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The High-Stakes SEP Clash: Patent Leverage, Forum Shopping, and Brazil's Courts

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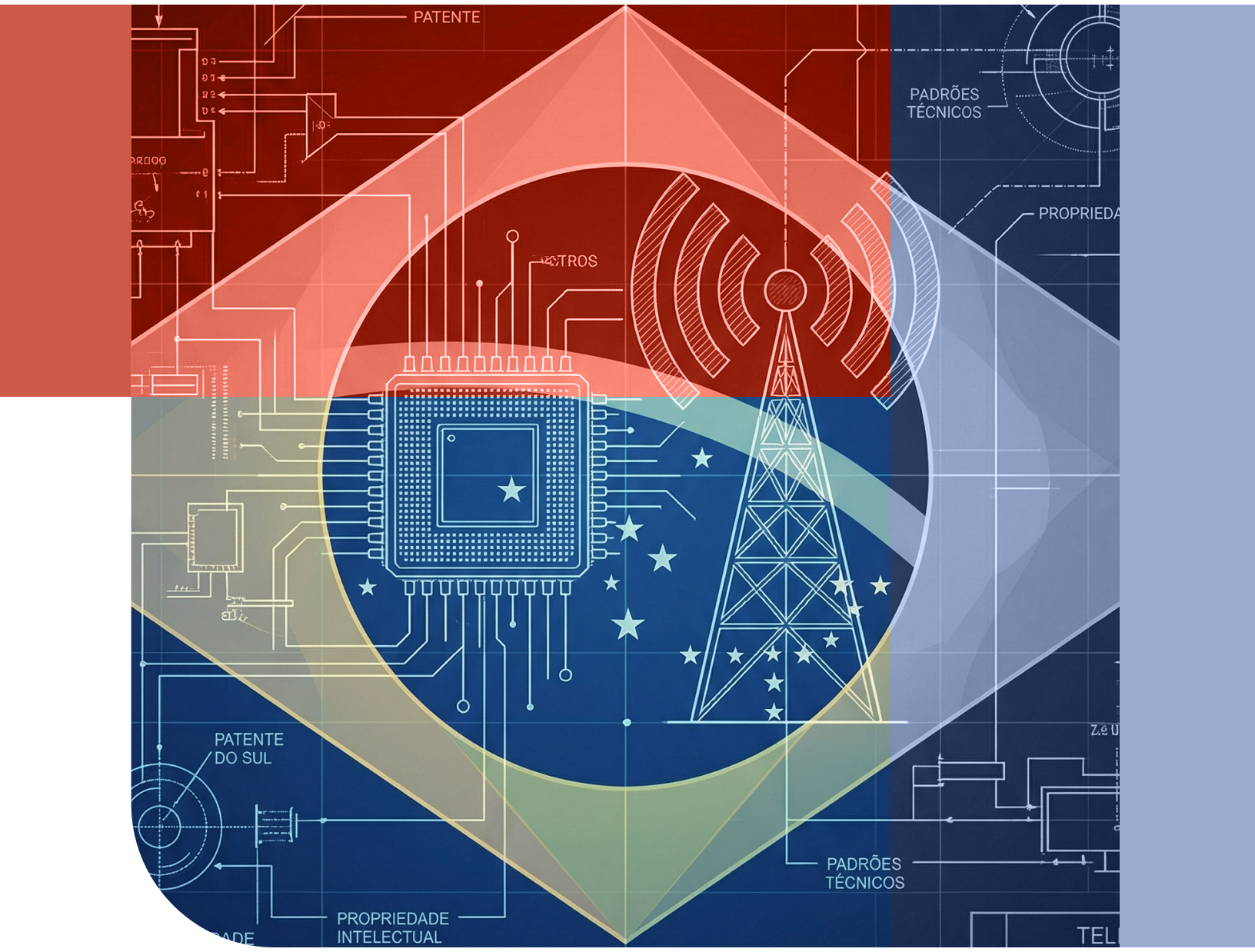

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Extended Executive Summary – Standard Essential Patents (SEPs)

Standard Essential Patents (SEPs) are becoming increasingly central to Brazil's digital and industrial transformation. Yet the country's legal and institutional framework has not evolved at the same pace. Today, Brazilian courts tend to handle SEPs exactly like ordinary patents, applying general injunction standards without accounting for essentiality, FRAND (fair, reasonable and non-discriminatory) commitments, or the systemic impact of excluding standardized technologies from the market.

This approach is increasingly misaligned with international practice and creates conditions in which IP enforcement can be converted into bargaining leverage, used to obtain supra-FRAND settlements and to shape market dynamics through litigation rather than competition on the merits.

This Executive Summary sets out the conceptual foundations of SEPs, explains why they require differentiated treatment, analyses how the current Brazilian framework amplifies risks of anticompetitive abuse, and outlines a set of recommendations that could guide courts, CADE, INPI, regulators and policymakers in building a modern, effects-based approach to SEP disputes.

Standard Essential Patents Require Tailored Guidelines within the Framework of Intellectual Property Rights

The Role and Importance of Technical Standards

SEPs arise in a specific institutional environment: that of technical standards developed by Standards Development Organizations (SDOs) and approved by Standards Setting Organizations (SSOs). Standards are not merely technical manuals; they are coordination mechanisms that underpin interoperability across devices, networks, and platforms. They reduce transaction costs, expand market reach and create predictable architectures on which firms invest in complementary innovation. Empirical studies in multiple jurisdictions show that standardization is associated with productivity gains, knowledge diffusion and measurable contributions to GDP growth and firm revenue.

Technical standards are collectively agreed specifications that define how products and systems must operate to ensure interoperability, safety and performance. They are ubiquitous: telecommunications, IT equipment, industrial processes, payment infrastructures, automotive systems and consumer devices all depend on shared standards. Their benefits can be described along four axes: enabling interoperability between heterogeneous products; generating scale and network effects; widening consumer choice by ensuring compatibility; and serving as reference points for quality and safety.

The standard-setting process is structured around specialized bodies (SDOs/SSOs) that combine the participation of firms, research institutions and public bodies. These organizations

manage three functions: discovery (identifying promising technologies and potential standard candidates), standardization (selecting and consolidating technical specifications through open and consensus-driven processes), and regulation (setting intellectual-property rules, including FRAND policies and disclosure obligations for patents that are or may become essential). This governance architecture is designed to prevent the capture of the standardization process by any single firm and to ensure that standardized technologies remain broadly accessible.

Within this ecosystem, SEPs are patents that are indispensable to implementing a specific standard. Any company wishing to build a compliant product – such as a 5G handset, Wi-Fi router, video streaming device or connected car – must necessarily use the technologies covered by these patents. Because of that inevitability, SDOs require SEP holders to commit to license on FRAND terms. In theory, this commitment preserves a balance: SEP holders are compensated for innovation and R&D, while implementers and consumers benefit from broad access to interoperable technologies.

The Specificities of Standard Essential Patents That Require Differentiated Treatment

SEPs sit at the intersection of this governance structure and the patent system. Once a patented technology is incorporated into a standard and declared essential, it ceases to be one option among many and becomes a non-substitutable input. This shift has several implications:

Essentiality as gatekeeping power. While a regular patent can often be worked around through alternative designs, a SEP cannot: the implementer must obtain a license or abandon the standard.

Fragmentation and the "anticommons." Modern standards can encompass hundreds or thousands of SEPs, often held by different entities in multiple jurisdictions. Implementers must navigate a dense web of licenses, each covering a fraction of the required technology, increasing transaction costs and legal uncertainty.

Royalty stacking. If each SEP holder independently seeks to maximize its royalty, the cumulative burden can exceed the reasonable value of the standardized functionality, especially when the patented feature is only one small component of a complex product.

Non-practicing entities (NPEs) and asymmetric incentives. Whereas operating companies may balance licensing revenues against access to complementary technologies, NPEs derive their business model almost entirely from licensing and enforcement, which can lead to more aggressive strategies, as they do not bear downstream production or reputational risks.

For these reasons, FRAND commitments were introduced as institutional safeguards. They are not a separate form of license, but a set of constraints on how SEPs can be licensed: compensation should reflect the incremental value of the technology, implementers in comparable positions should receive comparable terms, and both parties should negotiate in good faith.

However, these safeguards are difficult to operationalize. There is no universal definition of what is "fair and reasonable," no single methodology for calculating royalties, and no clear standard for identifying what counts as discrimination or good-faith conduct. Information asymmetries exacerbate these difficulties: SEP holders typically have better access to data on comparable licenses and portfolio composition, while implementers may lack visibility on how their proposed terms compare to market practice.

In the absence of clear guidelines, FRAND commitments can be diluted into vague promises, and the structural leverage created by essentiality can be used in ways that undermine competition rather than support it. This is particularly true when injunctions are available as a low-threshold remedy.

The Absence of Specific Guidelines Fosters Anticompetitive Abuses and Market Distortions, Particularly in the Context of Injunctions

The Conduct: Strategic Use of Injunctions to Impose Supra-FRAND Royalties or Force Abusive Global Settlements

Injunctions are a legitimate remedy in patent law: they prevent continued infringement and are a natural consequence of the exclusive right conferred by patents. In the SEP context, however, their strategic use raises distinct concerns. Because SEP-covered technologies are unavoidable for standard compliance, injunctions can halt manufacturing, block imports, freeze inventories and even trigger recalls of products already in circulation. In markets where production cycles are tight and supply chains are global, the mere threat of an injunction can be enough to change negotiation outcomes.

The economic literature identifies three interconnected phenomena that make SEP injunctions particularly problematic:

Lock-in. Once a technology has been incorporated into a standard and widely adopted, implementers become dependent on it at multiple levels:

- Patent lock-in: alternative technologies that once existed ex ante are no longer viable ex post, as the standard has crystallized around specific solutions.
- Network lock-in: as more market participants adopt the standard, the cost of switching to an alternative becomes prohibitively high.
- Product lock-in: firms have sunk significant investments into R&D, tooling, certification, marketing and distribution based on the assumption that the standard will remain available.

Together, these layers of lock-in transform SEP exclusivity into structural blocking power: even a single injunction can functionally exclude a product from the market.

Hold-up. Hold-up occurs when one party exploits the other's sunk investments to extract concessions that would not have been accepted ex ante under competitive conditions. In SEP licensing, lock-in creates precisely this vulnerability. After implementers have committed

capital and integrated standardized technologies, SEP holders can threaten injunctions to renegotiate terms upwards, aiming at supra-FRAND royalties or tying arrangements that extend beyond the legitimate scope of the patent.

Royalty stacking and cumulative risk. When ownership of SEPs is fragmented, implementers must negotiate with multiple holders, each with the ability to request injunctive relief. Even if each individual royalty might appear manageable, the aggregate burden can be unsustainable. This cumulative pressure multiplies the leverage associated with injunctions and increases the likelihood of settlements driven by urgency rather than by the economic value of the technology.

Practically, these dynamics manifest in a range of litigation strategies:

- **Injunctions halting production and sales.** Temporary or permanent bans on manufacture, import or sale of standardized products.
- **Stop-ship and recall orders**. Measures that block distribution of existing inventories or require withdrawal of products already in the market, with significant logistical and reputational costs.
- **Anti-suit and anti-anti-suit injunctions**. Cross-border procedural tools used to control where FRAND disputes will be adjudicated, often in jurisdictions perceived as more favorable to extensive injunctions or to global royalty determinations.

In each of these cases, the economic risk borne by the implementer far exceeds the marginal value of the SEPs in question. This imbalance arises regardless of whether courts adjudicate disputes on a one-SEP-per-case basis or allow multiple SEPs to be asserted within a single proceeding, as is common, for example, in the United States. This asymmetry shifts the bargaining frontier: implementers may accept supra-FRAND conditions or global portfolio licenses covering weak or non-essential patents simply to avoid operational disruption. When courts do not apply specific criteria to SEP injunction requests, these strategies are effectively validated, and the FRAND commitment is undermined.

Framing Anticompetitive Abuse and the Importance of Guidelines to Identify and Remedy It

Faced with these challenges, major jurisdictions have progressively moved toward differentiated treatment of SEPs, combining patent, competition and public-interest considerations. While their doctrinal paths diverge, they converge on a core premise: injunctions involving SEPs should not be granted automatically and must be subject to heightened scrutiny.

In the European Union, the cases Samsung and Motorola (2014) marked the recognition that SEP injunction requests can constitute abuse of dominance under Article 102 TFEU when used to pressure implementers who are willing to enter into FRAND licenses. The Court of Justice further refined this approach in Huawei v. ZTE (2015), establishing a procedural framework that links the legitimacy of injunctions to the parties' negotiation behavior. SEP holders must notify alleged infringers, make a specific FRAND offer and engage constructively in negotiations; implementers must respond diligently and present counter-offers when appropriate. While

this model provides structure, it has also faced criticism for introducing subjective "good faith" assessments that can prolong litigation and favor more sophisticated parties.

In the United States, the turning point was eBay v. MercExchange (2006). Although not a SEP case, the decision fundamentally reshaped the doctrine of injunctive relief by rejecting automatic injunctions and requiring courts to apply a four-factor test: (i) irreparable harm; (ii) inadequacy of monetary remedies; (iii) balance of hardships; and (iv) public interest. Because this framework applies to all patents subject to equitable relief, subsequent courts interpreted eBay as directly applicable to SEPs.

Subsequent decisions, including Apple v. Motorola and other SEP-related disputes, applied this framework to FRAND-encumbered patents, holding that injunctions are generally inappropriate when monetary damages can adequately compensate the patent holder. Empirical studies indicate that eBay reduced the rate of permanent injunctions, encouraged additional R&D investment in litigation-exposed ICT firms and generated measurable welfare gains by mitigating hold-up and royalty stacking.

Across Asia, several authorities have integrated competition-law concerns directly into SEP enforcement. In China, the Qualcomm case and the 2024 Antitrust Guide for SEPs issued by the State Administration for Market Regulation (SAMR) address practices such as tying non-SEPs to essential portfolios, imposing unfair licensing conditions and leveraging SEPs to exclude competitors. Japan's METI and JPO have released guidance on SEP negotiations, emphasizing transparency and predictability. In South Korea, the KFTC's decisions, also involving Qualcomm, treat the misuse of SEPs as an anticompetitive practice and impose remedies designed to restore contestability in downstream markets.

Although these jurisdictions differ in legal tradition and institutional design, they share three relevant features: (i) SEPs are explicitly recognized as requiring differentiated treatment relative to ordinary patents; (ii) Injunctions are subject to additional filters – procedural, substantive or both – reflecting the FRAND commitment and the systemic role of standards; (iii) Competition authorities and courts interact, either formally or informally, to ensure that SEP enforcement remains compatible with broader policy goals related to innovation, access and consumer welfare.

The Brazilian Context: Absence of Specific Criteria, Exposure to Abuses, and Recommendations

Brazil stands out for the absence of SEP-specific safeguards. In practice, courts apply the same criteria to SEPs as to any other patent: likelihood of success on the merits and risk of irreparable harm, with limited or no integration of FRAND, essentiality or competitive impact in their reasoning. Preliminary injunctions, including ex parte measures, have been repeatedly granted at early stages of litigation in SEP disputes.

Historic cases such as Ericsson v. TCT and Vringo v. ZTE already signaled that Brazilian courts were receptive to early injunctive relief in SEP contexts. More recent disputes have reinforced that pattern. In DivX v. Netflix, a Rio de Janeiro business court imposed a final

injunction preventing Netflix from offering content with certain video functionalities tied to an HEVC-related patent, treating the matter as an ordinary infringement case without explicit consideration of essentiality or FRAND. In Ericsson v. Lenovo/Motorola, also in Rio, an injunction prohibited the manufacture, sale and distribution of 5G-compatible devices using Ericsson's security technologies, backed by substantial daily fines, again without analysis of SEP-specific constraints.

In parallel, an alternative line of reasoning has only recently begun to surface in Brazil, and so far only in a handful of isolated rulings. In DivX v. Gorenje, a preliminary injunction initially granted in favor of the SEP holder was subsequently suspended and replaced with a judicial bond, allowing the implementer to continue operating, reflecting a judicial assessment that the dispute was fundamentally monetary and that market exclusion would have been disproportionate.

In the provisional order issued in May 2024, the Rio de Janeiro State Court further clarified that, before obtaining preliminary injunctive relief in SEP disputes, patent holders bear the burden of demonstrating that they have offered a license on FRAND terms, with particular emphasis on the non-discrimination requirement. This understanding, however, remains fragmented and has yet to crystallize into a coherent national standard.

From the competition-law perspective, CADE's trajectory has also evolved. In older cases, such as Ericsson v. TCT, SEP licensing and injunction disputes were treated predominantly as private contractual matters, not as potential anticompetitive conduct. More recently, CADE has opened investigations into SEP-related practices (for example, involving 5G licensing and global portfolio negotiations) and has published an analytical report explicitly warning that Brazilian courts – especially those in Rio de Janeiro – are being used as leverage points in global SEP disputes because of their willingness to grant broad injunctions without SEP-specific scrutiny. Despite these signals, Brazil still lacks:

- Uniform judicial criteria recognizing the hybrid nature of SEPs and integrating FRAND into injunction analysis.
- Structured channels for coordination between courts, CADE, INPI and sector regulators in cases that raise competition or public-interest concerns.
- Guidance to distinguish legitimate IP enforcement from strategic litigation aimed at maximizing leverage via market exclusion.

The result is a framework in which exclusionary remedies can be obtained relatively quickly, creating incentives for forum shopping and increasing the risk that Brazil will be used as a pressure jurisdiction in global disputes. This not only distorts bargaining dynamics but can also affect national priorities such as 5G deployment, industrial digitalization and consumer access to standardized products.

Recommended Direction: Objective, Effects-Based Criteria for SEP Injunctions

To address these gaps, the analysis proposes a shift towards an effects-based framework inspired by the logic of the eBay test but adapted to Brazilian law and institutions. The core idea is not to eliminate injunctive relief in SEP cases, but to condition it on objective filters that reflect the FRAND commitment and the systemic role of standards. Four principles stand out:

- **Irreparability should not be presumed**. When a SEP holder has voluntarily committed to license on FRAND terms, it implicitly recognizes that monetary compensation is the primary channel through which value will be realized. Claims of irreparable harm must therefore be examined with care, especially where the holder does not itself manufacture products, has access to escrow mechanisms or can be compensated retroactively.
- **Monetary remedies should be treated as presumptively adequate.** Before granting an injunction, courts should assess whether less restrictive measures – such as bonds, escrow, provisional royalties or detailed accounting orders – can protect the patent holder's interests. In many SEP disputes, the underlying conflict is purely monetary; in such cases, exclusionary relief is disproportionate relative to the harm inflicted on implementers and consumers.
- **Balancing of hardships must incorporate lock-in and downstream risks.** Implementers operating in standardized markets face greater and more systemic harm from exclusion than SEP holders face from temporary unlicensed use. Production shutdowns, recalls, supply-chain penalties and reputational damage can be severe, particularly when multiple SEP holders may follow with similar claims. These realities should be explicitly considered in any proportionality assessment.
- **Public interest should be a central factor.** Standards underpin critical infrastructure and digital services. Excluding compliant products from the market can slow technological diffusion, reduce consumer choice and undermine policy objectives related to connectivity, innovation and competition. In SEP disputes, public-interest considerations are not peripheral; they are integral to determining whether injunctive relief is appropriate.

In addition to judicial criteria, the analysis recommends strengthening institutional coordination. CADE could be positioned to provide expert input where SEP disputes raise competition concerns. INPI could explore mechanisms to improve transparency on essentiality claims, which would benefit courts when assessing the weight to be given to a particular patent. Sector regulators – for example, in telecommunications – could identify contexts where SEP injunctions may conflict with deployment or coverage objectives, informing the public-interest analysis.

Crucially, adopting these principles does not require Brazil to transplant foreign models wholesale. Rather, it suggests that the logic of differentiated treatment – with emphasis on proportionality, compensability and market effects – should inform the evolution of national doctrine and practice. The result would be a framework that is consistent with Brazilian legal traditions yet aligned with international benchmarks. For courts, the development of SEP-

specific criteria would provide a clearer analytical path in an area that is currently handled through generic tools. Judges would be able to:

- Distinguish between ordinary patent disputes and those involving essential technologies;
- Evaluate injunction requests in light of FRAND commitments and systemic consequences;
- Issue remedies that protect legitimate IP rights without inadvertently endorsing hold-up or supra-FRAND strategies;
- Reduce legal uncertainty by providing predictable signals to both SEP holders and implementers.

For CADE and policymakers, a modern SEP framework would support a more coherent interface between IP and competition law. It would help identify when SEP enforcement crosses the line from legitimate exclusion of free-riders into abuse of dominance or unfair licensing practices. It would also facilitate the design of advocacy initiatives aimed at informing judges and litigants about the competitive implications of SEP disputes. For the broader ecosystem – industry, consumers and the State – the benefits would include:

- Greater legal certainty for investment and product-launch decisions in standardized markets;
- Reduced risk of forum shopping and of Brazil being used as a leverage point in global disputes;
- More efficient diffusion of technology, as legitimate FRAND licensing is preserved and strategic blocking is discouraged;
- Alignment with international best practices, enhancing Brazil's credibility in global IP and technology governance.

Conclusion

Standard Essential Patents are not simply "important patents." They are structural components of the governance architecture that supports interoperability and innovation in technology-intensive markets. Their hybrid nature – combining exclusive rights with access commitments – demands a legal response that is more nuanced than the framework currently applied in Brazil. When SEPs are treated as ordinary patents and injunctions are granted without SEP-specific criteria, legitimate enforcement and strategic hold-up become indistinguishable in practice, particularly in the early stages of litigation.

International experience demonstrates that this is neither inevitable nor desirable. Jurisdictions that have re-examined SEP enforcement through the lenses of proportionality, FRAND and public interest have managed to preserve incentives for innovation while reducing the probability that SEP disputes will be used as tools of market distortion. Brazil, which is in the midst of critical investments in telecommunications, digital infrastructure and connected industries, has strong reasons to move in the same direction.

This Executive Summary argues that the path forward lies not in weakening IP protection, but in aligning enforcement mechanisms with the economic realities of standardization. By adopting objective, effects-based criteria for SEP injunctions and strengthening coordination among courts, CADE, INPI and regulators, Brazil can reduce uncertainty, discourage opportunistic litigation and ensure that SEPs fulfill their intended function: enabling, rather than obstructing, innovation, competition and access to technology.