



I. Holubenko

Postgraduate Student,
Department of Civil Law,
Taras Shevchenko National University of Kyiv

**TESTS AS CRITERIA FOR DETERMINING
NATIONALITY OF LEGAL PERSONS OF INVESTORS
IN PRIVATE INTERNATIONAL LAW**

The research deals with the issue of tests as criteria used in private international law to determine the nationality of legal persons of investors.

Bilateral investment treaties have essentially relied on the following tests for determining the nationality of legal persons. Different criteria – in various combinations – have been used. These are the place of incorporation, the location of the company’s seat – also referred to as the *siège social*, real seat or principal place of business – and the nationality of ownership or control.

As has been explained in greater detail in the paper, each of these different criteria has its advantages and disadvantages. Most investment treaties use a combination of the tests for determining nationality of legal persons so that a company must satisfy two or more of them in order to be covered.

Also, the author provided the necessary recommendations to improve legal regulation of legal persons. Some changes in the drafting of clauses may produce significant effects on the defined and foreseeable scope of the investor’s protection:

- Not referring to the laws of each contracting party to define company’s nationality but choosing a single criterion that will be applicable to both contracting parties in the treaty;

- Always having at least two combined nationality criteria for companies, which shall be applied cumulatively: incorporation plus substantial business activities or head office plus substantial business activities;

- Defining the concept of substantial business activities (number of permanent employees; turnover; tax status etc.);

- Including a denial of benefits clause which would be “automatic” in its effects and also “comprehensive” in its application, i.e., prohibiting treaty shopping by both national investors and those of non-party countries; and

- Defining the content of control criteria. For example, establishing the level of participation required in order to have control, or significant influence, in a company or, in the case where the nationality of the ultimate investor in a complex investment chain is relevant, defining who that investor is.

