

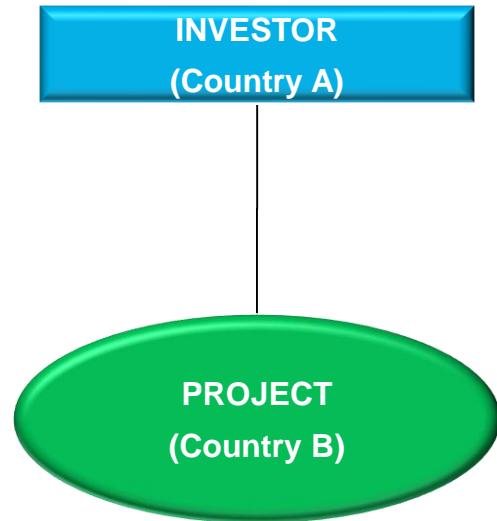
## 2022 Dispute Resolution In M&A Transactions

# Investment arbitration: Recoverability of reflective loss

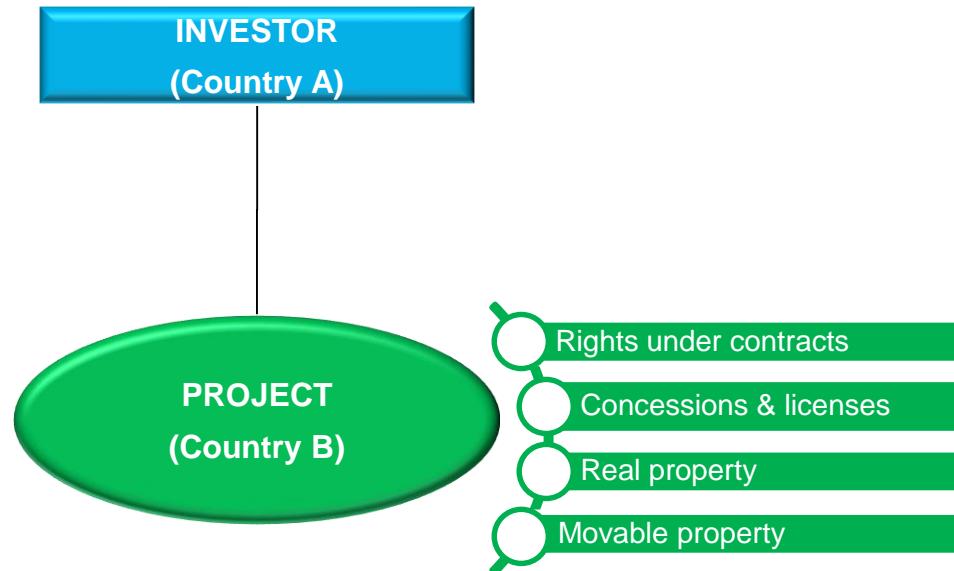
Agnieszka Zarówna

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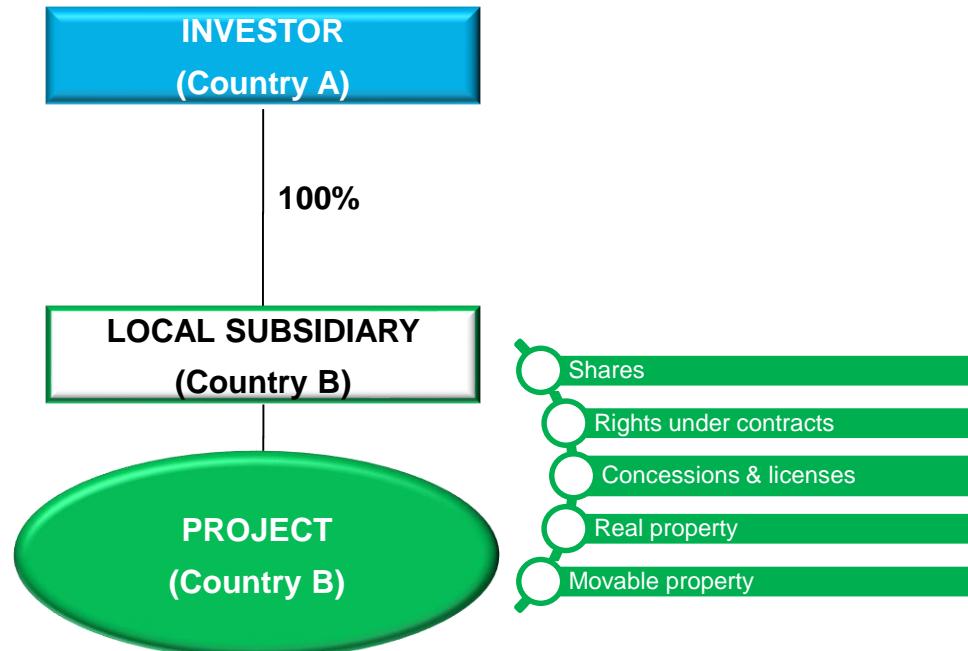
# Investing Into A Project In Country B



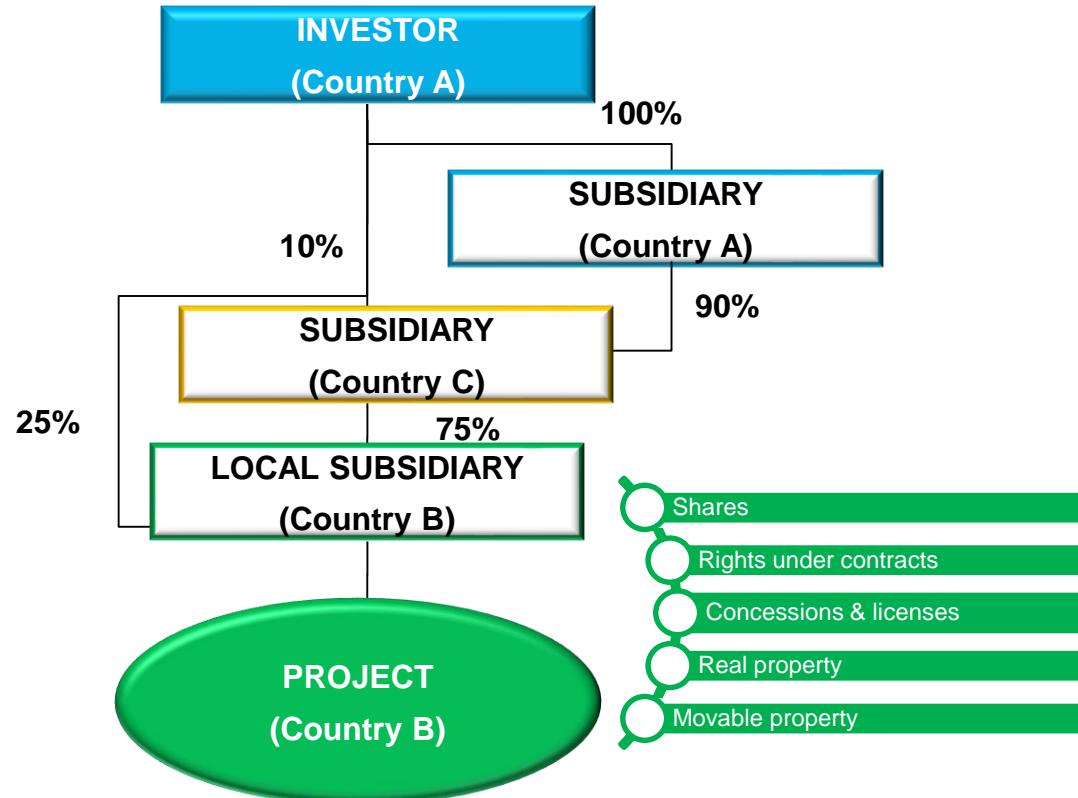
# Investing Into A Project In Country B



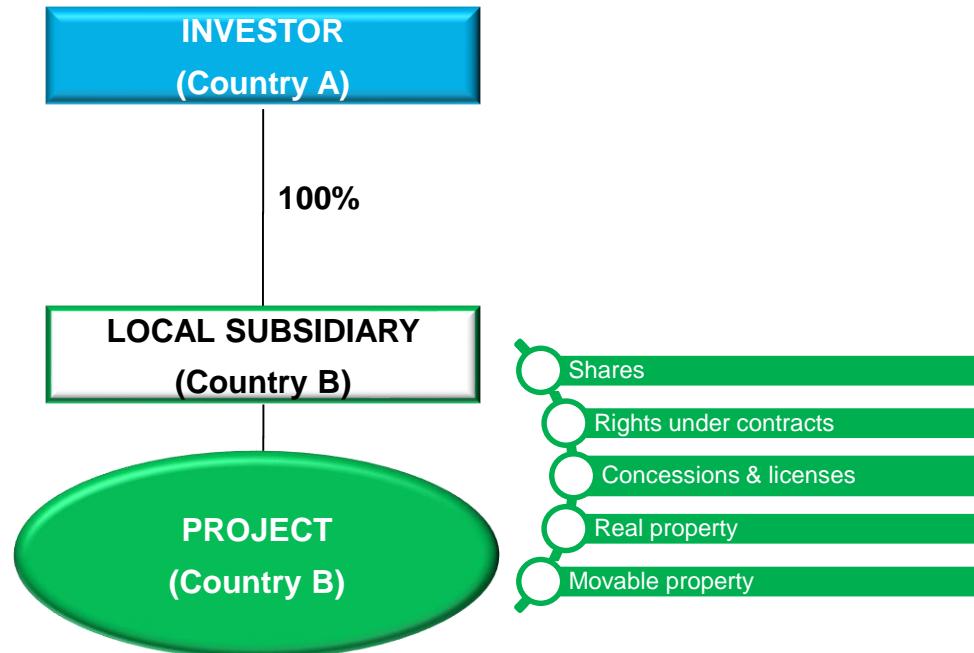
# Investing Through A Subsidiary In Country B



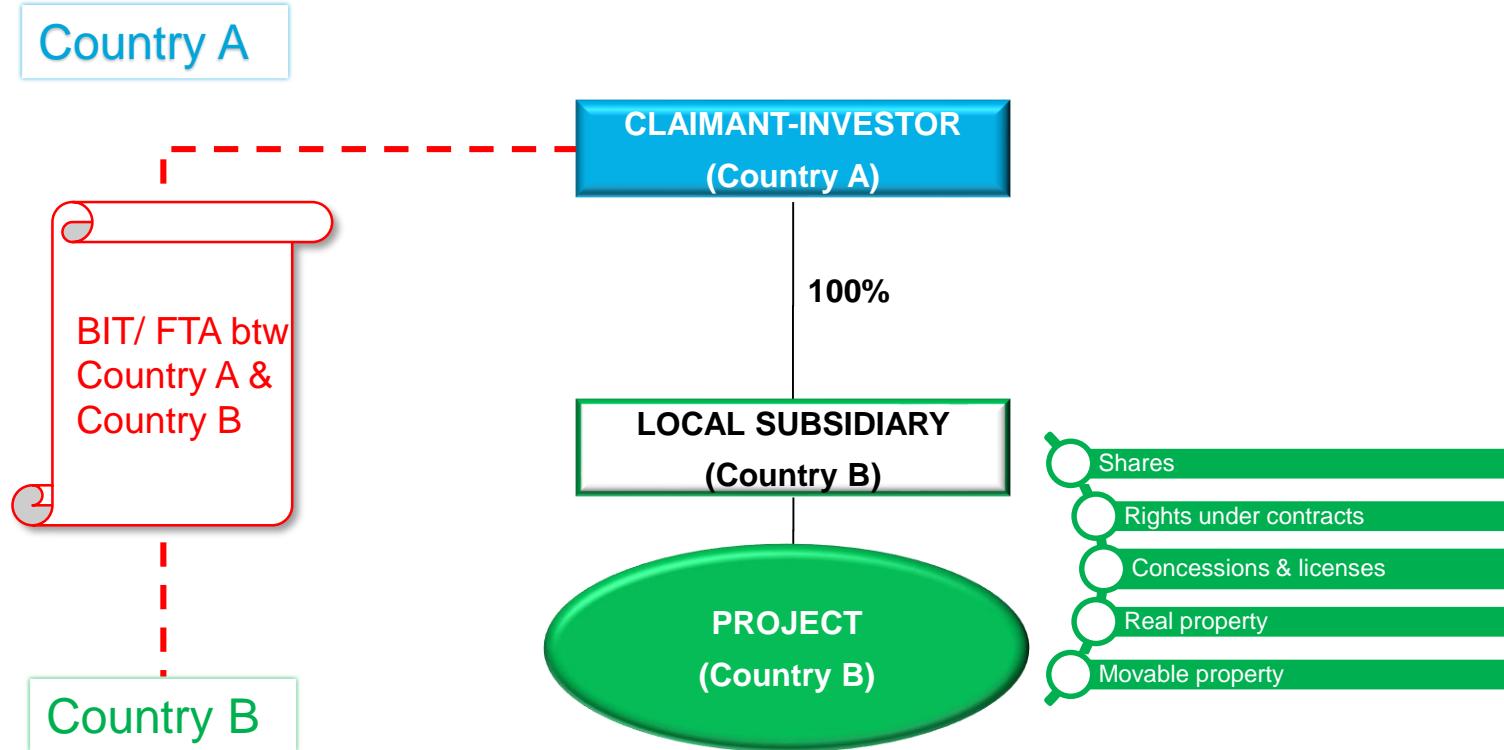
# Investing Through Several Layers Of Subsidiaries



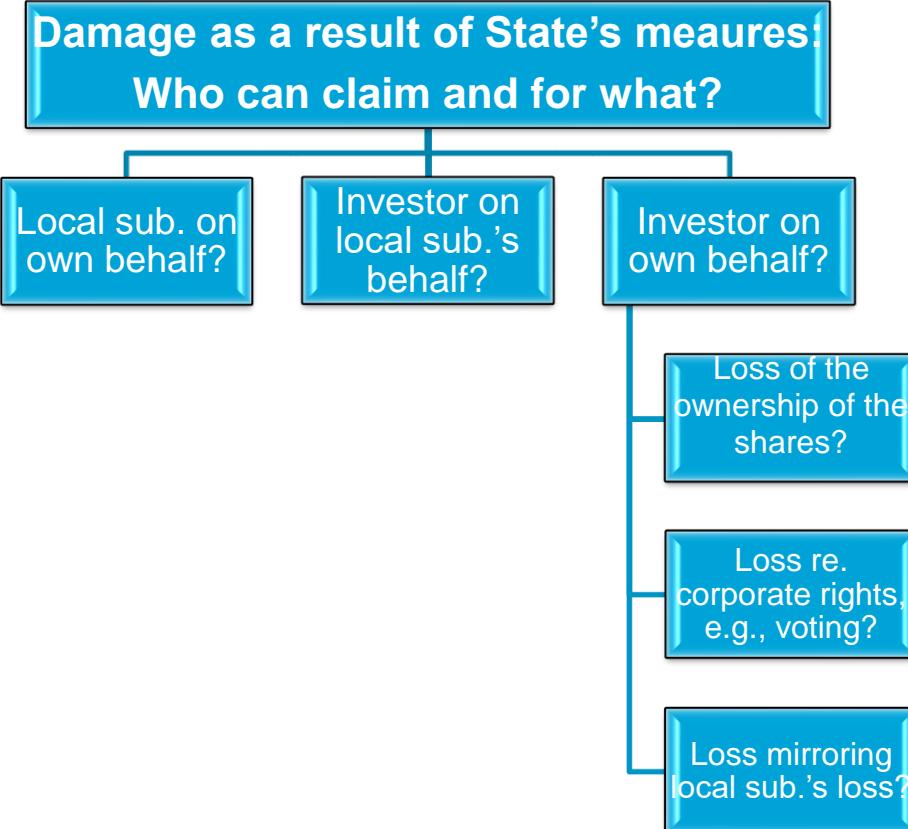
# Investing Through A Subsidiary In Country B



# Investor's Access To Arbitration Under BIT/ FTA



# Shareholder Claims In ISDS



# Reflective Loss Claims In Various Legal Regimes

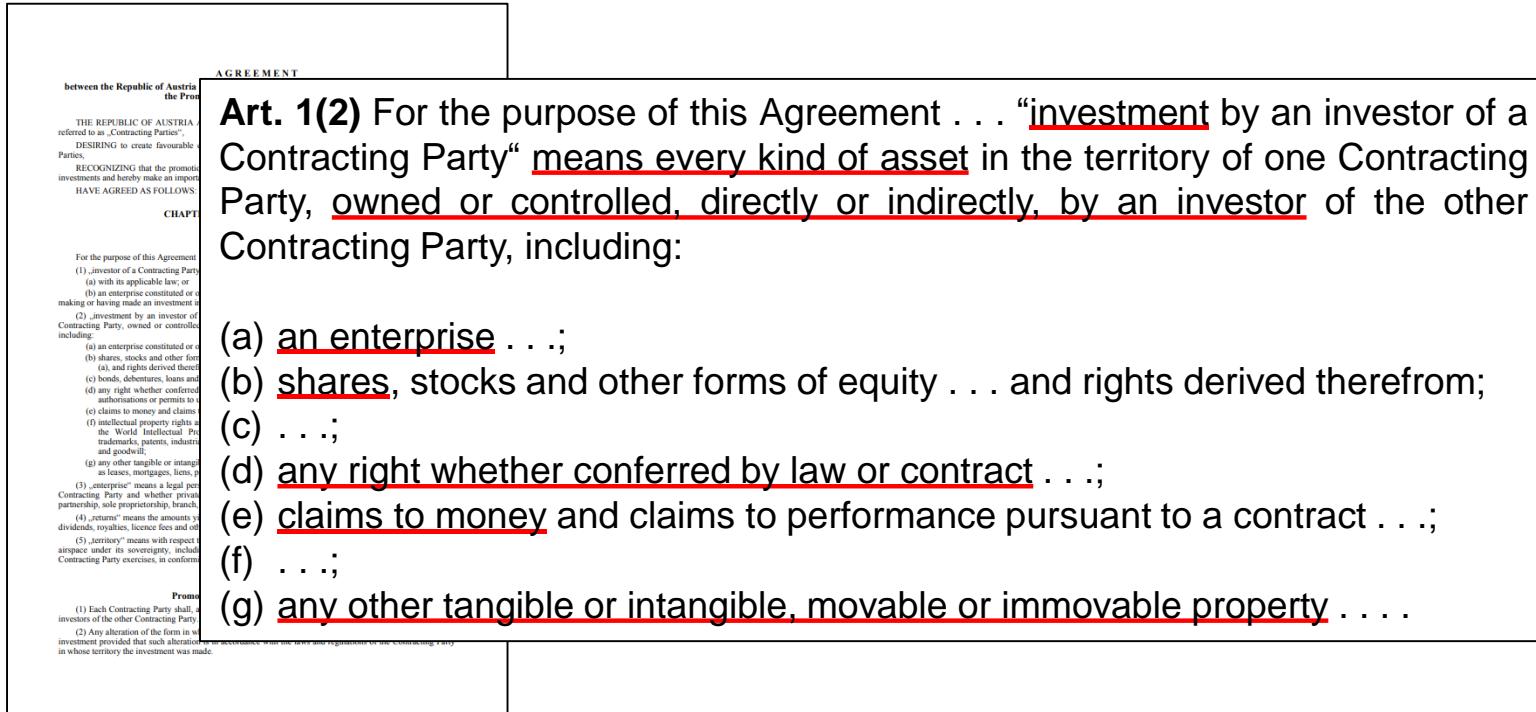
Domestic  
law?

International  
law?

Investment  
treaties?

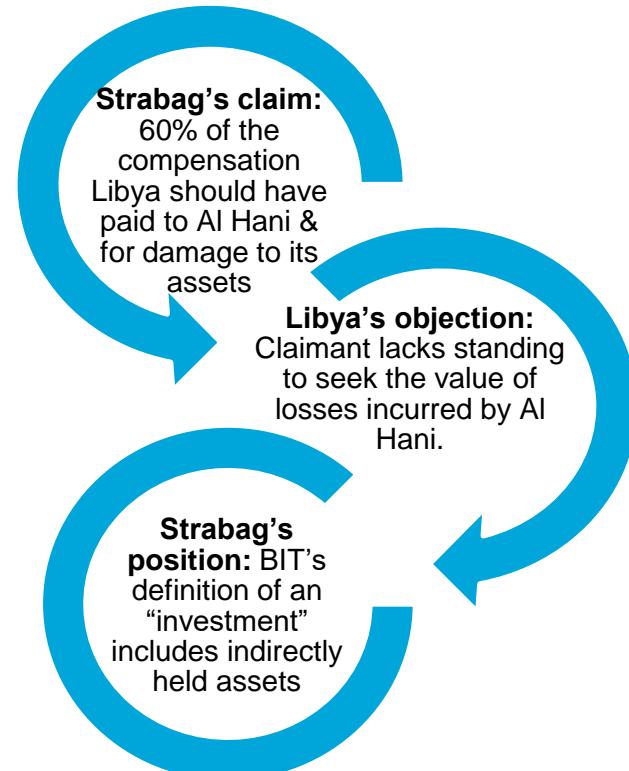
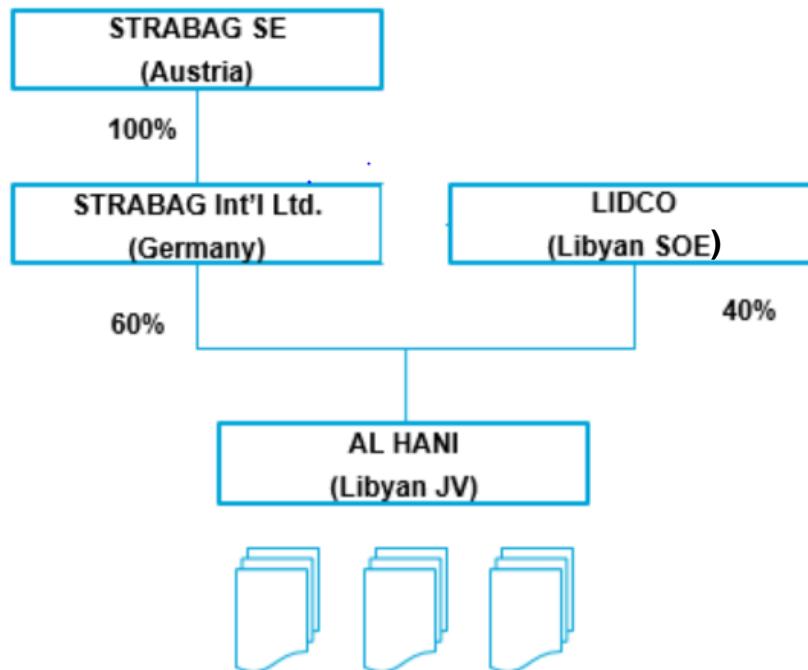
# The BIT's Definition Of An Investment

Austria-Libya BIT, Art. 1(2).



# *Strabag v. Libya*

*Strabag v. Libya*, Award dated 29 June 2020 (Tribunal: John R. Crook, Antonio Crivallero, Nassib Ziade).



# The Tribunal Rejected Libya's Objection And Upheld Claimant's Standing

*Strabag v. Libya*, Award dated 29 June 2020 ¶¶ 134-135.

<p>INTERNATIONAL CENTRE FOR SETTLEMENTS OF INVESTMENT DISPUTES (ADDITIONAL INFORMATION)</p> <p>In the arbitration proceedings between STRABAG SE, Claimant, and LIBYA, Respondent,</p> <p>Libya, Respondent, Respon</p> <p>ICSID Case No. ARB(AF)/15/1</p> <p>AWARD</p> <p>Members of the Tribunal: Professor John R. Basson, Professor Antonio C. Gómez-Pomar, Professor Nassib O. Ghannouchi</p> <p>Secretary of the Tribunal: Ms. Frauke Schmitz</p> <p>Date of dispatch to the parties:</p>	<p>134. The record thus shows that <u>Al Hani did not in fact operate as a separate company, but instead operated under the clear control of Strabag and relevant subsidiaries. It was in all but name a Libyan subsidiary of Strabag</u> with full transparency, <u>in which costs and expenses, on the one hand, and revenues, on the other hand, pertained to Strabag</u>, which expected the return of its expenses through payments received by Al Hani, not through dividends. <u>There was no separation between Strabag and Al Hani, but rather economic identity: the economic harm or shortfall in Al Hani was equivalent to the harm or shortfall of Strabag pro rata commensurate to its share ownership.</u></p> <p>135. In the Tribunal's view, <u>these circumstances clearly satisfy the requirements of Article 1(2) of the Treaty</u>. The investment here included a variety of assets, in addition to Strabag's 60% interest in Al Hani, that were owned or controlled, directly or indirectly, by Claimant. <u>The Tribunal accordingly denies Respondent's jurisdictional objection to the effect that Claimant improperly asserts claims for injuries to Al Hani's property and interests.</u></p>	<p><b>Outcome:</b> The damages of EUR 75 million</p>
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# NAFTA's Standing Provisions

NAFTA, Arts. 1116(1), 1117(1).

## **Art. 1116(1): Claim by an Investor of a Party on Its Own Behalf**

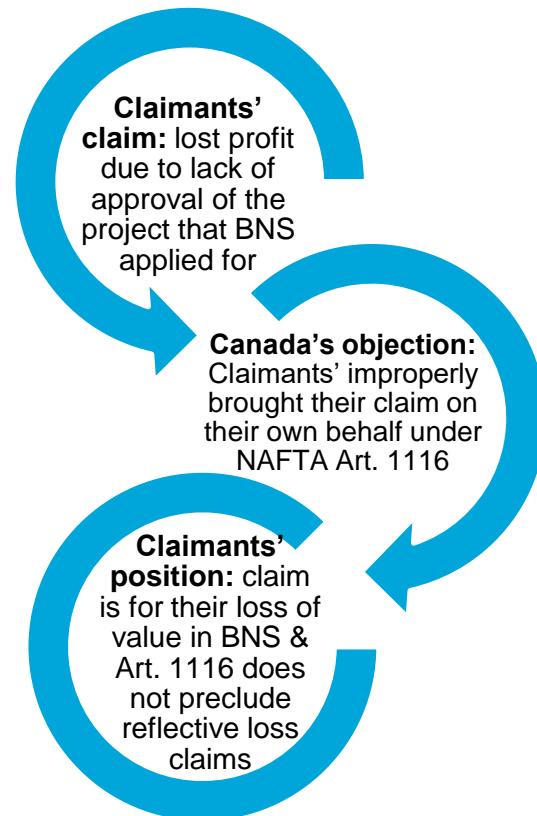
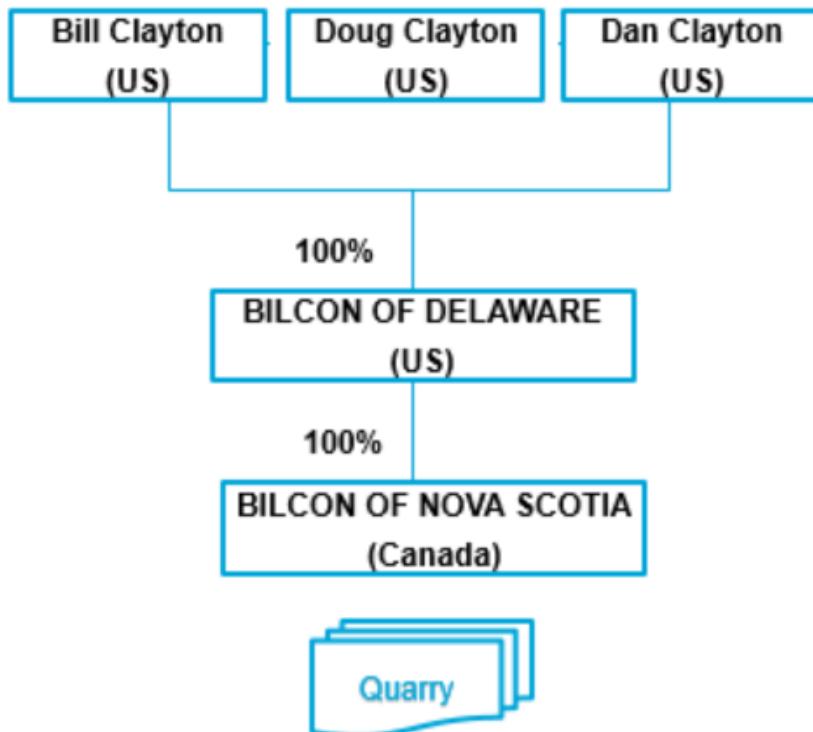
An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [NAFTA Section A & Art. 1502(3)(a)] and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

## **Art. 1117(1): Claim by an Investor of a Party on Behalf of an Enterprise**

An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation under [NAFTA Section A & Art. 1502(3)(a)] and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

# *Clayton v. Canada*

*Clayton v. Canada*, Award on Damages dated 10 Jan. 2019 (Tribunal: Bruno Simma, Bryan Schwartz, Donald M. McRae).



# The Tribunal Upheld Canada's Objection BUT Still Awarded Damages To Claimants

Clayton v. Canada, Award on Damages dated 10 Jan. 2019 ¶¶ 389, 394, 396.

IN THE MATTER OF AN ARBITRATION  
CHAPTER ELEVEN OF THE NORTH AMERICAN  
AND THE UNCITRAL RULES OF 1976

- between -

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DANIEL CLAYTON AND BILL CLAYTON (the "Investors")

- and -

GOVERNMENT OF CANADA (the "Respondent" and, together with the Investors, the "Parties")

AWARD ON JURISDICTION AND LIABILITY

17 MARCH 2015

ARBITRAL TRIBUNAL  
Judge Bruno Simma (President)  
Professor Donald McRae  
Professor Bryan Salter

SECRETARY  
Dr. Dirk Palkowsky

Permanent Court of Arbitration (PCA) Case No. 2009-04

**389. [T]he Tribunal is persuaded that the Respondent and the United States are in principle correct. Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116.**

**394. [W]hile for largely administrative reasons, the Investors conducted some of their dealings through Bilcon of Nova Scotia, the sole purpose of Bilcon of Nova Scotia was to build and operate a quarry, a role that it never got to fulfil. It was not an entity set up to establish and manage an investment in a quarry and a marine terminal with the Claytons just as passive investors. . . . Bilcon of Nova Scotia was no more than a conduit to facilitate the Claytons' operations.**

**396. The opportunity to invest in a quarry and a marine terminal, which was denied by [Canada]'s unlawful conduct, was an opportunity of the Investors and not an opportunity of Bilcon of Nova Scotia. Accordingly, compensation is owed directly to the Investors pursuant to Article 1116. It is not precluded by the prohibition against awarding "reflective loss."**

**Outcome:** The damages of US\$ 7 million

# Way Forward

