

Brazil: Latest Position of INPI

INPI has increased control over technology transfers, but these will diminish with successes

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This presentation is about a very special subject: It is the first opportunity to talk about the latest Normative Acts of the INPI (National Institute of Industrial Property) in the area of technology transfer. This opportunity is indeed significant on account of the audience and of its specialization in this area of the law.

First of all, we should recall the INPI's authority to issue rules for the transfer of technology. We should not forget the powers that were given to the INPI, by two laws that were discussed and voted at the National Congress, to restructure transfers of foreign technology to Brazil according to the constitutional principles of intervention in the economic domain.

It is natural that all rules, when issued, suffer criticism by all those who feel that their interests are at stake. However, one should remember that the procedure of preparation of any Normative Act involves prior discussion of its contents with the interested parties: companies, class associations, government entities, research institutions, etc. These acts are not issued because the INPI autocratically believes they are appropriate, but because they are the result of an understanding among the most varied segments of the community in general and especially of the production sector.

An example of this preparation procedure—about which I could talk for hours as I took part in the development and conclusion of the process—is the conception of Normative Acts 55 and 60. Brazilian engineering companies were claiming greater protection against imports of unnecessary services; these two acts filled a gap that brought serious consequences to the sector, and also strengthened the position of the Brazilian companies by reserving the domestic market for them and thus permitting them to increase their penetration in the international market.

The publication of these acts certainly gave rise to discontent and was not welcomed by those companies that wanted to contract engineering services abroad without consulting any domestic suppliers. It was not yet known, however, whether Normative Acts 55 and 60 would not only benefit the Brazilian engineering companies, but would also favor our economy, by saving foreign exchange and preserving the jobs of our profes-

sionals and thus giving them the opportunity to actually use their technical knowledge.

Today it is difficult to believe that these acts, which meant so much to our economy, could have been questioned by anyone at the time. But they were vehemently challenged.

Series of Rules

In addition to the legal and constitutional principles that support the INPI's activity, it is important to note that there is a series of rules that are known to all and that only those rules that are contained in official acts or documents of the INPI are applied. There is thus no abuse or misuse of power.

What reassures Brazilian companies, on the other hand, is to know that these rules are applied fairly and equitably. As they now participate in the decisions of the INPI, our entrepreneurs can see that the INPI does not render different decisions in similar cases. The same treatment is afforded to all companies, regardless of whether they are large, medium or small. I repeat that this equality became possible because all the rules are known to the public.

After these preliminary comments, I wish to point out that Normative Acts 64, 65 and 68 are part of a new phase of INPI activity in connection with the contracting of foreign technology. Generally speaking, I believe that the past activity of the INPI can be divided into two major phases as reflected in the Normative Acts enacted after the INPI began analyzing contracts in 1972.

The first was the phase of the Normative Acts reflecting a concern with the internal aspects of contracts. This was the period of fighting the contractual clauses containing the so-called restrictive commercial practices. The principal act in this phase was Normative Act 15.

This act actually reflected what the INPI applied from 1972 to 1975 based on existing legislation. The laws that govern foreign capital, the antitrust law, tax laws and the Industrial Property Code were the instruments that the INPI used over this period. Normative Act 15, by joining all this legislation into a sole instrument while adding further rules, did in fact make it easier for companies to understand what had to be done in preparing contracts. The main reason for the enactment of that Normative Act was to establish discipline and to organize the rules contained in the law.

Normative Acts 30 and 32 were issued still in the first phase, while the latter represents the *dernier cri* of the first phase. It is of great importance for the control of transfers of technology as it put an end to the practice of confronting the INPI with consummated facts.

The second phase, which we will concentrate on from now on, is the present phase that began in 1979. It reflects

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a concern with the improvement of the system of controlling transfer of technology and with strengthening the innovation capacity and the technological infrastructure of Brazilian companies.

This phase began with Normative Acts 55 and 60 and continued with Normative Acts 64, 65 and 68.

Parallel to these Acts, several ordinances were issued to set up work teams to judge the technical merits of each contract. The formation of these teams permitted better evaluation of the main condition for allowing the contracting of foreign technology, namely that there is no similar technology available in Brazil.

New Thinking

These teams reflected a new way of thinking of the INPI: that the best decision is the one that results from a consensus. This is also why our decisions gained in force, as they are no longer an isolated opinion but the judgment of a group. Businessmen, research institutions and other government entities are now also participating in these decisions.

The results of the new control system are worthy of note. First, the number of prior consultations that were rejected grew from 4.7% in 1978 to 27.3% in 1983. Second, the expenditure for transfers of technology has been falling gradually, although this tendency has in recent years also been the result of a decline in our production activity. Were it not for the control of the INPI, our expenses with transfers of technology could possibly have reached about \$900 million in 1982. The amount actually spent in that year was \$240 million.

It should also be explained that the figure we attained in 1982 represents a forecast of expenses as from 1971, when the foreign companies were remitting—and remitting a lot—to their parent companies for technology transfer. The remittances that are made today are practically all made by Brazilian capital companies.

These figures lead to several conclusions. In my view, however, the main conclusion is that, in spite of the reduced expenses, Brazilian companies have maintained their competitiveness and are even increasing their exports. This is what the figures really reflect.

We said that the second phase was also a period of strengthening the invention capacity and the technological infrastructure of Brazilian companies. These are the precise purposes of the Normative Acts 64, 65 and 68. On issuing them, the INPI intended to increase the positive effects of each contract, to make their results reflect on the entire economy by reducing the risk of paying for obsolete technology and guaranteeing the market.

At the II National Industrial Property Seminar, held at this same place two years ago, we showed the need for our companies to increase their investments in technology. This was desirable not only to accompany technical progress but also because the foreign market, which was becoming more and more indispensable for the Brazilian economy, demanded it.

The technological standards of the foreign market were unrelenting for several reasons, the main one referring to the actual supplier of the technology. On seeing that the company to which it transferred the technology was exporting and thus conquering markets that belonged to the supplier, the supplier stopped transfer-

ring the technology.

We must look at the problem of the Trade of Technology to Brazil from another angle. Until a short time ago, technology was transferred to our companies without this kind of problem because we were producing to supply the domestic market. The market for our products was limited to our frontiers. The technology transfer contract was thus a means for the technology supplier to obtain earnings on a market in which it did not participate directly. However, to the extent that Brazilian companies are crossing our frontiers and becoming competitors in other markets, the technology supplier loses or runs the risk of losing markets that were covered directly by it before. This is where the Brazilian technology purchaser begins to encounter problems. How can we continue to export and to receive technology?

In the developed world, the trade of technology among major companies is often carried out by means of cross licenses by which the companies transfer what each of them has to offer among each other. Within this framework, impositions or restrictions among them are secondary, as they are both benefitting from the arrangement.

We will have to take further steps to reach that stage. And the first step is doubtlessly to start investing more in our own technology. The supplier will then be less interested in the percentage of the sales of the Brazilian company or in the restriction of markets, as it will be aiming at receiving technology in exchange.

Evidence of this is that contracts for the exchange of technology have begun to appear, although the Brazilian company must at the beginning pay a little for the technological difference as compared to the foreign company. These contracts have begun to appear mainly in the chemical sector.

Another point to be discussed as regards the INPI's requirement that Brazilian companies invest more in technology is the fact that it is unacceptable and unsustainable that the Brazilian company makes payments in foreign exchange abroad and is not willing to invest cruzeiros in local research.

How can a company, which has a quality-control system, contract foreign technology without assuming a commitment to invest in its own technology? On the other hand, how can a company pay up to 5% of its sales in dollars and not agree to invest up to 1% of its sales in local research and development?

It is clear that the company that did not invest in technology will probably apply for extension of the contract when it expires. This will mean further expenditures of foreign exchange, and all this because the Brazilian company was not interested in developing its own technology or even in fully absorbing the technology it received. The extension of the contract may be necessary but the company must also show that it is interested in absorbing and developing the technology it acquired.

The INPI is thus not against the contracting of foreign technology when it is necessary. It is against it when such contracting was made without planning simultaneous investments in its own technology.

Nevertheless, the requirements of the INPI do take the situation of each specific Brazilian company into account. The rule of simultaneous investment is not ap-

plied indiscriminately. The INPI first considers the behavior of the domestic market, its expansion or retraction. A retracting market inhibits investments in technology. At the same time, other conditions are examined as a whole: the participation of the company in the market, the conduct of its exports, and its level of indebtedness, etc.

If the combination of these factors is favorable, the INPI considers that it is time to start a procedure of replacing imports of technology in the specific case of such company. The INPI then asks the company to submit a plan showing in what areas it needs to invest. On analyzing the plan, the INPI seeks to direct it, if applicable, to ensure that the investment will have true effects on the existing technological picture of the company.

After the enactment of Normative Act 64, it was said that it was negative for Brazilian companies because by causing them to invest in technology, it reduced their capacity to compete with the foreign companies. Statements like that are far from being impartial and, contrary to what they want to show, they are concerned more with interests of other kinds than with our progress.

Can technological backwardness or dependence by chance be defended? Would our companies gain or lose as regards foreign companies, if they invested in technology? As we have seen, there is no way to escape from this determination: Either Brazilian companies invest in their own technology or they stop receiving foreign technology. This is thus the issue that is worrying all of us.

It is important to mention that companies have begun to submit plans for investment in research spontaneously. Some already state in their prior consultation how much they intend to invest and in what.

To finalize this subject, I would like to recall some figures that I brought to this Seminar two years ago about investments in research in Brazil. At that time, I showed that, in relative terms, namely in percentages reflecting what is invested in technology as compared to operating revenues, West Germany invested 47 times more than we did, and Japan invested 25 times more. In the chemical sector—the one in which we invested the most—West Germany and the United States made investments 10 times greater and Japan 8 times greater than ours.

Further, Normative Act 64 governs the contracts of subsidiaries of foreign companies with companies with head offices abroad that are not their parent companies.

The provision contained in item 2 of this act has been considerably questioned in certain circles. The rule it establishes is that a company controlled by foreign capital, which acquires technology abroad from a supplier that does not belong to its economic group, will be required to provide for the investment of risk capital in Brazil in an amount compatible with the amount to be remitted for the technology.

The facts that led the INPI to propose this rule fully justify it. The INPI received information, including that from foreign government entities, to the effect that remittances for technology were being paid by the subsidiaries of foreign groups to third-party nominees not connected with the respective groups. These nominees then used several clearly identifiable mechanisms to

pass the foreign exchange payments on to the holding company of the Brazilian subsidiary. This triangulation was being used to defraud the rule that payments for technology within the same economic group may only be made by remitting profits.

The irregular use of these mechanisms, which was even confirmed in a recent article by Professor Keith Rosen, of the Law School of the University of Florida, was not however the main reason for the action taken by the INPI. Other more serious and even more tangible considerations led the INPI to propose this rule.

Benefits

Foreign companies are received and welcomed in developing countries for two fundamental reasons: first, because they contribute to development by bringing capital into the country; second, because they improve the technological level of the country by bringing their own technology. In exchange for these true and unquestionable benefits, the foreign investor acquires the right which is not available to any Brazilian investor, namely the right to remit its profits abroad in foreign currency.

Now, if a company controlled from abroad does not have the necessary technology within its group, it must on purchasing the technology correct its own balance of payments and reintegrate the value of the technology in its investment base.

If it were possible to purchase technology abroad without investing the countervalue in Brazil and thus cause the Brazilian subsidiary to become updated with the new technology and to thus obtain greater profits, for purposes of Brazilian and foreign equity and equilibrium it would be necessary to let Brazilian companies legally remit their profits abroad.

The grounds for the rule are thus marked by absolute good sense and not subject to any objection in good faith. In a situation in which the Brazilian economy is making all possible efforts to produce foreign exchange to repay the country's debts to the international financial market, any different attitude would have been socially irresponsible.

And there is more: the respect for the foreign investor who participated in our development by bringing capital into Brazil obliged us to avoid such a draining of foreign exchange, which would not only be illegitimate, but would also contribute to making it difficult for the country to honor its obligations with other countries. The respect for nearly all the foreign investors who participate in our current efforts and who are acting in accordance with Brazilian interests, the investor that understands the problems that Brazilian society is facing, also obliged us to refuse the inadequate behavior of a few. In summary, our respect for foreign capital, whether financial or risk capital, forced us to correct the abnormality that was found and confirmed.

Conditions concerning Brazilian capital also recommended the issuance of the rule. The entry of a Brazilian subsidiary that belongs to a multinational group into new sectors in which the group has no technology or experience, can result in great imbalance in the standards of competition of these sectors. The subsidiary, without any new investment and still remitting foreign exchange, would begin to compete with a company already established in Brazil and would so compete

without having its own technological potential or experience to justify the advantage that it has on account of its greater economic power.

This competition with a Brazilian company already established in Brazil often occurs only on the domestic market. In this case the subsidiary's contribution to our balance of payments is even more negative. The rule of Normative Act 64 is in accordance with the Letter of Economic Rights and Duties of States, adopted by the U.N. in 1974. In addition, other countries—mainly the developed ones—have laws that condemn triangulation as a mechanism for evading controls on taxes and on remittances of foreign exchange.

Italian Law

For example, the Italian Corporate Income Tax Law extends the specific rules for the control of multinational groups to companies that do not belong to such groups in cases of close economic triangulation or link.

Likewise, all the double-taxation treaties that are based on the OECD model contain rules that obligate companies of the same economic group to interact as if they had no connection among themselves.

In summary, to create a rule that hinders triangulation is perfectly compatible with international law, particularly if the triangulation may mean, as in our case, an evasion of taxes to the detriment of the Brazilian Treasury.

In the domestic field, we have seen that Law 5648 of 1970, confirmed by the provisions of Article 126 of the Industrial Property Code, gave the INPI the authority to govern transfers of technology for purposes of economic development of the country. The Brazilian Congress thus affirmed its principle of giving the INPI the power to intervene in the economic sphere to control the trade of technology on two different occasions.

The authority of the INPI in this area was in fact confirmed by the Federal Supreme Court in uniform judgments that upheld the determination of the Brazilian Congress. And our Supreme Court also accepted explicitly that the discretionary power to control the flow of technology should be exercised to the benefit of Brazil's balance of payments.

Certain objections were made by those who argued that the provisions of Article 2 of the Foreign Capital Law precluded the enactment of Normative Act 64. The Foreign Capital Law says that foreign capital will receive the same treatment as Brazilian capital, and that all discriminations not contained in that law are forbidden. These objections are thus obviously groundless as there is no discrimination against foreign investors. The rule of item 2 of Normative Act 64 is addressed to the Brazilian company controlled by foreign capital and not to the foreign investor.

In fact, the act does not deal with the legal subject of foreign capital, as it does not concern the registration of investments nor the repatriation or remittance of profits. It simply governs, as it could not fail to do, transfers of technology although its secondary effect is to avoid—or to try to avoid—tax evasion and unauthorized remittances of profits.

Other and much more violent objections were made against item 2 of the Normative Act by those who point out an increase in the remittance base as a result of the

registration of new investments made to compensate for the imported technology. These critics say that, as a result of an immediate correction of the balance of payments, Brazil would be subjecting itself to a much greater imbalance in the future.

These exaggerated objections do not give the due attention to foreign investment, which the Normative Act seeks to encourage. Whoever invests risk capital is entitled to recover the profits. Whoever creates jobs, increases the technological level of the country and contributes its faith to the future of Brazil deserves to share this future. The Normative Act, which is not addressed directly to this investor, does however uphold the principle that compensation for legitimate efforts is the base of the economy of the Western World.

Equity in Act

Summarizing, the rule of Normative Act 64 was established as an attention to the foreign investor for its indispensable and valuable contribution to the development of Brazil. What is present in this rule is equity between foreign investors and not discrimination against them. And this ensures the validity of the rule as an appropriate instrument for the transfer of technology, as affirmed by the Minister of Industry and Commerce, through his representative the Secretary of Technology, in his talk at this Seminar.

Normative Act 65, in turn, is an instrument to help Brazilian companies contract foreign technology. Rather than being restrictive, it is mainly a rule that gives Brazilian entrepreneurs a rich variety of technical information and it thus reduces the risk of making a bad technological choice and it increases their bargaining power.

The INPI does not intend to interfere in the procedure of this choice. This is in fact not its role. It was always the company that chose the technology and the INPI, with Normative Act 65, wants to make it more capable of making the best choice.

In reality, most Brazilian companies contracted technology abroad without considering whether the technology was appropriate, the existing technological alternatives, what the supplier or licensor might have to offer that was better, and so forth.

There are numerous cases—and you who work in this area are well aware of this—in which the Brazilian company contracts technology abroad by means of know-how agreement when the technology is already patented in Brazil. There are also many cases in which companies negotiate knowing only that the use of the technology of the foreign company will improve the quality of their product and their competitiveness, while ignoring that the same foreign company has technology that is even better than the one that is being negotiated.

If examples can show the importance of Normative Act 65, I thought that I should again bring a fact that occurred in Sweden and that is known, because it was reported by Dr. Roberto Coaracy, also Director of the INPI, on another occasion.

A company of that country was contracting technology from a multinational company when it discovered that the latter was offering it something that it no longer used. In other words, the multinational com-

pany, which had more advanced technology, was negotiating its old technology. The fact was discovered because the Swedish company consulted the Patent Bank of its country before closing the deal. The information was there and the company took advantage of this.

And this is the intention: That the Brazilian company systematically use our Patent Bank in order to contract foreign technology, if applicable, with more knowledge and greater control of what it is seeking.

In Canada, a proposal—made recently by the Vice Minister, who is responsible for the Canadian Patent Office—is being studied. It would cause the industrial sector of that country to consult the Patent Office's files before contracting any foreign technology. They are thus discussing their own Normative Act 65.

Other Benefits

Although Normative Act 65 was issued for the reasons we have mentioned and mainly to give Brazilian companies access to an instrument that would strengthen their contracting of foreign technology, the INPI is also being benefitted in its work of analyzing contracts, because the picture of each case has now become clearer.

Normative Act 65 has permitted us to see more safely the internal availability of technology that is to be contracted. We have also begun to see cases like the one of a foreign subsidiary that was trying to contract technology from a competitor of its parent company under the allegation that the parent company did not have such updated technology. The patent search that was made showed that the parent company did have the technology and the contracting was rejected by the INPI. There are other examples, but the important point is to make it clear that the Patent Bank is an instrument of great utility and of great importance in helping Brazilian companies to contract foreign technology.

As regards Normative Act 65, it should also be mentioned that it will reduce the number of contracts that are submitted to DIRCO for analysis. On inquiring at CEDIN regarding patents and other documents connected with unpatented technology, the company will be able to determine whether the technology already exists in Brazil and will thus give up the idea of contracting the technology abroad. If possible, it will be able to copy the foreign technology that is not patented in Brazil.

Another thing to be said about Normative Act 65 is that, seeking to improve its implementation, the INPI will try to sign contracts with Brazilian companies that have solid technical managements and are concerned with research. The program—Program for Automatic Supply of Technological Information—was introduced this month and several companies have already applied, most of them with their own research and development centers. Less than 20 days after its introduction, there are seven contracts already signed.

Under this program, the company begins to systematically receive information from CEDIN as such information arrives from abroad. The Brazilian company is thus updated and knows what is happening in other countries and what its foreign competitors are developing. Its research work can be directed better and the option of contracting foreign technology parallel to its

own research work is thus better evaluated on a day-to-day basis.

The last of the Normative Acts in the area of technology transfer is Act 68, which deals with the prior examination of public notices of state companies. These often demand that Brazilian companies contract technology abroad as a condition for purchasing their products. This requirement is sometimes made even if the Brazilian company masters the technique and does not need the foreign technology and can thus cause an unnecessary outflow of foreign exchange.

The INPI thus wants to avoid the consummated fact. The prior examination of the public notice will hinder unreasonable requirements and will strengthen private Brazilian enterprise.

Here again the INPI is seeking supplementary forms of strengthening its acts. The intention is to cause the purchasing power of state companies to be used in favor of the technological development of Brazilian companies. The policy that has so often been claimed by entrepreneurs would thus be adopted, namely a guarantee of the market as a means for investments in research.

In this respect, we will be signing an agreement with Petrobras in the next few days, whereby that state company will cooperate with the INPI on the basis of its orders for equipment. When a supplier needs to import technology, Petrobras will encourage the Brazilian companies it selects to make local investments in technology. Our objective is to extend this agreement to other state companies.

There is thus a clear connection between Normative Act 68 and Act 64.

INPI Goals

What we have just described shows that the INPI has sought to establish sound policies that reflect strongly on the technological and industrial areas. The reservation of the market for our engineering companies, investments in research in Brazil in compensation for imports of technology, the use of technical information contained in patent and other documents for the selection of technology, guaranteeing the market for state companies against investments in their own technology, the specialization policy applied especially in the capital goods sector, etc., doubtlessly produce manifold effects on our industrial and technological structure.

It happens that other government measures are required. A project for technological development must be integrated, meaning that several instruments must be combined in order to lead the companies and the country to continued technical progress and consequently to reduction of their dependence on foreign technology.

If we do not have greater tax incentives and a greater volume of financial funds on favorable conditions, we will not be able to change the present picture. In addition, once we have overcome the current difficulties, we must begin to grow again as growth is the main and even determinant incentive to encourage investments in technology.

As already mentioned, conquering the foreign market will be the technological trap for our companies if they are not able to invest in their own technology. If they do not have a product such as technology to offer in return

these companies will lose the markets they conquered because they will no longer be able to count on the technologies of their former suppliers.

Within this picture, the future action of the INPI may become negative. Our instrument urgently needs other ones to accompany and offset it.

In terms of integrated projects, we want the approval of a proposal considering the possibility of a tax deduction greater than the one now allowed for research expenses.

On the other hand, we could consider granting a differentiated incentive to companies that contract Brazilian instead of foreign technology—while there is no such distinction today.

Universities

An integrated project should also take a reformulation of Brazilian universities into account, so as to also encourage basic research work that is compatible with out reality and with the aspirations of our companies.

The project we are imagining does not stop there. However, as this is not the best moment to go into details on the matter, we merely suggest that business circles and other entities participate more in the formulation of policies in the technological area.

The formation of councils including businessmen and representatives from other institutions in some govern-

ment entities involved in this area would be very important for the achievement of this objective. At the INPI we have already taken the first step by making entrepreneurs take part in our decisions through class entities, research institutions and other organizations.

From what we have explained, it is clear that Normative Acts 64, 65 and 68 are more than appropriate. Besides provoking a new form of action of the INPI, they also carry a new message in the technological area: that imports of technology will become more free and feasible to the extent that we become producers and owners of this product.

The intervention of the INPI in the area of technology transfer will unquestionably become more and more important as we advance in the area of technology. We are certain that what we are requiring now by means of these Normative Acts will, on the long term, diminish the activity of controlling transfers of technology. The process we are going through is thus dialectic: to the extent that we increase our invention capacity and become economically less vulnerable, the instruments of control will lose their force and will become secondary. The companies will thus conquer the space to which they are entitled and the INPI will, by improving its performance, make it possible for its function of technology control agent to disappear gradually in the near future. This is what happened in Japan and what will happen in Brazil.