PROMOTING INTANGIBLES TRADE: A REGULATORY PERSPECTIVE

Ladies and Gentlemen, welcome to the last session of the ASEAN Consultative Forum 2026. I represent AusCham ASEAN as its Vice-Chairman. My perspectives are those of Malaysia and Australia but I believe the message I share has wider regional significance and relevance.

1. Introduction

Malaysia and Australia have developed one of the Indo-Pacific region's most comprehensive bilateral economic relationships, evolving from a traditional goods-focused trading partnership into a sophisticated platform for intangible trade and services-led foreign direct investment (FDI). This evolution was formally recognised with the elevation of bilateral ties to a Comprehensive Strategic Partnership (CSP) in 2021, which explicitly prioritises cooperation in economic prosperity, digital technology, education and knowledge-based industries.

Given the time I've been allocated, I'd like to address just a few key areas that I believe are essential to the promotion of intangible trade and investments between our 2 countries.

2. Intangible Trade as a Strategic Economic Driver

With A$33 billion in two-way trade in 2023–24, Malaysia now stands as Australia's second-largest ASEAN trading partner, while Australia remains one of Malaysia's most significant developed-economy partners. As tariffs on goods are largely eliminated, future growth is increasingly concentrated in digitally deliverable services, intellectual property-embedded consumables, education exports and professional services investment.

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3. The Legal Architecture Supporting Intangible Trade

A. Trade and Investment Agreements

Trade and Investment Agreements further refine domestic legal infrastructure and enhance pre-existing legal norms.

Malaysia and Australia are connected through 5 overlapping trade and investment frameworks:

1. the Malaysia–Australia Free Trade Agreement (MAFTA);
2. the ASEAN–Australia–New Zealand FTA (AANZFTA);
3. the Regional Comprehensive Economic Partnership (RCEP),
4. the Comprehensive Strategic Partnership (CSP), established in 2021
5. the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Whilst international trade agreements require actualisation through domestic law reform, they provide clear roadmaps for attaining goals that improve trade and investment in the long term.

MAFTA, in force since 1 January 2013, is particularly significant for intangible trade because it extends beyond goods liberalisation to include services, investment, e-commerce, IP rights and competition policy across 21 chapters.

Under MAFTA Australia and Malaysia agreed to majority or full foreign ownership across key intangible sectors, including:

- 100 per cent foreign ownership in higher education
- 100 per cent ownership in accounting, auditing, bookkeeping and management consultancy
- At least 70 per cent foreign ownership in telecommunications services

Such liberalisation in legal ownership rules (though not necessarily regulatory ones) have enabled Australian institutions such as Monash, Curtin and

Swinburne Universities to operate and grow in Malaysia with regional reach beyond Malaysia. This together with the trade in educational courses attended by Malaysian students in Australia (estimated to number around 140,000 over the years) makes up the net trade surplus between our countries.

MAFTA's intellectual property chapter reinforces protection for copyrights, trademarks and patents, supporting IP-intensive business models across digital content, education material and research, and branded consumer services.

At this juncture let me make a brief mention about DEFA (the ASEAN Digital Economy Framework Agreement). This is a blueprint to harmonise digital trade, cross-border data flows, cybersecurity, digital ID and emerging tech across ASEAN. Malaysia is an active DEFA participant aligning many domestic laws and policies to DEFA goals. Although not an ASEAN member, Australia backs DEFA through funding, studies and technical support.

B. Domestic Legal Protection

Unlike commodity trade, intangible trade depends fundamentally on legal predictability, regulatory transparency, data protection and intellectual property (IP) enforcement. Therefore, a robust and efficient legal and regulatory framework is necessary if Malaysia wants to continue attracting trade and FDI of intangibles not just from Australia but also from larger intangible exporters such as the USA and China.

While Malaysia's IP laws are broadly compliant with the Trade-Related Aspects of Intellectual Property Rights Agreement or TRIPS, and she has constantly modernised her laws, persistent enforcement limitations may still be improved to further enhance confidence among foreign IP exporters. These shortcomings are especially relevant for Australian exporters whose competitive advantage resides primarily in IP rather than price or volume.

C. Australian Exports to Malaysia with Embedded Intellectual Property

Weak enforcement heightens risks of infringement replication, especially in IP-embedded or blended trade models.

- **Health, Pharmaceuticals and Nutraceuticals.** Australian exports of pharmaceuticals, supplements and wellness products embed value in scientific formulations, regulatory data, trade secrets and trusted branding. Pharmaceutical exports to Malaysia alone reached US$8.88 million in 2025. Both pharma and nutraceuticals rely heavily on brand equity rather than patents. Counterfeit supplements, unauthorised parallel imports and misappropriation of formulations undermine both consumer trust and returns on Australian innovation.

- **Branded Food and Beverage Products.** Australian food exports to Malaysia—including premium meats, dairy, processed foods and wine, are equally brand-driven rather than tariff-driven. IP protection for trademarks and geographical indication and quality assurance schemes therefore provide critical incentive for trade and investment.

- **Retail, Lifestyle and Franchise Brands.** Australian retail and lifestyle brands such as Aesop, Boost Juice, Cotton On and Harvey Norman operate in Malaysia via franchising and licensing, where the brand itself is the core export. These models rely on enforceable trademarks, trade dress protection and confidentiality over business processes. A competent and knowledgeable judicial system that delivers timely results which protects legitimate expectation under contract would preserve investor confidence.

D. Data Protection

Digital trade has emerged as a central pillar of the CSP. Australia's "*Invested: Southeast Asia Economic Strategy to 2040*" policy also explicitly identifies Malaysia as a priority destination for digital and services-driven Australian investment.

Data transmitted across borders and stored in servers are vulnerable to unlawful use and processing. These include algorithms and source codes. In Malaysia these are protected through a mix of data-protection statutes and intellectual-property law including the *Personal Data Protection Act 2010 (PDPA)*, the *Copyright Act 1987*, the *Computer Crimes Act 1997*, the *Communications and Multimedia Act 1998*, and the *Cyber Security Act 2024*.

Computer programmes and source codes are treated as literary works under the Copyright Act 1987. This gives exclusive rights to reproduce, adapt and distribute the work. The Act also criminalises unauthorised access to programs/data, unauthorised modification, and wrongful communication of computer material — offences that directly protect source code and algorithmic assets from hacking, copying or tampering.

The Personal Data Protection Act 2010 (PDPA), amended by the Personal Data Protection (Amendment) Act 2024, introduced mandatory data protection officers, breach notification obligations, data portability rights and enhanced cross-border data transfer rules. These amendments align Malaysia's regime more closely with mature international data governance standards, thereby increasing legal certainty for Australian cloud, fintech and digital service providers.

Further strengthening this environment, Malaysia enacted the Cyber Security Act 2024, establishing national cyber governance structures, mandatory incident reporting for critical infrastructure and licensing for cybersecurity service providers. Together, these reforms support secure cross-border digital trade and enable deeper technology-led FDI.

E. Malaysia's IP Enforcement

- **Reactive and Complaint-Driven Enforcement.** A central weakness of Malaysia's IP enforcement regime is its reactive nature. Most enforcement activity, particularly for trademark and copyright infringement, depends on complaints initiated by rights holders, often requiring extensive documentation, surveillance reports and participation in raids. This places disproportionate costs on foreign rights holders, particularly SMEs and digital content providers, and results in uneven enforcement. In practice, infringement may persist unless aggressively policed by IP owners themselves.
- **Fragmented Institutional Landscape.** Malaysia's IP enforcement responsibility is split across multiple agencies, including MyIPO, the Ministry of Domestic Trade, Royal Malaysia Police, Malaysian Customs and the Malaysian Communications and Multimedia Commission for online matters and the Courts. While coordination has improved, procedural fragmentation, particularly in cases involving both physical and online infringement, continues.
- **Limited Criminal Enforcement and Deterrence.** Criminal enforcement in Malaysia is largely confined to copyright piracy and trademark counterfeiting, while patent and industrial design infringement remain civil matters only. Even where criminal sanctions exist, penalties imposed are often too modest relative to commercial gains, to deter repeat offenders.

Passing-off, mislabelling and other IP infringements remain ongoing risks in the absence of strong and timely enforcement, and these breaches directly affect investor confidence.

4. Policy Implications and Conclusion

Malaysia's IP laws are sound in design and internationally aligned, but enforcement remains reactive, fragmented and insufficiently deterrent. For Australia, this matters because its fastest-growing exports to Malaysia are IP-embedded and brand-driven, not commodity-based.

Strengthening *ex officio* enforcement, improving inter-agency coordination, enhancing platform liability frameworks and increasing penalties for commercial-scale infringement would directly support bilateral intangible trade.

Thank you.