When it comes to Brazilian patent practice, the number 1 concern for applicants seeking protection for cosmetic methods is to explicitly differentiate the invention from a therapeutic method. Nevertheless, it is also necessary to think about a second prohibition contained in Article 10 (VIII) of Brazilian Intellectual Property Law: operating or surgical techniques.

According to the above-mentioned provision, therapeutic or diagnostic methods for use on the human or animal body are not considered to be inventions or utility models and this provision also applies to operating or surgical techniques. At a glance, it might seem that only the possibility of being considered a therapeutic method could impair the protection of a cosmetic method. However, to have a patent granted in Brazil the applicant must also guarantee that the claim set does not contain any kind of operating or surgical technique. Therefore, the question arises as to what the Brazilian Patent Office (BRPTO) considers an operating or surgical technique.

In order to clarify – and in some cases unify – the Examiners’ understanding, the BRPTO published the second part of the Guidelines on Examination of Patent Applications in 2016, which specifically addresses the patentability assessment. According to these guidelines, “any method that requires a surgical step, or an invasive step in the human or animal body, is regarded as operating method, and falls into what Article No. 10 (VIII) does not consider to be invention” (emphasis added).

The fact that any invasive step is deemed to be an operating method is indeed very restrictive and can be an obstacle to cosmetic methods, especially because the guidelines do not provide any further information on what should be considered an invasive step. Thus, in the absence of any definition in this regard, one possible strategy would be simply to rely on the general definition of “invasive”.

According to dictionaries, the word “invasive”, when related to the medical field, is an adjective denoting something involving puncture or incision of the skin or insertion of an instrument or injection of foreign material into the body. Since all operating methods are invasive, is it correct to consider everything that is invasive an operating method? Where should a minimally invasive procedure be placed?

Minimally invasive procedures are increasingly trending nowadays. Such procedures consist of interventions that are carried out with minimal damage to the physical integrity. In the aesthetic field, according to the Brazilian Society of Plastic Surgery, dermo abrasion, laser, chemical peeling, botulinic toxin, pallet-rich plasma and cutaneous filling are all considered minimally invasive procedures. The number of people looking for these procedures is increasing every year and so is the research to improve and develop each respective technique. Thus, it should be no surprise to also have an increase in the number of patent applications in this field. With this raise, Brazilian Examiners, sooner or later, will have to decide whether or not these minimally invasive cosmetic methods should be included in the restrictions of Article 10 (VIII).
Unfortunately, until updated guidelines are published, Brazilian Examiners will most likely stick to the current position and to their strict interpretation. However, it is worth noting that at the beginning of 2018, the BRPTO published guidelines directed to the technical examination of patent applications in the chemical field, comprising unexpected changes on some previously consolidated understandings (for example regarding the medical use of a compound). Therefore, considering that the BRPTO has loosened its position on such a controversial issue, there is also a chance that the understanding about minimally invasive procedures may be reviewed. Nevertheless, until such time, it is important to bear in mind that falling outside the definition of a method of treatment is not enough make minimally invasive cosmetic methods patentable in Brazil. For now, applicants should try to dissociate the invasive step from the novel and inventive part of any cosmetic method.