



# CLAIMS FOR REFLECTIVE LOSS UNDER INVESTMENT TREATIES

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OECD-hosted Side Meeting  
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Resumed 38<sup>th</sup> session, 20-24 January 2020, Vienna

22 January 2020



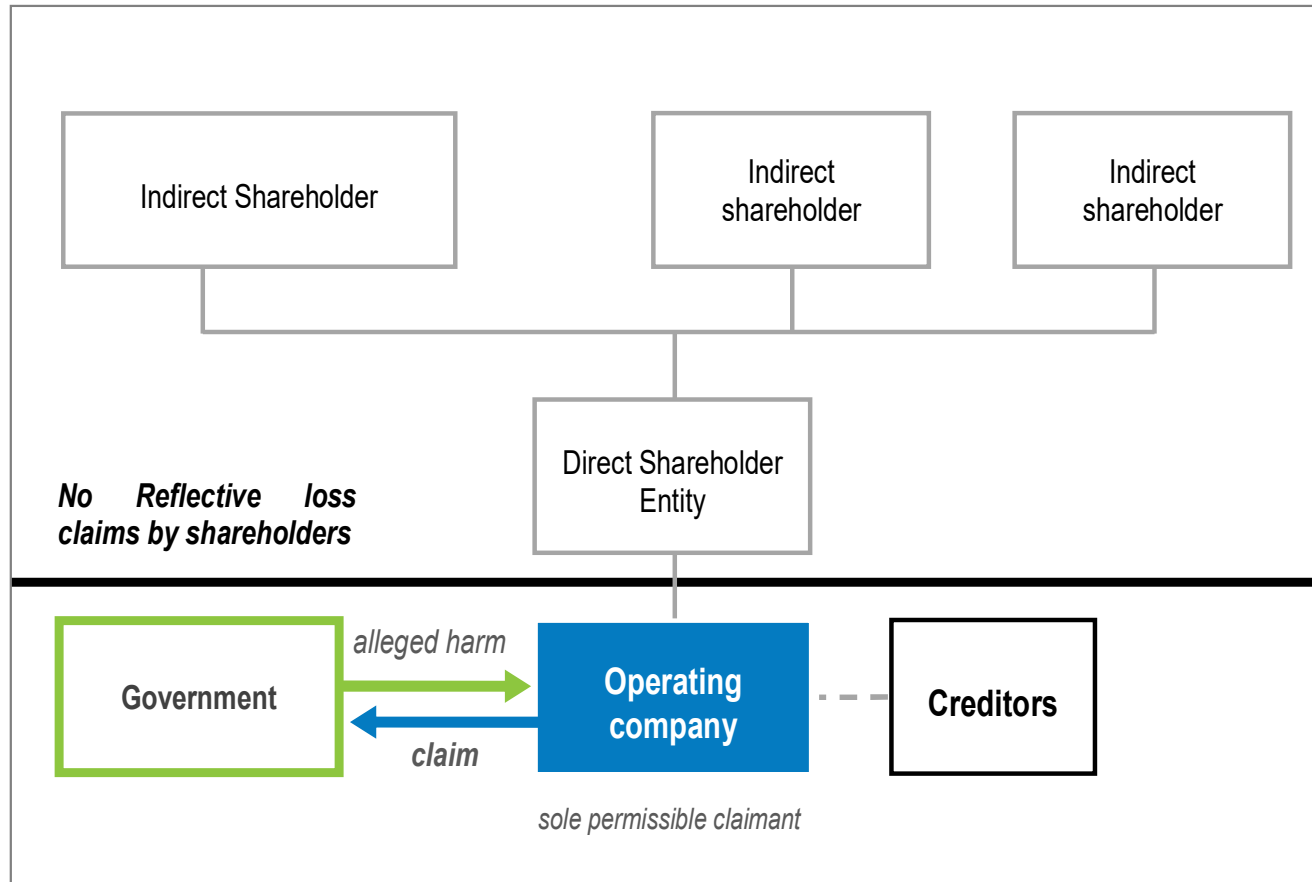
## Outline

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1. Contrast between domestic law and unique ISDS interpretation generally allowing reflective loss claims
2. Allowing reflective loss claims expands scope of ISDS and generates multiple potential claims for the same injury
3. Treaty shopping and forum shopping in ISDS using attribution of reflective loss claims
4. Minority shareholder claims for reflective loss
5. Effects of availability of reflective loss claims for some shareholders on corporate law and finance
6. Company recovery regimes: NAFTA-style derivative action and deemed foreign company models
7. Links and contact

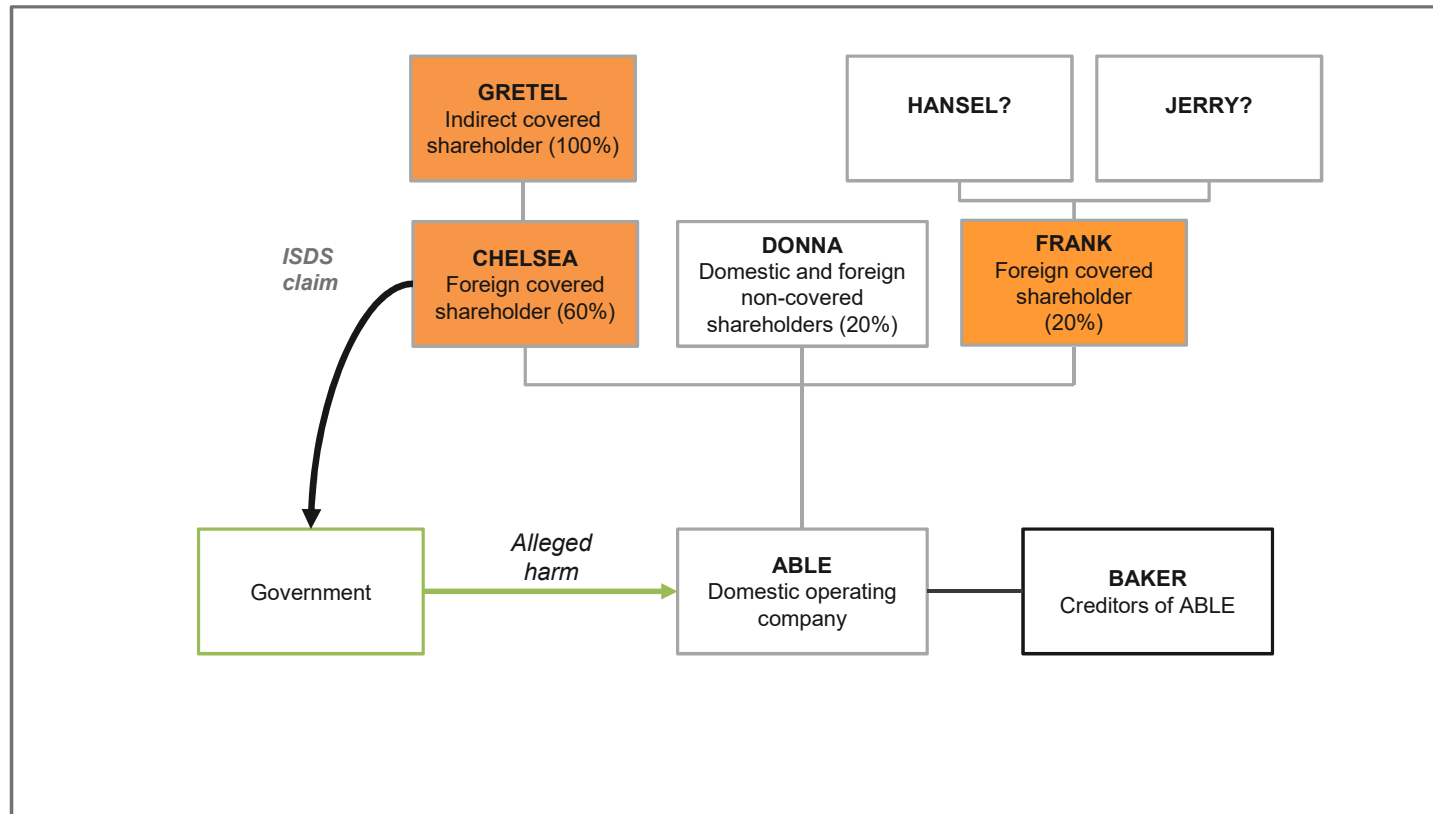


## Domestic Law: “No Reflective Loss” principle bars shareholder claims for reflective loss



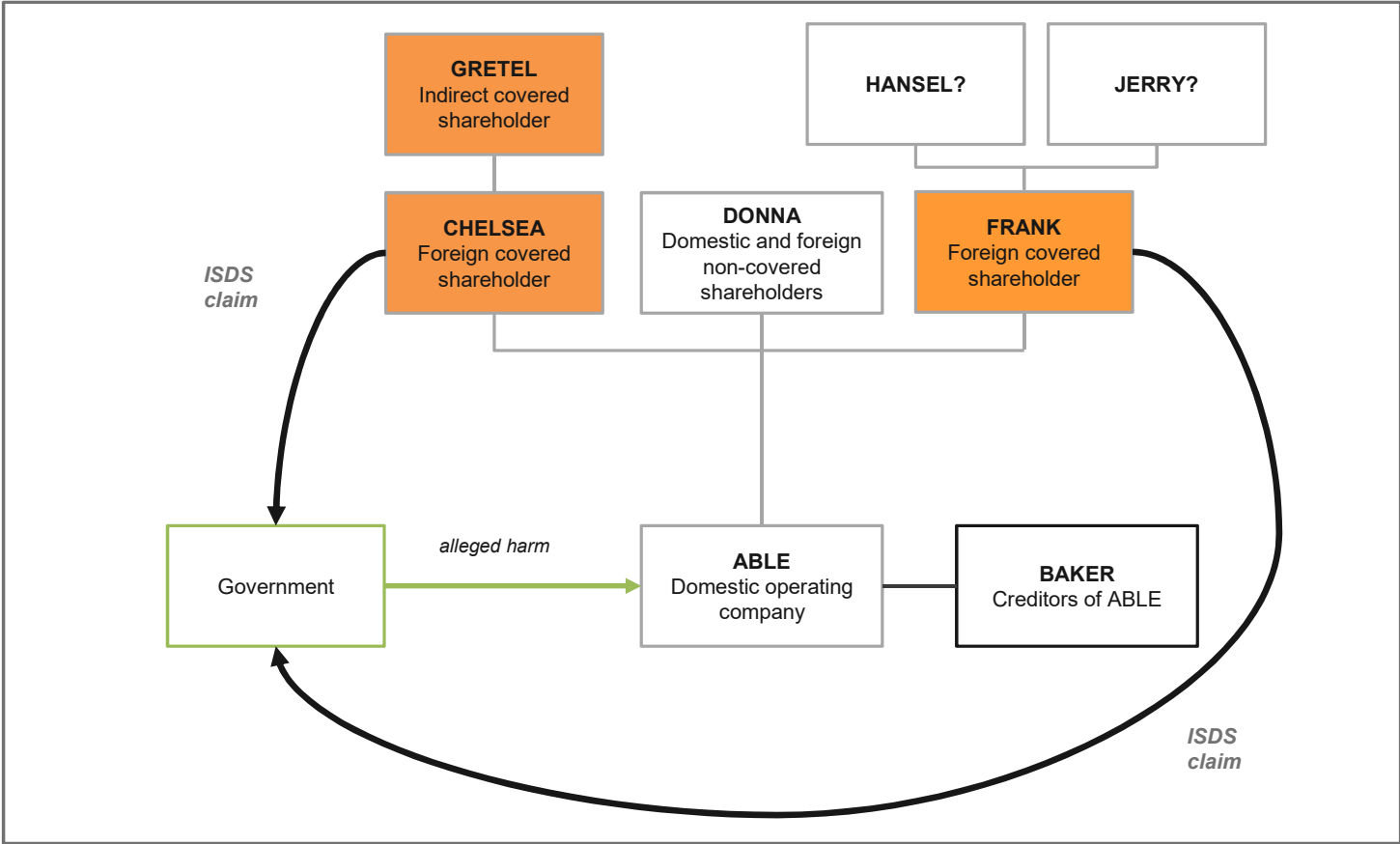


## ISDS: Reflective Loss Claim



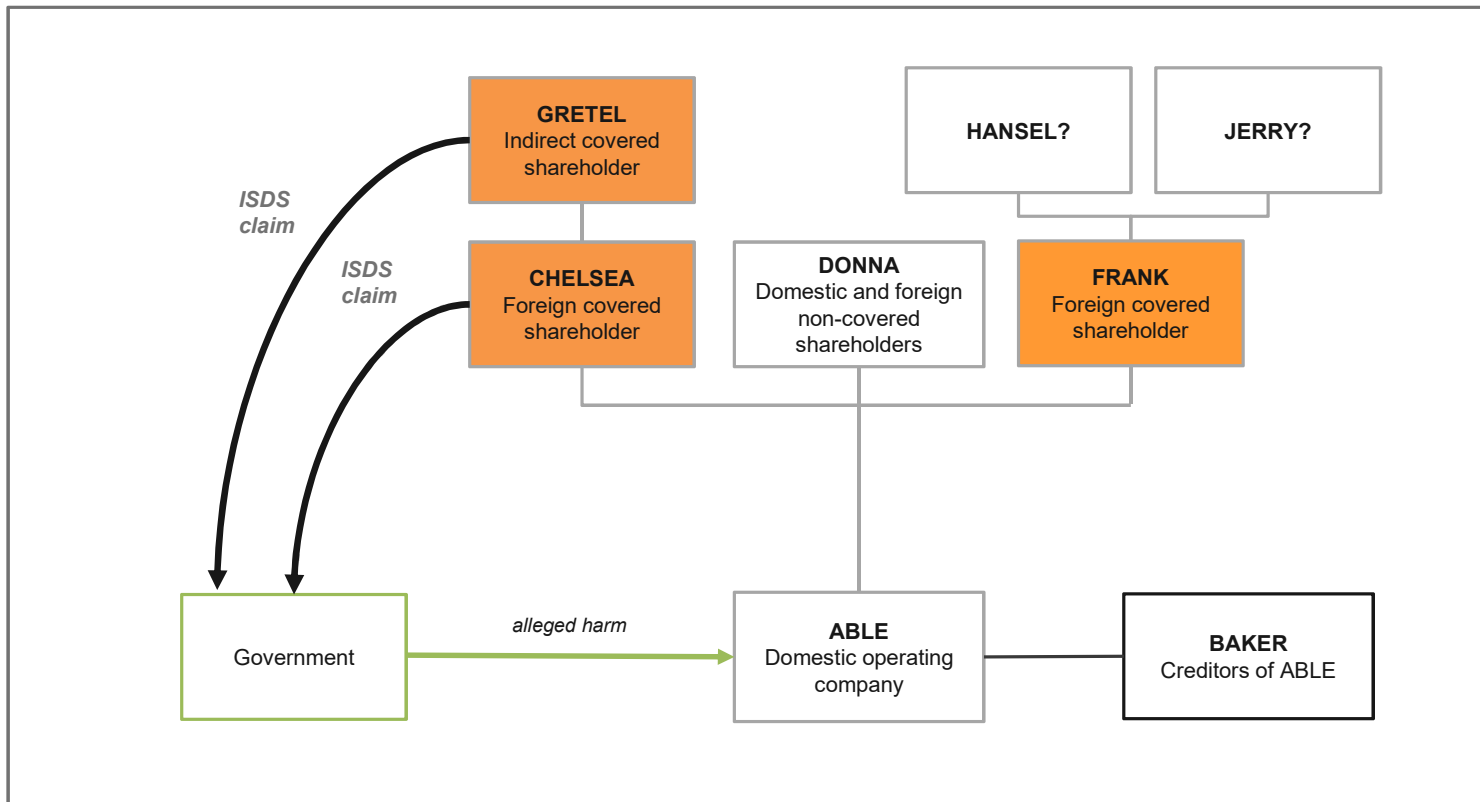


# ISDS: Multiple Reflective Loss Claims – Unrelated Entities



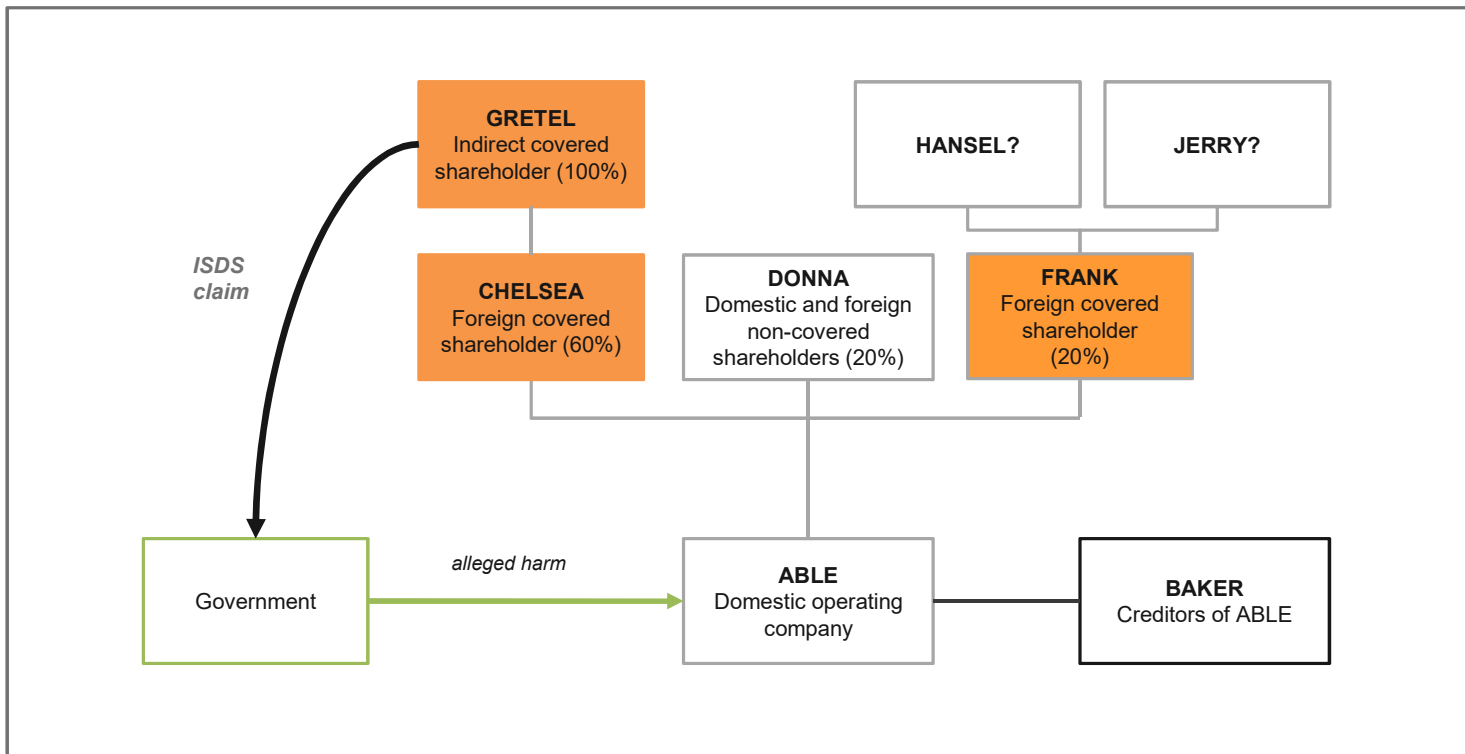


## ISDS: Multiple Reflective Loss Claims – Related Entities



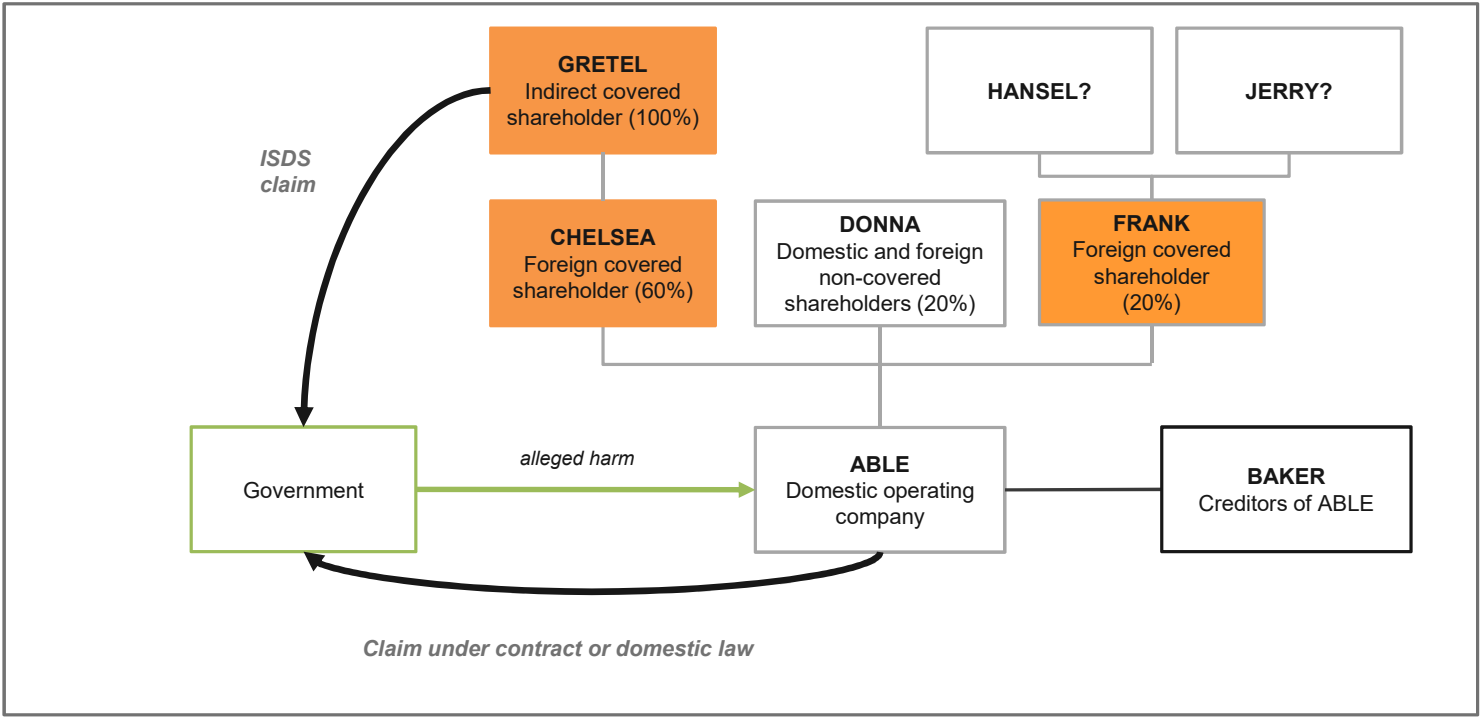


# ISDS: Potential Claims 1





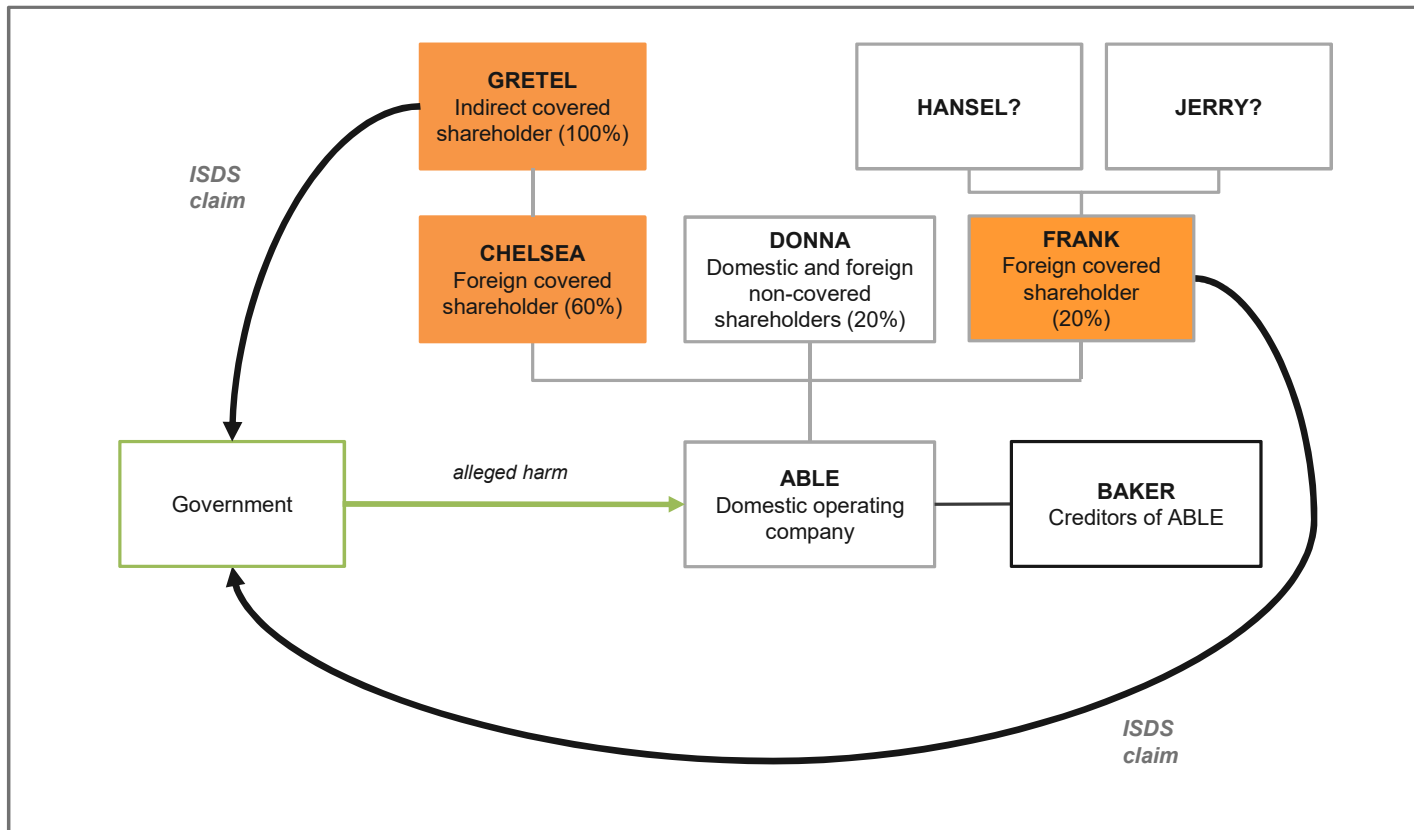
# ISDS: Potential Claims 2





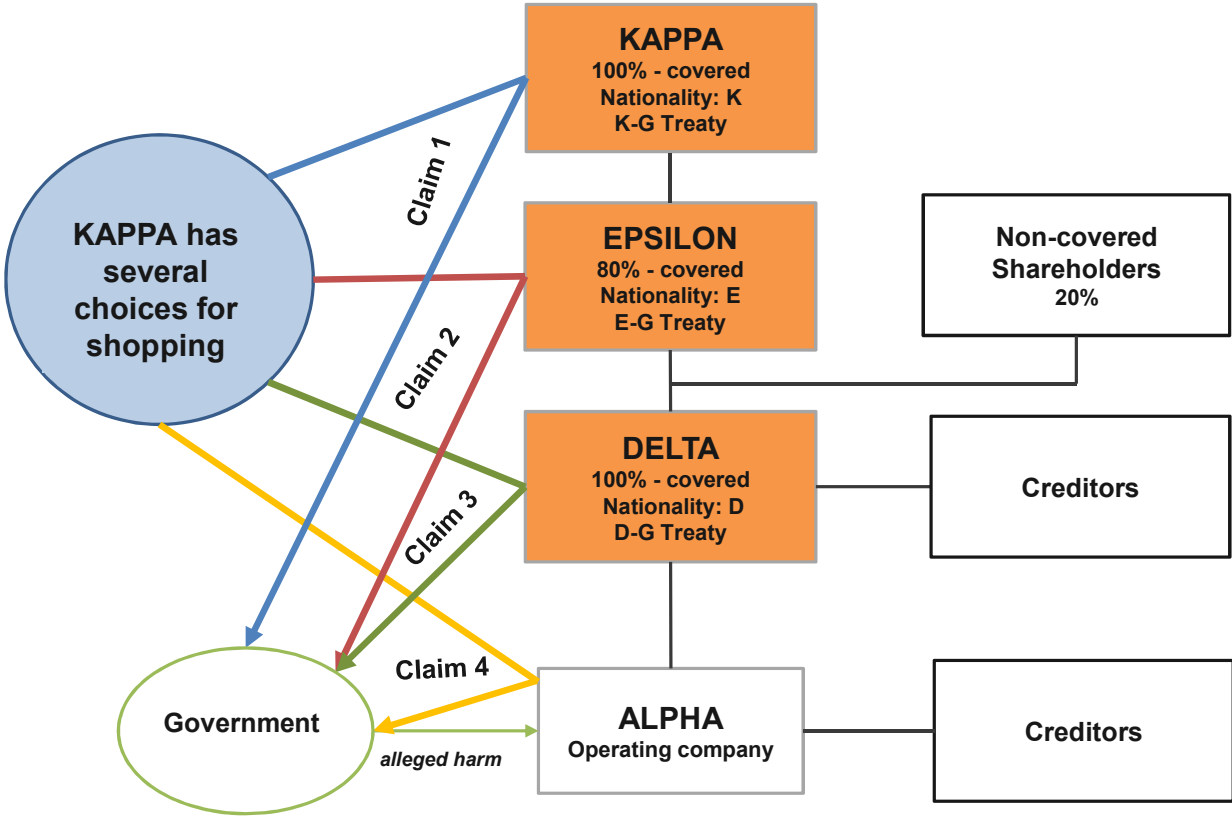


## ISDS: Potential Claims 3



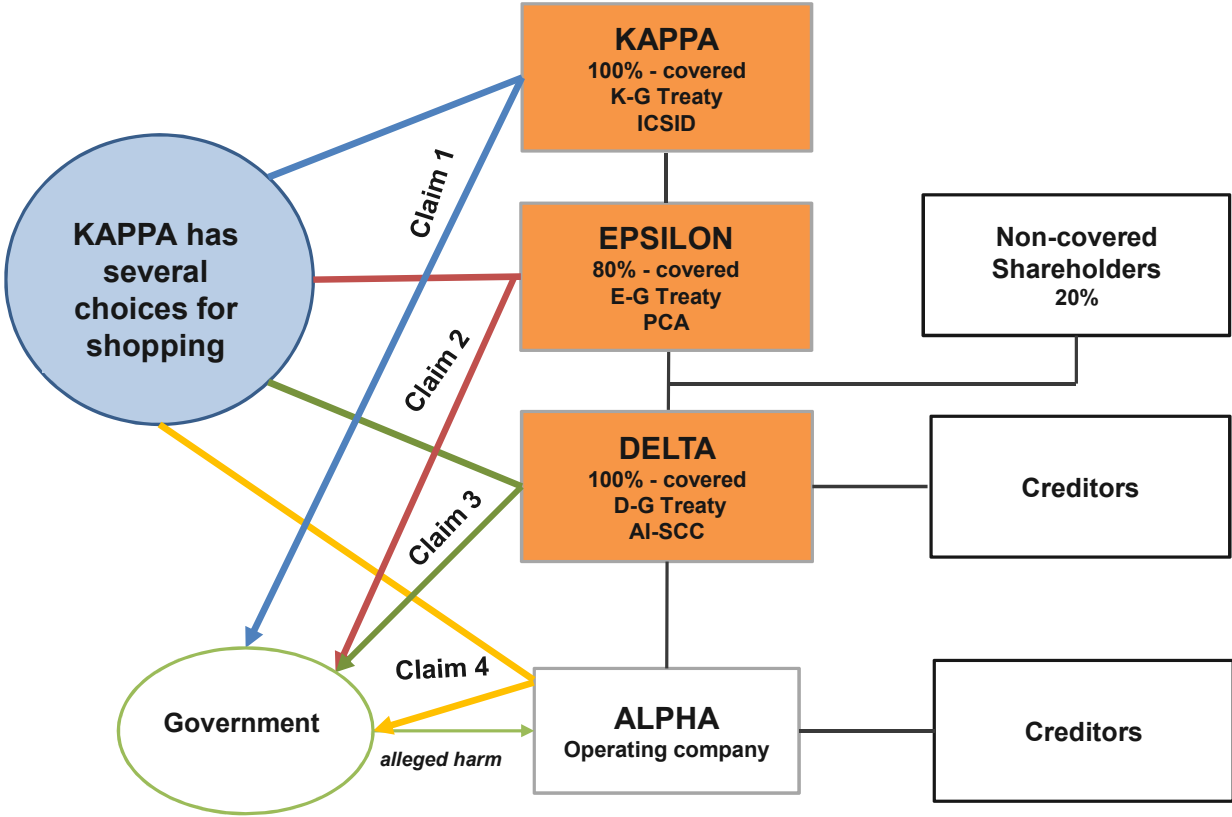


# ISDS: Treaty Shopping Using Attribution of Reflective Loss Claim(s)



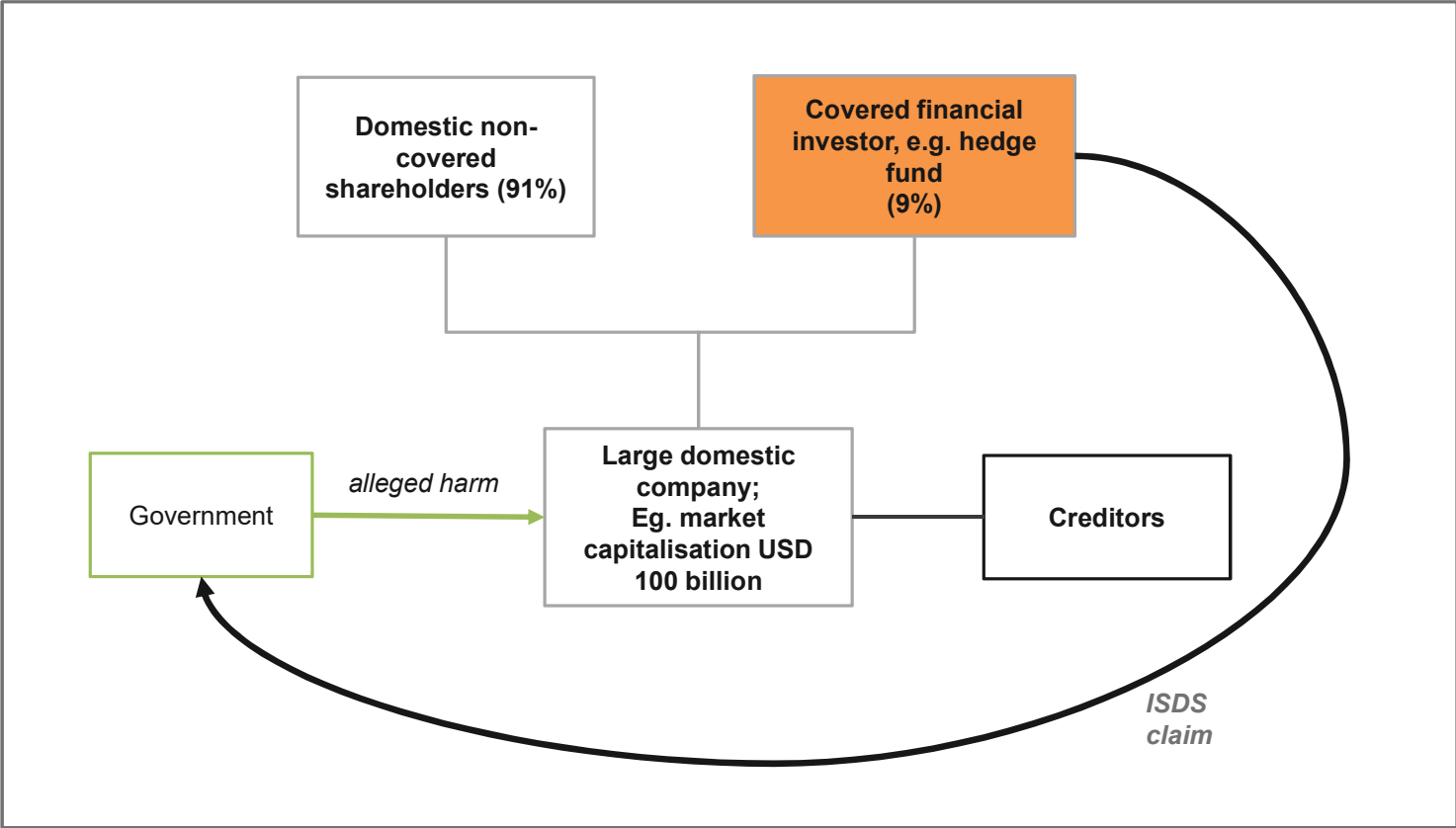


# ISDS: Forum Shopping Using Attribution of Reflective Loss Claim(s)



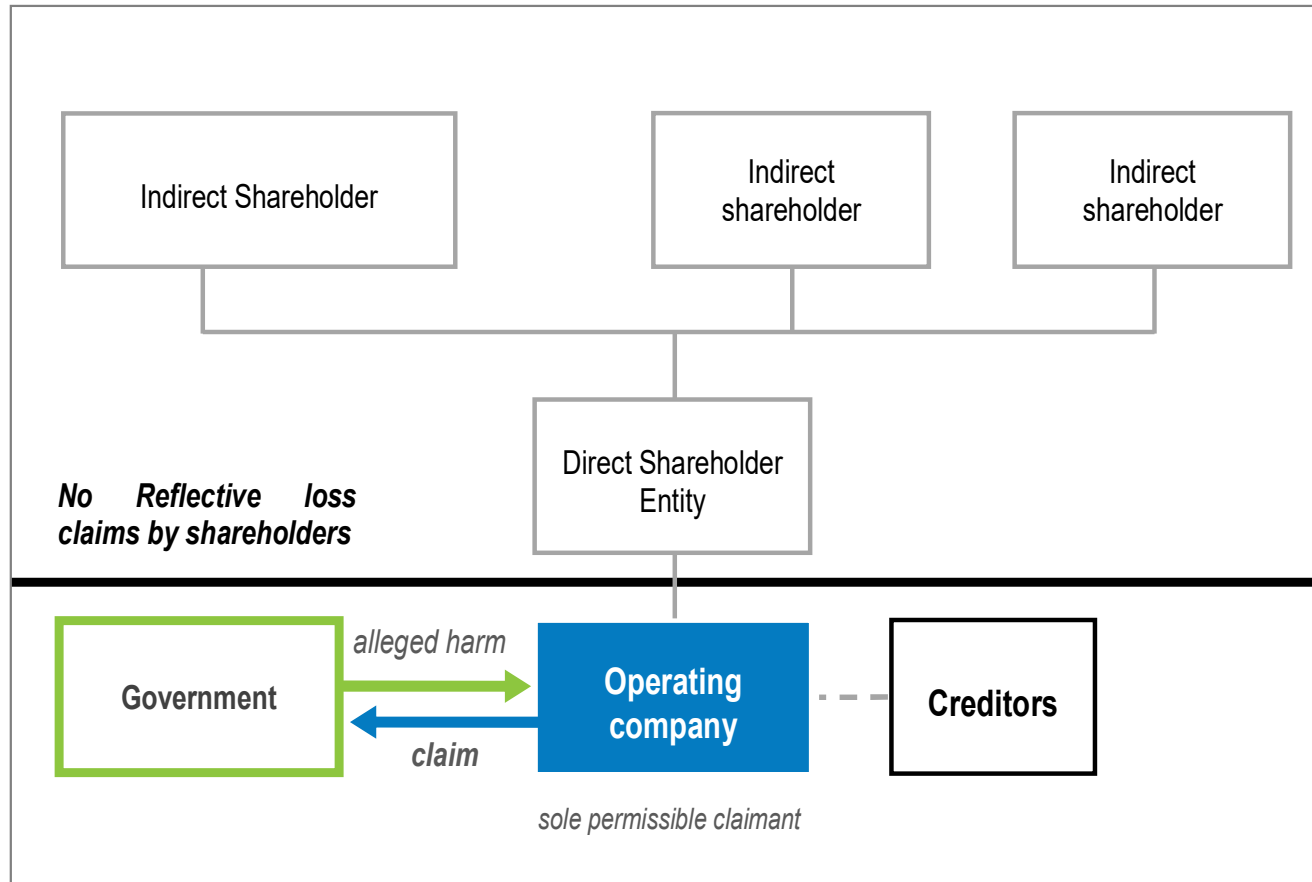


# ISDS: Minority Shareholder in Large Domestic Company



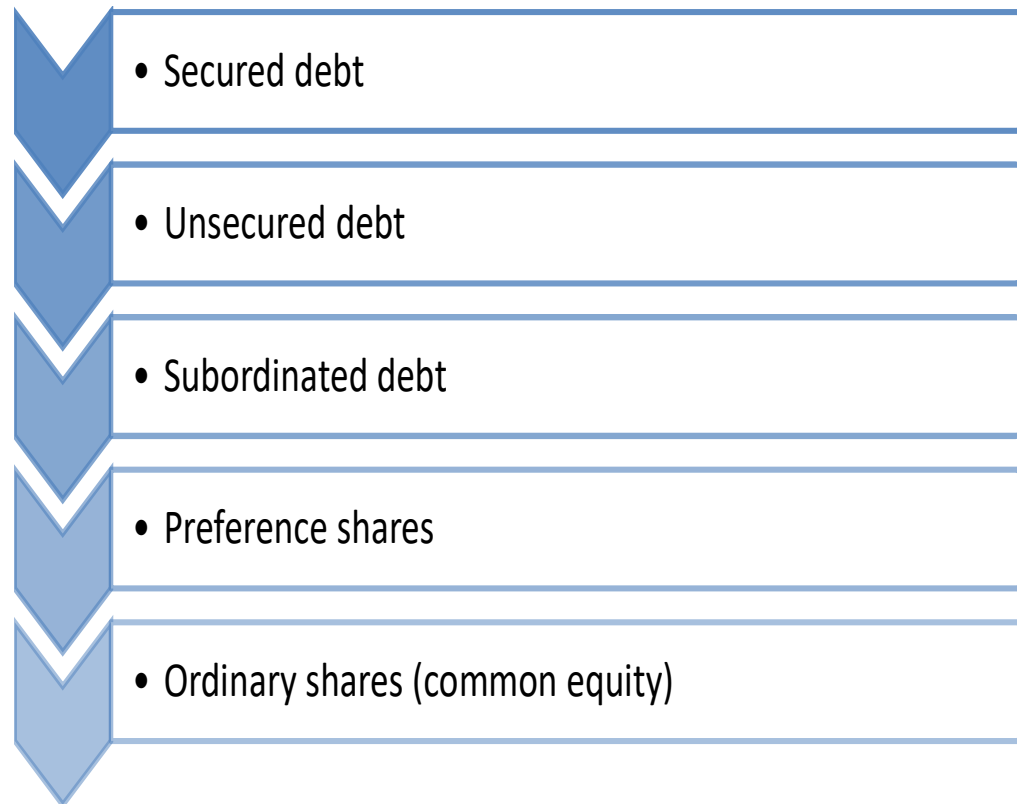


## Domestic Law: “No Reflective Loss” principle bars shareholder claims for reflective loss





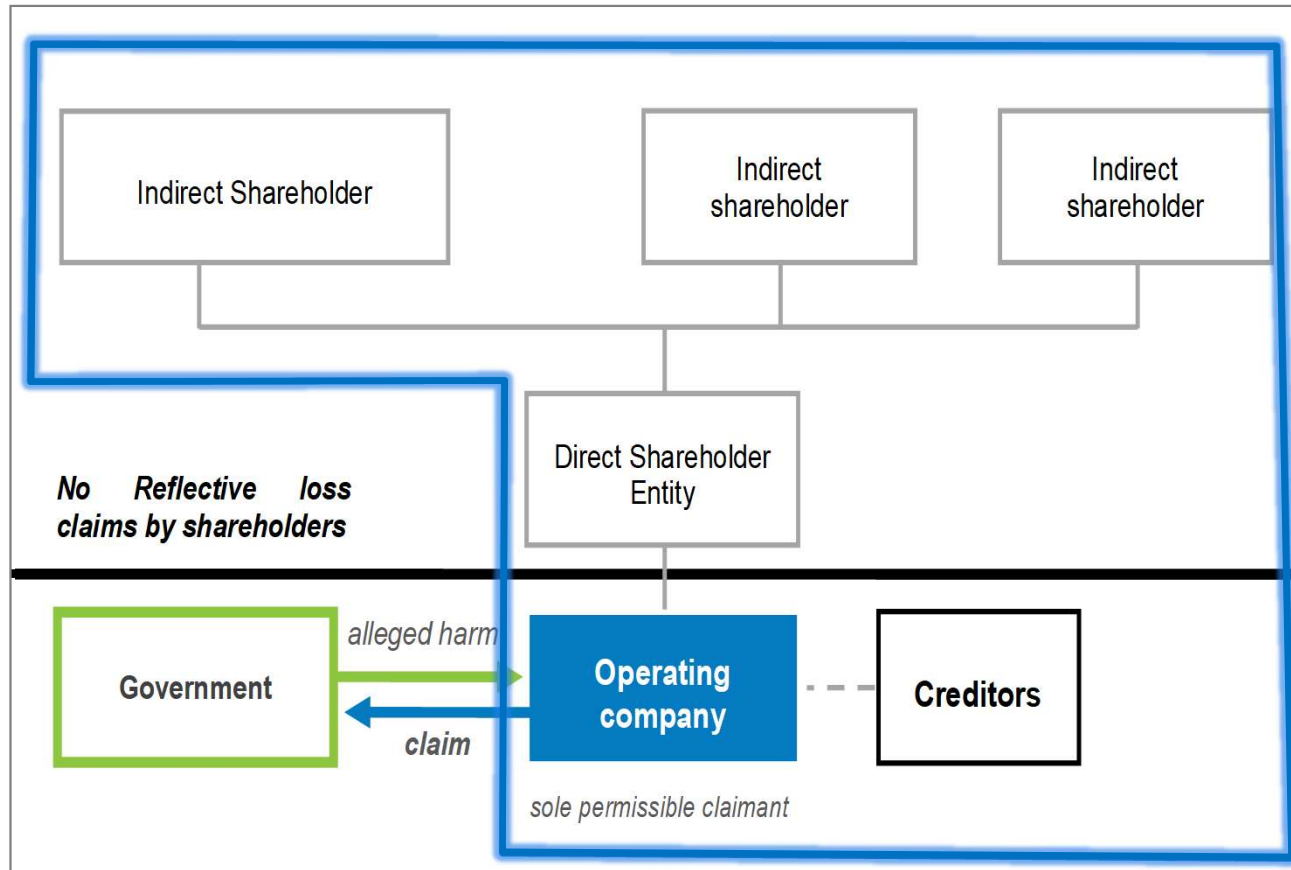
## Corporate finance: repayment rank order



\* Source: Prof. Eilís Ferran, "Reflective loss", presentation at the OECD, 16 October 2013.

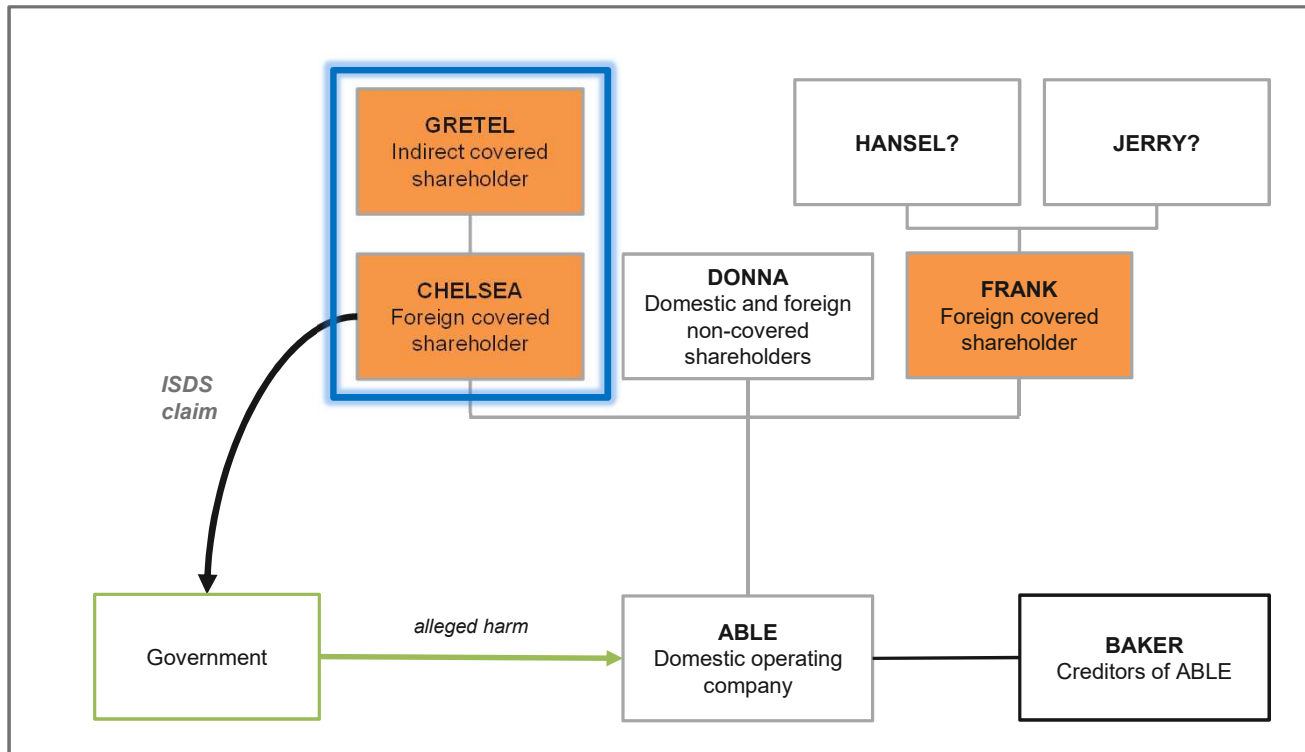


## Domestic Law: Who is Protected? – All Investors





## ISDS Reflective Loss Claim: **Who is Protected?\***

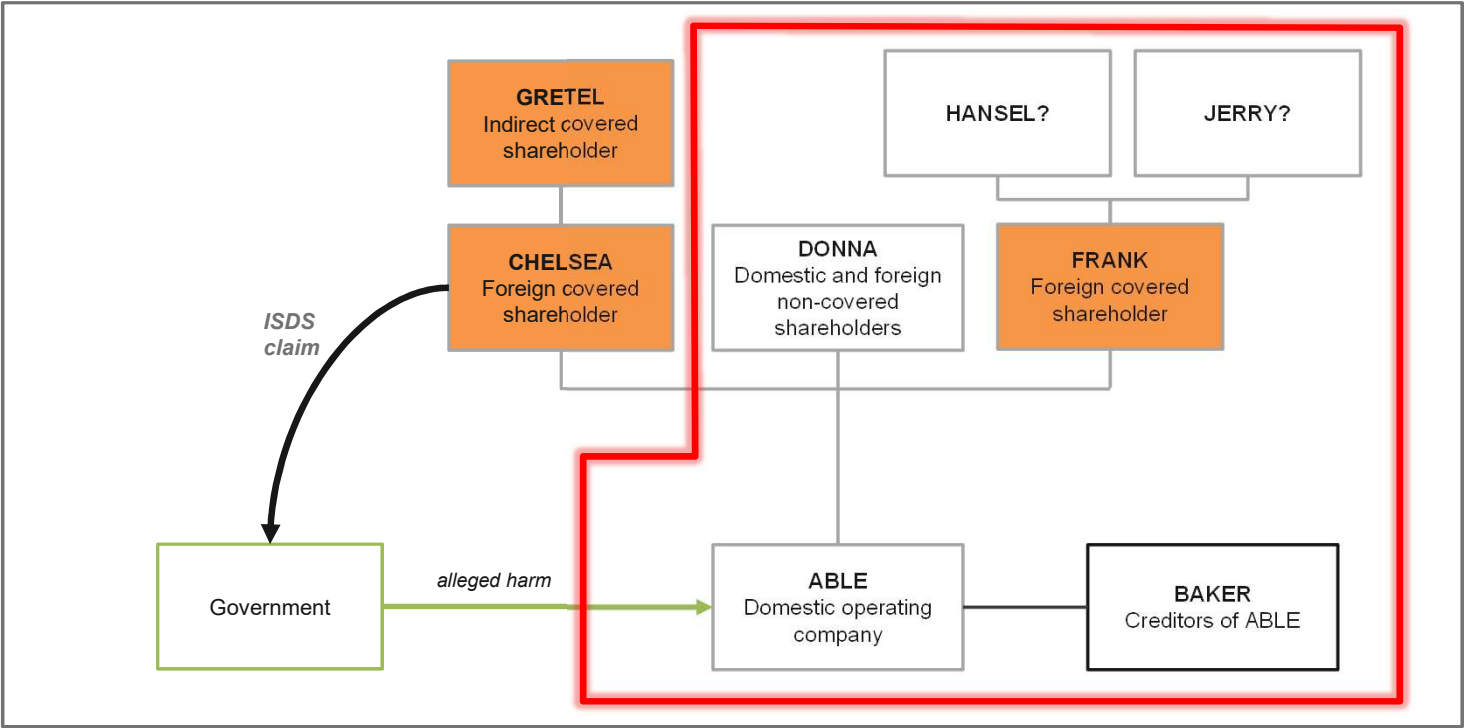


\* Note: This slide and the next slide have been corrected from the versions discussed at the side meeting. Frank's treaty coverage, which was inadvertently omitted, has been restored. Frank is not protected by the claim by Chelsea. It may bring its own ISDS claim if its individual loss is significant; this would generate multiple claims for the government and high costs while still leaving investors unprotected. Only a company claim protects all investors. On the categories of excluded and potential claimants for reflective loss in ISDS and claim incentives, see Gaukrodger (2013b), pp. 47-48, <http://dx.doi.org/10.1787/5k3w9t44mt0v-en>.



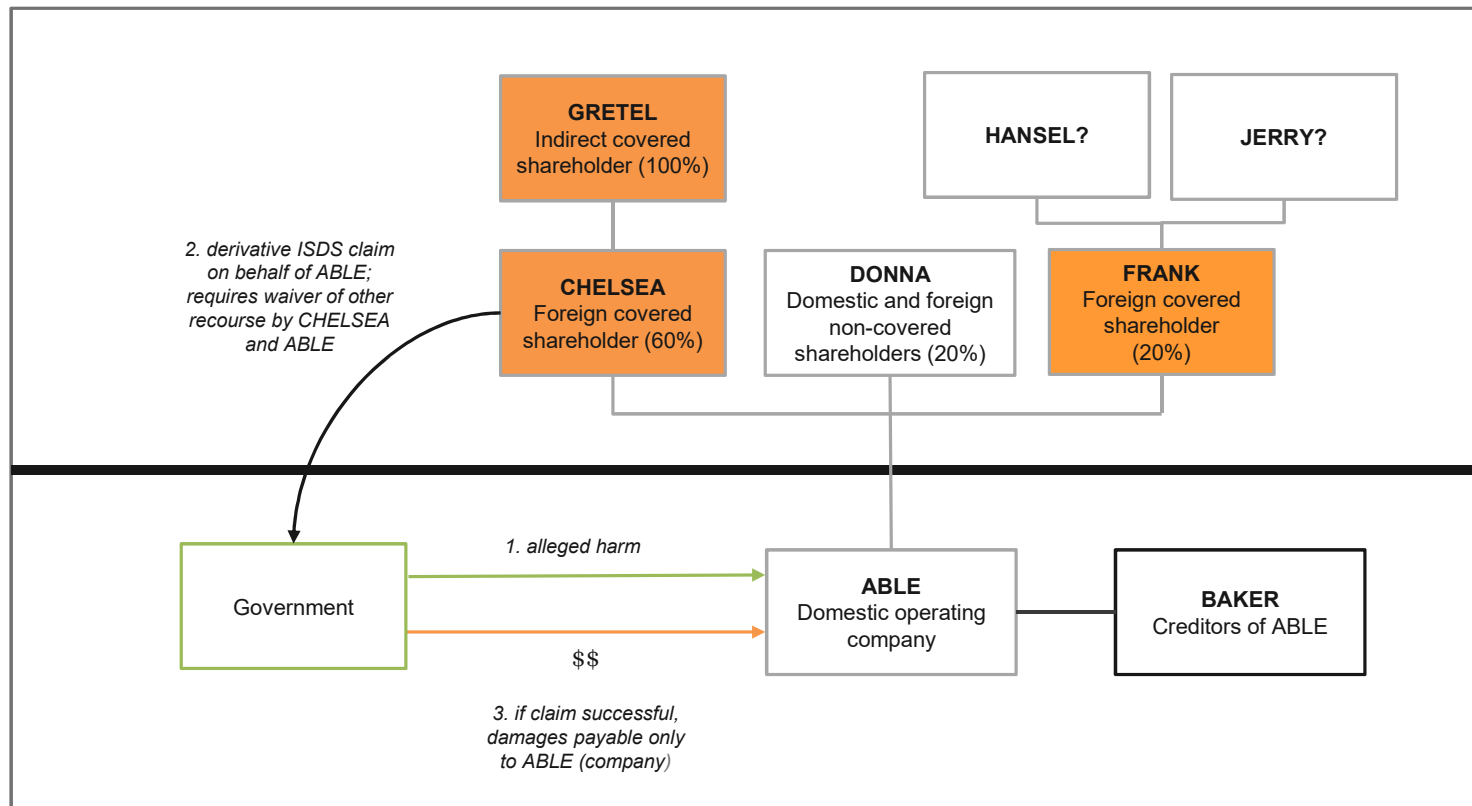


# ISDS Reflective Loss Claim: **Who is not Protected?**



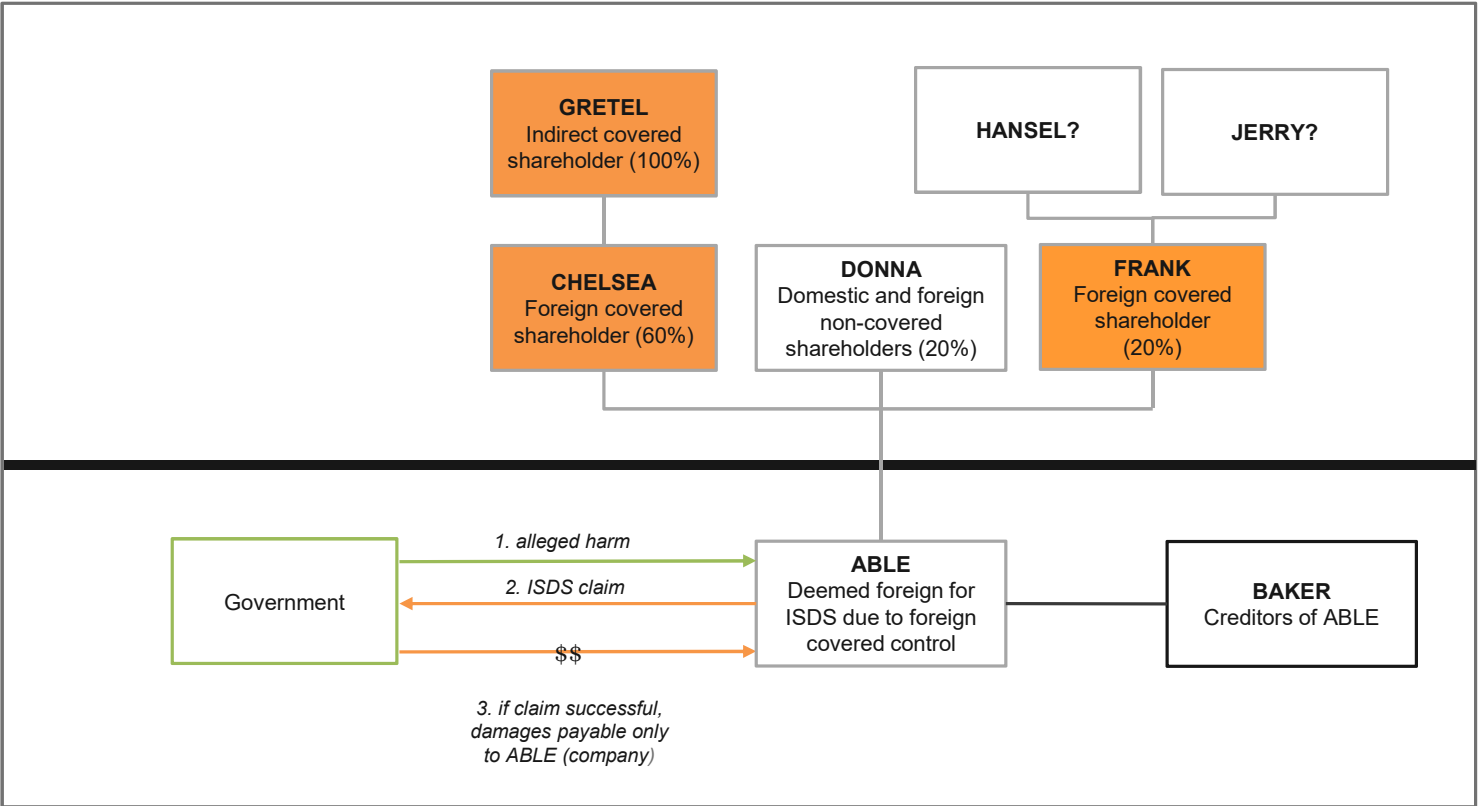


## ISDS: NAFTA-style Derivative Claim





# ISDS: Deemed Foreign Company Claim





## Links

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Gaukrodger, D. (2013), “Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency”, OECD Working Papers on International Investment, 2013/03. <http://dx.doi.org/10.1787/5k3w9t44mt0v-en>.

Gaukrodger, D. (2014a), “Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law”, OECD Working Papers on International Investment, 2014/02. <http://dx.doi.org/10.1787/5jz0xvngmr3-en>.

Gaukrodger, D. (2014b), “Investment Treaties and Shareholder Claims: Analysis of Treaty Practice”, OECD Working Papers on International Investment, 2014/03. <http://dx.doi.org/10.1787/5jxvk6shpvs4-en>.

OECD (2016), “The impact of investment treaties on companies, shareholders and creditors”, OECD Business and Finance Outlook 2016, Chapter 8. <http://oe.cd/1Zv>.

OECD (2018), Treaty Shopping and Tools for Reform, Investment Treaty Conference materials, pp. 11-15, figs. 1-3. <http://oe.cd/TS-analysis>.

UNCITRAL (2019), “Possible reform of investor-State dispute settlement (ISDS): Shareholder claims and reflective loss. Note by the Secretariat”, A/CN.9/WG.III/WP.170, 9 August 2019. <https://undocs.org/en/A/CN.9/WG.III/WP.170>.

Arato, J. et al (2019), “Reforming Shareholder Claims in ISDS”, Academic Forum on ISDS Working Paper 2019/9. [http://bit.ly/ISDS\\_AF\\_SRL\\_2019](http://bit.ly/ISDS_AF_SRL_2019)



## Contact

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