authoritative—albeit, formally speaking, not binding—explanation of the legal framework applicable to the Israeli occupation of the OPT and of the consequences of relevant violations. As demonstrated by individual opinions, unpersuasive points are likely due to the need to reach a majority in a bench where judges had diverging views on some relevant issues. Although the findings of the Court will likely influence the way in which the Israeli occupation is addressed in diplomatic circles, it is not for the ICJ to solve all the complex legal and non-legal problems pertaining to the Israeli-Palestinian conflict. Correctly, the Court indicates that political organs of the UN have the responsibility to ensure the end of the Israeli occupation and the realization of Palestinian self-determination, as well as to guarantee a peaceful and stable coexistence between Israel and Palestine. These are extremely difficult goals to achieve. However, any failure in this regard should not be attributed to the ICJ: the Opinion, on its own, is not an instrument to solve the Israeli-Palestinian conflict or part of it, but rather, it is an important parcel of a more complex and composite process involving multiple states and international organizations, largely governed by political actors rather than by international judges.

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WESTMORELAND MINING HOLDINGS LLC v. GOVERNMENT OF CANADA, Case No. UNCT/20/3. Final Award. *At* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/20/3.
International Centre for the Settlement of Investment Disputes, Jan. 31, 2022.

The arbitral tribunal in *Westmoreland v. Canada* (*Westmoreland*), constituted under the North American Free Trade Agreement (NAFTA),[1] addressed the novel question of "whether the investor at the time the challenged measures are adopted or maintained must be the same entity as the investor at the time the arbitration is commenced" (para. 195). It answered the question in the affirmative and, consequently, decided that it lacked "jurisdiction *ratione temporis*" over the claimant's claims. This decision is significant for international dispute resolution and, particularly, for investor-state dispute settlement, due to the novelty of the issues it addressed, its approach to arbitral jurisdiction in its temporal dimension and the influence its findings might have on future investor-state arbitrations.

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[1] North American Free Trade Agreement, Dec. 17, 1992, 32 ILM 289 (1993).

The case arose out of a dispute in which Westmoreland Mining Holdings, LLC (Westmoreland) contested the decisions by the Canadian province of Alberta (Challenged Measures) both to phase out coal-fired power plants by 2030 (Climate Leadership Plan) and to deprive Westmoreland of payments made by Alberta to other coal-fired power plants expected to operate beyond 2030. The payments were meant to avoid stranding the assets of those plants and to allow for their transition into other fuel sources (Transition Payments) (paras. 80, 82). Westmoreland argued that, because Alberta's Climate Leadership Plan sought to reduce greenhouse gas emissions twenty-five years earlier than is required under federal regulations, it disregarded Westmoreland's legitimate expectations. In addition, Westmoreland argued, Alberta's decision not to accord Transition Payments to Westmoreland was discriminatory, since only certain Canadian coal-fired power plants received Transition Payments. The claims were brought under NAFTA Articles 1102 and 1105, which provide for national treatment and the minimum standard of treatment, respectively.

According to Canada, Westmoreland's coal mines were deemed ineligible to receive Transition Payments because the Climate Leadership Plan was exclusively meant to "phase out greenhouse gas emissions and air pollutants produced by coal-fired electricity generation" (para. 78). In particular, Canada submitted, "Transition Payments were made in respect of . . . coal-fired [electricity] generation units and not in respect of any interest in any coal mine" (para. 82). Because Westmoreland's coal mines were not electricity generation units as such, Canada contended, they were not eligible for Transition Payments.

The jurisdictional issues confronted by the tribunal mainly derived from the claimant's complex corporate structure. Westmoreland, a U.S. entity incorporated in Delaware, submitted claims on its own behalf, under NAFTA Article 1116 (concerning a "Claim by an Investor of a Party on Its Own Behalf") (para. 92). It also submitted claims under NAFTA Article 1117 (allowing for a "Claim by an Investor of a Party on Behalf of an Enterprise") (*id.*) on behalf of two Canadian companies (Canadian Enterprises) incorporated in Alberta: Westmoreland Canada Holdings Inc. (Westmoreland Canada) and Prairie Mines & Royalty ULC (Prairie). When Canada adopted the Challenged Measures, Prairie was directly held by Westmoreland Canada, which, in turn, was owned by Westmoreland Coal Company, a U.S. entity incorporated in Delaware (Westmoreland Coal) (para. 75).

In 2018, Westmoreland Coal contested the Challenged Measures (2018 NAFTA Claim). After Westmoreland Coal went bankrupt, Westmoreland was incorporated by its major creditors as part of a restructuring arrangement. Pursuant to this arrangement, the 2018 NAFTA Claim was acquired by Westmoreland. Westmoreland submitted its NAFTA claim in July 2019, following Westmoreland Coal's withdrawal of its 2018 NAFTA Claim. Westmoreland Coal, despite undergoing dissolution, still existed when the tribunal held its jurisdictional hearing.

Canada objected to the *Westmoreland* tribunal's jurisdiction on three grounds: (1) Westmoreland was not a protected investor at the time of the alleged breaches; (2) Westmoreland did not itself suffer any loss, thus failing to make out a *prima facie* damages claim; and (3) the measures that Westmoreland challenged did not "relate to" Westmoreland or its investments, as contemplated by NAFTA Article 1101(1), concerning the "Scope" of NAFTA Chapter 11. These jurisdictional objections, termed by the *Westmoreland* tribunal

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"temporal objections," (para. 101) formed the main object of that tribunal's Final Award, which ruled entirely in Canada's favor.

* * * *

Consent to Arbitration and Arbitral Jurisdiction Under NAFTA: Jurisdiction Ratione Personae *or* Ratione Temporis?

The jurisdictional objections concerned consent to arbitration and, in particular, whether temporal elements of the dispute (jurisdiction *ratione temporis*), as opposed to the claimant's status (jurisdiction *ratione personae*), implied the claimant's claims fall within the scope of arbitral jurisdiction. That consent to arbitration was at stake was clear: in the *Westmoreland* tribunal's view, "[i]t would not be reasonable to infer that the NAFTA Parties intended to *subject themselves to arbitration* in the absence of any *significant connection* between the particular *measure* and the *investor or its investments*" (para. 213 (emphasis added)). Yet, how to best conceptualize such a "significant connection" and whether its arguable absence deprived the *Westmoreland* tribunal of jurisdiction *ratione temporis* pose controversial issues.

The *Westmoreland* tribunal considered that such a significant connection was indeed missing as between Westmoreland and the Challenged Measures. To justify its findings, it elaborated on the nature and functions of NAFTA Article 1101(1): not only is NAFTA Article 1101(1) "*describing*" NAFTA's scope of application (descriptive role) but also setting out "the *requirements* . . . to be *entitled to* the *protection* provided by Chapter Eleven" (para. 197 (emphasis added)) (prescriptive role). Furthermore, it stated, NAFTA Article 1101(1)'s prescriptive role implies that "[a]ccess to [NAFTA] Chapter Eleven . . . is thus restricted only to *those entities which* can satisfy the provisions of subparagraphs 1101(1)(a)–(c)" (*id.* (emphasis added)). Pursuant to these provisions, NAFTA Chapter 11 "applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party" (para. 105). In particular, turning to Westmoreland's claims, it concluded, the prescriptive role of NAFTA Article 1101(1) implies that, if Westmoreland is not "the *same entity*" as Westmoreland Coal, "Westmoreland's claim must fail for lack of jurisdiction *ratione temporis*" (para. 194 (emphasis added)).[2] Tellingly, the *Westmoreland* tribunal does not focus on the *fact* that the requirements for entitlement to NAFTA Chapter 11 protection be satisfied by an entity, notably at the time of an alleged breach, choosing to emphasize that entity's *status* of being "the same entity" over a period of time inclusive of the time of an alleged breach, instead. Such status, as arguably required by the prescriptive role of NAFTA Article 1101(1), is variously described by the *Westmoreland* tribunal.[3]

The *Westmoreland* tribunal's emphasis on the claimant's aforementioned status as basis for its finding of lack of jurisdiction *ratione temporis* over Westmoreland's claims is evidenced by

[2] Further stating that "it will be necessary to determine whether Westmoreland is the same entity as WCC [Westmoreland Coal], albeit in a new corporate form."

[3] For instance, "status" is sometimes employed by the *Westmoreland* tribunal. Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, para. 91 (Oct. 11, 2002) (discussed in para. 209 (noting its interpretation of NAFTA Article 1101(1) was consistent with the *Mondev* tribunal's view that an investor need not "maintain a *continuing status* as an investor at the time the arbitration was commenced" (emphasis added)).

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that tribunal's confusing use of the noun "jurisdiction." Very often, the *Westmoreland* tribunal uses the noun "jurisdiction" to refer to a *claimant's ability* to bring a claim (normally known as "standing" or *jus standi*) rather than to the *tribunal's power* to hear that claim. This confusion is evident in the tribunal's conclusion that "only *the party* which owned the investment at the time of the alleged treaty breach *has* jurisdiction *ratione temporis* to bring a claim" (para. 209 (emphasis added)).[4] However, the tribunal sometimes also uses the noun "standing" to capture this idea. Most notably, in its Final Award's operative part, it declared, "Westmoreland *does not have standing* to bring" the claims at issue (para. 252(1) (emphasis added)). These numerous uses of "jurisdiction," as a claimant's *ability*, are concomitant with less frequent—though correct—references to the lack of or possession of jurisdiction on the part of the tribunal, as seen in its conclusion that "*the Tribunal does not have jurisdiction* over Westmoreland's claim" (para. 231 (emphasis added)).

In sum, the *Westmoreland* tribunal's erratic uses of the noun "jurisdiction" not only are often incorrect but also inapposite to substantiate its findings; on the contrary, they convey that a claimant's "ability" to bring claims is *inextricably connected* to its status and other qualities—normally subsumed under jurisdiction *ratione personae*, as opposed to jurisdiction *ratione temporis*.

Treaty Interpretation and Its (Lack of) Textual Basis: "Reading" Jurisdictional Barriers "into" NAFTA?

The basis of the Westmoreland tribunal's jurisdictional findings was articulated in terms of the aspects discussed above notwithstanding the fact that "the text of [NAFTA] Article 1101(1) *does not expressly address*" these aspects (para. 199 (emphasis added)). Having made this observation, the question before the *Westmoreland* tribunal could simply have been, in its own plain words, "whether Westmoreland *meets* the NAFTA *jurisdictional requirements*" (para. 228 (emphasis added)). However, its approach focused on the claimant's aforementioned status. Indeed, it enquired "whether the investor . . . must *be* the *same* entity" both when a breach occurs and when arbitral proceedings arising out of that breach are commenced (para. 195 (emphasis added)). Hence, emphasis is placed on a claimant's *continuous status* as an investor meeting certain requirements over a period of time delimited by these two "critical" dates.[5] Yet, only the date of commencement of (arbitral) proceedings is typically relied on to establish jurisdiction. And, where consent to arbitration is confined to breaches of a treaty, as is the case with consent to arbitration under NAFTA, it is that treaty's date of entry into force, rather than the date of a breach of obligations thereunder, which tends to be used to determine jurisdiction *ratione temporis*.[6]

[4] Interpreting NAFTA Articles 1101(1), 1116(1), and 1117(1).

[5] One of its members has argued in favor of the date of breach as part of the requirement that an investor holds a "relevant nationality." ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 292, para. 545 (2009) (arguing this "is implicit in the architecture of [an] investment treaty"). However, even is this proposition were accepted, it would only concern one among other applicable "temporal requirements *ratione personae*," instead of being an element of jurisdiction *ratione temporis* proper. *See* Lucy F. Reed & Jonathan E. Davis, Ratione Personae*: Who Is a Protected Investor?*, *in* INTERNATIONAL INVESTMENT LAW 614, 633, para. 46 (Marc Bungenberg et al. eds., 2015).

[6] *Mondev*, *supra* note 3, paras. 57–75, 154, 156; *see also* CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 208, para. 5.169 (2d ed. 2017) ("at issue in the doctrine of *ratione temporis* is the principle of non-retroactivity . . . of treaties"). A *Westmoreland*

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Invoking Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the *Westmoreland* tribunal professed to interpret NAFTA based on its text's "ordinary meaning."[7] Like other NAFTA tribunals, it relied on grammatical features of the interpreted provisions.[8] In order to construe NAFTA Article 1101(1), it sought "further guidance" from NAFTA Articles 1116 and 1117 (para. 199). In its opinion, NAFTA Article 1116's "[t]itle . . . suggests the claim must be brought by the entity which was affected by the alleged treaty breach" (para. 200). Also, it focused on NAFTA Article 1116(1)'s final part (*id.*). In particular, it emphasized the use of the definite article "the" (*id.*): by contrast to "an," it reasoned, the "use of the word 'the' . . . directs . . . to the clear understanding that the investor which brings the claim must be 'the' investor which has suffered loss" (*id.*). It further noted that other NAFTA arbitral tribunals agreed with this approach, such as the *Gallo v. Canada* tribunal, which had similarly "specifically referred to 'the' investor, not 'an' investor."[9] Hence, the *Westmoreland* tribunal concluded, two jurisdictional requirements must be satisfied by an investor bringing a claim under NAFTA Article 1116(1) (*id.*):[10] that "it held the investment at the time of the alleged breach" (*id.*)[11] and "must itself have suffered loss or damage arising out of that breach" (*id.* (emphasis removed)).

A claimant's *continuous status* as an "investor," though involving temporal elements, was a predominant factor in the *Westmoreland* tribunal's analysis. The *Westmoreland* tribunal considered "whether the reference to 'investor[s] of another Party' in Article 1101(1)(a) is a reference to the same 'investor[s] of another Party' as . . . referred to in Article 1101(b) [*sic*]" (para. 199). In short, it enquired, "[w]hat is meant by 'the' investor?" (para. 200). If the above "reference(s)" to "investor" are identical, it reasoned, the claimant "must show the Challenged Measures related to Westmoreland itself as well as to the Canadian Enterprises" (para. 199). This proposition was made notwithstanding its acknowledgment that this question "is less clear" than that concerning NAFTA Article 1101(1)'s role as a "gateway" (*id.*). The lack of clarity in this regard has also been pointed out by the *Tennant v. Canada* tribunal (*Tennant* tribunal):[12] while under "[NAFTA] Article 1116(1) [it] is clear that the claimant-investor must be claiming on its behalf and must itself have suffered loss or damage arising out of the alleged breach," the *Tennant* tribunal opined, whether an "investor of a Party" is the same as "investor[s] of another Party" under paragraphs (a) and (b) of NAFTA Article 1101(1), respectively, "is less clear."[13]

This uncertainty springs from NAFTA's text itself, lacking any relevant express provisions (para. 199 (emphasis added)).[14] Indeed, the claimant's aforementioned status and related

tribunal's member has defined jurisdiction *ratione temporis*, insofar as the "[c]onsent of host state" is concerned, as a matter of "[w]hen did the obligations *enter into force*?" DOUGLAS, *supra* note 5, 144, para. 301 (referring to the "[t]emporal (*ratione temporis*) . . . [a]spect of the scope of adjudicative power," that is jurisdiction *ratione temporis* (emphasis added)).

[7] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 (invoked in para. 196).

[8] B-Mex, LLC v. United Mexican States, ICSID Case No ARB(AF)/16/3, Partial Award, para. 145 (July 19, 2019) (discussed in para. 206).

[9] Vito G. Gallo v. Government of Canada, PCA Case No. 55798, Award, para. 328 (Sept. 15, 2011) (discussed para. 202).

[10] Noting NAFTA Article 1117(1) "contains the same requirements."

[11] "And is not bringing the claim on another's behalf."

[12] Tennant Energy LLC v. Government of Canada, PCA Case No. 2018-54, Final Award (Oct. 25, 2022).

[13] *Id.*, para. 428.

[14] *See also id.*, para. 426.

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temporal elements articulated in the *Westmoreland* tribunal's analysis of jurisdiction *ratione temporis* are not the object of NAFTA's express rules. As the *Tennant* tribunal observed regarding the "connections" the *Westmoreland* tribunal established between various jurisdictional elements, "[t]he text of the NAFTA does not make these *connections of temporality and directness* on its face."[15] Indeed, it argued, "neither [NAFTA] Articles 1101, 1116, nor 1117 expressly states that the *claimant must have held the investment at the time of the alleged breach*."[16] In addition, it reasoned, NAFTA Articles 1101, 1116, and 1117 do not "state that the wrongful measures must have *directly* affected the claimant."[17] Recalling the above "connections of temporality and directness" are absent in NAFTA's text, it further considered, NAFTA "could have been drafted to do so clearly."[18] Indeed, since NAFTA Article 1101 expressly delimits NAFTA arbitral tribunals' jurisdiction *ratione loci*,[19] NAFTA parties could have equally restricted jurisdiction *ratione materiae* or *ratione temporis* in the ways asserted by the *Westmoreland* tribunal.

To sum up, since the requirements postulated by the *Westmoreland* tribunal lack a textual basis in NAFTA, as the *Tennant* tribunal appositely put it, NAFTA tribunals would be "asked to add to the text of the Treaty in making such a finding."[20] Hence, the *Westmoreland* tribunal merely professed to apply VCLT Article 31.

Directness of Challenged Measures and Claimant's Existence and Status as Maker of Investment and Directly Injured Party

The *Westmoreland* tribunal's jurisdictional findings are predominantly grounded on the claimant's aforementioned status. Such emphasis is further confirmed by two parts of the *Westmoreland* tribunal's jurisdictional findings, requiring the claimant possess the status of both having *directly* made an investment affected by challenged measures (and having assumed risk, including the risk of being subjected to measures such as the Challenged Measures, when making that investment) and having been *directly* injured by those challenged measures.

First, the direct making by a claimant of an investment and the attendant assumption of risk by that claimant was a requirement for establishing jurisdiction *ratione temporis* assessed in Westmoreland's case. Indeed, the *Westmoreland* tribunal held, "Westmoreland must demonstrate that it was itself, Westmoreland, that was *seeking to make the Canadian Investments in relation to which this claim is being brought*" (para. 205 (emphasis added)). As for the requirement of assumption of risk, it started its reasoning by countering the claimant's opposition to interpretations prone "to infer a stipulation where none is express" (para. 201). It rejected the claimant's expert's view that interpreting "NAFTA such that the claimant must have owned or controlled the investment at the time of the alleged treaty breach is . . . not a 'necessary

[15] *Id.* (emphasis added).
[16] *Id.* (emphasis added).
[17] *Id.* (emphasis added).
[18] *Id.*
[19] Bayview Irrigation District and Others v. United Mexican States, ICSID Case No ARB(AF)/05/1, Award, para. 101 (June 19, 2007) (finding a lack of jurisdiction *ratione loci*). *See* Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, *in* INTERNATIONAL INVESTMENT LAW, *supra* note 5, at 1212, 1248, paras. 142–43 ("The third dimension of jurisdiction concerns jurisdiction *ratione loci* . . . Article 1101 of the NAFTA contains an explicit territorial limitation.").
[20] *Tennant*, *supra* note 12, para. 426.

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inference' in circumstances where this requirement could have been spelled out by the NAFTA Parties" (para. 211). Quite the contrary, it held, "the duty on a NAFTA Party to accept certain obligations of investment protection is predicated upon an investor taking the risk of making an investment . . . *an investor must have taken a risk by making an investment* in order to be assured of treaty protection" (para. 201 (emphasis added)). In sum, under its self-styled "*correct* construction of [NAFTA] Articles 1101(1), 1116(1) and 1117(1)," in order "to be entitled to [NAFTA] Chapter Eleven protection, an investor must have accepted risk" (para. 212 (emphasis added)). Yet, its reasoning regarding "risk" may conflate jurisdiction *ratione personae* with jurisdiction *ratione materiae*: the latter normally accounts for "risk" as a requirement stemming from the applicable treaty's definition of "investment,"[21] provided, of course, such a requirement is expressly contained in that treaty.

Secondly, a challenged measure's character as "related to" an investor or its investment and an investor's status as an entity *directly injured* by that measure proves controversial. The *Tennant* tribunal, unlike the *Westmoreland* tribunal, did not imply an investor claiming on its own behalf for losses it suffered itself, on one hand, and an investor to whom a wrongful measure relates, on the other, need be the same entity. Indeed, in the *Tennant* tribunal's opinion, the lack of clarity in NAFTA Article 1101(1) concerned "whether the 'investor of a Party' under Article 1116(1), who brings the claim and who itself suffers loss or damage arising out of the breach, must be the same 'investor[s] of another Party' under Article 1101(1)(a) who the wrongful measures related to."[22] In its view, since a "claim must be submitted by an investor, and the investor who submits the claim must have suffered a loss or damage by reason of a NAFTA breach, in most cases the claimant *will be* the investor who held the investment at the time of the breach."[23] Hence, it framed the identity between the concepts of investor under NAFTA Articles 1101(1)(a) and 1116(1) in terms of *probability* rather than *conceptual necessity*. Furthermore, unlike the *Westmoreland* tribunal, it did not assume that "damage by reason of a NAFTA breach" can only occur "at the time of the breach," so that only an investor having held an investment to which a measure in breach of NAFTA related at the time of that breach has standing to make a claim for that breach. Accordingly, in its opinion, it is necessary to consider the circumstances, if any, "in which a claimant who files a NAFTA claim could also be an investor *who suffered loss* or damage as a result of the alleged breach *without having held the investment* at the time of the alleged breach."[24] In particular, it reasoned, one "cannot exclude the possibility of an investor, whilst not an investor at the time of the breach, *assuming an indirect loss* or damage by reason of or arising from the breach after the breach has occurred."[25] Consequently, it did "not foreclose *the possibility* of an investor who acquires an investment after an alleged treaty breach *to have assumed the loss caused* to the investment by the breach."[26] In particular, such a possibility might include, "*ex hypothesi*, . . . a situation where the investor undertakes significant liabilities caused by the alleged breach to another

[21] Other tribunals have considered that other elements of an investment, such as a "contribution" by an investor, once fulfilled by the "original" investor, can be transmitted to a subsequent investor. *See* Renée Rose Levy and Gremcitel S.A. v. Republic of Peru, ICSID Case No. ARB/11/17, Award, paras. 148, 154 (Jan. 9, 2015).

[22] *Tennant*, *supra* note 12, para. 428.

[23] *Id.* (emphasis in original).

[24] *Id.* (emphasis added).

[25] *Id.*, para. 429 (emphasis added).

[26] *Id.*, para. 438 (emphasis added).

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investor, and thus itself suffers loss or damage."[27] In addition, "an investor who suffers a loss from an alleged breach might sell the investment after the alleged breach (either *before or after filing a claim*) while *expressly seeking to retain the NAFTA claim* and still qualify for jurisdiction under Article 1116."[28] In this vein, it observed, this situation arose before the tribunals in *Daimler v. Argentina* and *EnCana v. Ecuador*, in both of which the "*sale of the investment after the breach occurred was not by itself a bar to the tribunals' jurisdiction.*"[29] For its part, the *Westmoreland* tribunal, which dismissed the relevance of decisions by the tribunals in *Daimler, EnCana*, and *Mihaly v. Sri Lanka*, considered these tribunals required a "claimant must have suffered damage as a result of the challenged measures,"[30] without clarifying, however, whether they specifically required such damage be *directly* suffered.

In essence, in the *Westmoreland* tribunal's analysis, *directness*, a rather subjective factor, emphasizing the closeness of challenged measures and the attendant damage to an investor, prevails over *temporality* as such, insofar as any related temporal requirements it articulated are a function of the status of an investor as having suffered *direct losses* only.

* * * *

The *Westmoreland* tribunal's jurisdictional findings raise important questions for international dispute settlement and investor-state dispute settlement in particular. However, the *Westmoreland* tribunal could have taken a more rigorous approach to articulating those findings, notably by avoiding to portray as elements of jurisdiction *ratione temporis* various requirements lacking a temporal character and rather stemming from a claimant's status as an investor having directly made an investment (and assumed risk attendant upon making that investment) and as a party directly injured by challenged measures relating to that investment. And, more fundamentally, given the absence in NAFTA's text of the "connections of temporality and directness" asserted by the *Westmoreland* tribunal under the guise of requirements for establishing jurisdiction *ratione temporis*, it ought not to have read into NAFTA requirements not agreed upon by NAFTA parties,[31] all while professing to observe the general rule of treaty interpretation, at whose core sits the interpreted treaty's text.

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[27] *Id.*, para. 429 (noting "[t]here may be other unusual situations in which the same appreciation may also arise" (emphasis in original)).

[28] *Id.*, para. 430 (emphasis added).

[29] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/01, Award (Aug. 22, 2012); EnCana Corporation v. Republic of Ecuador, UNCITRAL, LCIA Case No. UN3481, Award (Feb. 3, 2006) (discussed in *Tennant*, *supra* note 12, para. 430 (emphasis added)).

[30] *Daimler*, *supra* note 29; *EnCana*, *supra* note 29; Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (Mar. 15, 2002) (mentioned in para. 210).

[31] *Tennant*, *supra* note 12, para. 426.