TEM Journal. Volume 15, Issue 3, pages 2490-2497, ISSN 2217-8309, DOI: 10.18421/TEM153-38, August 2026.

New Generation of Investment Treaties: Analysis of Dominance

Martin Karas [1], Zuzana Čičková [1]

[1] *University of Economics and Bussiness in Bratislava, Dolnozemská cesta 1, 852 35 Bratislava, Slovakia*

Abstract **– This article focuses on investment treaty negotiation. Since UCTAD (United Nations Conference on Trade and Development) introduced its IIA Reform in 2012, an increased focus has been placed on finding a balance between investment protection and safeguarding host state's sovereign regulatory powers. This article examines how have these changes affected investment treaty negotiations with the focus on the dynamics between large capital exporting economies and relatively smaller capital importing countries. While there are several studies that use quantitative approaches to investment treaties, this is the first study that uses the concept of dominance to analyse investment treaties. The article answers two research questions: 1. Which capital exporting countries negotiate treaties with relatively the strongest investment protection? 2. Which capital exporting countries negotiate treaties with relatively the weakest investment protection? The article employs a mathematical analysis of dominance for a sample of 122 new generation investment treaties to answer these research questions. The analysis shows significant differences in countries' approaches to investment treaty negotiation. Türkiye and Japan are the most successful capital exporting countries in terms of signing treaties with strong investment protection. On the other hand, Brazil is a country that seeks to sign treaties with strong protection of regulatory autonomy of the host state regardless of capital relations between negotiating parties.**

DOI: 10.18421/TEM153-38
https://doi.org/10.18421/TEM153-38

Corresponding author: Martin Karas,
University of Economics and Bussiness in Bratislava, Dolnozemská cesta 1, 852 35 Bratislava, Slovakia
Email: martin.karas@euba.sk

Received: 17 September 2025.
Revised: 04 January 2026.
Accepted: 25 January 2026.
Published: 27 August 2026.

Keywords **– Investment treaties, investment protection, sovereignty, dominance.**

1. Introduction

There has been a lot of scholarship focused on investment treaties in the past twenty five years. This focus has been caused by several high-profile cases of investment arbitration based on these treaties and the subsequent reaction of states and international organizations that ranged from attempts to escape the system of foreign investment protection to calls for reform of the regime. As a result of these processes, a new generation of investment treaties has been negotiated in the past decade. Although there is no way to determine with precision when does the new generation of investment treaties begin, this study has chosen to use the signing of Canada-EU Comprehensive Economic and Trade Agreement as a starting point of analysis.

The scholarship that has been produced as a result of these changes has mostly had the character of legal analysis. Only a relatively small portion of the works published on investment treaties use quantitative methods. This has been pointed out by S. Franck as early as 2008 [1]. Not a lot has changed since then, although some high-quality work of this nature has been done, most notably on the link between investment treaties and foreign direct investment [2], [3], [4], [5].

This paper aims to further develop empirical research in the domain of investment law by showing how math-based approaches can be used to analyze investment treaties. The paper makes two contributions to investment treaty research. First, it offers a new way to operationalize investment treaties based on a content analysis of their provisions. Second, it shows how a multicriteria decision making approaches (process of using dominance principles to compare alternatives based on their performance across multiple criteria) can be used to arrive at empirically verified conclusions about the new generation of investment treaties.

2. Investment Treaty Research

Investment treaties represent one of the most important elements of analysis in international investment law research. The most common way to approach this topic is a deep qualitative analysis of a particular treaty, a small set of treaties or a model treaty of a country [6], [7], [8], [9], [10]. It is not the intention of this research project to dispute the contribution of this type of work towards understanding investment treaties and investment regimes in general, but this work needs to be complemented by rigorous quantitative analysis.

As mentioned in the introduction, existing research on investment treaties that has quantitative character is mostly focused on studying the effects of investment treaties on the levels of foreign direct investment between the countries involved. First articles that studied this relationship were usually only considering investment treaties as a binary variable, comparing levels of FDI in pairs of countries with an investment treaty and without an investment treaty [11]. Later, more sophisticated methods were developed, where researchers started to look at the content and variation in investment treaties to see whether a particular version of investment treaty has a more positive effect of FDI than another.

Final strand of quantitative research into investment treaties was developed by scholars that wanted to explain the variation in investment treaties, therefore treating the investment treaties not as an independent, but as dependent variable. Initial efforts were focused mostly on investor-state dispute resolution mechanisms as the variable element of the treaties [12], with more complex operationalizations of investment treaties developed more recently offering more complex tools for this kind of analysis [13]. This research has produced several hypotheses about the factors that influence the kind of treaty two states will negotiate, most notable the assumption that power differential between the capital exporting state and a capital importing state will have an influence on how “strongly” the treaty will protect foreign investors [12]. This research project uses this theoretical explanation of investment treaty design to inform the analysis, attempting to identify which treaties from the new generation correspond the most with this theoretical assumption in order to make inferences about which states are leveraging their power differential into investment protection for their investors abroad.

This article is thus proposing a new approach to analyzing investment treaties that combines the quantitative elements with focus on the relationship between bargaining power of negotiating states and the strength of the treaty in terms of level of protection that the treaty offers to foreign investors.

The goal of this article is finding out what patterns can be found in the new generation of investment treaties in terms of the relationship between the bargaining power of the capital exporting states and the resulting level of investment protection of the treaty. This goal will be achieved by answering the following research questions:

1. *Which capital exporting countries negotiate treaties with relatively the strongest investment protection?*
2. *Which capital exporting countries negotiate treaties with relatively the weakest investment protection?*

Answering these research questions can help identify any existing patterns in the recent investment treaty making and provide useful insight into the new generation of investment treaties.

3. Methodology

In order to answer the research questions presented in the previous chapter, a new way to measure the degree to which an investment treaty protects foreign investors from the host state’s interventions had been developed. This measure will be called the “strength” of the treaty, as it takes into account how many provisions that protect foreign investors there are, and what form do these provisions take in a sample of investment treaties. This approach is inspired by earlier works [4], [3], [12] in the sense of attempting to assign a value to a particular wording of treaty provisions of an investment treaty. These early approaches, however, are somewhat limited in the sense that they only look at investor-state dispute settlement provisions to determine the strength of a treaty. In this regard, this research project follows more recent scholarship [13] in trying to develop a more complex measure of treaty strength that includes other relevant provisions. Table 1 describes the values that particular provisions can take on depending on the form or the wording they have in the treaty. Explanation for the values is given below.

Table 1. Operationalization of investment treaty provisions

Pre-Establishment/Post-Establishment	Value
Pre-establishment	1
Pre-establishment for one of NT/MFN	0.5
post-establishment	0
National Treatment	
National treatment with no exceptions	1
National treatment with exceptions	0.5
No national treatment	0
Most Favoured Nation	
Most favoured nation with no exceptions	1
Most favoured nation with exceptions	0.5
No Most favoured nation	0
Standards of Treatment	
Fair and equitable treatment with no specification	1
Fair and equitable treatment with specification	0.75
Minimum standard of treatment (no FET)	0.25
No standards of treatment	0
Performance Requirements	
Extra performance requirements prohibition	1
“standard” performance requirements prohibition	0.5
No performance requirements prohibition	0
Non-Conforming Measures	
Standard non-conforming measures	0.5
Limited non-conforming measures	0.25
No non-conforming measures	0
Expropriation	
Standard expropriation prohibition without specification	1
Expropriation prohibition with specification for indirect expropriation	0.75
Only direct expropriation prohibition	0.25
No expropriation prohibition	0
Exemptions	
No exceptions (tax, security, prudential, life protection)	1
One exception	0.75
Two exceptions	0.5
Three exceptions	0.25
Four exceptions	0
Dispute Settlement	
Full ISDS options	1
Full ISDS with domestic court condition	0.75
Limited ISDS options	-0.25/-0.5
No ISDS option	0

The approach presented in the Table 1 can be criticized on several grounds. Mathematically, it is not the best approach to gain a value of a variable based on several factors that can take on different values. In this regard, the approach in this study moves away from a methodologically more sophisticated approach [13].

The reason for this move is the belief that this approach, based on [14], is better from the point of view of describing the real treaty strength. Different approaches were trialed in this research project, but when analyzing the resulting treaty strength for a small sample of treaties, the simple added-up composite of the strength of provisions provided the best values.

The second issue with the approach to operationalization of investment treaty strength is that particular estimations of the strength of the provisions (and their form/wording) cannot be accurately determined. There is simply no way to know, which provisions (and which form/wording) protect foreign investment the most. To illustrate this point, it could for example be argued that Fair and Equitable Treatment (FET) provisions are the most important provisions in the investment treaties, since almost all investment arbitration cases include a claim of breach of this provision. On the other hand, even if a treaty does not include FET, the same claim could most often be brought anyway, under the minimum standard of treatment principle. Additionally, the fact that a principle is often invoked in arbitration does not necessarily mean that it is also the strongest. For example, a direct expropriation is virtually non-existent in the arbitration universe, but if there was treaty without an explicit prohibition of expropriation without compensation, such treaty would certainly be considered extremely weak.

Unfortunately, there is no way to resolve these issues completely. The approach presented here should be considered a good way to approximate the treaty strength. The concept that mitigates the previously mentioned issues, is that, since the subject of this research project is the negotiation of investment treaties, the goal is not to measure the objective strength of the treaty, but rather the intersubjective understanding of the strength of the treaty. In other words, the aim is not to determine to which degree a treaty will really protect foreign investors from host state’s interventions, but the perception of states of the degree to which a treaty will protect foreign investors. This means that the researcher’s perception, based on existing research, should reflect the intersubjective understanding of the investment regimes community of the treaty strength. While the particular ratios between the provisions are debatable, it can always be argued that even if the operationalization does not reflect the actual strength of the provision, the intention behind the particular provision or wording is to either protect foreign investors more, or protect host state’s right to regulate more.

As far as the details of the operationalization go, some of the provisions are relatively uncontroversial. For example, the protection of foreign investments in the pre-establishment phase is clearly case of the treaty being "stronger" in the context of this paper. This study distinguishes between pre-establishment for one of National Treatment and Most Favoured Nation (MFN) and both. For National Treatment and Most Favoured Nation, this study is distinguishing between treaties that contain exceptions, which are naturally weaker. Unfortunately, there is no good way to accurately determine the extent of exceptions, since these reflect different strength depending on the context. For example, when there is an exception form national treatment for car industry in a treaty with the capital exporting country having a large manufacturing sector, the treaty is weaker that a treaty containing exception for a small industry that is not relevant in the relationship. The approach is based on the idea that any exception reflects an intention to weaken the national treatment and MFN provision to a certain extent and should therefore be seen as weakening the treaty.

For standards of treatment, the differentiation happens between different ways that the Fair and Equitable Treatment provision is formulated, up to the point of the treaty not having a fair and equitable treatment provision. Performance requirements are based on the number of performance requirements that are prohibited by the treaty, with the standards provision containing seven prohibitions (see for example Indonesia – Korea treaty). Non-conforming measures were considered to be less important and therefore assign a smaller value to this provision. For expropriation provisions, the way that indirect expropriation is dealt with was the most important factor. Although there are more exceptions, the following were considered the most important ones: the security exception, the prudential exception, the taxation exception and the protection of life or environment. The value was assigned based on how many of these are present in the treaty. Finally, for the investor-state dispute settlement (ISDS) options, the value was assigned based on how many of these options are present in the treaty.

This index was applied to a sample of 122 investment treaties. Since the goal was to capture recent trends in investment treaty making, the focus was on the new generation of investment treaties. Since the scholarship is not clear on what the cutoff is for the new generation of treaties and realistically there is no discrete point in time that can be used, it was decided to use the signing of the Comprehensive Economic and Trade Agreement (CETA) as the starting point.

Although it is true that the provisions of this treaty can be found in some treaties that predate it, this was the first treaty signed between two global economic powers that contains many of the new features that have not been common in the previous generation of treaties. The sample contains all treaties signed since CETA until May 2025 that have been published on the UNCTAD website [15].

Second element of this research project rests on using a simple mathematical analysis of the treaties operationalized in the way described above to draw conclusions about new generation investment treaty-making, using the concept of dominance as described in the following paragraphs.

In general, let the set $A = \{\mathbf{a}^{(1)}, \mathbf{a}^{(2)}, \dots, \mathbf{a}^{(n)}\}$ represent n alternatives and set $K = \{1,2,\dots,k\}$, represent k criteria. Consequently, each alternative is characterized by vector $\boldsymbol{a}^{(i)} = (y_1^{(i)}, y_2^{(i)}, \dots, y_k^{(i)})^T$, where $y_j^{(i)}$represents value of the j-th criterium $j \in K$ i-th alternative $i \in A$. Let us consider two alternatives $\mathbf{a}^{(i)}$a $\mathbf{a}^{(j)}$, $i, j \in A, i \neq j$. Alternatives can be ordered in the following way:

1. *Alternative* $\mathbf{a}^{(i)}$*strongly dominates alternative* $\mathbf{a}^{(j)}$(*alternative* $\mathbf{a}^{(j)}$*is strongly dominated by alternative* $\mathbf{a}^{(i)}$), if values of all criteria for alternative $\mathbf{a}^{(i)}$are greater than corresponding values of criteria for alternative $\mathbf{a}^{(j)}$, therefore $\mathbf{a}^{(i)} \succ \mathbf{a}^{(j)} \Leftrightarrow \forall l, l \in K{:}y_l^{(i)} > y_l^{(j)}$
2. *alternatíva* $\mathbf{a}^{(i)}$*dominates alternatíve* $\mathbf{a}^{(j)}$(*alternative* $\mathbf{a}^{(j)}$*is dominated by alternative* $\mathbf{a}^{(i)}$), if all values of objective functions for alternative $\mathbf{a}^{(i)}$are greater or equal to corresponding values of criteria for alternative $\mathbf{a}^{(j)}$, but there is at least one section of the vector $\mathbf{a}^{(i)}$, which is greater than the corresponding section of the vector $\mathbf{a}^{(j)}$**,** therefore $\mathbf{a}^{(i)} \succcurlyeq \mathbf{a}^{(j)} \Leftrightarrow \forall l, l \in K{:}y_l^{(i)} \geq y_l^{(j)} \wedge \exists h{:}\, y_h^{(i)} > y_h^{(j)}$
3. *indifference between the alternatives* $\mathbf{a}^{(i)}$*and* $\mathbf{a}^{(j)}$occurs when all values of criteria for alternative $\mathbf{a}^{(i)}$ are equal for corresponding values of criteria for alterantive $\mathbf{a}^{(j)}$, therefore $\mathbf{a}^{(i)} \approx \mathbf{a}^{(j)} \Leftrightarrow \forall l, l \in K{:}y_l^{(i)} = y_l^{(j)}$.

If none of these is the case, the alternatives cannot be ordered.

For the purposes of the analysis a sample of treaties $(A = \{\mathbf{a}^{(1)}, \mathbf{a}^{(2)}, \dots, \mathbf{a}^{(122)}\}$ is considered, where each i-th treaty $i \in A$, is characterized by three criteria: treaty strenght: sila zmluvy $(treaty\_strenght^{(i)})$, GDP $(GDP^{(i)})$, and capital exports $(capital\_exports^{(i)})$.

Treaty strength is calculated as an index presented in the previous paragraphs. GDP is a value taken from World Bank database [16] and capital exports are sourced from UNCTAD [17] (the stock mode values were used). Data was selected for the year that the particular treaty was signed. For all pairs of investment treaties from the sample, the procedure that enabled to determine dominance with regard to the analyzed criteria was used.

Two cases were analyzed. First, for each treaty, factors were considered:

$$\mathbf{a}^{(i)} = (treaty\_strenght^{(i)}, GDP^{(i)})^T, i \in A \quad (1)$$

Second, for each treaty factors were considered:

$$\mathbf{a}^{(i)} = \left(treaty_{strenght}{}^{(i)}, capital_{exports}{}^{(i)}\right)^T, \quad i \in A. \quad (2)$$

Based on the described methodology, it was possible to identify dominance for each pair of treaties in the sample. The scope of the table of dominance for these treaties does not permit its inclusion in the paper. A link can be found in the list of references [18]. Conclusions that can be drawn from these results are presented in the following chapter.

4. Results and Analysis

The result of the approach described in the previous chapter is a table, which shows the relationship between the analyzed treaties in terms of the selected factors. Caution needs to be employed when interpreting the results, since the analysis only goes so far. For example, the fact that a treaty is not dominated by any other treaty does not necessarily mean that a strong country in the pair negotiated a treaty with strong protection for its investors as the results could simply be due to the fact that the GDP/capital exports differential is very significant. For example, the Treaty between EU and New Zealand is the weakest treaty in the whole sample, but since the power differential between the two states in terms of both GDP and capital exports is large, the treaty is not dominated by other treaties. What the analysis enables to do is to identify treaties with both a significant power differential and strong investment protection which in turn enables us to identify countries that are the most successful in providing their investors with the most protection when investing abroad. Therefore, the results are helpful when analyzing groups of treaties to identify broader trends, but less useful when analyzing individual treaties. A closer look at the results enables to make several observations about the new generation of investment treaties.

The results of this study indicate that the capital exporting countries that negotiate the best treaties from the point of view of the rationalist framework include Türkiye and Japan. All treaties negotiated by Türkiye are dominated by only a few treaties meaning that very few large capital exporting states were able to negotiate stronger protection for their investors. All of these treaties have been signed with countries that are expected to be net capital importers from Türkiye. The only small exception is the treaty with Lithuania. This means that Türkiye is able to leverage their power differential into investment protection better than many other countries. Table 2 shows how many treaties dominate treaties signed by Türkiye (number of dominant treaties) and how many treaties are dominated by treaties signed by Türkiye (number of dominated treaties). Although it does not make sense to use this approach to infer anything about a particular treaty or relationship between any two treaties, it enables to identify broader trends. The table demonstrates that Türkiye is generally able to negotiate treaties with stronger investment protection compared to most of other countries with similar power relations to the negotiating parties.

Table 2. Treaties signed by Türkiye in relation to other new generation treaties (using GDP for power differential)

Treaty	Number of dominant treaties	Number of dominated treaties
Türkiye - Venezuela	6	53
Türkiye - UAE	5	53
Türkiye - Serbia	6	49
Türkiye - Uruguay	11	45
Congo - Türkiye	16	41
Türkiye - Burkina Faso	5	56
Cambodia - Türkiye	6	54
Lithuania - Türkiye	29	15
Türkiye - Mauritania	6	15
Türkiye - Belarus	6	57
Serbia - Türkiye	13	42
Chad - Türkiye	5	66
Burundi - Türkiye	5	66
Mozambique - Türkiye	5	55
Moldova - Türkiye	11	45
Rwanda - Türkiye	5	69

The same logic applies even stronger to Japan with fewer treaties, but an even larger number of dominant treaties, as can be seen in Table 3.

The analysis does not enable us to directly compare Japan and Türkiye in terms of which country does "better" in terms of the strength of protection of their investors because of the differential in their own strength, but both are among the best negotiators.

Table 3. Treaties Signed by Japan in relation to other new generation treaties (using GDP for power differential)

Treaty	Number of dominant treaties	Number of dominated treaties
Angola - Japan	11	21
Bahrain - Japan	1	90
Georgia - Japan	5	23
Ivory Coast - Japan	2	48
Morocco - Japan	2	65
Argentina - Japan	8	25
Japan - Jordan	4	33
Japan - UAE	0	102
Armenia - Japan	5	29
Japan - Israel	9	22

These results suggest that countries with strong BIT program and experience in negotiation are generally successful in getting treaty with strong investment protection in dyads with "weaker" countries. These results are consistent for both measures of country negotiating strength (GDP and capital exports) with only minor differences. The same goes for strong and weak dominance.

Of the countries that are expected to be capital exporters in the cases where a new generation treaty has been signed, Brazil is the most notable case where a divergence from the rationalist expectations can be observed, as can be seen in Table 4 (below). In other words, while it could be expected for Brazil to sign dominant treaties based on their strength in relation to most of the co-signatories (Ecuador, Guyana, Surinam, UAE, Morocco, Ethiopia), they are in fact signing "weak" treaties that do not dominate other treaties and in fact are dominated by many treaties negotiated by stronger countries. Even for the treaty with India, even though it is hard to make assumptions about the capital relations between the two countries (in terms of who is expected to be the capital exporter and who the importer), the treaty signed is "weak" from the point of view of investment protection. The Brazilian model of investment treaty points to importance of historical and cultural factors in investment treaty-making that stand in opposition to rationalist idea of capital exporting countries trying to achieve the strongest possible protection for their investors.

Brazil has long been known for its reluctance to sign investment treaties altogether seeing them as a tool of imperialist influence [19], [20]. While this can still be explained within the rationalist framework, for example by using the concept of *policy learning* [21], [22], it also points towards the possibility of social constructivism being an important theoretical framework for explaining investment treaty design for the new generation of investment treaties.

Table 4. Treaties signed by Brazil in relation to other new generation treaties (using GDP for power differential)

Treaty	Number of dominant treaties	Number of dominated treaties
Brazil - India	39	0
Brazil - Ecuador	17	4
Brazil - Morocco	22	2
Brazil - UAE	23	2
Brazil – Guyana	16	3
Brazil - Surinam	16	3
Brazil - Ethiopia	21	2

When it comes to other capital exporting countries, the treaty-making is inconsistent. For example, Australia has signed five treaties. The treaty with Uruguay is dominated by 31 other treaties despite the fact that the power differential is substantial for both GDP and capital exports, while the treaty with Peru, another and somewhat similar South American country, is only dominated by three treaties. Qatar, as a country with relatively high capital exports signed treaties with Rwanda, Argentina, Togo, Ukraine and Paraguay. These treaties are all dominated by at least 25 other treaties, showing that Qatar does not negotiate particularly strong investment protection when they are the capital exporter. Interestingly, in a somewhat more equal relationship with Singapore, the treaty that Qatar negotiated is among the strongest, which suggests that Qatar is very flexible in their approach and is willing to accommodate the model of the negotiating partner. This is similar for Singapore, who negotiated a strong treaty with Armenia and Myanmar, but a relatively weak treaty with Rwanda, Sri Lanka and Nigeria.

It is also worth pointing out that when a treaty is between two countries that generally sign treaties with countries where they are expected to export capital, it is often a strong treaty. This leads to a logical inference that countries that are very engaged in investment treaty making in order to create favourable conditions for their investments abroad negotiate treaties with strong investment protection even in cases where the relationship is more even in terms of capital exports.

For example, both Japan and United Arab Emirates are countries with a large network of investment treaties with smaller countries. The new generation treaty that they recently signed is one of the strongest treaties in the sample.

5. Conclusion

The analysis described in the previous chapter enables to make several inferences about the trends in investment treaty-making in recent years. Two countries, Türkiye and Japan have been consistently signing treaties with “weaker” partners that offer strong protection of foreign investment. These countries are the most successful from the point of view of the rationalist framework where capital exporters are seeking to maximize investment protection. Other capital exporting countries, such as Singapore and Qatar have a more flexible approach that prioritizes signing a treaty even when the protection is weaker. Some capital exporting countries have an altogether different approach that cannot be explained by reference to the traditional theories of investment treaty design and require more nuanced explanation. For example, Brazil’s approach to investment treaty-making seems to prioritize host state’s regulatory autonomy regardless of the power differential between the two negotiating countries. This suggests that cultural, historical and social factors might be an important avenue for future research when seeking to explain the recent trends in investment treaty-making.

Acknowledgements

This article was written within the project „Aplication of Cooperative Game Theory Models in Economy and Internationa Relations“ – VEGA 1/0115/2.

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