



ICT Patent adjudication in Brazil in the last decade (2013-2023)

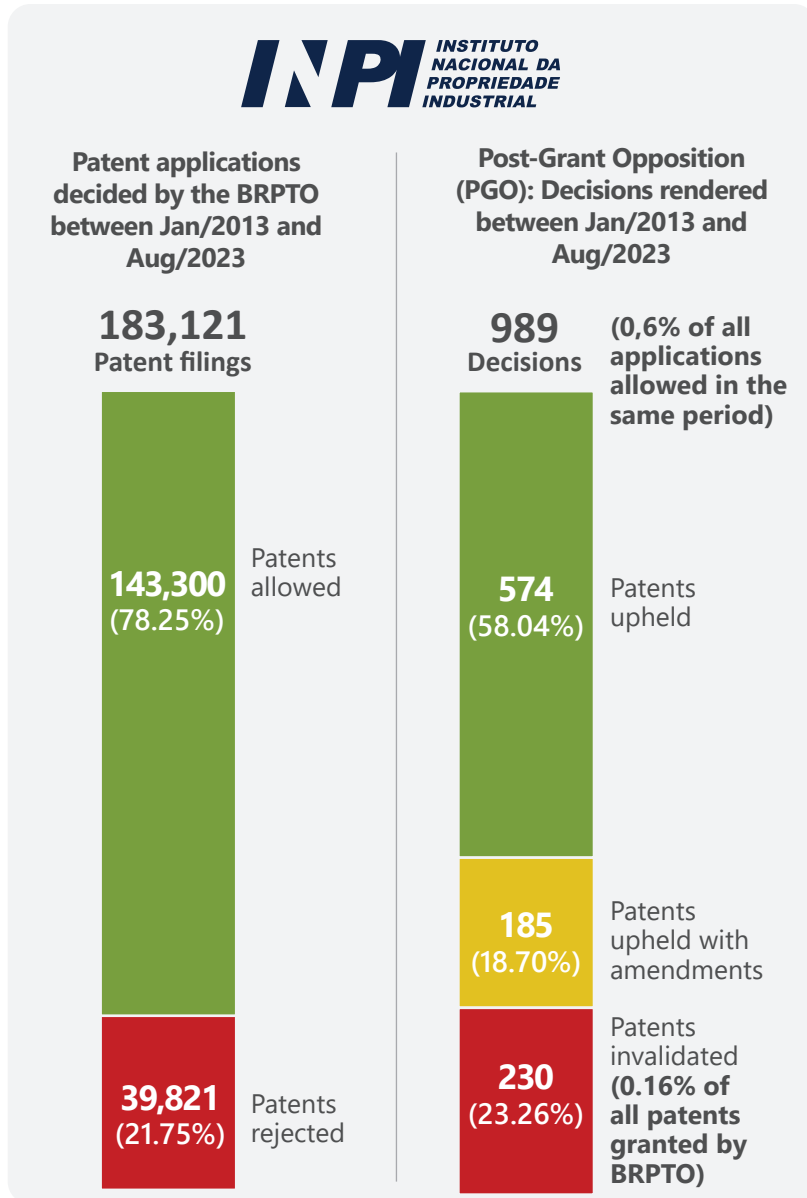


WHEN FAILURE IS NOT AN OPTION,
WE CAN LEAD THE WAY

WINNING IS AT THE CORE OF OUR PRACTICE

Licks Attorneys' team of 300+ members handle complex litigation, IP, regulatory, commercial and corporate disputes for over the last 20 years, supporting companies of all sizes and technological fields from all over the world.

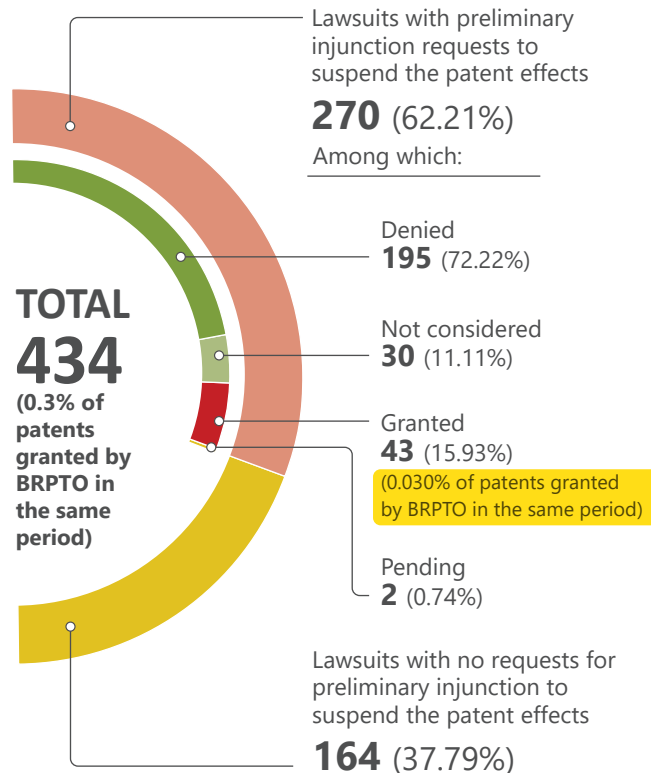
The predictability and certainty of the Brazilian patent system in the last 10 years (Jan/2013 - Aug/2023)



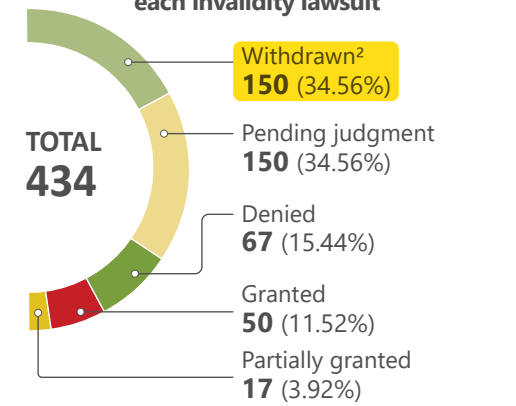
Patent invalidity lawsuits filed between Jan/2013 and Aug/2023¹



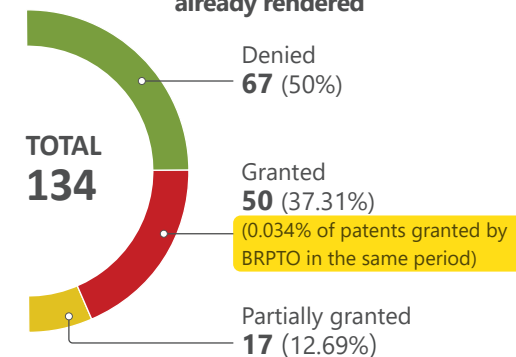
Analysis of preliminary injunction requests to render the patent unenforceable during the litigation



Analysis of the decisions on the merits of each invalidity lawsuit



Total lawsuits with merit decisions already rendered



¹ The research was limited to cases filed and decision issued at trial level (district court).

² The percentage of patent invalidity lawsuits "withdrawn" consist of lawsuits in which there was no analysis or decision about the validity of the patent, including any form of settlement.

The 434 patent invalidity lawsuits filed nationwide in the last 10 years were distributed as follows upon docketing: JFRJ (379), JFSP (31), JFRS (8), JFDF (6), JFSC (6), JFPR (4), JFMT (3), JFBA (3) and JFMG (1); regardless of any later reassignment to other district court or Circuit Court.

The Brazilian Legal System

Brazil has a legal system based on the Continental European civil law tradition, influenced by Portuguese and German Law, and the Napoleonic Code. Most recently US law.

The country's formal written 1988 Constitution provides for:

- Division of powers between three branches: executive, legislative, and judiciary.
- Judiciary's two different sets of self-governing courts, independent of the executive branch: federal and state courts.
- The organization and jurisdiction of the federal courts.

The country's legal system makes the foundation for the Brazilian patent adjudication.



The Brazilian bifurcated system of patent adjudication

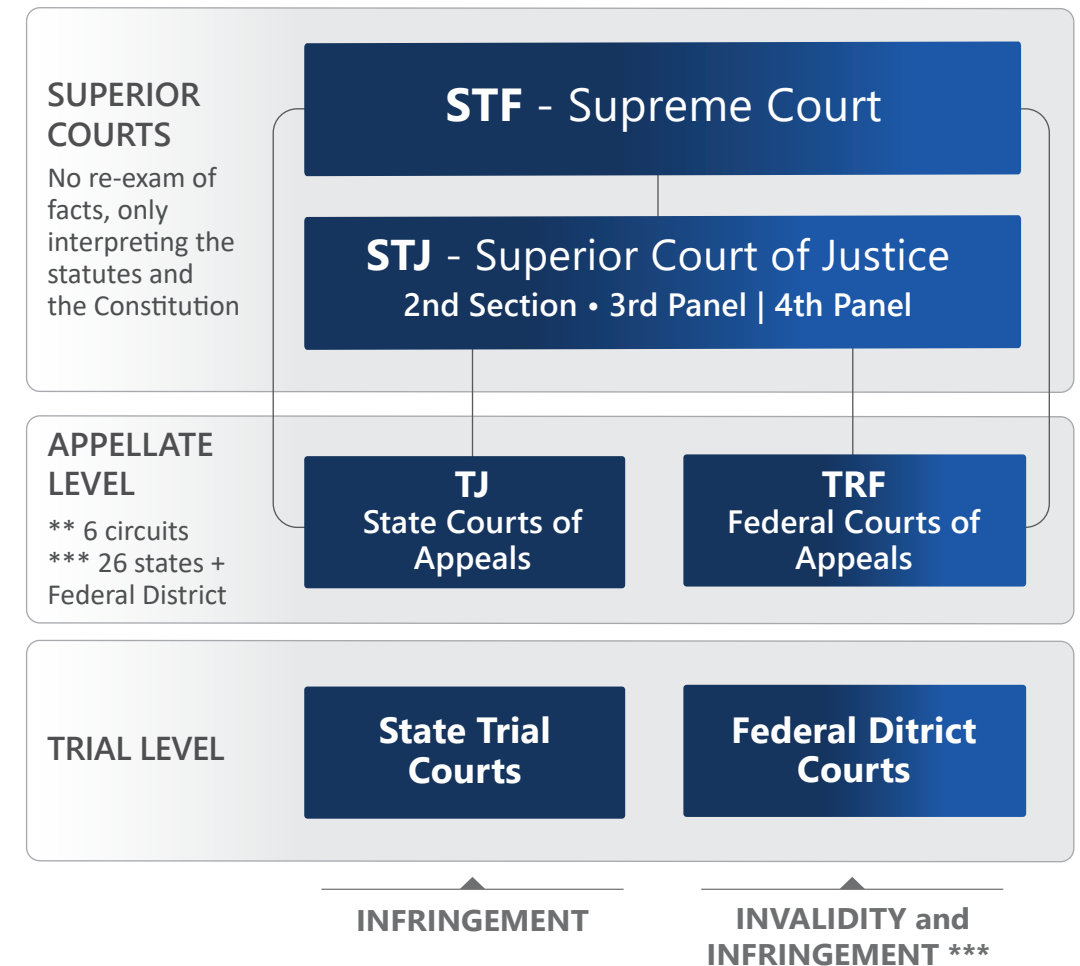
A patent might be challenged before the BRPTO up to six months after its grant. The decision is subject to judicial review by Federal Courts, with no judicial deference.

Infringement lawsuits are filed before State Trial Courts, and invalidity lawsuits are filed before Federal District Courts.

Federal Courts also hear infringement claims against the Federal Government and its departments and agencies, as well as civil actions to obtain a patent, usually after a final rejection of an application by the BRPTO.

Federal Courts might render a patent unenforceable during the invalidity case. These preliminary decisions have been issued in 15% of the cases in the last 10 years. A State Courts may stay an infringement case to await the outcome of a parallel invalidity case. A stay is rare.

The Federal and State court proceedings don't move at the same speed. A State court decision on infringement is faster.



**** Infringement claims against the Federal Government and its agencies.

SEP and non-SEP patent invalidity litigation in Brazil as of Aug. 31, 2023

Licks Attorneys have represented all patent owners in the 18 cases filed in the country since 2012

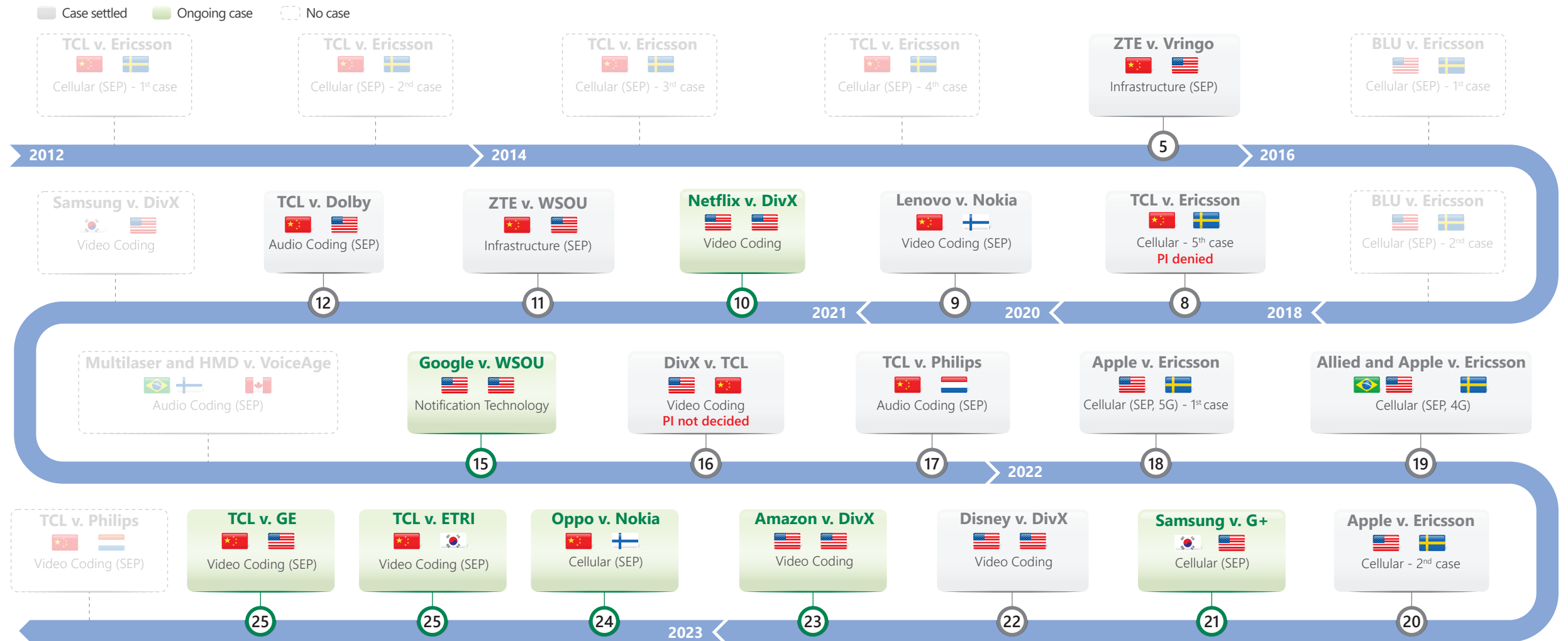
11 (out of 18) are SEP's (61%) • None of the SEP invalidity cases had PI requests and seven were settled (63,6%)

Seven (out of 18) are non-SEP (39%) • Two of the non-SEP invalidity lawsuits had PI requests, one was granted for 21 months (overruled afterwards) and the other was not decided • Of the seven non-SEP Cases, 4 were settled (57%)

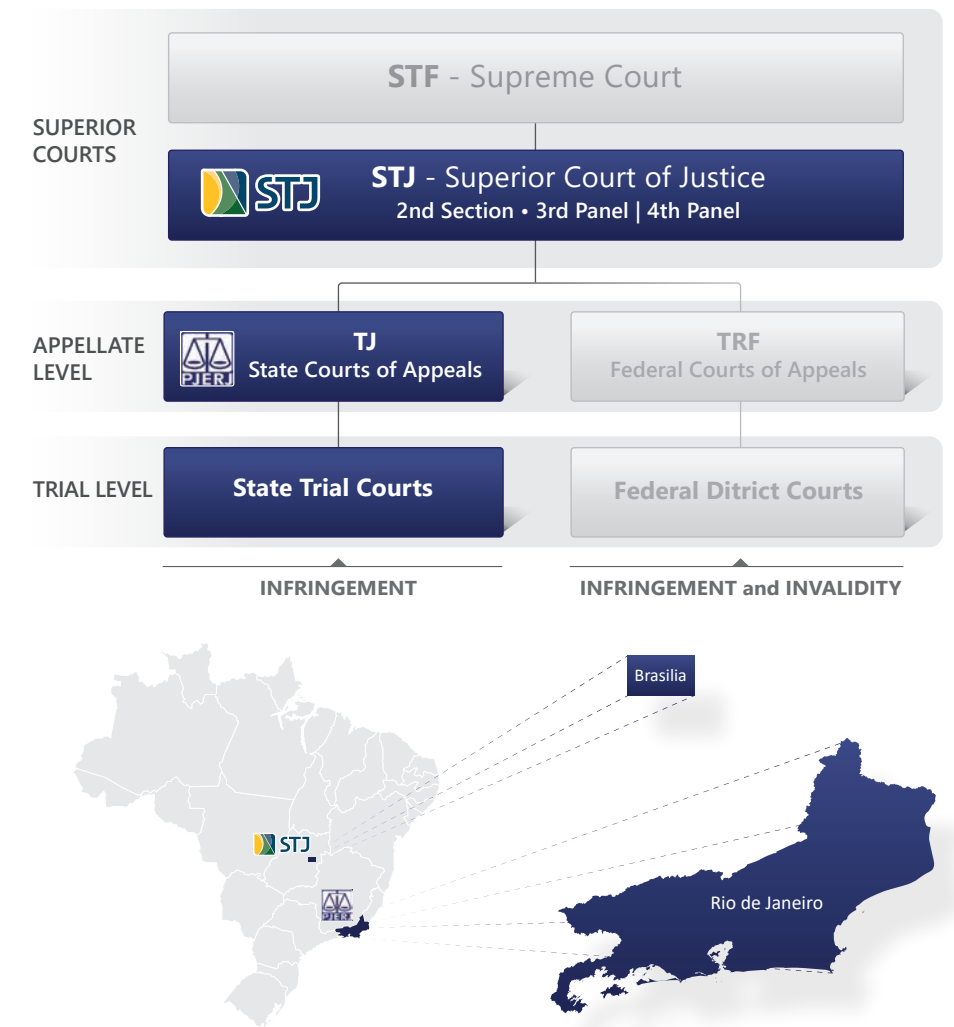
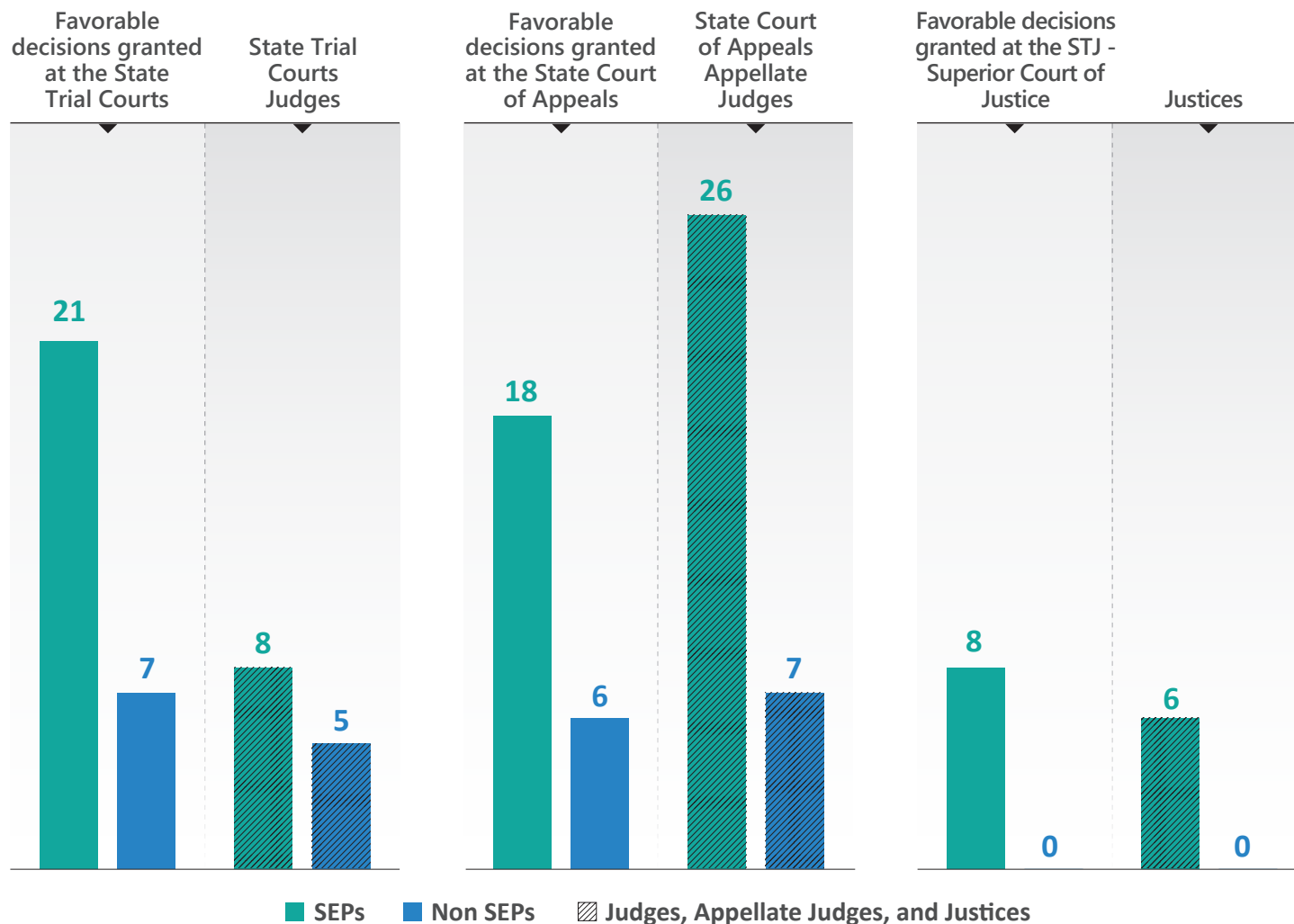
Of the seven pending cases, two are stayed (28%). **Licks Attorneys have managed to prevent the invalidation of all ICT patents**

In invalidity lawsuits, the BRPTO (INPI) is a mandatory co-defendant, along with the patent owner

Of the 14 BRPTO's answers to the invalidity complaints, which are persuasive to the judge's decision, six (42%) were favorable to the patent owners' interests, seven (50%) were partially favorable to the patent owners' interests, and one was against patent owners' interests

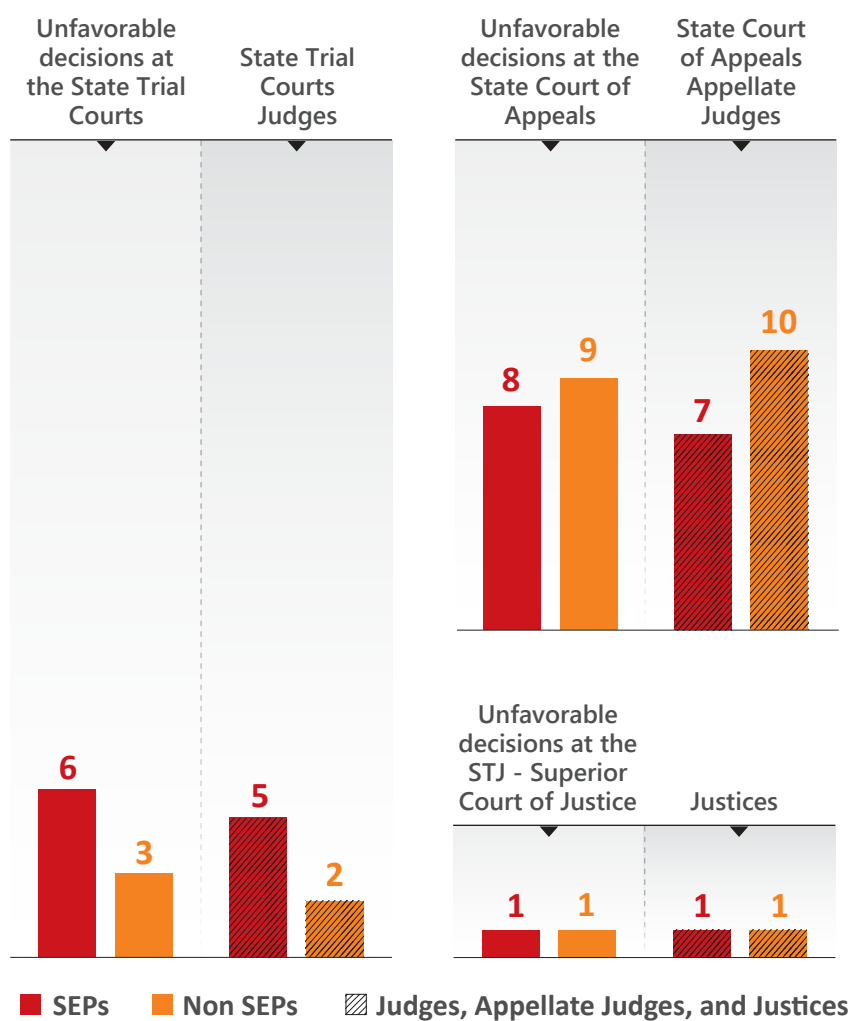


60 favorable decisions granting and maintaining preliminary injunctions in ICT adjudications against unwilling-licensees issued by 47 Brazilian judges



14 unfavorable decisions denying or staying preliminary injunctions in ICT adjudications against unwilling licensees (7 SEPs, 7 Non-SEPs)

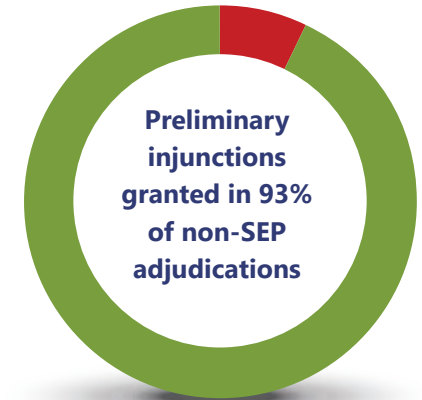
14 additional unfavorable decisions were reviewed or overruled in favor of patent owners, with seven judges changing their opinions favorably to grant the preliminary injunctions (8 SEPs, 6 Non-SEPs)



Arguments used to deny or stay the effects of preliminary injunctions	Arguments on the decisions not vacated or overruled		Arguments on the decisions reviewed or overruled	
	State Trial Courts	State Court of Appeals	State Trial Courts	State Court of Appeals
A Court- appointed expert examination is required	9	8 11 15 16 21 23	8	10 14 18
The defendant is capable of assuming the eventual debt	15	15 19	12 13 19	10 14 16
Negative impact to the business activity	—	11 16 19 21	8	8 14
There is no irreparable harm	—	10 11 21	8 18	8 14 16
Lack of urgency: defendant uses the technology for a long time	—	16 21 23	8	8 10
Unfeasible for the defendant to fulfill the obligation imposed by the injunction	—	8 19	12	—
Answer of BRPTO on invalidity challenge agreeing with the invalidity of some claims do not allow establishing likelihood of success at this time	—	16 21	—	—
Impact of PI on public interest and consumers	—	16	—	—
Technical evidence presented by plaintiff should be subject to due process	—	19	—	8 10
Technical evidence presented by both parties do not allow establishing likelihood of success at this time	—	16 21 23	—	—
Violation of free enterprise and fair competition	4	—	18	—
Patent owner cannot refuse SEP licensing	4	—	18	—
The defendant does not engage in direct competition with the plaintiff	—	23	8	—

Brazilian jurisdiction highlights

- Preliminary and permanent injunctions, and damage awards are available for SEPs and non-SEPs.
- NPE patentee-friendly jurisdiction.
- FRAND commitments and agreement not litigated in Brazil.
- Legacy patents: 10 years from grant validity term for patents issued before May 2020.
- Many Patents expired worldwide are usually still valid in Brazil.
- Brazilian Courts have never set the royalty rates for local or global licenses of SEPs.
- No protective letters, preliminary review of validity, or anti-suit preliminary injunctions.
- Assertion of a single patent is sufficient to deter infringement.
- No antitrust violation on the enforcement of SEPs against hold-out.
- Bifurcated system with no automatic stay of infringement. Invalidation litigation is slow. Killing rate is low.
- Most SEP cases established infringement over the relevant part of the standard and not infringing use.
- Infringement lawsuits are not judged or dismissed based in procedural grounds or technicalities.



The Brazilian bifurcated system of patent adjudication

There is no jury trial in patent adjudication. Only bench trials (summary judgment and full trials). Federal and State decisions are rendered by career judges, who are not appointed nor elected.

Despite under States, **infringement courts only apply federal law and the same federal procedures.**

The selection process for joining the federal and state benches is based on a public test, organized by the State or Federal Circuit judicial power with the open position. Admission is to the career (in a particular state, or at Federal level), not to a specific court. Trial judges progress in the career, being promoted to more important trial courts and to the appellate court based on seniority.

Decisions from second and third-instance courts on appeals from the merits and on interlocutory appeals are rendered before the people, immediately after the oral

hearings. **Deliberations and votes are public.**

Federal and State courts follow jurisdiction and venue rules provided for in the Constitution and the Civil Procedure Code (Federal Law).

Despite being organized by the Brazilian States, the infringement courts only apply federal law and have the same federal procedures.

There is no US style discovery, deposition, or cross-examination. US discovery orders are enforced in Brazil.

“Battle of the experts” jurisdiction. Experts write opinions and are not deposed. There is no hot tubbing.

Procedures are e-“paper-based” (all filings electronic).

Most hearings are attended only by lawyers.

Brazil is a safe jurisdiction for ICT SEP litigation against hold-out by unwilling licensees

The Brazilian Judiciary sees SEP owners' obligations with standard-setting organizations (SSOs) as a matter of foreign law. Thus, Brazil doesn't have jurisdiction to establish / enforce FRAND commitments.

The Brazilian Judiciary knows that parties never choose Brazilian Law to determine the rules of a global licensing contract. Thus, Brazil doesn't have jurisdiction to establish global royalties for foreign contracts.

Brazilian Courts have never set the FRAND terms or royalty rates for global licenses of SEPs, since the country's courts have no jurisdiction over such matters. Courts never settled FRAND royalties for Brazil.

Decisions concerning the definition of global FRAND rates are seen as a defiance to other countries' sovereignty and jurisdiction.

The Brazilian Judiciary does not limit the rights of a SEP owner guaranteed by the country' constitution and patent statute, as it does not grant compulsory licenses to unwilling licensees practicing hold-out.

State Court SEP decisions are valid nationwide: TROs, exclusion orders, preliminary injunctions, permanent injunctions, and damages.

Brazilian Administration has no intention of regulating SEPs. **The Brazilian antitrust authority has cleared the enforcement of SEPs against unwilling licensees.**

Statutory authority for interlocutory relief, preliminary injunctions, and TROs from State and Federal courts

Brazilian Patent Statute #9,279 of 1996

Article 209. [...]

Paragraph 1. The judge may, in the case records of the same action, to avoid irreparable damages or damages that would be difficult to recover, grant an injunctive order to suspend the violation or act that has such in view, before summoning the defendant, against, if deemed necessary, monetary caution or a fiduciary guarantee.

Brazilian Patent Statute #9,279 of 1996

Article 300

Interlocutory relief shall be granted when there are elements that prove the probability of the alleged claim and the risk of loss or injury to the useful outcome of the lawsuit.

Paragraph 1. 1 In order to grant interlocutory relief, a judge may demand suitable security interest [...]

Paragraph 2. Interlocutory relief may be granted on a preliminary basis or upon prior justification.

Paragraph 3. Interlocutory relief of a preliminary nature shall not be granted when there is a risk of the effects of the decision being irreversible.

Examples from Federal Courts Preliminary injunctions to stay the effects of a granted patent while a validity challenge is pending, or to reinstate prosecution of a patent application.

Examples from State Courts Preliminary injunctions for search and seizure of products or evidence, ordering recalls, stay in sales, exclusion orders at customs, ordering to maintain log of sales, inventory, etc. Preliminary injunctions in lawsuits seeking a declaratory judgement of non-infringement, to allow products to be sold and used, as well as process to be continuously used or implemented.



No antitrust liability

The Brazilian antitrust authority (CADE) has found in *TCL v. Ericsson* that a SEP enforcement case is a private matter to be resolved in a private dispute, **not warranting the interference of the Government**:

*"It is therefore noticeable that the facts presented before this authority are linked to a private relationship of the parties, which means that, although the Defendant's acts may have impacted the economic activities of the Plaintiff and, possibly, the financials of the company, this is a result of reasonable grounds and arguments, and **could not be interpreted as an infringement to the economic order, as it could not lead to anticompetitive effects on the market.**"*

CADE has decided that the patent owner is entitled to file lawsuits to enforce patent rights, and the assertion of SEPs in that case is **reasonable given the long period of unfruitful negotiations** and the **many licensing agreement** with other players in the industry.

CADE has mentioned that matters involving negotiations of a licensing agreement and SEP infringement are generally a **matter of contract and patent law**, and only exceptionally will concern competition law.

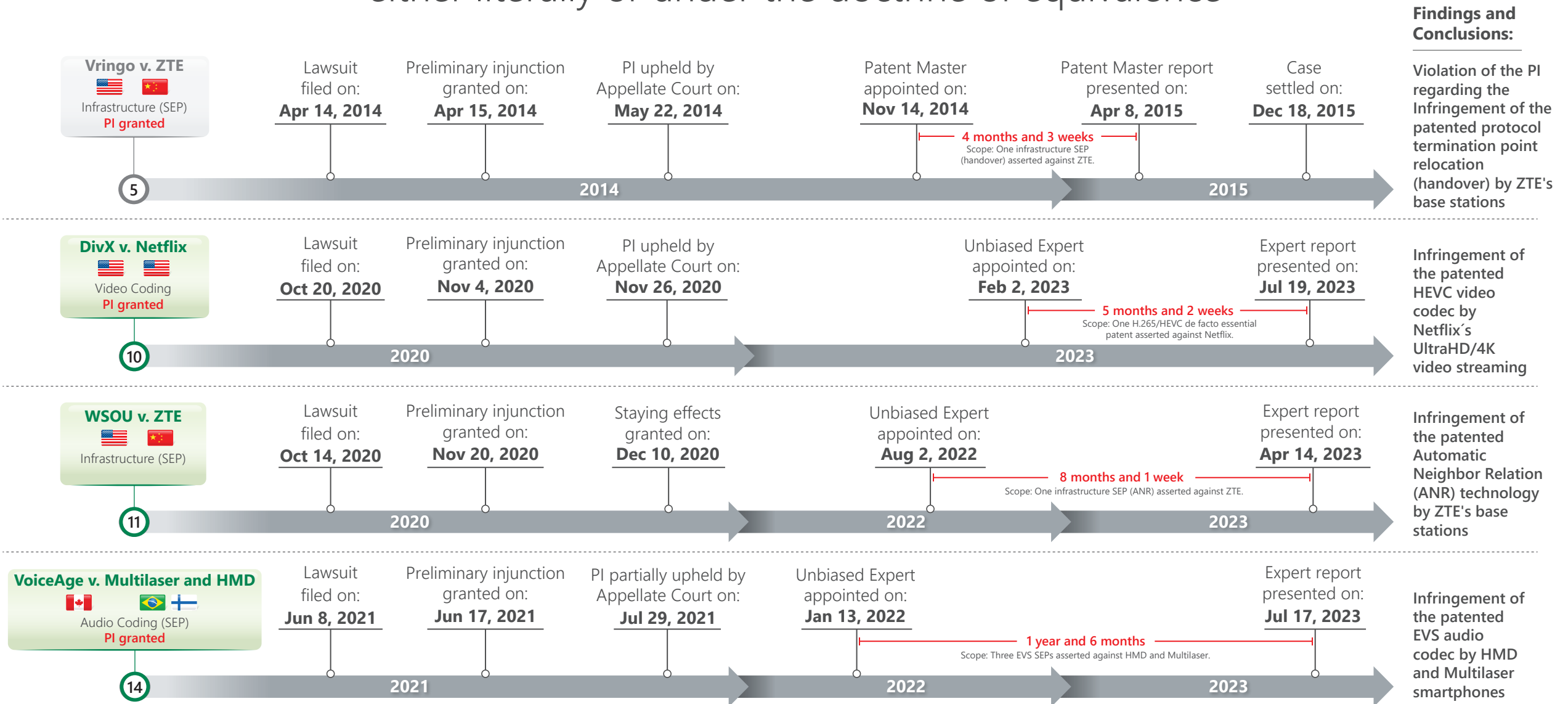


The position of the Brazilian FCC (ANATEL)

4.5.11 The Personal Mobile Service, a substitute for the Cellular Mobile Service, is regulated by Anatel¹⁵. References to additional facilities and amenities can be found in the approved regulation, but these are not disclosed. The regulation does not define which technologies may be employed for services to be provided.

Conflict disclosure: Licks Attorneys represents the defendants in the case(s) mentioned above.

All court-appointed unbiased experts have agreed with Licks Attorney's claim construction and infringement theories of every single adjudicated patent claim, either literally or under the doctrine of equivalence



Brazilian economic system relevant data

➤ **GDP 2022:** R\$9,9 Trillion - \$1,92 Trillion.

➤ **GDP growth (2022):** 2.9%.

➤ **Inflation last 12 months:** 3.94%.

➤ **General Market Price Index (IGP-M) (2022):** 5.45%.

➤ **Credit Card Installment Interest Rate:** 204.4%/year.

➤ **Credit Card Revolving Interest Rate:** 487.36%/year.

➤ **Cash Flow Loan Interest Rate:**
(i) Working capital with a term up to 365 days - 40.85%/year; (ii) Working capital with a term exceeding 365 days- 26.75%/year; (iii) Overdraft - 216.74%/year.

➤ **Basic interest Rate:** 13.75%/year

➤ **Judicial recoveries**
(Jan-apr 2023) = 382 - 38% growth

Brazil is an ICT significant jurisdiction



Large
market

5th smartphone market
in the world

Heavy user

1st

share of desktop search
traffic originating from

Google

3rd

WhatsApp and
Instagram



2nd

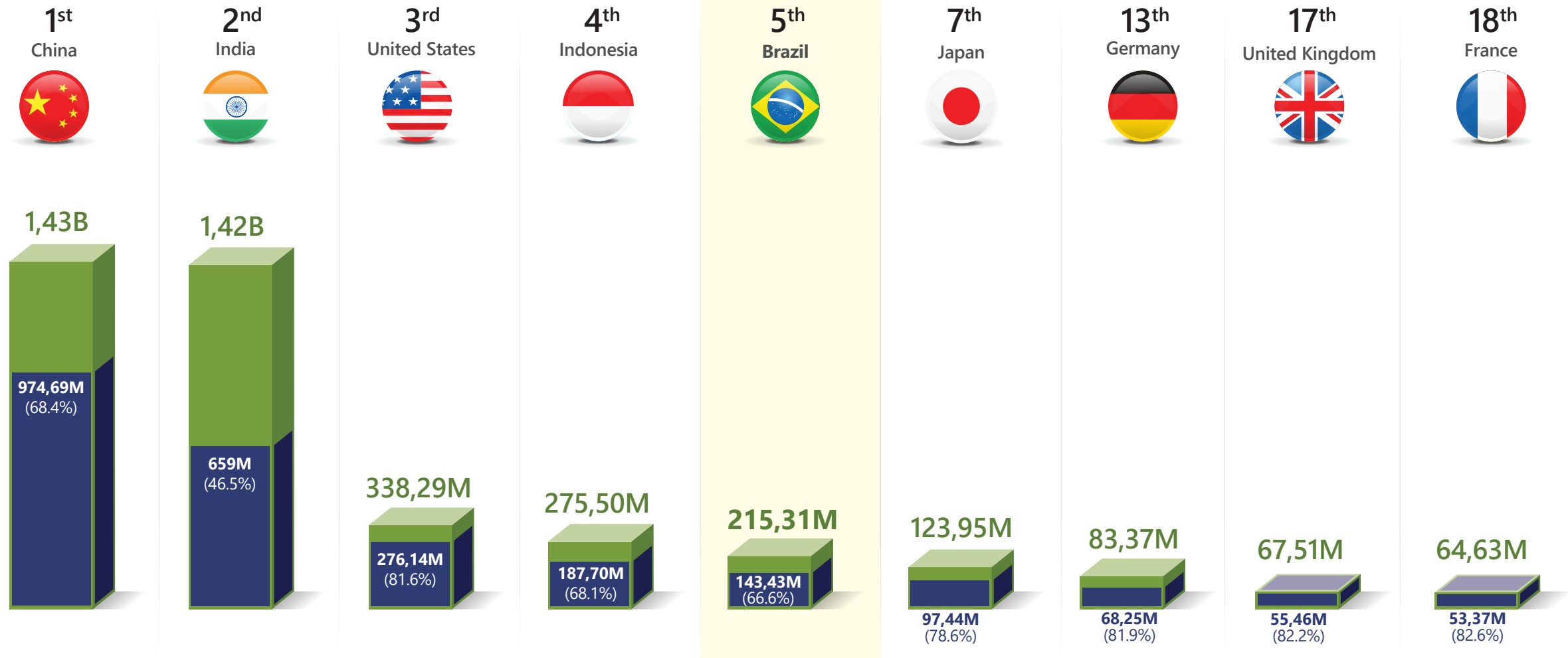
NETFLIX

4th

facebook
and Internet use

Smartphone market in the world - Year of 2022

■ Total Population (in million) ■ Smartphone Users (in million)



*Source: Newzoo Top Countries/Markets by Smartphone Users Report



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