

# Licensing in Asia-Pacific Market

*Many countries are following successful course set by Japan; planning, aggressive action offer rewards for businessmen*

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The business decision to "license" in one or more countries should not be based on an isolated analysis of licensing opportunities per se — the decision to license should flow from the broad analysis of the questions, "Should we do business in the area? If so, how?"

To consider only "licensing" is to isolate and classify only one business form, and that particular business form may be the least desirable of the three or four available.

Let us assume that your company's products are successfully sold in the United States and European markets and your management asks, "Should we not be doing business in the Asia-Pacific area?" Another question also may arise: "Can we manufacture more economically in the Asia-Pacific area for export into Europe, the United States, and other more highly-developed markets?"

Once your company recognizes a business opportunity in the Southeast Asia area, management should be advised to identify, analyze alternatives, and select the proper approach from business alternatives, such as:

1. Exporting through a distributor-agent.
2. Licensing local manufacturer.
3. Forming a joint venture for manufacture and distribution.
4. Direct investment in manufacture and distribution.

The safest approach to entering a new business in a foreign country is to establish an export program through distributors set up in the country. Once the market accepts the product, manufacturing may be initiated in the country. Manufacture may be by way of direct investment, joint venture or license.

This approach may be varied for a number of reasons. Import duties may force early manufacture. Investment may be impossible because ownership of plant may be limited. Licensing may be unattractive because royalties are severely limited. Advantages in obtaining local capital and local management may lead to the selection of a joint venture.

Although there are certain generalizations which can be made about establishing business in the Asia-

Pacific area, each country must be considered individually.

Two major considerations immediately arise. The first is an "Area Consideration." Does the proposed entry into the market area justify an area headquarters? If so, why, where and how? The second consideration is a "Country Consideration." What are the factors involved in entering specific countries? These considerations involve doing business in an individual country.

## *Area Considerations*

Area considerations raise questions of comparisons between countries of duties, taxation, banking, corporation laws, transfer of funds, repatriation of capital, staffing of offices, availability of finance, communication, and the continuity of laws and regulations.

Area considerations immediately bring forward the countries of Singapore and Hong Kong — and more recently, the Philippines as President Marcos attempts to induce company headquarters to be established in Manila.

## *Country Considerations*

On the other hand, country considerations involve matters of local market, duties, labor, wages, import quota, local five-year plan, patent, trademark, copyright, licensing laws, business partners, and the like.

But let's step aside into the discussion of business area and country business alternatives and consider the Asia-Pacific market into which we want to launch our business. Is it truly an area in which business attention is warranted in both near-term and long-term?

## *The Market*

Any consideration of business entry must be based on the premise that the Asia-Pacific market area is and will be a profitable market to enter.

First consider the area geographically — a vast distance from Europe or America — 5,000 miles. However, the various countries are relatively close once you get there.

For example, Singapore is 300 miles from Kuala Lumpur — nearer than Los Angeles is to San Francisco. Singapore is 1,400 miles from Manila — Los Angeles to Dallas. Manila is 700 miles from Hong Kong — Chicago to New York.

These distances are comparable to distances an American takes for granted in business travel in the United States; also on tourist and vacation travel.

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Once one arrives in the area the distance of business travel is not an overriding consideration.

The major countries in the Asia-Pacific market and their populations are:

Southeast Asia		Central Pacific	
Millions			
Australia	13	Hong Kong	4.3
Indonesia	110	Taiwan	14.0
Thailand	35	South Korea	35.0
Philippines	40		
Malaysia	12	Total	54.3
Singapore	2		
		Northern Pacific	
Total	212	Japan	110.0
Total Market — 376.3			

Table I

With the exception of Japan and Australia, all are developing countries. The developing countries have a total population of 253 million. The population of these countries will increase to over 400 million persons in 25 years. (Adding India and China to this population, in 25 years of peace the market could be one of a billion and a half souls).

Masses of people do not necessarily mean great markets. However, correlation of population to per capita income is significant in viewing new markets.

As a frame of reference when considering Asia market growth, Japan entered substantial consumer product growth when per capita income reached U.S. \$1,000 annually.

Market potential of countries of Asia in the near term may be identified from Table II.

Country	Population (in Millions)	GNP Real Growth Rate *	Country Per Capita Income	Large City Per Capita Income
Japan	110	5%	\$2,500	\$3,700 (1972)
Australia	13	4%	3,000	3,500 (1973)
Singapore	2	7%	1,000	1,050 (1972)
Malaysia	12	6%	713	1,000 (1974)
Hong Kong	4	7%	700	724 (1974)
Korea	35	10%	540	540 (1975)
Taiwan	14	6%	500	500 (1974)
Philippines	40	7%	260	400 (1972)
Thailand	35	7%	333	700 (1975)
Indonesia	110	N/A	87	142 (1972)

Table II

Indonesia is somewhat outside of near-term market appeal although it has large population and rich resources in oil, rubber, tin and palm oil. In 15-20 years it will be a substantial market. However, the remaining seven countries (Singapore, Malaysia, Hong Kong, Korea, Philippines, Taiwan and Thailand) have a total population of 143 million people. Five of these countries have annual per-capita real income growth rates which will be approaching \$1,000 in the early 1980's. For example, Korea's per-capita income in 1961 was \$83; in 1973, \$373; in 1975, \$400, and is projected to be \$1,000 by the early 1980's.

Once the \$1,000 in real value is reached, individuals have a reasonable portion of disposable income available to spend on housing, appliances and consumer products. Even today in Korea the consumer food product market is growing by leaps and bounds as

companies expand markets by introducing ice cream, chewing gum, confections and other retail products.

The population of the major cities now provides the largest present market, although government efforts are under way to distribute more income rapidly into rural areas. The cities of Singapore, Hong Kong, Kuala Lumpur, Seoul, Manila, Bangkok and Jakarta have combined populations of 23 million people. This leaves a market of 120 million in small towns and rural areas.

As the countries of Asia become more affluent, individuals in those countries will spend more of their income on consumer products. Once again, Japan is a good example. In Japan, an individual spends 35% of his monthly budget on food. Since 1955 the average Japanese has increased his daily calorie intake from 2,200 to 2,500. He now consumes 80 grams of protein where he only consumed 65 grams in 1955. Total food consumption in Japan is expected to increase 17% to 18% over the next ten years.

Korea, Taiwan, the Philippines, Malaysia, Singapore, Hong Kong, Thailand and Indonesia have economies that now are positioned along the growth the Japanese economy has followed since 1947. The growth rates vary but the direction is up. Following the Japanese market growth analogy, enormous markets are developing. (India and the PRC are unknown, but positive factors indicate market growth.)

Turning back to consideration of business alternatives:

Area considerations arise because of the desirability of having an area based headquarters from which administration and financial and management control of operations in various countries in the Asia-Pacific are possible. In considering area headquarters, the logical alternatives are Hong Kong and Singapore. Each is a highly developed port with a closely integrated business and governmental fabric. The governments are based on Anglo Saxon law and are western in their outlook.

## PROFILE OF HONG KONG

Hong Kong is a British Crown Colony administered by the Hong Kong Government of which the office of the Governor is the central feature. He represents the Queen and presides over the Executive Council. The population is 4 million.

Hong Kong enjoys a stable political climate with good relations with China, although no one knows what attitude the Chinese will take to the renewal of the lease for the New Territories. Hong Kong is a financial center. The language is Chinese and English, and most important documents are published in both languages.

The Companies Ordinance provides for private limited companies and public companies. A private company may be easily and inexpensively formed in six to eight weeks. There are no nationality or residential requirements placed on holding of shares — only one director need be elected and there are no residence or nationality requirements for directors. Director or manager meetings may be held anywhere in the world.

Hong Kong's tax structure is favorable to foreign investment. Corporations are taxed at 16½% rate on profits "arising in or derived from" the Colony. In-

come arising or levied in or derived from a place outside of the Colony is exempt from taxation even though it may be exempt at the source. If goods are manufactured in the Colony and sold overseas by a contract concluded overseas, the taxable profit is only the manufacturing profit.

Note: Dividends from corporations are not treated as taxable income in Hong Kong — no double taxation. Hong Kong has reciprocal tax agreements only with Commonwealth countries.

Import duties are levied only on tobacco, liquor and hydrocarbon products.

There are no exchange controls or restrictions in force.

The legal system of Hong Kong originates from the Colonial history of Hong Kong and is based on the English Common Law System. This has been modified by statutes passed by the local legislative council, which has full power to make law.

The court system of Hong Kong follows that of the United Kingdom. It is well respected and appears to fill its role well.

Hong Kong's trademark laws are based on that of the U.K. with several small differences. The patent law is simple and effective and involves registering a U.K. patent in Hong Kong.

Licenses may be negotiated at arms length and commercial royalty rate and provisions apply in each instance.

Although Hong Kong has a fine system of law, it is important that any product or machine which is introduced into Hong Kong by way of license or marketing be well protected. Hong Kong is a well-known place for copying. The colony does not present a large market in itself, so the main purpose of establishing a licensee in Hong Kong (or Singapore) would be to export to other areas of Southeast Asia.

Hong Kong is an outstanding location for an area base for the Asia-Pacific market area.

## SINGAPORE

The Republic of Singapore was established in 1965 by separation from Malaysia. It has a multiracial population of 2.2 million — 76% Chinese, 15% Malay, 7% Indian and 2% European. Some 50% of the population is under 20 years of age.

The government is firmly committed to free enterprise.

As a market, Singapore is small but rich with per-capita income of \$1,050 (1973), second to Australia and third to Japan. Singapore has an "open door" policy to foreign investment. Public and private limited companies may be easily formed. No minimum capital — at least two founders, two directors — no nationality requirements.

However, the corporate income tax rate is 40% (Hong Kong 16.5%), and is levied on all profits derived from or remitted to Singapore.

Singapore would make a good area headquarters because of its financial, labor, geographic and tax factors. However, from a tax point of view it would run behind Hong Kong.

The usual reason for licensing in Singapore is to license for manufacture of products that will be exported. It is a prosperous city-state having a compact

market but one not of the size that in itself would attract a great deal of attention from U.S. businessmen.

Singapore has patent laws based on the U.K. law in accordance with Ordinance No. 2 of 1973 and regulation and amendments of 1949, and the Patent Acts of 1968.

Only a patent registered in the U.K. may be registered in Singapore and valid for the remaining life of the U.K. patent.

No examination for novelty is undertaken, but the exclusive right to a patent may be canceled upon application of an interested party of similar grounds for revocation in Singapore.

Compulsory licensing exists in Singapore in that three years from date of sealing in the U.K., a compulsory license may be granted if the invention is not commercially exploited in Singapore.

Trademarks are independent of U.K. registration and a registration in Singapore is initially valid for seven years, renewable for fourteen years. The first user is entitled to registration which confers exclusive right of use.

Patents on medicines and drugs are not considered to be infringed when marketed, imported, and obtained on behalf of the state for the use of government in Singapore.

Government approvals of the terms of licenses or technical assistance agreements are not normally required. If the local licensee seeks to have the royalties or fees payable abroad to the licensor and exempt partially or completely from withholding taxes, the licensee must apply to the Ministry of Finance through the Economic Development Board. The Economic Development Board upon examination of the application and the proposed agreement may recommend the granting of a complete or partial tax exemption on royalties or fees.

Royalty and fee patterns follow purely commercial considerations with rates and allowance following different patterns for different products and levels of know-how involved.

In summary, there are no substantial restrictions on licensing into Singapore and obtaining a repatriation of royalties, even free of withholding tax.

## COUNTRY CONSIDERATIONS

Country considerations in doing business in the Asia-Pacific area are extremely important. Although each country has its specific requirements there are general considerations which are found in most of these developing countries. These include:

### *Five-Year Plans*

Each country in recent years has adopted annual planning cycles of three to five years. Some countries are on the third or fourth such plan. The most direct result of these plans to the businessman wishing to import into a country is the limitation on exchange. The plans set priorities on imports and products of low priority have limited, if any, exchange earmarked for import. Wisely, one should look to those products or that technology having priority in the five-year plan for business opportunity in a country.

## Approvals

To control flow of exchange and to be certain that priority programs have the greatest attention each country has set up a bureaucracy of greater or less effectiveness. Approval by those agencies is required depending upon the business entry plan being promoted. Such agencies will include Investment Authority, Central Bank, Bureaus and Departments concerned with the business matters such as the Department of Agriculture, of Fish and Game, and the like.

### License Registration Departments

Following the successful Japanese pattern of controlled import of technology, some Asian countries have established governmental boards to review licensing. Some, lacking the foresight of the Japanese, have been particularly ruthless in cutting back royalties, shortening license terms, and eroding trademark rights.

Government bureaus and agencies will not stymie an American businessman wishing to do business in Asia. However, in a number of countries they are major considerations.

### Nationality Requirements

A number of nations have set up requirements that no venture can be 100% foreign-owned. This means that a businessman entering a country to start a company must look for a local partner. The Philippines and Indonesia have such laws.

I think it is useful to give an example of a country in Southeast Asia which is developing along a path that is encouraging to U.S. businessmen. Hopefully, that country is an indicator of what can be done. That country is Malaysia.

## MALAYSIA

Malaysia is an ideal country to consider for the introduction of manufacturing into Southeast Asia. Malaysia is a prosperous country of approximately 12 million people north of Singapore. It is rich in tin, rubber, palm oil, and other natural raw materials. It has an industrious population. The gross national product per capita of Malaysia is over \$1,000/year — just behind Singapore. Consequently, the country has a prosperous economy and fewer currency exchanges and investment regulations than other countries of less prosperity.

In 1976 there were 310 applications for approval to manufacture in Malaysia. Of these, 126 were joint ventures between Malaysian and foreigners and seven applications were from wholly-owned foreign companies. In these joint ventures, transfers of technology from the foreign-owned company is a prime consideration for setting up the venture.

The Federal Industrial Development Authority of Malaysia (FIDA) is responsible for encouraging investment and approving new ventures. All technical assistance, royalty, patent, and management agreements under joint ventures or otherwise to be introduced into Malaysia must be approved by FIDA.

Application for approval must give the sources of the technical know-how and full details of any technical, managerial, royalty and patent agreements that will be made with overseas companies. Final approval is by the Director of Ministry of Trade and Industry. Royalties and technical assistance fees may be repatriated in the same manner as capital, profits, dividends and interest.

There is only minimal control in Malaysia in regard to inflow or repatriation of profits, earnings or capital. This is further assured by Malaysian accession to Article VIII of the IMF Articles of Agreement, whereby Malaysia has undertaken not to impose restrictions or practice discrimination in the free interchange of currency without prior approval of international monetary fund.

Malaysia also has an investment incentive program under which companies which intend to produce goods not already manufactured on a commercial scale can achieve a "pioneer" status. Pioneer status provides companies with a tax relief period of two years beginning on the first production day. No minimum investment level is required for the two years' relief. Additional years of tax relief can be obtained if the capital investment is of a larger amount.

### No Patent Office

Malaysia has no patent office. Registration of trademarks is carried out under the provisions of the Trademark Ordinance and the United Kingdom Patent Ordinance. The registration of trademarks and patents is carried out on a territorial basis in western Malaysia and the eastern states of Sabah and Sarawak. Each area has its own trademark and patent ordinance, which generally follows the U.K. laws. It is the intention of the Malaysian government shortly to introduce one uniform law for the entire federation, with a central agency.

Patents that have previously been registered in the United Kingdom are registerable in Malaysia. It takes about a month. Such applications must be made within three years of the date of the U.K. patent. The normal term of a Malaysian patent is sixteen years.

Technical service agreements are subject to conditional approval by the Ministry of Trade and Industry and are not governed by specific legislation. In addition, it is necessary to get approval from the Controller of Foreign Exchange; that is, the Governor of the Central Bank.

The rationale of the government in reviewing and approving royalty agreements is based on:

1. Provisions of additional employment in Malaysia.
2. Undue competition with items already being produced in Malaysia.
3. Foreign exchange control.
4. Insurance that the fees payable are commensurate with the level of technology transferred.
5. To strengthen the bargaining power of local industries.
6. To see to the development of local research and development.

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### 7. To avoid restrictive business practices.

The normal rate of royalty approved is two percent of net sales. A slight deviation from this normal rate is allowable depending upon the merits of each case. In addition, the government does not encourage lump-sum payments.

Licensing agreements for local manufacture or marketing must be recorded by the Ministry of Trade and Industry. A licensee may sue in his own name against "infringement of his rights." The government does not allow export territorial restrictions.

In summary, it has been my experience that the growing Asia-Pacific market area offers tremendous business potential.

Japan has been the leader in market growth along a path that many Asian countries are following. In 10-15 years businessmen entering the Asian markets now will be harvesting worthwhile rewards.

The key is planning, followed by aggressive action.

## EEC Trademark — Why and How

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During the years our friend has spent a fortune on those trademark cases and now he has no longer any trademark at all. The sale of his pipes has considerably decreased mainly because the consumers have been confused. Now Little John tries to sell his pipes without any name or trademark at all, but the sale decreases even more. He puts small red silk ties to the pipes and advertises "the pipe with the red tie." But some of his competitors imitate his idea.

One day Little John goes bankrupt and his factory is sold by order of the court. He takes up residence in the woods and makes brilliant bows and arrows from the branches of the trees. His former sales manager serves as a spy in Brussels, and when officials of the EEC commission pass through the wood in their distinguished black cars they are stopped by Little John and his men and are only released on payment of big ransoms. Now, who is going to pay?

## Trademark Linking in Mexico

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3. A Mexican or foreign company manufacturing or producing in Mexico articles or products which bear foreign origin trademarks or Mexican-origin trademarks owned by foreigners or by Mexican subsidiaries of foreign companies, that are the object of a trademark license agreement filed for recordal at the

National Registry of Transfer of Technology after February 10, 1976, fall within the provision of third paragraph of Article 128. It prescribes a one year term counted as from the date the trademark license agreement is recorded at the National Registry of Transfer and Technology.

4. The fourth and last specific case covers those Mexican or foreign companies manufacturing or producing in Mexico articles or products which bear foreign origin trademarks or Mexican-origin trademarks owned by foreigners or by Mexican subsidiaries of foreign companies, and which trademarks are being used under a tacit or informal trademark license agreement which obviously has not been recorded at the National Registry of Transfer of Technology.

This case, also falls within the provisions of the third paragraph of Article 128, which prescribes a one year term counted as from the date the respective trademark was first used.

In all of the preceding specific cases, either the Law of Inventions and Trademarks or its Regulations establish the granting by the Ministry of Patrimony and Industrial Development, of extensions of terms for a period of one year at the most, provided that the requestor can justify the granting of such extension.

## Changing World for Trademarks

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Group B countries cataloged a number of problems presented by these proposals, including the impact that they would have on relations with nondeveloping countries in view of "Most Favored Nation Clauses" in Friendship, Commerce and Navigation Treaties, the lack of any requirement of "need," and the problems that such proposals would present in the ratification process. A new proposal which was suggested at the last meeting will be discussed at a future meeting. It provides that a developing country may charge its nationals up to 50% less than the nationals of other countries for the granting and maintaining of patent and trademark rights. While this proposal is clothed in the form of a proposal for preferential treatment, it is a clear derogation of the principal of national treatment.

Among the other issues which will be considered, the question of independence of patents and the wish expressed by LDCs to improve the information they now receive regarding the treatment and fate of applications upon which priority is based will be discussed on the basis of a paper prepared by WIPO. The paper outlines four different solutions to the problem, none of which would require change in existing Article 4 of the convention which establishes the principal of independence of patents. Each of the four solutions addressed in the paper would leave sole responsibility in the hands of the authorities of the LDCs for determining the patentability of inventions in their own country.