

Private Ordering in Global SEP Licensing: Comparative Lessons for Brazil's Emerging Role in FRAND Disputes

La gobernanza privada en la concesión global de licencias sobre patentes esenciales para estándares: lecciones comparadas para el creciente papel de Brasil en los litigios FRAND

Sabrina Pekarovic¹

Abstract

Brazil is becoming an increasingly visible forum for standard-essential patent (SEP) disputes. Recent litigation before the Rio de Janeiro Business Courts and defensive declaratory actions in São Paulo suggest that Brazilian courts may play a more significant role in global fair, reasonable, and non-discriminatory (FRAND) licensing strategy. This article argues that Brazil should preserve credible patent enforcement without allowing SEP litigation to substitute for commercial licensing. The comparative experience of the United States, the European Union, the United Kingdom, and China shows that national approaches to remedies, competition claims, and global rate-setting can shape bargaining leverage and encourage forum shopping. The central claim is that SEP licensing remains a system of private ordering, supported by standard-setting organisations, FRAND commitments, patent pools, portfolio licensing, and negotiated commercial agreements. Brazilian courts should therefore act as backstops that make negotiation credible, discipline strategic delay, and prevent disproportionate injunction pressure. Where disputes concern global portfolio valuation, confidential comparables, or complex licensing terms, mediation, expert determination, and arbitration may offer a more suitable path. Brazil's opportunity is not to become either a patent-holder-friendly injunction forum or an implementer-friendly defensive forum, but a jurisdiction where enforcement, proportionality, and private ordering reinforce one another.

Keywords: Standard-essential patents; FRAND commitments; private ordering; transnational patent litigation; forum shopping; injunctive relief.

1. Student and researcher at the IE University School of Law, Madrid, Spain. Competition fellow at the International Center for Law & Economics, Portland, Oregon, United States. ORCID: <https://orcid.org/0009-0001-2645-7055>. Email: sabrinampekarovic@gmail.com.

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Resumen

Brasil se está convirtiendo en un foro más visible para litigios sobre patentes esenciales para estándares (SEP). Los procedimientos recientes ante los Tribunales Empresariales de Río de Janeiro y las acciones declarativas defensivas en São Paulo sugieren que sus tribunales pueden adquirir mayor peso en la estrategia global de licencias justas, razonables y no discriminatorias (FRAND). Este artículo sostiene que Brasil debe preservar una tutela efectiva de las patentes sin permitir que el litigio SEP sustituya a la negociación comercial. La experiencia comparada de Estados Unidos, la Unión Europea, el Reino Unido y China muestra que los enfoques nacionales sobre remedios, competencia y fijación de regalías globales pueden alterar el poder de negociación y promover el *forum shopping*. La tesis central es que las licencias SEP siguen siendo un sistema de gobernanza privada, apoyado por organismos de estandarización, compromisos FRAND, *pools* de patentes, licencias de cartera y acuerdos negociados. Por ello, los tribunales brasileños deben actuar como respaldo institucional: hacer creíble la negociación, disciplinar las estrategias dilatorias y evitar una presión cautelar desproporcionada. Cuando las controversias versen sobre valoración de carteras globales, comparables confidenciales o términos complejos, la mediación, la determinación pericial y el arbitraje pueden ser más adecuados.

Palabras clave: Patentes esenciales para estándares; compromisos FRAND; gobernanza privada; litigios transnacionales de patentes; *forum shopping*; medidas cautelares.

1 Introduction

Standard-essential patent disputes arise from a structural tension within the standardisation process.² When patented technology becomes essential to an industry standard, the patent holder's right to exclude and the implementer's need for access must be reconciled through licensing³ since companies that want to sell standard-compliant products usually cannot avoid using it.⁴ FRAND commitments are the principal mechanism for that reconciliation: SEP holders undertake to license their essential patents on fair, reasonable, and non-discriminatory terms, preserving both access for implementers and compensation for the firms that contributed the technology.⁵ However, FRAND does not remove the parties' incentives to bargain aggressively. SEP disputes are often framed through the opposing risks of hold-up and hold-out. Patent holders may argue that implementers continue using standardised technology while delaying or avoiding a FRAND licence. Implementers may argue that SEP holders use the threat of injunctions to demand excessive licensing terms.⁶ These risks should

2. Lei No. 9.279, de 14 de maio de 1996, Lei da Propriedade Industrial [Industrial Property Law], Diário Oficial da União [D.O.U.] de 15.5.1996, art. 42 (Braz.); Otto Licks, Carlos Aboim & Rodolfo Barreto, *Brazil: SEPs and FRAND – Litigation, Policy and Latest Developments*, Iam (Nov. 20, 2025), <https://www.iam-media.com/hub/sepfrand-hub/2025/article/brazil-seps-and-frand-litigation-policy-and-latest-developments>.
3. Lei No. 9.279, *supra* note 1, art. 42; Licks et al., *supra* note 1
4. World Intell. Prop. Org., *Standard Essential Patents*, World Intell. Prop. Org., <https://www.wipo.int/en/web/patents/topics/sep> (last visited June 9, 2026); Wentong Zheng, *Jurisdictional Competition on Standard-Essential Patents*, 14 N.Y.U. J. Intell. Prop. & Ent. L. 1 (2024) <https://jipel.law.nyu.edu/wp-content/uploads/2025/03/JIPEL-Volume-14-Number-1-Zheng.pdf>
5. European Telecomms. Standards Inst., *ETSI Intellectual Property Rights Policy* cl. 6.1 (Dec. 12, 2022), <https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>; World Intell. Prop. Org., *Standard Essential Patents*, *supra* note 3.
6. World Intell. Prop. Org., *WIPO Strategy on Standard Essential Patents 2024–2026* at 4–5, World Intell. Prop. Org. (2024), <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2024-12-en-wipo-strategy-on-standard-essential-patents-2024-2026.pdf>; Zheng, *supra* note 3.

not be treated as automatic evidence that SEP licensing requires court-led or regulatory control. Instead, they are bargaining risks within a commercial relationship.⁷

Brazil's position matters because SEP litigation is not confined to the national dispute before the court. A decision in one jurisdiction can affect the negotiation of a global licence, and repeated decisions can shape how parties perceive that jurisdiction as a forum for SEP disputes.⁸ A court known for fast injunctions may attract patent holders seeking enforcement leverage. A court known for broad declaratory actions, FRAND defences, or resistance to injunctions may attract implementers seeking to reduce that leverage.⁹ The way Brazilian courts handle these disputes will therefore influence not only individual cases, but also Brazil's commercial reputation in global SEP licensing.

SEP holders and implementers usually have a commercial interest in reaching agreement since the patent holder wants licensing revenue, and the implementer wants continued access to standardised technology.¹⁰ What parties often need from institutions is not a replacement for negotiation, but a way to make negotiation faster, more credible, and less vulnerable to strategic delay. Brazil's strongest contribution to this system is in preserving the conditions under which commercial licensing can function. Its courts should make negotiation serious by ensuring that rights can be enforced and delay is not rewarded. At the same time, they should avoid turning SEP litigation into a substitute for the parties' commercial agreement. The terms of the license should remain, where possible, with the parties themselves or, where necessary, through mediation and arbitration mechanisms better suited to technical, confidential, and commercially complex disputes.¹¹

This paper examines how Brazil can preserve a balanced role in SEP negotiation. It argues that Brazil should avoid becoming a forum identified with either patent holder leverage or implementer resistance. Either path would encourage forum shopping and risk turning litigation into a substitute for licensing. Brazilian courts should act as institutional backstops that discipline strategic conduct on both sides while leaving the commercial terms of FRAND licences, where possible, to the parties themselves or to dispute-resolution mechanisms better suited to global, technically complex, and confidential licensing negotiations.

7. For the debate over whether SEP licensing presents a structural market-failure problem warranting regulatory intervention, see Giuseppe Colangelo, *FRAND Determinations Under the EU SEP Proposal: Discarding the Huawei Framework?*, Int'l Ctr. for L. & Econ. (Nov. 15, 2023), <https://laweconcenter.org/resources/frand-determinations-under-the-eu-sep-proposal-discarding-the-huawei-framework/> (arguing that the European Commission's proposed SEP regulation was justified by proponents "within a market-failure framework," but that "the volume of SEP-litigation cases has been stable in Europe and represent only a very small proportion of patent disputes overall" and that "[t]here is also no evidence that SEP-licensing conditions systematically suppress or delay standards implementation")
8. Zheng, *supra* note 3.
9. Benjamin C. Elacqua, Scott M. Flanz, Christopher O. Green & Whitney Reichel, *Analyzing SEPs: Strategies for Licensing Negotiations*, The Licensing J., reprinted at Fish & Richardson (Aug. 1, 2025), <https://www.fr.com/insights/thought-leadership/articles/strategies-for-sep-licensing-negotiations/>; Zheng, *supra* note 3.
10. Zheng, *supra* note 3; Nora Manthey, *FRAND Licensing for SMEs: Dancing with Elephants in the World of SEPs*, WIPO Mag. (Jan. 29, 2026), (reporting that one major SEP holder had signed or renewed more than 250 license agreements since 2017, with fewer than 1% involving litigation, and observing that "most FRAND deals are reached through negotiation"). <https://www.wipo.int/en/web/wipo-magazine/articles/frand-licensing-for-smes-dancing-with-elephants-in-the-world-of-seps-88126>.
11. WIPO Arb. & Mediation Ctr., *WIPO ADR for SEP/FRAND Disputes*, World Intell. Prop. Org., <https://www.wipo.int/amc/en/center/specific-sectors/ict/frand/> (last visited June 9, 2026); Matthieu Dhenne, *SEP, FRAND, and Arbitration: A "Paranoid" Quest for Harmony in Global Patent Disputes*, Kluwer Patent Blog (Apr. 29, 2025), <https://legalblogs.wolterskluwer.com/patent-blog/sep-frand-and-arbitration-a-paranoid-quest-for-harmony-in-global-patent-disputes/>.

2 The private ordering structure of SEP licensing

The SEP licensing relationship begins with a technical standard developed through standard-setting organisations. Firms that contribute patented technology to that standard commit to license their standard-essential patents on fair, reasonable, and non-discriminatory terms.¹² That commitment is a private undertaking designed to allow standardised technology to spread while preserving the patent holder's right to be compensated.¹³ FRAND therefore works as a mechanism of private ordering.¹⁴ It does not eliminate bargaining between the parties. The patent holder must offer access on terms that satisfy the FRAND obligation,¹⁵ while the implementer must engage seriously with the licensing process and cannot simply deploy the technology while deferring payment.¹⁶ The system depends on both sides treating FRAND as a commitment to negotiate and conclude a licence, not as a tool for opportunistic leverage. This kind of tension is normal in private commercial relationships since each side seeks the most favourable agreement it can obtain. The patent holder wants to preserve the value of its technology; the implementer wants access on terms that allow it to compete profitably.

The empirical record supports caution against over-judicialisation. Since 2018, there have been an average of just 28 FRAND-related disputes globally each year, and in Europe SEP litigation accounts for roughly 60 cases annually against approximately 330 non-SEP patent cases.¹⁷ These figures suggest that most SEP licensing continues to function through negotiation and private coordination rather than solely through litigation.¹⁸ One major SEP holder reported having signed or renewed more than 250 license agreements since 2017, with fewer than one per cent involving litigation.¹⁹ Thus, treating FRAND disagreements as presumptive antitrust or regulatory failures may distort a system that has largely operated without centralised administrative oversight.

The same logic explains the importance of private coordination mechanisms that developed precisely because fragmented patent rights can make technology markets difficult to navigate. Patent pools are one example. They allow multiple patent holders to aggregate complementary patents and offer licences through a common structure, reducing transaction costs and giving

12. ETSI Intellectual Property Rights Policy, *supra* note 4, cl. 6.1.; World Intell. Prop. Org., *Standard Essential Patents*, *supra* note 3.

13. World Intell. Prop. Org., *Standard Essential Patents*, *supra* note 3.

14. Bowman Heiden & Justus Baron, *A Policy Governance Framework for SEP Licensing: Assessing Private Versus Public Market Interventions* (June 23, 2021), SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872493.

15. ETSI Intellectual Property Rights Policy, *supra* note 4, cl. 6.1.

16. WIPO *Strategy on Standard Essential Patents 2024–2026*, *supra* note 5, at 4.

17. Fredrik Erixon, Oscar Guinea & Dyuti Pandya, *The Proposed EU Regulation for Standard Essential Patents: Chronicle of a Death Foretold*, Eur. Ctr. for Int'l Pol. Econ. (Sept. 2025), <https://ecipe.org/publications/eu-regulation-for-standard-essential-patents/>; see also Baron et al., *Empirical Assessment of Potential Challenges in SEP Licensing* 71, 97 (Eur. Comm'n 2023) <https://www.pure.ed.ac.uk/ws/portalfiles/portal/391650876/BaronEtal2023EmpiricalAssessmentOfPotentialChallenges.pdf>; IP Europe, *A (Bad) Solution in Search of a Problem – Part V* (July 19, 2023), <https://ipeurope.org/blog/sep-licensing-disputes-do-not-justify-a-new-conciliation-process/>.

18. Valéria Silva, *FRAND-Licensing Litigation Across the Atlantic: A Comparative Assessment of US and UK Jurisprudence on Telecom Disputes*, Int'l Ctr. for L. & Econ. (Apr. 8, 2025), <https://laweconcenter.org/resources/frand-licensing-litigation-across-the-atlantic-a-comparative-assessment-of-us-and-uk-jurisprudence-on-telecom-disputes/>

19. Manthey, *supra* note 9

implementers a clearer route to access.²⁰ Standard-setting organisations perform a related but different function. They do not ordinarily set license prices themselves. Instead, they create the technical standards that allow interoperability and require participating patent holders to commit to license essential patents on FRAND terms.²¹ The FRAND commitment is therefore a private undertaking that makes standardisation possible by preserving access for implementers while maintaining compensation for patent holders.

These mechanisms are distinctive since their purpose is to make technology usable across jurisdictions and to reduce the need for repeated bilateral conflict over every patent in a standard. They are built around the standard, not around the selection of a favourable national court. They do not eliminate disagreement, since SEP holders and implementers may still disagree over infringement, validity, essentiality, royalty levels, comparable licences, or willingness to negotiate. However, those disagreements arise within a licensing structure that is already designed to reduce fragmentation and make commercial agreement possible.

This point is especially important because FRAND licences are usually global, portfolio-based, and shaped by business considerations that do not fit easily into a single national infringement proceeding.²² The parties may be negotiating over more than one patent, more than one product, and more than one market. They may also care about confidentiality, timing, cross-licensing, future cooperation, and the risk of disruption to their commercial relationships. These factors can be weighed in negotiation more easily than in adversarial litigation. As Gabriel Tajra has observed, the ideal is for the SEP holder and implementer to reach agreement themselves, because they are better positioned to arrive at reasonable royalty terms and to account for non-monetary elements of the licensing relationship.²³

Private ordering is therefore not an abstract preference for less judicial involvement. It is part of the structure of the SEP system itself. Standardisation depends on firms agreeing in advance to a shared technical framework. FRAND commitments depend on parties negotiating access to essential technology within that framework. Patent pools and portfolio licences depend on the ability to aggregate rights and conclude licences that operate across markets. As Heiden and Baron demonstrate in their comprehensive governance framework, the SEP licensing ecosystem is “largely a story of collective, private ordering through the creation of open, consensus-based SDOs, FRAND-based IPR policies, and patent pools,” and the success of this ecosystem provides a plausible explanation for why theories of market failure in SEP-enabled markets have not been shown empirically to occur in the mobile economy.²⁴ Scholars have similarly observed that participation in industry consortia and patent pools can facilitate collaboration and licensing because the parties have aligned long-term incentives: a standard that is widely implemented generates more royalty income for all patent holders than a standard that is obstructed by excessive licensing demands.²⁵

20. See U.S. Dep’t of Just. & Fed. Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5 (2017) (explaining that pooling arrangements may integrate complementary technologies, reduce transaction costs, clear blocking positions, and avoid costly infringement litigation) <https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/0558.pdf>

21. *TCL Comm’n Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson*, 943 F.3d 1360, 1364 (Fed. Cir. 2019) (noting that ETSI’s intellectual-property-rights policy requires standard-essential patent holders to license on FRAND terms but does not define FRAND) <https://www.wipo.int/wipolex/en/text/591372>

22. Silva, *supra* note 17

23. *Webinar on SEP Licensing and FRAND Commitments in Brazil*, Int’l Ctr. for L. & Econ. (Aug. 25, 2025) <https://laweconcenter.org/events/sep-licensing-and-frand-commitments-in-brazil-post-event/>

24. Heiden & Baron, *supra* note 13, at 66.

25. *Id.*

The judicial role should therefore be understood as supportive rather than substitutive. Courts are necessary where private ordering fails. They make patent rights credible, prevent implementers from using delay as a strategy, and provide recourse where negotiations are not conducted seriously. They can also prevent SEP holders from using injunctions in a way that creates disproportionate pressure before the licensing dispute has been properly assessed. In that sense, courts are part of the institutional background that upholds negotiation.

3 Comparative fragmentation in global FRAND litigation

Because SEP licensing is global but patent enforcement remains territorial, national legal systems play a central role in shaping parties' bargaining strategies. Forum choice is a part of that process, driven by the procedural and remedial advantages each side seeks to obtain.²⁶ A patent holder may choose a jurisdiction where enforcement is fast because delay weakens the value of the right. An implementer may choose another forum to challenge infringement or resist pressure from an injunction. These choices are strategic, and show that parties use courts as part of the bargaining environment around a global licence. Different approaches to injunctions, antitrust, FRAND defences, and royalty determination affect the kind of disputes a jurisdiction attracts and the kind of leverage it gives to each side.²⁷ Therefore, the relevant question is whether the forum improves the conditions for agreement or distorts them.

The experience of other jurisdictions illustrates how procedural choices shape SEP strategy. In the United States, SEP disputes have often been shaped by damages analysis, antitrust arguments, patent validity challenges, and a more cautious approach to injunctions after *eBay*.²⁸ This makes American courts attractive where parties want deeper scrutiny of patent scope, validity, damages, and competitive effects, but it generally gives SEP holders less immediate exclusionary leverage than jurisdictions where injunctions are more readily available.²⁹ Implementers may therefore view U.S. proceedings as a forum in which to challenge the strength of the asserted patents, develop FRAND counterclaims, or resist the use of injunctions as negotiating pressure.

In the European Union, *Huawei v ZTE* tried to discipline the use of injunctions without removing them altogether.³⁰ The Court of Justice required attention to the parties' pre-litigation conduct, including notice, offers, counteroffers, and willingness to conclude a licence.³¹ The framework is important because it treats SEP enforcement as a conduct-sensitive question rather than a purely automatic exercise of exclusionary rights. Its application, however, has differed markedly across national courts. Germany, in particular, has remained attractive to SEP holders because its courts are known for speed and robust injunctive relief where the implementer is not treated as a willing licensee.³² Other European courts may be more receptive to implementer arguments around proportionality, FRAND conduct, or the limits of exclusionary relief. The

26. Zheng, *supra* note 3.

27. *Id.*

28. *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388, 393–94 (2006).

29. Zheng, *supra* note 3.

30. Case C-170/13, *Huawei Techs. Co. v. ZTE Corp.*, ECLI:EU:C:2015:477 (July 16, 2015).

31. *Id.* at 60–66.

32. Zheng, *supra* note 3.

result is that the EU does not operate as a single SEP forum in practice.³³ It contains several procedural environments that parties can use differently.

The United Kingdom represents a more centralised judicial approach. In *Unwired Planet*, the Supreme Court confirmed that where a UK SEP is valid and infringed, the court may determine the terms of a global FRAND licence, with acceptance of those terms operating as the practical alternative to an injunction.³⁴ For SEP holders, the model creates strong leverage because a UK infringement finding can pressure the implementer to accept a global license rather than face exclusion from the UK market. For implementers, the model may offer procedural certainty, but it comes at the cost of allowing a single national court to shape the terms of a global licensing relationship. The UK experience illustrates the risks of judicial centrality. After *Unwired Planet*, commentators observed that “the UK has become a popular forum for SEP owners seeking to resolve their licensing disputes with implementers” because English courts are willing “to determine the terms, including royalty rates, of FRAND licences on a global basis.”³⁵ Huawei warned that this would make English courts the “de facto international or worldwide licensing tribunal for the telecommunications industry.”³⁶ Subsequent commentary has noted that “it is common in UK FRAND cases for parallel proceedings to be commenced in other jurisdictions by one or both parties,” confirming that the UK model can produce both forum competition and satellite litigation over the proper forum for global FRAND determination.³⁷

China presents the most interventionist model. Chinese courts have asserted jurisdiction to determine global FRAND royalty rates in cases such as *Xiaomi v InterDigital*³⁸ and *OPPO v Sharp*³⁹, and later moved further toward substantive global rate-setting in *OPPO v. Nokia*.⁴⁰ This expansive judicial role has been reinforced through anti-suit injunctions, which prevent parties from pursuing parallel proceedings in other jurisdictions. The Chinese approach treats judicial rate-setting as a routine tool rather than a last resort, and its anti-suit injunctions have provoked retaliatory anti-anti-suit injunctions from courts in Germany, the United Kingdom, and India. For Brazil, China’s experience offers the clearest illustration of what over-judicialisation produces. Rather than encouraging negotiation, Chinese global rate-setting has intensified forum shopping and generated jurisdictional conflict. SEP holders have responded by filing pre-emptive actions in other courts to avoid Chinese jurisdiction, while implementers have sought Chinese proceedings precisely because the rates set by Chinese courts have tended to be lower

33. *Id.*

34. *Unwired Planet Int’l Ltd. v. Huawei Techs. Co.* [2020] UKSC 37, [1], [67].

35. Tom Brazier & Andrew Sharples, *United Kingdom: SEPs and FRAND – Litigation, Policy and Latest Developments*, Global Competition Review (Oct. 27, 2023) <https://globalcompetitionreview.com/hub/sepfrand-hub/2023/article/united-kingdom-seps-and-frand-litigation-policy-and-latest-developments>

36. Richard S. Zembek & Eric Green, *UK Supreme Court Rules UK Courts Can Set Global FRAND Rates for SEPs*, Norton Rose Fulbright (Aug. 31, 2020), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/80b80137/uk-supreme-court-rules-uk-courts-can-set-global-frand-rates-for-seps>

37. Licks et al., *supra* note 1. (“As seen in *Nokia v Oppo*... it is common in UK FRAND cases for parallel proceedings to be commenced in other jurisdictions by one or both parties.”)

38. Binxin Li, Chuanshu Xu & Leon Li, *Recent Development on SEP Disputes in China – Anti-Suit Injunction*, Kluwer Patent Blog (Nov. 20, 2020) <https://legalblogs.wolterskluwer.com/patent-blog/recent-development-on-sep-disputes-in-china-anti-suit-injunction/>

39. World Intell. Prop. Org., *2024 WIPO IP Judges Forum Informal Case Summary – Supreme People’s Court of China [2021]: OPPO Guangdong Mobile Communications Co., Ltd. v. Sharp Corp.*, Wipo Lex (2021), <https://www.wipo.int/wipolex/en/text/591740>

40. Crystal J. Chen & Kevin C.W. Feng, *OPPO v. Nokia: China Court Set First Global 5G FRAND Rate*, Lexology (Jan. 11, 2024) <https://www.lexology.com/library/detail.aspx?g=aaa81bdf-17b9-4f3b-b1e8-4ff2469862b1>

than those determined elsewhere.⁴¹ The result is not a more efficient licensing system but a more fragmented one. Brazil should treat this as a cautionary example of how judicial competence to determine FRAND terms does not, by itself, show that routine judicial rate-setting improves licensing outcomes.

Three propositions emerge from this comparative survey. First, jurisdictions that offer speed without conduct-sensitivity, as Germany has sometimes been perceived, risk becoming enforcement instruments rather than forums for balanced adjudication. Second, jurisdictions that place the court at the centre of global licensing, as the United Kingdom and China have done in different ways, risk attracting forum shopping and generating jurisdictional conflict rather than encouraging negotiated outcomes. Third, jurisdictions that offer extensive procedural opportunities without timely resolution, as the United States sometimes does, may permit implementers to use litigation itself as a delay strategy. Brazil's challenge is to avoid all three distortions. Brazil should instead aim for a model in which enforcement remains credible without turning the country into an injunction forum. Courts should retain the competence to resolve legal disputes, but they should not become the centre of global licensing negotiations. Procedural safeguards should also remain available, without allowing litigation itself to become a source of delay.

The comparative survey points to a broader lesson for Brazil. National procedural choices affect the negotiation of global licences.⁴² This matters for Brazil because it is now becoming part of this fragmented landscape. As Brazilian courts attract both enforcement actions and defensive strategies, their approach will shape how Brazil is perceived as a SEP forum and whether Brazilian litigation becomes a tool for resolving licensing disputes or another front in global "FRAND wars."⁴³

4 Brazil's emerging role: enforcement without over-judicialisation

In 2025, infringement filings before the Rio de Janeiro Business Courts increased from six cases per year in 2023 and 2024 to 31. Implementers also began filing more actions in São Paulo, where non-infringement and declaratory actions rose from one case in 2023 and none in 2024 to seven in 2025.⁴⁴ This growth should not, however, be treated as evidence that Brazil needs a regulatory or antitrust-led FRAND system. One lesson from the European debate is that SEP licensing has often been described as a market-failure problem without sufficient empirical support.⁴⁵ Litigation remains limited when compared with the scale of SEP licensing,⁴⁶ and most

41. Jorge L. Contreras, *Anti-Suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: The Case for Judicial Restraint*, 11 N.Y.U. J. Intell. Prop. & Ent. L. 171, 179 (2021). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899923

42. Zheng, *supra* note 3.

43. Joseph Kattan, *FRAND Wars and Section 2*, Antitrust 30, 30 (2013) <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Kattan-FRAND-Wars-and-Section2-Antitrust-Summer-2013.pdf>; Isabel Milman, *Fast Injunctions and Growing Dockets: Brazil's Role in Global SEP Enforcement Dynamics*, Daniel Law (May 6, 2026), <https://www.daniel.com.br/en/articles/fast-injunctions-and-growing-dockets-brazils-role-in-global-sep-enforcement-dynamics/>.

44. Rob Rodrigues & Tatiana Machado, *SEP Litigation in Brazil: Five Big Developments in 2025*, Kluwer Patent Blog (Jan. 5, 2026), <https://legalblogs.wolterskluwer.com/patent-blog/sep-litigation-in-brazil-five-big-developments-in-2025/>

45. Heiden & Baron, *supra* note 13.

46. Colangelo, *supra* note 6.

agreements are still concluded through negotiation rather than through courts or administrative supervision. This leaves only a narrow role for Brazil's competition authority, CADE, which may become relevant where SEP conduct genuinely raises anticompetitive concerns, but should not transform ordinary FRAND disputes into matters for administrative supervision. Even so, Brazil is becoming more relevant to global SEP negotiations because litigation affects the bargaining environment in which those negotiations take place. Although it is not yet a major SEP litigation market like the United States, the United Kingdom, Germany, or China, its courts are increasingly perceived as pro-patent, technically capable, and relatively fast, including when granting preliminary injunctions.⁴⁷ The numbers are not large in themselves, but they show that Brazil is increasingly being used as a forum for SEP strategy.

The 2025 injunctions granted by the Rio de Janeiro Business Courts illustrate both the strengths and the risks of Brazil's current trajectory. In several cases, preliminary injunctions were granted at an early stage of proceedings, before the court had fully assessed essentiality, FRAND conduct, or the availability of alternative remedies.⁴⁸ These decisions were commercially significant because they created immediate pressure on implementers to negotiate under the threat of market exclusion.⁴⁹ For SEP holders, this demonstrated that Brazilian enforcement could be fast and effective.⁵⁰ For implementers, however, early injunctive relief may raise concerns where it is granted without the conduct-sensitive analysis that the *Huawei v ZTE* framework requires in Europe.⁵¹ The São Paulo declaratory actions reflect the opposite dynamic. Implementers have used non-infringement and FRAND declaration claims to challenge enforcement pressure and to establish a defensive procedural position.⁵² The risk is that these actions become a mirror image of the Rio injunctions, functioning as a litigation tool designed to shift bargaining leverage rather than to resolve the licensing dispute on the merits.⁵³ The important implication of this split litigation is that Brazil is beginning to reproduce, within its own court system, the forum dynamics that characterise global FRAND disputes.

If Brazil becomes known primarily as a fast injunction forum, it may attract patent holders seeking leverage in global licensing negotiations, but it may also create uncertainty and hesitation for implementers entering the Brazilian market, and weaken the role it could play in supporting efficient licensing outcomes.⁵⁴ Standard-compliant products often depend on thousands of patents, complex supply chains, and global licensing arrangements. A jurisdiction perceived as permitting rapid market disruption without sufficient attention to FRAND conduct, essentiality, proportionality, or reverse harm may increase the legal risk of operating in Brazil.⁵⁵ This is particularly important in SEP cases because injunctions and related measures can affect production, distribution, supply chains, and commercial reputation before the licensing dispute has been fully resolved.⁵⁶ The opposite reputation would be equally damaging. If Brazil

47. Milman, *supra* note 42.

48. Carlos Ragazzo, *The High-Stakes SEP Clash: Patent Leverage, Forum Shopping, and Brazil's Courts* 19 (CCIA Rsch. Ctr. Apr. 2026), https://ccianet.org/wp-content/uploads/2026/04/CCIA_The-High-Stakes-SEP-Clash-Patent-Leverage-Forum-Shopping-and-Brazil-Courts_Report-Final.pdf; Milman, *supra* note 42.

49. *Id.* at 19, Licks et al., *supra* note 1

50. Milman, *supra* note 42.

51. Case C-170/13, *supra* note 29

52. Rodrigues & Machado, *supra* note 43.

53. Zheng, *supra* note 3.

54. Elacqua et al., *supra* note 8.

55. Ragazzo, *supra* note 47.

56. *Id.* at 19

becomes known mainly as a defensive forum for implementers, SEP holders may perceive the jurisdiction as one where enforcement can be delayed or weakened through declaratory actions and procedural resistance.⁵⁷ Such a reputation would be difficult to reconcile with the logic of FRAND, which seeks to balance access to standardised technology with the need to preserve investment, compensation, and incentives for future innovation.⁵⁸

The value of Brazilian courts should therefore lie in improving the conditions for negotiation, not in giving either side a more effective litigation weapon. Courts can play their most effective role by concentrating on the questions that fit judicial decision-making, including infringement, validity, essentiality, conduct during negotiations, and the proportionality of relief. However, if every FRAND dispute is pushed toward judicial determination, parties will choose the forum that gives them the greatest leverage rather than the forum best suited to resolving the license on commercially workable terms.

Some scholars have suggested an “expert-first” track.⁵⁹ That proposal reflects a broader acknowledgement that courts cannot resolve SEP disputes through legal analysis alone. Where the infringement claim appears serious but the real dispute concerns licensing terms, the court may preserve the claim while giving the parties an opportunity to address FRAND issues through mediation or expert determination before deciding whether injunctive relief is proportionate. These mechanisms are better adapted to technical evidence and the wider commercial relationship between the parties. Recent Brazilian practice points in the same direction. In *IP Bridge v. BYD*, the presiding judge appointed two separate experts, one for technical infringement issues and one for FRAND-related economic evidence, and set a structured timetable for expert reports and hearings.⁶⁰ This suggests that Brazilian courts are already recognising the need for specialised technical and economic input in SEP disputes, rather than treating judges as the sole institutional decision-makers.

ADR fits naturally within this framework. Mediation can narrow the issues before the dispute becomes fully adversarial. Expert determination may assist where the disagreement concerns essentiality, technical evidence, licensing comparisons, or portfolio valuation. This has already been seen in Brazilian case law. In *InterDigital v. Disney*, an injunction requiring Disney+ to deactivate specific functionalities was granted on the basis of a provisional expert report produced before the adversarial phase, prompting Disney to reconfigure its encoders and negotiate contractual adjustments while the case remains ongoing.⁶¹ The example does not show that courts should withdraw from SEP disputes. It shows that judicial intervention in technically complex disputes depends on specialised expertise and should be structured carefully before it produces significant commercial pressure. The same logic supports arbitration where the parties need a final determination rather than technical guidance alone. Arbitration can provide confidentiality, expertise, and finality where the parties need a binding decision on licensing terms.⁶² These mechanisms would allow courts to remain available for patent enforcement and ancillary judicial functions, while directing the most technical and commercial aspects of FRAND licensing toward institutions better suited to address them.

57. Bowman Heiden & Matthew Rappaport, *How Weak Are Strong Patents: Patent Holdout and Small(er) Technology Firms*, 38 Berkeley Tech. L.J. 349, 353 (2023) https://btlj.org/wp-content/uploads/2023/11/38_Haas_FullIssue.pdf

58. Ragazzo, *supra* note 47, at 13.

59. Milman, *supra* note 42.

60. *Id.*

61. Milman, *supra* note 42.

62. WIPO Strategy on Standard Essential Patents 2024–2026, *supra* note 5

WIPO's 2024-2026 SEP Strategy⁶³ reinforces this balance. Its emphasis on neutrality, complementarity, and voluntary participation supports private negotiation without converting national courts into the ordinary forum for global FRAND determination.⁶⁴ WIPO also identifies multi-jurisdictional litigation, forum shopping, exclusionary pressure, and delaying tactics as recurring costs in SEP disputes, and its Arbitration and Mediation Center offers mediation, arbitration, expert determination, model submission agreements, and deal mediation for licensing negotiations. For Brazil, this provides a practical reference point. This also corresponds to concerns already raised in the Brazilian debate. Juliana Oliveira Domingues has observed that injunctions may be useful, but quick conclusions on the merits are not always available, which is why alternative dispute-resolution methods should be encouraged and the judiciary should be called upon only where there is no other way to resolve the dispute.⁶⁵

Such an approach would strengthen Brazil's position in technology investment and innovation markets. SEP-heavy sectors are no longer limited to smartphones and telecommunications. They affect connected cars, IoT, health devices, fintech infrastructure, industrial connectivity, and other markets in which access to standardised technology is commercially essential. A credible SEP framework would signal that Brazil can host sophisticated technology disputes without creating arbitrary risks for market entry. Brazil's opportunity is to become a jurisdiction where enforcement is reliable, negotiation is taken seriously, and complex FRAND issues are handled through procedures that match the nature of the dispute.

5 Conclusion

This paper has argued that Brazil's emerging role in global SEP disputes should be shaped by the structure of the SEP licensing system itself. That system is built around private ordering through mechanisms such as FRAND commitments, patent pools, portfolio licensing, and negotiated commercial agreements that operate across jurisdictions.⁶⁶ Courts play an essential role in making that system credible, but they do not improve it by becoming the ordinary mechanism for determining licensing terms.⁶⁷

Brazilian institutions should aim to reduce the strategic value of litigation while preserving the credibility of patent enforcement. FRAND commitments are designed to make access to standardised technology possible through licensing, while preserving compensation for the firms that contribute patented technology to the standard. This mechanism works only where the legal environment makes negotiation credible and attaches consequences to strategic conduct on both sides. Brazilian courts can support this balance by focusing on issues that fit judicial decision-making, such as infringement, validity, essentiality, party conduct, and the proportionality of relief. These questions determine whether legal intervention is needed to discipline opportunism and restore the conditions for negotiation. Where the dispute turns

63. *Id.*

64. Enrico Bonadio & Akshita Rohatgi, *Outlining the WIPO's 2024–2026 Strategy on Standard Essential Patents*, Kluwer Patent Blog (May 16, 2024) <https://legalblogs.wolterskluwer.com/patent-blog/outlining-the-wipo-2024-2026-strategy-on-standard-essential-patents/>

65. Webinar on SEP Licensing and FRAND Commitments in Brazil, *supra* note 22.

66. Heiden & Baron, *supra* note 13

67. Igor Nikolic, *The Approach of English Courts in SEP Disputes: No Standalone Actions for Determination of Global FRAND Rates*, SSRN (July 24, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4519405

instead on commercial licensing terms, mediation, expert determination, and arbitration may offer a more suitable path.

This approach allows Brazil to strengthen its role in SEP disputes without making litigation the main driver of FRAND outcomes. Judicial speed and enforceability remain valuable when they support serious negotiation and prevent strategic delay, while ADR mechanisms help address the technical and commercial dimensions of licensing, which courts are less suited to resolve directly. Brazil's strongest position in global FRAND disputes lies in making negotiation reliable before litigation becomes the main source of leverage.

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