

Malaysia: Opportunities, Pitfalls

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Malaysia offers much for foreign companies aware of Mascom 2020. But caution is a worthy partner.

Malaya gained its independence from the British in 1957. Together with Sabah and Sarawak, it formed Malaysia in 1963. Essentially an agricultural country until the 1950s, Malaysia embarked on a program of industrialization soon after independence. In the 1960s, the emphasis was on promotion of import substitution industries. In the 1970s, export-oriented industries were encouraged. In the 1980s, resource-based industries and engineering supporting industries were emphasized. The current trend is to develop industry with high technology.

MANUFACTURING LICENSE

Companies that may avail themselves of the opportunities in Malaysia may fall into two categories—those that require a license to operate as a manufacturing company under the Industrial Commodities Act of 1975 and those that do not require such a license.

Under the Act, only a manufacturing company that undertakes a manufacturing activity with 75 or more full-time employees and a paid-up capital of RM25 million or more is required to obtain a license from the Ministry of International Trade and Industry. A manufacturing activity is defined by the list as:

"the making, altering, finishing, assembling, finishing or otherwise working or adapting any article or substance with a view to its use, sale, transport, delivery or disposal and includes the assembly of parts and ship repairing the hull and superstructure of a vessel normally associated with such or wholesale trade."

AREAS OF ACTIVITIES

Through the Promotion of Investments Act of 1966 the Malaysian government has given various tax incentives to investors.

A company may acquire pioneer status. It will have to pay tax on only 50% of its statutory income for the first five years of its operation. A company incurring qualifying capital expenditure within the first five years of its operation may be given an investment tax allowance of 60%.

A company will be eligible for pioneer status or investment tax allowance if it engages in a promoted activity or produces promoted products. Such promoted activities and products may be in the areas of manufacturing, agriculture or tourism. A updated list are the promoted activities and products will be provided from time to time by the Malaysian Industrial Development Authority (MIDA).

The current list includes industries related to the utilization of rubber, timber, tin, palm oil and clay into higher value-added products for export, microelectronics, computers, biotechnology, communication technology, advanced materials technology, components and parts and printing/processing of fruits and vegetables, livestock breeding and aquaculture.

There are various business activities that are not encompassed in the list of promoted activities and products and in which investments may be made by all enterprises including those with smaller paid-up capital and work force. Examples of such activities are business consultancy and education with a training program with overseas universities.

Asides:

The Malaysian government has

set up industrial estates and free-trade zones. Facilities available include licensed manufacturing warehouses, electricity, water, telecommunication, air cargo ports, cargo transportation and railway services. The country is criss-crossed with good roads.

EXCHANGE CONTROL

Malaysia has always adhered to a liberal exchange control policy. It has acceded to Article III of the GATT Articles of Association. This ensures free transfer of funds and interconvertibility of currencies.

For a residence of more than RM 10,000.00, a form has to be completed giving reasons for the residence and submitted to any commercial bank. The commercial banks are generally authorized to approve the payments. Approval Bank Negara (the Central Bank) is required only if the payment is for investments in securities or land abroad and for extending credit to or placement or deposits with non-residents when such transactions are financed by credit facilities obtained in Malaysia.

Principal Foreign Incentives

MIDA has aggressively promoted Malaysia as a country that welcomes foreign investments. The principal countries that have taken advantage of the investment opportunities in Malaysia from 1986 to July 1992 are shown in Table 1.

AUSTRALIA'S INTEREST

Malaysia continues to record high economic growth despite the recession.

Mass Rate Is Review, Impact, Malaysia, paper presented at LEAS Australia/New Zealand Council Conference, March 1993.

COUNTRY	INVESTMENT (\$Million)
1. Taiwan	10,755.4
2. USA	7,000.4
3. UK	4,562.1
4. France	4,175.6
5. Germany	3,742.7
6. United Kingdom	3,742.7
7. Australia	2,762.4
8. Rep. of Korea	2,457.9
9. Singapore	2,457.9
10. Hong Kong	1,811.5

Source: AFTA.

Table 1

sions in various parts of the world. Australian companies are attracted to Malaysia on account of its ability to contain any political development an adverse nature and the availability of skilled labor at a cost lower than that of Australia. For some Australian companies, it appears more profitable to relocate their manufacturing facilities in Malaysia and import the goods into Australia than produce them domestically.

Malaysia is also a member of ASEAN. At the 4th ASEAN Summit on January 27 and 28, 1990, agreement was reached by the member countries to liberalize the ASEAN market, to establish free trade areas within 10 years and with immediate effect to progressively reduce duties and tariffs within the region. Australians with long-term interests have come to realize that by establishing a presence in Malaysia they would be able to utilize the opportunities made available to the ASEAN Free Trade Area (AFTA).

FOREIGN COMPANY

To do business in Malaysia, a foreign corporation may register as such. To effect registration, the following documents are required to be filed with the Registrar of Companies:

1. A certified copy of its certificate of incorporation.
2. A certified copy of its memorandum and articles of association.
3. A list of the directors with their present and former names, addresses, nationality, occupations, passport numbers and the particulars of other directorships held by them.
4. If there are local directors, a memorandum defining their powers.

5. A power of attorney authorizing a resident in Malaysia to accept service of process on behalf of the company.

6. A statutory declaration affirmed by the agent conferring his appointment as an agent of the company.

Private Company

The most common method of doing business is by incorporating a private limited company in the country with an authorized capital of RM100,000.00 and a minimum paid-up capital of RM1.00. The board of directors should be raised persons of full age. Two of them should have their principal or only place of residence in Malaysia. This private limited company may be a subsidiary of a foreign company or it may be a joint-venture company formed pursuant to a joint venture agreement entered between the foreign company and the local parties.

Choice of Partners

In making a choice of partners for a joint venture, it is necessary to take note that what would be considered an discriminatory to other countries would be deemed to be perfectly legal in Malaysia. Article 103 of the Malaysian Constitution enables quotas to be reserved for Bumiputeras. They are entitled to special privileges. Positions may be reserved for them in the public service. They are entitled to scholarships and educational and training privileges. Promotions or increases for the operation of any trade or businesses may be allotted to them in preference to Malaysians of other races. This provision is an entrenched provision in the Constitution and it can only be amended by the Malaysian Parliament with the consent of the Conference of Rulers.

The special privileges of Bumiputeras may not be questioned by any person. If a person questions them, he will be deemed to have committed an act of sedition under the Section 40, 1968. Bumiputera participation in any venture undertaken by an Australian company in Malaysia is necessary for the company to reap the maximum benefits.

The pool of available Bumiputeras

entrepreneurs has widened and a selection should be made of the most influential Bumiputeras to be partners in the joint venture. They may serve in the board of directors and participate in the equity of the company.

Equity

A locally incorporated company that exports 90% or more of its goods may be wholly owned by a foreigner, but a company that exports 50% to 80% of its goods may only be wholly owned by the foreigner if he invests RM50 million or more in fixed assets excluding land or implements projects that have at least 50% value-added and the production of the company do not compete with those being manufactured locally for the domestic market. Companies that do not meet these requirements but export 51% to 79% of their production may have foreign equity ownership of 50% to 79%.

Those exporting less than 20% to 29% of their production may have 20% to 51% foreign equity ownership. Those exporting less than 20% of their production should have foreign equity ownership not exceeding 20%.

High-technology industries and industries producing priority products for the domestic market may have foreign equity ownership of up to 51%. Although it is not explicitly spelled out in guidelines from the government as to who should form the rest, it is generally understood that the rest should preferably be Bumiputeras.

Name of Joint Venture Company

An overseas company engaged in a joint venture with a Malaysian partner would prefer to have a name similar to its name as the name of the locally incorporated company. The joint venture agreement should provide for creation of a name by the locally incorporated company if the overseas company has no more interests in the local company.

INTELLECTUAL PROPERTY

The name of a company if it is also the trademark of the overseas

company should be registered in Malaysia under the Trade Marks Act 1976. A registered user agreement should be entered into with the local company in order that it would be clear from the beginning that the ownership of the trademark is with the overseas company while the local company is merely a licensee of it.

The technology to be transferred should be clearly identified. If it is the subject matter of a patent, registration should be effected in Malaysia by the overseas company under the Patents Act 1983.

Designs registered in the United Kingdom are deemed to be extended in Malaysia under the design legislation of Malaya, Sabah and Sarawak. Malaysia's accession to the Berne Convention has enabled works protected by copyright in a member country of the Convention to be also protected here.

In drawing up contracts relating to confidential information, it should always be borne in mind that under the Contracts Act of 1950 a law in restraint of trade to limit employees would be deemed to be void.

Choice of law

In the event of a dispute arising out of or in connection with the joint-venture agreement, the parties may decide that it be resolved through court proceedings by way of arbitration. The governing law and the place of jurisdiction should be agreed upon by the parties.

The local partner would request for the governing law and the place of jurisdiction to be those of Malaysia. If the locally incorporated company is a manufacturing company, the Malaysian authorities would require that both the governing law and the jurisdiction be those of Malaysia before granting a license.

If arbitration is preferred, it may be noted that the parties have the choice of appointing particular individuals as arbitrator or the Regional Center for Arbitration Kuala Lumpur to arbitrate the dispute. Arbitration has its advantages. The parties may have a law hearing with counsel chosen from any part of the world representing them.

ETHICAL QUESTIONS

In setting up its operations in Malaysia, the Australian partner in the joint venture may have to consider the extent to which he is willing to compromise on matters of ethics.

Corruption is not condoned by law. The provisions of the Malaysian Penal Code are similar to those of the corresponding Australian legislation. For corruption is rampant, and the thinking appears to be that a person may indulge in corrupt practices as long as he is not caught.

In Australia, environmental considerations are important and strict standards have to be adhered to, if a factory goes into operation. Malaysia has its Environmental Quality Act 1974. The many regulations made under it deal with clean air, sewage and industrial effluents, noise, waste disposal, smoke and gas emissions. The standards imposed are very high. Enforcement, however, is not at its best.

The *Shan Kuei Earth case*, which commenced in 1965 and has still not been brought to a conclusion, gives an idea of the problem. The defendant is a locally incorporated company with substantial Japanese interests processing monazite in an industrial estate in Malaysia. Radioactive gases 228 and 232 , traces of uranium and thorium escape from the defendant's plant into the air. This results in people in the neighborhood dying of cancer and children being stillborn.

Those affected brought proceedings in court against the company. In the course of the proceedings it became clear that the Japanese shareholders of the defendant could not undertake such an activity in Japan because of the stringent environmental requirements of that country. The moral question is: Should it be permitted to engage in such an activity through its joint-venture company in Malaysia and take advantage of the delay in determining issues that have become part and parcel of our legal system?

Pollution

Environmental issues do not

simply revolve but generate more problems for the country in the future. Owners are not encouraged to air their views on environmental issues. Problems related to passive smoking are not considered important enough to be the subject of legislation or the concern of the environment in setting up the working environment for his enterprise.

Ownership

Ownership laws are very strict. A person may bring a videotape into the country only after obtaining a permit to import and a censorship clearance. Even if the contents of the videotape are promotional in nature, the Customs Department has a right to detain the same, although usually the Customs officers exercise their discretion and allow a person to bring them.

Air

Trees are being felled continuously to make way for housing projects. There is a steady increase in tree penning-over the years in this country. In the Klang Valley, the air is polluted because of the number of industries located there and the numerous motor vehicles. Australians are used to smoggy activities, but the pollution will make it hazardous for them to go jogging. Further, the sun's rays may cause skin cancer. The heat is debilitating. The performance of the workers has not been affected because of the air-conditioning of the offices and the factories in which they work.

Medical Expenses

Proper medical attention is available in Malaysia. There are a number of government-owned hospitals. If the best treatment is sought, private hospitals are often recommended and the medical expenses, in such treatment are prohibitive.

Traffic

The numerous vehicles on the road in the Klang Valley area create traffic congestion, a daily phenomenon. It is not possible to make several business appointments in a day because commuting from one place to another may take hours and be stressful.

Expatriate Employment

To supervise the joint venture, the foreign investor may require his personnel to be present in Malaysia. If the local company has a foreign paid-up capital of USD2million or more, five expatriate posts will be automatically approved. If it has foreign paid-up capital of RM5000000, no key posts may be filled by expatriates. In companies with a lower foreign-paid-up capital, the executive posts requiring professional qualifications may be held by expatriates for up to 10 years while the non-executive posts requiring technical skills may be held for up to five years.

Education

Expatriates granted professional visit passes may bring along their wives and children to Malaysia. To continue their education, the children may attend an international school following the curriculum of the British schools. There is no set

no institution adopting the Australian curriculum at the primary and secondary school level, although at the post-secondary school level (i.e. Higher School Certificate) it is possible for a student to sit for the fourth Australian Matriculation Examinations. While the school term begins in February in Australia, the international schools begin their term in September and the children of the expatriates from Australia need to make much effort to adjust to the change.

Communication

The medium of instruction in the international schools is English, but in the national-type schools meant for the Malaysian children the medium is Malay. As a result, the standard of English in Malaysia has deteriorated and at times it would be difficult for expatriates and their family members to communicate with taxi drivers and sales personnel in English. Expatriates may feel

the need to master the national language while stationed in Malaysia at least to complete the application forms for permits or to understand the road signs and the contents of any advice sent by the postal authorities to them regarding items received from overseas.

Food

Western food is readily available, but it is normal for spicy food to be served at business lunches and dinners. Initially, it may upset the expatriate's stomachs.

Conclusion

All said and done, Malaysia will continue to attract Australians if it maintains its growth rate. There is every reason to believe that this will be maintained. The country has carved out a vision for itself known as Vision 2020. It has targeted itself to become a developed country by the year 2020. It is taking all steps possible to realize this vision.