status is granted even if the child leaves the state and does not reside there after birth.

The United States is an example of such a country and despite the criticism that this version of citizenship receives, it does not seem as though it will be revoked, as its origin traces back to the Fourteenth Amendment of the U.S. Constitution.

Another more restrictive version of *jus soli* awards individuals citizenship based on the location of birth but conditions citizenship on a continued presence in the state of birth for a significant period after birth. Some versions even condition the awarding of the citizenship on the renunciation of any other citizenship he or she may have.[26]

Another common route to acquire citizenship is *jus sanguinis*,[27] which offers citizenship based on "blood" or descent.[28] This concept is not uniform and has several categories; the strongest form equates citizenship with ethnic membership regardless of any territorial considerations.[29] The easy access that Jewish people have to citizenship in Israel is a good example of this version of citizenship.[30]

A more limited version of *Jus Sanguinis* is when children inherit the citizenship of their parents. This limited version of *Jus Sanguinis* also does not account for territorial considerations. A good example of this version is the access to U.S. citizenship that children of U.S. citizens have

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23. Lister, *supra* note 9, at 198–209. *See also* Brooks, *supra* note 2; Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 95–106 (2010), https://doi.org/10.1086/600080 [https://perma.cc/A5GZ-SQNX]; James Brown Scott, *Nationality: Jus Soli or Jus Sanguinis*, 24 AM. J. INT'L L. 58 (1930); H. S. Q. Henriques & Ernest J. Schuster, *"Jus Soli" or "Jus Sanguinis"?*, 3 PROBS. OF THE WAR 119 (1917).

24. *See* Scott, *supra* note 23, at 58–59.

25. Lister, *supra* note 9, at 198–209.

26. *Id.*

27. *See* Scott, *supra* note 23, at 58; *see also* Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AM. J. INT'L L. 248 (1935).

27. *See* Jordan Collins, *Same Laws, Different Century: The Bureau of Industry & Security's Role in Global Trade & National Security*, 15 CURRENTS: INT'L TRADE L.J. 108, 116 (2006) (stating that 141 countries confer citizenship exclusively by *jus sanguinis*).

29. *See* Lister, *supra* note 9, at 199.

30. *See* Law of Return, 5710–1950, LSI 4 114 (1950), as amended (Isr.).

even when these children were born outside the United States and even if they have not and will not reside in the United States.[31]

The last way to acquire citizenship is Naturalization, which is the most challenging route to acquire citizenship as the states condition it, and the requirements vary from one state to the other. These requirements generally require the alien who wishes to acquire citizenship to assimilate into the state. Assimilation includes a minimal period of stay in that state (residency period), to be knowledgeable of the state's culture, language, and way of life, and some states even require the alien to take an oath of allegiance or even renounce other citizenships.

These naturalization requirements serve two main purposes: (1) they ensure a commitment to the country of immigration; and (2) they ensure assimilation into the country's culture. Obviously, the two functions may be linked. Some will find the link to be necessary, arguing that an immigrant cannot be sufficiently committed to the state of immigration without being highly assimilated into that state's culture.[32]

Even though acquisition of citizenship is available through any of the three routes, the vast majority of citizens in all states acquired their citizenship based on blood/descent or based on the location of birth. Neither of these paths to citizenship require the citizen to have any material relations with the country of citizenship nor do they require the citizen to ever reside in that state.

This outcome undermines the significance that is attributed to citizenship status, especially under the following two phenomena: (1) the abandonment of the exclusive nature of the citizenship status and the diffusion of dual and multiple citizenships by a growing number of states; and (2) the introduction of citizenship investment programs (CIPs), which reflects the understanding that immigration policy can be adopted to attract wealthy individuals,[33] as well as educated and skilled individuals, who are generally referred as the "best-and-brightest" to boost their domestic economies.[34] These two phenomena, however,

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31. *See* Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 648 (2008).

32. *See* Lister, *supra* note 9, at 219.

33. *See* LEILA ADIM, RESIDENCE AND CITIZENSHIP BY INVESTMENT: AN UPDATED DATABASE ON IMMIGRANT INVESTOR PROGRAMS (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914350 [https://perma.cc/C3P4-Z7N2].

34. *See* KAPUR & MCHALE, *supra* note 18.

explain the relatively high naturalization rates of cross-border migrants,[35] many of whom do not renounce their U.S. citizenship.[36]

As we noted previously, while a century ago, or even as recent as five decades ago, the acquisition of a new citizenship was conditioned on whether the individual renounced his or her other citizenships. By now, many states have abandoned this approach, and the requirement of exclusive allegiance to the state has been relaxed by a growing number of states over the past five decades. As of 2023, more than 75% of the states accept dual and sometimes even multiple citizenships.[37]

This change, which may have been viewed as technical or meaningless, has put a source of international tension concerning which state can claim protection of individuals holding multiple citizenships, and to which state these individuals owe allegiance, especially when their loyalty to one state contradicts with their loyalty to the other state.[38]

However, while the trend of abandoning the exclusive citizenship requirement and allowing citizens to have multiple citizenships spreads, many states limit the ability of their aliens to exercise their political rights and limit their ability to vote. States restrict these rights under the assumption that aliens residing in another country are less involved and as such their ability to interfere with the state's domestic and foreign affairs should be restricted.[39]

Simultaneously, as countries abandoned their exclusive citizenship requirement, they realized the opportunities in attracting the best and brightest, or the wealthiest, to boost their economies. As such, countries relaxed their immigration policies, making it selective and attracting educated and skilled individuals. This occurs especially when states' populations diminish and age, requiring more service providers, particularly in the medical field, to support their aging population.[40]

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35. *See* Liav Orgad, *Naturalization*, *in* OXFORD HANDBOOK OF CITIZENSHIP 337, 348–50 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017); JEFFREY S. PASSEL, GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION, 19 (2007); *see also* THOMAS JANOVSKI, THE IRONIES OF CITIZENSHIP 221 (2010) (analyzing naturalization rates in eighteen countries).

36. *See* Paul R. Organ, *Citizenship and Taxes*, 31 INT'L TAX & PUB. FIN. 404 (2022) (examining the number of individuals renouncing U.S. citizenship during the early 2000s (roughly 500 per year) and the years 2013–2018 (roughly 4,000 per year)). Despite the significant increase of the number of U.S. citizens living abroad who renounce their U.S. citizenship, it should be noted that this is still a significantly low number of all Americans residing abroad.

37. Vink et al., *supra* note 21, at 362–63.

38. *Id.* at 363–64.

39. Allison Christians, *Buying in: Residence and Citizenship by Investment*, 62 ST. LOUIS U. L.J. 51 (2017).

40. For instance, Canada adopted this approach in its immigration policy.

This phenomenon is generally referred to as "brain drain"[41] and as the saying "following the food comes the appetite" goes, states then introduced a more novel phenomenon, some may say cynically abusive. This novel phenomenon offers foreign nationals citizenship on the condition that they acquire real estate within the state, invest capital, or deposit significant sums of money in their financial systems.[42]

However, this "migration" policy, the so-called Citizenship Investment Programs (CIPs), is significantly different from the "brain drain" phenomenon, because individuals who acquire foreign citizenships pursuant to CIPs do not necessarily relocate to these new states. The acquisition of citizenship under CIPs is generally done for other purposes, mostly to obtain financial advantages.[43]

Following the stock market and housing market crash of 2008, the literature identified a fairly new economic phenomenon in which states used their immigration policy to boost their economies and introduced new citizenship/residency/immigration investment programs (known as CIPs/RIPs/IIPs). States not only offered foreigners citizenship but also offered favorable tax treatment in an attempt to compete for these foreign nationals.[44]

Over the years more and more countries introduced such programs, and even though one might think that countries with low GDP per capita might be the first to adopt such programs, an International Monetary Fund (IMF) study from 2015 tells a slightly different story.

The 2015 IMF Working Paper lists Antigua and Barbuda, Cyprus, Dominica, Grenada, Malta, St. Kitts and Nevis, Australia, Bulgaria, Canada, France, Greece, Hungary, Ireland, Latvia, New Zealand, Portugal, Singapore, Spain, United Kingdom, and the United States as jurisdictions offering citizenship and/or residency in return for investment.[45]

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41. Jagdish N. Bhagwati & Koichi Hamada, *The Brain Drain, International Integration of Markets for Professionals and Unemployment: A Theoretical Analysis*, 1 J. DEV. ECON. 19, 19–20 (1974); Jagdish N. Bhagwati & Koichi Hamada, *Domestic Distortions, Imperfect Information and The Brain Drain*, 2 J. DEV. ECON. 265 (1975) (extending the authors' economic model).

42. Adim, *supra* note 11, at 122–23.

43. *Id.* at 123–24; Ayelet Shachar, *Dangerous Liaisons: Money and Citizenship*, SHOULD CITIZENSHIP BE FOR SALE? (Ayelet Shachar & Rainer Bauböck eds., 2014).

44. For instance, Italy. *See* Adim, *supra* note 11, at 123–24; ADIM, *supra* note 33.

45. Svetislav V. Kostić, *International Taxation and Migrations*, *in* RESEARCH HANDBOOK ON INTERNATIONAL TAXATION 353 (Yariv Brauner ed., 2020); *see* Xin Xu, Ahmed Al-Ashram & Judith Gold, *Too Much of a Good Thing? Prudent Management of Inflows Under Economic Citizenship Programs* 5 (Int'l Monetary Fund, Working Paper No. 2015/093, 2015), https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Too-Much-of-a-Good-Thing-Prudent-Management-of-Inflows-under-Economic-Citizenship-Programs-42884 [https://perma.cc/697R-9GYU].

It is important to understand that the list of countries is not exhaustive, and a closer look reveals that these programs offer a variety of different regulatory frameworks and condition the offering of citizenship or permanent residency differently. While some states require the alien to form a business that would employ local employees, invest in the real estate market, and purchase regular or low-interest government bonds, other states require aliens to pay an annual payment or non-refundable fees to the state.[46]

The literature criticizes these programs[47] and also identifies an alternative policy that offers aliens permanent residency status (RIPs). RIPs promises a permanent status and the enjoyment of fiscal and financial rights in the state but does not award them with citizenship, this is also referred to as "denizenship."[48] The literature considers both CIPs and RIPs to be abusive, especially when the naturalization process under these programs does not require an actual residence (physical presence) and still provides aliens an opportunity to reduce their global tax liability by using their new citizenship or permanent residency status.[49]

Following Italy's immigration program, which invited high-net-worth foreign non-Italian individuals to become Italian residents for a fixed annual payment of Euro 100,000, Professor Allison Christians conducted a study on CIPs and RIPs in 2017, examining over thirty states that introduced RIPs and CIPs. This study revealed that there is competition between smaller and poorer states and OECD member states to attract these foreigners, but the smaller states are at a distinct disadvantage to OECD member states. Accordingly, while states with lower GDP per capita offer residence/citizenship to aliens in exchange for the investment of thousands of U.S. dollars[50] or tens of thousands of U.S. dollars,[51] OECD member states and states with high GDP per capita offer such

46. Adim, *supra* note 11, at 121; Christians, *supra* note 39.

47. *See* Alan Gamlen, et al., *Re-Thinking Immigrant Investment Funds* 20–25 (Inv. Migration Council, Working Paper No. IMC-RP 2016/2, 2016), https://investmentmigration.org/wp-content/uploads/2020/09/Gamlen-et-al-IMC-RP1-2016.pdf (last visited Sept. 1, 2022).

48. *See* Neil Walker, *Denizenship and the Deterritorialization in the EU* 1–3 (Eur. Univ. Inst., Working Paper No. LAW 2008/08, 2008), https://cadmus.eui.eu/bitstream/handle/1814/8082/LAW-2008-08.pdf?sequence=1&isAllowed=y (last visited Sept. 1, 2022).

49. *See* Rainer Bauböck, *What Is Wrong with Selling Citizenship? It Corrupts Democracy!*, *in* SHOULD CITIZENSHIP BE FOR SALE? 37, 37–38 (Rainer Bauböck ed., 2018).

50. Christians, *supra* note 39, at 56–57. The following states offer aliens permanent residency or citizenship status for thousands of U.S. dollars (between $5,000 and $16,400): Panama, Paraguay, Thailand, and Lithuania.

51. *Id.* at 56–57. The following states offer aliens permanent residency or citizenship status for tens of thousands of U.S. dollars (between approximately $40,000 and $160,000): Latvia, Costa Rica, United Kingdom, Ukraine, Colombia, Jersey, Canada (Quebec), Cayman Islands, and Brazil.

status for hundreds of thousands of U.S. dollars,[52] and some even offer it for an investment of over one million U.S. dollars.[53]

This phenomenon of states offering immigration investment programs has become even more popular in recent years. Following Christians's study in 2017, Professor Leila Adim presented an updated database in 2021 which clearly indicated two trends: (1) more states introduced immigration investment programs; and (2) states increased the entry requirement (the minimal investment) to be admitted to such favorable programs.[54]

Despite the voices of many international law scholars who argue that the era of globalization experiences a "*decline* . . . of citizenship" and that citizenship is no longer an important normative category[55] as cross-border human capital mobility increases (as Part II shows), we nonetheless contend that citizenship remains important in general and for tax purposes in particular.

However, it seems that citizenship status that is acquired by birth (*jus soli*) or by descendent (*jus sanguinis*) may be formal and meaningless in most material aspects, and as such cannot imply a territorial allegiance between the state and its national. On the other hand, citizenship status that is acquired through naturalization is more often than not difficult to acquire as it requires the foreign national to assimilate and pass "citizenship tests" although this excludes citizenship acquired through investment programs.[56] Accordingly, we argue that citizenship status that is easily proven can indeed be used in determining fiscal residency; however, citizenship or permanent residency does not suffice and an additional criterion/factor should be accompanied in such determination, such as a physical presence test.

However, even before the introduction of CIPs/RIPs/IIPs over the past several decades, more and more European states adopted a novel migration status for labor migrants who were awarded long-period working visas ("denizens"), known as denizenship status.[57]

The concept of denizenation traces back to common law legal systems in the 13th century, which enabled foreign nationals to gain economic

52. *Id.* at 57. The following states offer aliens permanent residency or citizenship status for hundreds of thousands of U.S. dollars (between approximately $250,00 and $750,000): Andora, Greece, Portugal, United Arab Emirates, Turks & Caicos, France, Cyprus, South Korea, China, Mauritius, United States, Ireland, Spain, and Australia.

53. *Id.* The states offer aliens permanent residency or citizenship status for over one million U.S. dollars: Seychelles, New Zealand, Netherlands, and Singapore.

54. ADIM, *supra* note 33.

55. Bosniak, *supra* note 12, at 467 (italicized in original).

56. *See* Ayelet Shachar, *Gated Citizenship*, 26 CITIZENSHIP STUDIES 625, 634 (2022).

57. Tomas Hammar, *Legal Time of Residence and the Status of Immigrants*, *in* FROM ALIENS TO CITIZENS: REDEFINING THE STATUS OF IMMIGRANTS IN EUROPE 187, 187–88 (Rainer Bauböck ed., 1994).

privileges, including the ability to own land through the operation of the royal prerogative, thus creating a new status between citizen and non-citizen.[58]

This hybrid status was reintroduced in 20th-century academic literature by Tomas Hammar to describe waves of immigrants who entered northern and western Europe during the 1960s to find employment or protection and become long-term residents with many legal and social rights but lacking political citizenship. Naturally, this new hybrid status weakened the significance of citizenship status, reduced the motivation of immigrants to become full citizens, and increased the concerns of governments and its citizens that their country would lose its identity.[59]

The new hybrid status can be understood and justified in three dimensions: (1) objectively, as it refers to the bundle of economic rights or obligations it encompasses to and from the denizens; (2) subjectively, as it refers to the self-identification and psychological aspects of the denizen and how she sees herself as part of the state; and (3) intersubjectively, as it refers to recognition of the denizens.[60]

From our perspective, the denizenship status improves the citizenship status by supplementing a "residency" requirement in the citizenship criterion that is formal and does not require an economic proximity/territorial allegiance between the state and its citizen. This addition is highly significant in our context as citizenship-based tax systems may define individuals who do not have any presence there and have no economic ties, cultural ties, or any other affiliation with the state except for the legal right to have a passport, which is often not exercised.[61]

It may be that at the objective level, the idea of a distinction between citizenship and denizenship becomes increasingly fuzzy, and at the subjective and inter-subjective levels becomes overstated and perhaps redundant. In these circumstances, denizenship, or its functional and imaginary equivalent, might seek to assert itself as the master category of association with and investment in the political community rather than a residual sub-category. In other words, within its most radically transformative trajectory, the idea of denizenship ceases simply to be a label for describing, emphasizing, and reordering known dimensions of

58. Walker, *supra* note 48, at 1.

59. Hammar, *supra* note 57, at 188.

60. Walker, *supra* note 48, at 2.

61. H. Oger, *Residence as the New Inclusive Criterion for Citizenship*, 2003 WEB J. CURRENT LEGAL ISSUES, http://www.bailii.org/uk/other/journals/WebJCLI/2003/issue5/oger5.html [https://perma.cc/4D4C-GRBR].

regulation and experience; instead, it becomes the key to a new regulatory and experiential map.[62]

That is why we therefore call to adopt the denization concept within the international tax regime as it is both relatively easily administered and, no less important, economically meaningful.

The following part explores the magnitude of human capital mobility in the 21st century, explains the economic impact this phenomenon has, and shows tax aspects (mainly tax holidays) offered by human capital importer states, which assists in analyzing the tax aspects that may result in basing citizenship status in a fiscal residency determination in the international tax regime.

II. The Decline of Nationalism and Rise of Globalism

A. *Numbers*

Over the last several decades the number of cross-border migrants has grown exponentially. Based on the most recent United Nations (U.N.) survey, in 2021 there were approximately 300 million cross-border migrants, while the number of domestic migrants was estimated to be three times higher, which is approximately one-eighth of the world population. The economic and social impact and contribution of such migration is far greater than its relative representation in the population, as we will show in the following part.[63]

Even though the percentage of cross-border migrants represents approximately only 4% of the global population, meaning only a small minority of the world's population leaves their country of birth while the overwhelming majority of the global population do not migrate across borders, it is clear that this figure has continued to grow exponentially in the last seven decades after the two World Wars.[64] While the number of cross-border migrants was approximately 50 million in the 1950s, it slightly increased to approximately 120 million people in the 1970s, and despite COVID-19 travel restrictions, the number of cross-border migrants stayed relatively significant and was approximately 300 million individuals in 2021.[65]

Based on the U.N. report approximately 60% of the cross-border migrant population are considered labor migrants.[66] While intuitively one

62. Walker, *supra* note 48, at 6.

63. INT'L ORG. MIGRATION, WORLD MIGRATION REPORT 2022 (M. McAuliffe & A. Triandafyllidou eds., 2021), https://www.un-ilibrary.org/content/books/9789292680763 [https://perma.cc/9QTX-LKMW] [hereinafter WORLD MIGRATION REPORT 2022].

64. *Id.* at 21.

65. *Id.* at 23. *See also* Catherine Wihtol de Wenden, *New Migrations*, 13 SUR INT'L J. HUM. RTS. 17 (2016).

66. *See* WORLD MIGRATION REPORT 2022, *supra* note 63, at 3.

may think that most cross-border migrants travel from south to north (i.e., from developing countries to developed countries), based on the U.N. report it seems that 52% of the cross-border migrants move to developing countries, while the minority of them move to developed countries.[67] Many of these migrants wish to naturalize and become citizens in the state of destination without renouncing their citizenship status of their state of origin, thus ending up with dual or multiple citizenships.[68]

Another important factor in this context is the number of displaced persons among cross-border migrants. Based on the 2022 U.N. migration report, approximately one-third of all cross-border migrants are displaced migrants. Of the displaced migrants, approximately 40% are refugees and asylum seekers and the other 60% are displaced persons most of whom are displaced due to conflict, violence, and disasters.[69]

Equally important are the demographic changes between high-GDP countries (developed countries) and low-GDP countries (developing countries). While the population in developed countries is generally decreasing and aging, the situation in developing countries is completely different:

> [a] stark demographic divergence separates high-income countries from developing countries. By 2030, for every young person (those 15–24 years old), there will be three seniors (65+) in Germany, Italy, and Japan (table 2.1). Even in China, the number of young persons is expected to be no greater than that of seniors by 2030. "By comparison, the ratio of old to young will be 1:9 in Uganda, 1:7 in Nigeria, and 1:2 in India and Mexico." The inevitable consequence of the current trajectories will be large labor-market imbalances and mounting fiscal pressures in high-income countries as tax bases narrow and the costs of caring for the elderly rise. In contrast, developing nations with growing pools of young people will need to generate sufficient jobs to reach their targets for poverty reduction and growth.[70]

These demographic changes lead to migration pressures that are likely to increase the working-age population (15–64 years). While the working-age population in developing countries is expected to grow by

67. World Bank Grp. [WBG], *Leveraging Economic Migration for Development: A Briefing for the World Bank Board*, at 4 (July 1, 2019), https://documents1.worldbank.org/curated/en/167041564497155991/pdf/Leveraging-Economic-Migration-for-Development-A-Briefing-for-the-World-Bank-Board.pdf?_gl=1*7bxjnz*_gcl_au*NzU3ODcwNzEyLjE3MjQ4MjI0MjU [https://perma.cc/2B84-US2B].

68. *Cf.* WORLD MIGRATION REPORT 2022, *supra* note 63, at 47 (examining naturalization of refugees).

69. *Id.* at 4.

70. World Bank Grp. [WBG], *supra* note 67, at 8.

552 million between 2018 and 2030, the demand for foreign/migrant workers in developed countries is expected to grow because their domestic supply will not meet the demand. This gap suggests a shortfall of millions of workers and would force developed countries to further relax their migration policies.[71]

B. *Economic Impacts of Cross-Border Migration*

As previously stated, even though the percentage of cross-border migrants is only estimated at less than 4% of the world's population, their economic impact is far greater than their representation in the global population for various reasons. Many of these cross-border migrants are either well-off individuals or more educated or skilled individuals who can cross countries and are admired for their education, skills, experience, or initiatives.

According to an economic report prepared by the World Bank in 2019, one of the main drivers for cross-border migration is the income gap between the average income in high-GDP countries and low-GDP countries. According to the report's findings, during 2013–2017, the average income in the high-income OECD member states was $43,083, whereas the average income in low-income countries was $795. This is a ratio of 54:1, and closing such an income gap is estimated to take 135 years.[72]

A rough estimation of the economic significance of the cross-border migration phenomenon suggests that the 180 million labor migrants (approximately 60% of all cross-border migrants) earn roughly $7.8 trillion. These cross-border migrants also have a significant role not only in the country of destination but also in their country of origin. For example, based on U.N. statistics, they remitted approximately $700 billion to their friends and families who were left behind in 2020.[73] Notably, this amount was even greater before COVID-19 spread in 2020.

Cross-border migrants also economically contribute to their countries of origin in other ways, including by purchasing real estate there or by financially investing in these countries. Many of the cross-border migrants circulate and return to their countries of origin after spending several years overseas, bringing home knowledge, skills, experience, and economic networks that boost the local economies. An additional contribution such cross-border migration may have is creating diaspora communities that support other cross-border migrants from these countries of origin once they cross-border migrate.[74]

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71. *Id.* at 8.

72. *Id.* at 7.

73. WORLD MIGRATION REPORT 2022, *supra* note 63, at 39.

74. For detailed analysis of the advantages and disadvantages that arise from cross-border migration *see* Brauner, *supra* note 18; Shanan & Narotzki, *supra* note 18.

C. *Economic Aspects of Investor Citizenship Plans*

As we indicated previously, many states introduced CIPs/RIPs to incentivize wealthy, educated, or entrepreneurial individuals to relocate and become full members of that state. However, some states are willing to offer such status on the condition that the aliens would invest in real estate, invest in interest-free government bonds, employ local employees, and make other similar investments; some states simply require them to pay a fixed annual payment.[75]

Many of these states introduced favorable tax regimes to incentivize the desired aliens to pick their state. These favorable tax regimes offer different tax breaks. For example, Portugal was among the first states to offer such a preferential regime following the stock market collapse of 2008. Portugal offered newcomers a preferential tax regime of up to 10 years, including exemptions and reduced rates for foreign source income.[76] Similarly, Cyprus offers newcomers exemptions on interest, dividend distribution, and capital gains; these tax breaks are not limited to foreign source income.[77] Whereas Bulgaria, for example, offers a 10% flat tax rate for all types of income.[78] Other states introduced non-domiciliary regimes that offer exemptions on foreign source income for a period of 10 or 15 years with some differences. For example, Israel offers newcomers and taxpayers who return after a 10-year period full exemption on foreign source income.[79] The United Kingdom offers exemptions on foreign source income during a 15-year period; however, it does tax income that is repatriated to the United Kingdom during the preferential period (remittance basis).[80] Whereas Italy offers an exemption on foreign source income but requires payment of an annual fixed sum of 100,000 Euros during the 10-year preferential period.[81] Other states are willing to offer generous deductions including cost of living deductions, deductible rent, and more that are otherwise not

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75. *How Citizenship by Investment Works – Programs, Benefits, Planning, and Application Process*, HIGH NET WORTH IMMIGR., https://www.high-net-worth-immigration.com/citizenship-by-investment [https://perma.cc/73AP-N4Z2].

76. Christians, *supra* note 39, at 58.

77. *Id.* at 58 n.24.

78. Daniel J. Mitchell, *Bulgaria Announces 10 Percent Flat Tax*, CATO INST.: CATO AT LIBERTY (July 30, 2007, 11:04 AM), https://www.cato.org/blog/bulgaria-announces-10-percent-flat-tax [https://perma.cc/5TTQ-2375].

79. *E.g.*, Income Tax Ordinance (New Version), 5721-1961, 6 DMI 120, as amended by amendment 168 (2008) (Isr.) (offering generous tax breaks to newcomers and to returning residents).

80. The United Kingdom offers a generous non-domiciliary regime that offers foreign nationals who establish their home in the U.K. a favorable tax break during their first 15 years. Christians, *supra* note 39, at 55–56 n.16. This regime was introduced in 1799 while William Pitt the Younger served as the Prime Minister.

81. For a presentation of the Italian new non-domiciliary regime *see id.* at 51–52, 58.

deductible for local taxpayers. Some states were even willing to offer tax breaks to local employees to make sure that they would not relocate overseas.[82]

To summarize, over the last two decades more and more states realized the economic benefits that arise in introducing selective migration policies and in relaxing their naturalization requirements. These states boosted their economies and increased their tax revenues (both income and consumption taxes), to a certain extent at the expense of the countries of origin, as the international tax regime is generally a zero-sum game. Essentially, one could say that one state's "gain" is the other's loss in a race to the bottom, which may be considered abusive. In an attempt to eliminate tax evasion, the international tax regime attempted to limit the tax benefits to situations in which the taxpayer physically changed his or her fiscal residency; however, these attempts were unsuccessful to a certain degree. The following part will analyze the origin of the existing international tax regime and the changes made over the years to eliminate double non-taxation and to fairly allocate tax revenues among the relevant countries in cross-border settings.

D. *The Nomadism Phenomenon*

Another recent phenomenon that challenges international tax rules to a certain extent is the digital nomadism phenomenon. This phenomenon refers to individuals who choose to move from one state to another having no fixed anchor or permanent home or address while continuing to work either as service providers or as employees remotely. Technological and communicational advancements have changed the ways labor can be performed in more professions than ever before, simply by logging into one's personal computer and working virtually from any place that can offer an internet connection. Even though it is not entirely clear how representative the recent surveys on digital nomadism are, the general estimation is that in 2022, there were approximately 35 million digital nomads globally, approximately 15 million originate from the United States, 27% of which originate from Europe, and 17% of which originate from the rest of the world.[83]

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82. *See* Stjepan Gadžo, *Using Tax Policy to Address the Brain Drain and Depopulation: The Case of Croatia*, 67 BELGRADE L. REV. 116, 132–33 (2019); Kostić, *supra* note 45, at 353 ("[I]n 2019 Poland and Croatia introduced tax measures which provide a more beneficial treatment to those under the age of 26 in the case of Poland and the age of 30 in the case of Croatia. Croatia offers those under the age of 25 a full exemption from employment income taxation, and a 50% one for those between the ages of 25 and 30. Poland exempts those under the age of 26 from income tax provided their income is below a statutory threshold which is set some 50% above the average income level.").

83. Matthew Metcalfe, *Digital Nomad Statistics: How Big Is the Nomad Movement?*, TWO TICKETS ANYWHERE (Oct. 20, 2023), https://www.twoticketsanywhere.com/digital-nomad-statistics/ [https://perma.cc/DPN2-NS3H].

Even though it seems that digital nomadism is not tax-driven, many of the digital nomads observe that their reason for moving was their difficulty in paying the cost of living in their country of origin, their desire to travel and experience different places and people or to change their lifestyle. Such phenomenon presumably results in untaxed revenues as the country in which the income originated does not tax them, and they are claiming to have no fiscal residency for tax purposes, which is in our view unjustified. It is thus our view that these nomads should be taxed by the states of their citizenships/permanent residence.[84]

III. CROSS-BORDER TAX ASPECTS

A. *Introduction*

The 1923 League of Nation's economic committee proposed a compromise between the country in which the income originated and the country in which the taxpayer consumes the income proceeds. As Professor Michael Graetz described the 1923 committee recommendations, in proposing how to allocate the taxing rights of cross-border income among the different states, they adopted a trade-off between income and consumption, as these are the the two most common bases to tax income.[85]

The justification for allocating taxing rights to the country in which the income originates is to compensate it for the resources it invested, including infrastructure (e.g., cost of roads, electricity, security, economic stability), the costs of police, military, the system for enforcement of laws, education, and more. Furthermore, the 1923 committee proposed a compromise between the source country (the country in which the income originated) and the country of residence (the country whose taxpayer generates the income). The 1923 committee recommended allocating the first right to tax cross-border income to the source country but to also allocate the residence country an inferior right to tax foreign source income (also referred to as "a second bite of the apple") as it was expected to offer a credit for any foreign source income paid. As Professor Graetz explains, in determining the residence country,

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84. MBO PARTNERS, STATE OF INDEPENDENCE IN AMERICA 2022: HAPPIER, HEALTHIER & WEALTHIER 24 (2022), https://info.mbopartners.com/rs/mbo/images/MBO_2022_State_of_Independence_Research_Report.pdf [https://perma.cc/P4X6-FSFC] (finding that 16.9 million American workers currently describe themselves as digital nomads, increasing 8% from 2021 and a staggering 131% from the pre-pandemic year 2019). *See also* Doron Narotzki & Vered Kuperberg, *The Potential Federal Income Tax Liability of Foreign Digital Nomads*, 179 TAX NOTES FED. 65, 65 n.1 (2023).

85. Michael J. Graetz, *Taxing International Income - Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*, 54 TAX L. REV. 261, 294 (2000).

which focuses on the state in which the income is consumed, such determination would be based on a destination basis.[86]

In the consumption tax context, the widely accepted general practice is to impose such taxes on a destination basis. In other words, to allocate the tax to the nation where the consumption occurs. Although credit-method value-added taxes are the common form of such consumption taxes, consumption taxes may be imposed in a manner quite similar to income taxes.[87]

We wish to offer a different rationale for taxation by the residence country. In our view, the allocation of taxing rights to the residence country should be viewed as compensation for the resources that the state invested in educating the taxpayer and providing him or her with a welfare/healthcare network. We naturally refer to the costs and other resources it invested in public education, in protecting her and in providing health and medical services as well as in providing financial aid to individuals or families in need.[88] This rationale justifies defining residency by the country of origin, which is partially or fully responsible for his or her earning potential (at least initially after relocation and before the know-how and skills become outdated or even obsolete).

The 1923 Report was accepted by the League of Nations, and it was incorporated in the first bilateral tax treaty model that was used as the basis for the first tax treaty negotiations. This recommendation is still in effect today and clearly reflects the customary international tax regime. Based on the 1923 Report, bilateral tax treaties were negotiated and signed, and after the Second World War, the United States, the OEEC and its successor, the OECD, and the U.N. each prepared a model tax treaty to be used for treaty negotiation purposes and intended, among other things, to eliminate double taxation and prevent tax evasion. Each of the three tax treaty models included a preference for the source countries based on the Benefit approach that was endorsed by the 1923 Report. Also, each of the three tax treaty models determined that for tax treaty purposes, an individual is considered a resident of the relevant country if, under the laws of that country, he is liable to be taxed by reason of his domicile or residence.[89]

B. *The Dominant Personal Connecting Factors in Determining Fiscal Residency Among the OECD Member States*

A comparative examination of all OECD member states reveals a great disparity in the way each member state defined fiscal residency. In

86. *Id.* at 289.

87. *Id.* at 298–99.

88. Shanan & Narotzki, *supra* note 18.

89. *See* Doron Narotzki, *Tax Treaty Models—Past, Present, and a Suggested Future*, 50 AKRON L. REV. 383 (2017).

determining fiscal residency for tax purposes, the following criteria are relevant: physical presence in the state, permanent residence, domicile, habitual abode, center of vital interest, and nationality. Most member states defined fiscal residency based on several factors, the most common test adopted by the vast majority of OECD member states being the physical presence test, whereas nationality was only adopted by only three member states—the United States, Hungary, and Lithuania. We will review the three most common tests and explain why the physical presence test may have been relatively meaningful and useful in determining tax residency throughout most of the 20th century. However, it may be less meaningful in the 21st century when human capital has become more mobile than ever, and citizenship and permanent nationality status can possibly improve the physical presence test.

+ **Physical Presence Test** (adopted by 27 OECD member states)[90]

As indicated previously, most OECD member states incorporated some form of a physical presence test in their residency definition. The typical physical presence test these OECD member states rely on is the six months (183 days) within a calendar year test. The idea behind the physical presence test is that using a connecting personal factor for allocating taxing rights does not need explanation. Moreover, since individual taxpayers can only be in a single place at any given time, this factor can be easily measured and is less manipulatable. However, this connecting factor can be easily orchestrated in advance by the taxpayer if desired. Furthermore, the technological and communicational breakthroughs of the past decade and following the global pandemic make it clear that territorial relationship is of less importance than before. Consequently, physical presence is not sine qua non for taxation.

Furthermore, the physical presence test as a personal connecting factor in determining fiscal residency can change from year to year and does not recognize the history of the taxpayer. One can reside for 25 years in a certain country and then move the following year to a different country. The physical presence test disregards the 25 previous years instantaneously. Also, since the 1923 Report already put an emphasis on the territorial connection to the country that hosts the economically profitable activity, it is unclear what this connecting factor adds. In any event, active income is taxed at the source, and except for remote work, the source rules in any way that gives preference to the host country.[91]

90. The states that adopted the permanent physical presence factor in determining fiscal residency are Austria, Denmark, Greece, Iceland, Ireland, Italy, Portugal, Türkiye, Germany, Spain, the United States, Canada, Finland, Australia, New Zealand, Czech Republic, Poland, South Korea, Slovakia, Slovenia, Chile, Israel, Estonia, Latvia, Lithuania, Colombia, and Costa-Rica.

91. Brauner, *supra* note 18.

+ **Permanent Home/Residence** (adopted by 12 OECD member states)[92]

The "permanent home" criterion may sound formal or technical as one may purchase or even rent a home to meet this standard, but the rationale behind this factor is clearly that the home should be more than just a place to sleep and keep some belongings on a temporary basis. The permanent home should be of a quality that reflects an allegiance between the individual and the state in which the home is located and possibly may strengthen one's vital interest with that state.

Therefore, to meet the permanent home criterion, it is unimportant whether the home is rented or owned, but the focus would be on the permanent nature (as opposed to the temporary nature) of the home and on the permanency of its use by the individual. Even though it may sound challenging to administrate this factor, attesting to use of the home can be relatively easy and can be simply established by weighing the intensity of the individual's use by counting the number of days one stayed within that state and the utility bills that could possibly show the use of the home.

+ **Domiciliary** (adopted by 12 OECD member states)[93]

The domicile factor, which is used by twelve OECD member states in determining fiscal residency, unfortunately has different meanings in English and Continental language-speaking countries. In common-law countries, domicile is linked to the intention of an individual to establish a permanent home there, and under this definition, an individual must have one domicile at any given time, and he or she cannot have more than one domicile. Therefore, this concept reflects the strongest affiliation one has with a certain state where he or she is domiciled.

In continental-law countries, "domicile" mainly means that a person is registered in a particular state and has a home (i.e., an address) there. Many of these states mandate such registration in an official registrar when the individual's stay there exceeds several months. Therefore, this factor in continental-law countries is more formal and does not necessarily attest to a strong affiliation or allegiance with that state but merely that he or she intends to stay there for a period that exceeds several months.

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92. The states that adopted the permanent home/residence factor in determining fiscal residency are Denmark, Greece, Norway, Sweden, Switzerland, Germany, Mexico, Hungary, Slovakia, Latvia, Lithuania, and Costa-Rica.

93. The states that adopted domicile in determining fiscal residency are Austria, Belgium, France, Ireland, Italy, Luxembourg, the United Kingdom, Germany, Japan, Australia, South Korea. and Chile.

+ **Habitual Abode** (adopted by 7 OECD member states)[94]

The term "habitual abode" refers to the "frequency, duration and regularity of stays that are part of the settled routine of an individual's life and are therefore more than transient."[95] This means that in determining one's habitual abode, one follows where he or she normally, regularly, and customarily lives. These considerations are supposed to reflect a certain connection or allegiance with that state.

Clearly, the habitual abode factor can be categorized as a sub-test of the physical presence test, as it requires a sufficient length of time in a particular state but also requires that such a stay would be a minimal qualitative stay. Therefore, the time factor under this test is very important in deciding one's habitual abode.

+ **Center of Vital Interests or its equivalent** (adopted by 4 OECD member states)[96]

The "center of vital interests" criterion or its equivalents probably requires the most complex factual analysis as it requires the determination of which of the states has the strongest affiliation (social, familial, economic, and more) to the individual. However, unlike physical presence or citizenship status, which are relatively easily determined, the determination of which state has the closest affiliation may be more complicated.

Assume a single individual who moves from one place to another having no fixed permanent home whose mother resides in state A whereas his father resides in state B; assume an individual who is divorced twice with one divorcee and one child who live in state A and his other divorcee also with one child who lives in state B. These examples may sound like an interesting TV series or a good reality show. However, life offers much more complicated situations, and familial connections are only one factor that is weighed under the center of vital interest factor.

Assume a person has two jobs or two companies that he or she manages, and so forth.[97] Accordingly, this factor requires significant

94. The states that adopted habitual abode factor in determining fiscal residency are Austria, Greece, Luxembourg, Germany, Finland, New Zealand, and Hungary.

95. KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS 307–09 (Ekkehart Reimer & Alexander Rust eds., 5th ed. 2022) [hereinafter VOGEL].

96. The states that adopted the "center of vital interests" factor or similar equivalents in determining fiscal residency are Belgium, Greece, Mexico, and Hungary.

97. In defining the center of vital interest for treaty purposes, Vogel listed the factors that have been used by the courts to evaluate these criteria. The following represents some of the factors that have been reviewed including: house; family home; furnishings; rented apartment; owned apartment; passport; sharing a room; no rent; no lease; place where that taxpayer was born and raised; children; country of birth of the children's spouse; country of divorce; where spouse seeks employment; family visits; other family members; membership; language skills; work;

work to analyze the private and economic spheres of the individual, which creates a lot of uncertainty, and any such determination might lead to significant litigation, which would be costly and may lead to arbitrary outcomes.

+ **Citizenship/Nationality** (adopted by 3 OECD member states)[98]

Over the past century, the only developed state that based taxation on nationality was the United States. However, over the past decade, Hungary and Lithuania adopted this test to determine fiscal residency. The nationality/citizenship factor allegedly reflects a strong affiliation between the state and its nation as it often is not easily acquired, and it offers civil rights and protections.

However, as we explain next, unlike a century ago, there are many nationals who hold dual or even multiple citizenships, and states relaxed their migration policies to award aliens nationality more easily conditioned on investment in their economy. Accordingly, a national of a state may have never set foot in that state, and therefore, this factor does not necessarily attest to a strong affiliation between the state and its national and may even be used to evade taxation. That is, this factor has been criticized and not adopted by many OECD member states.[99]

This short summary of the dominant factors used by OECD member states in determining fiscal residency attests to the importance state attributes to the physical presence of a taxpayer during the relevant calendar year. It seems that except for nationality and possibly domicile (under the common-law states' interpretation), all other factors are based on the physical presence of the individual in the state. Most OECD member states define residency based on several alternative factors. However, most of them rely heavily on the physical presence of the individual in the country. These factors were developed many years ago when human capital mobility was not as high as it is today. However, as cross-border transportation becomes faster, more reliable, and less costly, and more and more services can be rendered remotely, we call to reexamine the way fiscal residency should be determined in our new economic reality in an era of globalization.

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employer; adaption of professional qualifications (professional licenses); bank accounts; brokerage accounts; credit card; money transfers; health insurance and entitlement to Medicare; retirement plans and future retirement accounts; driver's licenses; personal belongings; registration to electoral roll and more. VOGEL, *supra* note 95, at 303–04.

98. The states that adopted nationality in determining fiscal residency are the United States, Hungary, and Lithuania.

99. For example, Hungary and Lithuania adopted the citizenship's taxpayer as an alternative criterion for establishing fiscal residency for tax purposes. *See* Act CXVII of 1995 on Personal Income Tax (Hung.); 2002 Lietuvos Respublikos Gyventojų Pajamų Mokesčio Įstatymas [Law on Personal Income Tax] art. 4 (Lith.).

C. *Fiscal Residency Determination Under the Model Tax Conventions*

The determination of tax residency under each of the U.N., U.S., or the OECD model tax conventions is conditioned on individuals being classified as a tax resident in both contracting states, and only then the treaty rules would come into play. This expresses the treaty drafters' thought that each state has sovereign authority to determine fiscal residency for tax purposes differently and that many states define residency for tax purposes based on several factors.

Furthermore, each of the three treaty models adopts a binary approach, which means that if an individual is deemed to be a resident under the domestic law of both contracting states, he or she will be classified as a tax resident of only one contracting state under the operation of Article 4 of the treaty. Accordingly, the binary approach, where one is either a resident of one contracting state or a resident of the other, may result in unfair and arbitrary consequences. However, replacing the binary approach with a comprehensive approach would require the development of novel mechanisms that would eliminate double taxation on a personal basis.

Arguably, the tax treaty models do not have a preference for personal attachment to the particular state if such attachment is based on physical presence, domiciliary, or nationality. However, when one analyzes more carefully the tiebreaker rules that were incorporated in Article 4 on the tax treaty models to determine which of the two contracting states has the right to tax the individuals, it seems that the physical presence test supersedes. The tiebreaker rules propose several connecting factors in a specific order, and if the first connecting factor is only satisfied in one country, then the other country "loses" its status as the "residence" country for purposes of the application of the treaty, and so forth. The four tiebreaker rules, in the exact order they appear in the treaty model, are: (1) permanent home that is available to him; (2) personal and economic relations (aka center of vital interests); (3) habitual abode; and (4) nationality.[100] However, and as we indicated previously, the reliance on "physical presence" in determining fiscal residency in general and the minimal presence period of six months (or 183 days) in determining such residency may be easily manipulated in our present economic reality and therefore, the time has come to reexamine how residency should be determined and whether more than a single state should be entitled to treat the individual as its resident.[101] We also believe that the period in which an individual residency is examined should be extended (from a calendar year to a five-year period), and such extension will assist in

100. VOGEL, *supra* note 95, at 277–80.
101. *Id.* at 257–58.

recognizing the contribution of the taxpayer's country of origin (home country) and to reflect it in the international tax practices and rules.[102]

Lastly, and not less importantly, after CIPs became popular and it was clear that states would offer significant tax holidays in attracting aliens to become their residents, all three of the treaty models included an anti-avoidance mechanism that would condition the application of the treaty models only on if the taxpayer is not "liable to tax in that state in respect only of income from sources in that state or capital situated therein" and this term was interpreted to mean liable to comprehensive tax. We also propose to amend this condition in Article 4(1), which would also deprive the application of the treaty when the individual is liable to comprehensive taxation. However, he or she is subject to a reduced rate in comparison to other residents in that state.[103]

IV. CITIZENSHIP/DENIZENSHIP BASED TAX SYSTEMS

The United States was the first state that chose to tax its citizens living overseas and, by doing so, adopted a citizenship-based tax regime. The idea to tax citizens living overseas began during the American Civil War as a symbolic gesture when Americans were expected to serve in the military and serve their country, and the minimal solidarity that was expected from Americans living abroad who managed to avoid the draft was to participate in the national crisis and pay taxes (at higher rates) to support the war effort.[104] As stated by a senator who served as a manager in the conference committee:

> We do not desire that our citizens who have incomes in this country . . . should go out of the country, reside in Paris or elsewhere, avoiding the risk of being drafted or contributing anything personally to the requirements of the country at this time, and get off with as low a tax as everybody else . . . . If a man draws his income from our public debt or from property here and resides in Paris, skulking away from contributing his personal support to the Government in this day of its extremity, he ought to pay a higher income tax.[105]

Surprisingly, even after the war ended, the idea to tax United States citizens living abroad was incorporated in the early draft of the Revenue

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102. David Elkins, *A Scalar Conception of Tax Residence for Individuals*, 41 VA. TAX REV. 149, 157–59 (2020).

103. Tamir Shanan, *The Impact of Tax Treaties on International Mobility of Work*, *in* MOBILITY OF WORK (forthcoming 2024).

104. Reuven S. Avi-Yonah, *Taxing Nomads: Reviving Citizenship-Based Taxation for the 21st Century* (Univ. Mich. L. & Econ., Working Paper No. 22-035, 2022), https://repository.law.umich.edu/law_econ_current/237 [https://perma.cc/C29J-FQ2H].

105. CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Collamer) (reflecting on 1862 legislation).

Code of 1894, and then it was incorporated into the Revenue Code of 1913. In fact, the United States was the only state that adopted a citizenship-based tax system. That is why a decade after, in 1924, these rules were challenged in the Supreme Court in *Cook v. Tait*, and the court upheld the taxation of nonresidents and ruled that the United States has jurisdiction to tax a native United States citizen who lived permanently in Mexico and derived his income from real and personal income located in Mexico.[106] The Supreme Court ruled that the United States has jurisdiction to tax its citizens living abroad because:

> [T]he foundation of [plaintiff's argument] is the fact that the citizen receiving the income and the property of which it is the product are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or, to put the contention another way, to the existence of the power and its exercise, the person receiving the income and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases. In *United States v. Bennett*, 232 U.S. 299, the power of the United States to tax a foreign-built yacht owned and used during the taxing period outside of the United States by a citizen domiciled in the United States by a citizen domiciles in the United States was sustained.[107]

However, even though the United States adopted a citizenship-based tax system according to which it taxes its citizens living abroad on a worldwide basis, it should be noted that de facto, it exempts most of its citizens living abroad as it offers them an exclusion of their foreign earnings up to an amount that is currently set at $120,000 (for 2023).[108] This exclusion means that the vast majority of the United States citizens living abroad are not taxed on their foreign source income by the United States, and as the United States also offers foreign tax credit, many of its citizens who earn more than the exclusion amount are still untaxed in the United States, as they can credit foreign taxes paid by them against their foreign source income (over the exclusion).

However, the United States did not base its fiscal residency definition solely on citizenship status or physical presence but also incorporated a denizenship factor, according to which any lawful permanent resident

106. Cook v. Tait, 265 U.S. 47, 56 (1924).
107. *Id.* at 54–55 (citing United States v. Bennett, 232 U.S. 299 (1914)).
108. 26 U.S.C. § 911.

residing abroad has not formally notified United States Citizenship and Immigration Services in order to abandon that status.[109]

Over the past century, there were other attempts to adopt citizenship-based taxation on citizens living abroad in Eritrea and the Philippines, but they did not include a reference to its denizens. However, it is unclear to what extent these states successfully taxed their citizens living overseas; in fact, the Philippines admitted that as it did not manage to enforce taxation over this population, so it decided to abandon its program in 1972.[110]

Over the past decade, Hungary and Lithuania amended their tax laws and added citizenship (but not denizenship) as an additional criterion for being classified as tax resident. However, it is unclear if they enforce these new rules.

Up until recently, most scholars criticized citizenship-based taxation and could not find any meaningful rationale to justify it as the citizenship status by itself does not necessarily reflect proximity and meaningful economic relations between the state and the individual taxpayer (especially for people who acquired citizenship by being born there or by descent and have been living almost all of their lives overseas and sometimes don't even know they are eligible to be citizens in that country).[111]

However, over the last decade, several prominent legal scholars, including Professors Zelinski, Kirsch, and Avi-Yonah, all advocated in favor of a citizenship-based regime for the following reasons.

Professor Zelinsky argues that an individual's citizenship can be referred to as a proxy of one's domicile as it is generally linked to where his or her permanent home is. Accordingly, citizenship should not be viewed merely as a "formal" status but as a representation of an individual's allegiance to the state of citizenship. Accordingly, Professor Zelinsky argues that citizenship-based taxation should be adopted not only because it is easily administered (unlike residency determination that requires factual-complex inquiries) but also because of the benefits that citizenship status awards. He believes there is allegiance between the

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109. 26 U.S.C. § 7701(a)(30)(A).

110. Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 207 (2017) (discussing problems the IRS faces when taxing non-resident citizens); Richard D. Pomp, *The Experience of the Philippines in Taxing Its Nonresident Citizens*, *in* INCOME TAXATION AND INTERNATIONAL PERSONAL MOBILITY 43, 52 (Jagdish Bhagwati ed., 1989) (discussing problems that the BIR faced when taxing non-resident citizens and their abandonment of the prior tax program).

111. Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for US Residence Based Taxation of Individuals*, 41 VAND. J. TRANSNAT'L L. 705, 705 (2008); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389, 389 (2010); Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 17–39 (2012); Ruth Mason, *Citizen Taxation*, 89 S. CAL. L. REV. 169, 173 (2016).

state and its citizens and, therefore, finds the adoption of citizenship as a connecting factor to award the right to tax foreign-source income as a proxy for his or her domicile. As such, this regime does not deviate from the existing common rules.[112]

Professor Kirsch advocated for a citizenship-based taxation regime and explained that while decades ago such regimes were mainly symbolic as taxing foreign citizens was hardly enforceable, recent globalization changes (including lowered barriers to cross-border trade and the increased mobility of employees), as well as the weakening of bank secrecy and the recent exchange of information practices, make citizenship-based taxation more relevant than ever. That is why, unlike before, states can tax citizens living overseas in the same manner as citizens residing within their state of citizenship.[113]

Lastly, Professor Avi-Yonah initially argued a decade ago that a citizenship-based tax regime cannot be justified, even though it is easily administered and even though citizenship status may award the individual certain benefits. He also asserted that this regime cannot even be justified by the ability to pay rationale and that, in fact, the United States is the only developed country to adopt this regime and that de-facto, the state is unable to fully tax its foreign citizens because if offered the foreign exclusion, this regime becomes ineffective. However, in a recent article, Professor Avi-Yonah explained that as human capital mobility continues to rise and as the physical presence of individuals becomes less meaningful (especially for individuals who move from one state to another and have no permanent fixed home, also referred to as nomads) citizenship status can serve better as a connecting factor in the international regime.[114]

Considering the above, it seems that citizenship can serve as a connecting factor in the international tax regime. However, a citizenship-based regime should take into account the fact that citizenship status acquired by birth or descent may, in many cases, be economically meaningless and unjustified.

This tax regime should also take into account that tens of millions, if not hundreds of millions, of individuals have dual or multiple citizenships. As such, the regime should include mechanisms that would eliminate double taxation and possibly mechanisms that would bifurcate/allocate the taxing rights among different states of citizenships.

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112. *See* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1289 (2011).

113. *See, e.g.*, Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 443 (2007); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 117 (2014). *See also* Young Ran Kim, *Considering "Citizenship Taxation": In Defense of FATCA*, 20 FLA. TAX REV. 335, 335 (2017).

114. Avi-Yonah, *supra* note 104, at 3–6.

Lastly, in light of recent citizenship investment programs that offer citizenship to foreign individuals to boost their economies and in an attempt to attract these skilled, educated, and wealthy individuals, offer them tax holidays that reduce their overall effective tax liability, anti-evasion measures should be introduced.

In our view, even though citizenship-based tax systems can easily be administered at present and could significantly reduce litigation since 97% of the world population acquired their citizenship by birth or descent, since such status does not necessarily attest to the existence of a meaningful allegiance between the individual and the state(s) in which he or she is a citizen, most states did not factor citizenship status in their fiscal residency definition. However, unlike citizenship, denizenship status is different for the following two reasons: first, a person is not admitted or awarded denizenship status automatically and is required to "naturalize" in some form or manner; second, denizenship is not a mere formal status and is economically meaningful. Additionally, denizenship status is generally conditioned on a meaningful physical residence and, unlike citizenship, expires when such allegiance between the state and its denizen becomes lax.

CONCLUSION

Over the past century, migration has become more meaningful and relevant than ever, and studies on this subject expect this phenomenon to continue in the next several decades. More than a billion people leave their homes, families, and friends to become integral parts of new communities, three-quarters of which migrate locally within their home countries, while the others leave their home countries and build new homes overseas. The rules for allocating taxing rights were determined a century ago when this phenomenon was peripheral, and the economic reality was very different, and the time has come to reexamine them.

A century ago, it was very difficult for "home countries" to keep in touch with their citizens who moved abroad or to be informed of the income and gains their former residents generated overseas. This may be one of the reasons why the rules put a lot of emphasis on the territorial connections with the country that hosted the activity that generated the profit/income and with the country that hosted the taxpayer and served as her home. Unfortunately, the country of origin of the migrant did not receive its appropriate recognition and was unable to participate and collect taxes.

Our proposal calls for a change in the way fiscal residency is determined. We wish to strengthen the social contract between the country and its national/permanent residents. Fifty years ago, a change in this direction (regarding developing countries) was raised by Professor Bhagwati and several of his colleagues; however, their efforts were futile.

Professor Bhagwati's basic idea was to compensate the home country by imposing on the host country a foreign migrant surtax. This proposal did not pick up momentum for various reasons, and absent the cooperation of the countries of destination, it was clear that it could be declaratory and unenforceable by the home countries.

However, the technological and communication breakthroughs, as well as the resistance of countries from exchanging information, have been dramatically diminished during the past decade after the creation of Common Reporting Standards and the Foreign Tax Compliance Act (FATCA), and the adoption of FACTA by over a hundred countries. Moreover, the recognition that double non-taxation is undesirable can set the grounds for a desired change, especially in light of the increasing cross-border mobility of human capital which is not expected to stop but to increase.

Our recommendation does not intend to rock the foundations of the international tax regime and its compromises by leaving the source country with the primary right to tax cross-border income and awarding the resident country with an inferior right. However, we do recommend that the taxpayers' fiscal residency should be determined based on their national domiciliary. Since domiciliary is determined based on one's intent to establish a permanent home, and one's intention is difficult to prove, we recommend that denizenship status be used as a proxy for domiciliary. In our view, because mere citizenship status can be acquired without any meaningful proximity or allegiance with a state (economic, territorial or otherwise), it is recommended that fiscal residency be determined based on denizenship status, as long as that status is conditioned on a meaningful physical presence that is also easily established and difficult to manipulate as "individuals can only be in one place at any given time."[115] However, we also believe the current rules that require a minimal period of 183 days (six months) to establish denizenship status should be relaxed.

Second, we recommend adopting anti-avoidance mechanisms that would make sure denizenship would not be acquired principally to evade taxes. Accordingly, fiscal residency should only be respected if the individual is taxed on a comprehensive basis and only if the individual is taxed in the same manner and at the same rates as other domestic taxpayers in that state. Also, we recommend that no exclusion or exemption be available. As we previously indicated, over the past several years, states have come to understand the economic contributions that skilled migrants can bring; and in relaxing their migration policies, they offer favorable tax treatment in a race to the bottom, which is undesirable

115. Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1311 (1996).

in our view. We, therefore, recommend that resident countries tax their nationals on a worldwide basis while also allowing deductions that would mitigate the cost of their minimal living standard overseas. We also recommend declaring that an individual cannot be "fiscally stateless" for tax purposes and that no one can be exempt from being taxed on a worldwide basis, including those who adopt a nomadic way of living.

Third, we believe that relying on denizenship status is fairer as it strengthens the social contract between the state and its denizens, and it also recognizes that abandonment of domiciliary/nationality is a process that takes time (several years), as does the acquisition of citizenship status. We, therefore, recommend considering some restrictions regarding the acquisition of denizenship under immigration investment programs that do not require a significant physical residence and where the state has very little social and economic proximity with the taxpayer. This proposal thus suggests adopting a period of several years in which the "home countries" would be able to participate and tax the foreign income of their citizens living overseas, but it would not be perpetual and would be limited to a certain period between five to ten years. During this period, the ties between the migrant and her home country are stronger and tighter. Also, the legitimacy of imposing such taxes during the first couple of years following immigration is, in our view, self-explanatory as a compensatory mechanism for the state's investment in the taxpayer and her family. However, as time goes by, such legitimacy lessens, and the contribution of the home country to the economic welfare of the taxpayer becomes more and more distant. As such, the taxes imposed on the migrants by the home country should be adjusted and reduced during this period. Furthermore, we would like to note that this proposal does not automatically apply to refugees, asylum seekers, and displaced persons. To the extent that the taxpayers were persecuted in their home countries and, as such, had to leave (to escape for their lives), the home country should be entitled to no tax revenues.

Lastly, we are aware that there are tens of millions of people who have dual/multiple citizenships, and possibly denizenships, and that all three model tax treaties adopt a binary approach, according to which an individual cannot be treated as being a dual resident for treaty purposes. We believe that under our proposal dual/multiple citizenship or permanent residency should not lead to double tax liability as we recommend that residency should not be changed during a five to ten year period, and therefore an individual should be classified during that period as a resident of her country of origin. Only if he or she acquires new denizenship does the new denizenship become effective following the transition period.