

## Australia-Türkiye BIT

### BCSDA's Responses to Specific Feedback Sought in Consultation

#### Overarching Objectives: Balancing Openness and Public Interest

*How can the updated treaty between Australia and Türkiye 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

Australia can retain its open, rules-based economic architecture in any modernized investment treaty with Türkiye by refining key provisions to protect both investors and the government's regulatory autonomy. Clear drafting of investor protections, explicit policy carve-outs, and updated dispute resolution procedures are central. Specific precedents from Australia's recent treaties (for example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) underscore several strategies:

##### 1. Upholding Investor-State Dispute Settlement (ISDS) with Safeguards

- Requiring investors to attempt local remedies first (unless there is undue delay) can deter frivolous claims.
- Mandating transparency in arbitration (e.g., open hearings, public disclosure of filings) reflects Australia's commitment to accountability.
- Clarifying the definitions of "investment," "fair and equitable treatment," and "expropriation" reduces legal uncertainty and protects legitimate policy action.
- Including a code of conduct for arbitrators and a mechanism to dismiss unmeritorious claims aligns with the trend in newer agreements.

##### 2. Carving Out Public Policy Space

- An explicit "right to regulate" provision, modelled on clauses in the 2022 Australia-UK Free Trade Agreement, ensures that health, environmental, and social measures cannot be challenged solely because they affect profitability.
- A "general exceptions" article modelled on World Trade Organization (WTO) norms can protect measures necessary for public health or conservation. For example, Australia's tobacco plain-packaging laws, previously challenged under older treaty frameworks, inform the need for robust public-health carve-outs.
- An environment or sustainable development clause (similar to CPTPP's Environment Chapter) can embed commitments to address climate change and support energy transition without triggering liability under investor protections.

##### 3. Aligning with High-Level Policy Goals

- **Fostering Sustainable Economic Growth.** Modern clauses can reference shared objectives of inclusive growth, reflecting Australia's practice in existing agreements that encourage responsible business conduct. For instance, requiring investors to meet local environmental, labour, and corporate governance standards can enhance overall investment quality.
- **Supporting Energy Transition.** Türkiye is expanding renewables and seeking foreign investment in infrastructure. Australia's updated treaty can encourage clean energy projects by removing investment barriers while preventing challenges to new climate or energy regulations. This approach is consistent with Australia's push for decarbonization—domestically, renewable energy capacity expanded by 9% in 2022 (Clean Energy Regulator data), and the government increasingly promotes low-emissions technology exports.
- **Promoting Innovation and Technology Transfer.** Including cooperation mechanisms or voluntary guidelines for knowledge-sharing aligns with Türkiye's interest in upgrading its manufacturing base and Australia's expertise in mining automation, agtech, and clean-tech.
- **Ensuring Development Benefits and Inclusive Trade.** Australia-Türkiye annual merchandise trade topped A\$3.5 billion in 2022, doubling from roughly A\$1.7 billion a

decade prior (DFAT figures). Modernizing the treaty so smaller ventures (e.g., in services, agri-food, or digital industries) benefit could further diversify bilateral commerce, in line with Australia's push to broaden its export base.

#### 4. Drawing on Contemporary Treaty Models and Precedents

- **CPTPP and Australia–UK FTA:** Detailed chapters on environment, transparency, and ISDS reforms help reconcile investor rights with public-interest regulation.
- **Australia's Policy on BIT Modernization:** Following internal reviews (2020–2023), DFAT has signalled a preference to renegotiate older BITs to meet present-day standards, including safeguarding the ability to enact legitimate policy measures in health, environment, and security.
- **EU-Led Reforms:** Türkiye's ongoing (if stalled) EU accession process exposes it to evolving European practices, such as more exhaustive definitions of "substantive obligations" and investor responsibilities. Incorporating similar language (for instance, disclaiming protection for "shell" or "mailbox" companies) can reduce treaty abuse.

#### 5. Consolidating Broader Australia–Türkiye Cooperation

- Leveraging the Bilateral Investment Treaty alongside a Double Taxation Agreement (DTA) helps reduce overall risks and costs for cross-border projects.
- Including a side letter or memorandum on energy partnership—Türkiye's energy demand grew by 5.5% annually in the last decade (Turkish Energy Ministry figures)—could fast-track joint ventures in renewables or LNG while retaining carve-outs for critical climate policies.
- Encouraging business networks (e.g., the Australia–Türkiye Business Council) to advise on new or emerging investment issues can ensure the updated treaty stays relevant to sector-specific concerns.

By weaving these elements into the updated agreement, Australia can maintain its open, rules-based approach—supporting investor confidence and transparency—while preserving policy flexibility. The result would be a treaty that not only promotes capital flows but also aligns with Australia's broader objectives of sustainable growth, a just energy transition, and modern regulatory standards.

### 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

Australia's revised treaty with Türkiye would be most effective if it covered a broad range of assets—equity stakes, debt instruments, tangible and intangible property, intellectual property rights, and similar interests—while tailoring specific exclusions or limitations to safeguard critical policy priorities. Modern precedents like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Australia–UK FTA show that comprehensive definitions of "investment" can be balanced with targeted carve-outs.

#### 1. Broad Coverage of Tangible and Intangible Assets

- **Enterprise Investments:** Equity in Turkish-registered companies, joint ventures, or subsidiary operations, essential for mining, infrastructure, and manufacturing.
- **Intellectual Property (IP) Rights:** Technology transfers are increasingly valuable. Including IP in the definition of investment encourages Australian firms (especially in agtech, mining tech, and renewables) to share know-how.
- **Contractual Rights:** Long-term concessions (in energy or public infrastructure), which are significant in Türkiye's fast-growing renewable and transport sectors.
- **Licenses/Permits:** In Türkiye, foreign investors often require specific licenses for mining, solar farms, or telecommunications. Covering these rights reduces regulatory risk.

#### 2. Potential Carve-Outs or Exclusions

- **National Security and Critical Infrastructure:** Australia's Foreign Investment Review Board (FIRB) maintains heightened scrutiny over defense, telecommunications, and energy grid assets. A modern treaty can acknowledge these procedures—similar to the Australia–UK FTA, which clarifies that essential security interests override investment obligations.
- **Public Services and Cultural Industries:** Broadcasting, film, and certain cultural sectors might need explicit carve-outs. Historically, Australia has reserved cultural industries in trade treaties to protect local content rules. Türkiye similarly may wish to preserve policy space for audiovisual services.
- **Sensitive Land and Water Rights:** Exclusions or special conditions can apply to farmland, water entitlements, or strategic maritime assets—areas sometimes regulated for food security or conservation.

### 3. Notable Areas for Expanded Cooperation

- **Renewable Energy:** Türkiye's installed renewable capacity exceeded 53 GW in 2022 (International Energy Agency data), driven by solar, wind, hydro, and geothermal projects. Australia's clean-tech expertise could help Türkiye reach its renewables targets. Including robust facilitation provisions—such as expedited approvals or pilot project support—could spur joint ventures.
- **Mining Technology and Resource Efficiency:** Australia leads in advanced mining equipment and software. Türkiye seeks to expand responsible extraction of minerals like boron, gold, and rare earths. Provisions encouraging cooperative research, technology sharing, or supply-chain integration could boost high-value investment.
- **Digital and Services Trade:** Including data-related or e-commerce provisions is increasingly common in new treaties. Australian financial services and IT firms could invest more confidently if cross-border data flows and cybersecurity standards are clarified.
- **Innovation Clusters and Technology Transfers:** Türkiye's drive for R&D hubs (notably around Istanbul and Ankara) aligns with Australia's strengths in research commercialization. Specific cooperation mechanisms—joint R&D projects, startup incubator connections—can enhance the overall impact of covered investments.

### 4. Precedents Illustrating Flexible Coverage

- **CPTPP:** Delivers a broad definition of investment but incorporates clear government regulatory carve-outs—particularly for health and environmental measures.
- **Australia–UK FTA:** Inserts provisions preserving the right to regulate for legitimate objectives (public health, environment), ensures transparency in dispute settlement, and specifies that national security measures are non-justiciable.
- **Australia's Updated Bilateral Investment Treaties:** Reflect DFAT's ongoing policy of granting comprehensive coverage but instituting exceptions for sensitive sectors, mirroring the approach taken in recent renegotiations of older BITs.

By striking this balance—covering most forms of capital and intangible assets, excluding carefully defined sensitive areas, and emphasizing cooperation in renewables and innovation—Australia can preserve an open, rules-based framework for investment while ensuring that vital security, cultural, and policy concerns remain protected.

## 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

We believe, the following points are important to consider.

#### 1. Explicit Right-to-Regulate Clause

- Including language akin to the Australia–UK FTA's Article 13.2, which states that each Party retains the right to adopt and enforce measures in pursuit of legitimate public welfare objectives—health, safety, environment, and social services.

- Referencing precedents like the CPTPP (Article 9.16) helps confirm that public interest regulations are not automatically deemed expropriatory.
- 2. Clear Definition of Fair and Equitable Treatment (FET)**
    - Restricting FET to the minimum standard of treatment under customary international law, rather than an open-ended definition, limits the scope for broad investor claims.
    - Including illustrative examples—denial of justice or targeted discrimination—guards against misuse of FET for routine regulatory changes.
    - According to UNCTAD data, unclear FET clauses under older BITs accounted for roughly 60% of successful investor claims globally from 2010 to 2019.
  - 3. Detailed Carve-Outs for Public Policy**
    - Drafting a “General Exceptions” provision modelled on GATT Article XX or GATS Article XIV, thereby exempting measures necessary for protecting public health, the environment, or social welfare.
    - Specifying non-compensation for bona fide regulations. This ensures that non-discriminatory measures—such as stricter emissions standards—cannot form the basis of successful investor–state disputes.
    - Australia’s tobacco plain-packaging outcome illustrates the importance of unequivocal public-health exceptions. Although an arbitral tribunal dismissed the claim under a different treaty, the case underscored the risk of ambiguous language in investment provisions.
  - 4. Refined Definition of Expropriation**
    - Stating that measures of general application, taken for legitimate public welfare objectives, do not constitute indirect expropriation unless they are manifestly excessive or discriminatory.
    - Drawing on CPTPP Annex 9-B, which clarifies that “non-discriminatory regulatory actions...designed and applied to protect legitimate public welfare objectives” do not amount to expropriation.
    - Requiring an assessment of the measure’s economic impact, the measure’s character, and its interference with expectations—crucial to avoiding unintended compensation claims.
  - 5. Reformed Investor–State Dispute Settlement (ISDS) Procedures**
    - Imposing procedural filters to discourage speculative or frivolous claims (e.g., preliminary objection mechanisms that quickly dismiss unsubstantiated cases).
    - Ensuring greater transparency: open hearings, publication of documents, and stakeholder participation (*amicus curiae*).
    - Mandating a code of conduct for arbitrators reduces perceptions of bias. The Australia–HK investment treaty (2020) incorporates many of these transparency and ethical standards.
    - Allowing a Party to direct the tribunal to consider public policy context (for instance, environmental imperatives) helps protect regulatory intent.
  - 6. Safeguards for Sensitive Sectors**
    - Enumerating essential security or national security exceptions, so that regulatory measures in defence technology or critical infrastructure cannot trigger unfair liability.
    - Reserving cultural industries or public broadcasting as non-covered sectors, consistent with Australia’s historical approach in film and digital content.
  - 7. Binding Interpretative Statements**
    - Establishing a joint committee or commission with authority to issue binding interpretations of treaty provisions. This preempts contradictory arbitral rulings and ensures consistent application to public interest measures.
    - The NAFTA/USMCA framework demonstrates how Parties can clarify FET or expropriation clauses when disputes arise, reducing the risk of unintended interpretations by arbitral panels.

Including these tailored provisions—backed by direct examples (Australia–UK FTA, CPTPP, Australia–HK BIT) and statistical evidence of where older BITs generated uncertainty—would shield public interest regulations from unfair or excessive investor claims. Over 1,000 investor–state disputes were filed globally between 2011 and 2020 (UNCTAD), with a significant portion invoking broad FET or expropriation provisions. A

carefully updated Australia–Türkiye BIT that integrates strict definitions, exceptions, and procedural safeguards can preserve Australia’s policy space while giving investors predictable protections.

## 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

We believe, the following points are important to consider.

#### 1. Fair and Equitable Treatment (FET)

- **Narrow Definition:** Limiting FET to the customary international law minimum standard avoids broad interpretations. UNCTAD notes that from 2010 to 2019, more than half of successful investor claims used broad FET language. Restricting it to evident denial of justice, discrimination, or manifestly arbitrary conduct aligns with CPTPP Article 9.6, ensuring regulatory space remains intact.
- **Clear Illustrations:** Enumerating typical FET breaches—e.g., targeted discrimination, lack of due process—helps tribunals interpret the standard more predictably. Australia–Peru FTA Annex 8-A follows this model, offering tribunals guidance to prevent overreach.

#### 2. Full Protection and Security (FPS)

- **Physical and Legal Security:** Explicitly linking FPS to physical safety of investors and assets underscores that it is not an all-encompassing guarantee against mere financial losses.
- **Global Best Practices:** The OECD’s work on investment treaties stresses clarifying that FPS does not impose obligations beyond state capabilities and does not extend to purely commercial or economic risks (e.g., currency fluctuations).

#### 3. Protection Against Expropriation

- **Direct vs. Indirect:** Modern treaties typically define expropriation as direct appropriation of property or an indirect measure causing equivalent effect (CPTPP Annex 9-B). A transparent definition ensures that routine regulations—tax or environmental rules—are not automatically compensable.
- **Legitimate Public Welfare Clause:** Stipulating those non-discriminatory measures to protect public health, safety, or the environment generally do not qualify as indirect expropriation, unless they are clearly excessive in light of their purpose.

#### 4. Non-Discrimination (National Treatment / Most-Favoured Nation)

- **Specific Carve-Outs:** Reserving policy space for sensitive sectors (e.g., broadcasting, defence, cultural industries) prevents claims of discriminatory treatment. The Australia–UK FTA schedules these reservations, clarifying that certain domestic programs (like local content quotas) remain protected.
- **MFN Caution:** Modern practice avoids “importing” broader obligations from older treaties via MFN. Text can restrict MFN from applying to dispute settlement provisions, reducing treaty-shopping by investors.

#### 5. Free Transfer of Funds

- **Safeguards for Crisis Situations:** Acknowledging that temporary exchange restrictions may be permissible in genuine balance-of-payments or financial crises is standard in newer agreements, mirroring IMF guidelines. This flexibility protects macroeconomic stability without undermining the right to repatriate profits under normal conditions.
- **Transparency:** Requiring notification and time limits on transfer restrictions fosters predictability. CPTPP Article 29.3.3 sets an example, obliging parties to minimize the duration of any restrictions.

#### 6. Balancing Robust Investor Protections with Regulatory Objectives

- **Right-to-Regulate Provision:** Incorporating language from the Australia–UK FTA or CPTPP clarifies that public welfare measures—health, safety, environment—are not per se treaty violations. NAFTA/USMCA practice also ensures that general welfare or security measures can override investment protection if proportionate.

- **General Exceptions Article:** Explicitly referencing WTO-style exceptions (GATT Article XX) for measures “necessary to protect” health or environmental interests. Including further safeguards against frivolous claims is consistent with Australia’s experience in Philip Morris Asia v. Australia, where an unclear carve-out in an older BIT prompted the investor–state case.
- **Enhanced ISDS Procedures:** Incorporating early dismissal for unmeritorious claims and mandatory transparency in arbitral proceedings reflects modern practice. The Australia–Hong Kong Investment Agreement (2020) sets a standard by providing open hearings and a code of conduct for arbitrators.

#### 7. Precedents Underscoring the Modernized Approach

- **Australia–Peru FTA:** Restricts FET more explicitly, details expropriation exceptions, and includes a wide public policy carve-out.
- **CPTPP:** Features an investment chapter that balances investor rights with environmental and labour protections, alongside robust transparency requirements.
- **EU-Led Reforms (CETA and EU-Singapore):** Introduce permanent investment courts with appellate mechanisms. Although Australia and Türkiye have not adopted that model, its emphasis on clarity and consistency could inspire more precise drafting of dispute clauses.

Updating these protections—while clarifying definitions, incorporating public-interest carve-outs, and introducing procedural safeguards—helps preserve a stable environment for investors and respects legitimate regulatory prerogatives. In the Australia–Türkiye BIT context, this approach would lock in vital investor rights and modern best practices, ensuring the treaty remains fit for purpose as both countries address priorities such as environmental protection, health policy, and sustainable growth.

- **Example clause**  
"Investor protections under this agreement shall be balanced with explicit public policy carve-outs, ensuring that non-discriminatory regulations in areas such as environmental protection, labour rights, and public health cannot be challenged as indirect expropriation. Additionally, investors are required to comply with international ESG standards as a prerequisite for treaty protection, reinforcing responsible business conduct."

## 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

Reformed ISDS mechanisms and alternative dispute resolution approaches can address concerns that have arisen under older-style BITs. Multiple models exist that Australia and Türkiye could consider when updating their 2009 treaty:

#### 1. Investment Court System (ICS) or a Permanent Tribunal

- The EU–Canada Comprehensive Economic and Trade Agreement (CETA) includes an ICS, with an appellate mechanism and a roster of appointed judges.
- This model reduces ad hoc arbitrations and perceived conflicts of interest.
- It assures more predictability because the same pool of adjudicators handles disputes, subject to a built-in appeals process.
- Similar structures are under discussion in various forums (e.g., UNCITRAL Working Group III).

#### 2. Reformed ICSID / UNCITRAL Arbitration Rules

- ICSID’s caseload surpassed 880 known registered cases by 2022 (ICSID Caseload – Statistics), highlighting the ubiquity of these rules.
- Revised ICSID and UNCITRAL rules mandate higher transparency (publication of awards, open hearings) and include a code of conduct for arbitrators.
- Specific procedural reforms—like early dismissal of unmeritorious claims—help safeguard regulatory space for governments.

### **3. State-to-State Arbitration with Limited Investor Access**

- The United States–Mexico–Canada Agreement (USMCA) narrows investor–State mechanisms to certain sectors and conditions.
- A strictly state-to-state process, optionally allowing investor–State arbitration in specific areas (e.g., major infrastructure), can deter frivolous claims.
- Brazil’s Cooperation and Facilitation Investment Agreements (CFIAs) rely on state-to-state dispute resolution and joint committees, avoiding ISDS entirely.

### **4. Multi-Tier Dispute Resolution (Mediation First)**

- Mandatory mediation or consultation before arbitration, as seen in some modern BITs (e.g., Indonesia’s newer model BITs), fosters amicable settlements.
- Conciliation panels or an ombudsperson mechanism can resolve disputes early without full arbitral proceedings.
- This approach can cut costs and preserve long-term commercial relationships.

## **Safeguards, Limitations, and Exceptions**

### **Right to Regulate**

- Text explicitly confirming that non-discriminatory regulatory measures for legitimate public interests (health, environment, financial stability) do not constitute expropriation.
- Canada–EU CETA and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) clarify that fair and equitable treatment (FET) does not override public policy actions.

### **Clear Definitions of “Investment” and “Investor”**

- Narrow definitions help avoid “treaty shopping” and speculative claims.
- Including criteria such as the investor’s substantial business activities in the home country.
- Some states use denial-of-benefits clauses to exclude shell or mailbox companies.

### **Exhaustion or Deferral of Local Remedies**

- A waiting period to allow domestic courts to address issues, unless local remedies are demonstrably ineffective.
- This manages parallel proceedings, reducing the risk of conflicting rulings.

### **Prohibition of Parallel Proceedings**

- Clauses preventing investors from pursuing the same dispute in multiple fora.
- This avoids double recovery and jurisdictional clashes.

### **Limitation Periods and Frivolous Claims Filter**

- Restricting claims to a certain window (e.g., within three years of the investor becoming aware of the dispute).
- Empowering tribunals to dismiss frivolous or abusive claims at an early stage, akin to ICSID and UNCITRAL reforms.

### **Security for Costs**

- Allowing tribunals to order claimants to post security for legal costs if there is a serious risk the respondent state cannot recover costs.
- This especially addresses the spike in claims by small or undercapitalized entities that might be used solely for litigation financing.

## **Ensuring Transparency, Fairness, and Proportionality**

### **Open Hearings and Public Documents**

- As under the CPTPP and reformed UNCITRAL Rules on Transparency, hearings should be open to the public and key documents published (notwithstanding confidentiality for business secrets).
- Transparent proceedings foster trust and accountability; UNCTAD estimates that over 40% of today’s known ISDS claims are now subject to some transparency measures.

### **Third-Party Submissions (Amicus Curiae)**

- Permitting interventions by civil society or impacted stakeholders can enhance fairness.
- Tribunals gain broader insight on public interest aspects (e.g., environmental or human-rights implications).

### **Code of Conduct and Permanent Roster of Arbitrators**



- Detailed rules on impartiality, independence, and “no double-hatting” reduce concerns about arbitrators also acting as counsel in other cases.
- A permanent roster model (as in CETA’s ICS) or a curated pool of arbitrators prevents parties from unilaterally selecting sympathetic adjudicators.

#### **Proportional Remedies**

- Encouraging tribunals to consider non-pecuniary remedies or phased remedies (e.g., injunctions, renegotiation) instead of large damages.
- Formal recognition in the treaty of proportionate compensation—avoiding punitive damages or speculative losses.

#### **Appellate Mechanism**

- An appellate body, featured in the EU’s ICS proposals, corrects factual or legal errors and increases consistency.
- It mitigates investor–State jurisprudential fragmentation, making outcomes more predictable.

A modernized Australia–Türkiye BIT can incorporate a blend of these approaches. Statistics from UNCTAD’s ISDS Navigator show over 1,190 known treaty-based ISDS claims filed globally by end-2021, a dramatic increase from 50 total known cases in 2000. Türkiye has faced roughly 17 known claims, often under the Energy Charter Treaty or older BITs, while Australia has dealt with two known claims (including Philip Morris Asia v. Australia). These trends make it crucial to embed robust safeguards, clarity of scope, and procedural transparency in any updated treaty, to ensure that legitimate policy measures remain protected while giving genuine investors’ confidence in legal recourse.

### **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**

Clean energy, infrastructure, and critical minerals would see the greatest value from bilateral facilitation in an updated Australia–Türkiye BIT. Australia’s mining and clean-tech capacity aligns with Türkiye’s growing demand for green infrastructure and advanced industrial inputs. Türkiye’s public–private partnership (PPP) track record in infrastructure similarly matches Australia’s large-scale project expertise. Both countries aim to diversify supply chains for critical minerals (e.g., lithium, rare earths, nickel), and updated treaty provisions can direct investment toward projects that advance climate goals and inclusive growth.

#### **Sectors or Investments Most Likely to Benefit**

##### **1. Clean Energy**

- Türkiye targets expanding renewable capacity to over 60 GW by 2030, with solar, wind, and geothermal among the fastest-growing segments (Turkish Ministry of Energy data).
- Australia holds over 30% of the world’s lithium resources and significant rare earth deposits, essential for battery and wind power technology (Geoscience Australia).
- An updated BIT that clarifies incentives and risk-sharing for renewable projects would support developers, financiers, and technology transfers in solar farms, offshore wind, and green hydrogen facilities.

##### **2. Infrastructure**

- Türkiye has completed US\$156 billion in PPP projects since 2002 (Turkish Treasury and Finance statistics), ranking among the top global PPP markets.
- Australian engineering and project management firms increasingly seek overseas infrastructure projects, particularly under robust legal frameworks.
- Enhanced cooperation—joint financing tools, streamlined approvals, and investor protections—would catalyse railways, ports, airports, and smart-city developments benefitting from Australian expertise and Turkish execution capabilities.

##### **3. Critical Minerals and Processing**



- Australia's critical minerals exports surged 47% between 2019 and 2022 (Austrade data), driven by battery metals and rare earths.
- Türkiye hosts strategic metals like boron (around 70% of global reserves) and chromium, along with potential for value-added mineral processing.
- A modernized BIT can foster joint ventures in refining, processing, and recycling, ensuring robust protections and environmental standards.

## **Concrete Measures for Sustainable and Inclusive Investment**

### **1. Explicit ESG Provisions**

- Reference to environmental, social, and governance (ESG) principles, echoing Morocco–Nigeria BIT clauses that commit investors to corporate social responsibility.
- Requirement that projects above a certain size complete Environmental Impact Assessments (EIAs) meeting international benchmark (IFC Performance Standards).
- Mandatory stakeholder engagement for infrastructure and mining developments, including consultations with local communities and labour groups.

### **2. Facilitation Protocols and Joint Committees**

- A dedicated “Investment Facilitation Committee” to expedite permits, licenses, and reduce bureaucratic overlap (akin to provisions in Brazil's Cooperation and Facilitation Investment Agreements).
- Periodic review of emerging technologies (e.g., battery storage, hydrogen fuelling) to align regulatory frameworks, funding options, and pilot projects.
- Joint research and capacity-building programs that leverage Australia's clean-tech R&D and Türkiye's engineering base.

### **3. Green Financing Incentives**

- Clear protection for climate-related incentives, such as feed-in tariffs or green tax credits, ensuring investors can rely on stable clean energy policies.
- Provisions allowing states to direct “positive discrimination” toward environmentally beneficial projects (e.g., green procurement rules).
- Collaboration with multilateral development banks (ADB, EBRD) to blend concessional financing for sustainable infrastructure, supported by the BIT's investor assurances.

### **4. Inclusive and Local-Content Approaches**

- Requirements or incentives for local workforce training, small-business subcontracting, or technology transfer (e.g., minimum share of local suppliers).
- Tax breaks or simplified customs for equipment vital to renewable energy or critical minerals processing, ensuring supply chains develop within both countries.
- Sunset clauses for performance requirements that prioritize skill development and technology upgrading without imposing permanent burdens on investors.

### **5. Monitoring and Transparency**

- Annual disclosure of high-impact projects under BIT protection, including climate and social metrics (similar to the CPTPP environment and labour transparency provisions).
- Mechanisms for civil society input on project compliance with sustainability commitments (amicus curiae briefs or stakeholder panels).
- Mandatory publication of investment facilitation decisions, building trust and minimizing corruption risks.

Australia's outward FDI in mining and energy surpassed A\$90 billion by 2021 (DFAT data). Türkiye's renewable energy segment attracted US\$1.6 billion in foreign investment in 2021 alone (Turkish Ministry of Energy). A reinforced and modernized BIT that embeds green incentives, strong ESG clauses, and robust dispute prevention would steer these funds toward durable, inclusive, and climate-friendly development in both countries.

## **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 Argentina, Pakistan, and Türkiye?*

## BCSDA Response

Expanded investor protections and clear dispute-resolution mechanisms often stimulate higher-quality foreign direct investment (FDI), which can bring technology transfer and job creation. Australia's outward FDI reached A\$875 billion in 2021 (DFAT), with the mining, infrastructure, and renewable energy sectors drawing particular interest. Türkiye, drawing on its history of public-private partnerships—totalling US\$156 billion in signed deals since 2002 (Turkish Treasury data)—and a rapidly growing renewables market, can gain from renewed investor confidence under modernized BIT provisions.

### Potential Commercial and Economic Benefits

#### 1. Greater investor certainty

- Clear definitions of investment and reformed ISDS clauses reduce perceived political risk, encouraging more Australian firms to enter Türkiye's market and vice versa.
- Australia's mining industry, which accounted for 8% of outbound investment in 2021, may expand exploration and downstream processing in Türkiye (e.g., gold, boron, and rare earth projects).

#### 2. Technology and knowledge transfer

- Infrastructure and clean energy projects often involve specialized Australian engineering and project management, fostering local upskilling and supply-chain integration.
- Joint ventures in critical minerals processing—building on Türkiye's major boron reserves—could incorporate Australian expertise in refining and environmental standards.

#### 3. Job creation and regional development

- New mining or infrastructure projects often cluster in developing regions (e.g., Anatolia for mineral exploration). Australian resource investments in Latin America have historically generated thousands of local jobs (ICMM statistics), suggesting similar outcomes in Türkiye.
- The Turkish Industrial Development Bank estimates that each US\$100 million invested in renewables adds 1,300 direct and indirect jobs; expanded Australian solar or wind investments can replicate that effect.

#### 4. Diversification of bilateral ties

- Moving beyond raw materials and commodities trade, updated BIT terms on services or digital infrastructure can attract investments in logistics, fintech, and advanced manufacturing.
- Deeper economic links reinforce diplomatic and cultural ties, complementing security dialogues under G20 or bilateral summits.

### Potential Drawbacks

#### 1. Regulatory constraints

- Some investors might challenge public-interest regulations, particularly if the BIT's definitions of expropriation or fair and equitable treatment are broad.
- Türkiye's efforts to manage current account deficits or impose capital controls in crisis periods could conflict with strict free-transfer clauses in a BIT.

#### 2. Increased public scrutiny

- High-profile cases of environmental or social impacts could face opposition if the BIT is seen to limit Türkiye's regulatory prerogatives. Similar controversies have emerged under older BITs worldwide, for instance, when resource projects faced local community resistance or environmental disputes.

#### Administrative burdens

- Implementing stronger transparency, ESG requirements, and local content provisions can create additional compliance costs.
- However, these measures often enhance project quality and mitigate disputes in the long run.

#### 3. Employment, Regional Development, and Strategic Ties Employment growth

- Major infrastructure initiatives involving Australian expertise (rail, ports, airports) drive skilled and unskilled labour demand, especially in Türkiye's interior regions.
- Resource projects in remote areas can stimulate ancillary services (catering, transport, equipment maintenance) and improve local incomes.

#### **Regional development spillovers**

- Infrastructure improvements funded by FDI contribute to domestic connectivity, reducing logistics costs and spurring private sector development.
- Education and training partnerships—common in Australia's resource sector—raise local capabilities (geology, engineering, environmental management).

#### **Strategic leverage**

- Strengthened economic interdependence can promote cooperation in security, counter-terrorism, and global governance (e.g., G20, MIKTA).
- Türkiye's critical geostrategic location between Europe, the Middle East, and Asia gives Australian investors a hub for regional export.
- Australia's resource base complements Türkiye's industrial infrastructure, aligning two G20 economies that seek to diversify trade partners amid shifting geopolitical landscapes.

Renegotiating the treaty with robust safeguards can elevate commercial opportunities while preserving Türkiye's regulatory space, helping both sides realize sustainability and local-development goals. Careful drafting—particularly around definitions, dispute settlement options, and performance requirements—ensures balanced gains across businesses, governments, and local communities.

### **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**

Explicit and flexible clauses on sustainable development and regulatory space can future-proof the Australia–Türkiye Bilateral Investment Treaty (BIT), especially given the global shift toward decarbonization and stricter climate targets. Annual global clean-energy investment reached US\$1.1 trillion in 2022 (BloombergNEF), and both countries are positioning themselves to attract a share of this capital.

#### **Provisions Addressing Longer-Term Challenges**

##### **1. Climate and Environmental Safeguards**

- Clear carve-outs protecting a state's right to implement climate regulations, carbon pricing, emission limits, and renewable energy incentives.
- Language referencing the Paris Agreement or upcoming UNFCCC commitments, as seen in the EU–Vietnam FTA's sustainable-development chapter.
- Guidance that environmentally beneficial measures do not automatically constitute expropriation or violate fair and equitable treatment.

##### **2. Standards for Sustainable Investments**

- Requirements that investors comply with best-practice environmental and social standards (IFC Performance Standards, Equator Principles).
- Mandatory climate-risk disclosures for large-scale energy or mining projects, paralleling evolving EU Corporate Sustainability Reporting Directive.
- Encouragement for green-technology transfer, building on the Netherlands' Model BIT which includes cooperative provisions on environmental technologies.

##### **3. Supportive Provisions for the Energy Transition**

- Explicit coverage of renewable power generation, storage, grid modernization, and carbon capture projects.
- Simplified procedures or capacity-building for cross-border clean energy investments, referencing possible cooperation on hydrogen supply chains (a major Australian export ambition).

- Carve-outs allowing differentiated subsidies or tax credits favouring low-carbon innovation, to reinforce national net-zero targets.

#### **4. Periodic Review Mechanism**

- Clause mandating a joint committee (or ministerial-level review) every five years to assess alignment with climate goals, technological advancements, and socio-economic developments.
- Built-in authority to update annexes or schedules swiftly, avoiding protracted renegotiations for routine policy adjustments.
- Flexibility to incorporate new sustainability indicators, e.g., adding metrics on greenhouse gas reductions or local content for clean-tech manufacturing.

#### **5. Dispute-Prevention Tools**

- Provision for good-faith consultations on regulatory changes related to climate or energy transition, helping parties address investor concerns preemptively.
- Early determination mechanisms to dismiss claims challenging non-discriminatory environmental measures, limiting potential “chilling” of public policy.

### **Resilience and Adaptability**

#### **1. Dynamic Reference Clauses**

- Linking the BIT to evolving external standards (e.g., ISO on climate risk, updates from the International Renewable Energy Agency) ensures continuous relevance without formal amendments.
- Enabling either party to propose additions to a “Sustainable Development Annex” that lists approved sectors for special facilitation (e.g., solar panel manufacturing zones).

#### **2. Balanced Termination and Renegotiation Options**

- Shorter initial term (10–12 years) with automatic extensions unless a party opts for renegotiation, fostering periodic alignment with emergent realities (AI-driven energy, circular economy).
- Clause allowing partial revision of specific chapters if both parties consent, rather than triggering full treaty termination.

#### **3. Institutional Cooperation Framework**

- A standing bilateral committee on sustainable investment that involves government agencies, business councils, and environmental representatives.
- Joint monitoring of projects to ensure compliance with environmental and social obligations, modelled on Morocco–Nigeria BIT’s Joint Committee approach.
- Encouragement of knowledge-sharing programs, technical workshops, and pilot initiatives for advanced clean-energy systems.

Australia’s 2023 Climate Change Act commits to 43% emissions cut by 2030 (from 2005 levels). Türkiye’s revised Nationally Determined Contribution aims to slash emissions by 41% from a business-as-usual scenario by 2030. Aligning the BIT with these pledges ensures it remains a tool for green growth, avoids investor–State friction over environmental legislation, and supports resilient, adaptable economic ties.

### **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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