



2021 GENERAL REVIEW OF THE MALAYSIA-AUSTRALIA FREE TRADE AGREEMENT

September 15, 2021

The Global Data Alliance¹ welcomes the opportunity to provide comments in response to the general review of the Malaysia-Australia Free Trade Agreement (**MAFTA**) by the Department of Foreign Affairs and Trade (**DFAT**).²

The Australian Government is playing a leading role in advancing a new international legal framework for the digital economy through its proactive and creative approach to negotiating digital trade provisions and digital economy agreements (DEAs). These agreements benefit both Australia and its trading partners, supporting job creation, productivity growth, and overall competitiveness. In today's economy, cross-border data transfers are critical in the [workplace](#), in [health](#), in [innovation](#) and in [international trade](#).³ Furthermore, at a time when some countries are placing limits on international technological collaboration and the cross-border transfer of information, Australia's leadership in advancing digital trade provides an essential counter-narrative that will help ensure that open and innovative economies will be able to collaborate with like-minded partners to develop new scientific and innovative solutions to address the health, environmental, and economic challenges of our generation.

The Global Data Alliance (**GDA**) is a cross-industry coalition of companies that are committed to high standards of data privacy and security and that rely on the ability to transfer data responsibly around the world. While GDA members have an interest in a range of topics that could be addressed in digital economy agreements, we focus our comments on issues related to data localization and cross-border data transfer matters, which are the primary focus of the GDA.

I. Discussion

As reflected in the GDA's [Dashboard of Trade Rules on Data Transfers](#), cross-border data transfer in recent digital economy agreements (and digital trade chapters in Free Trade Agreements)⁴ can be measured against several key metrics. These metrics include whether any rules on cross-border data transfers:

- Are necessary to achieve a legitimate public policy objective;
- Are not applied in a manner that would result in arbitrary or unjustifiable discrimination or a disguised restriction on trade;
- Do not impose transfer restrictions greater than necessary;
- Do not discriminate against foreign service providers by treating cross-border data transfers less favorably than domestic data transfers;
- Apply across all sectors, including financial services; and
- Are enforceable.

The ongoing review of the MAFTA presents an important opportunity for both countries to enshrine their shared commitment to cross-border data transfers and open digital trade in an ambitious, high-standard trade agreement that meets or exceeds the standards of previous free trade agreements, such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).

Both Australia and Malaysia should capitalize on this review to strengthen the current robust economic relationship that leverages the benefits provided by the responsible free flow of data between both countries. The Global Data Alliance urges both countries to include digital trade provisions that:

- Obligate the Parties to permit the cross-border transfer of data while protecting personal information; and
- Prohibit data localization requirements.

We further describe several key commitments for the MAFTA review below.

Free Movement of Data Across Borders: The Agreement should obligate governments to refrain from imposing barriers to the cross-border transfer of data. Recognizing that a government may seek, for public policy purposes including privacy or security, to adopt or maintain measures that are not consistent with this obligation, the Agreement should stipulate that any such measures not discriminate against foreign service providers; must not constitute a disguised restriction on trade; and must be necessary to achieve the specific objective. Furthermore, if a Party treats domestic data transfers differently from cross-border data transfers, such differential treatment must not result in less favorable treatment to a foreign service provider. Where appropriate, countries should also work together to create trust-based frameworks that are interoperable and support the seamless movement of information across borders. This could include recognizing the use of a variety data transfer mechanisms that meet the domestic standards of both Australia and Malaysia. Finally, a dispute settlement mechanism also must be available to allow close scrutiny and enforcement of measures that derogate from the cross-border data transfer obligation.

No Localization Requirements: The Agreement should preclude governments from using data localization requirements as a market access barrier in any sector of the economy. For example, a government should not require that a data center be built inside its borders as a condition for doing business in its territory.

The Agreement should prohibit a government from requiring, as a condition of doing business, that a service provider use or locate computing facilities in its territory. Recognizing that a government may seek, for public policy purposes including privacy or security, to adopt or maintain measures that are not consistent with this obligation, the Agreement should stipulate that such measures must not discriminate against foreign service providers or constitute a disguised restriction on trade, and must be narrowly tailored to achieve the specific objective. A dispute settlement mechanism also must be available to allow close scrutiny and enforcement of measures that derogate from this obligation.

Financial Services: Rules specific to any specific sector, such as financial services, which have in past agreements been addressed in separate chapters of free trade agreements, must be substantially the same as the rules of general applicability on cross-border data flows and localization.

This approach is consistent with the joint statement issued by the United States and Singaporean governments in February 2020⁵, through which both governments recognize the benefits of rules that ensure that financial service suppliers can transfer data across borders, and that refrain from requiring data or infrastructure localization. The MAFTA provides an important opportunity to ensure this approach will also apply to policies regulating financial data flows between Australia and Malaysia.

II. Conclusion

The Global Data Alliance welcomes the opportunity to provide this submission regarding the review of the MAFTA. Please do not hesitate to contact us with any questions. Should you have any additional questions or comments, please contact Ms. Eunice Lim (eunicel@bsa.org). We look forward to working with you.

¹ The Global Data Alliance (globaldataalliance.org) is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. Alliance members are headquartered across the globe and are active in the advanced manufacturing, aerospace, automotive, consumer goods, electronics, financial services, health, media and entertainment, natural resources, supply chain, and telecommunications sectors, among others. BSA | The Software Alliance administers the Global Data Alliance. For more information on the Global Data Alliance, please see: <https://www.globaldataalliance.org/downloads/aboutgda.pdf>

² <https://www.dfat.gov.au/trade/agreements/in-force/mafta/call-for-submissions-on-malaysia-australia-fta>

³ See Global Data Alliance, *Cross-Border Data Transfers and Remote Work* (2020), at <https://globaldataalliance.org/downloads/10052020cbdtremotework.pdf>; See Global Data Alliance, *Cross-Border Data Transfers and Remote Health Services* (2020), at <https://globaldataalliance.org/downloads/09152020cbdtremotehealth.pdf>; Global Data Alliance, *Cross-Border Data Transfers and Innovation Work* (2020), at <https://globaldataalliance.org/downloads/04012021cbdtinnovation.pdf>; Global Data Alliance, *Cross-Border Data Transfers and Supply Chain Management* (2021), at [https://globaldataalliance.org/downloads/03182021\[primersupplychain.pdf](https://globaldataalliance.org/downloads/03182021[primersupplychain.pdf)

⁴ See Global Data Alliance, *Dashboard of Trade Rules on Data Transfers* (2020), at: <https://www.globaldataalliance.org/downloads/gdadashboard.pdf>

⁵ US Department of the Treasury, *United States – Singapore Joint Statement on Financial Services Data Connectivity* (Feb. 2020), at <https://home.treasury.gov/news/press-releases/sm899>