Part I

Investor-State Arbitration
Overview of Investor-State Arbitration: The Regressive Character of the 2004 U.S. Model BIT

Stephen M. Schwebel

*International Arbitrator*

*Washington, DC, USA*

For more than 150 years, the U.S. government sought protection under international law of foreign investment. It did so as a major exporter and importer of foreign capital. That longstanding and enlightened policy was severely modified by the adoption of the 2004 Model Bilateral Investment Treaty (BIT). The 2004 Model BIT contains regressive provisions that undermine key elements of the 1994 Model BIT and depart from standard provisions found in the great majority of the some 2,800 BITs concluded by states the world over.

The cause for this remarkable regression of U.S. policy is found in the fact that a half dozen cases were filed by Canadian investors under the North American Free Trade Agreement (NAFTA). The United States unusually found itself to be the defendant. It found that international obligations ran more than one way. As a result of this discovery, the United States reacted with the maturity of a banana republic. Not only did it litigate the cases against it with every plausible and implausible argument (and it won them all), it revised its model BIT to undermine substantial elements of the protection accorded to foreign investment by their terms.

The 1994 Model BIT and other U.S. BITs that were adopted using that template fundamentally provide that, “Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.” The comparable provision of the 2004 Model BIT, entitled “Minimum Standard of Treatment,” provides as follows:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph prescribes the customary international law minimum standard of treatment of aliens as the minimum standard to be afforded to covered investments. The concepts of