

BIOTECH BUZZ

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Patent Term Extension in Brazil

Brazil does not provide for patent term extensions for patents relating to pharmaceutical products due to regulatory delays.

Patent terms are clearly defined article 40 of Brazilian Industrial Property Law 9.279 of May 14 1996 as follows:

"Article 40 - The term of a patent of invention shall be 20 (twenty) years and that of a utility model patent shall be 15 (fifteen) years counted from the filing date of the application.

Sole Paragraph - The term shall be no less than 10 (ten) years for a patent of invention and 7 (seven) years for a utility model patent counted from the date of grant, except where the INPI (*Brazilian Patent and Trademark Office - BPTO*) is prevented from carrying out the substantive examination of the application owing to a duly evidenced judicial dispute or for reasons of *force majeure*."

Basically, for patents of invention the law establishes the minimum 20 years patent term established by the TRIPS Agreement. Nonetheless, the Brazilian law also establishes a minimum 10 year validity term as of the patent granting.

In other words, patent terms are calculated as being either: a) 20 years from the filing date or 10 years from the granting date, which ever is the later date. This measure guarantees that if there is a delay in patent granting for which the BPTO is responsible, applicants will have a minimum of a 10 year term.

This provision is extremely useful when there are extensive backlogs at the BPO which is often the case for applications in the pharmaceutical and biotechnology fields and such applications frequently remain pending for more than 10 years.

Nonetheless, must be noted that while this is a very important measure to ensure that patent owners are compensated for such delays, this measure brings a great degree of legal uncertainty. This is because it becomes impossible to predict the term of an application that has been pending for more than 10 years, until such application is actually granted since in said

case the term will not be calculated from the date of filing but rather from the date of grant.

Hopefully, this is a provision of the Brazilian Industrial Property Law that will be less and less used in the near future. Recent developments in the BPTO including the implementation of on-line filing and the publication of Examiner's opinions on line, the increase in the number qualified of examiners and the proposal of new more consistent examination guidelines to be implemented soon, have significantly increased productivity and diminished average examination time. With continued efforts in the years to come, the BPTO aims to decrease examination time to four years by 2016, which will significantly diminish backlog and provide greater legal certainty to patent owners and third parties.

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