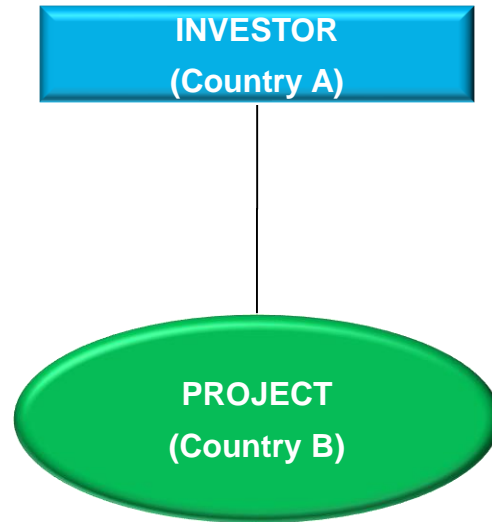


2022 Dispute Resolution In M&A Transactions

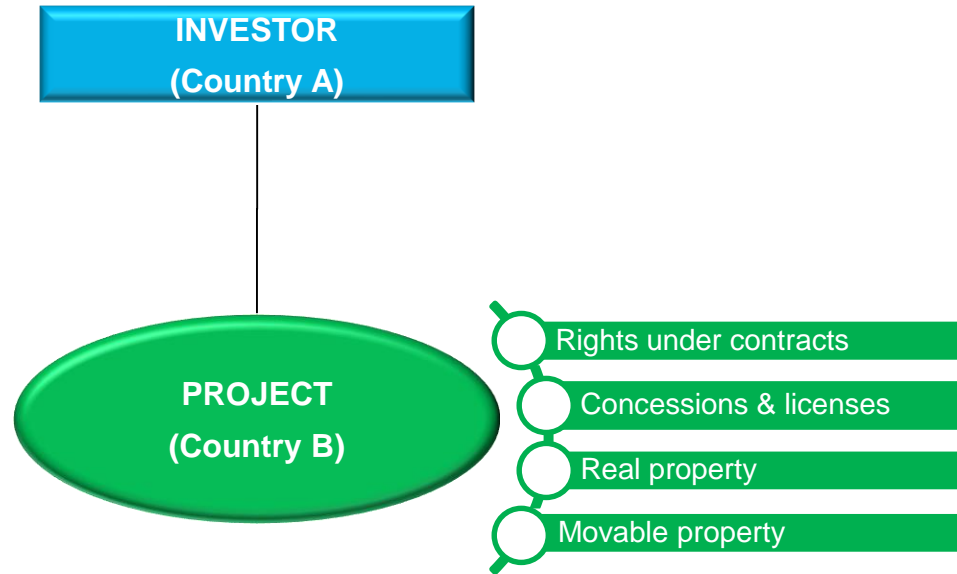
Investment arbitration: Recoverability of reflective loss

Agnieszka Zarówna

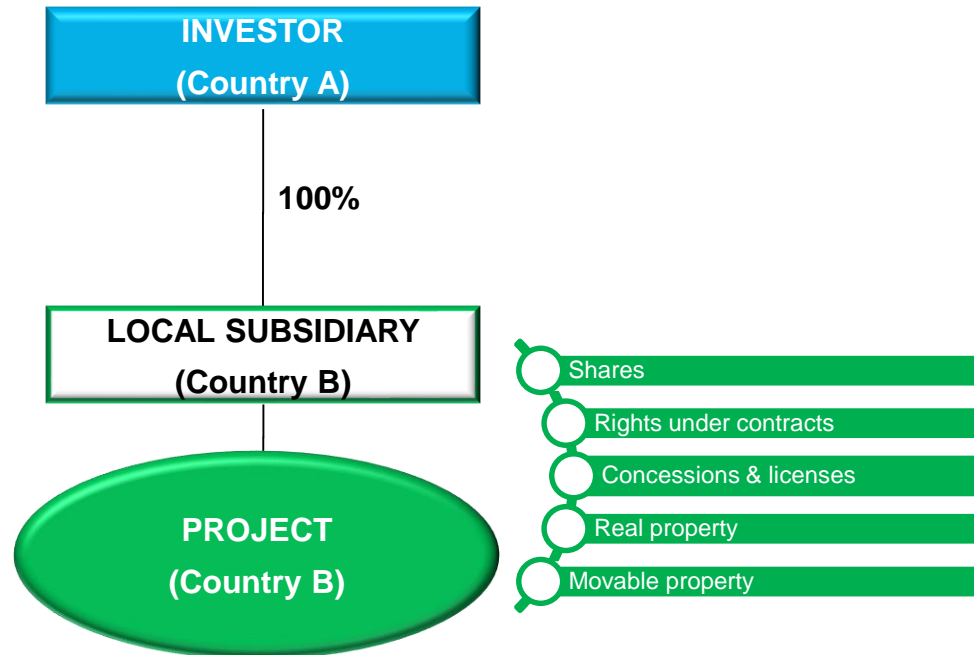
Investing Into A Project In Country B



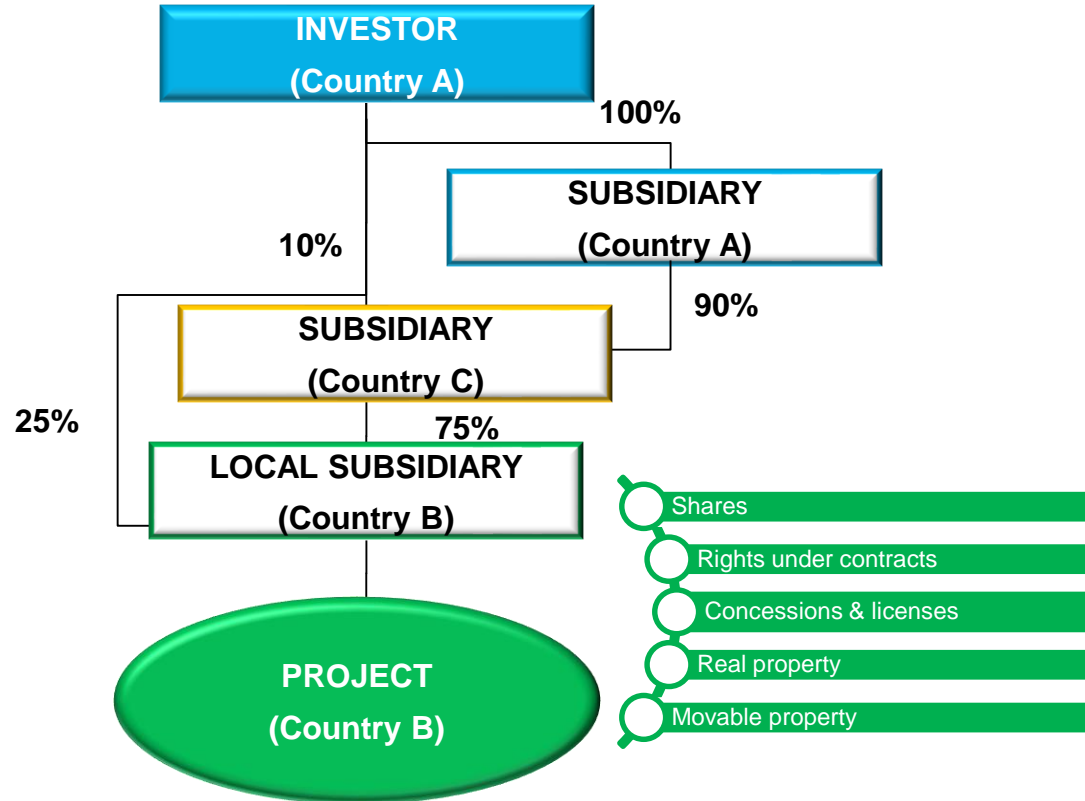
Investing Into A Project In Country B



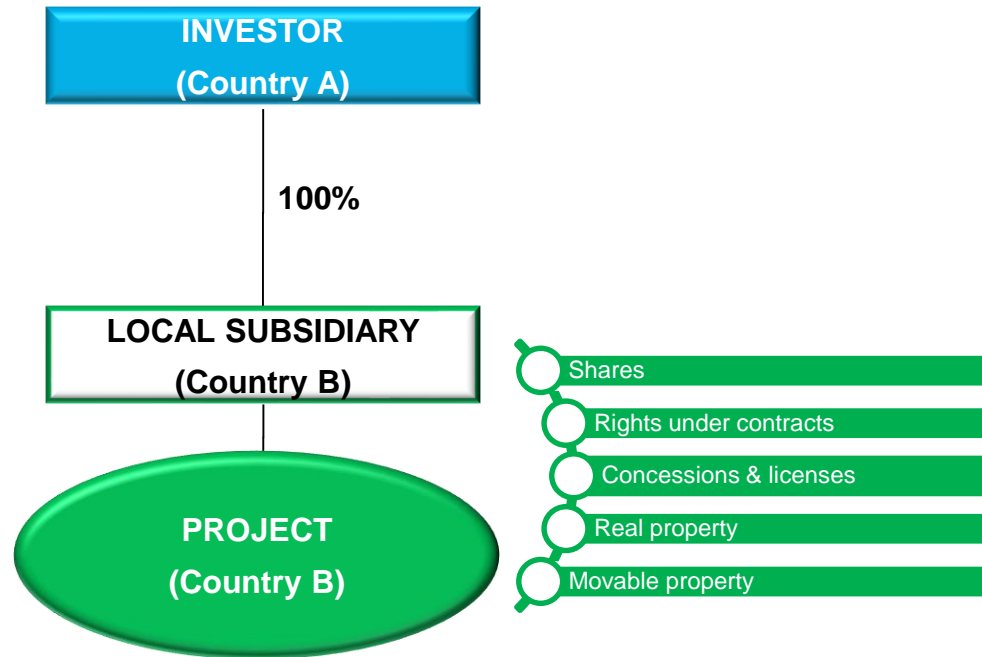
Investing Through A Subsidiary In Country B



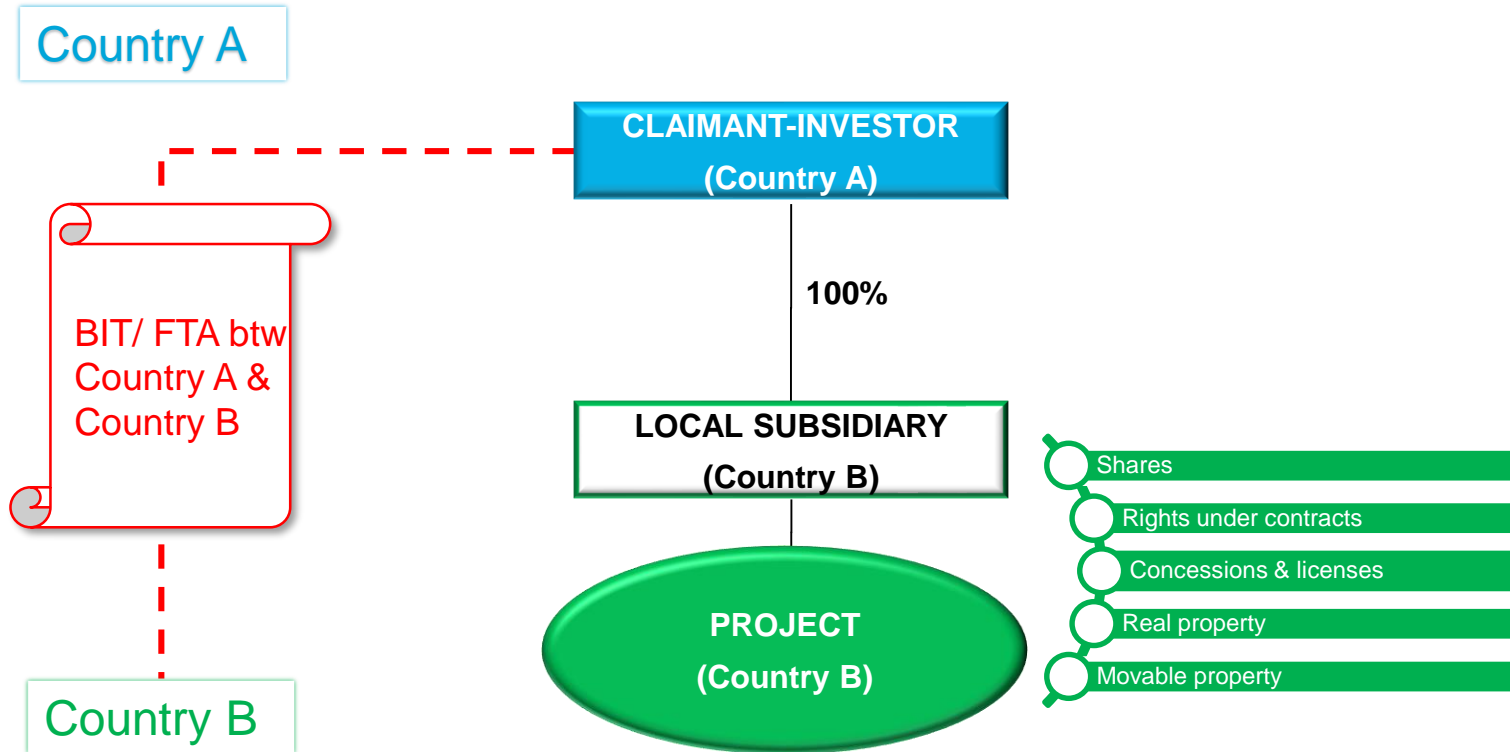
Investing Through Several Layers Of Subsidiaries



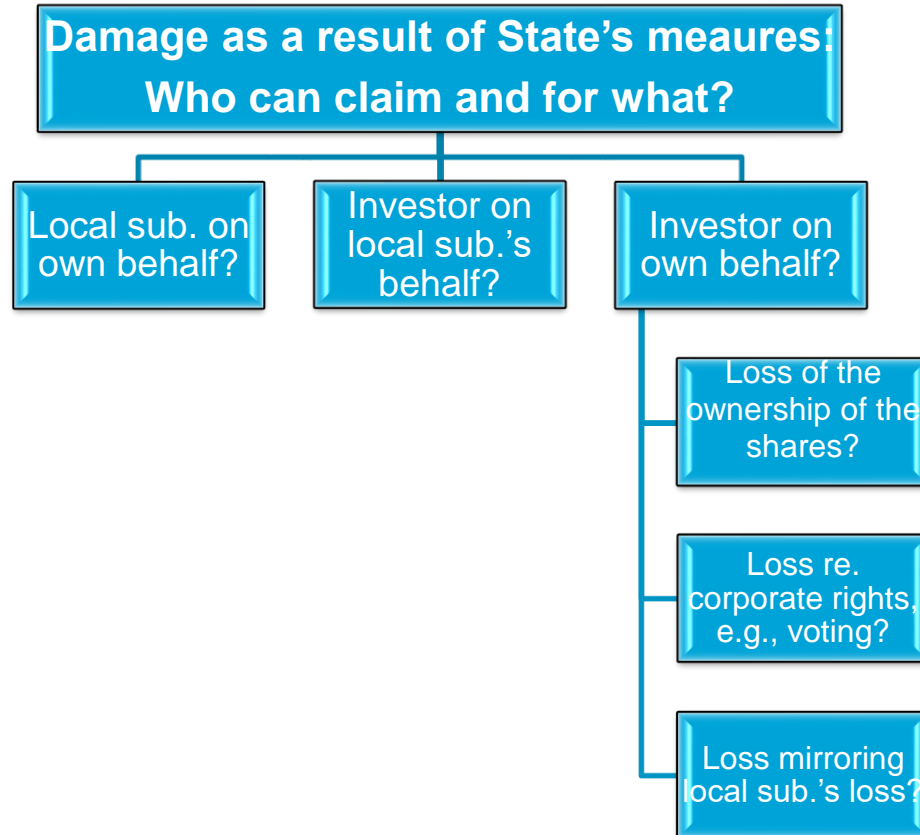
Investing Through A Subsidiary In Country B



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).

AGREEMENT

between the Republic of Austria
the Pro

THE REPUBLIC OF AUSTRIA,
referred to as „Contracting Parties“,
DESIRING to create favourable
Parties,
RECOGNIZING that the promiss
investments and hereby make an import
HAVE AGREED AS FOLLOWS:

CHAPT

For the purpose of this Agreement
(1) „investor of a Contracting Party“
(a) with its applicable law; or
(b) an enterprise constituted or a
making or having made an investment in

(2) „investment by an investor of
Contracting Party, owned or controlled
including:
(a) an enterprise constituted or c
(b) shares, stocks and other for
(c) bonds, debentures, loans and
(d) any right whether conferred
authorisations or permits to
(e) claims to money and claims
(f) intellectual property rights a
the World Intellectual Prop
trademarks, patents, indicies
and goodwill;
(g) any other tangible or intang
as leases, mortgages, liens, p

(3) „enterprise“ means a legal per
Contracting Party and whether priva
partnership, sole proprietorship, branch

(4) „returns“ means the amounts-y
dividends, royalties, licence fees and ot

(5) „territory“ means with respect
airspace under its sovereignty, includ
Contracting Party exercises, in conform

Promis

(1) Each Contracting Party shall, a
investors of the other Contracting Party
(2) Any alteration of the form in w
investment provided that such alterati
in whose territory the investment was made.

Art. 1(2) For the purpose of this Agreement . . . “investment by an investor of a Contracting Party“ means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:

(a) an enterprise . . . ;

(b) shares, stocks and other forms of equity . . . and rights derived therefrom;

(c) . . . ;

(d) any right whether conferred by law or contract . . . ;

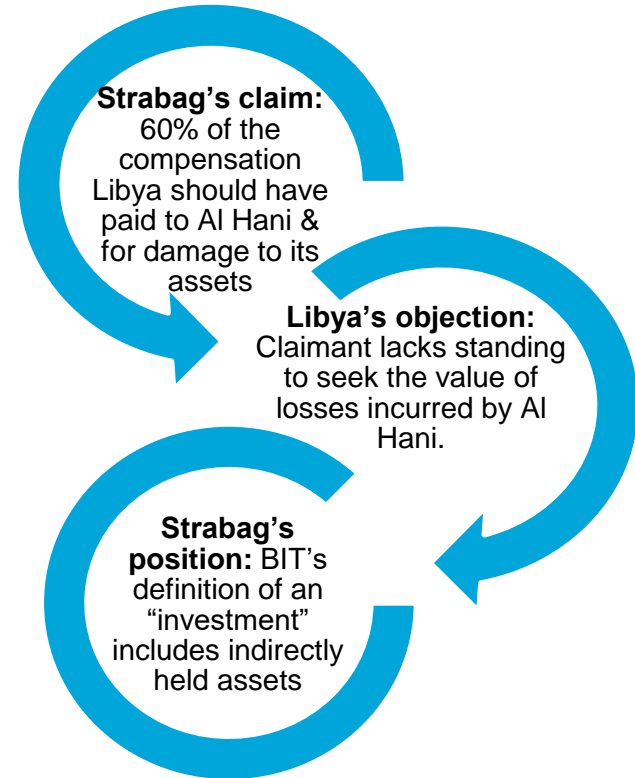
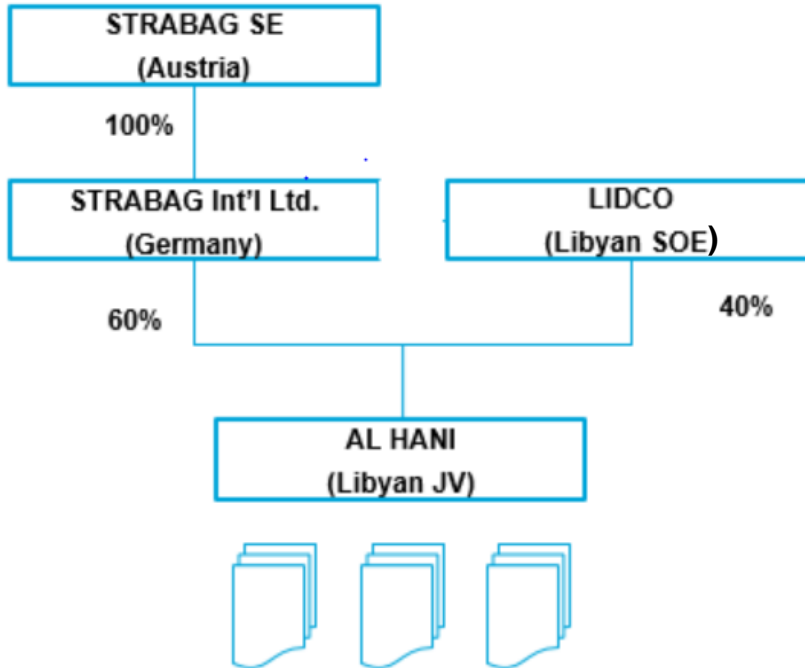
(e) claims to money and claims to performance pursuant to a contract . . . ;

(f) . . . ;

(g) any other tangible or intangible, movable or immovable property

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 SETTLEMENT OF INVESTOR STATE DISPUTES (ADDITIONAL INFORMATION)</p> <p>In the arbitration proceedings</p> <p>STRABAG</p> <p>Claimant</p> <p>Respondent</p>	<p>134. The record thus shows that Al Hani did not in fact operate as a separate company, but instead operated under the clear control of Strabag and relevant subsidiaries. <u>It was in all but name a Libyan subsidiary of Strabag with full transparency, in which costs and expenses, on the one hand, and revenues, on the other hand, pertained to Strabag, which expected the return of its expenses through payments received by Al Hani, not through dividends. 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>ICSID Case No. ARB(AF)/15/1</p>	
<p>AWARD</p> <p>Members of the Tribunal: Professor John R. Doherty Professor Antonio T. Antonelli Professor Nassib M. Ghannouchy</p> <p>Secretary of the Tribunal: Ms. Frauke</p> <p>Date of dispatch to the parties:</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>Outcome: The damages of EUR 75 million</p>

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

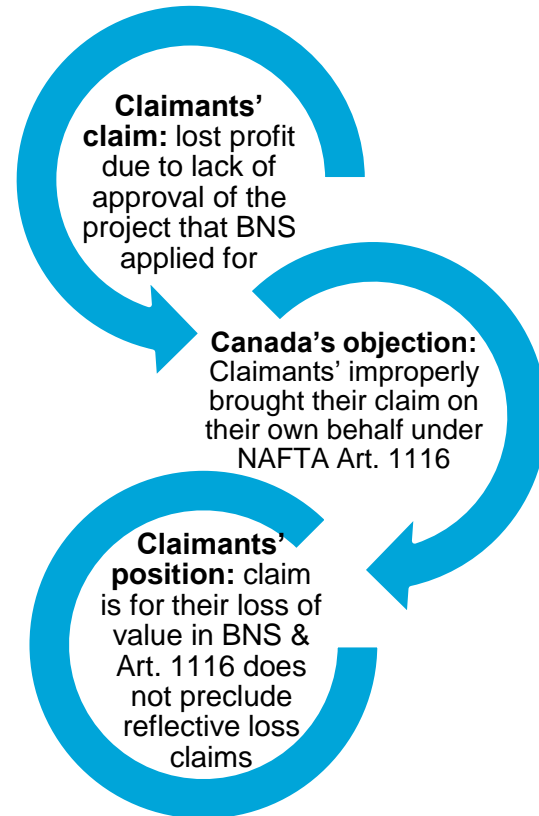
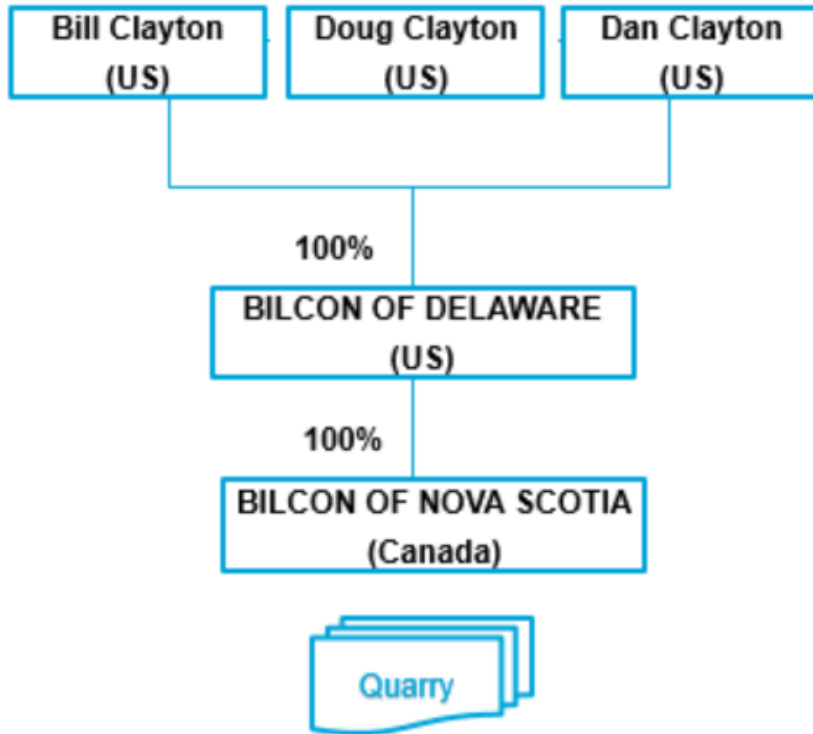
An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation under [NAFTA Section A & Art. 1502(3)(a)] and that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

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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 ARBITRAL AWARD MADE UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL RULES OF 1976	389. [T]he Tribunal is persuaded that the Respondent and the United States are in principle correct. <u>Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116.</u>
- between -	
WILLIAM RALPH CLAYTON, WILLIAM RALPH CLAYTON, DANIEL CLAYTON AND BILCON OF NOVA SCOTIA (the "Investors")	394. [W]hile for largely administrative reasons, the Investors conducted some of their dealings through Bilcon of Nova Scotia, <u>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.</u>
- and -	
GOVERNMENT OF CANADA (the "Respondent" and, together with the United States, the "Respondents")	
AWARD ON JURISDICTION AND LIABILITY 17 MARCH 2015	
ARBITRAL TRIBUNAL Judge Bruno Simma (President) Professor Donald M. McRae Professor Bryan Salvendy	396. <u>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."</u>
SECRETARY Dr. Dirk Pulkowski	
Permanent Court of Arbitration (PCA) Case No. 2009-04	

Outcome: The damages of US\$ 7 million

Way Forward

