

**National Interest Analysis [2020] ATNIA 14**

**with attachment on consultation**

**Agreement between the Government of Malaysia and the  
Government of Australia on film co-production**

(Sydney, 29 November 2019)

**[2020] ATNIF 18**

## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### Agreement between the Government of Malaysia and the Government of Australia on film co-production

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#### Nature and timing of proposed treaty action

1. The proposed treaty action is the entry into force of the *Agreement between the Government of Malaysia and the Government of Australia on film co-production* ('the Agreement'), which was signed in Sydney on 29 November 2019.
2. Article XXIV of the Agreement provides that the Agreement shall enter into force once the Parties have notified each other through diplomatic channels that their respective domestic requirements have been completed. The Agreement shall enter into force on the latter date of these two notifications. Australia will provide its notification to Malaysia as soon as practicable following the completion of domestic treaty-making requirements.

#### Overview and national interest summary

3. The purpose of the proposed Agreement is to stimulate industry, employment, technical development and cultural exchange between Australia and Malaysia by facilitating screen co-productions between the two countries. The Agreement provides a framework within which the relevant authorities of each country may cooperate to approve the making of a broad range of films including feature films, television, video recordings, animations and digital format productions.
4. Under the Agreement, projects approved as official co-productions will be regarded as national productions of both Australia and Malaysia, and will therefore be entitled to the full enjoyment of any benefits or programs of assistance available under the domestic laws of either country. Malaysia's screen industry has a system of government support to encourage the creation of local content and to attract foreign production. The model of government support is very similar to the Australian Government screen support model, with rebates for qualifying expenditure.
5. The Australian screen industry supports the Agreement, and has done so from the outset of negotiations. This Agreement will open up new markets for Australian films and enable a creative and technical interchange between film personnel. It also has the potential to increase the output of high-quality productions through the sharing of equity investment. It is likely that productions under the Agreement will include animation projects and multi-party productions.

6. The treaty action will further strengthen bilateral relations between Australia and Malaysia by building upon existing interest between screen producers to open up new markets for jointly developed Australia-Malaysia screen projects. The Agreement will also create a larger distribution network for quality exportable film products in the domestic markets of both countries, as well as the international market.
7. The Agreement was concluded in the margins of the Trans-Pacific Partnership Agreement (TPP) negotiations in October 2015 and is considered to be a valuable outcome for the Australian screen industry arising from that trade agreement. As a result of its association with the TPP, Australian producers have a strong expectation that the Agreement will enter into force.

### **Reasons for Australia to take the proposed treaty action**

8. This Agreement will be the thirteenth co-production arrangement that Australia has entered into under the auspices of Australia's International Co-production Program ('the Program'), the principal purpose of which is to foster industry development and cultural exchange between cooperating countries. Within this framework, co-production arrangements are negotiated bilaterally with the aim of sustaining and developing Australian creative resources and production. Australia is currently party to ten bilateral film co-production treaties (with the United Kingdom, Canada, China, Italy, Ireland, Israel, Germany, Republic of Korea, Singapore and South Africa) and two Memoranda of Understanding (with France and New Zealand). Since the inception of the Program in 1986, 194 co-productions with a total budget of approximately AUD 2 billion have either been completed or have commenced production (as at 10 February 2020).
9. The objective of the proposed Agreement with Malaysia is to facilitate co-productions which:
  - increase the output of high-quality productions, by sharing equity investment with Malaysia;
  - open up new markets both in Malaysia and internationally for Australian film, television, animation and digital format productions;
  - share the risk (and cost) of screen production;
  - establish links with Malaysian production and distribution interests;
  - facilitate interchange between Australian and Malaysian screen professionals, particularly those in principal creative positions;
  - create employment opportunities for Australian industry personnel; and
  - strengthen existing diplomatic ties between Australia and Malaysia.
10. Official Australia-Malaysia co-productions will gain financial benefits under the Agreement. In Australia, the main benefits available for co-productions will be their eligibility to be treated as productions with significant Australian content that can therefore access the Australian Screen Production Incentive – Producer Offset under the *Income Tax Assessment Act 1997*, and eligibility to qualify as 'Australian program content' for the purposes of the Australian Content Standard for commercial

television broadcasting. Official co-productions will also be able to access direct funding through Screen Australia. Similarly, in Malaysia an official co-production will be considered a Malaysian production for the purposes of official financial support and audiovisual regulations.

11. Malaysia is an attractive market for Australian co-productions, due to the numerous government-funded schemes in place to support local film production and the potential to reach a very large audience (population of 32 million, over 1,000 cinemas nationwide, and the growing appeal of Malaysian films in China). The government allocated MYR 30 million (AUD 10 million) and MYR 20 million (AUD 6.5 million) for the development of the local film industry for 2019 and 2020 respectively. Fifty-four locally-produced films were released in 2018, with gross takings over MYR 170 million (AUD 60 million), and Malaysia's participation in the 2019 edition of the International Market of Communications Programs (MIPCOM) alone generated MYR 20.7 million (AUD 7 million) worth of local film exports and investments.
12. The Agreement is underpinned by the notion of reciprocity, a principle applied to ensure that over time there is an overarching balance of financial and creative participation by both countries, and that the Agreement is of comparable benefit to both countries. This includes an overall balance in relation to respective production costs, studio and laboratory usage, and the employment of nationals of both Parties in major creative (i.e. directors, writers), performing, craft and technical positions related to screen co-productions made under the Agreement.
13. The Agreement will build on existing partnerships between Australian and Malaysian producers and provide the impetus to develop high-quality projects that may not otherwise have been undertaken.

## **Obligations**

14. Pursuant to Article III, proposals for the making of co-productions must be submitted to the Competent Authorities of each Party (as designated under Article II) for provisional approval prior to the commencement of production. Paragraph 4 of Article III provides that, in considering the approval of proposed co-productions, the Competent Authorities may stipulate additional conditions of approval to ensure that individual projects meet minimum quality standards and an overall balance between the two countries. Where such approval is withheld by one of the Competent Authorities, Paragraph 6 of Article III requires that the project not be approved as a co-production under the Agreement. Paragraph 7 of Article III provides that neither Party is bound to permit the public exhibition of a completed co-production.
15. In approving co-productions, Article IV requires the Competent Authorities to ensure that none of the co-producers are linked to one another, either directly or indirectly, by common management, ownership or control, unless the common management relates to the making of the co-production itself. Article V further requires the Competent Authorities to ensure that contractual arrangements between co-producers include certain details, such as the date of completion of the co-production, and is

consistent with Article VII (Entitlement to Benefits) and Article XXI (Protection of Intellectual Property Rights) of the Agreement.

16. Once approved as a co-production between Australia and Malaysia, Article VII requires that each co-production be entitled to all the benefits that are or may be accorded in Australia or Malaysia to national productions. Pursuant to paragraph 2 of Article VII, any subsidies, tax incentives or other financial incentives that may be granted to a film co-production shall accrue to the co-producer who is permitted to claim the benefits under the existing measures of that Party. Such benefits may not be assigned except pursuant to paragraph 3 of Article VII, to or for the benefit of:
  - a. a legal entity or national of that co-producer's country; or
  - b. an individual or legal entity of a third country, who is a third country co-producer consistent with Article VI (a co-producer of a film under another film co-production agreement or other arrangement between that third country and Malaysia or Australia, so long as that production has been approved by the Competent Authorities as a co-production under this Agreement).
17. Article IX obliges Australia, subject to its laws, to permit the import and re-export, free of import duties and taxes, of cinematographic and technical equipment for the making of co-productions. Article VIII provides that Australia shall facilitate the entry and temporary stay in Australia of Malaysian nationals or nationals of the country of any third co-producer, for the purpose of producing the film. Malaysia is under the same obligations in corresponding circumstances (Article VIII).
18. Article X requires that each co-producer contribute a minimum of 20% of the total financial and creative contributions and that the creative contribution is in reasonable proportion to that co-producer's financial contribution. Pursuant to Article XVIII, each Competent Authority will monitor and ensure that an overall balance of contributions is achieved over each three-year period, consistent with the aims of the Agreement. Where the approval of a project as a co-production will affect this overall balance, paragraph 2 of Article XVIII allows either Competent Authority to withhold such approval.
19. Articles XI to XIV and Articles XVI set out obligations and powers of each Party and their Competent Authority in relation to various aspects of film production, including location filming (Article XI), participation of nationals of a Party in the making of a film co-production (Article XII), the language of soundtrack and footage (Article XIII), the location of the majority of film making and processing, (Article XIV) and acknowledgements and credits (Article XVI).
20. Article XV requires that each Party satisfy itself that the working conditions in each of the countries of the participating co-producers are generally comparable and the working conditions for approved location filming in countries other than those of the co-producers is, generally, no less favourable.
21. Article XVII obliges both Parties to apply their respective laws for the purposes of taxation, subject to the provisions of any tax convention between Australia and Malaysia.

22. Article XXI requires that the Parties conform with their respective national laws, rules and regulations and any respective international obligations regarding the protection of intellectual property rights.
23. Article XXII requires that the processing, treatment, recording, distribution, or transmission of documents, data and information under this Agreement is consistent with the respective domestic laws of each Party on confidentiality, and any respective international obligations.
24. Pursuant to Article XX, any dispute concerning the interpretation and/or implementation and/or application of any of the provisions of this Agreement shall be settled amicably through mutual consultation and/or negotiations between the Parties through diplomatic channels, without reference to any third party or international tribunal.
25. Pursuant to Article XXIV, in the event of termination, the Agreement shall continue as if in force in respect of any co-production approved by the Competent Authorities, but not yet completed prior to the termination.

### **Implementation**

26. No new legislative measures are required to implement the obligations under the Agreement.
27. The *Income Tax Assessment Act 1997* allows access to tax incentives for official co-productions (the Producer Offset), and the *Migration Act 1958* and its regulations allow for entry into Australia of co-production teams as envisaged by the Agreement.
28. For goods that are the subject of a 'relevant intergovernmental agreement', the *Customs Act 1901* provides for their delivery into home consumption as goods temporarily imported, without the need for the goods to be entered for that purpose, or the payment of applicable duty, provided that a security or undertaking is established. Corresponding provisions in *A New Tax System (Goods and Services Tax) Act 1999* extend these arrangements to the otherwise applicable Goods and Services Tax. Once in force, this Agreement will constitute a 'relevant intergovernmental agreement' for the purposes of both the Customs and Tax Acts. Consequently, no change is required in these Acts to allow for the temporary admission, free of duty and tax, upon the giving of a security or undertaking, of cinematographic and technical equipment for the making of a co-production as required by Article IX of the Agreement.
29. The Agreement confirms that both Parties can apply their domestic tax laws, subject to the provisions of any tax treaty in force between Australia and Malaysia (Article XVII). The current tax treaty between Australia and Malaysia is the *Agreement between the Government of Australia and the Government of Malaysia for the*

*Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, which was signed in Canberra on 20 August 1980 and entered into force on 26 June 1981 [1981] ATS 15. This tax treaty has been amended several times: by an Amending Protocol signed in Sydney on 2 August 1999 with entry into force on 27 June 2000 [2000] ATS 25; a Second Amending Protocol signed in Genting Highlands on 28 July 2002 with entry into force on 23 July 2003 [2003] ATS 1; and a Third Amending Protocol signed in Canberra on 24 February 2010 that entered into force on 8 August 2011 [2011] ATS 27. The tax treaty applies to Australian and Malaysian income tax and includes rules which limit taxing rights over various types of income, as well as rules for reducing any double taxation where both countries exercise their right to tax. Further, Australia is Party to the *Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting* (OECD MLI). As at 27 May 2020, Malaysia had signed, but not yet ratified, the OECD MLI. Should the OECD MLI enter into force as between Australia and Malaysia, the provisions will modify Australia and Malaysia's double taxation treaty according to each Party's notifications to the OECD MLI.

30. The Agreement will be administered by Screen Australia on behalf of the Australian Government as part of Australia's International Co-production Program.

#### **Costs**

31. While there will be some costs associated with the administration of the proposed Agreement, these costs will be absorbed by Screen Australia.
32. Direct agency funding of Australia-Malaysia co-productions through Screen Australia will be provided from existing funds. Production under the Agreement is estimated to incur claims under the Producer Offset in Division 376 of the *Income Tax Assessment Act 1997*. This was considered in the broader context of the TPP Agreement, as the co-production agreement was finalised in the margins of that mechanism.

#### **Future treaty action**

33. Article XIX specifies that revisions, modifications and amendments to the Agreement can be made with the mutual agreement of both Parties. A revision, modification or amendment would enter into force once the Parties have notified each other that their respective domestic requirements for entry into force of the revision, modification or amendment have been completed. A revision, modification or amendment of the Agreement would be subject to Australia's domestic treaty-making requirements, including tabling and consideration by JSCOT.

#### **Withdrawal or denunciation**

34. Article XXIV specifies that the Agreement shall remain in force initially for three years from the date of its entry into force, and shall thereafter be renewed automatically for further successive periods of three years.

35. Pursuant to Article XXIV, either Party may terminate the Agreement at the conclusion of a three-year period by giving six months prior notice in writing through diplomatic channels. Termination by Australia would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.

**Contract Details**

Screen Industry Section

Office for the Arts

Department of Infrastructure, Transport, Regional Development and Communications



## **ATTACHMENT ON CONSULTATION**

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#### **CONSULTATION**

36. Negotiation of the Agreement commenced in 2010 with the then Department of Environment, Water, Heritage and the Arts (DEWHA) (the ‘Department’) taking the lead role.
37. The Trade and Co-production Forum (TCF) – an industry consultative group convened by the Department – was consulted at ad hoc meetings during the formative stages of negotiations to ensure that the Agreement was in line with current industry practice and would provide potential benefits to the Australian industry. The industry bodies involved in the TCF are national organisations that consult widely across all States and Territories. No issues were raised in these consultations. The text of the Agreement was developed with advice from Screen Australia, as the Competent Authority for all of Australia’s coproduction agreements, using the coproduction agreement template that had been developed in consultation with the TCF. The TCF comprised representatives of the peak film and digital content industry bodies, including:
- Australian Guild of Screen Composers;
  - Australian Directors’ Guild;
  - Australian Writers’ Guild;
  - Media, Entertainment and Arts Alliance;
  - Screen Producers Association of Australia;
  - Ausfilm;
  - Australian Interactive Media Industry Association;
  - Games Developers Association of Australia;
  - Interactive Entertainment Association of Australia;
  - Motion Picture Distributors Association of Australia;
  - Independent Cinemas Association of Australia; and
  - Australian Cinema Exhibitors Coalition.
38. State and Territory Governments have been advised of the Agreement through the Standing Committee on Treaties’ (SCOT) Schedule of Treaty Action. The Agreement has been on the list of treaties under negotiation, consideration or review by the Australian Government since 2010. No objections or concerns were raised by the State or Territory Governments as a result of this notification.