

Observations On Negotiations In Brazil

BY DAVID S. LIREY*



Facilities are competitive and ready to transfer technology sans government intervention.

When I agreed to give this talk in a conversation with Luis Koppe last year in Brookdale, things were quite different than now in Brazil. Then, Normative Act 15 had been the law for 15 years, and while inflation was rampant things were "normal" by Brazilian standards. Since then, you have had a change of government with the election of President Collor and from what I read and hear not many things have been the same. But Normative Act 15 is still the law and its effects as perceived by the American will be the subject of my comments.

Let me start by saying that I am not an expert and don't pretend to be one on Brazil or its laws and regulations. My first trip to Rio was in 1952 for a former employer. I have been to Brazil about six times since then, always on business. I have been involved in about a dozen technology transfer deals between Brazil and U.S.A., although probably more of those failed to be concluded than those that were. This does not qualify me as any kind of an expert on Brazil, but it has given me some very vivid and often discouraging impressions of the Brazilian procedures.

Before I start telling you about the problems I see in your system, let me tell you how much I admire Brazil and its people. The beauty of Brazil, including those covering the beaches, speaks for itself. I only wish that Pittsburgh had a small fraction of the natural beauty that abounds here. More importantly, the people that I have met and worked with are top quality. That includes the people that have sat across the table from our teams as well as the locals that have worked

on our side. That also includes the engineers and management that have had to carry out the various agreements that reached fruition. Now Brazilians are tough and smart negotiators, and in my opinion, most Normative Act 15 about as much as the Japanese need longer working hours. Brazilians in LDC are typical of the high quality people I have encountered in negotiatory hours here. So I don't come here as a critic, but I come as an admirer and a friend of Brazil.

Next, let me say that my comments are my own personal opinions. They do not in any way represent the viewpoint or an expression of the policy of my employer, USX Corporation, formerly United States Steel Corporation. These comments are solely a reflection of my own impressions based on personal experience in dealing with Brazil the past 15 years, and based on discussions I've had with others dealing with Brazil.

A great deal has been written about the delays that led up to the enactment of Normative Act 15 in this country and similar laws that were enacted in other Latin American countries, and, in fact, around the world. There can be little doubt that the industrialized western nations, sought to obtain the highest possible royalties, did not always transfer the latest technology, and did not always transfer appropriate technology for the receiving country. Also, the technology that was transferred often had a lot of restrictions on how it could be used and where the products resulting from the technology could be sold. While there are good reasons for some of this, it is little wonder that the moving countries perceived that something had to be done to balance the equation. Brazil was no exception.

However, in passing Normative Act 15 I don't think that many people could envision the disadvantages that would result to the Brazilian inventors and thus the Brazilian people as a whole.

••• Last Time •••

First, let's consider the time that is lost because of the law. As we say, time is money, and a lot of it is spent in Brazil in trying to conclude a deal. There is the inordinate amount of time that is required to negotiate the agreement. Usually, in my experience, the negotiations take a year or more to conclude. I've seen it take this long for a simple \$25,000 consulting agreement on an industrial project. Now, I don't mean one-stop talks of that duration, but from start to finish that is the time I have experienced. So much time is consumed in trying to structure the deal so that INPI might approve it. It is a concerted process of not being able to say what the parties really want and want, but having to say it in a way that will be approved by the government. Considerable management and technical time is lost by Brazil in these negotiations.

Time consumed in the negotiatory process is expensive to Brazil in another way, namely, in the loss of the technology during that period. The delay deprives Brazil of the improved technology and/or products for that added time. In a world that is moving as fast as this one, a lost year can be significant. Instead of catching up, Brazil may fall behind a little more. The USSR and India

*Senior General Attorney/Consulting and Intellectual Property, USX Corporation, Pittsburgh, Pennsylvania, President-Elect, IAS of U.S.A./Canada.

are two other countries that are known for their slow procedures in concluding agreements. I would not tell you how their economies are doing.

◆ Precludes Transfer ◆

The new major disadvantage to Brazil caused by Normative Act 15 is that it precludes the transfer of many process technologies. Consider the licensor that has already licensed its technology to a group of western companies. Let's assume that the licensor has convinced its existing licensees that the technology deserves a 10% royalty and a 10-year term because of the benefits which will accrue to the licensees. These are not unusual numbers, whether we're talking a new product or an industrial process. There may or may not be a "most-favored licensee" clause in the existing agreements. These probably is an ongoing free exchange of improvements among the licensees. There probably are strict territorial limitations on the various licensees, at least during the period of patent protection. Now, how in the world are you going to license this fantastic technology into Brazil? With great difficulty! Even though experienced businessmen from multiple advanced western countries have found the license to be fair and economically attractive to them, you simply can't make this technology available to Brazil. The regulations won't permit it. The royalty exceeds the advance limits that are set. The term is much too long. The free exchange of improvements is a problem. And territorial restrictions are a no-no, except in very limited circumstances. While I understand INPI has loosened somewhat its former 5 and 8 limits on royalties and term, the problems are insurmountable as far as I can tell. If the licensor has given a most-favored licensee commitment to prior licensees, your chances of success in Brazil are nil. Thus, Brazil is deprived of this technology because the licensor simply is not free to make the massive concessions required by the Regulations. To do so would destroy the carefully constructed

licensing program that has already been put into place with the other licensees and would jeopardize future license with non-comers.

Thirdly, a funny thing happens during negotiations in Brazil. It wasn't apparent to me on the first few occasions. But then I began to see a pattern. The licensor and the licensee become a team. The other side is INPI. I believe that Brazilian management attention is directed from its own goals in the negotiation to "how do we get around us through INPI." I hesitate to say that Brazilian management agrees to things that are not in their best interests, but, I believe that may be one possible result. They seem to lose sight of their own corporate interest, and focus more on the Regulations. This could work to their disadvantage.

◆ Financial Loss ◆

Next, I believe the Regulations drive cost the Brazilian party financially. If a licensor is looking at only 5% for 5 years (with possible, but not assured, extensions), he is going to charge more upfront. Thus, instead of improving the payment terms available to the Brazilian party, the Regulations may have the opposite effect. The licensor may drive a harder bargain for larger upfront payments than would otherwise be requested. Even though these must be approved by INPI, they still may be larger than those obtained from licensees in unregulated countries. With a severe balance of payments problem, the acceleration of payments caused by the Regulations creates quite a hardship on Brazil. For, from the licensor's standpoint, it may be the only way to be sure that there will be reasonable compensation for the transfer.

In my home state of Pennsylvania, we have a law that prohibits driving an automobile over a speed of 55 miles per hour. Our interstate highways are as good as the German Autobahns and can handle 80 to 100 mph with ease. Our better cars can be safely driven at over 80 mph. Needless to say, not many people obey the 55 mph speed limit.

I see a certain parallel in Brazil's

technology transfer law. I believe it is unrealistic at best; at worst it damages the Brazilian economy and the integrity of those that must deal with it. The Brazilian Government asks you to drive at 55 mph, while three-fourths of the world is traveling much faster. If you speed up, you may violate the regulations; if you don't you may be out of business. The government should not force people involved in technology transfer to make that choice. The law should be changed to reflect the realities of today's world and thereby permit the participants once again to drive within the limits.

Normative Act 15 embodies a policy judgment made more than 15 years ago. While perhaps valid then, it may be less so today and will be even less so in the future. Look at what has happened to Brazil's economic situation over the past 15 years. This can't all be blamed on Normative Act 15, but an economist might blame a bit of it on the overall protectionist and paternalistic approach taken by the Brazilian Government. Normative Act 15 is but one piece of that protective puzzle. Look at what has happened in Europe (Europe's efforts could draw certain parallels of protectionism). The regulation of the flow of technology in these countries has not had good results. I expect we will see big changes toward free flows of technology in these countries in the coming months and years.

◆ Less Protective Rule ◆

It appears that President Collor wants to have Brazil assume a less protective role over its industrial companies. This makes sense to me. In my experience Brazilian industrialists are strong enough and smart enough to look out for their own interests when dealing with other industrialized countries. Some of the toughest and smartest negotiations I've ever met have been in Brazil. The fact that you can find this outstanding contributor to tests to the sophistication of LES Brazil and its members.

Spain is discussing its technology transfer regulations as it continues

its integration into the European Community. Mexico drastically reduced its regulation of technology transfer earlier this year. I believe it's the last study to talk about results, but there seems to be the beginning of a trend — a trend away from the intensive regulations of the 1970s and 1980s.

Since I still have some time remaining, let me make a few comments about specific changes that I would recommend to the Brazilian rules. I have found that the most difficult constraints are those that limit the royalty rate and the duration of the transfer agreement. Denis David commented in his speech earlier this year to the American Intellectual Property Law Association that the former limits of 5 and 5 may have been raised to 11 for royalty rate and 10 year for term. Of course, it may take a technological advance on the order of the transistor in order to qualify for those more lenient numbers. I would hope the government would see fit to permit your some businessmen to negotiate their own financial terms. Some technology is worth far more than 1%, or even 11%, if the savings that accrue from the technology are great enough. Likewise, I would eliminate, or at least liberalize the time period for agreements. If a time limit of, say, 10 years were still required, I would leave open the door in exceptional cases that an agreement could be approved for more than 10 years at the discretion. To wait 5 or 10 years to find out if you will be later granted an extension creates unacceptable uncertainty that often

chills and/or kills the negotiations.

The other area where I would recommend that INPI loosen up is in the area of the territory of the Agreement. I recognize that exporting products and earning hard currency is extremely important to Brazil. On the other hand, if the deal is killed because of export considerations, then Brazil runs the risk of the technology. Therefore, if the licensee wishes to reserve other territories for itself, whether for direct investing, joint venturing or other licensing arrangements, this should be sufficient to preclude the Brazilian licensee from that territory. If the licensee agrees. On the other hand, if the licensee feels he must export to certain areas in order for them to be a viable economic arrangement, then he should state his case to the licensee. This is the difference between deal making by negotiation or by fiat. I believe most licensees will listen very closely to a licensee that says he needs the extra sales and can, in fact, make them. Nonetheless, the licensee is usually just as interested in earning royalty income as the Brazilian licensee is interested in selling additional product. Therefore, there will be a natural tendency to permit the licensee to export in those situations where it makes good commercial sense. Please leave it to the licensee and the licensee to determine the territory.

There are a number of restrictions the government can impose that I believe most businessmen would not object to. The Japanese Government or the European Community would probably reject many such

restrictions if submitted for approval. Therefore, I don't think it would make technology transfer if Brazil continued to reject provisions that require the grant back of title or an exclusive license to improvements made by the licensee. Similarly, such restrictions in an agreement that try to impede research and development by the licensee could and should be rejected. Likewise, it is unreasonable in my opinion to require the licensee to purchase component parts from the licensee if those parts of equal quality are available in the licensee's home country. There are various other restrictions that I believe most businessmen around the world will have no part in a legitimate technology transfer.

In conclusion, I urge the government to step out of those areas, price, term, and territory. These three factors are so significant to the licensee and vary so much from transaction to transaction that no realistic ceilings or boundaries can be set ahead of time. If these key provisions are left to the parties to negotiate, I feel Brazil will be much better off in the long run.

It may not be the time in Brazil to lower your guard on the luxury items, such as Brazilian caviar, French perfume, and American Chevrons. But, I submit that your industrialists and their attorneys and other advisors are ready and able to build their own in the number of industrial technology. I urge Brazil to take the lead in dismantling those regulations around the world. I think you will certainly benefit as a country if you do so.