INTRODUCTION

The contextual background to this article may be readily summarized: since Germany and Pakistan entered into the first bilateral investment treaty (BIT) in 1959, more than 2,500 similar treaties have been concluded, over 2,000 of which have been signed since 1990. Just as such treaties have proliferated, there has been a very significant increase in the number of disputes referred to arbitration in reliance upon their dispute settlement provisions, particularly in the course of the last ten years.

While there is a cause and effect relationship, to the extent that the increased coverage of these treaties has led to the very great importance of investment treaty arbitration today, that is not the focus of this article. It is inspired, in part at least, by another cause and effect relationship: the experience of the United States in the context of the North American Free Trade Agreement (NAFTA) and its decision to reassess the drafting of its BITs. In 2004, the United States promulgated its most recent model treaty (U.S. Model). But has the U.S. Model been adopted consistently, in whole or in part, by other States engaged in, or contemplating, a revision of existing BITs or the promulgation of new BITs? For the purposes of this article, references to treaties signed since 2004 are to a “new generation” of BITs.

This article considers this new generation of BITs in an attempt to assess whether these treaties evidence a trend towards consensus or divergence—
or neither. To what extent have existing provisions been refined in the new generation of BITs; what new rules do they contain; and what, if anything, has been jettisoned? The new generation of BITs is not homogenous; the framing of the terms of these agreements remains the subject of experiment by draftsmen in all parts of the world. There is inevitably a degree of divergence in the results of those efforts, not least attributable to the experience of the United States with NAFTA, and its apparent determination to follow a particular path as a result. The article offers some necessarily speculative observations on the implications of the resultant divergence for investors and for governments.

MAIN FEATURES OF NEW GENERATION BILATERAL INVESTMENT TREATIES

It is useful background briefly to consider the demographics of the new generation of BITs, which numbers slightly more than 100 treaties. The past decade has seen not only an explosion in the number of investment disputes referred to arbitration under these treaties, but also in the number of treaties concluded year after year. Four hundred and thirty-two treaties were signed in the 40 years up to 1990; more than 2,000 have been concluded since. Developed economies continue to be the preponderant signatories to BITs, but there has also been a significant increase in the number of so-called south-south agreements. Germany has signed more BITs than any other country—some 138 as of June 1, 2007. Germany (with China and Morocco) has also led the way so far as the renegotiation of existing treaties is concerned.

UNCTAD has identified five main features of the new generation treaties:

2 See the year-by-year list of treaties maintained by the International Centre for Settlement of Investment Disputes (ICSID), http://icsid.worldbank.org/ICSID/Index.jsp, (last visited May 28, 2008).

3 Id.


6 Germany has renegotiated 13 treaties while China and Morocco have renegotiated 12 each; see UNCTAD, Recent Developments, supra note 4, at 3.