

The Malaysia-Australia Free Trade Agreement – National Interest Analysis

Free Trade Agreements

- 2.1 International agreements regulating trade come in two forms. The first are the multilateral agreements, intended to apply a universal set of rules for trade between nations. There are three major multilateral agreements: the General Agreement on Tariffs and Trade (GATT), which regulates the international trade of goods; the General Agreement on Trade in Services (GATS), which regulates international trade in services; and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which regulates the treatment of intellectual property rights.¹
- 2.2 In general, these three agreements are intended to liberalise trade through individual national commitments to reduce barriers, such as tariffs and quotas, to international trade. The agreements are administered by an international agency, the World Trade Organisation (WTO).²
- 2.3 The second form of international agreement regulating trade is the bilateral or plurilateral free trade agreement or regional trade agreement (referred to as ‘free trade agreements’ henceforth). These agreements are negotiated between two or more countries and are intended to liberalise

1 World Trade Organisation (WTO), *Understanding the WTO: the Agreements*, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm>, accessed 4 September 2012.

2 WTO, *Understanding the WTO: the Agreements*, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm>, accessed 4 September 2012.

trade between the signatories by providing them with more favourable access to each other's markets than is available to other countries.³

- 2.4 Negotiation of free trade agreements has increased significantly since the 1990s as a result of the slow negotiation process for the improvement of the three multilateral agreements. As of January 2012, 511 free trade agreements had been notified to the WTO.⁴
- 2.5 The Australian Government has negotiated a number of bilateral and plurilateral free trade agreements, using the agreements as a mechanism to obtain market access for Australian exports to some of Australia's largest trading partners. At the time of writing, Australia has six ratified free trade agreements and eight free trade agreements under negotiation.⁵
- 2.6 The treaty under examination here, the Malaysia-Australia Free Trade Agreement (MAFTA), is the only agreement undergoing domestic approval at present.

Criticism of free trade agreements

- 2.7 While the WTO is in general supportive of free trade agreements, it does express a number of concerns about the impact of these agreements on the freedom of trade generally. For example:
- the WTO points out that, by their very nature, free trade agreements are inherently discriminatory because they build in a systemic advantage to the signatory countries;
 - the net economic impact of free trade agreements on signatory countries depends on the agreement's internal parameters and architecture;
 - the expected benefit of free trade agreements to signatory countries may be undercut by distortions in resource allocations and trade and investment diversion; and

3 WTO, *Regional trade agreements and preferential trade agreements*, <http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm>, accessed 4 September 2012.

4 WTO, *Regional trade agreements*, <http://www.wto.org/english/tratop_e/region_e/region_e.htm>, accessed 6 September 2012.

5 Department of Foreign Affairs and Trade, *Australia's Trade Agreements*, <<http://www.dfat.gov.au/fta/index.html>>, accessed 25 September 2012.

- overlapping free trade agreements tend to generate a system of coexisting different trade rules in a single country, hampering trade as a result of the costs to exporters of negotiating these coexisting rules.⁶
- 2.8 The Productivity Commission has also been a critic of bilateral and plurilateral free trade agreements. In its Research Report, *Bilateral and Regional Trade Agreements*, released in December 2010, the Productivity Commission made the following observations on Australia’s free trade agreements:
- while the theoretical analysis suggested that tariff preferences in free trade agreements would significantly increase trade flows between signatory countries, in reality, the increased trade flows were in part generated by the diversion of trade from other trade partners, resulting in only modest increases in national income;
 - the process for assessing and prioritising free trade agreements lacked transparency and tended to oversell the likely benefits; and
 - other policy options may be more cost effective for Australia.⁷
- 2.9 The Productivity Commission recommended that:
- the economic modelling of free trade agreements should include realistic scenarios and should be overseen by an independent body; and
 - a full and public assessment should be made of each provision of the negotiated outcome.⁸

Australia’s trade relationship with Malaysia

- 2.10 According to the National Interest Analysis (NIA), Malaysia is Australia’s tenth largest trading partner, and the third largest trading partner in the Association of Southeast Asian Nations (ASEAN). The two way trade between Australia and Malaysia is believed by the Department of Foreign Affairs and Trade to have been A\$16 billion in 2011, or 2.6 per cent of Australia’s total trade in goods and services.⁹

6 WTO, *Regional trade agreements: Scope of RTAs*, <http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm>, accessed 6 September 2012.

7 The Productivity Commission, *Bilateral and Regional Trade Agreements – Research Report*, 2010, p. XX.

8 The Productivity Commission, *Bilateral and Regional Trade Agreements – Research Report*, 2010, p. XX.

9 NIA, para. 4.

- 2.11 Australia exported A\$4.49 billion worth of goods to Malaysia in 2011. Australia's principal exports were crude petroleum, copper, coal and wheat. The value of Malaysia's exports to Australia in 2011 was A\$8.56 billion, and included: crude petroleum; electronic equipment such as computers, monitors, and televisions; and refined petroleum.¹⁰
- 2.12 In relation to trade, Australia's exports to Malaysia in 2011 were valued at A\$1.64 billion, with significant contributions from education and tourism. Australian imports of Malaysian services in 2011 were valued at A\$1.33 billion, including major contributions from transport services and tourism.¹¹
- 2.13 In terms of investment, Malaysians invest significantly more in Australian shares than Australians invest in Malaysian shares. Malaysian investment in Australian shares amounted to A\$13.99 billion in 2011, while the reciprocal figure was A\$5.69 billion.¹²

The Treaty

- 2.14 MAFTA is the latest bilateral free trade agreement with a member of ASEAN. As with the previous bilateral free trade agreements with Thailand and Singapore, this agreement has been made to build upon the ASEAN, Australia and New Zealand Free Trade Area Agreement (AANZFTA), which entered into force on 1 January 2010.¹³
- 2.15 In addition to the AANZFTA and the two extant free trade agreements, Australia also has bilateral investment treaties with Indonesia, Laos, the Philippines and Vietnam.¹⁴
- 2.16 The NIA for MAFTA claims that:

10 Department of Foreign Affairs and Trade, *Malaysia Fact Sheet*, <<http://www.dfat.gov.au/geo/fs/mly.pdf>>, accessed 18 September 2012.

11 Department of Foreign Affairs and Trade, *Malaysia Fact Sheet*, <<http://www.dfat.gov.au/geo/fs/mly.pdf>>, accessed 18 September 2012.

12 Department of Foreign Affairs and Trade, *Malaysia Fact Sheet*, <<http://www.dfat.gov.au/geo/fs/mly.pdf>>, accessed 18 September 2012.

13 *National Interest Analysis* [2012] ATNIA 17, Malaysia-Australia Free Trade Agreement, done at Kuala Lumpur on 22 May 2012, 2012 ATNIF 9, (Hereafter referred to as 'NIA'), para. 2. For further background on AANZFTA, see Joint Standing Committee on Treaties, *Report 102: Review into treaties tabled on 12 and 16 March 2009*, Chapter 2, tabled on 24 June 2009, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/12march2009/report.htm>.

14 Joint Standing Committee on Treaties, *Report 102: Review into treaties tabled on 12 and 16 March 2009*, para. 2.16.

Entry into force of MAFTA will deliver additional benefits to Australian producers, exporters, consumers and investors and provide a platform for securing further trade and investment liberalisation in the future.¹⁵

- 2.17 The Department of Foreign Affairs and Trade (DFAT) emphasises the benefits of MAFTA as a part of a broader strategy to engage with the ASEAN region:

...MAFTA will enhance the integration of the Australian economy into the region by building on AANZFTA and complementing Australia's two existing bilateral free trade agreements (FTAs) with individual ASEAN countries (Thailand and Singapore). MAFTA will also strengthen Australia's broader bilateral relationship with Malaysia, support Australia's objectives for progressing its AANZFTA built-in liberalisation agenda and, at a regional level, deepen Australia's engagement with the Asia-Pacific.¹⁶

Reasons for Australia to take the proposed treaty action

- 2.18 DFAT argues that MAFTA will provide greater certainty for Australian exporters and investors through the Agreement's commitments to goods and services market access and the temporary movement of skilled personnel.¹⁷
- 2.19 MAFTA is also expected to improve the transparency and predictability of regulatory regimes through consultation and cooperation between the parties.¹⁸ MAFTA contains a range of market access commitments by Malaysia that go beyond those contained in the AANZFTA. MAFTA also includes improvements in regulatory disciplines that will improve decision making transparency, and includes better legal protections for Australian investments in Malaysia.¹⁹

Tariffs

- 2.20 Tariffs are customs duties on imported goods the aim of which is to create a competitive advantage for similar locally produced goods.²⁰

15 NIA, para. 3.

16 NIA, para. 5.

17 NIA, para. 6.

18 NIA, para. 6.

19 NIA, para. 10.

20 WTO, *Tariffs*, <http://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm>, accessed 4 September 2012.

- 2.21 MAFTA is expected to result in tariff reduction and elimination at a rate significantly greater than that agreed in the AANZFTA. The following have been agreed in relation to tariffs:
- Australia will eliminate all tariffs on Malaysian imports on entry into force (this was not scheduled to occur under AANZFTA until 2020);
 - Malaysia will not increase tariffs on 99 per cent (based on 2009-11 data) of Australian exports to that country;
 - Malaysia will eliminate tariffs at a higher rate and at a faster pace for a range of products than previously agreed under AANZFTA;
 - Malaysia will provide tariff free access to 94.8 per cent of tariff lines on MAFTA's entry into force, covering 96.7 per cent of Australia's exports to Malaysia; and
 - the number of tariff free lines will increase to 98.6 per cent in 2016, 98.8 per cent in 2020, and 98.9 per cent in 2026.²¹

- 2.22 In relation to specific exports:
- Malaysia will remove virtually all tariffs on auto parts on entry into force;
 - the Malaysian tariff on smaller cars will be removed by 2016;
 - 96.4 per cent of iron and steel tariff lines exported to Malaysia will be tariff free by 2016, rising to 100 per cent by 2020;
 - virtually all Malaysian tariffs on plastics and chemicals will be removed on MAFTA's entry into force;
 - Malaysian tariffs on a range of processed food and manufactured products will be eliminated on MAFTA's entry into force;
 - Malaysian tariffs on fruit will be eliminated on MAFTA's entry into force;
 - Australian milk exporters will be able to access additional Malaysian quotas, including for higher value products on MAFTA's entry into force; and
 - Australian rice exporters will have open access to the Malaysian market from 2023, with the complete elimination of tariffs by 2026.²²

Rules of origin

- 2.23 When a product is wholly produced in-country, its origin is not in question, but where a good is produced that includes elements that originate in another country, rules of origin are applied to determine
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21 NIA, para. 7.

22 NIA, para. 7.

- whether that good is eligible for preferential tariff treatment under the Agreement.²³
- 2.24 MAFTA retains the innovations in the application of rules of origin introduced by the AANZFTA. Under MAFTA, exporters will be able to choose either a Change in Tariff Classification methodology or a Regional Value Content approach to meet the rules of origin test.²⁴
- 2.25 The Change in Tariff Classification Method defines a good that is produced using elements that come from another country as originating in the exporter's country when the production process results in a change in the tariff classification that applies to the good. In other words, the production process results in sufficient change in the good for it to be considered something different under the agreement's classification system.²⁵
- 2.26 The Regional Value Content approach uses an equation to determine the value of the work carried out on a product in the exporter's country as a percentage of the total value of the product. If the percentage is higher than the regional value content applying to that product, the exporter will be able to avail themselves of any preferential tariff treatment available under the free trade agreement.²⁶
- 2.27 In addition to the option of which rule of origin to use, exporters may also choose which of the two applicable agreements, the AANZFTA or MAFTA, to apply to a particular transaction.²⁷
- 2.28 DFAT argues that the choice of tariff rate will not necessarily be only based on the lowest rate, which would result in the selection of MAFTA as the applicable agreement. Exporters may choose a higher tariff rate in the AANZFTA, for example, in order to avail themselves of the benefit of the regional rules of origin it contains.²⁸
- 2.29 Over and above the innovations offered in the AANZFTA, MAFTA additionally permits Australian exporters to issue a 'Declaration of Origin' as either part of a commercial invoice or as a letter under company
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23 NIA, para. 8.

24 NIA, para. 8.

25 Australian Customs Service, 2004, *A Guide to Determining the Origin of Goods Under TAFTA using the "Change in Tariff Classification Method"*, para. 6. <www.customs.gov.au/webdata/resources/files/rothatafta_041104.pdf> accessed 29 October 2012.

26 Department of Foreign Affairs and Trade, *Australia-United States Free Trade Agreement: Chapter Five - Rules of Origin*, undated, <http://www.dfat.gov.au/fta/ausfta/final-text/chapter_5.html>, accessed 29 October 2012.

27 NIA, para. 8.

28 Joint Standing Committee on Treaties, *Report 102: Review into treaties tabled on 12 and 16 March 2009*, para. 2.18.

letterhead. This arrangement replaces the requirement for a third party 'Declaration of Origin' as required under the AANZFTA.²⁹

- 2.30 DFAT stated that Australia's general preference is for the use of 'Declarations of Origin' and that this had been the approach taken with previous free trade agreements, such as the one with Chile.³⁰
- 2.31 Malaysian exporters to Australia will still be required to obtain a third party 'Certificate of Origin'.³¹

Reduction in Malaysian non-tariff measures

- 2.32 MAFTA includes provisions ameliorating a number of Malaysian non-tariff measures that apply to Australian exports. In addition, MAFTA provides for future consultation on non-tariff measures.
- 2.33 Specific provisions in MAFTA in relation to non-tariff measures include:
- in relation to automotive exports, the removal of Malaysian quantitative restrictions on motor vehicle exports from Australia; and
 - in relation to liquid milk exporters, a liberalisation of licencing arrangements allowing Australian exporters to gain access for higher value retail products.³²

Services

- 2.34 In relation to services, MAFTA includes provisions providing greater access to Australians wanting to invest in Malaysian companies providing services. Malaysian investors will benefit from an increase in the Foreign Investment Review Board (FIRB) threshold for specific services below which Malaysians will be able to invest without having to submit to an FIRB assessment. Malaysian investors will also benefit from some specific service sector commitments by Australia.³³
- 2.35 In a number of instances, MAFTA provides better outcomes than those contained in the AANZFTA. DFAT specifically identify the following benefits for Australians wanting to invest in Malaysia:
- Australians will be allowed to own up to 70 per cent of any given Malaysian higher education institution upon MAFTA coming into force, increasing to 100 per cent in 2015;

29 NIA, para. 8.

30 Dr Milton Church, Coordinator, South-East Asia Goods Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 13.

31 NIA, para. 8.

32 NIA, para. 9.

33 NIA, para. 11.

- Australians will be permitted 70 per cent ownership in a range of other education services;
- in investment banking and direct insurance, Australians will be permitted to own up to 70 per cent of any given entity;
- Australians will be able to own accounting, auditing, bookkeeping and management consulting services outright;
- Australians will be permitted to own 70 per cent of any given telecommunications entity; and
- majority ownership of 51 per cent will be permitted in taxation services, mining related services, tourism, travel, and research and development related entities.³⁴

2.36 Australia's service commitments to Malaysian investors are as follows:

- the FIRB screening threshold applying to identified services will be increased from \$100m as it currently stands under the AANZFTA to \$244m under MAFTA; and
- sector specific commitments on private hospital services, hospital support services, research and development services, and some construction services.³⁵

Skilled persons

2.37 According to DFAT, MAFTA provides greater access to the Malaysian labour market for Australians with a number of specific skill types. No reciprocal changes will be necessary because Australia already provides the level of access for qualified personnel identified in MAFTA.³⁶

2.38 The improved access for Australians will include:

- an increase in the number of Australian senior managers, business executives and experts who will be allowed to live and work in Malaysia;
- the definition of 'business visitors' has been expanded to include goods sellers and investors – business visitors are entitled to enter Malaysia and stay for a period of 90 days;
- spouses and dependants of Australians working in Malaysia for periods longer than 12 months will be allowed to stay, and sometimes work, in Malaysia;

34 NIA, para. 11.

35 NIA, para. 11.

36 NIA, para. 12.

- Malaysia has committed to a more timely and transparent visa application process, including ensuring that visa applicants are advised of the outcome of their application before they arrive in Malaysia; and
- the provisions for temporary movement of skilled persons will apply to Australian citizens and Australian residents.³⁷

Economic and technical cooperation

2.39 MAFTA also contains commitments for Australia and Malaysia to engage in economic and technical cooperation by identifying specific strategic interests. There are five priority areas identified in MAFTA for such cooperation:

- automotive;
- agriculture;
- tourism;
- clean coal technology; and
- electronic commerce.³⁸

2.40 The arrangements for cooperative projects in these areas are contained in Attachment IV to the NIA for MAFTA, a non-legally binding *Implementing Arrangement for Economic and Technical Cooperation in Agreed Areas*.³⁹

2.41 The objective of the economic and technical cooperation provisions is to:

...provide a strategic framework for existing and future economic cooperation. It covers areas of mutual interest and of benefit to both Australia and Malaysia and the costs of the cooperation projects will be shared. The activities will focus on strengthening existing relationships and building new ones, advancing human resource development, creating new opportunities for trade and investment and contributing to the role of the private sector. The activities will also build on existing cooperation and relationships and enhance bilateral trade.⁴⁰

37 NIA, Attachment III, p. 12, *MAFTA Factsheet: Temporary Movement of Skilled Personnel*.

38 NIA, para. 13.

39 NIA, para. 13.

40 NIA, Attachment III, p. 15, *MAFTA Factsheet: Economic and Technical Cooperation*.

Obligations

- 2.42 By their nature, free trade agreements contain a large number of very specific obligations intended to liberalise trade between the signatory countries.⁴¹
- 2.43 Having said that, and bearing in mind the benefits to Australia detailed above, the bulk of the obligations in relation to MAFTA lie with the Malaysian Government.
- 2.44 Australia's specific obligations will be as follows:
- all Australian tariffs on Malaysian imports will be eliminated on MAFTA's introduction into force;⁴²
 - Australia will permit Australian exporters to produce their own certificates of origin for export to Malaysia;⁴³
 - the establishment of the Malaysia-Australia Automotive Industry Dialogue, intended to improve networking between the industries and identify opportunities for cooperation;⁴⁴
 - a reduction in the FIRB screening threshold for Malaysian investors in identified services; and⁴⁵
 - sector specific commitments on private hospital services, hospital support services; research and development services, and some construction services.⁴⁶

Costs

- 2.45 According to the NIA, MAFTA will have no net impact on the 2012-13 Budget. In the following financial years, MAFTA will reduce tariff income by A\$80m over the forward estimates.⁴⁷

41 NIA, para. 15.

42 NIA, Regulation Impact Statement, Para. 59.

43 NIA, para. 8.

44 NIA, Regulation Impact Statement, Para. 59.

45 NIA, para. 11.

46 NIA, para. 11.

47 NIA, para. 24.

