



January 30, 2024

Mr. Daniel Lee

Assistant U.S. Trade Representative for Innovation and Intellectual Property
Office of the United States Trade Representative.

Re: 2024 Special 301 Review

Docket Number USTR-2023-0014

Dear Mr. Assistant USTR Lee,

This submission presents a contribution by the Brazilian Association of Industrial Property Agents (ABAPI) regarding the 2024 Special 301 Review. Our association consists of a class entity founded in 1948, aiming to disseminate, spread, and defend the interests of Industrial Property, as well as the improvement of academic training for industrial property agents, Lawyers, Engineers, and other professionals working in the area.

ABAPI promotes the study of Intellectual Property Law and related matters, organizing training and professional development courses, lectures, and academic events, always valuing the quality of the programs and the specialized academic staff.

Hence, the following contribution therefore reflects our position that is of common knowledge to the Brazilian federal government regarding patent registration, since we work closely together, and our association seeks to contribute as much as possible to the intellectual property ecosystem in Brazil.

First, we would like to reassure that Brazil maintains a highly efficient legal framework for ensuring the protection and enforcement of intellectual property. As a result, Brazilian courts commonly grant both preliminary and permanent injunctions. In the pursuit of legal clarity, Brazil's Patent and Trademark Office (BPTO) regularly issues and updates its examination guidelines, aligning them with the practices of international Patent Offices. Additionally, BPTO's board of appeals, which serves as the ultimate authority in procedures before the BPTO, annually discloses a summary of their decisions in a transparent manner.

On another note, BPTO continues to perform admirably in reducing patent backlog, which has resulted in a slight increase in filings in Brazil. The new leadership of the BPTO also seems well-aligned with Vice President and Minister of Development, Industry, Trade, and Services, Geraldo Alckmin, and the Secretary of Competitiveness and Regulatory Policy, Andrea Macera.

In August 2023, the Hague Agreement on the international registration of industrial designs came into effect in Brazil, followed by updated design examination guidelines released in October 2023. Accession to the agreement was part of the government's strategic agenda to modernize the Brazilian IP system, aligning with the country's earlier accession to the Madrid Protocol in 2019.

Another relevant action has been the country's efforts to join the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. The proposed draft bill, introduced in 2022 (466/22) is currently under Congress consideration. If Brazil becomes a party to the Treaty, local institutions may be designated as an International Depository Authority (IDA) under the Treaty, easing the burden on Brazilian companies and institutions required to deposit biological material for compliance with patent application disclosure requirements in the field of Biotechnology.

Starting in 2018, the BPTO implemented measures to expedite the examination process, resulting in a significant reduction in the backlog of patent applications, including the Patent Prosecution Highway Program (PPH), faster examinations for green patents and products for diseases such as HIV and cancer, among others. Nevertheless, over the past two years, there has been a decline in the number of decisions made by the BPTO's 1st instance regarding the merits, which includes notices of allowance and rejections. In 2020, over 30.5 thousand decisions were made versus 21.7 thousand in 2023.

In that sense, our association is concerned about recent indications from the BPTO that, in the eagerness to further reduce the patent grant timeline, attempts are being made to adopt measures that may diminish Brazil's attractiveness by making the act of presenting amendments to patent applications overcomplicated.

For instance, one of BPTO's internal rules (Resolution N. 93/2013) states that it would not be possible to claim – not even in a divisional application – a subject matter not claimed when the examination was requested, even if it does not extend beyond the application's content initially filed, which is opposed to the Brazilian IP Law.

Also, a recent open comment period was conducted regarding the patent application process. Despite the majority of respondents expressing a reluctance for a drastic change in Articles 32 and 33 of Brazil's Intellectual Property Law, the BPTO has stated its intention to advocate for a bill proposed by the Office of the Chief of Staff to reduce the examination request period and, consequently, amendments to patent applications.

For example, according to Article 32 of BPTO's normative instruction N. 30/2013, if an applicant has already filed an administrative appeal against the rejection or the BPTO's board of appellate patent examiners has objected to the lack of unity of invention, they are not permitted to submit a divisional appeal afterward.

Furthermore, on December 12, 2023, INPI published Opinion N. 19/2023, which prohibits amendments to claim sets in patent application appeals, even if such amendments aim to narrow the scope of claims. This stance struck us as unreasonable, since, in practice, it would eliminate the chances of success in administrative appeals.

Finally, Brazil should consider amending its Intellectual Property Law to incorporate a provision empowering the BPTO to extend a patent term if the office excessively delays the patent-granting process.

Our association has been actively working to improve intellectual property rights in Brazil, alongside other entities. We remain optimistic about our efforts and would like to count with the support of the USTR in our understanding regarding necessary changes to the BPTO and IP Law in Brazil.

Should you need more information, we make ourselves available for any clarifications. Please feel free to contact us via abapi@abapi.org.br or +55 (21) 2224-5942.

Our focal points are Gabriel Di Blasi, president of the ABAPI, and council member Maria Eduarda Negri.

Sincerely,

Brazilian Association of Industrial Property Agents (ABAPI)