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Asymmetric Hegemony by Design: Measuring Contractual Fairness in BITs and ISDS

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ABSTRACT

Background. Bilateral investment treaties (BITs) are widely charged with entrenching an asymmetric hegemony: they protect foreign investors through investor-State dispute settlement (ISDS) while imposing few reciprocal constraints on investors and wide ones on host States.

Objective. This article converts that charge into a measurable index of contractual asymmetry and tests where the asymmetry originates, in the bargaining power of the parties or in the design template of the era.

Methods. A structured content analysis coded forty investment treaties from their authentic UNCTAD texts: twenty in Indonesia's network and twenty comparators, spanning old-generation BITs and the reform generation. Each treaty was coded, through a grammatical–systematic–teleological reading, for ten host-adverse clause features summed into a 0–10 asymmetry index; a blind second coder re-coded a subsample (Cohen's $\kappa = 0.825$). The clause data were read against verified UNCTAD ISDS statistics.

Results. Old-generation treaties were overwhelmingly asymmetric (mean 8.19 of 10) and reform-generation treaties markedly balanced (2.86). The separation was near-total (Mann–Whitney $p < 0.001$), and the index declined strongly with signature year ($\rho = -0.70$). Within the old generation, South–South BITs did not differ significantly from North–South BITs (8.00 vs 8.24, $p = 0.49$), and Indonesia–Malaysia scored a perfect 10.

Conclusion. Asymmetry is therefore more consistent with a design default shared across treaties than with dyadic bargaining power. Because the source appears to be design rather than power, the remedy may lie largely within a host State's control, as Indonesia's post-2014 treaty reform illustrates.

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1. Introduction

A bilateral investment treaty is concluded between two States, yet it benefits a third party. That party is the foreign investor. The investor receives substantive protections and, through investor-State dispute settlement (ISDS), the standing to enforce them directly against the host State before an international tribunal. This triangular structure has drawn sustained criticism. Capital-importing States, together with much of the scholarship that sympathizes with them, describe the treaties as an asymmetric hegemony. On their account, the instruments grant broad and enforceable rights to investors, impose almost no reciprocal obligations, and place the host State's regulatory autonomy under the interpretive discretion of arbitral tribunals.[1,2] The result, seen this way, is a one-sided contract of adhesion (the phrase is used here analogically), negotiated between formally equal sovereigns but tilted in substance toward the exporter of capital.

Most of this critique proceeds doctrinally. Scholars read well-known awards and dissect individual clauses: the open-ended definition of investment, fair and equitable treatment with no defined standard, the umbrella clause, and expropriation provisions that carve out nothing for public-welfare regulation.[1] Measurement is what the doctrinal literature seldom provides. We lack a systematic account of how common these features are across a body of treaties, and of what actually explains their distribution.[3–5] Two rival explanations are rarely set against each other. The first is a bargaining-power account. Asymmetry mirrors the relative strength of the parties, so a treaty between a developed and a developing State should be more one-sided than a treaty between two developing States. The second is a template account. Asymmetry mirrors the dominant drafting template of the era, a hegemonic default reproduced through legal transplantation whoever sits across the table.[6,7]

The two accounts point toward very different reforms, yet the empirical basis for choosing between them is thin. Suppose asymmetry follows from power. Capital-importing States

could then do little on their own, since the distribution of bargaining strength is not theirs to rewrite. Suppose instead that it follows from template. The imbalance is then visible in the text and can be corrected by re-drafting, even when relative power stays where it is.[8,9] A growing body of empirical work on ISDS, covering outcomes, the standing of affected parties and the regulatory effects of the regime, has sharpened the descriptive picture of who gains and who is exposed.[10,11] It has not yielded a reproducible instrument for grading how asymmetric a given treaty is. Nor has it produced a research design that isolates the source of that asymmetry.

Indonesia offers an unusually clean setting for this inquiry. Since 2014 the State has terminated a large share of its old bilateral investment treaties (by one count some 29 of the 55 then in force; by another, 25 BITs terminated since 2014),[12,13] and it has shifted to a reformed negotiating posture. It has concluded rebalanced instruments such as the 2018 Indonesia–Singapore BIT and the 2019 Indonesia–Australia Comprehensive Economic Partnership (IA-CEPA).[12,14] The recalibration is more than diplomatic. It rests on the constitutional-economic order. Article 33(2)–(3) of the 1945 Constitution (UUD 1945)[15] commits the State to control the branches of production important to the country and the natural resources therein, for the greatest welfare of the people. Law No. 25 of 2007 on Investment[16] treats foreign capital as an instrument of national development, subject to public-interest regulation; Law No. 24 of 2000 on International Treaties[17] governs the competence to ratify and terminate the very instruments at issue.[12] Can the asymmetry critique be answered from a host State's own legal resources? Indonesia's reform therefore tests exactly that.

The article makes three contributions. First, it operationalizes contractual asymmetry as a transparent, reproducible ten-indicator index coded from authentic treaty texts and validated by blind re-coding; this extends the computational and content-analytic study of treaty language into a fairness metric that can support comparative analysis.[3,4] Second, it adjudicates between the bargaining-power and template accounts. The instrument does the work. Treaty generation is held constant while South–South and North–South BITs are compared, a design that discriminates between the two explanations. Third, it links the textual measurement to the pattern of ISDS practice and to Indonesia's constitutional and statutory reform toolkit, so that the diagnosis is translated into three reform proposals, each assigned to a named actor.

The article proceeds as follows. Section 2 sets out the materials and methods: the sample of forty treaties, the coding instrument and its interpretive method (Table 1), the primary and comparative sources (Table 2), and the reliability and analysis strategy. Section 3 reports the results. These cover the clause-level anatomy of asymmetry (Figure 1), the generational reform turn (Table 3; Figures 2 and 3), the template-versus-power test (Figure 4), the asymmetry found in ISDS practice, and the robustness checks (Section 3.5). Section 4 discusses the findings and benchmarks them against international reform standards (Table 4). It then sets out the *de lege lata* deficiencies and three *de lege ferenda* proposals, and states the limitations of the study. Section 5 concludes.

2. Methods

This study is an original empirical, comparative and socio-legal analysis of investment-treaty texts. It is empirical because it codes and measures a defined corpus of treaties on explicit indicators. It is comparative because it contrasts drafting generations and dyad types, and benchmarks them against international reform standards. It is socio-legal because it reads the coded text against the record of how ISDS has actually been used. The unit of analysis is the treaty. The quantity of interest is contractual asymmetry, understood as the degree to which a treaty places obligations on the host State and rights on the investor with no corresponding constraints running the other way.

2.1 Research type and justification

A doctrinal, case-by-case reading of awards can be illuminating. It cannot answer a question about prevalence and cause across a population of treaties. A content-analytic design was therefore chosen, following the tradition of systematic legal document coding; it makes the reading of each treaty explicit and repeatable, allows inter-coder reliability to be tested, and supports statistical comparison between defined groups. The design is comparative in two registers. Those registers are generations (old versus reform) and dyads (North–South versus South–South), and only a comparison that holds one dimension constant can separate the effect of the drafting template from the effect of the parties. Holding generation constant is the comparison on which the study relies. Conditional on generation, dyad type is assumed, not shown, to be independent of other determinants of asymmetry; Section 4.4 treats this as a limitation. The socio-legal element triangulates the textual index with UNCTAD's ISDS statistics. It guards against the inference that a one-sided text is inert on the page.

2.2 Interpretive approach

Every treaty was construed rather than merely scanned. Coding followed a layered sequence of legal interpretation. The grammatical reading fixes the ordinary meaning of a clause; one example is whether the investment definition uses the open-ended ‘every kind of asset’ formula, while the systematic reading places the clause within the treaty as a whole. That reading asks whether a broad-looking standard is qualified elsewhere, by a general-exceptions article, an interpretive annex, or a definitional carve-out, whereas the teleological reading turns to the regulatory consequence of the clause. The question there is whether an expropriation provision, read together with any carve-out, in fact exposes bona fide public-welfare measures to indirect-expropriation claims.[1] A historical reading separates the drafting conventions of the old generation from those of the reform generation. What the second coder reproduced independently was this layered construction. It was not the presence of keywords.

2.3 Sample and sources

The sample comprises forty investment treaties. They are split evenly between Indonesia’s network and a set of comparators. The Indonesian group has ten older BITs with developed and developing partners, and it also has ten further instruments, including the reform-era treaties: the 2018 Indonesia–Singapore BIT, the 2019 IA-CEPA and Indonesia–UAE BIT, and the ASEAN/AANZFTA and RCEP investment chapters. The comparator group has ten older developed–developing BITs not involving Indonesia, ranging from the 1959 Germany–Pakistan BIT, the first ever concluded, to the US–Argentina and Netherlands–Bolivia treaties. It also has ten reform-generation instruments and models. They are Morocco–Nigeria, the Indian and Netherlands models, Brazil–Mozambique, China–Türkiye, RCEP and the EU–Vietnam IPA. The sample is purposive, built to contrast generations and dyads (Section 4.4). Each treaty was located on the UNCTAD Investment Policy Hub; coding drew on its authentic text or on the UNCTAD IIA-Mapping element data, and the coded dataset records the source reference and coding date for every treaty.

2.4 Coding instrument

Ten binary indicators were coded for each treaty. Every one is a recognized pro-investor or host-adverse design feature, and together they sum to a 0–10 asymmetry index; Table 1 sets out the ten indicators and the fairness concern each captures. The index counts how many host-adverse features a treaty contains, so a higher score denotes a more one-sided, less balanced bargain. Two indicators presuppose ISDS. They

are direct access without exhaustion (A2) and asymmetric investor-only standing (A9). With no ISDS at all, both were coded absent. Treaties that dispense with ISDS therefore score as more balanced, which is the intended meaning; Table 2 catalogs the primary legal instruments coded, the international reform standards, and the Indonesian constitutional and statutory sources against which they are read.

Table 1. Contractual-asymmetry indicators and the fairness concern each captures.

Code	Host-adverse clause feature	Fairness concern
A1	Investor-State arbitration (ISDS) present	Delegates disputes to arbitral tribunals over domestic courts
A2	No exhaustion of local remedies required	Investor bypasses the host legal system entirely
A3	Broad 'every kind of asset' investment definition	Extends protection to portfolio and speculative holdings
A4	Unqualified fair-and-equitable treatment	Open-textured standard, expansively construed by tribunals
A5	Umbrella clause	Elevates ordinary contract breaches to treaty violations
A6	Free transfers without a safeguard	No balance-of-payments/prudential protection for the host
A7	Expropriation without a right-to-regulate carve-out	Regulatory measures exposed to indirect-expropriation claims
A8	No general exceptions or investor obligations	No public-policy space; no reciprocal investor duties
A9	Asymmetric investor-only standing	Only the investor may sue; no State counterclaim
A10	Broad, unqualified most-favored-nation clause	Imports favourable provisions, potentially including ISDS

Table 2. Primary legal sources, comparative benchmarks and Indonesian constitutional/statutory law.

Category	Instrument / source	Function in the analysis
Old-generation BITs	Germany–Pakistan (1959); US–Argentina (1991); Indonesia–Malaysia (1994); Indonesia–Netherlands (1994; parent agreement 1968)	High-asymmetry exemplars (index 8–10)
Reform-generation treaties	Indonesia–Singapore BIT (2018); IA-CEPA (2019); Indonesia–UAE BIT (2019); RCEP investment chapter	Balanced exemplars (index 1–5)
Reform model instruments	Indian Model BIT (2016); Morocco–Nigeria BIT (2016); Netherlands Model BIT (2019)	Drafting benchmarks for reform coding
International reform standards	UNCITRAL WG III draft provisions; ICSID Arbitration Rules 2022	Procedural-reform benchmark (A1, A2, A9)
Indonesian constitutional/statutory law	Article 33 UUD 1945; Law No. 25/2007; Law No. 24/2000	Constitutional frame for the reform argument
Practice data	UNCTAD Facts and Figures on ISDS (2024); Investment Dispute Settlement Navigator	Law-in-action triangulation

Note. The Dutch treaty database dates the Indonesia–Netherlands BIT to 6 April 1994 (in force 1 July 1995), under the Agreement on Economic Cooperation of 7 July 1968.

Each indicator marks host-adverse design. That rests on a considered judgment, not a self-evident one. The coding rests on settled doctrinal debates. These are detailed in Table 1. Indicator A3 (the 'every kind of asset' definition) tracks the expansion of protected subject-matter to portfolio and speculative holdings, which a closed, enterprise-based definition forecloses.[18] Indicator A4 (unqualified fair-and-equitable treatment) reflects a divergence among tribunals: some tether the standard to the customary minimum, while others read it as an autonomous and expansive guarantee.[1] Indicator A5 (the umbrella clause) codes the contested elevation of ordinary contract breaches to treaty violations; this device has been shown to extend treaty protection to side-agreements that constrain host regulation and taxation.[7] Indicator A7 (expropriation without a right-to-regulate carve-out) turns on the difference between the sole-effects approach and the police-powers doctrine, under which bona fide non-discriminatory regulation is not a compensable taking.[1,10] In each case, a positive code marks the drafting choice that leaves the host more exposed to the expansive construction.[19] Qualifying language, where present, produced a negative code. The codebook records that language.

The full codebook is available from the corresponding author on reasonable request, so that the coding can be reproduced. For each of the ten indicators it gives an operational definition, the textual cues that trigger a positive code, the treatment of qualifying language (exceptions, annexes and carve-outs), and worked examples of positive and negative codings. Coding was manual and preceded the statistical analysis. As far as the identity of the instruments allowed, the primary coder recorded each indicator from the clause text itself, not from the treaty's label. The blind second coder worked from the same written protocol and did not know the study's hypotheses. The reliability estimate is therefore not inflated by shared expectancy.

2.5 Reliability and analysis

A blind second coder independently re-coded a random subsample of eight treaties (eighty indicator judgments). Raw agreement was 91.25% (73 of 80 judgments), with Cohen's $\kappa = 0.825$ (95% CI 0.70–0.95), in the conventional 'almost perfect' range ($\kappa \geq 0.81$).[20] The seven disagreements fell on the most construction-dependent indicators: whether an MFN carve-out is meaningful, whether a clause is a true umbrella clause, and whether a security exception counts as a general exception. Reasoned discussion resolved them before the

final coding was fixed. The Mann–Whitney U test compared generations and, likewise, dyad types. Spearman's rank correlation tested the index's association with signature year. Effect sizes (rank-biserial correlation; the correlation coefficient and its confidence interval) are reported alongside. The clause findings were then read against UNCTAD's verified ISDS-outcome statistics. All tests were two-sided; the Mann–Whitney p-values rest on the normal approximation with a correction for ties, and the significance threshold was $\alpha = 0.05$. The study analyzes only publicly available treaty texts and aggregate statistics and involves no human subjects, so no ethics approval was required.

2.6 Positioning relative to prior treaty coding

This instrument builds on prior coding of treaty content. It is nonetheless distinct. Computational and text-as-data scholarship has mapped clause prevalence and traced the diffusion of treaty language across the BIT universe; it shows that a small number of capital-exporting states have disproportionately shaped the standardized text.[3,4] Machine-learning analyses have likewise begun to identify the factors that drive the spread of particular safeguards across treaty networks.[21] Related work has quantified how the professional actors of the regime propagate language and citations over time.[6] The present study differs in three respects. These make up its methodological contribution. It aggregates ten interpretively coded features into a single fairness-oriented index, where earlier work catalogs features in isolation, and it validates the coding through blind human re-coding with a reported reliability coefficient. It also uses the resulting measure to adjudicate between two named causal explanations of asymmetry, not to describe the treaty population. Aggregation into a comparable score makes the generational and dyadic tests possible.

3. Results

3.1 The anatomy of asymmetry

The mean asymmetry index across the forty treaties is 6.32 of 10 (SD 2.83). That average hides a bimodal distribution, and generation drives it. Figure 1 shows the clause-level pattern and thus which features carry the asymmetry. Investor-State arbitration appears in nearly every treaty (90%). Two structural asymmetries travel with it: investor-only standing with no State counterclaim (80%), and direct access without exhausting local remedies (70%). Next in frequency come the broad asset-based definition of investment (78%) and expropriation protection with no right-to-regulate carve-out (73%). The more contested expansions of substantive protection appear in roughly half the corpus, as Figure 1 also shows: broad MFN (55%), unsafeguarded transfers (55%), unqualified fair-and-equitable treatment (50%), the absence of any exceptions or investor obligations (48%) and the umbrella clause (35%). In short, the asymmetry rests on the procedural architecture, meaning who may sue and with which preconditions, and on the breadth of protected subject-matter. The substantive standards form a more variable layer on top.

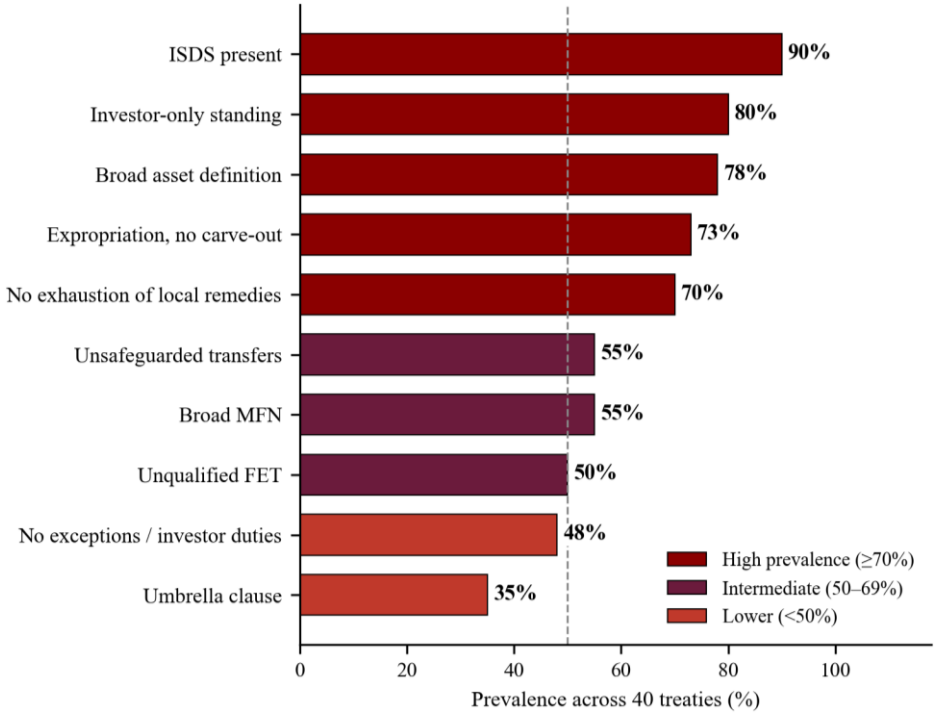

Figure 1. Prevalence of each host-adverse clause feature across the 40 treaties.

3.2 The reform turn

Generation is the main dividing line, as reported in Table 3 and illustrated in Figures 2 and 3. Old-generation treaties have a mean asymmetry index of 8.19 (SD 1.17; n = 26). Reform-generation treaties average 2.86 (SD 1.23; n = 14). The two groups barely overlap: Figure 2 shows that every old treaty outscores every reform treaty, and the Mann–Whitney test returns the maximal statistic ($U = 0$, $z = -5.24$, $p < 0.001$; rank-biserial $r = 1.00$). The index declines strongly with signature year (Spearman $\rho = -0.70$, 95% CI [−0.83, −0.50], $p < 0.001$), a trend plotted in Figure 3. Indonesia's own network follows the same shift. Its old BITs average 8.12 and its reform-era treaties 3.50 ($p = 0.002$), a trajectory that the post-2014 termination program made tangible.[12] Reform, then, is not mere rhetoric. The text itself shows a full rebalancing of the bargain, in line with the state-driven treaty redesign documented in the reform literature.[8,9]

Table 3. Asymmetry index by treaty generation and by dyad.

Group	n	Mean
Old generation	26	8.19
Reform generation	14	2.86
Bilateral: North–South	26	7.35
Bilateral: South–South	9	5.44
Old only: North–South	21	8.24
Old only: South–South	5	8.00

Note. Old vs reform: U = 0, z = −5.24, p < 0.001. North–South vs South–South p = 0.08; old-only North–South vs South–South p = 0.49. Spearman ρ = −0.70 [95% CI −0.83, −0.50]. Indonesia: old 8.12, reform 3.50, p = 0.002. SD is 1.17 for the old generation and 1.23 for the reform generation (Section 3.2); dispersion within the dyad rows is not reported in the source manuscript.

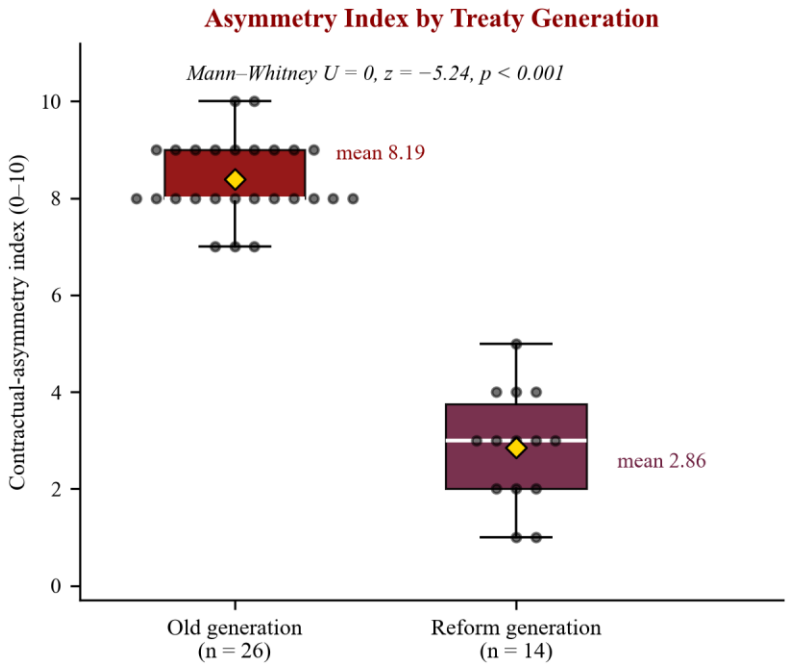

Figure 2. Contractual-asymmetry index by treaty generation.

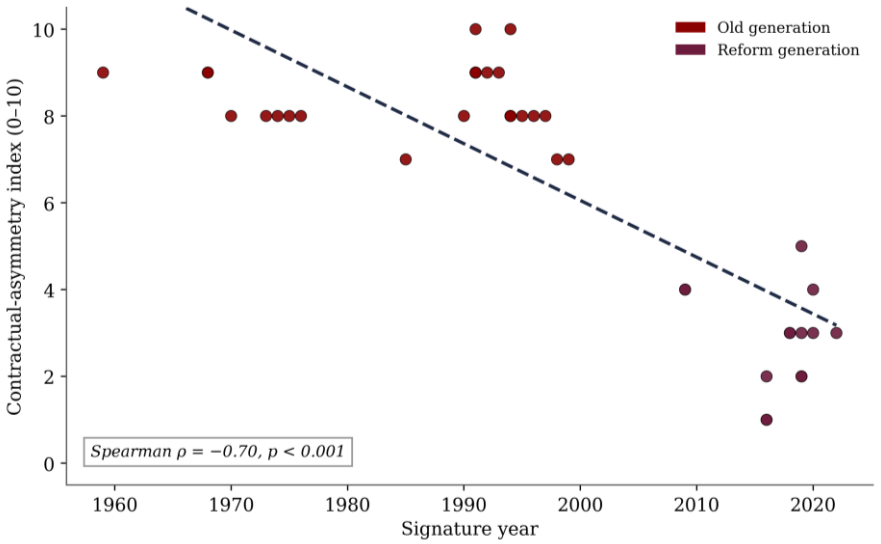

Figure 3. Asymmetry index against signature year, with linear fit.

3.3 Hegemony as template, not bargaining power

The most theoretically sharp result concerns where the asymmetry comes from. Figure 4 displays it in the clause matrix. If asymmetry reflected bargaining power, treaties between a developed and a developing State should be clearly more one-sided than treaties between two developing States; Table 3 records that across the whole bilateral sample the North–South mean (7.35) does exceed the South–South mean (5.44). The difference only approaches significance ($p = 0.08$), and generation confounds it, because the reform and South–South categories overlap. The key test holds generation constant. Within the old generation alone, North–South and South–South BITs show no statistically significant difference (8.24 vs 8.00, $p = 0.49$, with five South–South and 21 North–South treaties); the pro-investor template appears to have been applied just as severely when both parties were developing States. In Figure 4 the Indonesia–Malaysia BIT of 1994 scores a perfect 10, and the Indonesia–China, Indonesia–Egypt and Indonesia–India BITs score 7 to 8. Old-generation asymmetry was not something the strong imposed on the weak in each negotiation; it appears to have been the default design of the age, and the data are consistent with its recurrence in treaties with no capital-exporting State at the table, in line with computational evidence that treaty language spreads through copying.[3,4] On this reading the pattern is hegemonic in a fuller sense: a bargain so naturalized that the disadvantaged party appears to have reproduced it against itself. The study does not, however, measure the intentions of the States concerned.

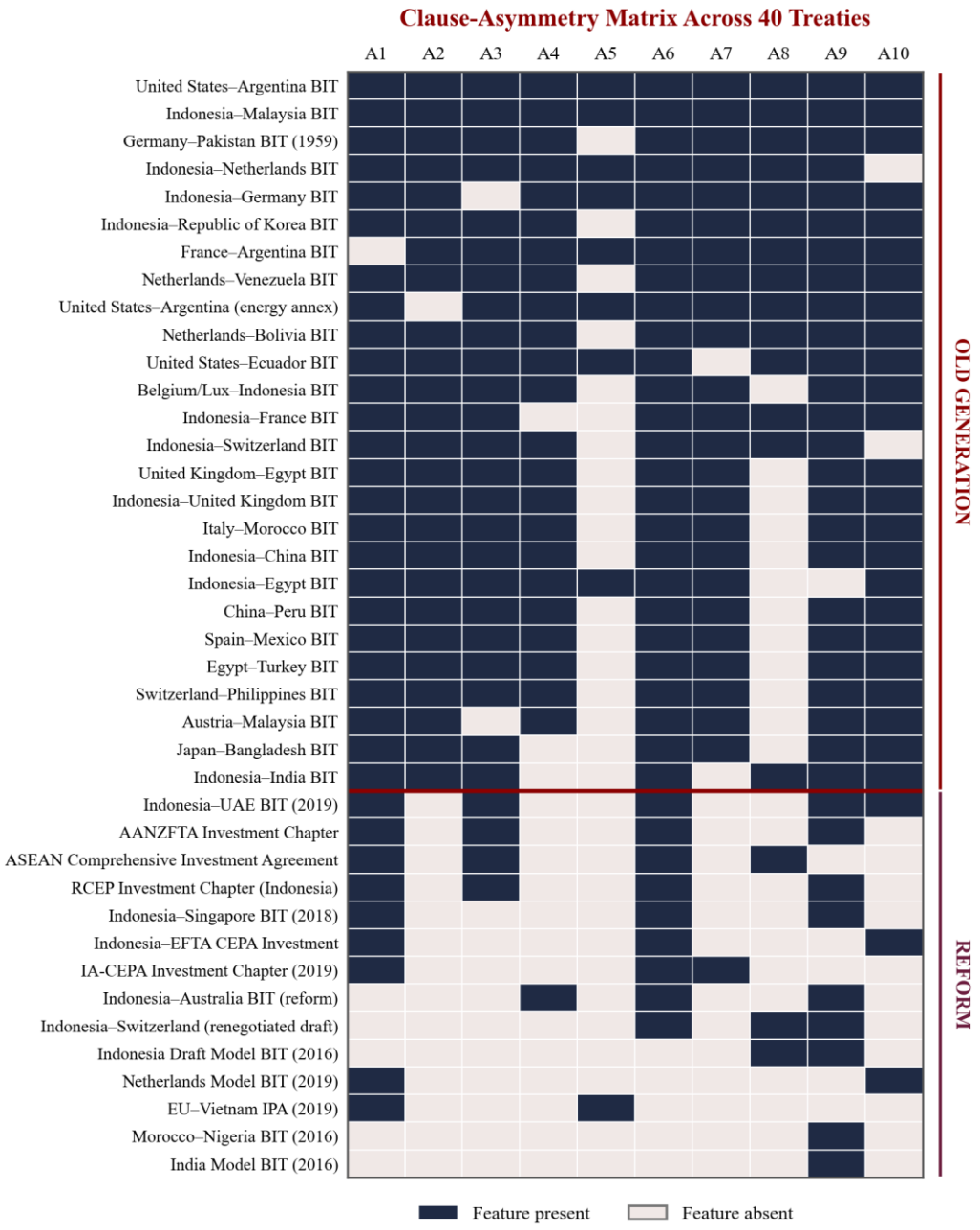

Figure 4. Clause-asymmetry matrix across the 40 treaties, grouped by generation (navy = feature present; A1–A10 as defined in Table 1).

3.4 Asymmetry in practice

The use of ISDS matches the one-sidedness written into the old-generation text. UNCTAD's Investment Dispute Settlement Navigator records more than 1,330 known treaty-based ISDS cases to the end of 2023, up from fewer than 600 a decade earlier, and the total has since passed 1,460 by the end of 2025.[22] Developing countries face most of these disputes, and most are brought by claimants from developed economies. About one-third of all cases arise in the energy-supply and extractive industries, the single most frequent sector.[22]

Indonesia fits this profile squarely. Its known ISDS exposures have clustered in the extractive and financial sectors. Its response, terminating a large share of its old BITs since 2014 and adopting a reform template, is consistent with a reaction to asymmetry of the kind this study measures on the page.[12,14] Claims concentrate in extractive sectors, and investment treaties have shown they can constrain host taxation and regulation. Respondent States therefore treat the exposure as consequential even when a given claim does not succeed.[7,10]

3.5 Robustness of the central results

Three checks address the main threats to the measurement. The first concerns the coding convention that scores the two ISDS-dependent indicators (A2, A9) as absent for treaties without ISDS; in principle it could create part of the generational gap, since no-ISDS instruments cluster in the reform tail. Five of the fourteen reform-generation treaties contain no ISDS. Excluding those five lifts the reform mean only to 3.33, far below the old-generation mean of 8.19; recomputing the index rescaled to the number of applicable items for every treaty leaves the separation essentially unchanged (old 8.38, reform 2.59). The generational difference is therefore real and not an artifact of the convention. The second check probed the equal-weighting assumption through reweighting. Doubling the three procedural indicators (A1, A2, A9) on a 0–13 scale gives means of 11.27 (old) and 4.14 (reform); the separation holds, and it also holds under a weighting derived from the indicators' inter-correlations. The third check concerns the within-old-generation dyadic comparison. Much of the argument turns on it. Its non-significant difference (8.24 vs 8.00) does not establish equivalence. A two-one-sided-tests (TOST) procedure at a margin of one index point cannot be passed with only five South–South treaties: taking the old-generation SD of 1.17 as the pooled SD, the 90% confidence interval for the 0.24-point difference runs from about −0.8 to +1.2 points, which is wider than ±1. The result is therefore read as an absence of evidence for a difference, not as proof that none exists. In this small-sample setting, the perfect score of the Indonesia–Malaysia BIT (Figure 4) is equally probative as an existence proof: the pro-investor template operated at full strength between two developing States.

4. Discussion

The findings support the asymmetry critique but relocate its cause. Old-generation investment treaties are strongly one-sided, and the data confirm this with unusual clarity. The mean is eight host-adverse features out of ten, anchored in near-universal investor-only ISDS without any requirement to exhaust local remedies, broad protected subject-matter, and expropriation clauses that expose ordinary regulation to challenge (Figure 1; Table 3). The source of that asymmetry, however, is not, or not mainly, the bargaining power deployed in each negotiation. Within the old generation, the treaties that two developing States concluded with each other are as asymmetric as those a developing State concluded with a capital exporter (Figure 4). The template carried the asymmetry, not the negotiating table. Computational evidence points the same way: a handful of early movers shaped a treaty language that was then transplanted worldwide.[3,4]

This diagnosis is more troubling than the bargaining-power story. It is also more hopeful. It is more troubling because the imbalance did not need a powerful counterparty to impose it; the design had become the unmarked default, adopted even where its logic served neither party's structural interest.[6] Critics argue that the mainstream reform debate too often takes this status quo as given.[23] It is more hopeful because a template can be rewritten in a way that a distribution of power cannot. The reform generation is that rewriting. The data show it is real, not cosmetic. The asymmetry index falls from eight to under three (Table 3), and the reforms achieve this by tethering fair and equitable treatment, restoring the right to regulate, adding exceptions and investor obligations, and, in some instruments, retiring ISDS.[8,9]

The reform treaties in the sample, benchmarked against the emerging international standard, are recognizably part of a coordinated movement rather than idiosyncratic national experiments, as the comparative mapping in Table 4 shows. Their substantive design follows the Indian Model BIT and the Morocco–Nigeria BIT. It uses narrowed, enterprise-based investment definitions, fair-and-equitable treatment tethered to the customary minimum standard, general exceptions and reciprocal investor obligations,[1,18] while the RCEP investment chapter and the wider turn to domesticated Asian rulemaking give the regional version.[24,25] The multilateral track runs through UNCITRAL Working Group III. It addresses the procedural indicators (A1, A2, A9) on which old-generation treaties score highest.[9,26] Both thus address the same object. Computational work on investor-obligation clauses cautions that such provisions are increasingly common but mostly vague and not addressed directly to investors,[27] and legal analysis holds that States have the power to impose obligations on investors by treaty even though investors' international legal personality is not yet mature enough to carry such obligations on its own.[28]

The lesson for Indonesia and comparable capital-importing States concerns design, not power. The asymmetry was template-driven. Because of that, the remedy is template-driven too, and it may lie largely within the host State's own control, although a bilateral treaty also needs the counterparty's consent; replacing old texts with reform texts, as Indonesia has begun to do, changes the bargain even without any shift in relative power.[12,14] Here the constitutional and statutory architecture becomes decisive. Article 33 UUD 1945[15] commits the State to control of the economy for public welfare, Law No. 25 of 2007 on Investment[16] frames foreign capital as a regulated instrument of development, and Law No. 24 of 2000 on International Treaties[17] allocates ratification and termination competence. Together they give a domestically driven correction both its mandate and its machinery.[12]

Indonesia's constitutional and statutory framework is more than context. It is the legal mechanism of the correction. Article 33(2)–(3) UUD 1945 vests in the State control over the branches of production important to the country and the natural resources therein, to be used for the greatest welfare of the people. A treaty that exposes bona fide public-welfare regulation to indirect-expropriation and fair-and-equitable-treatment claims (indicators A7 and A8 in Table 1) therefore stands in tension with a constitutional commitment to regulatory stewardship of the economy. Law No. 25 of 2007 on Investment, as amended by Law No. 11 of 2020 and Law No. 6 of 2023 on Job Creation, frames foreign capital as a regulated instrument of national development. It is not an autonomous rights-holder. Law No. 24 of 2000 on International Treaties allocates the competence to bind and to unbind the State by treaty, the competence Indonesia exercised in terminating a large share of its BITs from 2014.[12] The Constitutional Court's engagement with the treaty-approval question in *Putusan Mahkamah Konstitusi* No. 13/PUU-XVI/2018 confirms that the making and unmaking of such international commitments is subject to constitutional and parliamentary discipline.[29,30] Read together, these sources supply the normative basis. A host State can then correct treaty asymmetry from within its own legal order. The template diagnosis predicts this possibility.

Table 4. Reform-model instruments mapped against the ten asymmetry indicators (● retained/host-adverse; ○ removed/balanced; ●/○ = present in some instruments only).

Indicator	Old	India (2016)	Morocco–Nigeria (2016)	NL (2019)	Indonesia
A1 ISDS present	●	● (exhaustion)	○ (limited)	●	●/○
A2 No exhaustion	●	○	○	○	○
A3 Broad asset definition	●	○ (enterprise)	○	○	○
A4 Unqualified FET	●	○ (closed list)	○ (tethered)	○	○
A5 Umbrella clause	●	○	○	○	○
A6 Unsafeguarded transfers	●	○	○	○	○
A7 Expropriation, no carve-out	●	○ (carve-out)	○	○	●/○ (UAE)
A8 No exceptions / duties	●	○ (exceptions+duties)	○ (investor duties)	○	○
A9 Investor-only standing	●	● (limited)	○ (counterclaim)	●	●
A10 Broad MFN	●	○ (qualified)	○	○ (qualified)	○

4.1 De lege lata deficiencies

On a *de lege lata* reading, four deficiencies define the old-generation bargain, and they survive, in part, even in reform texts. First, procedural asymmetry. Near-universal investor-only standing without any State counterclaim (indicator A9), coupled with direct access unconditioned by the exhaustion of local remedies (A2), places the host legal system outside the dispute altogether and produces a structural inequality of arms. Even proposals to extend standing to affected parties struggle against this imbalance.[11] Second, regulatory exposure. Expropriation clauses without a right-to-regulate carve-out (A7), and the absence of general exceptions (A8), expose bona fide public-welfare regulation (environmental, prudential, public-health) to indirect-expropriation and fair-and-equitable-treatment claims.[1,10] Third, the absence of reciprocity: old-generation texts impose no investor obligations, so the bargain runs one way. Fourth, interpretive open-texture. Unqualified FET (A4) and broad MFN (A10) delegate law-making to tribunals through expansive teleological construction unmoored from the customary minimum standard.[1] In Indonesia's network the residual asymmetries are easy to name. Investor-only standing persists generally, and the Indonesia–UAE BIT retains expropriation protection without a full regulatory carve-out (Table 4). These mark where the rewriting remains incomplete.

4.2 De lege ferenda: three reform proposals

These deficiencies translate into three specific, actor-assigned reform proposals.

Proposal 1: Enact a binding Indonesian Model BIT / negotiating template. The template would embed an enterprise-based investment definition in place of the open-ended 'every kind of asset' formula, would tether fair-and-equitable treatment expressly to the customary minimum standard, and would delete the umbrella clause. General exceptions would follow the model of GATT Article XX, with a balance-of-payments and prudential safeguard on transfers, and an explicit right-to-regulate clause would carry an indirect-expropriation annex distinguishing compensable takings from non-compensable regulation. Investor obligations would be reciprocal. They would cover anti-corruption, human-rights and environmental due diligence.[1,18] Responsibility: the Ministry of Investment and Downstreaming/Investment Coordinating Board (BKPM) together with the Ministry of Foreign Affairs and the Ministry of Law (the former Ministry of Law and Human Rights, divided in October 2024); legal basis: Article 33(2)–(3) UUD 1945 and Law No. 25 of 2007 on Investment, which mandate state stewardship of the economy for public welfare.

Proposal 2: Legislate *ex-ante* parliamentary and risk-assessment discipline on ISDS-bearing treaties. Any treaty conferring investor-State arbitration should require prior approval by the *Dewan Perwakilan Rakyat* (DPR) and a published fiscal- and regulatory-risk impact assessment. A standing program to renegotiate or terminate surviving old-generation BITs should accompany it.[12,14] Responsibility: the DPR and the Government acting jointly. Legal basis: Law No. 24 of 2000 on International Treaties, which governs the competence to ratify and terminate treaties, read with the Constitutional Court's jurisprudence on parliamentary treaty approval (*Putusan Mahkamah Konstitusi* [*Constitutional Court Decision*] No. 13/PUU-XVI/2018, reviewing Law No. 24 of 2000).[29]

Proposal 3: Institutionalize State defense and support multilateral and regional procedural reform. Indonesia should set up a dedicated inter-ministerial ISDS unit. It would handle treaty defense and portfolio management. Future treaties should carry mandatory cooling-off, local-remedies and State-counterclaim provisions, and Indonesia should also back the standing or appellate mechanism under discussion in UNCITRAL Working Group III, along with an ASEAN advisory center.[9,26,31] The design features and trade-offs of an appellate mechanism have been weighed in the literature.[32] The Attorney General's Office represents the State in litigation. It would hold responsibility together with the Ministry of Foreign Affairs. The legal basis rests on the ASEAN Comprehensive Investment Agreement and on the UNCITRAL Working Group III reform mandate, and it is supplemented by the regional rulemaking turn that is already under way in Asia.[24,25] Because these are international instruments, the unit itself would need a domestic basis, and Indonesia has a precedent in the form of a presidential regulation: Presidential Regulation No. 17 of 2016 created a team to handle one specific international arbitration claim,[33] and a standing unit could be created in the same form. The dispute-settlement provisions of the ASEAN Comprehensive Investment Agreement have been found largely consistent with Law No. 25 of 2007,[34] which should ease their alignment with domestic law.

4.3 Caveats and the welfare trade-off

Two caveats temper the normative reading. First, a balanced treaty is not necessarily a better one for development; the reform generation's retreat from investor protection could, on one view, raise the cost of capital, and this study measures the fairness of the bargain. It does not measure its welfare consequences.[35] Second, recent empirical work finds only limited and conditional effects of investment treaties on domestic governance and investment flows, a finding that cautions against

assuming that textual asymmetry translates mechanically into arbitral outcomes or economic harm.[10,35,36]

The welfare trade-off deserves a candid word. This study measures the fairness of the bargain, not its economic consequences. The two should not be conflated. On one view, the reform generation's retreat from investor protection could raise the cost of capital or deter investment in the very capital-importing States that the reform is meant to serve. On another view, the older, over-protective template produced regulatory chill and fiscal constraint without a matching investment payoff, since the empirical evidence that treaties reshape domestic governance or attract investment is at best equivocal.[7,35,36] The most defensible reading is that the reform generation tries to find a calibrated midpoint between under-protection and over-protection, and the fairness gains that this index captures are necessary for a welfare improvement, but they are not sufficient. The present study adds a way to measure the fairness dimension. Quantifying the welfare dimension is the natural next task. It lies outside this study's design.

Experience in other States shows why the welfare question cannot be settled from the treaty text alone. India's termination of a large group of its bilateral investment treaties in 2016 was followed by a significant fall in foreign direct investment inflows from the partner countries concerned.[37] Chinese bilateral investment treaties, by contrast, are associated with higher bilateral investment flows, although they are also associated with divergence in voting at the United Nations.[38] A formal model of reform options for developing-country regulatory chill likewise finds that excluding ISDS may fail because of hold-up, while a carve-out from compensation for climate-positive measures looks most promising.[39] For Indonesia, whose own terminations began in 2014, these studies suggest that a rebalanced text should be accompanied by monitoring of investment flows. That inference lies beyond what the present design can test.

4.4 Limitations

Four limitations bound these claims. First, the asymmetry index measures the text of the bargain, not its operation: how a tribunal construes a clause, and how that clause meets the facts of a dispute, cannot be read from a coding of the treaty. Inter-coder reliability ($\kappa = 0.825$) falls short of perfect. The shortfall concentrates on the most construction-dependent indicators. That shows where the textual reading is itself open to dispute. Second, the ten indicators carry equal weight even though their practical consequences differ: an umbrella clause and a broad definition are not equivalent risks. A consequence-weighted index would shift individual scores, although the near-total generational separation holds under any credible reweighting (Section 3.5). Third, the sample of forty is purposive, built to contrast generations and dyads, not to represent the treaty population, and the South–South old-generation cell is especially small (five), so the null result there fits the template account but rests on limited data. It should be read as strongly suggestive, not conclusive. Fourth, the dyad classification treats development status as categorical and fixed at a single point, which obscures the changing position of States such as Korea, Singapore and the UAE. The natural next step is a larger probability sample with a consequence-weighted index, together with matched entry of the ISDS histories of the same treaties.

4.5 Validity threats

The main threats to validity are stated plainly. Internal validity is limited by possible coder expectancy and by the ISDS-absent coding convention; blind second-coding and the fixing of the primary coding before analysis mitigate the first, and Section 3.5 shows that the second is immaterial to the generational result. Construct validity is limited by the equal weighting of indicators. The choice of the ten features limits it too. The selection is defended by its match to the reform literature's own catalog of host-adverse design. The weighting sensitivity analysis probes it. External validity is limited by the purposive sample and, above all, by the small South–South old-generation cell, so in this constructed corpus the study can support the claim that old-generation asymmetry is generation-driven, not dyad-driven. It remains cautious about generalizing the precise index magnitudes to the full treaty population. Throughout, the strong and well-identified claim is kept apart from the weaker, sample-bounded claim about exact values: the strong claim is that the template account receives support in this sample and the bargaining-power account finds none within the old generation.

5. Conclusion

This article measured contractual asymmetry in forty investment treaties. The coding drew on their authentic texts and reached almost-perfect inter-coder reliability, and the measurement was then linked to how ISDS has been used. Old-generation treaties are strongly one-sided (mean 8.19 of 10), while the reform generation is clearly balanced (2.86). The index tracks this near-total separation across signature years (Table 3; Figures 2 and 3). Indonesia's own network reproduces it, moving from an average of 8.12 to 3.50. The central contribution of the study is to locate the source of that asymmetry. It lies less in the bargaining power exercised in each negotiation, because South–South treaties within the old generation are as one-sided as North–South ones (Figure 4). It lies instead in the hegemonic design template of the era, which spread through legal transplantation and appears to have been reproduced even by the States it disadvantaged. This diagnosis makes reform tractable. A template can be rewritten. For capital-importing States such as Indonesia, equipped with Article 33 UUD 1945, Law No. 25 of 2007 and Law No. 24 of 2000, replacing the old text with a balanced one is a measurable and largely self-directed correction. The underlying problem was one of design, not of power.

Declarations

Ethics Approval and Consent

Not applicable. The study analyzed publicly available treaty texts and aggregate statistics and involved no human participants, so ethics committee approval and informed consent were not required.

Consent for Publication

Not applicable.

Use of Artificial Intelligence

None. No artificial intelligence tools were used to generate, analyze or write any part of this work.

Author Contributions

I.A.: Conceptualization, Methodology, Investigation, Formal analysis, Writing – original draft. D.A.S.: Methodology, Validation, Data curation, Writing – review & editing. J.A.: Resources, Visualization, Supervision, Writing – review & editing. All authors reviewed and approved the final manuscript.

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Competing Interests

None. The authors declare no competing interests.

Data Availability

The coded dataset for all forty treaties (the ten indicators, metadata, the computed asymmetry index and the UNCTAD source reference for every treaty), the blind reliability key and the analysis script are available from the corresponding author on reasonable request. ISDS statistics are taken from

UNCTAD's published Facts and Figures on ISDS Cases and the Investment Dispute Settlement Navigator.

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