

Australia-Pakistan BIT

BCSDA's Responses to Specific Feedback Sought in Consultation

Overarching Objectives: Balancing Openness and Public Interest

How can the updated treaties preserve Australia's open, rules-based economic architecture while ensuring policy flexibility? What high-level policy goals (e.g., fostering sustainable economic growth, supporting energy transition) should shape Australia's negotiating approach?

BCSDA Response

Given the context and experiences of the 1998 Bilateral Investment Treaty (BIT) between Australia and Pakistan, an updated agreement presents an opportunity for Australia to preserve its commitment to an **open, rules-based economic architecture**, while simultaneously ensuring the **policy flexibility** necessary to manage public-interest concerns. This requires balancing investor protections with explicit safeguards for legitimate public regulations, reflecting contemporary global best practices in investment treaties.

Strategic Policy Goals to Shape Australia's Negotiating Approach

An effective renegotiation strategy should prioritize the following **high-level policy objectives**:

1. Promoting Sustainable Economic Growth and Sustainable Development

Australia's negotiating strategy should explicitly embed sustainability goals into the BIT framework, ensuring investments promote **long-term sustainable economic growth**. Considering Pakistan's significant climate vulnerability (ranked 8th globally by the Global Climate Risk Index 2021), sustainable investment should be a high priority. For instance, promoting renewable energy projects aligns both with Pakistan's climate resilience goals (Pakistan aims for 60% renewable energy by 2030) and Australia's strategic focus on sustainable infrastructure and clean energy exports (e.g., green hydrogen or solar technologies).

Australia can draw from its modern agreements, such as the **Australia–Indonesia Comprehensive Economic Partnership Agreement (IA-CEPA)**, which explicitly references sustainable development goals, environmental protection, and labour standards. Incorporating similar provisions can ensure that both parties retain the right to implement environmental protections without fearing investor lawsuits.

Specific Recommendations:

- **Incorporate clear exceptions for public interest regulations** (e.g., environmental protection, public health), explicitly stating that non-discriminatory regulatory actions do not constitute indirect expropriation.
- **Establish investor obligations**, requiring compliance with international environmental, labour, and corporate responsibility standards. This aligns with Australia's evolving treaty practice evident in agreements like CPTPP and RCEP.
- **Introduce explicit references to international climate agreements** such as the Paris Agreement, underscoring both countries' commitments to sustainable development.

High-Level Policy Goals Guiding Australia's Negotiating Approach

Australia's negotiations for an updated BIT with Pakistan should be shaped by several high-level policy goals, which reflect Australia's economic and strategic priorities, including:

1. Promoting Sustainable Economic Growth

Australia should prioritize investment flows that contribute to **sustainable economic development**. Emphasis on **green infrastructure, agriculture efficiency, water management, and clean energy** can leverage Australia's expertise while meeting Pakistan's development needs. Specifically:

- **Renewable Energy:** Australian companies are global leaders in solar and wind technologies. Given Pakistan's ambitious renewable energy targets, Australia's BIT could explicitly support renewable energy and clean technology investments, thus positioning Australian firms advantageously in Pakistan's growing renewable energy market.
- **Agriculture and Agritech:** Australia's advanced agribusiness sector, worth around AUD 90 billion annually, can significantly assist Pakistan's agriculture sector modernization. A targeted approach encouraging agritech innovations, crop resilience technologies, and supply chain investments under the new BIT would strengthen trade linkages while promoting sustainable agricultural practices in Pakistan.

2. Supporting the Energy Transition and Climate Goals

Australia can leverage its global leadership in energy transition to support Pakistan's energy transition, explicitly encouraging Australian investment in Pakistan's renewables sector. Australia's Low Emissions Technology Statement (2022) highlights opportunities in clean energy exports; an updated BIT could reinforce these goals by explicitly incentivizing clean energy investments such as green hydrogen projects, solar power installations, or battery storage solutions.

- **Energy Transition Cooperation:** Pakistan's Nationally Determined Contribution (NDC) under the Paris Agreement requires international capital and technology transfers. Australia, as a leader in renewable and low-emissions technologies, could directly support these goals through structured incentives within the BIT framework.

3. Supporting Regulatory Autonomy and Policy Flexibility

Given the costly lessons learned from Pakistan's experience (the Tethyan Copper dispute), Australia should clearly safeguard policy autonomy. Australia's updated BIT with Indonesia (signed in 2019 under the IA-CEPA) and its recent FTAs (such as the Australia-UK Free Trade Agreement, 2021) include explicit language ensuring governments' rights to regulate in the public interest. These approaches prevent disputes similar to Philip Morris vs. Australia (2011), a landmark case that shifted Australian policy towards a more cautious stance on Investor-State Dispute Settlement (ISDS).

- **Explicit Regulatory Carve-outs:** Clearly defined carve-outs for legitimate public policy measures, such as environmental regulation or public health, should be included to safeguard both Australian and Pakistani policy interests. Australia's recent FTAs (with UK and India) demonstrate successful implementation of such provisions, balancing investor certainty with regulatory freedom.

4. Strengthening Institutional Cooperation and Transparency

Australia should promote **institutional cooperation and transparency** measures. The updated agreement could establish or strengthen joint committees, exchange mechanisms, or business dialogues to actively monitor and support investment activities.

- **Joint Investment Committee:** Regular high-level dialogues or committees, such as the existing Australia-Pakistan Joint Trade Committee, could proactively manage investment concerns, resolve misunderstandings early, and promote opportunities.
- **Transparency Provisions:** Ensuring transparency in regulations affecting investors is crucial. This could include obligations for timely publication and consultation regarding new regulations affecting investment, ensuring predictability and reducing disputes.

5. Supporting Inclusive Economic Development

With Australia's commitment to gender equality and inclusive growth (as outlined in its 2022-25 International Development Policy), the BIT could promote investments contributing to inclusive growth outcomes. Provisions could encourage investment projects that create jobs, skill transfers, and community engagement in underdeveloped regions of Pakistan, particularly focusing on sectors with high potential employment impact such as manufacturing, textiles, and services.

- **Capacity Building:** The updated BIT can explicitly include cooperation provisions encouraging technical assistance and skills transfer, particularly benefiting Pakistan's workforce in sectors Australia targets for investment.

6. Modernizing Dispute Resolution Mechanisms (ISDS reform)

The **Investor-State Dispute Settlement (ISDS)** provision needs careful calibration. Australia's experience (e.g., Philip Morris arbitration over tobacco packaging) has increased sensitivity to potential abuses of ISDS. Australia's current policy favours either eliminating ISDS or ensuring stringent safeguards such as a preliminary mechanism to filter frivolous claims, mediation as the first step, and requiring local remedy exhaustion before arbitration.

- **ISDS reforms:** Australia should advocate for explicit criteria limiting ISDS claims to significant breaches, possibly introducing mandatory mediation or conciliation stages before arbitration, or even opting for state-to-state arbitration to reduce frivolous or opportunistic claims.

Toward a Balanced Investment Framework

An updated Australia-Pakistan BIT should reflect Australia's contemporary trade and investment priorities, namely:

- **Clearly safeguard public interest regulatory autonomy.**
- Foster **sustainable, climate-conscious investments**.
- Support **transparent and rules-based market access** for investors.
- Incorporate institutional mechanisms for ongoing bilateral cooperation and regulatory transparency.
- Promote inclusive economic development through targeted sectoral investments (e.g., energy, agriculture, technology).

Australia's negotiating position should thus reflect a nuanced understanding of its national interests, emphasizing a modernized treaty framework that is investor-friendly yet clearly preserves governments' rights to regulate and pursue sustainable development objectives.

Scope of Renegotiation and Treaty Coverage

What types of investments should be covered by the new agreements?

Should any specific sectors or activities be excluded or limited in scope (e.g., national security, cultural industries)?

Are there notable areas that require expanded cooperation or facilitation (e.g., renewable energy, technology transfers)?

BCSDA Response

A renewed Australia-Pakistan Bilateral Investment Treaty (BIT) could be updated to preserve Australia's open economic architecture, maintain policy flexibility, and incorporate modern policy objectives, supported by specific details, statistics, and examples:

1. Types of Investments to Include

An updated BIT should broadly define investments to cover all contemporary forms of economic engagement while clearly delineating boundaries to exclude speculative claims or short-term financial transactions that add limited developmental value.

Recommended Coverage:

- **Renewable Energy and Green Technologies:**

Australia is globally recognized in renewable energy and emerging green technologies, with significant growth potential in solar, wind, and green hydrogen sectors. Pakistan has set ambitious renewable energy targets, aiming for 60% renewable electricity by 2030, requiring nearly **\$40 billion** in investment (Government of Pakistan NDC, 2021). Clearly including renewable energy infrastructure under treaty protections would facilitate Australian investment into Pakistani projects, mirroring recent Australian agreements such as the Australia-Indonesia Comprehensive Economic Partnership Agreement (IA-CEPA), which explicitly encourages renewable energy investments.

- **Mining, Resources, and Extractives:**

Given the historical importance and ongoing potential—illustrated by the recent **\$10 billion**

Barrick Gold-led Reko Diq copper-gold project—mining should remain explicitly protected under the updated BIT. Clearer provisions should ensure investment stability while respecting Pakistan’s sovereignty over natural resources. The Reko Diq dispute (resulting in a **\$5.9 billion ICSID award**) illustrates the critical importance of clear dispute resolution frameworks, explicitly balancing investor protections with public interest regulations (ICSID, 2019).

- **Agribusiness and Agritech:**

Australia’s agriculture sector (valued at approximately **AUD 90 billion annually**) is well-positioned to collaborate with Pakistan’s agriculture sector, which contributes around **19% to Pakistan’s GDP** and employs **38.5%** of its labour force. Australian investment in modernizing Pakistan’s agricultural practices—such as advanced crop science, irrigation technologies, dairy farming, and food processing—should be explicitly supported.

- **Education and Professional Services:**

Pakistani students form Australia’s fifth-largest international student group, numbering around **20,000** students annually (DFAT, 2023). Investment protections under the BIT should specifically cover higher education, vocational training, and digital education technologies, facilitating investments such as Australian campuses, technology transfers, or online education platforms.

- **Infrastructure and Technology (ICT):**

ICT and digital infrastructure are rapidly expanding sectors in Pakistan (digital economy projected to surpass **\$30 billion** by 2030). Australian investors, including ICT and fintech firms, would benefit from clearly defined protections encouraging digital innovation, cybersecurity ventures, and fintech solutions.

Ensuring Policy Flexibility: Areas for Exemptions and Explicit Safeguards

Australia’s modern BIT practice, notably demonstrated in recent FTAs (IA-CEPA with Indonesia and Australia-UK FTA), incorporates clear exceptions that safeguard regulatory autonomy. An updated BIT with Pakistan could include similar modern clauses, explicitly preserving both governments’ rights to:

- Regulate investments to protect **public health, safety, and environment** (following the model of the Australia–Indonesia CEPA).
- Introduce measures for national security and public order, exempting such measures from investor claims.
- Maintain flexibility in taxation, prudential financial regulation, and monetary policy (examples from recent Australian treaties with UK and India).

Specific Recommendations and Precedents:

- Adopt **“right-to-regulate”** provisions, clearly distinguishing legitimate regulatory actions from indirect expropriations, using wording from Australia’s recent FTAs (e.g., Australia–UK FTA, 2021).
- Include transparent procedural safeguards such as requiring investors to exhaust domestic remedies or mediation before resorting to Investor-State Dispute Settlement (ISDS), reflecting global ISDS reform trends (e.g., CPTPP).
- Enhance transparency provisions mandating consultation and publication of investment-related regulations to prevent arbitrary decisions, modelled after the Australia–Singapore Digital Economy Agreement (2020).

High-Level Policy Goals Shaping Negotiations

Australia’s negotiating approach should focus on the following high-level policy goals:

1. **Sustainable Economic Growth**

Aligning with Australia’s commitment to sustainability (International Development Policy 2022–2025), Australia should seek BIT provisions explicitly fostering investments in sustainable sectors such as renewable energy, agritech, and sustainable mining practices. Including references to sustainability principles, as done in recent Australian FTAs (e.g., with the EU or UK), would demonstrate mutual commitment to environmentally responsible and socially inclusive growth.

Examples:

- **Renewable Energy:**
Australia, aiming to become a renewable energy export powerhouse (Low Emissions Technology Statement, 2022), can leverage this BIT to support Australian renewable energy investments in Pakistan (solar parks, wind farms, green hydrogen infrastructure), aligned with Pakistan's **Alternative and Renewable Energy Policy (2019)**.
- **AgriTech and Sustainable Agriculture:**
With Pakistan's agriculture sector critical for its economic stability and food security, Australia's advanced agricultural technologies can enhance productivity and climate resilience. A specific emphasis on sustainable agribusiness practices can boost Australia's export potential in agricultural innovation (drip irrigation, drought-resistant seeds, precision agriculture technologies).

Policy Flexibility and Investor Protections:

- Provisions clearly distinguishing legitimate public regulations from investor protections would prevent disputes similar to the Tethyan Copper controversy. For example, new BITs increasingly include language clarifying that legitimate regulatory actions (environmental, labour standards, public health) are not considered indirect expropriation (as seen in Australia–Indonesia CEPA, Annex on Expropriation).

Explicit National Security and Public Policy Exceptions

Given increased global focus on national security, Australia's updated BIT should explicitly exempt measures deemed essential for national security or maintaining public order from investment claims. Such explicit exceptions exist in the CPTPP, allowing Australia to screen sensitive foreign investments without fear of disputes. Clearly defining this in the Australia–Pakistan BIT would provide greater regulatory predictability.

Institutional Mechanisms for Enhanced Transparency and Cooperation

The updated BIT should also strengthen institutional dialogue and investment facilitation mechanisms, including:

- **Joint Investment Facilitation Committee:** Institutionalized consultations between Australia's Austrade and Pakistan's Board of Investment to address practical issues faced by investors proactively.
- Transparency obligations on both governments, ensuring predictable policy frameworks and better information sharing on new regulations affecting investments.

Precedents from Recent Agreements

Australia has successfully introduced modernized provisions that safeguard both investors and government rights in recent agreements:

- **Australia–UK Free Trade Agreement (2021)** explicitly acknowledges governments' right to regulate to achieve public welfare objectives and national security measures, providing valuable precedents for the Pakistan BIT.
- **The Indonesia–Australia Comprehensive Economic Partnership Agreement (IA-CEPA, 2019)** includes innovative approaches for sustainable investment cooperation, supporting regulatory flexibility.
- **The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, 2018)** sets standards on public-interest regulations and ISDS reform, including clear definitions of indirect expropriation and arbitration procedural safeguards.

Toward a Balanced, Modern Investment Framework

Australia's negotiating approach toward an updated BIT with Pakistan should clearly balance its traditional commitment to open investment regimes with contemporary policy needs, explicitly ensuring regulatory space for sustainable growth, environmental protection, and national security. Drawing lessons from previous challenges (such as the Reko Diq arbitration case), Australia can craft an investment treaty framework responsive to modern realities, enhancing investment certainty while preserving sovereign regulatory flexibility.

This balanced approach will help realize untapped bilateral economic potential, positioning Australian businesses favourably in strategic Pakistani markets, contributing to sustainable economic development and reinforcing Australia's diplomatic engagement with Pakistan.

Protections for the Right to Regulate

Which specific provisions should be included to preserve the government's right to regulate in the public interest (e.g., environmental, public health)?

How can the treaties ensure that public interest regulations are safeguarded from unfair claims?

BCSDA Response

An updated Australia-Pakistan BIT could preserve Australia's rules-based economic system while explicitly safeguarding public-interest regulations from unfair claims. Specific examples, precedents, and recommended treaty practices are included:

Safeguarding Public Interest Regulations within an Updated BIT

Given past experiences such as the Tethyan Copper (Reko Diq) arbitration case, Australia must ensure future bilateral investment treaties clearly protect the government's right to regulate in the public interest—covering environmental, health, public safety, and national security measures—without exposure to excessive or unfair investor claims.

Recommended Policy Provisions and Safeguards:

An updated Australia-Pakistan BIT should explicitly incorporate the following types of provisions to ensure clear and effective safeguards:

1. Explicit "Right-to-Regulate" Clauses

The updated BIT should contain explicit language clarifying that legitimate public-interest measures—such as those to protect public health, the environment, labour standards, or security—are **not considered treaty breaches**, provided they are non-discriminatory, transparently applied, and enacted in good faith.

Precedents:

- **Australia-Indonesia CEPA (2019)**: Explicitly includes clauses asserting the right of governments to regulate for legitimate public welfare objectives.
- **CPTPP (2018)**: Article 9.16 explicitly clarifies that non-discriminatory regulatory actions to protect legitimate public welfare objectives (health, environment, and safety) do not constitute indirect expropriation.

2. Clarified Definition of Indirect Expropriation

One of the critical risks of BITs is overly broad interpretations of what constitutes "indirect expropriation." The updated BIT should clearly define indirect expropriation, clarifying that genuine, non-discriminatory public welfare measures (e.g., climate change policies, pollution control laws, public health regulations) are not expropriations requiring compensation.

Example of Clear Language (CPTPP 2018, Annex 9-B):

"Non-discriminatory regulatory actions by a Party designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances."

This language explicitly protects Australia's regulatory autonomy, providing clear guidance to tribunals to prevent overly broad interpretations like those encountered in past arbitration disputes (e.g., Tethyan Copper or Philip Morris tobacco packaging dispute).

3. General Exceptions for Public Interest

An explicit "General Exceptions" clause similar to Article XX of the WTO's GATT (1994) would strengthen both governments' ability to regulate without risking unfair arbitration:

Precedent and Example:

- **Australia-UK FTA (2021)** (Article 30.1): Incorporates WTO-style general exceptions, explicitly protecting regulatory actions for public health, environment, public morals, and safety from being challenged as treaty violations.

- **RCEP (2020)**: Similarly contains general exceptions allowing governments flexibility to pursue legitimate objectives without incurring claims.
- 4. National Security Exceptions**
An explicit national security carve-out should be included to protect measures related to defense, security, or essential interests. Given Pakistan's geopolitical sensitivities and Australia's strategic considerations, this is crucial.
Example:
- **Australia–Singapore FTA (Chapter 17, Article 17.3)**: Explicitly permits measures relating to essential security, thus insulating sensitive government actions from ISDS claims.
- 5. Modernized Investor-State Dispute Settlement (ISDS)**
Australia should consider ISDS reform by:
- **Requiring Exhaustion of Local Remedies or Mediation:**
The updated BIT could require investors to pursue domestic judicial remedies first, before initiating international arbitration, reducing unnecessary claims.
Precedent: The 2019 **EU–Vietnam Investment Protection Agreement (EVIPA)** mandates a domestic legal review period before arbitration.
 - **Introducing a Code of Conduct for Arbitrators and Transparency Provisions:**
Ensuring transparency, impartiality, and legitimacy in arbitration processes by mandating transparent proceedings and public access to arbitral hearings and documents.
 - **Introducing Safeguards Against Frivolous Claims:**
This could include clear thresholds (e.g., minimum claim size, demonstrable economic harm, or explicit legal basis).
- 6. Investor Obligations and Standards**
Modern BITs increasingly include explicit investor obligations to follow host country laws, environmental and labour standards, and corporate social responsibility (CSR) guidelines. This could significantly reduce unfair claims by ensuring investor accountability.
Example:
- **Australia–Indonesia CEPA (2019)**: Encourages responsible business conduct, requiring investors to adhere to international environmental and labour standards, mitigating risks of conflicts stemming from regulatory measures.

Specific Examples and Statistics Illustrating Need for Reform:

- **Tethyan Copper Company v. Pakistan (2019)**:
Pakistan faced an arbitration claim totaling around **USD 5.9 billion** (approx. 2% of Pakistan's GDP). This was due to ambiguous provisions in the older-generation BIT (1998). An updated BIT should explicitly clarify regulatory autonomy to prevent recurrence.
- **Philip Morris v. Australia (2015)**:
Australia incurred around **AUD 24 million in legal costs** defending against Philip Morris's claim related to plain-packaging tobacco legislation. Although Australia ultimately prevailed, the costly process prompted Australia to rethink BIT structures.

These precedents underscore the necessity for explicit regulatory safeguards in future agreements.

Alignment with High-level Australian Policy Objectives:

The recommended approach aligns with Australia's contemporary policy goals, including:

- **Sustainable Development** (outlined in Australia's International Development Policy 2022-25): explicitly incorporating sustainability clauses in BIT.
- **Energy Transition and Climate Commitments** (Low Emissions Technology Statement 2022): promoting investments aligned with clean energy priorities.
- **Balanced ISDS Framework** (DFAT Review of BITs, 2020): modernizing investment treaty arbitration processes to mitigate undue investor claims.

Such an updated BIT provides Australia with both investor certainty (upholding open, rules-based economic engagement) and sufficient regulatory autonomy to pursue public interest policies effectively.

The updated Australia-Pakistan BIT offers Australia a strategic opportunity to reinforce its open investment principles while securing necessary policy flexibility. By explicitly embedding regulatory carve-outs, sustainability criteria, transparent arbitration, and clearly defined investment protections, Australia can confidently engage with Pakistan economically, knowing public-interest safeguards are robustly maintained. These provisions not only strengthen the legal framework but also ensure the BIT aligns closely with Australia's broader strategic and economic priorities, fostering sustainable, mutually beneficial long-term bilateral economic relations.

Investor Protections

Which investor rights and protections (e.g., fair and equitable treatment, full protection and security) are essential to retain or update?

How can these protections be modernized to reflect evolving global best practices?

How do we balance robust investor protections with legitimate regulatory objectives?

BCSDA Response

Essential Investor Rights and Protections to Retain or Update

The following investor rights and protections—standard features in most BITs—should be retained or carefully updated in a revised Australia–Pakistan BIT:

1. Fair and Equitable Treatment (FET)

Why Retain?

Fair and equitable treatment (FET) remains a core protection that ensures foreign investors are treated transparently and predictably, safeguarding against arbitrary, discriminatory, or unreasonable governmental actions.

- The importance of FET was highlighted in the landmark ICSID ruling (*Tethyan Copper Company Pty Ltd v. Pakistan*, 2019), which determined Pakistan violated this standard, resulting in a \$5.9 billion award. Such cases highlight the practical necessity of retaining clear FET protections to assure investors.

Recommended Updates (Modernization):

- **Clarify the scope of FET:**
Modern treaties, such as the CPTPP (2018) and Australia–Indonesia CEPA (2019), tie FET explicitly to customary international law minimum standards, rather than broad or undefined interpretations. For example, the CPTPP explicitly defines FET as not exceeding the international minimum standard of treatment, preventing overly broad interpretations.
- **Specify prohibited measures clearly:**
Include provisions prohibiting arbitrary or discriminatory treatment explicitly, thus reducing uncertainty for investors and governments.

2. Full Protection and Security (FPS)

Retaining the obligation of "Full Protection and Security" is vital to reassure investors that host countries must take proactive measures to safeguard investments physically and legally against threats like violence, sabotage, or civil unrest.

Example:

- FPS was invoked notably in *Siemens AG v. Argentina* (2007), where the tribunal awarded damages because Argentina failed to provide adequate physical security during civil unrest. Similar explicit standards reassure investors, especially in politically volatile environments.

Recommended Modernization:

- **Clarify that FPS primarily refers to physical protection** rather than a broader interpretation covering legal or economic security unless explicitly intended.
- Explicitly limit the scope to prevent tribunals from interpreting FPS obligations as guarantees against purely economic or regulatory changes.

3. Protection against Direct and Indirect Expropriation

Explicit protection against unlawful expropriation remains fundamental. This provision ensures investors will receive compensation if assets are seized or if their economic viability is substantially impaired without legitimate justification.

Lessons from Precedents:

- In the *Reko Diq dispute*, Tethyan Copper successfully invoked expropriation protections, as the Pakistani government's denial of a mining license and contract revocation amounted to unlawful expropriation, illustrating the practical value of this provision.

Recommended Modernization:

- Include explicit criteria for **indirect expropriation**, clearly stating that legitimate public policy regulations (environmental, public health) do **not constitute compensable expropriation**, inspired by CPTPP's Annex 9-B or IA-CEPA, clearly distinguishing legitimate regulations from compensable expropriations.

4. Free Transfer of Funds

Retaining protections ensuring investors can freely transfer funds (profits, dividends, capital) is crucial. For instance, Australia's early ventures in Pakistan's energy sector (e.g., BHP's Zamzama gas project) benefited significantly from assurances enabling capital repatriation.

Recommended Modernization:

- Introduce explicit **exceptions for temporary safeguards** during legitimate financial crises or balance-of-payments emergencies, mirroring provisions found in recent treaties like CPTPP and RCEP, to protect both investor rights and host country financial stability.

5. Most-Favoured-Nation (MFN) Treatment

An updated BIT should retain the MFN clause, ensuring Australian investors remain competitive and receive treatment no less favourable than other foreign investors. MFN clauses reinforce market fairness, crucial for sectors like mining, infrastructure, and technology, where other countries (e.g., China under CPEC) already enjoy extensive investment rights.

Recommended Modernization:

- **Clearly exclude ISDS procedural elements** from MFN provisions, preventing investors from importing advantageous dispute-resolution provisions from other treaties. Such explicit exclusions have become common (e.g., recent USMCA or Australia–Indonesia CEPA).

Exclusions and Sectoral Limits to Ensure Policy Flexibility

Certain sectors or areas merit explicit limitations or exclusions from the BIT to protect policy autonomy:

- **National Security:** Exempt sensitive sectors clearly, as Australia has done in the CPTPP and Australia–Indonesia CEPA, explicitly preserving rights to regulate or restrict foreign investment critical to national security.
- **Critical Infrastructure and Communications:** Explicitly maintain Australian and Pakistani rights to regulate sensitive infrastructure (telecom, power grids, ports) without triggering arbitration claims.
- **Cultural and Media Sectors:** Consider excluding or explicitly limiting investment protections in cultural industries, reflecting practices common in Australia's existing agreements (e.g., Australia–UK FTA, 2021).
- **Environmental and Public Health Regulation:** Clearly exclude legitimate non-discriminatory public welfare regulations from treaty challenges.

Modernizing Investor Protections to Prevent Unfair Claims

To safeguard public-interest regulations effectively and prevent misuse of investor protections, specific mechanisms and clauses are recommended:

1. Right-to-Regulate and Regulatory Autonomy Clauses

Explicit treaty text asserting the government's "right to regulate" in public interest is critical.

Precedents:

- CPTPP (Annex 9-B) explicitly provides that non-discriminatory regulations related to health, environment, safety, or financial stability are not indirect expropriations.

- Australia–UK FTA (2021) expressly states regulatory measures in legitimate public interests are not actionable under investor claims.
- 2. Investor-State Dispute Settlement (ISDS) Reform**
- Considering Australia's caution post-Philip Morris arbitration (2011), modern ISDS provisions should include safeguards:
- **Mandatory mediation:** Require a mediation stage before arbitration.
 - **Exhaustion of Local Remedies:** Investors must first attempt resolution through domestic courts, reducing frivolous international claims. (Precedent: EU–Vietnam Investment Protection Agreement, 2019)
 - **Arbitration Filtering Mechanisms:** Introduce a screening mechanism preventing trivial claims, modelled after EU–Canada Comprehensive Economic and Trade Agreement (CETA).
- 3. Transparency and Procedural Safeguards**
- **Public Access to Arbitration Proceedings:** Following CPTPP standards, mandate transparency (public hearings, open documentation), ensuring accountability.
 - **Third-party (Amicus Curiae) participation:** Allowing independent submissions from civil society or NGOs to ensure balanced consideration of public interest issues (ICSID reforms following UNCITRAL Transparency Rules).

Expanded Cooperation and Facilitation Areas

There are several notable areas of expanded cooperation and facilitation that the updated BIT could emphasize explicitly, promoting investments aligned with broader policy goals of both countries:

- **Renewable Energy & Climate Transition:**
Explicit encouragement of renewable energy investments (solar parks, wind energy, battery storage, green hydrogen projects), crucial for Pakistan's renewable targets (60% renewable by 2030). Australia's proven capability, demonstrated through substantial renewable energy investments domestically (over AUD 35 billion in renewable projects since 2017), positions it strategically.
- **Agritech & Sustainable Agriculture:**
Investment facilitation in agritech and sustainable agriculture technologies, leveraging Australia's significant expertise in agritech and advanced farming methods to help Pakistan modernize agriculture (a sector employing over 38% of Pakistan's labour force).
- **Digital Technology and Innovation:**
Encouraging Australian digital service providers, fintech solutions, and e-commerce companies to enter Pakistan's rapidly expanding digital economy (projected at \$30 billion by 2030).
- **Education and Skill Transfer:**
Facilitating Australian investments in education infrastructure, vocational training institutes, and digital education platforms, reflecting the sizable presence of Pakistani students in Australia (~20,000 annually).

Striking the Balance

The updated Australia–Pakistan BIT should:

- Clearly retain and refine core investor protections (Fair and Equitable Treatment, Full Protection and Security, Free Transfer, MFN) with **updated language and explicit clarifications** to prevent excessive claims.
- Clearly establish **general exceptions** and **regulatory carve-outs** to protect public-interest measures and safeguard national security.
- Adopt **modern ISDS provisions** to prevent misuse while ensuring transparency and legitimacy.

This balanced approach preserves investor confidence and Australia's open, rules-based economic approach while ensuring both governments retain sufficient flexibility to regulate effectively in the public interest.

Dispute Settlement Mechanisms

Which model(s) or approach(es) to investor–State dispute settlement (ISDS) should be considered (e.g., reformed ISDS, state-to-state dispute resolution, alternative mechanisms)?

*What safeguards, limitations, or exceptions should be included to manage potential disputes?
How do we ensure transparency, fairness, and proportionality in dispute settlement?*

BCSDA Response

Recommended ISDS Approaches and Models for the Updated BIT

Given Australia's evolving stance on ISDS (particularly post-Philip Morris v. Australia) and Pakistan's significant experiences (notably Tethyan Copper), the updated Australia–Pakistan BIT should adopt a carefully reformed ISDS framework, balancing investor protection with public policy flexibility.

1. Reformed ISDS Approach

A modernized or "**reformed ISDS**" approach offers an ideal middle ground, retaining dispute resolution benefits while introducing safeguards to address historical concerns such as exorbitant arbitration awards, opaque proceedings, and unjustified investor claims.

Recommended Components of Reformed ISDS:

- **Mandatory Mediation or Conciliation:**

Before arbitration, investors should engage in compulsory mediation, promoting early resolution.

Example clause:

- "To enhance procedural fairness and mitigate frivolous claims, investors must exhaust all reasonable domestic legal remedies before pursuing international arbitration, unless such remedies are demonstrably futile. ISDS proceedings shall follow enhanced transparency standards, including open hearings, public disclosure of filings, and provisions for stakeholder submissions. Arbitrators shall adhere to a strict code of conduct to ensure impartiality and consistency in decision-making."

Example:

- EU–Vietnam Investment Protection Agreement (EVIPA, 2019) requires mandatory mediation before investors can initiate formal arbitration.

- **Local Remedies Exhaustion Clause:**

Investors must first seek remedy through domestic courts for a defined period (12–18 months) before international arbitration.

Precedent:

- India's Model BIT (2016) mandates investors to exhaust local judicial remedies, significantly reducing frivolous international claims.

- **Establishing an ISDS Appeals Mechanism:**

Introducing a formal appellate review mechanism to address inconsistencies and unfair tribunal decisions enhances proportionality and fairness.

Precedent:

- The EU–Canada Comprehensive Economic and Trade Agreement (CETA, 2017) proposes an Investment Court System with an appellate tribunal.

2. State-to-State Dispute Settlement as a Complementary Option

Given Pakistan's sensitivities around investor claims, especially after the USD 5.9 billion Tethyan Copper arbitration (nearly 2% of Pakistan's GDP at the time), an alternative or complementary approach could be **state-to-state dispute settlement**.

- Under this model, disputes are resolved between governments, not private investors. This reduces pressure from direct investor lawsuits, provides diplomatic space for resolution, and maintains governmental regulatory flexibility.

Example:

- **Australia–Japan Economic Partnership Agreement (2015)** emphasizes state-to-state dispute resolution, significantly limiting direct investor challenges and ensuring regulatory sovereignty.

3. Alternative Mechanisms: Investment Facilitation and Ombudsman

Adopting an alternative mechanism like an **Investment Ombudsman or Facilitation Committee** can proactively prevent disputes. Investors can raise grievances through a dedicated bilateral mechanism, significantly reducing litigation or arbitration.

Example:

- **The Brazil Model Investment Cooperation and Facilitation Agreement (CIFA, 2015)** includes ombudsman-based dispute prevention, avoiding costly arbitrations.

Recommended Safeguards, Limitations, and Exceptions for ISDS

To effectively manage disputes, explicit safeguards and exceptions are essential:

1. Clear Regulatory Carve-outs and Exceptions

- Explicitly state that non-discriminatory regulations for public health, environment, security, and financial stability **do not constitute indirect expropriation**.
- Example provisions from CPTPP Annex 9-B, stating:
“Non-discriminatory regulatory actions designed to protect legitimate public welfare objectives...do not constitute indirect expropriation, except in rare circumstances.”

2. Thresholds for Claims and Procedural Filters

- Require claimants to demonstrate clear **economic harm**, set minimum claim sizes (e.g., minimum USD 10 million claim threshold), and robust initial evidence to filter out trivial claims.
- Introduce a preliminary screening panel to eliminate frivolous claims at an early stage.

Precedent:

- ICSID Arbitration Rule reforms (2022) introduced clearer mechanisms to dismiss unmeritorious claims early.

3. Time Limits and Sunset Clauses

- Implement explicit time limits for filing claims (e.g., within three years of the incident), preventing outdated claims or treaty-shopping practices.
- Sunset clauses limiting the treaty’s continued protection post-termination (e.g., 10–15 years, as is standard in recent Australian FTAs).

Ensuring Transparency, Fairness, and Proportionality in ISDS

Modernized BITs place significant emphasis on transparency, fairness, and proportionality, addressing historical criticisms:

1. Transparency in Proceedings

- Mandate open arbitration proceedings, publication of documents, and full transparency of tribunal appointments and deliberations.
- Adopt the **UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)**, as already included in Australia’s recent FTAs (CPTPP, Australia–UK FTA).

2. Amicus Curiae Participation

- Explicitly allow submissions by **third-party stakeholders** (civil society, academia, or NGOs), improving transparency and ensuring public-interest considerations.

Example:

- ICSID and UNCITRAL Transparency Rules explicitly allow third-party submissions (used extensively in the Philip Morris v. Australia case, increasing legitimacy of outcomes).

3. Code of Conduct for Arbitrators

- Incorporate mandatory adherence to an international **Code of Conduct**, ensuring arbitrators’ impartiality, independence, and accountability, reducing risks of conflicts of interest or bias.

Example:

- The **EU Investment Court System (ICS)** in CETA and EVIPA explicitly includes strict ethical standards and a binding code of conduct for arbitrators.

Specific Case Studies Highlighting Necessity for Modern ISDS:

- **Tethyan Copper Company Pty Ltd v. Pakistan (2019):**
Highlighted the critical importance of explicit regulatory carve-outs, thresholds for arbitration claims, and clarified definitions of expropriation. Pakistan faced liabilities equivalent to nearly 2% of GDP, underscoring the urgency of ISDS reform.

- **Philip Morris v. Australia (2015):**
Showed the cost (AUD 24 million in legal fees) of defending against investor challenges to legitimate health regulations, emphasizing the importance of public interest exceptions and the need for transparent, robust filtering mechanisms in ISDS.

Australia's updated BIT approach with Pakistan should prioritize a **reformed, transparent, and balanced ISDS framework**, incorporating modern standards from CPTPP, CETA, and recent bilateral agreements. Introducing robust safeguards (mandatory mediation, regulatory carve-outs), explicit exceptions, transparency mechanisms, and alternative dispute-prevention models ensures that the agreement effectively manages investor-state relations, protecting legitimate public policies while maintaining investor confidence.

This balanced and modern approach ensures that the BIT supports Australia's open, rules-based economic principles, enhances investor certainty, and safeguards Pakistan's and Australia's regulatory autonomy effectively.

Sectoral Priorities and Facilitation

Which sectors or types of investment would benefit most from bilateral facilitation or enhanced cooperation (e.g., clean energy, infrastructure, critical minerals)?

What concrete measures could encourage sustainable and inclusive investment in these areas?

BCSDA Response

Key Sectors for Enhanced Bilateral Facilitation and Cooperation

Given the economic profiles and strategic priorities of Australia and Pakistan, the following sectors would benefit most from enhanced bilateral facilitation and targeted investment cooperation:

1. Renewable Energy and Clean Technologies

Rationale and Opportunities:

- Pakistan aims for **60% renewable energy** in its electricity mix by 2030, requiring approximately **USD 40 billion** in investment (Pakistan's NDC, 2021).
- Australia is globally recognized in renewable energy deployment, with over **AUD 35 billion** invested domestically since 2017 in renewables and clean technology projects.
- Australia's expertise in **solar photovoltaics, wind energy, and emerging green hydrogen technologies** directly complements Pakistan's renewable energy ambitions.

Examples of Potential Investments:

- Development of large-scale solar and wind farms in Pakistan's Sindh and Punjab regions.
- Joint ventures for battery storage solutions and green hydrogen production facilities to meet Pakistan's target of **60% renewable electricity by 2030**.
- Collaboration on technology transfers and capacity-building projects in energy storage and grid integration technologies.

2. Agriculture and Agritech

Agriculture represents approximately **19% of Pakistan's GDP** and employs **38.5% of its workforce** (Pakistan Economic Survey, 2022–23). Leveraging Australia's advanced agritech sector—valued at around **AUD 90 billion** annually—could drive significant productivity improvements in Pakistan.

Examples of Potential Investments:

- Introduction of Australian precision agriculture technologies (e.g., soil moisture sensors, drone-based crop monitoring, and precision irrigation systems).
- Dairy and livestock sector modernisation (e.g., dairy management technologies, livestock genetics, cold storage infrastructure).
- Joint ventures in sustainable food-processing and value-added agribusinesses.

3. Mining and Resource Development (Sustainable Mining)

Given the Reko Diq copper-gold project's significance (worth potentially **USD 10 billion in investment**), there's substantial opportunity to facilitate sustainable mining and resource

extraction. Australia's global leadership in sustainable mining practices, technology, and governance could play a pivotal role.

Examples of Potential Investments:

- Enhanced technical cooperation on **mining governance and regulatory frameworks**, learning from Australia's stringent environmental and social governance (ESG) standards.
- Joint investments or Australian technical advisory in modern mining technologies (water management, mine-site rehabilitation, environmental monitoring), boosting Pakistan's mining sector sustainability and productivity.

4. Agriculture and Food Processing (Agro-Industries)

Australian investments in Pakistan's agriculture and food processing industries can significantly enhance local value chains, food security, and export competitiveness. Australian businesses can introduce:

Post-harvest processing technologies

- Cold-chain logistics (critical, given Pakistan loses approximately **20-40% of produce** annually due to inadequate storage/processing infrastructure).
- Sustainable livestock and dairy farming practices (Australia is a world leader, exporting **AUD 4 billion annually** in dairy alone).

5. Digital Economy and Technology Innovation

Pakistan's digital economy is projected to surpass **USD 30 billion by 2030**, making it a prime target for Australian technology investments. Australia's robust fintech and digital services sector can greatly contribute to Pakistan's economic digitization.

Examples:

- **Fintech solutions** (digital banking, mobile payments, insurance services).
- **E-commerce platforms and logistics services**, particularly in facilitating cross-border e-commerce growth between Pakistan and international markets, including Australia.
- **Cybersecurity and data protection technologies**, areas where Australian expertise can be transformative given increasing digitalization risks.

6. Education, Vocational Training, and Skills Transfer

Education is already a cornerstone of bilateral engagement, with approximately **20,000 Pakistani students** enrolled annually in Australian institutions (DFAT, 2023). Investments in education infrastructure and digital learning technologies represent further strategic growth areas.

Examples of Potential Investments:

- Establishing **Australian university campuses or vocational training centers** in Pakistan.
- Investment in digital platforms and technologies for remote education and vocational training programs, aligning with Pakistan's growing youth demographic and demand for skilled workers.

Specific Bilateral Facilitation Mechanisms and Enhanced Cooperation Measures

To actively encourage these strategic investments, several targeted facilitation measures and institutional mechanisms should be incorporated into an updated BIT or parallel cooperation framework:

1. Bilateral Investment Facilitation Committee (Joint Investment Committee)

- Establish a formal bilateral committee comprising representatives from Austrade and Pakistan's Board of Investment to actively facilitate investment matchmaking, identify specific projects, and address investor concerns promptly.
- **Precedent:** Such a committee is successfully implemented under the Australia–Indonesia CEPA (2019).

2. Special Economic and Innovation Zones

- Facilitate Australian investment through special economic zones (SEZs), particularly in sectors like renewable energy, agritech, mining, and digital innovation, offering streamlined regulatory approvals, tax incentives, and clear governance structures.
- **Precedent:** Pakistan's existing SEZs under CPEC could be leveraged or expanded to accommodate Australian investment projects specifically, enhancing investor confidence.

3. Sector-specific Technical Cooperation Agreements

- Promote agreements specifically targeting high-priority sectors (renewable energy, mining technology, agriculture modernization, digital innovation), providing frameworks for technology transfer, joint research, skills training, and regulatory harmonization.
- **Precedent:** The Australia–India Economic Cooperation and Trade Agreement (AI-ECTA, 2022) explicitly includes sector-specific cooperation clauses encouraging technology exchange and capacity building.

Balancing Robust Protections with Public Interest

The updated BIT should explicitly balance investor protections with public interest by integrating:

- **Explicit Sustainable Development Goals (SDG) Alignment:** clearly stating that investments are encouraged if aligned with global sustainability principles (climate resilience, energy transition, responsible consumption, decent work).
- **Clear Regulatory Safeguards and Exceptions:** incorporating clauses clarifying that public-interest regulations (environmental, public health, labour standards, security) are protected from investor claims, referencing the CPTPP and Australia–UK FTA as models.

Concrete Statistics and Examples Reinforcing Investment Priorities:

- **Renewable Energy:** Pakistan requires an estimated **USD 40 billion** in renewable energy investment by 2030 to achieve its climate goals.
- **Mining and Resources:** The Tethyan Copper ICSID dispute, resulting in a **USD 5.9 billion award**, illustrates the sector’s economic importance and risk—reinforcing the necessity of enhanced investment protection balanced with sustainable regulatory clarity.
- **Agritech:** Australia’s agriculture sector contributes **AUD 90 billion annually**, making it highly suitable to assist Pakistan’s agricultural modernization goals.
- **Education Sector:** Pakistani students contribute significantly (**AUD 1 billion+ annually**) to Australia’s education export sector, underpinning mutual economic benefit and strategic importance of this investment area.

Recommendations

The updated Australia–Pakistan investment relationship should:

- Prioritize investment sectors where Australian strengths directly align with Pakistan’s strategic economic needs—particularly renewable energy, mining/resources, agritech, digital innovation, and education.
- Include formal institutional mechanisms (Joint Investment Committee, SEZ frameworks) and clear regulatory carve-outs, ensuring robust investor protections while preserving policy autonomy for public-interest regulations.
- Embed **explicit sustainability and public-interest criteria** within BIT texts to guide investment flows positively, demonstrating mutual commitment to long-term sustainable and inclusive economic development.

Incorporating these recommendations will create a more robust, mutually beneficial investment framework, enabling Australia and Pakistan to unlock significant untapped bilateral economic potential while protecting core public policy interests.

Economic, Commercial, and Regional Impacts

What are the potential commercial and economic benefits—or drawbacks—of updated BIT provisions? How might the renegotiations affect employment, regional development, and strategic relationships with Pakistan?

BCSDA Response

Potential Benefits and Opportunities of an Updated BIT

An updated BIT between Australia and Pakistan has the potential to unlock substantial economic benefits, promoting targeted investment flows while ensuring robust public-interest protections.

1. Enhanced Investor Confidence and Increased Investment Flows

A modern BIT would increase investor confidence by providing clearer and more predictable rules, directly fostering higher investment levels, particularly in strategic sectors:

- **Renewable Energy:**

Pakistan's ambitious renewable energy goal (60% renewable electricity by 2030, requiring an estimated **USD 40 billion** investment) presents an attractive opportunity for Australian renewable energy firms. Clear treaty protections could accelerate the entry of Australian renewable energy developers, particularly in solar, wind, and green hydrogen projects.

Example: Australia's success in Indonesia following the IA-CEPA (2019), where renewable energy investments rose significantly post-agreement due to improved legal certainty.

- **Agritech and Food Processing:**

Given agriculture's significance (**19% of GDP, employing nearly 38.5% of Pakistan's workforce**), facilitating Australian investment in agritech could lead to productivity gains, increased food security, and stronger agricultural value chains.

Example: Australian agritech companies introducing precision agriculture technologies (e.g., drought-resistant seeds, advanced irrigation technologies) would significantly boost Pakistan's agricultural efficiency, aligning well with Pakistan's food security goals.

- **Mining and Resource Sector Development:**

The recent revival of the Reko Diq copper-gold project (valued at approximately **USD 10 billion**) underscores the sector's strategic potential. Australian mining companies, known globally for sustainable mining practices, could support Pakistan's resource sector development sustainably, benefiting from explicit treaty protections against political and legal risks.

2. **Modernized Protections Balancing Investor Rights and Regulatory Autonomy**

Updating the treaty to explicitly balance investor rights with clear regulatory carve-outs ensures investments are protected without undermining each country's right to regulate in critical areas like environmental and public health policy.

Recommended Updated Protections:

- **Clarified "Indirect Expropriation" Definitions** (following CPTPP Annex 9-B): Clearly state that legitimate non-discriminatory regulations for public welfare objectives (environmental regulations, health standards) do not constitute compensable expropriation.
- **Right-to-regulate clauses** clearly articulating governmental autonomy to regulate on public interest grounds, modelled on the Australia–UK FTA (2021), IA-CEPA, and CPTPP, would significantly reduce the risk of disputes similar to Philip Morris vs. Australia or Tethyan Copper vs. Pakistan.

3. **Effective and Balanced ISDS Reform**

Implementing a **reformed ISDS framework** can significantly improve investor confidence while addressing the negative experiences and challenges previously faced.

Recommended ISDS modernization measures include:

- **Mandatory Mediation and Conciliation:** Requiring mediation before arbitration (e.g., as in the EU–Vietnam Investment Protection Agreement) reduces costly disputes.
- **Exhaustion of Local Remedies: Encouraging resolution in local courts first (India's Model BIT) can help minimize premature or frivolous arbitration claims.**
- **Appeal Mechanism and Transparency:** Establishing transparent, fair, and legitimate arbitration procedures with public hearings and third-party involvement (UNCITRAL Transparency Rules, ICSID Arbitration Rules reforms) can greatly increase legitimacy and proportionality in ISDS.

4. **Sectors or Activities to Limit or Exclude (Protecting Policy Space)**

Explicit exceptions or limitations could include sensitive areas like:

- **National Security and Critical Infrastructure:** Australia's current practice in FTAs (e.g., CPTPP, Australia–Indonesia CEPA) explicitly protects government actions taken for national security reasons, ensuring critical infrastructure (ports, telecom, energy grids) remains safeguarded.
- **Cultural and Media Industries:** Reflecting Australia's existing policy (Australia–UK FTA, CPTPP), cultural industries can be explicitly excluded to protect national identity and domestic cultural policy.

5. Concrete Recommendations on Transparency, Fairness, and Proportionality

To ensure ISDS legitimacy, the treaty should explicitly include:

- **Transparency provisions** based on UNCITRAL Transparency Rules requiring open arbitration proceedings and publication of all key documents, as successfully demonstrated in Philip Morris v. Australia.
- **Arbitrator Code of Conduct:** Adoption of standardized conduct rules, as proposed in ICSID reforms, would enhance impartiality and accountability.

Ensuring Transparency, Fairness, and Proportionality

To enhance dispute settlement legitimacy:

- **Transparency:** Adopting UNCITRAL Transparency Rules explicitly within the BIT ensures proceedings are publicly accessible.
- **Third-party Participation (Amicus Curiae):** Permitting civil society engagement enhances legitimacy, evident in the Philip Morris arbitration.
- **Proportionality in Arbitration Awards:** Explicit guidelines limiting awards to actual economic damages and preventing punitive awards ensure fairness.

Potential Risks and Drawbacks to Consider

While beneficial, updated BIT protections must carefully manage potential risks:

- **Excessive Regulatory Claims:** Without clear carve-outs, disputes similar to Tethyan Copper (where Pakistan faced a USD 5.9 billion claim) could recur. Explicit regulatory autonomy clauses mitigate this.
- **Excessive Arbitration Costs:** Even unsuccessful claims (e.g., Philip Morris costing Australia AUD 24 million) impose heavy burdens. Introducing mandatory mediation and domestic remedies would reduce such expenses.

Recommendations and Way Forward

Australia's negotiating approach for the updated BIT should prioritize:

- **Explicit balancing clauses** clearly protecting regulatory rights.
- **Robust, reformed ISDS** with transparency, mediation, and procedural fairness.
- Explicit investment facilitation mechanisms targeting high-potential sectors (renewables, agritech, mining, digital economy, education).

This comprehensive, modernized approach ensures Australia retains its commitment to a transparent, predictable investment environment, mitigates risks from arbitration claims, and maximizes mutually beneficial economic cooperation with Pakistan.

Future-Proofing and Sustainability

What provisions would best address longer-term challenges, such as the energy transition and climate change?

How can the treaty remain resilient and adaptable to evolving global and domestic priorities?

BCSDA Response

Provisions Addressing Long-term Challenges: Energy Transition, Climate, and Sustainability

An updated BIT must reflect evolving global challenges—particularly energy transition, climate resilience, and sustainable economic growth. Key provisions include:

1. Explicit Sustainable Development and Environmental Protection Clauses

Explicitly integrating sustainability clauses aligns bilateral investments with international climate and sustainable development targets.

Examples of suitable provisions include:

- **Alignment with Paris Agreement Goals:**
 - Treaty text explicitly referencing commitments under the Paris Agreement (2015), underscoring both countries' pledge toward carbon neutrality and climate resilience.

- **Precedent:** EU–Canada Comprehensive Economic and Trade Agreement (CETA, 2017) explicitly references climate agreements, embedding investor obligations to uphold climate commitments.
- **Promotion of Green Investments:**
 - Specific provisions encouraging investments in renewable energy, green infrastructure, low-carbon technologies, and climate-resilient infrastructure.
 - **Example:** Australia's recent Low Emissions Technology Statement (2022) specifically targets clean energy export opportunities (green hydrogen, battery storage), suitable for Pakistan's ambitious renewable targets (60% renewable by 2030, requiring USD 40 billion investment).

Key Sectoral Provisions and Opportunities:

1. Renewable Energy and Clean Technologies

Given Pakistan's pressing climate vulnerability (ranked 8th globally by the Global Climate Risk Index 2021), explicit BIT provisions fostering Australian renewable energy investments are critical.

- **Targeted sector incentives** in renewable energy investment:
 - E.g., facilitation of Australian firms developing large-scale solar farms (e.g., Quaid-e-Azam Solar Park expansions), offshore wind projects along Pakistan's coastal areas (Sindh/Balochistan), or green hydrogen production.
- **Technical Cooperation and Capacity Building:**
 - Agreement provisions facilitating knowledge transfer (technology, training, skills development) explicitly targeted at renewable energy infrastructure projects.

2. Sustainable Mining and Resources

Given the history of the Tethyan Copper dispute and new large-scale ventures (e.g., USD 10 billion Reko Diq project), modern BIT provisions should explicitly support sustainable mining practices.

- **Explicit Sustainable Mining Guidelines:**
 - Mandate investors comply with internationally recognized standards like the IFC's Environmental and Social Performance Standards or Australia's Mining Sustainability Guidelines, reducing environmental risks and community conflicts.
 - Provisions clearly excluding legitimate environmental regulations from indirect expropriation claims.

3. Agribusiness and Climate-resilient Agriculture

Agriculture contributes around 19% of Pakistan's GDP and employs 38.5% of its workforce. Australia's advanced agritech sector (AUD 90 billion annually) can help mitigate climate impacts.

- **Provisions supporting agritech investments** explicitly aligned with climate adaptation goals, such as drought-resistant crops, water-efficient irrigation (drip irrigation, water conservation technologies), and sustainable livestock production.
- Cooperation clauses supporting technology transfer, joint research, and climate adaptation initiatives in agriculture.

Safeguards and Limitations Ensuring Regulatory Flexibility

To safeguard Australia and Pakistan's policy autonomy amid long-term uncertainties (climate change, technological shifts), the treaty should explicitly incorporate:

- **Right-to-Regulate Clauses:** clearly stating that public-interest measures for climate resilience, environmental protections, public health, and social welfare are not actionable under investor claims.
 - **Example Clause (CPTPP Annex 9-B):** "Non-discriminatory regulatory measures designed to protect legitimate public welfare objectives such as public health, safety, and environment are not indirect expropriations."
- **Explicit General Exceptions (WTO-style Article XX Exceptions):**
 - Clearly exempt public-interest measures related to environmental and health regulations, similar to Australia's commitments under CPTPP and Australia–UK FTA (2021).

Modernized Investor–State Dispute Settlement (ISDS)

Provisions ensuring balanced, proportionate dispute settlement mechanisms aligned with modern best practices:

- **Mandatory Mediation and Local Remedies:**
 - Requiring mediation prior to arbitration (EU–Vietnam Investment Protection Agreement, 2019).
 - Requiring exhaustion of local remedies before international arbitration (India Model BIT).
- **Investment Ombudsman Mechanism:**
 - A dedicated bilateral body (modelled on Brazil’s Cooperation and Facilitation Agreements, CFAs) proactively addressing investor concerns, significantly reducing arbitration claims.
- **Transparency and Accountability in Arbitration:**
 - Adopting UNCITRAL Transparency Rules (2014), open hearings, and publicly accessible arbitration documents, increasing legitimacy and reducing public concerns about treaty-based arbitrations.

Adaptability and Future-proofing the Treaty

To ensure the BIT remains robust and relevant over time, treaty provisions should explicitly:

1. **Periodic Review and Adaptation Mechanism**
 - Establish a formal joint committee or review mechanism to reassess treaty effectiveness every 5–10 years, allowing updates in line with changing economic realities, technology developments, or climate commitments.
2. **Sunset and Revision Clauses**
 - Include sunset clauses (e.g., protections lasting 10–15 years post-treaty termination) and flexible mechanisms enabling treaty updates or amendments by mutual agreement, preventing outdated obligations.

Precedent:

- **Canada’s model BIT (2021)** includes explicit provisions for periodic treaty review and modernizing terms over time.

Ensuring Transparency, Fairness, and Proportionality in Dispute Settlement

To enhance legitimacy and effectiveness, adopt:

- **UNCITRAL Transparency Rules (2014)**, ensuring public hearings, openly accessible documents, and transparent tribunal processes.
- Explicit arbitration guidelines mandating proportional awards based strictly on demonstrable economic losses, preventing outsized compensation claims (as occurred in *Tethyan Copper v. Pakistan*).

Specific Statistics and Examples Illustrating Necessity and Benefits:

- **Renewable Energy Potential:**
 - Pakistan’s renewables market requires at least **USD 40 billion** by 2030 to reach climate goals; Australia’s proven expertise positions it ideally to capture a significant share, benefiting both economies.
- **Tethyan Copper Arbitration (2019):**

The USD 5.9 billion award (nearly 2% of Pakistan’s GDP) underscores the need for clear treaty language and regulatory carve-outs to avoid expensive future disputes.
- **Philip Morris Arbitration (2015):**

AUD 24 million incurred by Australia defending public-health regulation emphasizes transparency, mediation, and filtering mechanisms as critical ISDS reforms.

Towards a Robust, Future-proof BIT

By integrating explicit references to climate commitments, sustainability goals, right-to-regulate provisions, periodic treaty review, and robust transparency mechanisms, Australia and Pakistan can establish a

balanced and forward-looking BIT. This treaty would actively support key sectors (renewable energy, sustainable agriculture, mining), protect critical regulatory autonomy, and create an investment environment resilient to future economic, social, and environmental challenges.

Suggested Example clause

- "To ensure the long-term relevance and effectiveness of this agreement, both Parties commit to periodic joint reviews every five years. These reviews shall evaluate the treaty's impact on sustainable investment, technological advancements, and regulatory best practices. Furthermore, treaty provisions shall be adaptable to align with international climate commitments and evolving economic conditions."

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