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## **Abstract**

This article introduces Citizenship by Investment ('CBI') as exceptional municipal legal mechanisms that allow anyone to directly purchase citizenship from a selling state for a substantial monetary contribution. States that sell citizenship assume complete control, expose, and may ultimately give up control over citizenship. CBI simply means 'cash for passports' as direct, immediate naturalizations, which heightens mobility and pre-supposes multiple citizenship, without (or with negligible) actual physical residence requirements. CBI is marketed as 'global citizenship.' It creates a flexible, transactional citizenship, operating within an emerging tripartite nexus of states, citizens, and global markets for citizenship and residence entitlements. The orthodox view is that CBI schemes exist as marginal phenomena in isolation from the rest of citizenship, limited in personal and territorial application to the ultra-wealthy philanthropists and to small island states. In search of 'neo-Nottebohmian' 'genuine links' beyond state sales and global market control, this article argues that CBI laws are in fact complex agents of change, and that the concept of the genuine link has now been transformed and is to be re-envisioned in times of globalization. CBI's existence requires us to rethink citizenship's positioning within the international law community. In the laws of CBI, consideration should be given to factors that contribute to the greater good. CBI mechanisms may become available for all, whether wealthy or poor, as members of humanity.

## **Keywords**

investment, global, municipal dimension

# Genuine Links Beyond State and Market Control: The Sale of Citizenship by Investment in International and Supranational Legal Perspective

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## Abstract

*This article introduces Citizenship by Investment ('CBI') as exceptional municipal legal mechanisms that allow anyone to directly purchase citizenship from a selling state for a substantial monetary contribution. States that sell citizenship assume complete control, expose, and may ultimately give up control over citizenship. CBI simply means 'cash for passports' as direct, immediate naturalizations, which heightens mobility and pre-supposes multiple citizenship, without (or with negligible) actual physical residence requirements. CBI is marketed as 'global citizenship'. It creates a flexible, transactional citizenship, operating within an emerging tripartite nexus of states, citizens, and global markets for citizenship and residence entitlements. The orthodox view is that CBI schemes exist as marginal phenomena in isolation from the rest of citizenship, limited in personal and territorial application to the ultra-wealthy philanthropists and to small island states. In search of 'neo-Nottebohmian' 'genuine links' beyond state sales and global market control, this article argues that CBI laws are in fact complex agents of change, and that the concept of the genuine link has now been transformed and is to be re-envisioned in times of globalization. CBI's existence requires us to rethink citizenship's positioning within the international law community. In the laws of CBI, consideration should be given to factors that contribute to the greater good. CBI mechanisms may become available for all, whether wealthy or poor, as members of humanity.*

## I Introduction

Citizenship demarks the legal interface that links an individual to a particular polity.<sup>1</sup> Conventionally, citizenship refers to that connection's

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<sup>1</sup> Today, citizenship and nationality both refer to the nation state. However, each term reflects a different legal framework. Citizenship is largely confined to the national dimension, whereas nationality refers to the international legal dimension in the context of an interstate system.

municipal dimension, whereas nationality (a term often used interchangeably with citizenship), refers to the international law forum vis-a-vis other states.<sup>2</sup> Citizenship appears as the more flexible concept, whereas nationality is more static in its reference to nationhood, identity and state sovereignty.<sup>3</sup> Subject to globalization, the legal concept of citizenship, then, is in a process of transition to incorporate multiple meanings. In a world of heightened economic, political and social interdependence, individual, national, and global boundaries, as well as the definitions of citizenship, are increasingly becoming blurred.<sup>4</sup>

Globalization has incorporated millions of migrants into a global capitalist market with dimensions unprecedented in human history.<sup>5</sup> Persons have joined the movements of goods, services and capital.<sup>6</sup> The need for global mobility, in response to globalization, is one of the most pressing issues of this Century and is growing in both scope and complexity.<sup>7</sup> The currently estimated 258 million migrants of the world do not form their own country. If they did, that country would be the fifth largest on earth.<sup>8</sup>

According to Richard Bellamy, these '[c]urrent high levels of international migration [have been] sufficiently intense and prolonged and of such global scope as to have forced a major rethink of the criteria for citizenship'.<sup>9</sup> Similarly, Ayelet Shachar and Ran Hirschl observe that '[s]tate- and market forces are becoming increasingly intertwined in shaping migration selection criteria [and] setting membership allocation

See also Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006) 281–2.

<sup>2</sup> Kim Rubenstein, 'Globalisation and Citizenship and Nationality' (Legal Studies Research Paper No 69, *The University of Melbourne Faculty of Law*, 2004) 4; Kim Rubenstein, 'Rethinking Nationality in International Humanitarian Law' in Ustinia Dolgopool and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (Nijhoff, 2006) 89–104; Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff, 1956) 5; Paul Magnette, *Citizenship: The History Of An Idea* (ECPR Press, 2005) 20–1; Andrew Borkowski, *Roman Law* (Blackstone Press, 2001) 86; R H Graveson, *One Law — On Jurisprudence and the Unification of Law, Volume II* (North-Holland, 1977) 44; Saskia Sassen, above n 1, 281–2.

<sup>3</sup> Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Duke University Press, 1999). See also Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso, 1983) 7.

<sup>4</sup> Ken'ichi Omae, *The Borderless World: Power and Strategy in the Global Marketplace* (Harper Collins, 1990).

<sup>5</sup> Eliot Dickinson, *Globalization and Migration, A World in Motion* (Rowman and Littlefield, 2017) 4–5.

<sup>6</sup> Zygmunt Bauman, *Globalization: The Human Consequences* (Columbia University Press, 1998) 77.

<sup>7</sup> UN System Task Team on the Post-2015 UN-Development Agenda, *Migration and Human Mobility* (United Nations, 2012) 3; Ronald Skeldon, *Global Migration: Demographic Aspects and Its Relevance for Development — Technical Paper 6* (United Nations Department of Economic and Social Affairs, 2013).

<sup>8</sup> See Raquel Aldana, Won Kidane, Beth Lyon and Karla McKanders (eds), *Global Issues in Immigration Law* (West Publishing, 2013) 1; United Nations, Department of Economic and Social Affairs, *The International Migration Report 2017 (Highlights)* (18 December 2017) <<https://www.un.org/development/desa/publications/international-migration-report-2017.html>>.

<sup>9</sup> Richard Bellamy, *Citizenship, A Very Short Introduction* (Oxford University Press, 2008) 13.

priorities,' creating a '[f]usion of market logic and national interests.'<sup>10</sup> The underlying reasons for global migration are manifold and include humanitarian, as well as economic considerations.<sup>11</sup> Exposed to globalization, the nation state is joined by the highly mobile individual as well as other states operating in those markets. Nation states must therefore accommodate a transformation in the concept of citizenship. Since the advent of CBI and the creation of global markets for membership entitlements, nation states and citizens are no longer the exclusive stakeholders in the concept of citizenship.<sup>12</sup> As a result of the development of global markets for mobility, the sale of citizenship and residence entitlements, it is therefore necessary to find solutions to transcend the open and closed borders paradigm.<sup>13</sup>

Citizenship's emerging global stakeholder and market sphere requires a more transactional, legal and functional citizenship — one that is sufficiently formal and flexible to deal with phenomena such as the outright sale of citizenship or residence entitlements.<sup>14</sup> There also exists a humanitarian and universal side of citizenship, transnational or supranational, in addition to and complementing both states and global markets, understanding both individuals as well as nation states to owe reciprocal duties to all persons — to humanity — so that rights and obligations may function beyond state borders.<sup>15</sup>

## II Introducing Citizenship by Investment

This article introduces Citizenship by Investment ('CBI'), a transactional form of citizenship under the conditions of globalization, the modern inception of which can be traced to the Caribbean region in the 1980s.<sup>16</sup>

Ordinarily, citizenship is directly acquired by way of birthplace under the territorial principle ('*ius soli*') or by descent under the parental principle ('*ius sanguinis*').<sup>17</sup> In other cases, citizenship is acquired through

<sup>10</sup> Ayelet Shachar and Ran Hirschl, 'On Citizenship, States and Markets' (2014) 22(2) *The Journal of Political Philosophy* 231–2.

<sup>11</sup> Everett S Lee, 'A Theory of Migration' (1966) 3(1) *Demography* 49.

<sup>12</sup> See below nn 138–9.

<sup>13</sup> Christof Roos and Lena Laube, 'Liberal Cosmopolitan Norms and The Border: Local Actors' Critique of Global Processes' (2015) 15(3) *Ethnicities* 341; Bellamy, above n 9, 118; Andres Solimano, *International Migration in the Age of Crisis and Globalization*, (Cambridge, 2010) 78–116.

<sup>14</sup> As to the stakeholders of this market, see below nn 138–9.

<sup>15</sup> Immanuel Kant, *Practical Philosophy* (transcribed by Mary J Gregor, Cambridge University Press, 1996) 322; Georg Cavallar, 'Cosmopolitanisms in Kant's Philosophy' (2012) 5(2) *Ethics and Global Politics* 95, 99; See also Rafael Domingo, 'The New Global Human Community' (2012) 12(2) *Chicago Journal of International Law* 562.

<sup>16</sup> Most notably in the twin island state of St Kitts and Nevis from 1984, the year of independence from the UK. See also Christian H Kalin, *Ius Doni: The Acquisition of Citizenship by Investment* (2016, Ideos) 78, 2010–13 for historical examples of CBI, and 367–7 for St Kitts and Nevis.

<sup>17</sup> Maarten P Vink and Gerard-Rene De Groot, *Birthright Citizenship: Trends and Regulations in Europe 2010/8* (Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2010); Chikako Kashiwazaki, 'Jus Sanguinis in Japan' (1998) 39(3) *International Journal of Comparative Sociology* 278–300.

a naturalization process, by meeting the requirements of substantial residence periods, normally involving many years of actual physical presence in a country.<sup>18</sup> Residence may indicate the minimum nexus required between citizen and the country of choice, and thus function as an essential requirement in justifying the grant of citizenship.<sup>19</sup> CBI programmes, however, in effect offer individuals the opportunity to directly and outright ‘purchase’ the citizenship of the selling state for a large, one-off monetary contribution, in return for passports as full status passage rights and safety nets.<sup>20</sup> CBI, then, is an exceptional, immediate form of naturalization, as it comes either without any waiting time, including the ordinary requirement of actual, prolonged physical residence, or with only nominal and negligible periods of residence.

Temporal and permanent residency periods, as intermediate steps to citizenship, are the most significant checkpoints toward full membership in a polity.<sup>21</sup> Additional requirements that may attach to naturalization, such as language competency or the renunciation of another citizenship held, are also left out — criminal history checks aside. For these instantaneous or extremely fast-tracked naturalizations, the wealthy who can afford direct citizenship’s price need not hold any extraordinary skill or talent, but must only be able to summon a large monetary contribution.<sup>22</sup> CBI programmes are valued mainly as means of global mobility entitlements in the form of passports for heightened mobility (visa free

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<sup>18</sup> Required periods of residence can vary of anything between 2–15 years; Solimano, above n 13, 48.

<sup>19</sup> Ayelet Shachar has introduced the idea of actual, functional, substantial ties between citizen and polity, *ius nexi*, that may suffice to give rise to citizenship. Applying this idea to CBI, the only real nexus is a one-off payment: Ayelet Shachar, ‘Earned Citizenship: Property Lessons for Immigration Reform’ (2011) 23(1) *Yale Law Journal* 110, 116.

<sup>20</sup> Ayelet Shachar, ‘Citizenship for Sale?’, in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (2017, Oxford University Press), 789–816; Madeleine Sumption and Kate Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration* (Migration Policy Institute, 2014) 1–13; Christian Joppke, ‘Instrumental Citizenship — An Empirical-cum-Normative Inquiry’ (2016) *Paper presented at the Investment Migration Council Academic Day* (6 June 2016), Geneva (forthcoming); Christian Joppke, ‘Citizenship and Immigration’ (Polity Press, 2010); Jelena Dzankic, ‘The Pros And Cons Of Ius Pecuniae: Investor Citizenship In Comparative Perspective’ (2012) (14) *European University Institute Working Papers*, EUI; Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute RSCAS Working Paper 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014).

<sup>21</sup> Again, direct naturalization through CBI bypasses this step. See also Kim Rubenstein, ‘Review Essay: The Centrality of Migration to Citizenship’ (2010) 7(2) *Citizenship Studies* 255–6.

<sup>22</sup> These mercantile ‘cash for passport’ bargains refer not to human capital, but to capital per se in exchange for immediate membership. The law firm Henley and Partners describes CBI programs as existing to ‘[e]nable individuals to naturalize and acquire full legal citizenship status by making an exceptional economic contribution to another country. Most of the programs are structured to ensure that the investment contributes to the welfare, advancement and economic development of the country offering such a program’. See Henley and Partners, *The Henley and Partners Passport Index 2018* (13 February 2018) <[https://www.henleypassportindex.com/assets/PI\\_2018\\_INFOGRAPHS\\_GLOBAL\\_180215.pdf](https://www.henleypassportindex.com/assets/PI_2018_INFOGRAPHS_GLOBAL_180215.pdf)>.

travel),<sup>23</sup> as well as for protection and political diversification in the form of utilizing states as an insurance against political uncertainties elsewhere.<sup>24</sup> Unlike investor migration referring to economic gains, CBI utilizes the monetary contribution, even when in form of an investment, as a key for the purchase of citizenship.<sup>25</sup> With citizenship as the primary goal, CBI investments are not, then, always attractive from the viewpoints of economic profit or risk.<sup>26</sup>

Other forms of exceptional naturalization outside CBI legal mechanisms include discretionary direct transformations of skilled strangers as human capital into citizens where this is in the public interest.<sup>27</sup> For example this can be achieved by way of enlisting prospective soldiers, trading service for instantaneous citizenship.<sup>28</sup> This also includes direct naturalizations of elite athletes, famous artists,<sup>29</sup> or any deserving person.<sup>30</sup>

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<sup>23</sup> CBI schemes exist mostly for the ultra-wealthy who want hassle-free, unrestricted global mobility and immediate access to political safety in stable communities, as well as financial, tax or healthcare benefits. See generally Yen-Fen Tseng, 'The Mobility of Entrepreneurs and Capital: Taiwanese Capital-Linked Migration' (2000) 38(2) *International Migration* 143–68.

<sup>24</sup> Japan and Singapore, currently the top listed countries for visa free travel, allow visa free access to 180 countries, followed by Germany with 179 countries, Australia to 174 countries, the Russian Federation to 114 and China to 64. Afghanistan, at the other end of the spectrum, only does so for 24 countries; Henley and Partners, above n 22. See also Justin Spinney, Rachel Aldred and Katrina Brown, 'Geographies of Citizenship in Everyday (Im)Mobility' (2015) 64 *Geoforum* 325.

<sup>25</sup> Ordinary investment migration also comes with often substantial residence requirements. Non-CBI investor visa also normally follow clearly outlined rules and procedures, whereas CBI may be more discretionary. See, eg, the Austrian CBI scheme; Alfred M Boll, *Multiple Nationality and International Law* (Nijhoff, 2007) 112.

<sup>26</sup> Peyman Kiaras-Attari, 'EB-5 Investment: It's all about the risk' (2017) 1 *Trade and Invest in America* 88. This focus on citizenship as personal status for travel and protection is perhaps more akin to individual 'lifestyle migration', unless citizenship is itself viewed as an economic asset or investment. See Caroline Oliver, 'Lifestyle Migration' in Alexander Betts (ed) *Global Migration Governance* (Oxford, 2011) 133, 144.

<sup>27</sup> CBI migrants, on the other hand, do not need to be talented or skilled, or able to regain the funds used for entry in to the polity. See generally Martijn van den Brink, 'Investment Residence and the Concept of Residence in EU Law: Internations, Tensions, and Opportunities' (2017) 1 *Investment Migration Working Papers, Investment Migration Council* 3.

<sup>28</sup> For example, fast-tracking from three years to one day waiting time for US citizenship. See Jesse M Cunha et al, 'Expedited Citizenship for Sale: Estimating the Effect of Executive Order 13269 On Noncitizen Military Enlistments' (2014) 46(11) *Applied Economics* 1291.

<sup>29</sup> David Owen, 'Trading citizenship, human capital and the European Union' in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (European University Institute RSCAS Working Paper 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 31, 32; Ayelet Shachar, 'Picking Winners: Olympic Citizenship and the Global Race for Talent' (2011) 120(8) *The Yale Law Journal* 2088; Ayelet Shachar, 'The race for talent: highly skilled migrants and competitive immigration regimes' (2006) 81 *New York University Law Review* 148; Francesca Strumia, 'New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State' (2016) 4 *Investment Migration Working Paper No. 4*.

<sup>30</sup> See William Branigin, Simeon Tegel and Karla Adam, 'Ecuador grants citizenship to Julian Assange in bid to end London embassy standoff', *The Washington Post* (online) 11 January 2018 <[https://www.washingtonpost.com/world/europe/ecuador-grants-citizenship-to-julian-assange-in-bid-to-end-london-embassy-standoff/2018/01/11/55a4f232-f6ec-11e7-b34a-b85626af34ef\\_story.html?utm\\_term=.bf2896988015](https://www.washingtonpost.com/world/europe/ecuador-grants-citizenship-to-julian-assange-in-bid-to-end-london-embassy-standoff/2018/01/11/55a4f232-f6ec-11e7-b34a-b85626af34ef_story.html?utm_term=.bf2896988015)>; Owen Bowcott, 'Julian Assange is made an Ecuadorian citizen in effort to resolve impasse' *The Guardian* (online), 12 January 2018

Residence by Investment (‘RBI’), then, refers to the “cash for visa” fast-tracked acquisition of residence rights.<sup>31</sup>

### III Conceptions and Transformations of Citizenship Law

The act of naturalization — of turning a non-member into a ‘citizen’ — has always borne an air of ‘legal magic’, resulting in this area of public law being highly sensitive, regulated and politicised.<sup>32</sup> Citizenship is a contested, evolving concept.<sup>33</sup> In the world of nation-states, citizenship has long held a quasi-sacred status, which refers to identity and solidarity in cohesive communities, and is foundational to the right to active political participation, social cohesion and for civic equality.<sup>34</sup> John Rawls highlights reciprocal rights and duties under a conception of the good. Rawls refers to citizens as free, self-authenticating human beings, who are presumed to be rational and capable of taking responsibility.<sup>35</sup> Citizenship’s legitimacy depends on political and societal participation.<sup>36</sup> It is the capacity to ‘[i]nstitutionalize the rights of citizens in an appropriately egalitarian way’.<sup>37</sup> In political liberalism, citizenship is a concept understood to focus on the citizens’ rights, limited by fellow citizens’ rights, referring to political persons contributing to the common good and to shared interests of the citizenry.<sup>38</sup> Citizenship’s most recognizable aspect is its guarantee of legal rights, the ‘right to have rights’ as the prime right associated with national membership, guaranteed and

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<<https://www.theguardian.com/media/2018/jan/11/julian-assange-is-made-ecuadorian-citizen-in-effort-to-resolve-impasse>>.

<sup>31</sup> ‘RBI’ is the preferred option if one would otherwise lose one’s existing citizenship when acquiring new citizenship. RBI may include programs that offer permanent residence based solely on the demonstration of minimal funds to support oneself: Dimitry Kochenov, Roxana Barbulescu and Suryapratim Roy, *Investment Migration in the World* (2015, Investment Migration Council) 6–8; van den Brink, above n 27.

<sup>32</sup> Rainer Bauböck and Sara Wallace Goodman (2010) *Naturalisation*, EUDO Citizenship Brief No 2.

<sup>33</sup> See John Greville and Agard Pocock, ‘The Ideal of Citizenship Since Classical Times’ in Ronald Beiner (ed), *Theorizing Citizenship* (State University of New York Press, 1995) 29–52.

<sup>34</sup> Thomas Humphrey Marshall explains citizenship as a set of rights and duties bestowed on those who are full, equal members of a community: Thomas Humphrey Marshall, *Citizenship and Social Class and Other Essays*, (Cambridge, 1950) 28. See also Derek Heater, *What is Citizenship?* (Polity, 1999); Etienne Balibar, *Citizenship* (Polity, 2015); John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge, 2000).

<sup>35</sup> John Rawls, *Political Liberalism* (Columbia University Press, 1996) 30, 32; John Rawls, *The Law of Peoples* (Harvard University Press, 1999). See also Jonathan Crowe, *Legal Theory* (Lawbook Co, 2<sup>nd</sup> ed, 2014) 197.

<sup>36</sup> Engin F Isin and Greg M Nielsen (eds) *Acts of Citizenship* (Zed Books, 2008).

<sup>37</sup> Magnette, above n 2, 15.

<sup>38</sup> Angela Kallhoff, ‘The Normative Limits of Consumer Citizenship’ (2016) 29 *Journal Agric Environ Ethics* 23, 26, citing John Rawls, *Political Liberalism* (Columbia University Press, 1996); Richard Bellamy and Antonio Palumbo, *Citizenship* (Ashgate, 2010); Stephen Castles and Alastair Davidson, *Citizenship and Migration, Globalization and the politics of belonging* (Macmillan, 2000) 26; Derek Heater, above n 34; Bart van Steenberg, *The condition of Citizenship* (Sage, 1994); Keith Faulks, *Citizenship*, (Routledge, 2000).

protected by the state, from which other rights within that polity can derive (such as a right to political participation, health care, education).<sup>39</sup>

Citizenship is a fundamental concept for connecting citizens to nation states, which is intrinsically connected to the concepts of statehood and state sovereignty.<sup>40</sup> Citizenship has for a long time been viewed as a '[d]ebt of gratitude which cannot be forfeited, cancelled, or altered, by any change of time, place and circumstance...'<sup>41</sup> The status right of citizenship, then, excludes all non-citizens from the polity as 'aliens'.<sup>42</sup> Keith Faulks opines that '[a] citizens' income is a policy that removes citizenship's dependence upon the market and de-commodifies rights in ways which are likely to encourage a more activist and progressive citizenry'.<sup>43</sup> However, citizenship allows persons to function as integrated and competent members in a society. Contrary to Faulks view, citizenship also includes *economic* integration, as citizenship status both allows for and shapes the flow of resources between persons and social groups within the polity.<sup>44</sup> According to Carolina Nunez, it is useful to distinguish between formal citizenship (which Nunez calls 'pathways' to citizenship) and material or substantive citizenship. Substantive citizenship includes not only the formal guarantee of equal rights, but adds the notions of belonging, inclusion and shared identity.<sup>45</sup>

The historical meaning of being a citizen has fluctuated.<sup>46</sup> The Greek Aristotelian paradigm of an exclusive, active and participatory citizenship as the reign of full and equal members, gave way to a more functional, flexible citizenship in the Roman juristic tradition and its later

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<sup>39</sup> Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books, revised ed 2004), 376. See also *Perez v Brownell*, 356 US 44, 64 (Chief Justice Earl Warren) (1958); *Afroyim v. Rusk*, 387 US 253 (1967); T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institute, 2010).

<sup>40</sup> See Linda Bosniak, 'Varieties of Citizenship' (2007) 75 *Fordham Law Review* 2449, 2451; Ayelet Shachar, 'Citizenship and Global Distribution of Opportunity' in Engin F Isin, Peter Nyes and Bryan S Turner (eds) *Citizenship between Past and Future* (Routledge, 2008) 139; Engin F Isin and Patricia K Wood, *Citizenship and Identity* (Sage, 1999); Faulks, above n 38, 29; Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 *Melbourne University Law Review* 736.

<sup>41</sup> William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979) 357.

<sup>42</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso, 1983).

<sup>43</sup> Faulks, above n 38, 130–1.

<sup>44</sup> Engin F Isin and Bryan S Turner, 'Citizenship Studies: An Introduction' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (Sage, 2002) 1, 2. See also Richard Bellamy and Antonio Palumbo, *Citizenship* (Ashgate, 2010); Stephen Castles and Alastair Davidson, *Citizenship and Migration, Globalization and the Politics of Belonging* (Macmillan, 2000) 26; Faulks, above n 38; Engin F Isin and Patricia Wood *Citizenship and Identity* (Sage, 1999).

<sup>45</sup> D Carolina Nunez, 'Mapping Citizenship: Status, Membership, and the Path in Between' (Research Paper No 15–25 18–19, J Reuben Clark Law School, Brigham University, 2016); D Carolina Nunez, 'War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion' (2013) *Brigham Young University Law Review* 1517.

<sup>46</sup> Richard Bellamy, Dario Castiglione and Jo Shaw, 'Introduction: From National to Transnational Citizenship' in Richard Bellamy, Dario Castiglione and Jo Shaw (eds), *Making European Citizens, Civic Inclusion in a Transnational Context* (Palgrave, 2006) 1–31.

developments in medieval and early modern natural law. There was thus a paradigm shift away from the Athenian assumption of an ‘ideal’ equality that only worked to the exclusion of others, towards the Roman understanding of citizenship as a model in commerce, relating to persons and ‘things.’ Property rights and civil private law provided the model for the citizen’s place in society, having contracted out of natural liberty for a right to protection by the emerging concept of the nation state.<sup>47</sup> Citizens were no longer seen as public agents, but as subjects, oriented less toward political action for the common good than the pursuit of their personal goals under the protection of the law, welfare and public power. This concentration of power and control in the state, both protecting as well as limiting the individual as a smaller unit within the state, then also led to the rights of the citizen being perceived as ‘subjective’ rights. CBI is therefore perhaps best conceptualised as being rooted in Roman conceptions of citizenship, which were sufficiently versatile, functional and ‘thin’ to be applied throughout the variables of an empire.<sup>48</sup>

Facing de-territorialisation and globalization of citizenship, and with citizens, states and markets now directly interfacing with one another, it is timely to again rethink the legal concept of Westphalian citizenship.<sup>49</sup> In a bid to hypermobility, persons now appear to follow the rules of capital migration. As one of the most powerful transitions of citizenship at present, a market bound CBI then appears as the liaison between public law of citizenship and the private market side for citizenship. When CBI as citizenship for sale is advertised as ‘global citizenship’, it is not clear whether this refers to the globalization of citizenship on the market sphere, or whether a claim is made to supranational citizenship, perhaps combining free movement rights available on markets before the backdrop of both national and universal human rights standards.<sup>50</sup>

<sup>47</sup> Ibid 3.

<sup>48</sup> See also Nunez, Mapping Citizenship, above n 45; See also Patrick Weil, ‘Access to Citizenship: A Comparison of Twenty-Five Nationality Laws’ in T Alexander Aleinikoff and D Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment Funds for International Peace, 2001) 17–35; Kristin Surak, ‘Global Citizenship 2.0, The Growth of Citizenship by Investment Programs’ (2016) 3 *Investment Migration Working Papers* Investment Migration Council 35.

<sup>49</sup> For instance, Vanuatu accepts bitcoin payments for its USD200 000 CBI program and pilots blockchain based decentralized transactional due diligence processes (not yet applying to membership legitimizations as such), whereas Estonia allows for virtual e-residency as digital membership to anyone in the world: Editorial, ‘Vanuatu Citizenship Program to accept bitcoin payments, pilot block chain based due diligence’, *Investment Migration Insider* (online), October 4, 2017 <<https://imidaily.com/asia-pacific/vanuatu-citizenship-program-accept-bitcoin-payments-pilot-block-chain-based-due-diligence>>. See also Government of Estonia, *What is E-Residency*, <<https://e-resident.gov.ee/>>; Costica Dumbrava and Rainer Bauböck (eds), *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?* RSCAS 2015/80 EUI Working Papers 1.

<sup>50</sup> *Universal Declaration of Human Rights*, (‘UDHR’), 10 December 1948, 217 A(III) art 13(2). See also *International Covenant on Civil and Political Rights* (‘ICCPR’), adopted 16 Dec 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(2); Dimitry Kochenov, ‘The Right to Leave Any Country’ in Richard Plender (ed), *Issues in International Migration Law* (Brill/Nijhoff, 2015) 143–78; Dimitry Kochenov, ‘The Right to Leave Any Country Including Your Own in International Law’ (2012) 28 *Connecticut Journal of International Law* 43–71; Alistair M Macleod, ‘Human Rights, Distributive Justice, and Immigration’ in: Win-chiat Lee

#### IV Characterizing the Current Elements and Practice of CBI: A Rights Based Approach

Citizenship status matters. For Michael Walzer, '[t]he rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history.'<sup>51</sup> A democratic, libertarian citizenship should rely on fairness, reciprocity and equality.<sup>52</sup> For this, governments are obliged protect the interests of all people within their territory, not just citizens.<sup>53</sup>

The interplay between citizens, states and markets is complex and, at this time, unclear. Some of CBI's potential ripple effects include erosion, commodification, privatization, incoherence or fragmentation of citizenship.<sup>54</sup> Citizenship's direct sale may pose a challenge to national sovereignty, power and control of the selling state. The effects of CBI on the concepts of nationality and citizenship are currently underexplored, with empirical research in this field scarce.<sup>55</sup>

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and Ann E Cudd (eds), *Citizenship and Immigration — Borders, Migration and Political Membership in a Global Age* (Springer, 2016) 163–4; Antoine Pecoud and Paul de Guchteneire, 'International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility' (2006) 21 (1) *Journal of Borderlands Studies* 69–86; Francois Crepeau and Anna Purkey, 'Facilitating Mobility and Fostering Diversity — Getting EU Migration Governance to respect the Human Rights of Migrants' (2016) 92(5) *CEPS Paper in Liberty and Security in Europe* 1; Serenca Forlati and Alessandra Annoni (eds) *The Changing Role of Nationality in International Law* (Routledge, 2013); Margaret Somers, 'Romancing the Market, Reviling the State: Historizing Liberalism, Privatization, and the Competing Claims to Civil Society' in Colin Crouch, Klaus Eder and Damian Tambini (eds), *Citizenship, Markets, and the State* (Oxford University Press, 2001) 23–4; Bellamy, above n 9, 114.

<sup>51</sup> Michael Walzer, *Spheres of Justice* (Basic Books, 1983) 52.

<sup>52</sup> Ana Tanasoca, 'Citizenship for Sale — Neomedieval, not just neoliberal?' (2016) 57(1) *European Journal of Sociology* 169, 192.

<sup>53</sup> Rubenstein, above n 21, 257.

<sup>54</sup> Peter J Spiro, 'Cash for Passports and the End of Citizenship' in Ayelet Shachar and Rainer Bauböck (2014) EUI RSCAS Working Paper 2014/1, 9–10. By transmuting rights into contracts, the practice of commodified, direct market citizenship may lead to the fragmentation and erosion of citizenship's foundations. See, eg, Margaret R Somers, *Genealogies of Citizenship: Markets, Statelessness and the Right to Have Rights* (Cambridge University Press, 2008). See also Michael B Katz, 'On Genealogies of Citizenship by Margaret Somers' (2011) 9 *Socio-Economic Review* 395; Michael B Katz, 'Citizenship, Statelessness and Market Fundamentalism' in Y Michal Bodemann and Gokce Yurdakul (eds) *Migration, Citizenship, Ethnos* (Palgrave Macmillan, 2006) 25; Michael B Katz, 'Romancing the Market, Reviling the State: Historizing Liberalism, Privatization, and the Competing Claims to Civil Society' in Colin Crouch, Klaus Eder and Damian Tambini (eds), *Citizenship, Markets, and the State* (Oxford University Press, 2001) 23; Richard Falk, 'The Decline of Citizenship in an Era of Globalization' (2000) 4 *Citizen Studies* 5–6.

<sup>55</sup> See, eg, Vesco Paskalev, 'If You Do Not Like Selling Passports, Give Them for Free to Those Who Deserve Them', in Ayelet Shachar and Rainer Bauböck (eds) *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 25–6; Roxana Barbuлесcu, 'Global Mobility Corridors for the Ultra-Rich: The Neoliberal Transformation of Citizenship' in Ayelet Shachar and Rainer Bauböck (eds) *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 15–6; Surak, above n 48, 2–7.

### A *Exceptional Naturalizations Without Time of Residence*

In CBI programmes, residence — the most important factor in the law of naturalization, and thus, state control over citizens — is missing or reduced to negligible, formal periods of days instead of years.<sup>56</sup> Likewise, for so called ‘Residence by Investment laws’ (‘RBI’), waivers and substantial reductions in time often correlate with considerable fees. Without a substantial time period of actual physical residence subject to state authority prior to acquisition of citizenship, the membership’s claim for political equality may be an empty one.<sup>57</sup> CBI naturalization is paradoxical: CBI does not require any period of residence, or, if it does, these periods are often negligible and perhaps absurd where one views naturalization as a gradual process in which a migrant should become or turn into a citizen.<sup>58</sup> Despite criminal history checks, without preliminary residence periods CBI states do not really know who the migrant is, nor their attitude towards the country and existing social values.<sup>59</sup>

The question is, however, how much relevance the concept of residence still holds in the process of naturalization and in constituting a citizenry. As Christian Kalin notes, there is an increasing incongruence between constituent people and the resident population. This incongruence is in part due to economic globalization, higher international migration flows, cultural, social and ethnic plurality, cross border affiliations and digitalization.<sup>60</sup> As CBI’s focus is on the generation of revenue, not necessarily the person, the CBI migrant then appears as an almost impersonal and exchangeable facilitator within the light of CBI’s more or

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<sup>56</sup> Residence is necessary to establish genuine ties through language, shared culture and other factors of integration beyond the commercial bargain through the exceptional, direct sale of citizenship. It is not clear whether CBI naturalizations act as legal mechanisms or simply do not require, bypass, waive, reduce to zero, or assume residence by way of legal fiction. General examples include the Caribbean joint island state of Antigua and Barbuda, which has no residence requirement. However, deprivation of citizenship may occur if the citizen does not spend at least five (originally 35) days during the period of five calendar years after the grant of citizenship. See s 4 of the *Antigua and Barbuda Citizenship by Investment Act 2013* (Antigua and Barbuda). The development fund contribution option is a non-refundable contribution to the National Development Fund of at least USD250 000. There is a real-estate investment option and a business investment option. Likewise, in Dominica, there is no residence requirement. Section 101 of the *Dominica Constitution* and ss 8 and 20(1) of the *Dominica Citizenship Act 1978* (Commonwealth of Dominica), *Commonwealth of Dominica Citizenship by Investment Regulations 2014* (Commonwealth of Dominica) and *Commonwealth of Dominica Citizenship by Investment (Amendment) Regulations 2016* (Commonwealth of Dominica) grant instant citizenship by a Certificate of Naturalization for a payment of USD100 000 into the government fund or USD200 000 investment in real estate. There is no residency requirement in the Cyprus scheme for naturalization of investors by exception. See s 111A(2) of the *Civil Registry Laws of 141(I)/2002–2015* (Cyprus). The contribution is USD2 Million.

<sup>57</sup> Owen, above n 29, 31.

<sup>58</sup> It is highly questionable whether one can ‘naturalise’ within a few days. See also, and less critically, Kochenov, Barbulescu and Roy, above n 31, 42; Madeleine Sumption, ‘The Growing Market for Citizenship and Residence: A Policy Perspective’ in Henley and Partners, *Global Residence and Citizenship Programs 2016* (Ideas, 2016) 15.

<sup>59</sup> ABC Radio National, ‘Identity and Citizenship’, *Future Tense*, 4 October 2015 (Demetrios Papademetriou).

<sup>60</sup> Kalin, above n 16, 14.

less transactional nature as the transfer of wealth. The CBI migrant may not even have a real need to purchase a particular citizenship, but could purchase any citizenship, as long as the new citizenship improves current mobility in the form of visa free travel rights and enhances political diversification and protection.<sup>61</sup> CBI therefore also appears to be exceptional and indeterminate in that it depends on the decision of the CBI migrant as to whether to reside or participate in the CBI state. Thus, CBI contracts function to directly access citizenship status, with actual residence being a mere future option that depends on whether the new passport holder ever wishes to settle.

### **B Acceptance of CBI — *Nottebohm's Genuine Link***

Acceptance of CBI is another important element, both nationally (in regard to the existing citizenry) and internationally. An early form of CBI is the 1955 decision of the International Court of Justice ('ICJ') in *Nottebohm (Liechtenstein v Guatemala)*.<sup>62</sup> This case shows that acceptance of CBI by other states may be missing where there is no genuine link between the citizen and the selling state. The ICJ doubted this link in view of the exceptional circumstances of Nottebohm's naturalization — in particular the speed and ease with which Liechtenstein granted his passport. Further factors were that the sole aim of attaining citizenship was said to come within Liechtenstein's diplomatic protection, and to enhance personal mobility without a real interest in the selling state's way of life or traditions. Actual connections with Liechtenstein were 'extremely tenuous.' Guatemala was thus not required to recognise Nottebohm's Liechtenstein citizenship, as there was no 'real and effective' nationality.<sup>63</sup> Today, the requirement of a 'genuine connection' should be viewed with care, as it is closely associated with the concept of allegiance between citizen and state, and decided at a time when dual citizenship was likened to bigamy.<sup>64</sup>

As a right of direct access, CBI may be seen to refer to static membership — a given rather than a process in the making — which is identified mainly by the contracts and payments through which it has been established.<sup>65</sup> In this respect, CBI is somewhat comparable with direct, inherited conditions of membership. As such, CBI as 'cash for passports' may be no more or less 'real' or 'genuine' than the randomness and potential inequalities of birthright citizenship.<sup>66</sup>

<sup>61</sup> For instance, to leave the current country and to enter the European Union or the Caribbean Region.

<sup>62</sup> *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 23 ('*Nottebohm*'). See also Boll, above n 25, 110–3; Danielle Ireland-Piper, *Accountability in Extraterritoriality* (Edward Elgar, 2017) 42–3.

<sup>63</sup> *Ibid* 25–6.

<sup>64</sup> See Christian Joppke, 'Citizenship between De- and Re-Ethnicization' in Y Michal Bodemann and Gokce Yurdakul (eds) *Migration, Citizenship, Ethnos* (Palgrave Macmillan, 2006) 63, 74. Cf Sassen, above n 1, 278.

<sup>65</sup> Cf Sassen, above n 1, 278.

<sup>66</sup> CBI may, in fact, be seen as an 'honest' form of citizenship in that it does not seek to hide or disguise the fact that citizenship can be bought and sold. See generally Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy. Its Randomness. Its Price' in Ayelet Shachar and Rainer

### *C Commodified 'Thin' Citizenship and Classes of Citizenship*

A transactional, 'thin' CBI does not refer to a material, substantiated citizenship as a form of identity. However minimalistic, CBI is still legal citizenship, granting full formal status rights and the choice to access a given demos.<sup>67</sup>

In order to sell citizenship, CBI may, at least temporarily at the moment of its sale, become reduced to a formal legal minimum, so that states can assume complete control over citizenship as a commodity. A citizenship sold may de-commodify, pending further actions of the CBI citizen such as visits or participation. This 'thinness' makes CBI sufficiently flexible and transactional to be sold without residence or other established genuine link requirements of acceptance.

A 'thin' CBI may create degrees, fragments or classes of citizenship. For example, St Kitts and Nevis places voting restrictions on its CBI citizens, and Cyprus requires CBI citizens to hold residential property of at least EUR 500,000.00 at all times, effectively creating two classes of citizen.<sup>68</sup> CBI could, thus, be seen as transactional, purposive, formal-legal, passive, or perhaps public-private citizenship, focussing predominantly on payment rather than making reference to material factors of active citizenship.<sup>69</sup>

### *D The Price of CBI as Resource for Global Mobility*

At first sight, direct 'cash for passport' sales may appear as exceptional measures, relating to times of national emergency.<sup>70</sup> CBI sales are, however, not limited in this way.

CBI's value may be set through various internal variables and external factors in the broader geopolitical context.<sup>71</sup> The latter could include

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Bauböck (eds), *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 27–9. As to allegiance, see Alfred Michael Boll, 'Nationality and Obligations of Loyalty in International and Municipal Law' (2005) 4 *Australian Yearbook of International Law* 37. But see Ayelet Shachar, 'Coda', in Ayelet Shachar and Rainer Bauböck (ed), *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 37.

<sup>67</sup> This choice is with the migrant until it materializes in the form of residence, making CBI somewhat indeterminate. For the European Union, Jo Shaw concludes that the case for a legal obligation under the Treaties of the European Union to moderate national CBI programs seems rather weak: 'It may be a mercantilist practice, but it is not arbitrary according to the norms of EU law.' Jo Shaw, 'Citizenship for Sale: Could and Should the EU intervene?' in Ayelet Shachar and Rainer Bauböck (ed.), *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 33.

<sup>68</sup> Walzer, above n 51, 252–6.

<sup>69</sup> CBI is transactional and thus 'thin' at least at the moment of sale. See also Joppke, above n 20; Will Kymlicka and Wayne Norman, 'Return of the Citizen' (1994) 104(2) *Ethics* 352–81.

<sup>70</sup> See Chris Armstrong, 'The Price of Selling Citizenship' in Ayelet Shachar and Rainer Bauböck (ed), *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 14.

<sup>71</sup> These may include living standards, the form of government, taxation requirements or the quality of the environment, references to its history, language, culture and existing citizenry.

regional or bilateral alliances, which may prove essential for CBI to retain value.<sup>72</sup>

CBI's comparably high price of up to a few million AU\$ per passport may create artificial scarcity, further raising the economic value of citizenship as a resource for global mobility.<sup>73</sup> Here, in view of the right to leave any country in art 13(2) of the *Universal Declaration on Human Rights* ('UDHR'), there may be a constraint on overly high prices so as to avoid financial deterrents for applicants.<sup>74</sup> In a European Union context, immigration fees are required to be 'reasonable'.<sup>75</sup>

It is yet unclear whether citizenship's price is or will be determined by states, markets, or perhaps both. While the decision to sell citizenship, as well as citizenship's valuation, may initially be within the sole power and control of the selling state, the price of citizenship, as well as other features of CBI, may subsequently become co-determined by the global market for the sale of citizenship.<sup>76</sup> As Peter Spiro observes, '[i]nvestor programmes show that citizenship is still worth something. As the market thickens, we will see how much [and will be] able approximately to isolate the value of citizenship itself...'<sup>77</sup> CBI contracts generate revenue for the CBI state and, in some instances (such as small island states), the entire state's economy depends on CBI gains. At other times, CBI revenue may be diverted to philanthropic causes or be marginal compared to the GDP.

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See Dimitry Kochenov (ed), *The Henley and Partners — Kochenov Quality of Nationality Index 2011-2015* (Ideos, 2015); Christian H Kalin, *Global Residence and Citizenship Handbook* (Ideos, 6<sup>th</sup> ed. 2016) 22-6.

<sup>72</sup> For instance, the heightened value of citizenship that is also European Union regional membership: Surak, above n 48, 35, 39.

<sup>73</sup> Ranging from USD100 000 to a few million. From an EU perspective, this then may equate to free-riding and cashing in on the shared EU assets of free movement rights and external visa waiver agreements with third states facilitated by the EU: Raul Magni Berton, 'Citizenship For Those Who Invest into the Future of the State is Not Wrong, the Price is the Problem', in Ayelet Shachar and Rainer Bauböck (ed), *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 11-2.

<sup>74</sup> *UDHR* art 13(2). See also *ICCPR* art 12(2).

<sup>75</sup> This requirement exists in art 10-13 of the *European Convention on Nationality*, opened for signature on 6 November 1997, ETS 166 (entered into force 1 March 2000). See also Peter J Spiro, 'A New International Law of Citizenship' (2011) 105(4) *The American Journal of International Law* 694, 729. It is, however, not clear whether CBI contributions and immigration fees are interchangeable concepts.

<sup>76</sup> This may refer to the standardization of CBI mechanisms according to economic considerations on global markets for CBI and RBI. Those CBI programmes that sell best may need to be adopted by larger numbers of states. Market operations by dominant, competing CBI states, ultra-high net worth migrants or other industry stakeholders may potentially create ripple effects for all market participants.

<sup>77</sup> Spiro, above n 54, 10.

### ***E The Practice of CBI: States, Migrants, Markets — Whose Citizenship to Sell?***

States selling citizenship assume complete initial power and control over the concept of citizenship.<sup>78</sup> For Javier Hidalgo, states can prevent foreigners from acquiring residence or citizenship. In turn, it may be permissible for the state to give the same foreigners the option of buying citizenship.<sup>79</sup>

The role of the sovereign in modern legal systems, however, is not absolute, but constitutionally limited, with no single body of power completely in control of the concept of citizenship.<sup>80</sup> It seems puzzling that the selling state is acting at the same time as the public trustee or guardian over public law citizenship, as well as the key market regulator, sole producer and end-seller of citizenship, transforming citizenship into an exclusive good or scarce resource.<sup>81</sup> While the state may ensure everything in its powers for the protection and advancement of CBI and its investor citizens, the motive for such action may not be clear. The state could primarily hold a vested interest in the protection of the scheme's flow of revenue, ensuring CBI's value, marketed image and acceptance, rather than acting out of concern for the new citizens.

Martin Walzer warns that CBI may result in an inappropriate mingling of markets and states.<sup>82</sup> The practice of CBI has caused political controversies in a number of countries because it circumvents ordinary naturalization, tax evasion, money laundering, admission of criminals, the issuing of diplomatic passports to non-diplomats, and other influence on political power.<sup>83</sup> CBI schemes have seen unfettered government discretion, randomness or inconsistency in decision-making, lack of control mechanisms including independent oversight, transparency, due diligence and complaint mechanisms as well as outright corruption.<sup>84</sup>

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<sup>78</sup> Some governments are now entering into a race to sell the product of citizenship, created virtually out of thin air, each attempting in multiple ways to attract the relevant bidders, undercutting other states, such as by presenting and advertising the benefits of citizenship or residence schemes on international conferences to stakeholders or by completely removing or substantially reducing periods of compulsory residence from years to weeks or days.

<sup>79</sup> Javier Hidalgo, 'Selling Citizenship: A Defence' (2015) *Journal of Applied Philosophy* 1, 2. See also Christopher Freiman, 'The Case for Markets in Citizenship' (2017) *Journal of Applied Philosophy* 1.

<sup>80</sup> Crowe, above n 35, 36.

<sup>81</sup> H Patrick Glenn, *The Cosmopolitan State* (Oxford University Press, 2013); Jason Clenfield, 'This Swiss Lawyer Helps Foreign Governments "Sell" Citizenship Like a Commodity', *Business Insider* (online), 3 March 2015 <[www.businessinsider.com.au/governments-are-selling-citizenships-2015-3](http://www.businessinsider.com.au/governments-are-selling-citizenships-2015-3)>; David Ley, *Millionaire Migrants: Trans-Pacific Life Lines* (Wiley-Blackwell, 2010); Ayelet Shachar, 'Dangerous Liaisons: Money and Citizenship' (Working Paper No 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 3.

<sup>82</sup> Walzer, above n 51, 100.

<sup>83</sup> See also similar examples in Dzankic, above n 20, 3–4.

<sup>84</sup> Jelena Dzankic, 'The Maltese Falcon, or: my Porsche for a Passport!' in Ayelet Shachar and Rainer Bauböck (ed), *Should Citizenship be for Sale?* (EUI Working Paper No RSCA 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 17–18.

These fast-paced schemes expose the CBI-countries that run them to the macro-economic volatilities and potential erosion caused by global markets.<sup>85</sup> Attempts to control CBI programmes are not surprising, as CBI schemes do not relate to active, state-controlled political citizenship, but are rather a billion-dollar industry for the sale of passports for rights to mobility and protection on a global market scale.<sup>86</sup> For Michael Sandel, CBI represents the '[e]xpansion of markets, and of market values, into spheres of life where they don't belong.'<sup>87</sup>

CBI as market citizenship is demand-driven and case-bound 'citizenship at work', with major corporations intermingling as actual, real market players between citizens and states.<sup>88</sup> The economic logic behind CBI as a facilitated, fast-tracked naturalization for investors may lead to evolving standardisations, harmonisations and market adjustments of immigration law and policy on a global sphere — to the benefit of some and detriment of other states, migrants and stakeholders — and to a 'citizenship under market' rule.<sup>89</sup> If this economic approach to citizenship prevails, CBI purchases could be followed by the actual exchange of citizenship or residence entitlements in direct trade between citizens, within, or perhaps outside, the state's permission.<sup>90</sup>

### ***F CBI as Property: Commodification, Erosion, or Equality?***

Citizenship rights could be understood as property rights, amenable to sale and purchase in the same manner as open market commodities, such as corn or gold.<sup>91</sup> In this regard, the image and role of the CBI state may

<sup>85</sup> Judith Gold and Ahmed El-Ashram, 'A Passport of Convenience' (2016) 2 *The Global Residence and Citizenship Review* 26, 37: 'A large and too rapid influx of investment in the real estate sector could lead to rising wages and ballooning asset prices, with negative repercussions on the rest of the economy ... Moreover, inflows under these programs are volatile and particularly vulnerable to sudden stops, exacerbating small countries' macroeconomic vulnerabilities.'

<sup>86</sup> The small island state of Malta alone had reached EUR1 Billion through its Individual Investor Programme: Henley and Partners, 'Malta: The World's 7th most powerful passport' (Newsletter, 23 October 2015) < [https://www.henleyglobal.com/industry-news-details/malta-the-worlds-7th-most-powerful-passport/?Source=newsletter&page=newsletter\\_link\\_november\\_15&utm\\_source=Newsletter&utm\\_medium=read%20more%20link&utm\\_term=malta-the-worlds-7th-most-powerful-passport&utm\\_campaign=newsletter%20November](https://www.henleyglobal.com/industry-news-details/malta-the-worlds-7th-most-powerful-passport/?Source=newsletter&page=newsletter_link_november_15&utm_source=Newsletter&utm_medium=read%20more%20link&utm_term=malta-the-worlds-7th-most-powerful-passport&utm_campaign=newsletter%20November)>; Gold and El-Ashram, above n 85, 34–6; Graziella Bertocci and Chiara Strozzi, 'The Evolution of Citizenship: Economic and Institutional Determinants' (2010) 53(1) *The Journal of Law and Economics* 95–136; Kalin, above n 16, 213.

<sup>87</sup> See Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus, Giroux, 2012) 7.

<sup>88</sup> See Bridget Conor, 'The Hobbit law: Precarity and market citizenship in cultural Production' (2015) 12(1) *Asia Pacific Journal of Arts and Cultural Management* 25, 32.

<sup>89</sup> Cf Aihwa Ong, '(Re)Articulations of citizenship' (2005) 38 (4) *Political Science and Politics* 627; See also Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Duke University Press, 1999); Aihwa Ong, *Neoliberalism as Exception — Mutations in citizenship and sovereignty* (Durham, 2006).

<sup>90</sup> For instance, Amanda Root qualifies market citizens as agents of change on markets as mediums for exchange: *Market Citizenship, Experiments in Democracy and Globalization* (Sage, 2007) 33, 43, 153.

<sup>91</sup> Matthew J Webb, 'Citizenship for Sale, National Rights as Transferable Goods' (Paper presented at the 4<sup>th</sup> Annual International Conference on Political Science, Sociology and

degrade to that of a container, gatekeeper or controller of passports — the migrant, in turn, that of a consumer.<sup>92</sup>

A full, material, reciprocal and participatory ‘thick’ citizenship is a measure of a functioning democracy.<sup>93</sup> Citizenship is a condition of civic equality. It is a political membership where all citizens can determine the terms of social cooperation on an equal basis.<sup>94</sup> Citizenship as an item of trade, while subjected to market rule, is an opportunity for sovereign States to gain and prosper from a valuable asset created virtually ‘out of thin air’.<sup>95</sup>

From one point of view, CBI migrants could be seen as equals in payment, and perhaps even relatively equal bargaining partners with states. On this view, CBI has the potential to free citizenship from arbitrary exclusions.<sup>96</sup> According to Dimitry Kochenov, for example, ‘price-bound citizenship’ may be less arbitrary and more transparent than territorial or parental acquisition of citizenship and no longer subject to mechanisms of arbitrary approval such as language or cultural tests.<sup>97</sup> With CBI, states, from a presumed and unalterable given, become an object of choice and contestation.<sup>98</sup> At the origin of states and nations lies an ideological myth of descent as a ‘constant ideological spectacle’.<sup>99</sup> The identity side of citizenship can be seen as artificial, ensuring that people are ready to sacrifice it all, while states and nations must be seen as sacred, possessing inherent good.<sup>100</sup>

CBI may here be explained with the ‘economic club good theory’ of citizenship. States co-opt with individuals and markets who invest money

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International Relations, 2014) 29; Shaheen Borna and James M Stearns, ‘The Ethics and Efficacy of Selling National Citizenship’ (2002) 37 *Journal of Business Ethics* 193; Neil Duxbury, ‘Do Markets Degrade?’ (1996) 59(3) *The Modern Law Review* 331; Viviana Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (Princeton, 1985).

<sup>92</sup> Peter Taylor, ‘The State as Container: Territoriality in the Modern World-System’ (1994) 18(2) *Progress in Human Geography* 151–62; John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge, 2000); Duxbury, above n 91, 331–8.

<sup>93</sup> Kim Rubenstein and Niamh Lenagh-Maguire, ‘Thick and thin citizenship as measures of Australasian Democracy’ in Glenn Patmore and Kim Rubenstein (eds) *Law and Democracy: Contemporary questions* (ANU, 2014) 17. See also Mattias Kumm, ‘The idea of thick constitutional patriotism and its implications for the role and structure of European legal history’ (2005) 6(2) *German Law Journal* 319.

<sup>94</sup> Rubenstein, above n 93, 17.

<sup>95</sup> Turning citizenship into a commodified market citizenship is a development led by sovereign states themselves.

<sup>96</sup> Shachar and Bauböck, above n 84; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality*, (Harvard University Press, 2009).

<sup>97</sup> Kochenov, Barbulescu and Roy, above n 31, 27–9.

<sup>98</sup> Dimitry Kochenov, ‘Introduction: A Glimpse of Global Trends’ in Henley and Partners, *Global Residence and Citizenship Programs* (Ideos, 2<sup>nd</sup> ed, 2016) 8.

<sup>99</sup> Dimitry Kochenov, above n 98, referring to Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Ancor, 1967); Philip Allott, *Eunomia* (Oxford, 1990); David Miller, ‘The Ethical Significance of Nationality’ (1988) 98 *Ethics* 654, 657. Also citing Anthony D Smith, *The Ethnic Origin of Nations* (Blackwell, 1986) 147; Roland Barthes, *Mythologies* (A Lavers trans, Farrar, Strauss and Giroux, 1972) 131.

<sup>100</sup> Kochenov, above n 98, 9; Miller, above n 99, 655–8; Ernest Renan, *Qu’est-ce-qu’une nation? Et autres essais politiques* (Agora, 1992) 41; Martin Walzer, ‘Civility and Civic Virtue in Contemporary America’ (1974) 4 *Sociological Research* 41; Christine Chwaszcza, ‘The Unity of People, and Immigration in Liberal Theory’ (2009) 13 *Citizenship Studies* 451.

in the polity ('club'). In a cost-benefit analysis, only those people who can help to decrease the shared costs of the community should be admitted.<sup>101</sup> A formal legal view, as well as an economic view of citizenship, may show that, reduced to a formal, legal perspective, being a citizen depends on the possession of the status of citizenship in accordance with the law of a particular jurisdiction, to which certain rights can be attached.<sup>102</sup> From a minimalistic, formal legal perspective, 'citizenship' could function with minimal or even no intrinsic ethical content.<sup>103</sup> Citizenship's core element is exclusion, and the grounds for inclusion are '[a]s variable as they are random.'<sup>104</sup>

Conversely, CBI schemes could be seen to allow for the systematic transfer of wealth in exchange for rights, referring to fast-track citizenship for the admission of the wealthiest migrants, and to the passive criteria of a specific class ('the ultra-rich'), and not in terms of merit based (including investment skills) selection.<sup>105</sup> For Martin Walzer, this breaks the 'sphere boundary of money' by unlocking blocked exchanges that limit the dominance of wealth.<sup>106</sup> CBI quietly assumes that only wealthy individuals are able to offer a significant contribution to a state's economy.<sup>107</sup> However, there is yet no guarantee that the CBI migrant is able to repeat the feat of wealth creation, or was the originator of such wealth in the first place. For Owen, CBI practices support 'the emergence of transnational class and status stratification in which mobility rights become radically unequally distributed...' and are thus '[n]ot compatible with the democratic legitimacy of states.'<sup>108</sup>

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<sup>101</sup> States have the moral obligation to only treat as equals existing members, not those who seek to become members when compared to the existing members. Yet again, applicants are to be treated equally between one another. This logic of equal treatment can be overridden where there are extraordinary gains for the community from an individual's membership, such as on grounds of national interest: James M Buchanan, 'An Economic Theory of Clubs' (1965) 32 *Economica* 1–14; Bruno S Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions* (Edward Elgar, 1999) 6: 'The optimal size of a club is reached where the marginal utility received corresponds to the marginal cost induced by an additional member'; Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Review of Politics* 250; Dzankic, above n 20, 2–3. An important economic argument for the sale of residence and citizenship here keeps in mind the existing citizenry, in that states should naturalize those individuals who can decrease the shared costs of membership. See, eg, Tanasoca, above n 52, 173; Christian H Kalin, 'Ius Doni: The Rise of Citizenship by Investment' (2017) 1 *The Global Residence and Citizenship Review* 9; Robert Reich, *The Work of Nations: Preparing Ourselves for 21<sup>st</sup> Century Capitalism* (Vintage Press, 1991) 18–9.

<sup>102</sup> See Engin F Isin, 'Citizenship in Flux: The Figure of the Activist Citizen' (2009) 29 *Subjectivity* 367; Engin F Isin and G Nielsen (eds), *Acts of Citizenship* (Zed Books, 2008); J M Balkin, 'The Proliferation of Legal Truth' (2003) 5 *Harvard Journal of Law* 26.

<sup>103</sup> Kochenov, above n 98, 9.

<sup>104</sup> Ibid; Carens, above n 101, 251; Matthew J Gibney, 'The Rights of Non-citizens to Membership' in Caroline Sawyer and Brad K Blitz (eds) *Statelessness in the European Union* (Cambridge University Press, 2011) 41.

<sup>105</sup> Michael Zantovsky, 'Selling citizenship' on *World Affairs Journal* (22 January 2014) <<http://www.worldaffairsjournal.org/blog/michael-zantovsky/selling-citizenship>>.

<sup>106</sup> Walzer, above n 51, 100–2.

<sup>107</sup> Dzankic, above n 20, 3.

<sup>108</sup> Owen, above n 29, 32.

This neoliberalisation of citizenship entails that the policy-making process does not give impartial consideration to all those whose morally significant interests are affected by these citizenship policies.<sup>109</sup> Legal references to the reciprocity of costs and benefits, to the existing citizenry and to a broader, more inclusive spectrum of social strata perspectives beyond the ultra-wealthy, are currently missing in CBI.<sup>110</sup> The direct exchange of citizenship for money may ultimately erode public trust.<sup>111</sup> The barter for membership may send a ‘terrible signal’ about what makes a good citizen and to whom the contemporary market-friendly state gives priority.<sup>112</sup> CBI reduces citizenship as a last bastion of sovereignty to a legal transaction with a mercenary-like quality.<sup>113</sup> No nexi between the country and the passport’s recipient are required.<sup>114</sup>

It is difficult to add to these competing views from a solely national perspective on citizenship. In times of globalization, one may be tempted to suggest new nexi, or genuine links of membership, especially as state run CBI schemes are now existing, and highly sought after phenomena, conferring both rights of internal access as well as external, heightened global mobility, and thus, connecting national, international and global (market) spheres.<sup>115</sup>

CBI may be one of the many examples of existing, underlying global inequality, opening borders for the ultra-rich in alignment with the neoliberal free market driven by supply and demand.<sup>116</sup> CBI, as is true of all forms of citizenship, may create (global) inequalities, as it exists in a world of regulated mobility and unequal distribution of opportunity.<sup>117</sup> CBI, however, restricts the benefits of direct naturalizations to those that are able and willing to pay, and in doing so, through global markets, touches on multiple strata that go beyond national inequalities, perhaps offering different, supranational opportunities for improvement.<sup>118</sup>

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<sup>109</sup> Such as the already existing (non-CBI) citizenry: Barbulescu, above n 55, 15–6.

<sup>110</sup> Owen, above n 29; Bellamy, above n 9, 114–5; Heater, above n 34, 4.

<sup>111</sup> Hannes Swoboda, ‘Linking citizenship to income undermines European values: We need shared criteria and guidelines for access to EU citizenship’ in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (Working Paper No 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 35–6; Shachar, above n 78, 9.

<sup>112</sup> Shachar, above n 66, 37; Shachar above n 81, 3–4.

<sup>113</sup> Shachar, above n 66, 37.

<sup>114</sup> Shachar, above n 81, 4.

<sup>115</sup> See generally Yishai Blank, ‘Spheres of Citizenship’ (2007) 8(2) *Theoretical Inquiries in Law* 411–52.

<sup>116</sup> Even where the existing citizenry would authorise the practice, it would still not answer the question whether the practice itself is to be endorsed or not: Armstrong, above n 70, 13–4; Barbulescu, above n 55, 15–16.

<sup>117</sup> Shachar, above n 78, 3–4.

<sup>118</sup> Manuela Boatcă, *Global Inequalities beyond Occidentalism* (Ashgate, 2015) 192–5; Shachar above n 96, 59; Surak above n 48, 5.

### **G General Approach: CBI Legal Mechanisms for All Migrants?**

At the present time, CBI programmes are commonly seen as legal isolates, run by the tiniest of nations, mostly island states, and include only a very small, negligible fraction of extremely wealthy migrants.<sup>119</sup> The programmes are thus said to have no real relevance for the institute of citizenship.<sup>120</sup> Jo Shaw argues that the '[e]ffects of the Maltese provisions will be marginal in terms of numbers [with] little impact on other European Union ('EU') member states.'<sup>121</sup> Dimitry Kochenov states that '[t]he scale of [Maltese CBI] sales will remain small.'<sup>122</sup> Madeleine Sumption also questions the actual economic benefits of CBI elite programmes for larger states.<sup>123</sup> Yet, if not completely incorrect, the above assumptions may not necessarily hold for long. The theory of CBI could create profound ripple effects where extended beyond elite programmes and small territories. Both the number of CBI citizens and the number of CBI states may grow substantially, virtually overnight, especially within existing regional polities such as the EU or the conceptional spaces of local, regional and global markets.<sup>124</sup>

There are no conceptual barriers that prevent CBI's legal mechanisms from being applied to most states and migrants. A recent example is the 2016 case of the Productivity Commission, an Australian think tank, considering Nobel laureate Gary Becker's idea of selling or auctioning off (in this case) residence entitlements for a set admission fee to virtually all migrants.<sup>125</sup> While this idea was ultimately rejected, the example shows

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<sup>119</sup> Joppke above n 20, 9–14: 'too tiny a scheme'; Spiro, above n 54, 10: 'invisible to the existing citizenry'; Kalin, above n 16, 219: 'with its very limited scope of application'; Surak, above n 48, 3: 'remarkably limited'. See also Jo Shaw, above n 67. For the terminology of 'legal isolates' see Anthony van Fossen, 'Citizenship for Sale: Passports of Convenience from Pacific Island Tax Havens' (2007) 45(2) *Commonwealth and Comparative Politics* 138–63.

<sup>120</sup> Joppke above n 20, 14; Spiro, above n 54, 10; Kalin, above n 16, 94: 'the vast majority of applicants under these programmes are not interested, as global citizens, in political participation'; 238: 'nearly all the applicants under Citizenship-by-Investment programmes have absolutely no interest in the political participation aspect of citizenship'. See also Surak, above n 48, 3.

<sup>121</sup> Shaw, above n 67, 33.

<sup>122</sup> Kochenov, above n 98.

<sup>123</sup> Sumption, above n 58, 14.

<sup>124</sup> Swoboda, above n 111, 35: 'Malta is not an isolated case'.

<sup>125</sup> Gary Stanley Becker, *A Radical Proposal to Improve Immigration Policy* (Mimeo, 1987); Gary Stanley Becker, 'Why Not Let Immigrants Pay for Speedy Entry?' in Gary S Becker and G Nashat-Becker (eds) *The Economics of Life* (McGraw-Hill, 1987) 58; Gary Stanley Becker, *The Challenge of Immigration — A Radical Solution* (The Institute of Economic Affairs 2011); Gary Stanley Becker, 'An Open Door for Immigrants — the Auction' *The Wall Street Journal* (New York) 14 October 1992; Edward P Lazear, 'A Market Solution to Immigration Reform — Commentary, *The Wall Street Journal* (New York) 1 March 2013; Edward P Lazear, *The Economics of Life: From Baseball to Affirmative Action to Immigration: How Real World Issues Affect our Everyday Life* (McGraw-Hill, 1997); Edward P Lazear, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (National Bureau of Economic Research, 1964). See also Richard K Vedder, 'Immigration Reform, a Modest Proposal' in Benjamin Powell (ed), *The Economics of Immigration* (Oxford 2015) 145; Shaheen Borna and James N Stearns, 'The Ethics and Efficacy of Selling National Citizenship' (2002) 37 *Journal of Business Ethics* 193; Julian Lincoln Simon, *The Economic*

that CBI or RBI may find general application by major migration nations to the total of existing and future migrants. In this way, so-called ‘Becker schemes’ could impact on the nature and development of citizenship and residence worldwide. Becker schemes are a form of CBI, extended toward a comparably low-cost (when compared to other CBI schemes, in this case, a flat fee of AUS\$ 50,000), direct and general sale of most, if not all migration entitlements within a polity. Had the proposal been implemented, Australia could have created a contentious, yet large scale source of revenue, fuelled by the total number of current immigrants (excepting humanitarian migration). Should a nation follow a charge-based approach to all citizenship or residence entitlements beyond the ultra-wealthy, the impact on citizenship, global markets, as well as the CBI industry, could be profound.<sup>126</sup> Where the standard fee proposal is coupled with waivers or support through public or private loan schemes akin to the widespread practice of student loans, or perhaps, through crowdfunding, CBI and RBI legal mechanisms could find much wider application.

Becker schemes may perhaps assist in balancing or overcoming inequalities and exclusions created by price distortions for exceptional naturalizations in high-class elite programmes, as well as the often unfair and random inclusions and exclusions of any person in regards to conventional birthright citizenship.<sup>127</sup> In this way, state control over admissions could be further refined, and reference to the public greater good or humanity made, including migration without, or with part or fully state supported admissions through payments, beyond a CBI merely equalling revenue generation.

### **H *Plural (Dual and Multiple) CBI***

CBI encourages, requires, presupposes and creates plural (dual and multiple) citizenship, as well as reduces (‘thins’) and individualises the connection between the citizen and the state to a transactional level. In this way, CBI appears to contribute to some detachment of citizenship from the single nation state, vesting the concept within a mercantile, as well as a fundamental rights approach to citizenship. Could CBI perhaps be a blueprint for international or a global mercantile citizenship, for mixed identities beyond the allegiance to one single nation alone? In other words, could CBI become an international standard or even proto-global

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*Consequences of Immigration* (University of Michigan Press, 2<sup>nd</sup> ed, 1999) 357; Odvar A Bodvasson and H van den Berg, *The Economics of Immigration: Theory and Policy* (Springer, 2013).

<sup>126</sup> Michael B Krakat, ‘Becker’s Long Shadow: Close Call for Australian ‘Uniform’ Residence-by-Investment Scheme?’ (2017) 1 *Investment Migration Council Bulletin* <<http://investmentmigration.org/newslettersection/imc-bulletin-issue-1-2017/>>.

<sup>127</sup> See generally in regards to birthplace inequality: Kim Rubenstein, ‘The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize’ (2005) 22(2) *Law in Context* 999; Ayelet Shachar, *The Birthright Lottery, Citizenship and Global Inequality* (Harvard University Press, 2009).

citizenship? According to some scholars, plural citizenship may become the norm.<sup>128</sup> For Peter Spiro, CBI is

[n]ot the cause, but a consequence of the changing perception of the core of state power and the relationship between the individual and the state as no longer being a ‘sacred bond’: CBI is just another symptom of the inevitable decline of citizenship due to globalization, alongside the increasing toleration of dual — (and multiple) citizenship (which CBI is one venue to create).<sup>129</sup>

Plural citizenship was once seen as a menace of divided loyalties.<sup>130</sup> However, today, this is changing, and the ‘passport mix’ is becoming more than just tolerated.<sup>131</sup> The 1992 judgment of the European Court of Justice (‘ECJ’) in *Micheletti* established that EU member states must recognise the supranational ‘EU part’ of a person’s dual citizenship, as to do otherwise would deprive that person of the benefit of free movement rights within the EU.<sup>132</sup> It is not clear whether the sale of member state citizenship affects the status of EU citizenship.<sup>133</sup> What appears clear is that value is added to the respective citizenship of Cyprus, Malta or Austria in the form of a supranational, complementary EU citizenship in addition to that of member states. Plural citizens are able to leverage benefits in multiple countries, at times against one another, extending options beyond the mere sum of all citizenships, to a transnational understanding of citizenship.<sup>134</sup>

### I *Global Market Citizenship*

Citizenship as property opens transnational, supranational or global perspectives through concepts such as global markets, as well as global justice and equality.<sup>135</sup> Traditional continuities of space, identity, citizenship and nationality, when facing globalisation and the need for increased individual mobility, are eroding or transforming.<sup>136</sup> Where states

<sup>128</sup> Kim Rubenstein and Daniel Adler, ‘International Citizenship: The Future of Nationality in a Globalized World’ (2000) 7(2) *Indiana Journal of Global Legal Studies* 519–48; Peter J Spiro, ‘Dual Nationality and the meaning of citizenship’ (1997) 46 *Emory Law Review* 1412.

<sup>129</sup> Spiro, above n 54, 9; Idem, ‘Citizenship, nationality, and statelessness’, 281–300, in: Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar, 2014); *Beyond Citizenship: American Identity After Globalization* (Oxford University Press, 2007).

<sup>130</sup> See, eg, *European Convention on Nationality 1997*, art 3(1).

<sup>131</sup> Holding multiple passports is now often necessary to counter or adopt to the effects of globalization. See in Kalin, above n 16, 253–6.

<sup>132</sup> Case C-369/90 *Micheletti*. [1992] ECR I-04239. See also Shaw, above n 67, 33.

<sup>133</sup> EU citizenship is the world’s most advanced system of supranational citizenship. See Shachar, above n 66, 37.

<sup>134</sup> Surak 2016, above n 48, 34: ‘For those seeking exit insurance, citizenship secures a destination.’

<sup>135</sup> Ayelet Shachar and Ran Hirschl, ‘On Citizenship, States and Markets’ (2014) 22(2) *The Journal of Political Philosophy* 231, 233–4. See also Ayelet Shachar and Ran Hirschl, ‘Citizenship as Inherited Property’ (2007) 35 *Political Theory* 253; Dzankic, above n 20; Rainer Bauböck, ‘What is wrong with selling citizenship? It corrupts democracy!’, Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (Working Paper No 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014), 19–22; Surak, above n 48, 3–4.

<sup>136</sup> Spiro, above n 54, 694; Kochenov above n 98, 9–10.

act as enterprises rather than public communities, they may fail to acknowledge public-and private spheres boundaries.<sup>137</sup> With emerging global market standardizations and harmonisations of citizenship, such as the need for residence waivers, it appears that states are, in effect, parting with sole power over the definition of the legal and political meaning of citizenship. Therefore, one of the main issues for states running CBI legal schemes may their relationship with the global market for citizenship and residence, in which these states also partake, as well as to that market's stakeholders and industry.<sup>138</sup>

Competition between CBI states and migrants as contracting parties for citizenship alone may pose a challenge to state sovereignty. Other actual or potential market stakeholders include a seemingly endless list of existing citizens and residents (CBI and non-CBI), CBI regions, all other, transitory and emerging (as well as non) CBI states, regions, and migrants non-governmental organizations, national and transnational corporations. The global migration industry then is again comprised of governments of selling states, migrants, lawyers, immigration and relocation consultants, accountants, financial advisors, estate agents, builders and other stakeholders, advertising 'citizenship for sale' as a positive force for creating 'global citizens', here within the meaning of wealthy global travellers and passport collectors with a cosmopolitan lifestyle.<sup>139</sup> Also, there are only very few legal service providers advising governments on formulating CBI law and policy, as well as assisting CBI migrants.

These stakeholders may impact on policy or legal standards for CBI or all citizenship, blurring and transforming demarcations between the public and the private. As Kristin Surak states, this goes beyond 'airlines checking passports or 'security firms running detention centres'.<sup>140</sup> With CBI, citizenship as such has become subject to the 'growing field of private actors shaping and implementing policy.'<sup>141</sup>

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<sup>137</sup> Joseph H Carens, above n 101, 251–73. See also Joseph H Carens, 'Membership and Morality: Admission to Citizenship in Liberal Democratic States' in R W Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America, 1989) 31–49; Joseph H Carens, 'Migration and Morality — A Liberal Egalitarian Perspective — Free Movement' in Barry Barry and Robert Goodin (eds), *Ethical Issues in the Transnational Migration of People and of Money* (Pennsylvania State University, 1992).

<sup>138</sup> Sumption, above n 58; Georg Menz, 'The Neoliberalized State and the Growth of the Migration Industry', in Thomas Gammeltoft-Hansen and Ninna Nyberg Sorensen (eds) *The Migration Industry and the Commercialization of International Migration* (Routledge, 2012) 108–11; Kristin Surak, 'The Migration Industry and Developmental States in East Asia', in Thomas Gammeltoft-Hansen and Ninna Nyberg Sorensen (eds), *The Migration Industry and the Commercialization of International Migration* (Routledge, 2012) 89–110.

<sup>139</sup> Surak, above n 48; Henley and Partners, 'Global Citizens — a Journey' (Ideos, 2013) 32; Henley and Partners, *The Firm of Global Citizens — Residence-by-Investment Australia* <<https://www.henleyglobal.com/residence-australia/>>. See also, Gold and El-Ashram, above n 85, 26.

<sup>140</sup> Surak, above n 48, 37.

<sup>141</sup> The programs of Antigua and Barbuda, Malta, and St Kitts and Nevis have been designed by Henley and Partners under relevant government mandates. The firm was also appointed by the Government of Grenada in 2016 to revitalize and restructure the Grenada Citizenship-by-Investment Program'. See Henley and Partners, above n 22; Surak, above n 48, 37.

In order to remain competitive against the citizenship products of other CBI states, the CBI states are becoming increasingly bound by market rule, so as to not further extend any remaining residency periods or other restrictions to direct naturalization. The current global market for citizenship thus already transcends the social contract of a single citizen.<sup>142</sup> By way of the actual and continuous existence and operation of CBI, states create, necessitate and operate a global market for residence and citizenship from which a single state may perhaps no longer readily withdraw.<sup>143</sup>

The ideal of the regulatory state has now given way to that of the competitive, efficient state under global market rule, constrained, even forced, to adopt particular policies, and removed from public scrutiny and accountability. Global market forces may render states, if not deregulated, powerless and disciplined by market logic.<sup>144</sup>

Related to the presumption of market efficiency and neutrality is the idea that contracting parties ought to share relative equality in bargaining power. Such economic reasoning in citizenship sales is problematic, as mutual benefits cannot be guaranteed, especially where the guardian of any such guarantee, the state, is a contracting party.<sup>145</sup>

Where CBI refers to privatised norm making and denationalised state agendas, it may lead to highly variable interpretations of state power within the global economy of citizenship, pleasing the market for citizenship rather than setting goals for social and economic well-being.<sup>146</sup>

## **V Universal Blueprints for New Genuine Links? Case Studies, Regulation and Reform**

In view of the above characterisations of CBI, it may be necessary to employ a universal rights approach beyond both state and market control.<sup>147</sup> Also, price-based policies may not necessarily be very efficient

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<sup>142</sup> Regarding the ‘global market’ for citizenship breaking down the wall that separates the spheres of money and power, see Rainer Bauböck, ‘Summary: Global, European and National Questions about the Price of Citizenship’, in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (Working Paper No 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 1, 2.

<sup>143</sup> Are states now transforming from gatekeepers to competing shopkeepers of citizenship? CBI’s development may then be followed in the upcoming schemes vis-a-vis particular existing schemes, as well as before the backdrop of all CBI programmes as the ‘system’ of CBI. The actual ‘globalization’ of citizenship may perhaps come in form of citizenship’s marketization and standardization. States, to remain competitive, are adjusting law and policy to market desire. The creation of global standards and harmonisations may serve global market demand for citizenship, but may clash with national goals for citizenship, resulting in a struggle for power and control over the development of the law and policy of citizenship.

<sup>144</sup> Sassen, above n 1, 224, 259.

<sup>145</sup> It is not particularly clear who may be overpowering whom — the state or the ultra-high net worth individual. Global markets and states have finally met within the concept of citizenship, allowing global markets the power of standardizations, norm and policy making and other homogenizing effects. See also Sassen, above n 1, 226, 247–8.

<sup>146</sup> Cf Sassen, above n 1, 224, 262.

<sup>147</sup> See Sassen above n 1, on the example of Antitrust policy.

or successful for migration control.<sup>148</sup> A more holistic outlook on CBI beyond a focus on price alone is therefore necessary. The CBI industry understands that nothing short of a ‘global outlook to market citizenship’ is required, which is to include those at the ‘lower’ end of market citizenship’s spectrum.<sup>149</sup> Ideas include voluntary donations, taxing multiple citizenships, conceptualizing a global tax for the rich, a global CBI fund from contributions of municipal CBI fees, and public policy reform to include philanthropic local and global goals in addition to national financial goals.<sup>150</sup>

### A *International and Supranational Migration Governance*

Frameworks for global, regional or international migration governance do not exist at this time.<sup>151</sup> The International Organization for Migration (‘IOM’) is currently limited in its role to that of a service provider advising governments and migrants.<sup>152</sup> There are but a few binding treaties and offices that exist for specific issues, including the nearly universally ratified 1951 United Nations (‘UN’) *Convention on the Status of Refugees* and the United Nations High Commissioner for Refugees (‘UNHCR’) or the International Labour Organization (‘ILO’). These are joined by soft law

<sup>148</sup> ‘Price mechanisms have proven a poor tool for regulating supply and demand on a terrain defined by shifting geopolitics and legal protocols’: Surak, above n 48, 5.

<sup>149</sup> The Investment Migration Council’s (IMC) mission is to set ‘global standards for citizenship’: *Code of Ethics and Professional Conduct* (June 11 2015) <<https://investmentmigration.org/code-of-ethics-and-professional-conduct/>>.

<sup>150</sup> Such fund may be somewhat akin to a fund for forced migrants, as proposed by T Alexander Aleinikoff and Sarah Cliffe, *A Global Action Platform and Fund for Forced Migrants: A Proposal* (25 July 2016) Netzwerk Flüchtlingsforschung <<https://fluechtlingsforschung.net/a-global-action-platform-and-fund-for-forced-migrants-a-proposal/>>. See also Alan Gamlen, Christopher Kutarna and Ashby Monk, ‘Re-thinking Immigrant Investment Funds’ (Working Paper No IMC-RP 2-16/1, Investment Migration Council, September 12 2016) <<https://investmentmigration.org/download/re-thinking-immigrant-investment-funds/>>; Jagdish N Bhagwati, ‘Taxing the Brain Drain’ (1976) 19(3) *Challenge* 34; Ana Tanasoca, ‘Double Taxation, Multiple Citizenship, and Global Inequality’ (2014) 1(1) *Moral Philosophy and Politics* 147; James Tobin, *The New Economics, One Decade Older* (Princeton University Press, 1974); James Tobin, ‘On Limiting the Domain of Inequality’ (1970) 13(2) *The Journal of Law and Economics* 263; Thomas Pogge, ‘Eradicating Systemic Poverty: Brief for a Global Resources Dividend’ (2001) 2(1) *Journal of Human Development* 59; Joseph Heath, ‘Rawls on Global Distributive Justice: a Defence’ in Daniel Weinstock (ed) *Global Justice, Global Institutions* (University of Calgary Press, 2005).

<sup>151</sup> Sabine Corneloup, ‘Can Private International Law Contribute to Global Migration Governance?’ in Horatia Muir Watt and Diego P Fernandez Arroyo (eds), *Private International Law and Global Governance* (Oxford, 2014) 304–7. See also Christian Joppke and Virginie Guiraudon (eds), *Controlling a New Migration World* (Routledge, 2001). Joel P Trachtman concludes that there is a ‘lack of multilateral international rules regulating migration for economic purposes’, and that ‘a multilateral agreement on economic migration may be feasible and useful’: *The International Law of Economic Migration: Toward the Fourth Freedom* (Kalamazoo, 2009) 4, 344.

<sup>152</sup> Despite its name, the IOM is not part of the UN system and lacks a formal mandate. The IOM could be such an organization. However, given that it is not part of the UN system and lacks a formal mandate, its role has so far been limited to that of a service provider to its members on a project basis: Rahel Kunz, Sandra Lavenex and Marion Panizzon, ‘Introduction: Governance through partnerships in international migration’, in Rahel Kunz, Sandra Lavenex and Marion Panizzon (eds), *Multilayered Migration Governance — The promise of partnership* (Routledge, 2011) 1, 5–6, 8–9.

approaches in the form of guiding principles and recommendations such as the UN General Assembly's High Level Dialogue on Migration and Development, or the intergovernmental Berne Initiative,<sup>153</sup> and with the International Agenda for Migration Management ('IAMM') or the United Nations led Global Commission on International Migration ('GCIM').<sup>154</sup> There are also calls for a World Migration Organization, which seem to favour bottom-up rather than top-down approaches to migration management, and include partnerships on bilateral and trans-regional levels.<sup>155</sup>

### ***B Regional and Global Legal Practice Standards, Ethics, and Oversight Mechanisms***

CBI states are careful to protect their programs' reputation. Applicants are screened for criminal backgrounds and their history of wealth acquisition, as otherwise third states may be less willing to accept CBI passports.<sup>156</sup>

CBI may benefit from Regional Consultative Processes ('RCP') — that is to say, non-binding, informal and confidential discussion forums dealing with the objective of network-building to promote trust and support between participating states.<sup>157</sup> RCPs have contributed to global convergence in perceptions and expectations, which have in turn led to some harmonisation of policies and practice.<sup>158</sup>

The global Investment Migration Council ('IMC') is currently operating to promote transparency, due diligence, training and academic research in the field. For this task, global practice standards, complaints procedures and ethics rules have emerged through the *IMC Code of Ethics and Professional Conduct*.<sup>159</sup> This entity could further develop as a global forum, as well as an oversight and monitoring body. Such a role may be emerging, for instance, in regard to the IMC Transparency International

<sup>153</sup> *Guiding Principles on Internal Displacement* presented to the UN Commission on Human Rights in 1998 (UN Doc E/CN.4/1998/53/Add.2/); also transregional level Free Trade Agreements and mobility partnerships; Kunz, Lavenex and Panizzon (eds), above n 152, 8–9.

<sup>154</sup> See Global Commission on International Migration, launched December 9, 2003 <<http://www.gcim.org>>. Other initiatives include the Berne Initiative (leading in 2001 to the adoption of the International Agenda for Migration Management, IAMM) <<https://www.iom.int/berne-initiative>>; the inter-agency-based Global Migration Group (GMG) <<http://www.globalmigrationgroup.org>>, and the state-led yearly meetings of the Global Forum on Migration and Development (GFMD) <<https://gfmd.org/>>.

<sup>155</sup> See further references in Corneloup, above n 151, 303–4. For T Alexander Aleinikoff, this is '[s]ubstance without architecture', a considerable codification of relevant rights, but no corresponding institutional structure: 'International Legal Norms on Migration: Substance without Architecture' in Ryszard Cholweinski, Richard Perruchoud and Euan MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (Asser, 2007) 467.

<sup>156</sup> Sumption, above n 58, 15.

<sup>157</sup> Corneloup, above n 151, 304–5; Randall Hansen and Jobst Koehler, *The Future of Migration Governance and Regional Consultative Processes* (International Organization for Migration, 2010) 9.

<sup>158</sup> Colleen Thouez and Frederique Channac, 'Shaping International Migration Policy: The Role of Regional Consultative Processes' (2006) 29 *West European Politics* 370 (Thouez and Channac, 2006) 386.

<sup>159</sup> Investment Migration Council, above n 149.

Report on the Hungarian RBI programme. The report's findings include strong indications that the programme does not contribute to the Hungarian economy but has instead been used for the private enrichment of politically influential individuals.<sup>160</sup>

### ***C The Greater Good: Public Interest Criteria and New Zealand's Discretionary Programme***

Most CBI programs ensure that the investment made contributes to local welfare, advancement and economic development.<sup>161</sup> Public Interest Criteria ('PIC') within naturalization laws refer to various aims of public policy. The public interest may range from the creation of revenue, and may also include global humanitarian causes, to which CBI proceeds can be assigned.

It is within the power and control of states to not only legislate CBI programmes, but also, through PIC, to decide and adjust the extent of local and global humanitarian references within such legislation. Adding these references in turn appears to give the CBI states some capacity to create greater public acceptance of CBI schemes, by stressing the benefits of these programs in terms of, for example, improved national healthcare for the poor or global refugee assistance. Philanthropy in PIC references could be stand-alone goals or they could be added to CBI revenue creation. PIC thus enable states to respond to demands of an interconnecting, globalizing citizenship.

Whereas in Austria's program successful applicants must provide extraordinary scientific, artistic, cultural or economic benefits to the Republic of Austria,<sup>162</sup> New Zealand's discretionary naturalization program allows the grant of more or less immediate citizenship to any person where it is '[i]n the public interest because of exceptional circumstances of a humanitarian or other nature relating to the applicant.'<sup>163</sup> Residence requirements, as well as any intention to continue to reside after grant, may then be completely waived as the Minister thinks fit.<sup>164</sup> For example, Peter Thiel resided in New Zealand for 12 non-

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<sup>160</sup> Boldizsar Nagy, *In Whose Interest? Shadows over the Hungarian Residency Bond Program* (Investment Migration Council, November 2016) 8–11 <<https://investmentmigration.org/download/whose-interest-shadows-hungarian-residency-bond-program/>>.

<sup>161</sup> See Henley and Partners, above n 22.

<sup>162</sup> See *Austrian Citizenship Act 1985* (Austria) s 10(6) (*Staatsbuergerschaftsgesetz*).

<sup>163</sup> The legislation in question is the *Citizenship Act 1977* (NZ) s 9(1)(c).

<sup>164</sup> *Citizenship Act 1977* (NZ) s 9(2). This discretion is limited where there are disqualifying convictions: ss 9A, 9B. Ordinarily, a permanent resident's actual, physical presence is required for at least 1350 days in the five years immediately preceding an application (s 8(2)(b)(i)). Alternatively, see s 8(2)(b)(ii), requiring at least 240 days in each of those five years. In exceptional circumstances, a residency period of 450 days may suffice (s 8(7)), or 450 days during the 20 months period immediately preceding the date of the application. Also, there must be the intention to reside in New Zealand after grant of citizenship (s 8(2)(f)). In addition, there are other requirements such as good character, as well as sufficient knowledge of the English language and knowledge of the responsibilities and privileges attaching to New Zealand citizenship (ss 8(2)(c),(d) and (e)). Since 2012, there have been 632 such applications,

consecutive days in four separate trips and is said to have had no interest in continuing to reside in New Zealand due to his commitments elsewhere.<sup>165</sup> Thiel's NZ \$1 Million donation to a philanthropic cause, the Christchurch earthquake relief fund, appears to have been a decisive element in the decision-making process within the overall equation of factors considered by government decisionmakers.<sup>166</sup> Other elements seem to relate to Thiel's actual and potential investments in New Zealand, as well as his entrepreneurial capacity to link New Zealand start-ups with Silicon Valley.<sup>167</sup> To justify exceptional direct naturalization, the public interest may thus include a spectrum of interests between the local and the global, and between economic considerations and philanthropy.

### D Malta's CBI Program and References to 'Humanity'

For Malta's CBI Individual Investor Programme, an economic contribution is made to the country's National Development and Social Fund.<sup>168</sup> As to the factor of residence, things have been more complicated in Malta than they are in other CBI states. While the European Union Commission initially indicated that CBI, generally, should fall under state sovereignty,<sup>169</sup> the EU Parliament later disapproved of the practice.<sup>170</sup> Sale

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with 92 Ministerial approvals: *Department of Internal Affairs*, 'Citizenship of Mr Peter Thiel' <<https://www.dia.govt.nz/Citizenship-of-Mr-Peter-Thiel>>; Department of Internal Affairs, Citizenship Grants <<https://www.dia.govt.nz/Citizenship-Grants>>.

<sup>165</sup> In accordance with s 11(2) of the *Citizenship Act 1977* (NZ), Thiel took the Oath of allegiance in a private ceremony in the United States, at the New Zealand Consulate in Santa Monica, California; *Department of Internal Affairs*, 'Citizenship of Mr Peter Thiel' <<https://www.dia.govt.nz/Citizenship-of-Mr-Peter-Thiel>>; David Streitfeld and Jacqueline Williams, 'New Zealand is 'the future'', Peter Thiel said in his push for citizenship', *The New York Times* (online), 01 February 2017 <<https://nyti.ms/2jVFadi>>.

<sup>166</sup> *The Department of Internal Affairs*, 'Citizenship of Mr Peter Thiel', <<https://www.dia.govt.nz/Citizenship-of-Mr-Peter-Thiel>>; Ryan Mac, 'The Many Contradictions of Peter Thiel's New Zealand Citizenship' *Forbes Magazine* (online), 01 February 2017 <<https://www.forbes.com/sites/ryanmac/2017/02/01/the-many-contradictions-of-peter-thiels-new-zealand-citizenship/#531a12921317>>.

<sup>167</sup> Also, Thiel's expected future actions were taken into account, including 'promoting' New Zealand and its citizenship and acting as an 'ambassador and salesperson' on a world stage. Additional factors were the purchase of local real estate and past business investments. See Eleanor Ainge Roy, 'New Zealand gave Peter Thiel citizenship after he spent just 12 days there', *The Guardian*, Dunedin, 29 June 2017, <[https://www.theguardian.com/world/2017/jun/29/new-zealand-gave-peter-thiel-citizenship-after-spending-just-12-days-there?CMP=edit\\_2221](https://www.theguardian.com/world/2017/jun/29/new-zealand-gave-peter-thiel-citizenship-after-spending-just-12-days-there?CMP=edit_2221)>; *Department of Internal Affairs*, 'Citizenship of Mr Peter Thiel', <<https://www.dia.govt.nz/Citizenship-of-Mr-Peter-Thiel>>.

<sup>168</sup> The 'Individual Investor Programme' ('IIP') is Malta's Citizenship by Investment (CBI) Programme. See also Malta Individual Investor Programme <<http://iip.gov.mt/>>. The applicable law is the *Maltese Citizenship Amendment Act 2013* (Malta), which amends art 10(9) of the *Maltese Citizenship Act 1964* (Malta). See also *Immigration Act (Cap 217) 1970* (Malta) as well as the *Residence and Visa Program Regulations 2015* (Malta). The Malta Citizenship program was introduced by amendments to the *Maltese Citizenship Act 1964* (Malta) in November-December 2013. See generally Eugene Buttigieg and Daniela DeBono, *Country Report on Citizenship Law: Malta* (European University Institute, January 2015).

<sup>169</sup> Andrew Rettmann, 'Malta free to sell EU citizenship, commission says' *EU-Observer* (online), 14 November 2013 <<https://euobserver.com/justice/122101>>.

<sup>170</sup> Isabel Teixeira Nadkarni, 'EU Citizenship should not be for sale at any price, says European Parliament', *European Union Parliament* (Plenary Sessions, 16 January 2014)

of EU citizenship, as attached to the sale of national citizenship, was seen as incompatible with the EU obligations of member states to all other member states.<sup>171</sup> On the example of Malta, the then EU Commission Vice President, Viviane Reding, stated that CBI programmes pose ‘[a]n entry door to the EU’ and that ‘[o]ne cannot put a price tag on [citizenship].’ In Reding’s view, Member states should only award citizenship to persons where there is a ‘[g]enuine link or genuine connection to the country in question’.<sup>172</sup> This led Malta to introduce a one-year period of residence, replacing the zero-residence requirement in its CBI scheme.

Interestingly, in Malta’s non-CBI but spousal naturalizations, contained in the same paragraph as the CBI scheme, immediate and direct naturalization without residence of the otherwise requisite period of five years is possible where there are ‘exceptional services’ rendered to Malta or to ‘humanity’.<sup>173</sup> In Malta’s CBI scheme, this link is currently missing. Here, CBI law applies to any person who may acquire citizenship by investment, albeit (now) with a minimum of one year of residence. It may then be asked whether a reference to humanity could be introduced also to the CBI part of this paragraph, and whether such exercise would be of benefit for developing a sustainable CBI. Arguably, since reference to services to Malta or to humanity are made for the naturalization of spouses of Maltese citizens, a similar reference could apply to CBI migrants, especially as these are complete strangers. Such systematic consistency would arguably assist to counter allegations of CBI as a “citizenship of convenience”.<sup>174</sup>

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<[http://www.europarl.europa.eu/pdfs/news/expert/infopress/20140110IPR32392/20140110IPR32392\\_en.pdf](http://www.europarl.europa.eu/pdfs/news/expert/infopress/20140110IPR32392/20140110IPR32392_en.pdf)>. (‘EU Parliament Debate 2014’). See also Shachar, above n 64, 37.

<sup>171</sup> Owen, above n 29.

<sup>172</sup> Viviane Reding, ‘EU Citizenship for Sale’ (Speech delivered at the Plenary Session debate of the European Parliament, Strasbourg, 15 January 2014) <[http://www.europa.eu/rapid/press-release\\_SPEECH-14-18\\_sv.htm](http://www.europa.eu/rapid/press-release_SPEECH-14-18_sv.htm)>.

<sup>173</sup> In other words, the usual rule of 5 years of residence is overcome by that spouse’s exceptional service to the nation or to humanity. The *Maltese Citizenship Act 1964* (Malta) para 10(9) reads as follows: ‘Notwithstanding the provisions of this or any other Act [...] the Prime Minister may [...] grant a certificate of naturalisation as a citizen of Malta: (a) to the spouse of any citizen of Malta when either the spouse or the said citizen has rendered exceptional services to the Republic of Malta or to humanity; or (b) to any person who is an applicant, or is a spouse or an eligible dependant of such applicant, under the individual investor programme of the Republic of Malta, and satisfies the requirements as prescribed under this act...’ Since 6 July 2007, there is an exception to the rule that a spouse of a citizen of Malta may acquire citizenship only five years after the marriage. Article 10 of the *Maltese Citizenship Act 1965* (Malta), ch 188 of the *Laws of Malta*, provides that the Prime Minister may authorise the Minister to grant a certificate of naturalization to the spouse of any citizen of Malta without any residence requirements. This is provided, however, that either the spouse or said citizen has rendered ‘exceptional services’ to Malta or humanity. See also Eugene Buttigieg, ‘Malta’s citizenship law: Evolution and current regime’ in: Rainer Bauböck, Bernhard Perching and Wiebke Sievers (eds), *Citizenship Policies in the New Europe* (Amsterdam University Press, 2009) 383.

<sup>174</sup> The concept of the greater good or humanity has justified Malta’s immediate spousal naturalization scheme since 1964. Could such reference to humanity be introduced to CBI legislation generally? This could have multiple benefits, as it would likely include the establishing or deepening of a genuine link between the CBI state and the CBI citizen, thereby, potentially, overcoming the missing or fast-tracked residence issue. Such a link to humanity

### **E Proportionality for CBI Programmes?**

In the EU context, proportionality is a principle that guides government decisions, such as regarding the loss of citizenship. Could proportionality also apply generally to the acquisition of CBI?<sup>175</sup> For instance, ongoing commitments between CBI states and migrants could be established. CBI migrants could be encouraged to more actively participate, to visit or reside in their country of choice, such as by being allowed to exercise more control and give input over the allocation and use of their own investments within the CBI state.<sup>176</sup> In the European Court of Justice's 2010 decision of *Janko Rottmann v Freistaat Bayern*,<sup>177</sup> the Court acknowledged that decisions as to the loss of citizenship, where these entail the loss of EU citizenship and thus deprive the person concerned of their rights and duties under that status, should be subject to a test of proportionality, especially in view of the duty of loyal or sincere cooperation between member states as contained in art 4(3) of the *Treaty on the European Union* ('TEU').<sup>178</sup> While such a duty does not exist between all CBI states, there could be a regional approach to CBI that includes mutual cooperation, good practice standards, shared due diligence to enhance CBI's sustainability and acceptance by other states and migrants.

### **F CBI's Antagonists and Mirrors**

On one view, CBI not only undermines political participation, it also contradicts the recent national efforts to re-substantiate citizenship, such as through additional tests and integration requirements.<sup>179</sup> The advent of CBI and global mobility are restricted by national instruments of political power and control, such as citizenship revocation provisions,<sup>180</sup> as well as artificial limitations on participation, placed especially on plural citizens.<sup>181</sup> These re-nationalizations of the concept of citizenship by the

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could come in many forms, and address criticism and assist in the public acceptance of CBI schemes and CBI migrants.

<sup>175</sup> Shachar, above n 64, 37.

<sup>176</sup> Kunz et al. above n 152, 5–6. This could also include a commitment for CBI states to facilitate a CBI migrant's family migration at any later point in time.

<sup>177</sup> (C-135/08) [2010] ECR-I-01449.

<sup>178</sup> *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993), as amended by *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999). See also Shaw, above n 46, 33.

<sup>179</sup> Barbulescu, above n 55, 15; Yasemin Soysal, 'Citizenship, Immigration and the European Social Project: Rights and Obligations of the Individuality' (2012) 36 *British Journal of Sociology*, 1–21.

<sup>180</sup> See for instance Rainer Bauboeck and Vesco Paskalev, 'Citizenship Deprivation, a Normative Analysis' (2015) 82 *CEPS Paper on Liberty and Security in Europe*; Sahar Akhtar, 'Stripping Citizenship: Does Membership Have its (Moral) Privileges?' (2017) 95(3) *Australasian Journal of Philosophy* 419–34; Peter J Spiro, 'Dual Citizenship as Human Right' (2010) 8(1) *I-CON* 111–30.

<sup>181</sup> As plural citizenship is an essential element of CBI, many of these limitations directly or indirectly impact on CBI. For example, limiting political participation for plural citizens can be seen in Australia's divide between open and closed conceptions of citizenship in its 'dual

state are in addition to citizenship's marketization and globalization-developments that today occur simultaneously.

Mirages and mirror images of CBI include a 'push from below' in what Kamal Sadiq terms 'documentary' or 'formal' citizenship, existing for some 'global others', such as those without means or proper papers.<sup>182</sup> Some illegitimate migrants readily adopt the behaviours of citizens, over an often substantial period of 'performative' time and physical presence, gradually acquiring resident status and, with it, tokens of legitimacy in form of a paper trail that, in many cases, eventually leads to citizenship.<sup>183</sup> Where CBI could be seen as lawful non-presence (the attaining of passports without residence requirements), its mirror image, the paper citizen and actual denizen, here displays an initially illegitimate presence, which may (and if so, only gradually, in a process akin to naturalization, requiring time) become lawful presence.<sup>184</sup>

In another example, the United Arab Emirates ('UAE') assigned foreign citizenship to control their local stateless population, the 'Bidoon'.<sup>185</sup> In doing so, the UAE bulk-purchased citizenship from the Comores Islands, a small nation in the African East Coast. This was done in part as a response to the UN initiative to end statelessness.<sup>186</sup> As a case of reverse CBI, the Bidoon, who have never set foot on the Comores, challenge citizenship's national narrative, having become a transactional instrument for the nation state in an attempt to counter globalization in the form of statelessness.<sup>187</sup>

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citizenship crisis'. See, eg, Michael B Krakat, 'Between the Local and the Global: Plural Citizenship in Australia' (2018) 3(1) *Investment Migration Council Bulletin* <<https://investmentmigration.org/articles/local-global-plural-citizenship-australia/>>. See also Paskalev, above n 55.

<sup>182</sup> Kamal Sadiq, *Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries* (Oxford University Press, 2011) 169.

<sup>183</sup> Bangladeshi's posing as Indians, '[w]earing the same clothes and cooking the same dishes': Sadiq, above n 182.

<sup>184</sup> Both are examples of 'paper citizens', with some of the recognized elements missing, whether time or formality. Do unauthorized migrants residing for a long time in a territory have 'better' rights to citizenship than 'thin' CBI citizens, not residing at all?

<sup>185</sup> The Bidoon also include expatriates that failed to secure residence entitlements and were stripped off acceptance, declared foreigners and guest workers, forever excluded from UAE citizenship or even residence entitlements and thus, from government benefits or status, and denied UAE nationality. The term 'Bidoon' may also apply to some of the stateless social classes in other Gulf States (such as Kuwait), as well as Iraq.

<sup>186</sup> Alastair Sloan, 'Comores: Citizenship for sale' (2015) March *New African* 42. See also Atossa Abraxia Abrahamian, *The Cosmopolites* (Columbia Global Reports, 2015) 55–9.

<sup>187</sup> Victor Almena argues that the increasing presence of stateless people puts pressure on the narrative of sovereignty, the power of national States' control, as well as on the reality of Human Rights application and their enforcement, as compared to a right to exercise free movement in a global age: Victor Granado Almena, 'Derecho de fuga? Derecho de migración y nacionalidad cosmopolita' [2012] 188(755) *ARBOR Ciencia Pensamiento y Cultura* 489.

### ***G Revisiting the Social Contract: ‘Neo-Nottebohmian’ Genuine Links, and Proto-International and Supranational Citizenship***

When states sell citizenship they part with the underlying conventions of citizenship. CBI assists to overcome the randomness of birthplace and, to some extent, releases citizenship from the conceptual weight of the nation state. The practice of the current form of CBI, when seen as global market citizenship, questions the foundations and narratives of national citizenship, including the function of the state in fundamental rights protection and enforcement, as well as citizenship’s claim to act as a (national) ‘right to have rights’.<sup>188</sup> Market CBI’s possible challenges to state sovereignty, when impacting norm-making in this way, also includes a challenge to the state’s decision whether to sell citizenship.<sup>189</sup> While citizenship as a concept continues to exist as long as forms of membership make reference to the nation state, universal human rights could already function to limit the potentially erosive, self-eroding state practice of CBI. In view of the universal guarantee of human dignity, the nation State’s discretion, power and control in the area of the sale of citizenship cannot be unfettered or unlimited.<sup>190</sup> A state centric view through which one, as citizen only, can access rights that apply to humans, is then increasingly being challenged.<sup>191</sup>

Boundaries to the discretion of national governments are created, for instance, by the international legal prohibition of abuse of rights in art 15(2) *UDHR*, which limits the ability of states to arbitrarily revoke citizenship or deny the right to change citizenship.<sup>192</sup> CBI as market citizenship is thus limited by the requirements and restrictions that apply to the concept of citizenship more generally. This in turn derives from the notion that it is not possible to attach market value to absolute or universal concepts such as human dignity.<sup>193</sup>

Without CBI’s current references to global citizenship, it is not clear whether substantial payments in CBI alone could suffice in the search for more flexible reconceptualisations of citizenship, and become viewed as

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<sup>188</sup> Hannah Arendt, *The Origins of Totalitarianism*. (Schocken Books, revised edition, 2004), 376. See also *Perez v. Brownell* 356 US 44, 64 (1957) (Chief Justice Earl Warren); *Afroyim v. Rusk* 387 US 253 (1967).

<sup>189</sup> Margaret R Somers, *Genealogies of Citizenship: Markets, Statelessness and the Right to Have Rights* (Cambridge University Press 2008); Margaret R Somers, ‘Citizenship, Statelessness and Market Fundamentalism’ in Y Michal Bodemann and Gokce Yurdakul (eds), *Migration, Citizenship, Ethnos* (Palgrave Macmillan, 2006) 35; Margaret R Somers, ‘Romancing the Market, Reviling the State: Historizing Liberalism, Privatization, and the Competing Claims to Civil Society’ in Colin Crouch, Klaus Eder, Damian Tambini (eds), *Citizenship, Markets, and the State* (Oxford University Press, 2001) 23.

<sup>190</sup> Kalin, above n 16, 244–5, referring to Christopher McCrudden, *Understanding Human Dignity* (Oxford University Press, 2014) 381.

<sup>191</sup> For Seyla Benhabib, individual rights exist not due to state power, or even ‘human nature’ as a fixed natural right, but as a right derived from humanity due to ‘being and acting human’, from the human ability to ‘question oneself’: Seyla Benhabib, ‘Menschenrechte ohne Nationalstaaten’ (2016) 06 *Philosophie Magazin Sonderausgabe*, 60.

<sup>192</sup> Kalin, above n 16, 171, 257–8.

<sup>193</sup> *Ibid* 243.

establishing a genuine link to the nation, or even as a ‘genuine link to humanity’.<sup>194</sup> In other words, a ‘neo-Nottebohmian’ genuine link through CBI, without residence, would be difficult to establish (even in times of globalization) when the ties established between the CBI citizen and state are defined by one-off payments alone. Where this is so, it may be necessary to allocate legal references as complementing concepts or substitutes for CBI monetary migration, such as by placing focus on references to the greater good, to humanity, global citizenship and to philanthropy, which some CBI programmes actually make. These references concerning national, regional or global humanitarian goals beyond markets could then act as substitutes for missing requirements of residence and political participation by CBI citizens in any given polity, and cater for CBI’s global commitments and aspirations, creating a genuine link for our times.

Yasemin Soysal suggests replacing citizenship altogether with universal human rights, the protection of which is now the key to securing individual autonomy.<sup>195</sup> In that context, CBI schemes’ references to global citizenship, while appearing to transcend national boundaries, are, in fact, at this time, still tied to the selling states, markets and individual rights protections.<sup>196</sup>

As seen above, fair, equal and orderly transnational migration may require supranational migration governance, and may as such require a global reframing and reconceptualisation of citizenship that includes CBI phenomena. This may be necessary to avoid fragmentations of citizenship, and to integrate CBI as a novel form of citizenship into umbrella concepts such as the ‘global social contract’ (‘GSC’).<sup>197</sup> The GSC, viewed through the lens of CBI, may refer to the idea of linking the social contract (and also citizenship) to notions including global membership or global justice. States could, for instance, decide to release their otherwise price-bound citizenship or residence entitlements for free to those who are deserving, such as to those serving the nation or humanity.<sup>198</sup>

While CBI schemes appear to contradict the national social contract, they may be merely implementing an existing commercial reality within an already highly mobile and globalised world.<sup>199</sup> Citizenship’s historical

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<sup>194</sup> This could include references to the existing citizenry of the CBI states, to other states within a union of states where there are mutual commitments between member states such as in the EU, the public good as well as to universal ‘humanity’.

<sup>195</sup> Yasemin Soysal, *Limits of Citizenship* (University of Chicago Press, 1994); Faulks, above n 38, 133.

<sup>196</sup> John Gaventa and Rajesh Tandon (eds), *Globalizing Citizens — New Dynamics of Inclusion and Exclusion* (Zed Books, 2010); Peter Kivisto and Thomas Faist, *Citizenship, Discourse, Theory and Transnational Prospects* (Blackwell Publishing, 2007) 128, 138; Faulks, above n 38, 129–34.

<sup>197</sup> Solimano, above n 13, 190.

<sup>198</sup> Paskalev, above n 55, 25–6. This in turn could lead to credits in a system of admissions, akin to the mechanisms of carbon offset schemes.

<sup>199</sup> ‘If [citizenship] still represented special ties as a sociological matter, then investor citizenship schemes would not exist [but would be] breaking the social contract’: Peter Spiro, ‘Cash for Passport and the End of Citizenship’ in Ayelet Shachar and Rainer Bauböck (eds), *Should*

social contract involved an exchange of rights and two core duties, allegiance and military duty, as evidence of loyalty.<sup>200</sup> Today, the citizen is primarily seen as a rights bearer, capable of claiming rights, with very few remaining core duties, including paying taxes and obeying laws.<sup>201</sup> There does not seem to exist any contemporary requirement to reside.<sup>202</sup>

CBI is currently challenged for leaving questions of integration and communal spirit unanswered.<sup>203</sup> This may be the price that CBI is to pay for utilizing the terminology of citizenship, leaving a gap that is currently filled by CBI's narrative of global citizenship to create coherence within its use of that terminology.<sup>204</sup>

Absent periods of personal, physical presence, and given its emphasis on mobile travellers holding plural citizenship, CBI may then be seen as de-territorial, 'global citizenship.'<sup>205</sup> CBI states do appear to create economic schemes in response to migrant claims to a right of mobility, which, in turn, perhaps finds expression in the right to leave any country in art 13(2) of the *UDHR*.<sup>206</sup> This right knows no corresponding 'right to enter', yet the possibility to outright purchase citizenship without residence requirements could assist in the formulation of such a free movement right.

A 'global citizenship' is not understood as an institutional legal status, as there is no organisation with global legal authority. Instead, global citizenship may here refer to the individual status of a person as a citizen of multiple countries, or worldwide, with time spent in a single nation state mattering no more than time spent in any other nation state, releasing the concept of citizenship from its connections to territory and territorial time. For Peter Furia, the question for global citizenship emerges in view of rights distribution in an unequal world.<sup>207</sup> The concept of citizenship, like that of a person, can then apply independently of any institutional arrangement under which it could be recognised.<sup>208</sup> However thin CBI may be, it is still bound by Human Rights standards. Understood in this way, a

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*Citizenship be for Sale?* (European University Institute RSCAS Working Paper 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2014) 9.

<sup>200</sup> Otfried Hoffe, *Democracy in an Age of Globalisation* (Springer, 2007). See also Joppke, above n 20, 9.

<sup>201</sup> In some countries, this also includes the duty to vote or participate in jury trial processes.

<sup>202</sup> Outside taxation, EU citizenship does not list a single duty: Christian Joppke, above n 20, 9; Dimitry Kochenov, 'EU Citizenship without Duties' (2014) 20(4) *European Law Journal* 482; Richard Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights' (2015) 21(4) *European Law Journal* 558.

<sup>203</sup> See, eg, Veit Bader, 'Institutions, Culture and Identity of Transnational Citizenship: How much integration and 'Communal Spirit is Needed' in Colin Crouch, Klaus Eder and Damian Tambini (eds), *Citizenship, Market and the State* (Oxford University Press, 2001) 197.

<sup>204</sup> CBI may contribute to the detachment of citizenship from a single nation state, perhaps creating blueprints for a global mercantile citizenship, or for multinational, globalized identities beyond the allegiance to one single nation alone.

<sup>205</sup> Surak, above n 48, 35; Gold and El-Ashram, above n 85, 26.

<sup>206</sup> *UDHR* art 13 (2); *ICCPR* art 12(2).

<sup>207</sup> Peter A Furia, 'Global Citizenship, Anyone? Cosmopolitanism, Privilege and Public Opinion' (2005) 19(4) *Global Society* 339–359.

<sup>208</sup> Steven P Lee, 'Cosmopolitan Citizenship' in Ann E Cudd and Win-chiat Lee (eds), *Citizenship and Immigration — Borders, Migration and Political Membership in a Global Age* (Springer, 2011) 45–6.

global citizenship driven by global citizen travellers under a necessarily incomplete global social contract goes beyond CBI mobility, and includes fundamental rights protections and obligations with reference to humanity and personhood.<sup>209</sup> A rights and obligations dimension could then be applied to both states and citizens, and owed to the international community as a whole,<sup>210</sup> addressing individual persons as the ultimate subjects in international law.<sup>211</sup>

It is yet not clear how many CBI migrants see themselves as world citizens, or whether they have confidence in the role of the United Nations. Research that actually links CBI's claim to global citizenship and CBI migrants is currently missing.<sup>212</sup> However, for the many individuals who do identify themselves as global citizens under an imagined global social contract that is evidenced by very real, fundamental and universal Human Rights protections, the political community of a global citizenship is more than mere imagination.<sup>213</sup>

## VI Discussion

Applying market logic, a completely transactional and functional ('thin') citizenship may come in form of temporary citizenship as a type of enhanced residence entitlement. For instance, Antigua now issues its CBI-migrants with an initial passport valid for five years — a 'temporary passport' — which is the amount of time often required to apply for and gain citizenship elsewhere.<sup>214</sup>

States may have legal authority to engage in the act of selling citizenship.<sup>215</sup> It is not clear, however, whether states are morally and

<sup>209</sup> Jeremy Waldron, 'What is Cosmopolitan?' (2000) 8(2) *Journal of Political Philosophy* 227–43; Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Penguin, 2006) xvi, 7–8, 57–8, 96, 111–2, 118–20, 131–2, 137–8, 153, 155–8; April Carter, 'Historical Origins of Global Citizenship' in Irene Langran and Tammy Birk (eds) *Globalization and Global Citizenship* (Routledge, 2016) 13–4; David Armstrong, 'International Law, Citizenship, and Changing Conceptions of Justice' in Irene Langran and Tammy Birk (eds), *Globalization and Global Citizenship* (Routledge, 2016) 103–4.

<sup>210</sup> Pierre-Marie Dupuy, 'The Deficiencies of the Law of State Responsibility Relating to Breaches of "Obligations Owed to the International Community as a Whole": Suggestions for Avoiding the Obsolence of Aggravated Responsibility' in Antonio Cassese (ed), *Realizing Utopia — The Future of International Law* (Oxford, 2012).

<sup>211</sup> UDHR art 6; ICCPR art 16. In the *Banjul African Charter on Human and Peoples Rights 1986*, art 5 s1, this right is linked with the right to dignity and personhood. See also Abdulqawi A Yusuf, 'The Role that Equal Rights and Self-determination of Peoples Can Play in the Current World Community' in Antonio Cassese (ed) *Realizing Utopia — The Future of International Law* (Oxford, 2012) 375–91.

<sup>212</sup> World Values Survey 1981–2014 <<http://www.worldvaluessurvey.org>>; Peter A Furia, 'Where are the Global Citizens?' in Irene Langran and Tammy Birk (eds) *Globalization and Global Citizenship* (Routledge, 2016) 182–3.

<sup>213</sup> Irene Langran, 'Global Citizenship in a Post-Westphalian Age' in Irene Langran and Tammy Birk (eds), *Globalization and Global Citizenship* (Routledge, 2016) 35.

<sup>214</sup> If Antiguan citizenship is to be maintained after the five-year period, the economic citizen is merely required to stay in the country for a nominal period of five days and swear the oath of allegiance. See references in Surak, above n 48, 13.

<sup>215</sup> Emerich de Vattel, *The Law of Nations or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, (London, 1834), xiv and 41.

legally permitted to undermine state sovereignty by allowing global market logic to limit that states' own ability to govern citizenship. As guardians of citizenship, and under the Human Rights umbrella, states are required to ameliorate the economic and social inequalities resulting from unregulated operations of citizenship markets.<sup>216</sup> No sensible conception of global citizenship, including global market citizenship (even where infused with Human Rights logic), is possible without the concept of state sovereignty as intermediary.

Derek Heater warns that globalisation 'undermines the autonomy of the person, which lies at the heart of the citizenry concept.'<sup>217</sup> Fast-tracked CBI schemes thus expose the countries that run them, and also, directly, individual migrants, to macro-economic volatilities and to the erosion of the rules of membership caused when citizenship law and policy are linked to global markets.<sup>218</sup> Irene Langran argues that '[s]tates are constrained in the economic realm by the need to adopt certain pro-globalization, neo-liberal policies under pressure from international organizations, such as the International Monetary Fund ('IMF') and the World Bank.'<sup>219</sup> The IMF is cautioning CBI states to pay back public sovereign debts, and warns of an over-reliance on CBI revenue, since CBI inflows could stop at any time. The IMF suggests a regional approach to CBI programs, which may strengthen integrity whilst reducing costs.<sup>220</sup>

CBI governments may face the dilemma of a lack of choice when adopting economic citizenship policies.<sup>221</sup> This may be the case for CBI schemes, especially where utilised not from a position of power and control of the selling state, but from a position of economic logic or need, as an emergency measure implemented to create revenue to save a failing economy. For instance, in Cyprus, CBI was offered in 2013 to affluent foreign investors as a compensation deal for their Cypriot bank account deposit losses at times of financial crisis.<sup>222</sup> CBI may also work as an economic response to natural disasters.<sup>223</sup> The recent Hurricane season of 2017 (the storms 'Irma' and 'Maria') lead directly to emergency sales of

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<sup>216</sup> '[B]asic equality can[not] be created and preserved without invading the freedom of the competitive market'; T H Marshall, 'Citizenship and Social Class' in T H Marshall and Tom Bottomore (eds), *Citizenship and Social Class* (Pluto Press, 1992) 7.

<sup>217</sup> Derek Heater, *World Citizenship: Cosmopolitan Thinking and Its Opponents* (Continuum, 2002) 3.

<sup>218</sup> Gold and El-Ashram (2016), above n 85, 37.

<sup>219</sup> Langran, above n 213, 26.

<sup>220</sup> See, eg, International Monetary Fund, 'IMF Executive Board Concludes 2017 Article IV Consultation with St Kitts and Nevis' (International Monetary Fund Press Release, No 17/261, July 5 2017) <<http://www.imf.org/en/News/Articles/2017/07/05/pr17261-imf-executive-board-concludes-2017-article-iv-consultation-with-st-kitts-and-nevis>>.

<sup>221</sup> Thomas L Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Picador, 2012).

<sup>222</sup> Shachar, above n 81, 3.

<sup>223</sup> Costing half the country's annual GDP for reparations. See Paul Crask, 'Dominica asks for aid after tropical storm Erika devastates island', *The Guardian* (online) 4 September 2015 <<http://www.theguardian.com/world/2015/sep/04/dominica-asks-for-aid-tropical-storm-erika-damage>>.

citizenship.<sup>224</sup> The issue of generating emergency funds at dramatically discounted prices (reductions of USD50 000 to 200 000) is a potential race to the bottom in standards of due diligence and monitoring requirements applied to applicants in an effort to immediately pay for hurricane-relief efforts. In other words, this could make authorities more inclined to approve would-be citizens and result in laxer vetting practices and potentially less time spent and funds expended in investigating each migrant's case.

An example could be the twin island state of Antigua and Barbuda in the Caribbean. Due to the vast devastation of Barbuda in the storm season of 2017, the commercial attractiveness of CBI was somewhat impacted. The price of CBI had been halved to remain competitive, and much of the revenue created was spent rebuilding Barbuda. This example may demonstrate the more than potential impact that market demand and economic needs might have on the laws and policies of a state. In other words, from a strictly commercially view only, to sell its own citizenship, a secession from Barbuda could have made sense for Antigua. Dominica, on the other hand, has not lowered the price of citizenship, as, in comparison to other selling nations, Dominica's (as well as St Lucia's) citizenship sales were already set at a comparably low cost (of around USD100 000).

CBI are thus predominantly mercantile phenomena.<sup>225</sup> When entering into contracts, all rights and obligations and other essential details such as price are finite, to be made known at the time of contracting. Otherwise, CBI contracts would not meet the requirement of contractual certainty. Global market citizens pay to enjoy liberties and to hold no further allegiances.<sup>226</sup> CBI thus refers to the right to mobility for payment, expressed in the direct, obligation-free purchase of passports at the time of contract.<sup>227</sup>

As a form of global citizenship, CBI would face the impossible challenge of reconciling both universality and diversity.<sup>228</sup> CBI's claims to universality, the relations between citizenship and the universal application of Human Rights, as well as CBI's inherently municipal nature, cannot be placed within a common legal structure.<sup>229</sup> April Carter states that a conflict of ideas is commonly associated with globalism, namely the neo-

<sup>224</sup> See, eg, Saphora Smith, 'Hurricane-hit countries slash cost of citizenship-by-investment programs' *NBC News* (online), 6 January 2018 <<https://www.nbcnews.com/news/world/hurricane-hit-countries-slash-cost-citizenship-investment-programs-n832161>>.

<sup>225</sup> Graziella Bertocci and Chiara Strozzi, 'The Evolution of Citizenship: Economic and Institutional Determinants (2010) 53(1) *The Journal of Law and Economics* 95–136.

<sup>226</sup> Kalin, above n 16, 213: '[N]early 100% of the applicants [...] have absolutely no interest in the political participation aspect of citizenship'; Abrahamian, above n 186, 85.

<sup>227</sup> If there are any obligations beyond the price, then those are nominal. Upon becoming a CBI-citizen, a clear criminal record is required, and after attaining citizenship, payment of taxes is mandated. See also Henley and Partners, *Global Citizens* (Ideos, 2016) 39.

<sup>228</sup> Langran, above n 213, 32.

<sup>229</sup> Seyla Benhabib, *Another Cosmopolitanism* (Oxford, 2006), 32–3. See also Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, 2006).

liberal free-trade agenda and the commitment to universal human rights. Immanuel Kant, writing in an age of colonisation, ‘explored how a cosmopolitan desire to travel the world could lead to the danger of exploitation.’<sup>230</sup> This conflict reappears now within CBI’s global ambiguities: CBI combines the elements of global free trade with a ‘flag of convenience’ citizenship, fixing citizenship’s price in a combination with market demand, and not by states alone. Is CBI nothing more (and nothing less) than market membership “enriched” with seemingly random, and at any stage merely voluntary references to “philanthropy”?<sup>231</sup> While CBI market schemes claim to exist in the public interest, generating revenue for the public good and, to some extent, for the general ‘global’ welfare,<sup>232</sup> given the discretionary nature of most programs there are no safeguards for such claims. CBI states seek large, one-off contributions, not as payments of upfront loyalty and in reference to their role as welfare states, but in their function as competitive states.

While citizenship’s legitimacy today is seen as still depending on social cohesion and political participation,<sup>233</sup> as seen in the existence of the very practice of CBI, citizenship itself does not necessarily provide a guarantee of the proper and loyal fulfilment of sovereign functions.<sup>234</sup> However, CBI makes another promise and claim towards a global citizenship of individual rights.<sup>235</sup>

In practice, CBI as a form of ‘global market’ citizenship allows legal pluralities and ambiguous overlaps of market and state legal powers, with many citizens holding plural citizenship status that allows them to exist somewhat within, as well as outside, a single state’s control.<sup>236</sup> This is because the legal system of CBI, once unleashed, may directly impact on traditional conceptions of citizenship as well as on the diplomatic and economic relations of all nations.<sup>237</sup> CBI’s ripple effects may force states to internationalise, and with eroding sovereignty, perhaps globalize, the law of citizenship. CBI renders states unable to implement naturalization

<sup>230</sup> April Carter, *The Political Theory of Global Citizenship* (Routledge, 2001) 9.

<sup>231</sup> Cash for passports schemes are at times (through the lens of the ultra-rich) described in terms of ‘philanthropic donations’. This terminology, however, does not necessarily change the nature of the monetary transaction as such; a donation is still a payment, as no CBI state accepts giving out passports for voluntary (or random) donations, but for a certain price only. For CBI as donations and as ‘*ius doni*’. See generally Kalin, above n 16.

<sup>232</sup> CBI monies are directed to municipal funds that may support anything from particular local projects to the financial sustainability of entire economies, as well as supranational humanitarian causes. On the other hand, the ties between the new mercantile citizen and the state are fragile at best. CBI means payment for admission, not residence or participation, at least, initially.

<sup>233</sup> See, eg, Engin F Isin and Greg M Nielsen (eds), *Acts of Citizenship* (Zed Books, 2008).

<sup>234</sup> Kalin, above n 16, 92.

<sup>235</sup> With this flexible nature, can CBI legal economic mechanisms function as a springboard toward a sustainable proto global citizenship that is no longer only a state and market run citizenship?

<sup>236</sup> States have placed citizenship on the global market, inviting non-state powers and control over the concept of citizenship. Citizenship’s direct sale may thus challenge national power and control over the standards of national citizenship.

<sup>237</sup> Cf Shar Levine and Andrew Phillips, ‘Citizenship on Sale: Investigating Ottawa’s Immigrant Investor Plan’ (1996) 109 (27) *Maclean’s* (Toronto) 14.

policies without considering the laws and policies of other states, as well as the quasi-normative powers of the global market for citizenship and residence entitlements, and, in addition, rely on international organisations as buffers, brokers and overseers of fundamental rights, reducing global disparities.<sup>238</sup>

For example, the reality of a plural citizenship as an emerging global standard is a promise also contained within market CBI. CBI facilitating plurality in citizenship may then also assist in overcoming some of the inequalities of naturalization and political assimilation of greater number of immigrants.<sup>239</sup> In this way, CBI as citizenship based on market value may achieve widespread acceptance.<sup>240</sup> At the same time, however, CBI, in its predominant focus on markets, may merely create further inequalities in membership on a global market sphere.

CBI's deconstruction of citizenship, through the combination of references to states, markets and the global social contract, could introduce a 'bottom up' approach to new meanings of global membership that place focus on the supranational, fundamentally protected status given to the individual by all states, placing the individual both within and yet outside the international community of states, as well as within and outside markets. CBI could be seen to currently exist complementary to national citizenship. This assumption means that CBI would, at least in part, exist somewhat in reference to factors vested outside the nation state. This in turn may mean that, beyond reference to global markets for membership entitlements, there is now a potential (and perhaps the necessity) to re-conceptualize citizenship in reference to an individual, personal status of global membership, more strongly tied to and vested within fundamental, universal human rights law.<sup>241</sup>

Without offering further reference points beyond markets and with states now directly operating on those markets, CBI is a complex phenomenon and seems paradoxical: CBI appears to challenge the concept

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<sup>238</sup> While currently driven by only those states that decide to sell citizenship, through market standardizations and harmonizations, CBI commodification schemes may have deep reaching effects and consequences to the naturalization and citizenship laws of all nations, with CBI acting as a binding force for a form of international, perhaps supranational law of citizenship. It may be relevant for research to gain an understanding of how the creation of market citizenship corresponds with the constitutional governmental dual role as seller as well as protector and public trustee for the institute of citizenship. See also Antoine Pecoud, *Depoliticising Migration: Global Governance and International Migration Narratives* (Palgrave Macmillan, 2015).

<sup>239</sup> Greg Brown, 'Political Bigamy? Dual Citizenship in Australia's Migrant Communities' (2002) 10(1) *People and Place* 71.

<sup>240</sup> See Kalin, above n 71, 240–1.

<sup>241</sup> Not being bound to a single territory or actual residency, existing market citizens may carry the promise and projection of a (proto) global citizenship, even where such global legal sphere is currently (and perhaps forever) absent. Such 'global' citizenship sphere complementing the nation state then appears to be coming from a 'bottom up' approach being based, and placing greater focus, on the individual members of states, as well as on those members and states operating on the global market sphere (linking statehood with markets), and the global community (humanity). Such citizenship may then perhaps be more inclusive than solely national citizenship and may find an important conceptualization and a legal base also in references to state enforced universal fundamental rights.

of statehood, as states now sell citizenship as one of the essential elements of statehood.<sup>242</sup> This leaves the concept of citizenship currently situated somewhere between commerce, a claim to philanthropy and a mere aspiration to somehow becoming global citizenship.<sup>243</sup> It is thus time to further explore and conceptualise CBI in ways that safeguard CBI's claims to function inclusively, in reference to all citizens as members of humanity.<sup>244</sup> If CBI becomes a global practice, it should include the 'global other' such as those seeking refuge. Without reconceptualising the genuine links of citizenship, CBI, relying predominantly on economic and market reasoning, is an incomplete legal concept, requiring further research.<sup>245</sup> Insofar as this article makes a case for CBI functioning as a transnational or supranational concept of citizenship in times of globalization, I conclude by emphasizing that this is a preliminary case. The immediate relevance of CBI then is to act as a placeholder for a conversation about the direction of the public law of citizenship, residence and naturalization.

## VII Conclusion

This article has introduced and critiqued CBI legal mechanisms. It has argued that CBI laws are complex and powerful agents of change. CBI programmes should therefore no longer be understood as legal isolates, but as potential blueprints in the evolution of public law. By selling citizenship, states are ceding control over citizenship to markets. CBI claims to act as global citizenship. However, as economic citizenship alone, allowing for market control, CBI transforms citizenship as an element of statehood and challenges statist interpretations of citizenship as vested within the sole power and control of the nation state. With a view to law reform, this article has suggested re-introducing 'neo-Nottebohmian' genuine links for a more sustainable CBI, incorporating, amongst other factors, reference to fundamental rights within the laws of market citizenship. This is to allow CBI to act as an interface beyond citizens, states and markets. CBI may then act as a window to forthcoming legal transformations in public law,

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<sup>242</sup> For the elements of statehood, see the *Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

<sup>243</sup> The paradox of CBI is that, at the same time of making a claim to global citizenship, CBI needs to rely on citizenship's municipal, national institutional legal framework as well as on the international forum in terms of their acceptance.

<sup>244</sup> A fundamental rights approach to citizenship as a concept for general membership of humanity may provide checks and balances from both market as well as state power, protecting autonomous spheres of 'citizens' as individuals no longer exclusively ascribed as subjects to particular policies.

<sup>245</sup> The question whether an economic reasoning of citizenship is sufficient for a sustainable future and direction of citizenship, especially in view of CBI's claim to global citizenship, remains. Some see citizenship generally as an incomplete concept as well. For instance, Saskia Sassen, above n 1, 277–8, applies Cass Sunstein's theory of incompletely theorized agreements to a form of flexible citizenship as an incomplete agreement or contract between the state and its subjects. This incompleteness allows for the state to accommodate and respond to changed conditions without sacrificing the formal status of citizenship: Cass R Sunstein, 'Incompletely Theorized Agreements Commentary' (1994–1995) 108 *Harvard Law Review* 1733, 1746; Cass R Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (Working Paper No 147, University of Chicago Public Law and Legal Theory, 2007).

and may, initially through marketisation, become a potential forerunner for an international or, complementing national citizenship, supranational law of citizenship.