

New Semiconductor Chip Protection Act in Brazil

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Through the Provisional Measure # 352 of January 22nd, 2007, the President of Brazil created a new protection for Semiconductor Topographies. This new law corresponds to the US Semiconductor Chip Protection Act of 1984 with some changes referring to the WTO's TRIPS Agreement rules on this kind of Intellectual Property. A bill with a very similar content was sleeping at Congress for over ten years.

A Provisional Measure is a decree of the Executive Power with force of law, which is, however, sent to Congress for confirmation. The latter may enact a conversion law that will change the Provisional Measure into a permanent law as it is or can change or modify it as it pleases. However, a Provisional Measure has immediate effect.

According to the new Brazilian Law, topographies are subject to registration before the Brazilian Patent and Trademarks Registration Office (INPI) but the requirements of originality and novelty are not examined. Any eventual discussion about those two requirements are deferred to court litigation, if is the case. The Brazilian Patent and Trademarks Registration Office will only examine the requirement of disclosure of the new topography in such a way that the court may eventually discuss the substantive requirements.

The Brazilian Patent and Trademarks Registration Office is at this moment drafting its regulation on this subject and is expected up to the end of February to initiate the full procedure for filing the new registrations.

The law corresponds in substance to the Washington Treaty on Production of Topographies, as changed by the TRIPS Agreement. The Washington Treaty has never entered into force due to some objections of major countries but there are laws corresponding to the original US Statute in major countries. The Brazilian Statute echoes the main characteristics of such legislation.

Topographies are to be registered one by one and shall only be accepted if were not sold in the world market or in any country within two years before the filing for registration (what is an economic novelty requirement, comparable to the plant variety law standard).

The originality requirement sums in fact two different requisites. The first is that the creation of the topographies can be attributed to the person filling for registration - in what could be described as subjective originality. The second is that the topography should not correspond to some comparable object that is already common or vulgar in the market. This second face of originality - which could be described as objective originality - doesn't assume any inventive step or non obviousness as it occurs in patent law. In substance, what the Brazilian statute requires is simply that a previously known topography is not slavishly copied.

Some important details of the Provisional Measure must and probably shall be changed during the Congressional examination. For instance, some cases of non authorized usage of topography, which are non conforming with TRIPS standards, shall be with all certainty amended in Congress in such a way that the final result is complying with international standards.

The topography statute is the part of an encompassing legislation that has as intent the establishment of a Brazilian Semiconductor industry. Although similar pieces of legislation are infrequently used by the core market players in the countries where they already exist, it was felt that the IP protection would line up with the investment attitude that the Brazilian Government is trying to create for the industry.

Economic analysts think that Brazilian R&D will center in designing topography and projecting their related technology without, at least in the initial phases, establish a foundry system in the country. At this moment some university research centers and the publicly funded semi-conductor research center in Porto Alegre are the main beneficiaries of the new measures, but there are already some private companies starting some design lines in order to take profit of the tax and others benefits provided by the law.

The overall Semiconductor industry initiative is a part of an ambitious technology capability plan scheduled to cover the new president term up to 2011, which also includes a new Innovation Law, a biotech initiative, a recent R&D Tax Law and some Software Development Propositions being prepared by the Brazilian Ministry of Science and Technology.

On a separate law, Brazilian Congress has now declared that the taxation (not income tax at source, but a special Contribution) heretofore incurred on Software importation at the rate of 10% is no longer due. Such congressional amendment has included a retroactive revocation of the former provisions in such a way that the tax is not due on all importations occurred during 2006.