

Separate Opinion of Andreas F. Lowenfeld

1. I concur in Parts I-VIII of the Award, in the conclusion to Part IX, and in the Decision. I write separately because I believe the majority's discussion of the "Countermeasures Defence" clouds the essential feature of investor-State arbitration, as it has developed since the ICSID Convention of 1965, the very large number of Bilateral Investment Treaties, and Chapter Eleven of the NAFTA. The essence of each of these arrangements is that controversies between foreign investors and host states are insulated from political and diplomatic relations between states. In return for agreeing to independent international arbitration, the host state is assured that the state of the investor's nationality (as defined) will not espouse the investor's claim or otherwise intervene in the controversy between an investor and a host state, for instance by denying foreign assistance or attempting to pressure the host state into some kind of settlement. Correspondingly, the state of the investor's nationality is relieved of the pressure of having its relations with the host state disturbed or distorted by a controversy between its national and the host state.

2. It follows that the host state cannot take out against the investor its disputes with the state of the investor's nationality, and that the investor cannot be held responsible for the actions of its host state. Nor can the state of the investor's nationality prevent an investor from bringing a claim, or oblige the investor to reach a settlement. The fact that two controversies -- investor-host state and state-to state -- may concern the same economic sector or actively cannot alter this fundamental principle.

3. The majority undertakes to educate the reader about the law countermeasures in general international law, the place of the ILC Articles of State Responsibility in defining that law, the traditional limitations (as it views them) on investors raising claims against host states on their own, and the prerequisites to espousal of claims by states on behalf of their nationals, including the doctrine of exhaustion of local remedies. Further, it launches into a discussion (para. 172) of the doctrine of continuing nationality and of the relevant date or dates for determining the right of states to raise a claim of its national. None of this is pertinent to a decision in the present case. Moreover, the presentation of the majority treats this case as if it were a new species introduced into a well kept garden of “traditional international law,” rather than a by now common instance of investor-State arbitration, authorized by some 2700 Bilateral Investment Treaties as well as the NAFTA and analogous bilateral and regional free trade agreements.

4. The majority finally gets to the point in paragraph 174, holding that an investor that brings a claim under Chapter XI of the NAFTA is seeking to assert its own rights, but then obscures that conclusion by suggesting that the investor is a third party in a dispute between “its own Sate” [sic] and the host state (para. 176). It so happens that the instant case arose in the context of a wider series of controversies between the United States and Mexico about trade in sweeteners. In most investor-State disputes there is no such context, and one of the objectives of BIT’s and NAFTA Chapter XI is to keep it that way. For instance, in the *Fireman’s Fund* case quoted extensively in Part VII of the Decision, there was no evidence of any controversy between the United States and

Mexico, or even any interest on the part of the United States.¹ Nor, for example, has the United States government made any concerted effort to become involved in the many arbitrations brought by American and other investors against Argentina, arising out of that State's financial crisis. The paradigm in investor-State disputes, as anticipated by the World Bank Convention on the Settlement of Investment Disputes (The ICSID Convention), is a dispute between the first party (nearly always the investor) as plaintiff, and the second party (nearly always the host state or state agency) as respondent. There is no third party.

5. Having come out correctly in paragraph 174, the majority feels the need to defend its conclusion with more irrelevant discussion of the *Loewen* case, the Vienna Convention of the Law of Treaties, and unrelated cases. The majority finally takes refuge in the conclusion that it cannot uphold a countermeasures defence since it cannot determine whether the challenged action of the United States was wrongful, because the tribunal lacks jurisdiction over the United States – here not a party, or over the controversy – here arising under an Annex to Chapter VII of the NAFTA. The statement about lack of jurisdiction *ratione personae* and *ratione materiae* is correct, but it again diverts from the real issue. Suppose, for example, a forum that had jurisdiction – say a NAFTA panel or a WTO panel, or indeed the World Court -- had found that the United States had breached an obligation vis-à-vis Mexico. In that case, would the majority uphold the countermeasures defence? It seems not, but I wish the majority had not seen fit to engage in “even if” discussions that once again blur the message.

¹ The United States government did not avail itself of the opportunity to make a submission to the tribunal pursuant to Article 1128.

6. *In sum*, I believe the majority goes to elaborate lengths to refute an unprecedented and unjustified argument made on behalf of Mexico. Though it comes out right (para. 174, 181), the opinion loses sight of and distorts the essence of investor-State arbitration under NAFTA, ICSID, and a mass of Bilateral Investment Treaties and Free Trade Agreements.

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Andreas F. Lowenfeld
Arbitrator