

Saint Louis University Law Journal

Volume 62
Number 1 *The Sanford E. Sarasohn Conference
on Critical Issues in Comparative and
International Taxation II: Taxation and Migration
(Fall 2017)*

Article 10

2017

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Recommended Citation

Leila Adim, *Between Benefit and Abuse: Immigrant Investment Programs*, 62 St. Louis U. L.J. (2017).
Available at: <https://scholarship.law.slu.edu/lj/vol62/iss1/10>

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BETWEEN BENEFIT AND ABUSE: IMMIGRANT INVESTMENT PROGRAMS

LEILA ADIM*

INTRODUCTION

During the last thirty years, an increasing number of countries have introduced Immigrant Investment Programs (“IIPs”) in order to attract foreign capital and boost national economies.¹ Canada, St. Kitts and Nevis, the United States, and Dominica initially implemented IIPs in the late 1980s/early 1990s; in the rest of the world, IIPs have been adopted only recently.² In particular, except for Ireland and the United Kingdom,³ European countries avoided the introduction of similar programs for attracting foreign capital and, until the last decade, admitted immigrant investors on a discretionary basis.⁴ However, the recession in 2008 induced many states of the European Union (“EU”) to change their approach toward immigrant investors and to regard IIPs as instruments for emerging from the crisis.⁵ Nowadays, these programs exist in almost half of the continent and represent the gateway of entry for many wealthy foreign individuals, but what is their overall impact at the domestic and at the global level?

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1. Judith Gold & Ahmed El-Ashram, *A Passport of Convenience*, FIN. & DEV., Dec. 2015, at 48, 48–49.

2. Xin Xu, Ahmed El-Ashram & Judith Gold, *Too Much of a Good Thing? Prudent Management of Inflows Under Economic Citizenship Programs 4* (Int’l Monetary Fund, Working Paper WP/15/93, May 2015), <https://www.imf.org/external/pubs/ft/wp/2015/wp1593.pdf> [<https://perma.cc/MKR7-LV4U>].

3. *Id.*

4. SERGIO CARRERA, HOW MUCH DOES EU CITIZENSHIP COST? THE MALTESE CITIZENSHIP-FOR-SALE AFFAIR: A BREAKTHROUGH FOR SINCERE COOPERATION IN CITIZENSHIP OF THE UNION? 1 (CEPS Paper in Liberty & Sec. in Eur., No. 64, April 2014), <https://www.ceps.eu/system/files/LSE%20No%2064%20Price%20of%20EU%20Citizenship%20final2.pdf> [<https://perma.cc/PH5D-N6DH>] (recognizing that EU Member States’ discretion over nationality laws has been reshaped).

5. MADELEINE SUMPTION & KATE HOOPER, MIGRATION POLICY INST., SELLING VISAS AND CITIZENSHIP: POLICY QUESTIONS FROM THE GLOBAL BOOM IN INVESTOR IMMIGRATION 3 (2014); Owen Parker, *Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes*, 55 J. COMMON MKT. STUD. 332, 332 (2017).

This Article addresses the various effects that IIPs may have on in- and out-migration of people and capital, with a special focus on the programs that have been recently introduced in some European countries. The purpose of the analysis is evaluating whether the benefit that IIPs bring to the host country's economy justifies a multilevel pattern of discrimination that may involve tax residents, tax jurisdictions, and immigrants with different levels of wealth. The Article is organized as follows: Part I focuses on the main features of IIPs, Part II addresses discrimination related to the coexistence of preferential tax treatments and IIPs, Part III examines the effects of IIPs in the ambit of global (tax) competition, and Part IV approaches the existing disparities in the admission of immigrants.

I. IMMIGRANT INVESTOR PROGRAMS: CHARACTERISTICS AND PURPOSES

IIPs are foreign capital attraction measures based on a conditional-exchange logic according to which the host country provides to third-country nationals, who make substantial investments in the private or in the public sector of the host country, a preferential procedure for obtaining the right to live within its borders.⁶ These programs can be very different in scope and characteristics, as every state has shaped IIPs in consonance with its specific needs and priorities.⁷ There are IIPs that require private sector investments or job creation,⁸ others in which applicants have to invest in the real estate market,⁹ and still others that request the payment of non-refundable fees to the state¹⁰ or the purchase of regular or low-interest government bonds.¹¹

Apart from the type of investment and its extent, which can vary significantly from country to country, IIPs can also be defined on the grounds of

6. Gold & El-Ashram, *supra* note 1, at 49.

7. Xu et al., *supra* note 2, at 4.

8. United States, France, Singapore, and the Netherlands apply this kind of IIP. Balakrishnan Prabhu, *25+ Immigrant Investor Citizenship Programs in the World*, CORPOCRAT MAG. (Oct. 20, 2015) (Hung.), <https://corpocrat.com/2015/10/20/25-immigrant-investor-citizenship-programs-in-the-world> [<https://perma.cc/M2V7-C6KD>]; *International Immigrant Investor Programs*, EB5 INVESTORS, <http://www.eb5investors.com/eb5-basics/international-immigrant-investor-programs> [<https://perma.cc/9CW9-8ZLM>].

9. This scheme has been adopted by countries such as Latvia, Spain, Greece, Cyprus, and Portugal, whose real estate markets have been badly affected by the recent economic crisis. Prabhu, *supra* note 8.

10. This is the case of Caribbean islands such as Antigua & Barbuda, St. Kitts and Nevis, and Dominica. *Id.*

11. Hungary required investment in no-interest government bonds, but as of April 2017, its program is suspended. *Hungary Residency Bond Program to Be Indefinitely Suspended from April 2017*, CORPOCRAT MAG., <https://corpocrat.com/2017/01/13/hungary-residency-bond-program-to-be-indefinitely-suspended-from-april-2017/> [<https://perma.cc/MW6H-ATLL>]. Ireland requires an investment in low-interest government bonds, while the United Kingdom and Australia offer resident permits in exchange for investment in regular-interest bonds. Prabhu, *supra* note 8.

the different “status” conferred to the investor.¹² Some programs allow applicants to receive temporary residence permits, which can be renewed and/or turned into permanent permits under specific conditions, while others entitle investors to directly obtain a second passport and citizenship or a permanent residence with—or without—the option to apply for citizenship after a few years.¹³

The reasons leading wealthy individuals to opt for IIPs can be related to the need to find a safe destination for them and their family—especially when they come from conflict zones—to overcome travel restrictions through the new residence permit or passport,¹⁴ to increase their business activity abroad, and also to pay less tax.¹⁵ The option to pay less tax is regarded with special attention by those individuals who apply for IIPs in Caribbean offshore jurisdictions. Dominica, for example, charges almost no taxes to nonresident individuals and corporations, has very strict financial privacy laws, and, along with St. Kitts and Nevis, allows people of any nationality to form offshore corporations within its borders and to open offshore bank accounts.¹⁶

12. Gold & El-Ashram, *supra* note 1, at 49.

13. *Id.*

14. CARRERA, *supra* note 4, at 5; Parker, *supra* note 5, at 334 (explaining how IIPs allow “greater access to global visa travel”). The opportunity to achieve a permit for travelling around Europe is one of the reasons for the popularity of EU Member States’ IIPs. As a matter of fact, by providing the immigrant investor with the resident permit, the EU host country opens not only its borders, but those of the entire Schengen Zone (composed of 26 EU Member States). *Schengen Area Countries List*, SCHENGEN VISA INFO, <https://www.schengenvisainfo.com/schengen-visa-countries-list/> [https://perma.cc/48SZ-4P5M]. This circumstance is not regarded as threat to the sovereignty of other EU Member States, as long as the IIP does not confer the right to citizenship in the absence of a genuine link with the host country. See CARRERA, *supra* note 4, at 26 (noting that the European Commission required Maltese authorities to introduce a “genuine link” prior to acquisition of Maltese nationality). In this respect, the European Commission and the European Parliament have taken action against Malta, because, through its IIP, it has conferred Maltese citizenship and hence also EU citizenship to individuals who have never resided in the island. *Id.* By arguing that Malta was “selling” the EU citizenship, the European Institutions affirmed that it was jeopardizing the duty of sincere cooperation among EU countries and obliged the Maltese authorities to modify its IIP. *Id.* However, such an intervention of the European Institutions did not significantly change the situation, because the concept of “genuine link” is still vague and discretionary: Malta now confers the citizenship after twelve months of residence in the country and states such as Bulgaria and Cyprus provide investors with a “fast-track” for achieving citizenship. *Id.* at 30, 42.

15. Parker, *supra* note 5, at 334 (recognizing “important tax advantages” as a benefit of IIPs).

16. See DOMINICA CITIZENSHIP BY INV., [HTTP://WWW.DOMINICACITIZENSHIPBYINVESTMENT.COM/](http://www.dominicacitizenshipbyinvestment.com/) [https://perma.cc/59AJ-MFGK]; see also G.A. Dwyer Astaphan, *Commentary: Who Is Really Running St. Kitts-Nevis?*, CARIBBEAN NEWS NOW! (Apr. 1, 2014), <http://www.caribbeannewsnow.com/topstory-Commentary%3A-Who-is-really-running-St-Kitts-Nevis%3F-20525.html> [https://perma.cc/RM43-ERFH] (discussing examples of several individuals carrying St. Kitts and Nevis passports who are not natives to St. Kitts and Nevis). See generally SUMPTION & HOOPER, *supra* note 5 (discussing the IIPs in Dominica and St. Kitts and Nevis).

However, these are not the only states that attract foreign investment due to their favorable tax regimes; some European countries lure immigrant investors through their tax treatments as well.¹⁷ Bulgaria, for example, offers to every tax resident a 10% flat tax rate on all income levels,¹⁸ while Portugal provides “new” tax residents with a preferential tax regime for up to ten years including reduced tax rates and exemptions on income earned abroad.¹⁹ Similarly, in Cyprus, exemptions on dividends, interest, and capital gains on the sale of real estate significantly increased the popularity of its IIP,²⁰ and a conspicuous number of wealthy immigrants were drawn by the idea of paying zero tax on income earned in the island.²¹ Thus, sometimes, there is no need to invest in a tax haven to receive residence permits and lower taxation on worldwide income at the same time. Furthermore, if the host country does not consider tax residence as a requisite for achieving the right to residency/citizenship, immigrant investors can decide where to be taxed on their worldwide income in order to obtain the most advantageous tax treatment.²²

II. IIPs, PREFERENTIAL TAX TREATMENTS, AND DISCRIMINATION AMONG TAX RESIDENTS: THE CASE OF PORTUGAL

The issue regarding the combination of IIPs with preferential tax regimes for foreign investors deals with the first hypothesis of discrimination that will be examined: Do IIPs generate disparities in the fiscal treatment of tax residents? For undertaking this analysis, the Portuguese preferential tax regime has been used as a reference sample.

17. Xu et al., *supra* note 2, at 6.

18. *Id.* at 6 n.8

19. *Id.*

20. LA VIDA GOLDEN VISAS, GOLDEN VISA PROGRAMMES: EUROPE 13 (2017).

21. See Mina Pieri, C. Saava & Associates Ltd., *Cyprus Non-Domicile Individuals (Non-Dom)*, LEXOLOGY (Mar. 31, 2017), <https://www.lexology.com/library/detail.aspx?g=9f927295-18bb-433e-bb09-4c452f73798a> [<https://perma.cc/RK56-SUVY>]. On July 16, 2015, Cyprus’ House of Representatives amended the Special Defence Contribution (“SDC”) Law and introduced the “non-domiciled” individual status. Accordingly, individuals who have not been Cyprus tax residents during the twenty years prior to the introduction of the mentioned amendment are not subject to the SDC. This means that these tax residents are not taxed in Cyprus on passive interests, rental income, and dividends (whether actual or deemed) regardless of the source and regardless of whether such income is remitted to a bank account or used in Cyprus. *Id.*

22. See generally LA VIDA, *supra* note 20.

The “non-habitual resident” (“NHR”) tax regime introduced by Portugal in 2009 and modified in 2012,²³ is not an integral part of the IIP²⁴ but represents a sort of “added value” to the Portuguese tax system that attracts many investors to the country. It applies to individuals²⁵ who have not been tax residents in Portugal during the previous five years.²⁶ A NHR is exempt from income taxation on foreign-sourced income if such incomes are subject to tax in a signatory country of a Double Tax Treaty (“DTT”) with Portugal or, in the absence of a DTT, if incomes are subject to tax in another jurisdiction and are not considered to be from a Portuguese source.²⁷ Some NHR exemptions apply even when foreign-sourced incomes are exempt in the source country because they are still considered subject to tax.²⁸ Consequently, under this preferential tax regime, cases of double non-taxation are not a remote possibility. In addition, it provides a 20% flat rate on employee, business, and professional earnings deriving from highly qualified activities carried out in Portugal.²⁹

23. See Decreto-Lei No. 249/2009, de 23 de Setembro, art. 4, Alteração ao Código do Imposto sobre o Rendimento das Pessoas Singulares [Change to Personal Income Tax Code] de 23.09.2009 (Port.) (adding the “non-habitual resident” tax regime to Article 16 of the Portuguese Individual Income Tax Code). Later modified by Lei No. 20/2012, de 14 de Maio, artigo 5, Alteração ao Código do Imposto sobre o Rendimento das Pessoas Singulares [Change to Individual Income Tax Code] de 14.05.2012 (Port.).

24. The IIP applies to non-EU individuals who make an investment either privately or through a company of: at least €1,000,000 in a Portuguese company, or by establishing a Portuguese company that employs more than ten people, or by purchasing a real estate property with a minimum value of €500,000. *Frequently Asked Questions by Investors Seeking Residency in Portugal*, GOLDEN VISA PORTUGAL, <http://goldenvisa-portugal.com/FAQ.html> [<https://perma.cc/6FCX-KXDK>].

25. According to Article 16, paragraph 1 of the Portuguese Individual Income Tax Code, tax residents are those who have their habitual residence in Portugal or who spend more than 183 days in Portugal in a tax year (Jan. 1st–Dec. 31st) or have/rent a house in Portugal on the 31st of December of that year with the intention to hold it as habitual residence. Lei No. 106/2017, de 04 de setembro, Código do Imposto sobre o Rendimento das Pessoas Singulares [Personal Income Tax Code], art. 16(1) (Port.).

26. *Id.* at art. 16(8).

27. *Id.* at art. 16(15).

28. See *id.* at art. 81(3)–(5).

29. Código do Imposto sobre o Rendimento das Pessoas Singulares, art. 99(8); Portaria no. 12/2010, de 7 Janeiro (Port.) (table of activities with high added value qualifying for the 20% flat rate), https://info.portaldasfinancas.gov.pt/NR/rdonlyres/6071C94D-AD61-4C88-99D9-2C7BD053BBAA/0/Portaria_12_2010_0701.pdf [<https://perma.cc/A6EY-D4TB>]. Architects, engineers, doctors, scientific researchers, people carrying out activities related to information technology and computing, designers, directors and top executives are included in this category. Portaria no. 12/2010, de 7 Janeiro. Tax relief for attracting human capital is far from being an unusual practice: the United States and Australia are among the numerous countries which use this method for incentivizing the immigration of skilled professionals. F.H. Buckley, *The Political Economy of Immigration Policies*, 16 INT’L REV. LAW & ECON. 81, 81–91 (1996); David Ley, *Seeking Homo Economicus: The Canadian State and the Strange Story of the Business Immigration Program*, 93 ANNALS ASS’N AM. GEOGRAPHERS, 426, 426–27 (2003).

The NHR tax regime looks like a hybrid treatment, merging aspects of both resident and nonresident income taxation, however it cannot be regarded as a third and autonomous category of taxpayers. Pursuant to the Portuguese Tax Law, NHRs are residents for income tax purposes as every other individual to which the general regime applies and their preferential tax treatment is only a “fiscal benefit.”³⁰ Portugal, as most of the countries that implement preferential taxation for attracting foreign capital, justifies the derived disparity in tax treatment as an exception aimed at satisfying a “public interest”: financing the expenditure of the state.³¹ At this point, a controversy may arise around two main questions: is not tax fairness a “public interest”? If yes, may the “public interest” in favoring the financing of the state outweigh the “public interest” in improving tax fairness?

The relevance provided by the tax systems of democratic countries to the principles of equity and ability-to-pay denotes that tax fairness is one of the most important “public interests” to be safeguarded, but it is not always clear whether it is superior or not to the other, especially when, as in the case of Portugal, the domestic economy is in recession.³² Nevertheless, the fact that both are generally considered as “public interests” suggests that the state has the duty to balance them in a way that the financing of the public expenditure does not end in abusive tax discrimination and that safeguarding tax fairness does not lead to a decrease in economic efficiency.³³

The tax reforms enacted by Portugal in the period in which the NHR’s regime has been introduced does not look in consonance with this approach. In the midst of the recent economic crisis, when the IIP appeared for the first time in the Portuguese Law, “habitual” residents’ tax rates have been severely incremented, and the increase in the burden on low-income taxpayers has been more pronounced than in most of the OECD countries.³⁴ To these observations,

30. Código do Imposto sobre o Rendimento das Pessoas Singulares, art. 16(8)–(9) (qualifying as a Portuguese tax resident is necessary to take advantage of NHR regime). Accordingly, “fiscal benefit” refers to exceptional measures introduced to promote relevant “public interests” that are greater than that of the taxation they prevent. Decreto-Lei No. 22/2017, de 22 de fevereiro, Estatuto dos Benefícios Fiscais [Statute of Tax Benefits], art. 2(1) (Port.).

31. Marta Filipa Ramos Mendes, *O Novo Regime Fiscal do Residente Não Habitual: Análise à Luz do Princípio da Não Discriminação no Direito Europeu* [The New Fiscal Regime of Non-Habitual Residents: An Analysis in Light of the Principle of Non-Discrimination in European Law] (Aug. 1, 2011) (unpublished L.L.M. dissertation, Universidade do Porto) (on file with author).

32. Alison Roberts, *Portugal’s Austerity Government Feels the Pinch*, BBC NEWS (July 2, 2013), <http://www.bbc.com/news/world-europe-23154232> [<https://perma.cc/GPH4-MFNB>].

33. See JOHN RAWLS, *A THEORY OF JUSTICE* 268 (1971); see also John G. Head, *Tax Fairness Principles: A Conceptual, Historical and Practical Review*, 9 AUSTRALIAN TAX F. 65, 65–66 (1992) (advocating an “equitable and efficient” tax structure in order to achieve a fair tax system).

34. JOSÉ CASTRO CALDAS, *EUR. ECON. & SOC. COMM., THE IMPACT OF “ANTI-CRISIS” MEASURES AND THE SOCIAL AND EMPLOYMENT SITUATION: PORTUGAL* 11 (2013); ORG. FOR

which highlight that the disparities in the distribution of wealth and the tax burden went far beyond the provision of a preferential regime for “new” tax residents, it should be added that the austerity measures implemented for stemming the crisis also involved a substantial reduction in personal income tax allowances.³⁵ It can be said, therefore, that Portugal has prioritized economic efficiency, even to the detriment of tax fairness.

These considerations confirm that, even when preferential regimes for “new” tax residents are aimed at satisfying a public interest, they may be inconsistent with the fundamentals of tax fairness, especially in those contexts in which wealth and tax burden are not equally distributed among the population. However, does the problem involve IIPs?

Undoubtedly, in a world in which taxation was the same everywhere, the amount of tax levied by the host country would not be an element to be taken into account while choosing where to apply for an IIP. However, since that is not the case, tax matters. Those states that do not offer tax incentives to foreign investors are likely to entice less wealthy immigrants than neighboring countries with attractive tax regimes. Accordingly, it is not surprising that those who want to obtain the right to live in the EU by investing in real estate and maintain, at the same time, some capital in their country of origin, tend to choose the Portuguese IIP rather than that of Spain.³⁶

Thus, the issue regarding preferential regimes and disparities in the tax treatment of resident taxpayers involves IIPs, as long as these programs are the vehicle for attracting a group of “privileged tax residents.” In point of fact, many of these tax residents would not be there without the combination of IIPs and preferential tax regimes.

Nevertheless, when it comes to migration inside the EU, the situation may be different. Since EU citizens do not need IIPs in order to reside in another EU member state,³⁷ become a tax resident in that country, and take advantage of its favorable tax regime, preferential tax treatments will continue to generate disparities even in the absence of IIPs. Hence, it can be concluded that preferential tax regimes are responsible for creating discrimination among tax residents, while IIPs are responsible for increasing the cases in which such discrimination takes place.

ECON. CO-OPERATION & DEV. [OECD], TAX POLICY REFORMS IN THE OECD 2016, at 32–33 (2016).

35. CALDAS, *supra* note 34, at 6.

36. The Spanish IIP, as will be broadly explained, is very similar to the Portuguese one; however, in Spain there are no particular tax incentives for investors who decide to apply. *Golden Visa Comparison: Portugal vs. Spain*, LUGNA, <https://www.lugna.pt/goldenvisa-portugalspain/> [<https://perma.cc/7N78-JUJY>].

37. Council Directive 2004/38, art. 7, 2004 O.J. (L 158) 77, 93–94 (EC).

III. IIPs AND GLOBAL (TAX) COMPETITION

The discussion on preferential taxation necessarily draws the attention to international tax competition, an argument that strictly involves the attraction of capital—the *raison d'être* of IIPs. As mentioned, IIPs exist in a world with different tax systems and, capital and people being mobile, the way in which one state exercises its taxing power may have repercussions on other states.³⁸ This mobility turns tax treatments into commodities that states commercialize in the global market at a fair price, in order to maintain “habitual customers” (e.g., tax residents), and/or at a discounted price to attract “new customers” (e.g., investors).³⁹

In a context in which states must compete to defend or increment their taxing power, the function of preferential regimes and, in general, of tax systems, is to attract “new customers,” and the purpose of IIPs is preventing extra-fiscal restrictions (e.g., migration rules) to hinder such attraction. IIPs become, therefore, the instrument of a tax competition that can be harmful. In general, it can be said that IIPs lead to harmful tax competition when they are included in the legal system of a state offering a wide range of fiscal advantages for attracting mobile capital, without minding their licit or illicit nature, and in the absence of transparency and effective exchange of information with other jurisdictions.⁴⁰ This circumstance is common in offshore tax jurisdictions such as Dominica and St. Kitts and Nevis, where IIPs are usually the gateway to an excessively tax-friendly environment,⁴¹ while in countries like Portugal and Cyprus, the active fiscal and financial cooperation with other jurisdictions and the limited extent of the preferential tax regime do not turn their IIPs into instruments of harmful tax competition. However, it cannot be said that cooperative countries do not create a climate of tax competition that, albeit non-harmful, reduce the ability of other states to attract foreign capital through IIPs.⁴² This leads one to ask: Why are there countries implementing IIPs without providing for preferential tax regimes for foreign investors?

The existence of IIPs is necessarily an indicator of the clear intention of some states to attract more foreign capital. However, the argument regarding the link between IIPs and competition goes beyond taxation because not every

38. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575–76 (2000).

39. See Vito Tanzi, *Globalization, Tax Systems, and the Architecture of the Global Economic System*, in TAXATION AND LATIN AMERICAN INTEGRATION 403, 404 (Vito Tanzi et al. eds., 2008).

40. Patricia Lampreave, *Fiscal Competitiveness Versus Harmful Tax Competition in the European Union*, 65 BULL. FOR INT'L TAX'N 6, 8–9, 11 (2011).

41. Duncan Tucker, *The High Price of 'Citizenship by Investment' in the Caribbean*, NEARSHORE AMERICAS (Sept. 9, 2014), <http://www.nearshoreamericas.com/citizenship-investment-programs-caribbean-fdi/> [<https://perma.cc/Y4MV-ZVSQ>].

42. See Tanzi, *supra* note 39, at 404 (“[T]ax competition aims to make a particular location . . . more attractive than other locations . . .”).

immigrant investor makes its choice on the basis of tax considerations. The cost-benefit calculus that leads a wealthy individual to apply for the IIP of one country rather than another may include a variety of factors, which widens the competitive scenario.⁴³ For example, those states that have broad welfare systems, flourishing economies, and political stability do not need to lure investors through tax incentives. They can eliminate the risk to discriminate among taxpayers by taxing “new” and “habitual” tax residents in the same manner and even require—without losing their seductive power—that immigrant investors contribute more actively to economic growth by creating jobs. Conversely, countries with a less favorable economic and socio-political situation may rely on their ability to offer more investment and mobility options due to agreements on trade and free movement, on their good weather and beautiful landscapes, or, finally, on preferential tax treatment. These kinds of states compete among each other in order to become the top destination for wealthy individuals. They also compete with other countries that may have different schemes for attracting investment, because, in reality, the peculiarities of each state and capital mobility are the true factors that generate competition.

Hence, it can be argued that competition is a systemic element in a diversified global environment, and it can be harmful when artificial and abusive mechanisms are used for obtaining undue benefits. Nonetheless, even when competition is non-harmful, it may be unfair if it gives rise to discrimination both at the national and at the international level. IIPs would not exist if every country did not have its peculiarities and if capital was immovable.⁴⁴ Thus, they necessarily create competition, but it is up to states that have IIPs to avoid such competition that ends in abuses and in differentiation between first-class and second-class individuals.

IV. IIPs AND DISCRIMINATION AGAINST IMMIGRANTS: THE CASE OF SPAIN AND THE EU MIGRANT CRISIS

The argument regarding the discrimination caused by IIPs has already been addressed in reference to tax residents of countries that offer preferential regimes to foreign investors; however, the issue is not limited to this case. The existence of such programs also tends to highlight that there are two categories of immigrants: the “wanted” and the “rejected,” the “beneficial” and the “burdensome,” those who can buy a better life and those who have to struggle to achieve it, the rich and the poor.

Paradoxically, immigrant investors can be considered either economic migrants, individuals who leave their countries of origin for a new destination

43. See *id.* at 404–05 (discussing several elements that make a particular location attractive).

44. See Tanzi, *supra* note 39, at 404 (explaining how a country’s tax base is no longer limited by that country’s territory, which allows countries to attract foreign financial capital, foreign real capital, foreign consumers, foreign workers, and foreign individuals with high incomes).

offering better economic conditions,⁴⁵ and/or refugees, individuals that might have been forced to emigrate because their lives were at risk in their countries.⁴⁶ In Europe, where the current migrant emergency involves both economic migrants and refugees, the discriminatory effect of IIPs may appear quite pronounced.

Almost half of EU member states have specific programs for attracting immigrant investors,⁴⁷ and each state, in the exercise of its sovereignty, has been free to design the IIP in the way that best suits its needs. The situation is completely different with regard to non-investor immigrants, since the entry and the stay of third-country nationals is regulated by common rules that every member state had to endorse as a requirement for joining the EU.⁴⁸ The difference in the approach to immigration is clearly reflected in the Spanish legal system, where the rules concerning the admission of immigrant investors are included in the *Ley de Apoyo a los Emprendedores y su Internacionalización* [Law for Supporting Entrepreneurs and their Internationalization],⁴⁹ while the requirements that the other foreigners should fulfill to access the country are established by the *Ley de Extranjería* [Immigration Law].⁵⁰

According to *Ley de Apoyo a los Emprendedores y su Internacionalización*, which has been recently modified by the *Ley no. 25/2015*,⁵¹ an investor visa valid for one year is provided to immigrants who either directly or through a

45. As affirmed by Anne Althaus: “The term ‘economic migrant’ has no legal definition. It is not mentioned in any international instruments of migration law. . . . [It] is nevertheless commonly used in the public discourse, [and] . . . [i]t frequently implies that the migrant has freely decided to move with the only aim of improving their financial situation” Anne Althaus, Opinion, *The False Dichotomy Between ‘Economic Migrants’ and Refugees*, NEW WORLD, no. 1, 2016, at 10.

46. *Id.*

47. Gold & El-Ashram, *supra* note 1, at 48–49.

48. There is, in fact, a common norm within the EU that prevents Member States from allowing entry and stay to third-country nationals. Exceptions are made mainly for those who enter without lucrative purposes, those who already have a signed employment contract, those carrying out highly qualified activities, and refugees. *See* Council Directive 2001/40, art. 3, 2001 O.J. (L 149) 34, 35 (EC); Council Directive 2003/109, art. 3, 2003 O.J. (L 16) 44, 46 (EC); Council Directive 2009/50, art. 1, 2009 O.J. (L 155) 17, 20 (EC); Council Directive 2011/98, art. 1, 2011 O.J. (L 343) 1, 4 (EU); Council Directive 2014/36, art. 1, 2014 O.J. (L 94) 375, 380 (EU); Council Directive, 2016/801, art. 1, 2, 2016 O.J. (L 132) 21, 29 (EU).

49. *Ley de Apoyo a los Emprendedores y su Internacionalización* [Law for Supporting Entrepreneurs and their Internationalization] art. 61 (B.O.E. 2013, 14) (Spain) [hereinafter *Ley de Emprendedores*].

50. *Ley Sobre Derechos y Libertades de los Extranjeros en España y su Integración Social* [Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration] art. 25 (B.O.E. 2000, 4) (Spain) [hereinafter *Ley de Extranjería*].

51. *See* *Ley de Mecanismo de Segunda Oportunidad, Reducción de la Carga Financiera y Otras Medidas de Orden Social* [Second Chance Mechanism Act, Reduction of Financial Burden and Other Measures of Social Order] (B.O.E. 2015, 25) (Spain) (including a modification to the IIP aimed at giving “a second chance” to a project that has brought to Spain little foreign capital).

company: (a) invest €2,000,000 in Spanish government bonds, €1,000,000 in shares of Spanish companies, or deposit €1,000,000 in a Spanish bank account; (b) purchase a real estate property with a minimum value of €500,000; or (c) undertake in Spain a business project that is regarded as being of general interest (e.g., creation of jobs, relevant socioeconomic impact in the territory, scientific and/or technological innovation).⁵² The foreign investors can then apply for a residence permit, which is valid for two years and renewable for two-year periods, provided that they have travelled to Spain at least once during the period, that they still meet the initial minimum investment requirements, and have complied with tax and Social Security obligations.⁵³ Investor visas with a maximum duration of six months are also provided to foreigners that have accessed Spanish territory with a tourist visa (ninety-days maximum stay) and who have not yet formalized the investment.⁵⁴

Conversely, the *Ley de Extranjería*, as every other immigrant law of EU Member States, establishes that the entry and the temporary residency is allowed only for non-lucrative purposes.⁵⁵ Additionally, evidence must be provided of the reason for and conditions under which foreigners are entering Spain, as well as evidence of financial support for their time of stay in the country or the ability to procure such funds legally.⁵⁶ A temporary permit for working reasons is released only to those foreigners who prove with a project and their financial means that they are going to start a business activity in Spain, or, in rare occasions, to those who have signed an employment contract for occupying specific posts listed by the Spanish Government.⁵⁷ This permit allows foreigners to apply for a special visa at the consulate of Spain in their country of origin in order to access Spanish territory.⁵⁸ Depending on the type of temporary permit, it can be renewed provided that the foreigner is working or has sufficient economic means for residing in Spain.⁵⁹ Other residence permits may be issued on the grounds of exceptional situations for international or humanitarian protection; cooperation with authorities; national security; public interest; female victims of gender-based violence; and collaboration with authorities against organized crime and human trafficking networks.⁶⁰

The Spanish Law provides formal and practical evidence, by means of separate regulations and different requirements for entering and staying in the territory of the Kingdom, that immigrant investors are different from every other

52. *Ley de Emprendedores* art. 63.

53. *Id.* at arts. 66–67.

54. *Id.* at art. 66.

55. *See* *Ley de Extranjería* arts. 25, 30, 33.

56. *See id.* at art. 25.

57. *Id.* at arts. 37–38.

58. *Id.* at art. 25 bis.

59. *Id.* at art. 31.

60. *Ley de Extranjería* arts. 31 bis, 33–35.

foreigner. Such a distinction indicates that a derogation from the EU common regulations on immigration and from the principle of equal treatment established by Article 20 of the European Charter of Fundamental Rights, and also by Article 14 of the Spanish Constitution, is possible when the discrimination entails an economic benefit to the country.⁶¹ This definition is made, however, *a priori* and is grounded on the idea that, unlike other foreigners who want to live and work in the EU, an immigrant investor may bring to the host country more benefits than problems. But is this always true? Undoubtedly, economic migrants who illegally reach the EU are different than those who enter with a “golden visa” because they are poorer and more in need of public services, but what will be the impact of both categories in the long term?

Nobody can say if immigrant investors will contribute forever to the economic growth of the host country. What will the consequences be if they leave, and, conversely, what effect may the inclusion of other economic migrants have in the future? It has been said, especially in reference to those countries in which IIPs provide an important share of revenue, that the potential loss of this resource is able to provoke an economic crisis.⁶² Others affirm that in the absence of economic migrants, the drop in the birth rate and increasing life expectancy will lead to a crisis of welfare systems caused by an over-aged overall population.⁶³ Nevertheless, it does not seem that these considerations influence actual immigration policies because, as in the case of the tax resident discrimination, the positive impact of the entry of immigrant investors is taken for granted.

However, there is a negative impact of IIPs that most of the EU Member States have taken into account: the likelihood of illicit capital entering EU territory. In point of fact, it cannot be overlooked that if the host country cannot access all the information related to capital invested within its territory, it is exposed to the danger of being involved in financial crimes and, in particular, money-laundering.⁶⁴ The issue is particularly problematic in the Caribbean,

61. CONSTITUCIÓN ESPAÑOLA, B.O.E. art. 14, Dec. 29, 1978 (Spain) (“Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”); CHRISTOPHER MCCRUDDEN & SACHA PRECHAL, EUR. NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUAL., THE CONCEPTS OF EQUALITY AND NON-DISCRIMINATION IN EUROPE: A PRACTICAL APPROACH 9 n.53 (2009). The equality clause in Article 20 of the European Charter of Fundamental Rights states: “Everyone is equal before the law.” *Id.*

62. Xu et al., *supra* note 2, at 9–10.

63. OECD, IS MIGRATION GOOD FOR THE ECONOMY? 3, 4 (Migration Pol’y Debates, May 2014); see Marshall Fitz, Philip E. Wolgin & Patrick Oakford, *Immigrants Are Makers, Not Takers*, CTR. FOR AM. PROGRESS (Feb. 8, 2013, 10:01 AM), <https://www.americanprogress.org/issues/immigration/news/2013/02/08/52377/immigrants-are-makers-not-takers> [<https://perma.cc/6LWF-JGX7>] (explaining how immigrants in the United States “are a key driver of keeping the Social Security Trust Fund solvent”).

64. Xu et al., *supra* note 2, at 23.

where the low level of fiscal and financial transparency may turn IIPs into an instrument for laundering illicit capital.⁶⁵

Within the EU, the risk of introducing illicit money has been reduced through the application of the Anti-Money Laundering Directive and the specific requirement to invest via bank accounts opened in the host country.⁶⁶ Due to these regulations, credit institutions are obliged to collect information on their customers and implement strict controls over their transactions.⁶⁷

The impact of the directive toward IIPs has been different depending on how it has been enforced in each Member State. Where credit institutions have not been too strict in their controls, some cases of money laundering have arisen,⁶⁸ while in other Member States excessive risk prevention has been considered as a determinant of a reduction in potential investors.⁶⁹ These considerations, however, do not regard Hungary, whose vicissitudes related to immigrant investors have been completely different from those of the rest of EU Member States. Hungary's IIP, introduced in 2012, provided permanent residency to foreign individuals who bought government bonds, but the evidence shows that the program was only an artificial mechanism for the benefit of a few companies.⁷⁰ During the entire application period of the IIP, which lasted until the thirty-first of March 2017, credit institutions exercised no real control over the origin of the capital invested, and public authorities were involved in the

65. Despite the U.S. Treasury's Financial Crimes Enforcement Network's ("FinCEN") warning on the likelihood that the IIPs of St. Kitts and Nevis were being used for abusive purposes and announced sanctions against the country, the governments of the Caribbean have not changed their approach toward foreign investors and there is still lax control over their activities. *See* FINANCIAL CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, FIN-2014-A004, ADVISORY: ABUSE OF THE CITIZENSHIP-BY-INVESTMENT PROGRAM SPONSORED BY THE FEDERATION OF ST. KITTS AND NEVIS (2014).

66. *See* Council Directive 2015/849, art. 1, 2015 O.J. (L 141) 73, 83 (EU) (amending the Regulation 648/2012/EU and repealing Directives 2005/60/EC and 2006/70/EC).

67. *See id.* at art. 1, 2.

68. Henrique Almeida, *Chinese Stuck in Portugal's Visa Limbo*, BLOOMBERG (Jan. 21, 2016, 6:24 AM), <https://www.bloomberg.com/news/articles/2016-01-20/chinese-property-buyers-stuck-in-portugal-s-golden-visa-limbo> [<https://perma.cc/WD4V-QP9W>].

69. Antonio Flores, *Spanish Banks Shut Doors to Iranian Investors*, BELEGAL.COM: BLOG (Sept. 26, 2013), <http://belegal.com/blog-by-antonio-flores/spanish-banks-shut-doors-to-iranian-investors/> [<https://perma.cc/RA63-9Y47>] (discussing how Spanish banks have refused to open bank accounts for Iranian nationals even though there is no specific regulation requiring them to do so). Malta does not seem to fear the loss in investments and in addition to the anti-money laundering control, the government authorities undergo the "fit and proper" test, a four-tier due diligence process in which checks are conducted with the International Criminal Court, INTERPOL, and various other authorities. MALTA IMMIGRATION, [HTTP://WWW.MALTAIMMIGRATION.COM/](http://www.maltaimmigration.com/) [[HTTPS://PERMA.CC/FFK7-VEPM](https://perma.cc/FFK7-VEPM)].

70. BOLDIZSÁR NAGY, INV. MIGRATION COUNCIL & TRANSPARENCY INT'L HUNG., IN WHOSE INTEREST?: SHADOWS OVER THE HUNGARIAN RESIDENCY BOND PROGRAM 8, 11 (2016).

corruption.⁷¹ The reasons related to the suspension of the program, which is probably the beginning of a procedure of abrogation, are unclear; some affirm that the country had no economic need for the IIP, others that the corruption scandal became too big,⁷² and there is also a part of the public that considers the IIP's suspension as a confirmation of the anti-immigrant and anti-refugee attitude of the government.⁷³

The latter point brings back the discourse to the wider issue of immigration and discrimination because in the migrant crisis affecting the EU as a consequence of the conflicts and political instability in the Middle East and Africa, the behavior of Hungary toward refugees has not been an exception.⁷⁴ In particular, it should be pointed out that some EU Member States that demonstrated considerable interest in integrating immigrant investors into their territory are not being similarly open to refugees.

Although refugees, according to EU law, are entitled to achieve the right to reside and work within the EU under the same conditions as Member State citizens,⁷⁵ such treatment is by far not comparable to the treatment provided by some Member States to immigrant investors. A noteworthy element of comparison in this regard concerns the duration of the procedures for obtaining the right to live in EU Member States. On average, in the EU, the period for processing IIP applications and issuing investor residence permits does not exceed three months,⁷⁶ while the period for asylum almost always fails to comply with the six-month deadline envisioned by the EU Asylum Procedures Directive.⁷⁷ The inefficiency of EU Member States in concluding asylum processes in a reasonable timeframe has been regarded with special concern by the EU Commission, which, in order to find a solution for alleviating the burden that the exceptional flow of refugees brought to Italy and Greece, decided to adopt the European Agenda on Migration in May 2015.⁷⁸ Thus, 160,000 refugees that arrived on the Italian and Greek coasts between 2014 and 2015 should have been quickly relocated in the other EU Member States according to

71. *See id.* at 11.

72. CORPOCRAT MAG., *supra* note 11.

73. *See* Christian Keszthelyi, *Hungary to End Sales of Residency Bonds*, BUDAPEST BUS. J. (Oct. 27, 2016), https://bbj.hu/politics/hungary-to-end-sales-of-residency-bonds_124017 [<https://perma.cc/6FQV-Y7H2>].

74. Claus Hecking, *EU Immigration: Only the Rich Are Welcome*, SPIGEL ONLINE (Oct. 8, 2013 10:37 AM), <http://www.spiegel.de/international/europe/immigrants-buy-visas-in-latvia-as-europoe-locks-out-the-poor-a-926543.html> [<https://perma.cc/4WNV-4ZPC>].

75. *See* Council Directive 2011/51, art. 1, 2011 O.J. (L 132) 1, 2 (EU) (amending Directive 2003/109/EC).

76. *See* LA VIDA, *supra* note 20, at 6.

77. Council Directive 2013/32, art. 31, 2013 O.J. (L 180) 60, 77 (EU).

78. Theresa Papademetriou, *Refugee Law and Policy: European Union*, LAW LIBR. CONG. (June 21, 2016), <https://www.loc.gov/law/help/refugee-law/europeanunion.php> [<https://perma.cc/DS5D-9JNR>].

a quota plan.⁷⁹ The apportionment took into account the size, economy, and population of each country and aimed at fairly distributing the refugees, but many Member States opposed the measure.⁸⁰ Among them, three had IIPs: United Kingdom, Ireland, and Hungary.⁸¹

These claims have caused important delays in refugee relocation, and most of the refugees are still in Italy and Greece.⁸² In contrast, no IIPs have been suspended due to the refugee crisis.⁸³ Such a diverging approach toward immigrant investors and refugees is clearly reflected in the case of Malta, the only EU Member State that establishes a specific quota of IIP applications per annum. This amount, 1,800 immigrant investors,⁸⁴ looks shocking not only in the light of the quota of 425 refugees that the EU plan allotted to the island,⁸⁵ but especially for the fact that, despite the high requirements of its IIP, every year Malta undertakes to admit a large number of immigrant investors while, by March 2017, the refugee quota had not been met.⁸⁶

CONCLUSION

In a time in which countries are increasingly sensitive to the need to promote a culture of transparency, integrity, and fairness, the implementation of IIPs seems in many cases to contradict the efforts aimed at countering abuses and discrimination.

Introduction of control mechanisms, the presence of small-scale migration flows, and provision of generous welfare systems are conditions able to overshadow the detrimental consequences of many IIPs, but these circumstances do not always accompany IIPs in every country they are found.

79. *Id.* The EU adopted its refugee redistribution scheme in September 2015. Jean-Michael Hauteville et al., *EU Refugee Quotas Failing Despite Landmark Ruling*, HANDELSBLATT GLOBAL (Sept. 7 2017, 3:02 PM), <https://global.handelsblatt.com/politics/eu-refugee-quotas-failing-despite-landmark-ruling-823289> [<https://perma.cc/JD5E-GX3Y>].

80. Papademetriou, *supra* note 78.

81. Council Decision 2015/1601, ¶¶ 46, 47, 2015 O.J. (L 248) 80, 86 (EU) (showing United Kingdom and Ireland opposing the measure); Papademetriou, *supra* note 78 (showing Hungary opposing the measure).

82. Papademetriou, *supra* note 78. As of September, 2017, more than 90,000 refugees are still waiting in Italy and Greece. Hauteville et al., *supra* note 79.

83. *Cf.* CORPORCRAT MAG., *supra* note 11 (showing that Hungary suspended its programs for reasons not related to the refugee crisis).

84. Xu et al., *supra* note 2, at 7.

85. Tom Batchelor, *MAPPED: How Many Refugees Each European Country Will Take Under EU Plan*, EXPRESS (May 16, 2016) (U.K.), <http://www.express.co.uk/news/world/607349/Migrant-crisis-map-EU-refugee-quota> [<http://perma.cc/7HQL-JP8E>].

86. *Member States' Support to Emergency Relocation Mechanism*, EUR. UNION (Nov. 2, 2017), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf [<https://perma.cc/UR9G-ZFZQ>].

The noticeable influence of these programs on in- and out-migration of individuals and capital has, as a consequence, resulted in the polarization of both migrants and states. IPPs, in fact, tend to reveal the existence of a wealthier class of migrants—able to invest in order to skip standard procedures for obtaining residence permits—and to show that the provision of preferential treatment is apt to turn states into “top destinations.” Such polarization does not arise from the willingness to damage a group of migrants or from attempts to undermine the economy of other countries. Rather, by implementing IPPs, host countries pursue economic benefits without paying any mind to many of their potential detrimental consequences.

It can be said that IPPs attract only a limited number of individuals and amount of capital and that, for this reason, their removal would be irrelevant in the struggle for global justice. It can be also argued that in the absence of IPPs there would still be means for shifting capital to “tax friendly” jurisdictions. Undoubtedly, major problems affect the world and IPPs are only drops in an ocean of *inequality spirals* that prevent individuals from having the same resources available for leading their lives and states from having the same instruments for competing at the global level.⁸⁷

After the Great Recession of 2007–08, there was an increasing interest in all states toward the elimination of global economic mismatches, and important achievements have been made in terms of tax justice, transparency, and cooperation. These efforts were focused on major issues such as the fight against aggressive tax planning, and small ones, like IPPs, have been wisely left aside. Nevertheless, this does not mean that the negative effects of IPPs are more tolerable than those of other abusive practices, or that states should remain indifferent to the discrimination they generate.

87. LLOYD LIPSETT, TAX ABUSES, POVERTY AND HUMAN RIGHTS: A REPORT OF THE INTERNATIONAL BAR ASSOCIATION’S HUMAN RIGHTS INSTITUTE TASK FORCE ON ILLICIT FINANCIAL FLOWS, POVERTY AND HUMAN RIGHTS 87 (2013).