

## Is the Patent Term “Guarantee” in Brazil Unconstitutional?

Article By:

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Article 40 of Brazil’s Industrial Property Law (Law) guarantees a minimum patent term of 10 years from the date of grant. This article is an especially important provision in the Law due to the fact that it typically takes 10 to 13 years for patent applications in the pharmaceutical and high technology areas to be granted by the National Institute of Industrial Property (INPI). The problem is further exacerbated for pharmaceutical applications which are required to receive “prior consent” from the National Sanitary Vigilance Agency (ANVISA) before such applications can be granted.

During the last few months in Brazil, Article 40 has been the subject of significant debate. In fact, proposed bill PL 5402/2013 would remove the “guaranteed” 10 year patent term and replace it with a maximum term of 20 years, as authorized by Article 33 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

Additionally, as discussed in a previous [BRIC Wall](#) post, on September 6, 2013, attorneys for INPI issued a binding opinion that the term of mailbox patents (patent applications filed between January 1, 1995 and May 14, 1997) was 20 years from their filing date and that the provision in the sole paragraph of Article 40 did not apply to these patents. Because the opinion was not self-executing, on September 12, 2013, 33 lawsuits were filed by INPI in the Federal Court in Rio de Janeiro. Examples of some of the companies named in the lawsuits include: Astellas, Merck, Monsanto, Boehringer Ingelheim, Sanofi, Pfizer, AbbVie, Bayer, Bayer Crop Science, Bayer Animal Health GmbH, Siemens Healthcare, Diagnostics GmbH, Novartis, AstraZeneca, Johnson & Johnson, Gilead and Eli Lilly.

Now comes word that on Monday November 4, 2013, the Associação Brasileira das Indústrias de Química Fina, Biotecnologia e Suas Especialidades ([Abifina](#)), a Brazilian organization representing national companies with chemicals interests, brought a constitutional challenge before the Brazilian Supreme Court requesting that Article 40 be declared unconstitutional. This case has been assigned to Judge Luiz Fux, appointed to the Supreme Court by the Workers’ Party – PT. It should be very interesting to see how Judge Fux rules with respect to this constitutional challenge.

Please watch the [BRIC Wall](#) for future updates on this constitutional challenge to Article 40 in Brazil.

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