

Why Can't We Be FRANDs?: Anti-Suit Injunctions, International Comity, and International Commercial Arbitration in Standard-Essential Patent Litigation

Picking up a smartphone to contact someone across the globe is facilitated by technical standards like 5G. These standards allow for technological compatibility worldwide. For instance, a 5G capable device can connect to 5G networks anywhere in the world because the same 5G standard is used globally. Standards, particularly those integral to the telecommunications industry, are also highly complex and contain many patents that are necessarily infringed when the standard is implemented. To avoid rampant patent infringement, owners of these standard-essential patents (“SEPs”) are required to license them to standard implementers at fair, reasonable, and non-discriminatory (“FRAND”) rates when their patents are incorporated into a standard. Apart from that, standard setting organizations (“SSOs”) provide minimal guidance about what rates are FRAND. As a result, SEP litigation over whether a rate is FRAND has spiked.

Courts hearing FRAND cases can set global rates, but patent rights are territorial. In response to the threat of foreign courts setting rates on patents granted in their jurisdiction, some courts have issued anti-suit injunctions to prevent parties from litigating a FRAND dispute elsewhere. This rise in anti-suit injunctions has resulted in some courts turning to anti-anti-suit injunctions as a response or preemptive measure. Parties have even petitioned courts for anti-anti-anti-suit injunctions. This spiral poses a threat to international comity because these injunctions, although directed at the litigants, interfere with a foreign court's ability to decide what to do with a matter before it. Within the FRAND context, an added danger is the potential breakdown of future technological interoperability if some parts of the world adopt different standards than others. For example, this might make some smartphones incompatible with some cellular data networks. In place of litigation, international commercial arbitration has been used with some success in FRAND disputes, but there are downsides to using arbitration alone.

This Note recommends federal courts grant anti-suit injunctions in SEP litigation only under a restrictive test, rather than maintaining the current

variation by circuit. Injunctions that up the “anti” should face greater scrutiny under a stricter test with international comity guiding the decision through concrete factors outlined in the sections on nonrecognition of foreign judgments in the Restatement (Fourth) of Foreign Relations Law of the United States. The Note further suggests that Congress should codify this test, but in the event of an injunction spiral that might preclude litigation altogether, SSOs should require the parties arbitrate the dispute before experts at the World Intellectual Property Organization (“WIPO”). Together, litigation and arbitration can help preserve the interconnected and technologically compatible system currently in place around the world.

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INTRODUCTION

Smartphones can now hold more computing power in their pocket-size footprints than the computer aboard Apollo 11.¹ People connect with one another on their smartphones using Wi-Fi or cellular data networks, and they are still able to use those networks after traveling to a new location, whether down the street or around the world. That ability could be disrupted, however, depending on the outcome of legal battles over patents within those telecommunications technologies.

Much of the telecommunications industry's success is premised on the creation and adoption of technical standards, like Wi-Fi and 5G. A technical standard is “[a] specification of the design of particular goods or components.”² These standards are crafted by standard setting organizations (“SSOs”) and used throughout industries.³ For example, the Institute of Electronic and Electrical Engineers (“IEEE”) created the IEEE 802.11 family of standards, commonly known as Wi-Fi.⁴ Wi-Fi networks are used globally to wirelessly connect devices to the internet. In a world without standards, multiple wireless network technologies might operate across the globe with certain smartphones only capable of connecting to certain networks.⁵ If this happens, the world loses technological compatibility and becomes technologically fragmented. The burdens of this fragmentation would likely weigh

1. See Graham Kendall, *Apollo 11 Anniversary: Could an iPhone Fly Me to the Moon?*, INDEPENDENT (July 9, 2019, 3:12 PM), <https://www.independent.co.uk/news/science/apollo-11-moon-landing-mobile-phones-smartphone-iphone-a8988351.html> [<https://perma.cc/927P-5PRH>] (noting phones nowadays have slightly more than 1,000,000 times more memory and 100,000 times the processing power).

2. *Technical Standard*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803102805121> (last visited June 22, 2022) [<https://perma.cc/MTN7-DFXT>]. “Examples range from the gauges of screw on nuts and bolts to the voltages of electronic equipment.” *Id.*

3. See Eli Greenbaum, *Forgetting FRAND: The WIPO Model Submission Agreements*, LES NOUVELLES 81 (June 2015), https://www.wipo.int/export/sites/www/amc/en/docs/frand_2015.pdf [<https://perma.cc/E4E6-SVTU>] (“SSOs provide a venue for market participants to meet, discuss and establish relevant technological standards.”).

4. *IEEE 802.11-2020*, IEEE STANDARDS ASS'N, https://standards.ieee.org/standard/802_11-2020.html (last visited June 22, 2022) [<https://perma.cc/J8SS-UMAG>].

5. See *infra* Part I.A (providing an example of semi-interoperability involving electrical sockets).

heaviest on those least able to pay for the multiple devices needed to stay connected to the rest of the world.

A technologically fragmented world is a risk we still face because the most important telecommunications standards contain patented technologies. Patents provide owners with the exclusive rights to an invention.⁶ When a device implements a standard that contains patents, it infringes on some of those patents. For example, when Apple implements 5G into their latest generation iPhones, they would infringe on patents within the 5G standard if they do not own or license those patents. This is because no single company owns all the patents within a standard. The patents that are necessarily infringed when a standard is used are called standard-essential patents (“SEPs”).⁷ To encourage the adoption of standards, SSOs require that SEP holders license standard-essential patents at fair, reasonable, and non-discriminatory (“FRAND”) rates.⁸ Yet enforcement of these terms falls to the parties involved in the licensing process, and SSOs provide little guidance on what constitutes a FRAND rate.⁹ Together, this provides fertile ground for litigation.

In SEP (or FRAND) litigation, lawsuits are often brought simultaneously in multiple jurisdictions where the SEPs were issued. Typically, a standard implementer or an SEP holder will sue the other over what they consider a non-FRAND rate. In setting a FRAND rate, any court can set a global rate for all the patents licensed under the agreement—even those not granted within that court’s jurisdiction.¹⁰ Courts will sometimes use their discretion to evaluate only the rates on patents issued within their jurisdiction.¹¹ Evaluating rates on another

6. U.S. CONST. art. I, § 8, cl. 8 (“To promote the [p]rogress of [s]cience and the useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors *the exclusive [r]ight* to their respective [w]ritings and [d]iscoveries.”) (emphasis added).

7. Greenbaum, *supra* note 3, at 81.

8. *Id.* at 82.

9. See Jorge L. Contreras, HTC v. Ericsson – *Ladies and Gentlemen, the Fifth Circuit Doesn’t Know What FRAND Means Either*, PATENTLY-O (Sept. 13, 2021), <https://patentlyo.com/patent/2021/09/contreras-ericsson-gentlemen.html> [<https://perma.cc/HXT4-GWQM>] (noting Judge Gilstrap’s jury instruction stated: “Ladies and gentlemen, there is no fixed or required methodology for setting or calculating the terms of a FRAND license rate.”).

10. For example, see *Unwired Planet Int’l Ltd. v. Huawei Techs. Co.* [2017] EWHC 711 (Pat) [¶ 807], *aff’d*, [2020] UKSC 37, where the U.K. Supreme Court set a global FRAND rate covering foreign patents.

11. For examples of judicial restraint, see *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013), *aff’d*, 795 F.3d 1024 (9th Cir. 2015); *In re Innovatio IP Ventures, LLC Pat. Litig.*, No. 11 C 9308, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); and *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201 (Fed. Cir. 2014).

country's patents can raise the hackles of foreign governments because patents are territorial.¹²

To prevent foreign courts from weighing in, many courts in the United States and in other countries have issued anti-suit injunctions. Anti-suit injunctions preclude parties from parallel litigation.¹³ They may be tailored to specify off-limits jurisdictions or may apply globally. The surge of anti-suit injunctions in FRAND litigation¹⁴ has been followed by a spike in anti-anti-suit injunctions to preempt or respond to an anti-suit injunction.¹⁵ Anti-anti-anti-suit injunctions have also been requested,¹⁶ and there is a risk of anti-suit injunction actions beyond even that ("AnSIs"), where "n" can take on ever-growing values.¹⁷

A race among foreign courts to issue AnSIs by increasing the value of "n" poses a threat to international comity. International comity is a foreign relations doctrine typically understood as the respect foreign institutions give one another's legislative, executive, and judicial acts.¹⁸ Anti-suit injunctions and AnSIs increase the risk that one nation's courts will attempt to usurp the jurisdiction of another. In FRAND disputes, conflicts surrounding technologies that form the backbone of worldwide economic and social communication add another danger. Further, sufficiently broad AnSIs might preclude parties from litigating anywhere if they target the court that issued an anti-suit

12. *Patents*, WPO, <https://www.wipo.int/patents/en/> (last visited Aug. 18, 2022) [<https://perma.cc/LN93-FLRQ>] ("Patents are territorial rights. In general, the exclusive rights are only applicable in the country or region in which a patent has been filed and granted, in accordance with the law of that country or region.").

13. STEPHEN C. MCCAFFREY & THOMAS O. MAIN, *TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE: THEORY AND APPLICATION* 63 (2009).

14. See Jorge L. Contreras, *It's Anti-Suit Injunctions All the Way Down – The Strange New Realities of International Litigation over Standards-Essential Patents*, *IP LITIGATOR* 3 (July/Aug. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647587 [<https://perma.cc/V4VU-K7EJ>] ("In recent years, the most significant use of anti-suit injunctions has been in connection with global FRAND disputes.").

15. See Alexander Shaknes, *Anti-Suit and Anti-Anti-Suit Injunctions in Multi-Jurisdictional Proceedings*, *NYSBA INT'L L. PRACTICUM* 96 (2008), <https://nysba.org/NYSBA/Publications/Section%20Publications/International/International%20Law%20Practicum/PastIssues2000present/Autumn2008/Autumn2008Assets/IntlPractAutumn08.pdf> [<https://perma.cc/M9WK-E76J>] ("The threat of an anti-suit injunction may lead to the filing of anti-anti-suit injunctions as a preemptive attack."); see, e.g., Dennis Crouch, *US vs China – Moving Toward Global Injunctions*, *PATENTLY-O* (Apr. 13, 2021), <https://patentlyo.com/patent/2021/04/moving-toward-injunctions.html> [<https://perma.cc/7BQP-NFJE>] (describing how Ericsson secured an anti-anti-suit injunction against Samsung in the United States in response to a Chinese court's anti-suit injunction).

16. Contreras, *supra* note 14, at 9–10.

17. See *id.* at 1 ("If there is no theoretical limit to the procedural machinations to which parties can go in such disputes, it may, indeed, be injunctions 'all the way down.'").

18. See *Comity*, *BLACK'S LAW DICTIONARY* (11th ed. 2019) ("A principle or practice among political entities (as countries, states, or courts of different jurisdictions), whereby legislative, executive, and judicial acts are mutually recognized.").

injunction.¹⁹ Arbitration, as an alternative dispute resolution tool, may also play a valuable role in settling FRAND licensing disputes between parties. To remedy the problems around FRAND litigation, scholars have suggested solutions such as judicial restraint, a centralized FRAND tribunal, and SSO obligations that require a licensor and licensee to enter arbitration over an SEP licensing dispute.²⁰

This Note proposes a hybrid solution using the first and final suggestions. It advocates courts apply a restrictive test for anti-suit injunctions and a stricter test when granting AnSIs in FRAND litigation. The Note then suggests arbitration to resolve disputes when there are a sufficient number of injunctions granted to impede litigation. Part I provides background on SEPs and FRAND licensing before delving into the rise of anti-suit injunction actions in FRAND litigation, the effect of anti-suit injunctions on international comity, and international commercial arbitration's historic role in FRAND disputes. Part II analyzes different methods foreign and domestic courts use in granting anti-suit injunctions and AnSIs, how courts have treated those injunctions, and the effectiveness of FRAND arbitration. Part III suggests that courts adopt the restrictive test for anti-suit injunctions in FRAND litigation and outlines a stricter test for granting AnSIs, both of which Congress should codify by statute. It further suggests using institutional arbitration by the World Intellectual Property Organization ("WIPO") as a failsafe for resolving SEP licensing disputes if the litigation reaches an impasse because of sufficiently broad injunctions.

I. BACKGROUND

A. *FRAND Litigation: Not Your Standard Dispute*

Technical standards help create the technologically compatible world we live in today. If every electric device had a different power

19. See Corrected Brief of International Intellectual Property Law Professors as Amici Curiae in Support of Neither Party at 27, *Ericsson, Inc. v. Samsung Elecs., Co.*, No. 21-1565 (Fed. Cir. Mar. 16, 2021) (noting the anti-anti-suit injunction granted in the United States might prevent the Chinese court from adjudicating its case).

20. See Eli Greenbaum, *No Forum to Rule Them All: Comity and Conflict in Transnational FRAND Disputes*, 94 WASH. L. REV. 1085, 1086 (2019) (advocating for judicial restraint limiting jurisdiction to patents issued within a court's national territory); Jorge L. Contreras, *Global Rate Setting: A Solution for Standards-Essential Patents?*, 94 WASH. L. REV. 701, 756–57 (2019) (modeling a nongovernmental FRAND tribunal on the U.S. Copyright Royalty Board to adjudicate disputes to facilitate "transparency, consistency, and comprehensiveness"); Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 BERKELEY TECH. L.J. 1135, 1138 (2013) (suggesting in the absence of agreement to FRAND licensing terms the parties enter mandatory "baseball-style" arbitration).

plug, everyone would have to hunt around a room or building for the specific electric socket that matched the device each time it had to be used or charged. In the United States, plugs match Type B (three-prong) or Type A (two-prong) electrical sockets.²¹ Around the world, there are a multitude of different electrical sockets, ranging from Type A to Type O.²² This is where adapters are useful. Imagine for a moment that adapters were needed for more than just charging devices. What if an adapter was needed in each country around the world to access the internet?

1. Technological Compatibility and Patent Licensing

Thankfully the Wi-Fi standard makes it possible for smartphones, tablets, and laptops, manufactured by companies from all around the world, to access the same network. Standards are adopted in a variety of ways. Some come about through government regulation,²³ others through widespread public acceptance,²⁴ and some, like Wi-Fi, are crafted by private SSOs.²⁵ Relevant SSOs in the telecommunications industry include the International Telecommunication Union (“ITU”) and the European Telecommunications Standard Institute (“ETSI”).²⁶ The standards these SSOs set include many patented technologies.

A patent rewards inventors by granting them exclusive rights to their invention for a set time.²⁷ Today, however, maintaining strict patent exclusivity is more likely to inhibit rather than promote technological progress.²⁸ To work around the problems posed by patent

21. *World Plugs*, INT’L ELECTROTECHNICAL COMM’N, <https://www.iec.ch/world-plugs> (last visited June 24, 2022) [https://perma.cc/92X5-GQ3H].

22. *Id.*

23. Electrical outlets are one example. Doris Johnson Hines & J. Preston Long, *Un-FRAND-ly Behavior*, FINNEGAN, at n.9 (Jan. 17, 2014), <https://www.finnegan.com/en/insights/articles/un-frand-ly-behavior.html> [https://perma.cc/6VM2-ZK65].

24. The QWERTY keyboard is an example of this. *Id.* at n.10.

25. See *supra* note 4 and accompanying text.

26. See *About International Telecommunication Union (ITU)*, ITU, <https://www.itu.int/en/about/Pages/default.aspx> (last visited June 24, 2022) [https://perma.cc/8VRV-QTYG] (“Every time you make a phonecall via the mobile, access the Internet or send an email, you are benefitting from the work of ITU.”); *About ETSI*, ETSI, <https://www.etsi.org/about> (last visited June 24, 2022) [https://perma.cc/5GA3-D89A] (“This environment supports the timely development, ratification and testing of globally applicable standards for [information and communications technology]-enabled systems, applications and services.”).

27. See, e.g., 35 U.S.C § 154(a)(2) (“[S]uch grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed.”).

28. For example, if you patented your world-changing invention, you, and only you, could sell that invention. Only those who could buy it from you would benefit. Others could not incorporate

exclusivity, inventors often decide to license their patents. Patent licensing allows others to make and sell devices that include a patented technology while allowing the patent owner to earn royalties on the licensed patent within said sold device.²⁹ This system benefits both the licensor and licensee, and it increases the availability of potentially useful products in the marketplace. As with any contractual relationship,³⁰ disputes sometimes arise, and litigation ensues. As technical standards become increasingly complex, they include more patented technologies. This heralds a likely rise in licensing disputes in the years to come as these standards are implemented.

To clarify why this increase is likely, consider a company that only manufactures smartphones. If it makes a phone that can access the 5G network, it has adopted and implemented the 5G standard. If this same company holds and licenses no patents within the 5G standard, then it has infringed on all the patents comprising the standard. Those patents that are necessarily infringed through the use of a standard are considered SEPs because they are essential to implementing the standard. Another example can be found in video compression, which makes it possible to transmit, store, and view movies over the internet. Implementers of the new video compression coding standard, Virtual Video Coding, will therefore necessarily infringe on certain video compression patents to make use of the standard's video streaming capabilities.³¹ Individual SEPs are owned by individual companies, with some owning portfolios of patents within a standard.³² No single company owns all the SEPs within a standard.³³ This is unlikely to change because of the sheer number of patents involved and the cost of acquisition. Therefore, anyone that makes a device that uses a standard must license at least some of the patents comprising the standard.

your invention into their products to possibly create something even better. You might get rich, but the rest of the world is out of luck.

29. ROBERT A. MATTHEWS, JR., ANNOTATED PATENT DIGEST § 35:28 (2022).

30. *Id.* § 35:29.

31. See Rickard Sjöberg, Jacob Ström, Łukasz Litwic & Kenneth Andersson, *Virtual Video Coding Explained – The Future of Video in a 5G World*, ERICSSON TECH. REV. 3 (Oct. 14, 2020) <https://www.ericsson.com/4a92d7/assets/local/reports-papers/ericsson-technology-review/docs/2020/versatile-video-coding-explained.pdf> [<https://perma.cc/Y783-LC9Q>].

32. A patent portfolio is a collection of patents owned by an individual entity. For example, in the 5G standard, six companies account for 72.5% of the core SEPs. Alan Weissberger, *Huawei or Samsung: Leader in 5G Declared Standard Essential Patents (SEPs)?*, IEEE COMM'NS SOC'Y TECH. BLOG (Mar. 15, 2021), <https://techblog.comsoc.org/2021/03/15/huawei-or-samsung-leader-in-5g-declared-standard-essential-patents-seps/> [<https://perma.cc/585S-E3F9>].

33. Samsung, a leading manufacturer of smartphones, is one of the six companies with the largest number of SEPs in the 5G standard. *Id.*; see also Greenbaum, *supra* note 3, at 81 (acknowledging that some companies are “vertically integrated” in that they both patent new technologies and use them in devices as well).

This poses a problem for everyone in the smartphone manufacturing business. They all must license SEPs, often from direct competitors.³⁴ What if some SEP owners decide to license their patents only at exorbitant rates? This is known as patent hold-up.³⁵ What if standard implementers do not take the license offered or attempt to escape payment? This is known as patent hold-out.³⁶

2. SSOs' Role in FRAND Licensing

Both SEP owners and standard implementers have significant incentives to hold-up and hold-out to maximize their own profits. This increases the transaction costs of patent licensing, thereby leading to a less effective patent licensing regime and eventually stifled innovation. In response, many SSOs have SEP holders make the voluntary commitment to license their patents at FRAND rates as a condition to include their technology in the standard.³⁷ SSOs also often mandate that patent holders who suggest the standard should include their own technologies disclose their ownership of those patents.³⁸

The requirement that SEP holders disclose and license in this way, to both friend and foe, is meant to assure potential adopters of the standard that the licenses will be available at a fair rate and to encourage adoption of the standard.³⁹ Seemingly, there should be no problem with this. Yet most SSOs provide no definition—let alone guidance—as to what the term FRAND means.⁴⁰ Because there is no widely agreed upon definition for FRAND,⁴¹ the ability of national

34. See *supra* note 32 and accompanying text.

35. Elizabeth D. Lauzon, Annotation, *Standard-Essential Patent Licensing on "Fair, Reasonable, and Nondiscriminatory" (FRAND) Terms*, 16 A.L.R. Fed. 3d Art. 5 § 2 (2016).

36. Peter Georg Picht & Gaspare Tazio Loderer, *Arbitration in SEP/FRAND Disputes: Overview and Core Issues*, 36 J. INT'L ARB. 575, 577 (2019).

37. Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671, 672 (2007); Picht & Loderer, *supra* note 36, at 577.

38. Greenbaum, *supra* note 3, at 81–82.

39. *Id.* at 82.

40. *Id.*

41. For Apple's views, see *A Statement on FRAND Licensing of SEPs*, APPLE, <https://www.apple.com/legal/intellectual-property/frand/> (last visited June 24, 2022), [https://perma.cc/4ALN-2Z3M]. For Ericsson's views, see *Licensing on FRAND Terms*, ERICSSON.COM, <https://www.ericsson.com/en/patents/frand> (last visited June 24, 2022) [https://perma.cc/8G5N-BJS3]. For a look into how these viewpoints have clashed, see Blake Brittain, *Ericsson Sues Apple to Clear Proposed 5G Patent Licensing Rates*, REUTERS (Oct. 5, 2021, 2:43 PM), <https://www.reuters.com/legal/transactional/ericsson-sues-apple-clear-proposed-5g-patent-licensing-rates-2021-10-05/> [https://perma.cc/RU7C-NKUV].

courts to set a global FRAND rate is a growing source of litigation between major companies around the world.⁴²

One solution to the FRAND problem is SSO action. This is unlikely for reasons beyond SSOs' past practice. In 2015, the IEEE amended its patent policy, and part of its changes included a definition of "reasonable rate."⁴³ As a result of the policy amendment, several companies provided negative letters of assurance for the updated Wi-Fi standard.⁴⁴ In a negative letter of assurance a licensor declines to assure a licensee of a FRAND rate, effectively declining to adopt a new standard in favor of an old one.⁴⁵ ETSI, on the other hand, did not similarly amend its patent policy and suffered no such issues with its cellular technology standards.⁴⁶ Wading into this relatively unregulated arena poses great risks for SSOs because they jeopardize subsequent standard adoption.⁴⁷ This might also create forward-looking technological fragmentation with some companies adopting new versions of standards and others resisting change.

Disputes over FRAND rates have a transnational character because standards operate worldwide. The Wi-Fi used in the United States is the same as that used in Nigeria, Kazakhstan, and Singapore. Furthermore, FRAND litigation "can entangle the parties in global snarls of the patent, antitrust, and contract laws of multiple jurisdictions, intertwined with questions of international trade policy and national security strategy."⁴⁸ While the validity of patents is often

42. For examples of cases in the United States and the United Kingdom involving global FRAND rate determinations, see *Vringo Infrastructure Inc. v. ZTE (UK) Ltd.* [2014] EWHC 3924 (Pat); *Unwired Planet Int'l Ltd. v. Huawei Techs. Co.* [2017] EWHC 711 (Pat); and *TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. CV 15-2370 JVS(DFMx), 2018 WL 4488286 (C.D. Cal. Sept. 14, 2018).

43. *IEEE-Standards Board Bylaws*, IEEE 17–19 (2022), http://standards.ieee.org/wp-content/uploads/import/documents/other/sb_bylaws.pdf [<https://perma.cc/Z9FL-EN66>].

44. David Cohen, *Wi-Fi Negative Letters of Assurance Contaminate and Compromise ISO 8802 Standards*, JD SUPRA (Nov. 4, 2020), <https://www.jdsupra.com/legalnews/wi-fi-negative-letters-of-assurance-61807/> [<https://perma.cc/AC4W-E4VP>].

45. *Id.*

46. See Florian Mueller, *Apple and Other WiFi Implementers Pressuring IEEE Not to Abandon Its 2015 Patent Policy—But Serious Impact of Negative Letters of Assurance Can't Be Denied*, FOSS PATENTS (May 12, 2022), <http://www.fosspatents.com/2022/05/apple-and-other-wifi-implementers.html> [<https://perma.cc/X4AR-JJ9P>].

47. See Kirti Gupta & Georgios Effraimidis, *IEEE Patent Policy Revisions: An Empirical Examination of Impact* 27–28 (Mar. 1, 2018), <https://dx.doi.org/10.2139/ssrn.3173799> [<https://perma.cc/PP5K-6PNJ>] ("[M]ultiple SEP owners are not willing to license under the new terms . . . [s]uch unwillingness from SEP holders can have a potential adverse impact on the standards development process.").

48. Greenbaum, *supra* note 20, at 1086; see also Picht & Loderer, *supra* note 36, at 578 (discussing how other important questions in FRAND disputes include if the patent is valid and is indeed an SEP, if the patent owner failed to declare SEPs or failed to make a FRAND declaration, and if any market participant may request a FRAND license).

a major part of FRAND litigation, at the heart of a FRAND rate conflict is a contractual dispute over a licensing agreement.⁴⁹

In resolving a FRAND licensing dispute, courts of one nation can set global FRAND rates, which affect patents that were issued in different jurisdictions. Some courts have exercised a great deal of caution and abstained from making judgments on patents not issued in their jurisdiction.⁵⁰ Others have been willing to extend the scope of their judgments beyond territorial borders and set global FRAND rates.

As an example, in *Unwired Planet v. Huawei*, the U.K. Supreme Court's decision to set a global rate proved unfavorable to the Chinese company Huawei because it allowed U.K. courts to set a FRAND rate on Chinese patents implemented by Huawei.⁵¹ The major concern with extraterritorial action is that courts issuing decisions on global FRAND rates usurp the jurisdiction of national courts where the patents in question were issued. To prevent this, some courts began granting anti-suit injunctions with increasing frequency in FRAND litigation.⁵²

B. Upping the "Anti": The Rise of Anti-Suit Injunctions

In international disputes, courts of all involved jurisdictions might have interests at stake that cause them to favor resolving the action themselves. When lawsuits are filed in multiple jurisdictions, European courts tend to follow a first-in-time approach, granting the court where the action was first filed exclusive jurisdiction.⁵³ This leads to a race to the courthouse, and the trial may proceed in a forum that is not best suited to resolve the dispute. Yet if parallel proceedings are initiated and allowed to continue, the litigation is often duplicative and could lead to inconsistent judgments.⁵⁴ This leads to a race to judgment and incentivizes one party to expedite the proceedings that might end favorably for them, while the other party does everything possible to

49. Greenbaum, *supra* note 3, at 81; MATTHEWS, *supra* note 29, § 35:29.

50. See *supra* note 12 and accompanying text; Jacob Schindler & Joff Wild, *Patents Are Politics, as an Early Awaited UK Supreme Court FRAND Licensing Ruling May Soon Show*, LEXOLOGY (Nov. 16, 2019), <https://www.lexology.com/library/detail.aspx?g=1f67a015-5c07-49d2-83c3-744841962791> [<https://perma.cc/KB64-99SQ>] ("Now, as leading Chinese companies face some of the most consequential IP disputes in their histories, the UK's highest court could be on the verge of declaring that Britain knows best when it comes to disputes that hinge in large part on Chinese patent portfolios.").

51. See *supra* note 10 and accompanying text; see also *infra* note 199.

52. Jorge L. Contreras & Michael A. Eixenberger, *The Anti-Suit Injunction – A Transnational Remedy for Multi-Jurisdictional SEP Litigation*, in THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW: COMPETITION, ANTITRUST & PATENTS LAW 451 (Jorge L. Contreras ed., 2017).

53. MCCAFFREY & MAIN, *supra* note 13, at 63.

54. *Id.*

prolong it. In response to these concerns, a court may issue an anti-suit injunction during a legal action to prevent litigants from commencing or continuing any parallel litigation in other jurisdictions.⁵⁵

1. Anti-Suit Injunctions and AnSIs

Among the benefits of anti-suit injunctions are their ability to lower litigation costs and prevent inconsistent decisions.⁵⁶ U.S. courts, however, are often unwilling to issue an anti-suit injunction simply to avoid parallel proceedings or thwart a race to judgment.⁵⁷ With origins as an equitable remedy at common law in English chancery courts,⁵⁸ anti-suit injunctions were used to enjoin parties from bringing suit in other English courts.⁵⁹ Later, the scope of these “common injunctions” expanded to Scotland, Ireland, and other British colonies, and finally, they began to extend to foreign courts.⁶⁰ Anti-suit injunctions are rare today and are typically used to protect a court’s own jurisdiction over a case or prevent a party to an arbitration agreement from shirking its commitment.⁶¹

Anti-suit injunctions have experienced a revival in FRAND litigation.⁶² During an ongoing FRAND dispute, SEP holders can bring patent infringement claims in courts where the SEPs were issued. A faster finding of patent infringement in a foreign court might undercut a judgment of the court deciding if a license is indeed FRAND. To prevent the threat of this inconsistency, courts have turned to anti-suit injunctions to prevent the parallel litigation described above until the issuing court has resolved the FRAND licensing.

In the United States, anti-suit injunctions were initially used by one state to prevent parallel litigation in other states.⁶³ Until recently, they were rarely issued in China, but the country’s courts have increasingly issued anti-suit injunctions in FRAND disputes

55. Contreras, *supra* note 14, at 3 (“Anti-suit injunctions are interlocutory *in personam* remedies.”).

56. *Id.*

57. See Part II.A for further details on how U.S. courts evaluate whether to grant an anti-suit injunction.

58. Contreras & Eixenberger, *supra* note 52, at 452.

59. *Id.*

60. *Id.*

61. Shaknes, *supra* note 15, at 96.

62. Contreras, *supra* note 14, at 1.

63. See *Cole v. Cunningham*, 133 U.S. 107, 111, 134 (1890) (affirming a Massachusetts anti-suit injunction “restraining citizens of that common wealth from the prosecution of attachment suits in New York, brought by them for the purpose of evading the laws of their domicile”).

throughout the last few years.⁶⁴ As a result, courts of other nations, like Germany and India, now issue anti-anti-suit injunctions to counter China's anti-suit injunctions.⁶⁵ Oftentimes courts issuing anti-anti-suit injunctions are civil law jurisdictions that view anti-suit injunctions as "offensive, even violative of international law."⁶⁶

This Note refers to anti-suit injunctions without a specified number of "antis" as AnSIs. There is an argument that if "n" is an odd number the injunction is offensive because it prevents a litigant from proceeding in another court.⁶⁷ But if "n" is an even number the injunction is defensive because it merely allows a parallel action to proceed.⁶⁸ By this logic an A3SI is equivalent to an anti-suit injunction and an A4SI is equivalent to an anti-anti-suit injunction. While that might be the case, the concerns over upping the "anti" are not entirely about the practical effect of the injunction on the parties but also the effect on foreign relations and international comity. Courts, in enjoining parties from seeking any type of AnSI, are effectively reaching out extraterritorially and preventing a foreign court from making its own decision regarding the injunction at issue. These comity concerns are discussed in greater detail below in Part I.C.

2. An Instance of Dueling Injunctions

To illustrate the way the preceding discussion works, consider the recent litigation between two titans of the telecommunications industry, Samsung and Ericsson. In 2021, Ericsson obtained an anti-anti-suit injunction against Samsung in the United States during a

64. See Peter K. Yu, Jorge L. Contreras & Yu Yang, *Transplanting Anti-Suit Injunctions*, 71 AM. U. L. REV. 1537 (2022) (discussing China's adoption of the anti-suit injunction in FRAND litigation).

65. For two examples where courts outside of the United States have issued anti-anti-suit injunctions, see *Anti-Suit Injunction: German Interim Injunction Against Chinese ASI*, PATENT-UND RECHTSANWALTSKANZLEI (June 22, 2021), <https://legal-patent.com/patent-law/anti-suit-injunction-german-interim-injunction-against-chinese-asi/> [<https://perma.cc/4TEP-EY35>], where the Regional Court of Munich granted an anti-anti-suit injunction when it viewed a Chinese court's anti-suit injunction as an affront to its jurisdiction and in violation of German law; and Tamanna Sharma, *Interdigital Vs. Xiaomi: India's First Anti-Enforcement Injunction Order*, MONDAQ (June 25, 2021), <https://www.mondaq.com/india/patent/1084008/interdigital-vsxiaomi-india39s-first-antienforcement-injunction-order> [<https://perma.cc/3VLG-TAVX>], when the New Delhi High Court raised notice and due process concerns over an action in China and ultimately issued an anti-anti-suit injunction.

66. Contreras, *supra* note 14, at 8 (quoting John J. Barceló III, *Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements*, Cornell Law School Research Paper No. 07-024 at 2 (2007)).

67. See *id.* at 7 ("Yet unlike an ASI, an AASI does not seek to bar a parallel action in another court, but to prevent the blocking of that action, effectively permitting the parallel action to continue.").

68. See *id.*

FRAND dispute.⁶⁹ This dispute began after Samsung's cross-license of SEPs with Ericsson expired in late 2020, and Samsung subsequently sued Ericsson in China on December 7, 2020, requesting a declaration of global licensing terms based on FRAND principles.⁷⁰ Four days later, Ericsson sued Samsung in the United States, claiming that Samsung violated its FRAND licensing commitments.⁷¹ On December 25, the Wuhan court issued an anti-suit injunction enjoining Ericsson from seeking any relief elsewhere.⁷² This was a global anti-suit injunction, any violation of which would be enforced with severe fines.⁷³

In response, Ericsson secured an anti-anti-suit injunction (also called an anti-interference order) in its action against Samsung in the Eastern District of Texas on January 11, 2021.⁷⁴ The order mandated Samsung take no action in the Chinese litigation that would affect the proceedings in the United States and that Samsung indemnify Ericsson for any fines assessed against it by the Wuhan court.⁷⁵ Samsung appealed the decision to the U.S. Court of Appeals for the Federal Circuit, seeking to vacate or narrow the District Court's injunction, but the parties settled before the appellate court could determine if the anti-anti-suit injunction was appropriately granted.⁷⁶

Although an anti-suit injunction is an *in personam* interlocutory remedy, meaning it is directed at the parties involved in the litigation before the issuing court, it has the practical effect of stripping another court of its jurisdiction.⁷⁷ As shown in the preceding example involving Samsung and Ericsson, parties might ultimately be precluded from litigating in any forum because the U.S. anti-anti-suit injunction could

69. Memorandum Opinion and Preliminary Injunction, *Ericsson Inc. v. Samsung Elecs. Co.*, No. 20-CV-00380, 2021 WL 89980 (E.D. Tex. Jan. 11, 2021) (granting an anti-anti-suit injunction).

70. See Crouch, *supra* note 15. A cross-license is an exchange of licenses between two companies.

71. *Id.*

72. Memorandum Opinion and Preliminary Injunction, *supra* note 69, at *2.

73. *Id.*

74. *Id.* at *7.

75. See *id.* at *8 (“This Court finds that a narrowly focused indemnification provision will ensure that both proceedings can progress on the merits without the risk of unbalanced economic pressure being imposed by one party on another.”).

76. Supantha Mukherjee, *Ericsson Settles Patent Dispute with Samsung*, REUTERS (May 7, 2021, 1:22 AM), <https://www.reuters.com/business/media-telecom/ericsson-settles-patent-dispute-with-samsung-2021-05-07/> [<https://perma.cc/DT2R-DDAN>].

77. See Shaknes, *supra* note 15, at 96 (“[M]ost courts acknowledge that such injunctions ‘effectively restrict the foreign court’s ability to exercise its jurisdiction’” (quoting GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 322 (2d. ed. 1994))); LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* 242–43 (1996) (“While the injunctive relief sought is technically against the parties rather than the foreign court, the impact is often the same, and the offense to the other court’s jurisdiction and sovereignty is as obvious.”).

serve as an anti-suit injunction against the Chinese court, leaving the parties with nowhere to litigate.⁷⁸ This is the danger of upping the “anti.”

If injunctions are granted broadly enough to cover all the possible fora the parties might select, then there would be nowhere left to litigate. The leading case in the United States on anti-anti-suit injunctions is *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, in which the D.C. Circuit granted an anti-anti-suit injunction over a British court’s anti-suit injunction.⁷⁹ This case will be discussed in greater detail below in Part II.A, within the analysis of anti-suit injunction tests. For now, it is important to know that the court in that case had to grapple with the notion that granting these injunctions raised concerns over a breakdown of the doctrine of international comity.⁸⁰

C. Comity Among FRANDs

International comity is the spirit of cooperation with which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.⁸¹ In the United States, comity plays a role in the recognition domestic courts give foreign judgments to foster reciprocity between nations and limits those courts’ extraterritorial reach.⁸² International comity is a keystone doctrine of foreign relations law, acknowledging other nations’ sensitive interests while striking a balance with a sovereign’s own interests.⁸³ It has widely affected U.S. court decisions on issues including foreign sovereign

78. See *supra* note 19 and accompanying text.

79. 731 F.2d 909 (D.C. Cir. 1984).

80. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984) (finding that the anti-suit injunction was counter to U.S. public policy and granting an anti-anti-suit injunction outweighed the international comity concerns raised).

81. MCCAFFREY & MAIN, *supra* note 13, at 67.

82. See William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2075 (2015) (arguing a recognition-only definition of comity is “incomplete and ambiguous” because it “fails to capture doctrines that restrain the application of U.S. law and the jurisdiction of U.S. courts”).

83. *Id.* at 2072.

immunity,⁸⁴ personal jurisdiction,⁸⁵ recognition and enforcement of foreign judgments,⁸⁶ and, of course, anti-suit injunctions.

1. The History of International Comity

The concept of international comity began with Dutch jurists in the seventeenth century.⁸⁷ One of the most prominent of the group, Ulrich Huber, posited in the third maxim of international law in his *De Conflictu Legum* and stated: “‘Comity’ calls on states to recognize and enforce rights created by other states, provided that such recognition does not prejudice the state or its subjects.”⁸⁸ This notion was adopted into English common law and later brought to the United States.⁸⁹

The Supreme Court first addressed international comity in *Hilton v. Guyot*,⁹⁰ in which the Court declined to recognize a French court’s decision because the French court would not recognize a U.S. court’s decision.⁹¹ International comity, the Court noted, “is neither a matter of absolute obligation . . . nor of mere courtesy and good will.”⁹² The Court went on to define the term as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation,” and in recognizing these acts, it advised courts to consider “international duty and convenience” and “the rights of its own citizens, or of other persons who are under the protection of its laws.”⁹³

In the nineteenth century, U.S. courts used international comity as a basis for enforcing and recognizing foreign judgments.⁹⁴ At this

84. See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (“Foreign sovereign immunity, by contrast, is not meant to avoid chilling foreign states or their [i]nstrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.”).

85. See *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014) (not finding the defendant at home in the United States for the purposes of general personal jurisdiction because such a broadening would pose “risks to international comity”).

86. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. §§ 483-484 (AM. L. INST. 2018). See *infra* notes 91–94 and accompanying text.

87. See Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 22 (2008) (describing its outgrowth from the Dutch independence movement and questions it prompted about applying foreign law).

88. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 592 (5th ed. 2011) (citing Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS 136 (1947)).

89. Dodge, *supra* note 82, at 2087.

90. 159 U.S. 113 (1895).

91. TEITZ, *supra* note 77, at 257.

92. *Hilton*, 159 U.S. at 163–64.

93. *Id.* at 164.

94. *Id.* at 202–03.

time, the rationale for international comity was “commercial convenience.”⁹⁵ In the twentieth century, when U.S. antitrust law was applied extraterritorially, courts used the doctrine to curtail its long reach.⁹⁶ Around this time, public interest and maintaining friendly relations with foreign countries grew in importance and began to supplant mutual convenience as the rationale behind international comity.⁹⁷

2. Recent Developments and Anti-Suit Injunctions

Unlike international law, which can bind Congress, the courts, and the President,⁹⁸ international comity does not create binding obligations on the United States.⁹⁹ This allows courts great leeway to craft the rules and standards of international comity. Professors Eric Posner and Cass Sunstein have advocated for judicial deference to the Executive as the best way to appropriately assess international comity concerns if the doctrine’s primary goal is the maintenance of good foreign relationships.¹⁰⁰

No matter what view one takes, judicial discretion is important because international law only serves as the base for application of

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh

95. Dodge, *supra* note 82, at 2086 (“Huber wrote that ‘nothing could be more inconvenient to commerce and to international usage than that transactions valid by law of one place should be rendered of no effect elsewhere on account of a difference in the law.’” (quoting Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 165 (1947))).

96. See BORN & RUTLEDGE, *supra* note 88, at 649 (“The [territoriality] presumption was reaffirmed in uncompromising terms in . . . *American Banana Company v. United Fruit Company* . . . which refused to apply the Sherman Act to a U.S. company’s actions in Costa Rica.” (footnote omitted)); see also *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976) (asking “whether American authority should be asserted in a given case as a matter of international comity and fairness”).

97. Dodge, *supra* note 82, at 2096–98.

98. It is worth noting Congress may pass laws that violate customary international law and treaty requirements. *Id.* at 2120.

99. *Id.* at 2121.

100. *Id.* at 2098 (“Posner and Sunstein have argued that, because comity doctrines are designed ‘to reduce tensions between the United States and other nations,’ the Executive is in the best position to determine how they should apply.” (footnote omitted)).

international comity.¹⁰¹ For example, in the context of foreign immunity, international law imposes some requirements, but comity considerations could result in greater grants of immunity.¹⁰²

Similarly, extraterritorial anti-suit injunctions, like those involved in FRAND litigation, necessarily raise international comity concerns, and courts' discretion becomes critical. This is because the result of an anti-suit injunction is direct judicial interference with a foreign court's jurisdiction even though the injunction technically applies only to the parties before the court.¹⁰³ Therefore, U.S. courts weigh the possible effects on comity when deciding whether to grant an anti-suit injunction.¹⁰⁴ AnSIs run even further counter to this sense of reciprocity and recognition with which courts approach issues of comity for their increasingly removed nature, particularly if issued before another court has granted an injunction.¹⁰⁵ There are even risks to international trade and technological innovation if SEPs are not viewed as globally protected.¹⁰⁶ With the increased tensions between foreign courts and the high stakes of the issues, the next Section considers ways to solve FRAND disputes outside the courtroom.

D. Let's Settle This Outside (the Courts): Alternative Dispute Resolution

Some FRAND disputes have been resolved outside the courts through methods of alternative dispute resolution. One such method, international commercial arbitration, has been used with success in notable FRAND disputes.¹⁰⁷ In addition, Professors Mark Lemley and

101. See *id.* at 2084 (“In some areas of foreign relations law today—like foreign sovereign immunity and prescriptive jurisdiction—one may think of an international law ‘core’ and a comity ‘penumbra,’ while in other areas all of the rules are rules of comity alone.”).

102. *Id.*

103. See *supra* note 77 and accompanying text.

104. See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003) (“When a preliminary injunction takes the form of a foreign antisuit injunction, we are required to balance domestic judicial interests against concerns of international comity.”).

105. Contreras, *supra* note 14, at 7.

106. See *Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments*, U.S. DEP'T OF JUST. & U.S. PAT. & TRADEMARK OFF. 8 (Jan. 8, 2013), <http://www.justice.gov/atr/public/guidelines/290994.pdf> [https://perma.cc/UP7C-YTT6] (suggesting “caution in granting injunctions or exclusion orders based on infringement of voluntarily F/RAND-encumbered patents essential to a standard”).

107. For example, see Ciarra Linane, *BlackBerry Awarded Final \$940 Million in Arbitration with Qualcomm over Royalties*, MKT. WATCH (May 26, 2017, 8:10 AM), www.marketwatch.com/story/blackberry-awarded-final-940-million-in-arbitration-with-qualcomm-over-royalties-2017-05-26 [https://perma.cc/2JGY-FVVU]; and Steve Brachmann, *Nokia Receives Favorable Arbitration Award on Patent License with LG Electronics*, IP WATCHDOG (Sept. 26, 2017, 5:15 AM),

Carl Shapiro have advocated for arbitration as a method to settle FRAND licensing disputes for some time now.¹⁰⁸

Arbitration is a private method for resolving disputes that most often results in a final and binding decision, known as an award, that is enforceable in court.¹⁰⁹ Parties to an arbitration have a great deal of autonomy over the process. First, they must consent at the outset to entering arbitration.¹¹⁰ From there, they can decide whether the arbitration will be administered by an institution or occur ad hoc without an institution, along with the rules, the location, and the language of arbitration.¹¹¹ Parties are also able to select the arbitrators.¹¹² Arbitrators are private citizens, who do not have to be legal professionals, and can be chosen for their expertise in a topic, unlike judges, who are usually generalists.¹¹³

There are significant advantages to international commercial arbitration. Arbitral awards have a higher likelihood of enforcement than a national court judgment because all countries party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) must enforce an award unless there was a critical defect in the arbitration process.¹¹⁴ The New York Convention is a treaty that provides common standards for recognizing and enforcing “foreign and non-domestic” arbitral awards to ensure that courts will not discriminate against awards not rendered within its jurisdiction or its laws.¹¹⁵ At least 169 countries are party to the New York Convention.¹¹⁶ Arbitration also offers the chance for parties to select a neutral forum for dispute resolution over one party’s home court.¹¹⁷ Parties can also keep both the proceedings and

www.ipwatchdog.com/2017/09/26/nokia-favorable-arbitration-award-patent-license-lg-electronics/id=88063 [<https://perma.cc/83D8-LHBL>].

108. See Lemley & Shapiro, *supra* note 20, at 1166 (proposing binding arbitration as a solution to the FRAND licensing problem).

109. MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 1 (3d ed. 2017).

110. *Id.* at 2.

111. *Id.* at 1.

112. *Id.*

113. *Id.* at 2.

114. GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 1 (2d ed. 2016).

115. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS COMM’N ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last visited June 26, 2022) [<https://perma.cc/3SRM-ZM3F>].

116. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS COMM’N ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited June 26, 2022) [<https://perma.cc/K2HY-KD2P>].

117. MOSES, *supra* note 109, at 3.

the award confidential.¹¹⁸ The ability to select expert arbitrators and the process's less stringent discovery requirements can make arbitration more appealing than a drawn out fight in the courts, which also makes the process less expensive for the parties.¹¹⁹

While the benefits are great, there are some limitations to arbitration. Less discovery might increase efficiency and reduce costs for the parties, but longer and more expansive inquiries may be necessary for complex disputes.¹²⁰ Striking a balance between a level of discovery necessary for arbitrators' complete, informed decisionmaking and globally derided "fishing expeditions" that increase transaction costs is key.

It is also difficult to vacate erroneously granted awards because they will be enforced as long as the arbitration process was complied with, even if the substance of the arbitration was clearly wrongly decided on the law or facts.¹²¹ In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹²² the Supreme Court decided the only grounds for judicial review of an award were outlined in the Federal Arbitration Act, which provided review only for unfair process or problems of arbitral bias or misconduct.¹²³ By comparison, in litigation there is an appeals process that enables judicial review.

Further, unlike judges, arbitrators have no power over nonparties and have no power to fine parties that do not comply with tribunal requests.¹²⁴ For example, arbitrators have no subpoena power and cannot force document production for discovery.¹²⁵ There is also a lack of diversity among arbitrators.¹²⁶ This could result in most tribunals being composed of European or North American arbitrators. There might be a risk that these arbitrators then view companies originating in western countries more favorably than those hailing from other countries, particularly SEP leaders in Asia.¹²⁷

Another important decision for parties is whether the arbitration will be administered by an arbitral institution or conducted ad hoc. If an institution administers an arbitration, parties pay the

118. BORN, *supra* note 114, at 201 (noting confidentiality is "typically used to refer to the obligation not to disclose information concerning the arbitration to third parties").

119. MOSES, *supra* note 109, at 4.

120. *Id.* at 5.

121. *Id.*

122. 552 U.S. 576 (2008).

123. MOSES, *supra* note 109, at 5.

124. *Id.*

125. *Id.*

126. *Id.* at 6.

127. *Cf. infra* note 199 and accompanying text.

institution a fee to take control of important administrative decisions.¹²⁸ Institutional rules facilitate arbitral procedures (like arbitrator appointment) and lend credibility to the arbitral award.¹²⁹ They are also “time-tested” and account for most issues that come up during an arbitration.¹³⁰ An ad hoc arbitration proceeds without an administering institution, allowing it to be more flexible and tailored to the particular circumstances leading to the arbitration.¹³¹ Parties may craft their own rules or adopt the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules.¹³² A downside of ad hoc arbitration is that parties may strategically stonewall the process in the absence of institutional rules.¹³³

In the face of concerns that procedures and expertise in FRAND arbitration are undeveloped, the World Intellectual Property Organization Arbitration and Mediation Center (“WIPO Center”) has developed alternative dispute resolution tools for FRAND licensing.¹³⁴ The WIPO Center has published thorough guidance for parties on the types of dispute resolution available and processes involved.¹³⁵ The International Chamber of Commerce (“ICC”) International Court of Arbitration also has some experience resolving FRAND disputes.¹³⁶

Other important forms of alternative dispute resolution include mediation, expert determination, and last-offer (“baseball”) arbitration. Mediation differs from arbitration in that it does not result in a binding decision.¹³⁷ Expert determination involves the parties submitting their dispute to someone with extensive training in the area at issue, and it is most useful when the parties are confronted with highly technical questions.¹³⁸ It is often binding, but parties can contract to enter a

128. BORN, *supra* note 114, at 26. Examples of arbitral institutions include the Singapore International Arbitration Centre (“SIAC”), the London Court of International Arbitration (“LCIA”), and the International Centre for Settlement of Investment Disputes (“ICSID”). *Id.*

129. MOSES, *supra* note 109, at 10.

130. *Id.*

131. *Id.*

132. BORN, *supra* note 114, at 26.

133. MOSES, *supra* note 109, at 10.

134. *WIPO ADR for FRAND Disputes*, WIPO, <https://www.wipo.int/amc/en/center/specific-sectors/ict/frand/> (last visited June 26, 2022) [<https://perma.cc/36PC-ZP2M>].

135. *See, e.g., Guidance on WIPO FRAND Alternative Dispute Resolution*, WIPO ARB. & MEDIATION CTR. (2021), <https://www.wipo.int/export/sites/www/amc/en/docs/wipofrandadrguidance.pdf> [<https://perma.cc/G6ZT-425Z>]. The guidance includes options to tailor the process to the parties’ needs. *Id.* at 1. It addresses the scope of the proceedings, arbitrator appointment procedure, setting the procedural schedule, choice of law, confidentiality, interim measures, and appeal options. *Id.*

136. Picht & Loderer, *supra* note 36, at 582.

137. MOSES, *supra* note 109, at 17.

138. *Id.* at 18.

nonbinding determination.¹³⁹ In baseball arbitration, parties state their best offers for the award and the arbitrators must choose between the two, incentivizing both sides to be as reasonable as possible.¹⁴⁰ This last form of arbitration has been suggested as an option to help parties settle on a FRAND rate that might be “reasonable” enough to live up to its moniker.¹⁴¹

For its ability to step outside the traditional confines of litigation, arbitration plays an important role in resolving international commercial disputes. It allows parties to create a bespoke process that serves their needs and results in an internationally recognized award. International commercial arbitration, therefore, promises itself as an enticing alternative to traditional litigation or at least as an additional, useful tool in the FRAND dispute resolution toolbox.

II. ANALYSIS

A. Patently Absurd: The Current Landscape of Granting Anti-Suit Injunctions

While FRAND litigation involves patents, the disputes are contractual and can theoretically be brought in any district court in the United States with jurisdiction. The Samsung-Ericsson example above was appealed to the Federal Circuit because the Federal Circuit has exclusive jurisdiction over patent infringement claims at the appellate level.¹⁴² Disputes where patent validity is not contested would be appealed to appellate courts of the circuit in which the district court sits. For example, *FTC v. Qualcomm* was decided in 2020 before the Ninth Circuit.¹⁴³ Therefore, there might be different outcomes to an anti-suit injunction request within the United States depending on the circuit in which the litigation occurs. The danger here, in addition to breakdowns in international comity and properly functioning industries, is forum shopping, which allows a party to seek the most favorable jurisdiction to bring their case. Forum shopping between state and federal court in the United States is discouraged by the *Erie* doctrine and forum non conveniens.¹⁴⁴ In FRAND litigation, forum

139. *Id.*

140. *Id.* at 18–19.

141. See Lemley & Shapiro, *supra* note 20 and accompanying text.

142. 28 U.S.C. § 1295(a)(1).

143. *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (declining to find a FRAND licensing violation and further declining to apply antitrust law as a remedy if there was a violation).

144. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding federal courts adjudicating with diversity jurisdiction should apply state substantive law but follow federal procedures).

shopping between any U.S. district court with jurisdiction is further encouraged by the varying stringency of the anti-suit injunction tests used by the different federal courts of appeals.

1. The Liberal and Conservative Tests

The Fifth and Ninth Circuits favor a more liberal approach to granting anti-suit injunctions, finding duplication of the parties and issues sufficient to consider an injunction.¹⁴⁵ This approach “gives less weight to the issues of international comity.”¹⁴⁶ Using this method, an anti-suit injunction is appropriate when a non-U.S. proceeding would “(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court’s in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations.”¹⁴⁷ Considering these factors in *In re Unterweser Reederei*, the Fifth Circuit affirmed an anti-suit injunction to prevent Unterweser from litigating a claim in an English court because the claim was pled as a counterclaim in the action before the U.S. district court that issued the injunction.¹⁴⁸ This liberal test was also used to grant the anti-anti-suit injunction in favor of Ericsson in the Eastern District of Texas.¹⁴⁹ The Seventh Circuit has also indicated support for this approach.¹⁵⁰

The D.C., Third, Sixth, and Eighth Circuits use a conservative standard after determining that the parties and issues in both actions are the same.¹⁵¹ Under this approach, courts only grant anti-suit injunctions if the movant shows: “(1) the non-U.S. action could prevent U.S. jurisdiction or threaten a vital U.S. policy; and (2) U.S. domestic interests outweigh concerns of international comity.”¹⁵² The Eleventh

Forum non conveniens allows for a case’s dismissal if an alternate, more convenient forum is available. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

145. Shaknes, *supra* note 15, at 98.

146. *Id.*

147. *In re Unterweser Reederei GmbH*, 428 F.2d 888, 890 (5th Cir. 1970).

148. *Id.*

149. *Ericsson Inc. v. Samsung Elecs. Co.*, No. 20-CV-00380, 2021 WL 89980, at *4, 8 (E.D. Tex. Jan. 11, 2021) (acknowledging the Fifth Circuit had not provided guidance on an anti-anti-suit injunction test but noted “while the test set forth above relates to the issuance of an anti-suit injunction, rather than an anti-interference injunction, it is nevertheless instructive and will be applied here”).

150. *See* Shaknes, *supra* note 15, at 98 (noting the Seventh Circuit “explained that the ‘lax’ standard toward which it leans demands evidence that comity is likely to be, rather than could be, impaired”) (citing *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993)).

151. *Id.* at 97.

152. *Id.*; *see Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984) (“Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant’s evasion of the important public policies of the forum.”).

Circuit has affirmed a lower court decision on these grounds.¹⁵³ The D.C. Circuit applied this test in *Laker Airways*, mentioned above in Part I.B, when affirming the grant of an anti-anti-suit injunction.¹⁵⁴ There, the court viewed the non-British defendants' attempt to litigate before English courts as an impermissible attempt to avoid the consequences under U.S. antitrust law for their actions within the United States.¹⁵⁵

The Second Circuit's approach has been classified as both conservative and intermediate.¹⁵⁶ This Note considers this approach restrictive and incorporates its factors into a new test for AnSIs. In *China Trade*, to grant an anti-suit injunction, the Second Circuit required that: "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined."¹⁵⁷ The court listed five factors to consider once the party seeking the anti-suit injunction shows it has met the threshold requirement:

- (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious;
- (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.¹⁵⁸

Considering those factors, the court reversed the district court's grant of an anti-suit injunction.¹⁵⁹ The court found that the foreign litigation was not a threat to its jurisdiction, nor did it violate any U.S. public policy.¹⁶⁰

2. The Intermediate Test and the Federal Circuit

The First Circuit uses an intermediate standard.¹⁶¹ This approach allows courts to grant an anti-suit injunction once the *China Trade* threshold requirements are met after considering:

- (1) the nature of the two actions . . . ; (2) the posture of the proceedings in the two countries; (3) the conduct of the parties (including their good faith or lack thereof); (4) the importance of the policies at stake in the litigation; and, finally, (5) the extent to which

153. See Shaknes, *supra* note 15, at 98.

154. See *supra* Part I.B.

155. *Laker Airways*, 731 F.2d at 955–56.

156. See Shaknes, *supra* note 15, at 97 (“Commentators disagree on whether to characterize the standard adopted by the Second Circuit as a restrictive/conservative standard or intermediate.”); see also *Gau Shan Co. v. Bankers Tr. Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (characterizing the *China Trade* court as having “adopted the *Laker Airways* analysis”).

157. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

158. *Id.*

159. *Id.* at 37.

160. *Id.*

161. Shaknes, *supra* note 15, at 98.

the foreign action has the potential to undermine the forum court's ability to reach a just and speedy result.¹⁶²

The court applied this test in *Quaak* to affirm the district court granting an anti-suit injunction when the foreign defendants attempted to interfere with the domestic plaintiffs' discovery request because the request sought to strip U.S. courts of their jurisdiction.¹⁶³

The Federal Circuit has also applied the liberal test in *Sanofi-Aventis Deutschland GmbH v. Genentech, Inc.*,¹⁶⁴ however, this is not necessarily dispositive of its approach to anti-suit injunctions.¹⁶⁵ This is because even though the Federal Circuit has exclusive jurisdiction over appeals in patent litigation,¹⁶⁶ it usually applies the law of the circuit where the matter would have been appealed had it not contained a patent issue.¹⁶⁷ For example, the Federal Circuit used the liberal test for granting an anti-suit injunction in *Sanofi-Aventis* because the appeal would have been heard by the Ninth Circuit.¹⁶⁸ This suggests that had the Federal Circuit heard the Samsung-Ericsson case it would have also used the liberal standard, given it originated within the Fifth Circuit. It also suggests that uniformity across the circuits in anti-suit injunctions and AnSI granting tests would disincentivize forum shopping within the United States. The lack of uniformity currently means that if a party is seeking an anti-suit injunction in the United States, they would be better off going to trial in the Eastern District of Texas than the Eastern District of New York.

3. Comity Concerns and Guidance for the Judiciary

While anti-suit injunctions' negative effect on comity is well documented, the FRAND aspect warrants further scrutiny.¹⁶⁹ National courts setting global rates on FRAND licenses may offend comity by usurping foreign courts' jurisdiction. Anti-suit injunctions might be seen as a reasonable response to a court that feels its jurisdiction is

162. *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004).

163. *Id.* at 19–20 (“This attempt to chill legitimate discovery by in terrorem tactics can scarcely be viewed as anything but an effort to ‘quash the practical power of the United States courts.’” (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984))).

164. 716 F.3d 586 (Fed. Cir. 2013).

165. See S. I. Strong, *Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States*, 66 AM. J. COMPAR. L. 153, 160–61 (2018).

166. See *supra* note 142 and accompanying text.

167. Strong, *supra* note 165, at 161 n.39.

168. *Id.*

169. See *supra* notes 101–106 and accompanying text.

being threatened even under a conservative standard.¹⁷⁰ Allowing so many anti-suit injunctions has already led to a jump in anti-anti-suit injunctions, and several courts have been petitioned for anti-anti-anti-suit injunctions. Any further flurry of AnSI activity would be harmful to international comity because courts would likely see foreign AnSIs as attempts to carve out jurisdiction, as they prevent litigants from accessing other, potentially better suited, fora to resolve their dispute.

Anti-suit injunctions are also only useful remedies if other courts abide by them and do not allow the enjoined parties to proceed with litigation in the forbidden jurisdiction. Before the court in *In re Unterweser Reederei* granted an anti-suit injunction, it also considered that “an injunction against suits being filed in foreign jurisdictions would be ineffective unless comity required its recognition.”¹⁷¹ That is because no rule of customary international law requires the recognition and enforcement of foreign judgments. As mentioned above, international comity is not customary international law; however, the boundary between international comity and customary international law can be muddled over time.¹⁷²

Following the logic in the argument that international comity’s purpose is to continue amicable foreign relations, a question remains: Should courts be required to defer to direction from the Executive?¹⁷³ In 2013, the Office of the United States Trade Representative issued a statement on FRAND expressing concerns over patent hold-up and hold-out in FRAND licensing.¹⁷⁴ The statement highlighted the “increasingly important role” that standards play in the economy and urged the International Trade Commission (“ITC”) to use caution in issuing exclusionary relief, which would allow the ITC to ban imports of patent infringing products.¹⁷⁵

This caution seems valuable in FRAND litigation contexts; however, the swinging pendulum of trade policies that results from

170. See *supra* note 152 and accompanying text.

171. *In re Unterweser Reederei GmbH*, 428 F.2d 888, 892 (5th Cir. 1970) (quoting *Mowinckels from British Transp. Comm’n v. United States*, 268 F. Supp. 682, 690 (S.D.N.Y. 1967)). The court dismissed this concern because *Unterweser* and substantial amounts of its assets were present in the forum. *Id.*

172. *The Paquete Habana*, 175 U.S. 677, 694 (1900) (“[W]hat originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.”).

173. See *supra* note 100 and accompanying text.

174. Letter from Michael B. G. Froman, U.S. Trade Representative Ambassador, to Hon. Irving A. Williamson, Chairman, U.S. Int’l Trade Comm’n (Aug. 3, 2013), https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF [<https://perma.cc/BC3G-SC2P>].

175. *Id.*; 19 U.S.C. § 1337.

administration shifts might still suggest otherwise.¹⁷⁶ In January 2013, the Obama administration released a policy statement on FRAND commitments.¹⁷⁷ On December 19, 2019, the Trump administration withdrew the 2013 statement and released its own, allowing “[a]ll remedies available under national law.”¹⁷⁸ About two years later, the Biden administration released a proposed policy, and in June 2022, it rescinded both the Trump policy and its own proposal.¹⁷⁹ It might be possible that too much deference to the Executive will result in divergent decisions depending upon which party occupies the White House.¹⁸⁰

If courts are to defer to the Executive in matters of international comity, as suggested by Professors Posner and Sunstein in *Chevronizing Foreign Relations Law*,¹⁸¹ this prompts the question of whether something akin to a Major Questions Doctrine is needed for ANSIs in FRAND litigation to maintain consistency. In administrative law, the Major Questions Doctrine applies when courts face an issue of agency action in an area of significant social or economic importance.¹⁸² When courts invoke the Major Questions Doctrine, they do not provide *Chevron* deference to agency interpretation or action when faced with an ambiguity in a statute and instead require the statute contains an explicit direction from Congress to the agency.¹⁸³ This rationale can perhaps best be explained by Justice Scalia’s evocative imagery in noting that Congress does not “hide elephants in mouseholes.”¹⁸⁴ Due

176. Kate Gehl, *Biden’s DOJ Signals Return to Pre-Trump Administration Standard Essential Patent Policies*, JD SUPRA (Oct. 13, 2021), <https://www.jdsupra.com/legalnews/biden-s-doj-signals-return-to-pre-trump-5788276/> [<https://perma.cc/LQK6-3MRQ>] (noting the Biden administration’s embracing of antitrust law in FRAND cases was a departure from the Trump era, which was a departure from the Obama years).

177. See U.S. DEP’T OF JUST. & U.S. PAT. & TRADEMARK OFF., *supra* note 106.

178. *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, U.S. DEP’T OF JUST. & U.S. PAT. & TRADEMARK OFF. 4–5 (Dec. 19, 2019), <https://www.justice.gov/atr/page/file/1228016/download> [<https://perma.cc/TTP9-CLET>].

179. Blake Brittain, *Biden Administration Scraps Policy on Tech-Standard Patents*, REUTERS (June 9, 2022, 2:11 PM), <https://www.reuters.com/legal/litigation/biden-administration-scraps-policy-tech-standard-patents-2022-06-09/> [<https://perma.cc/M6ZV-RVWX>].

180. See Dodge, *supra* note 82, at 2140 (arguing deference to the Executive “turns legal decisions into political ones, undermining not only the rule of law but also the foreign policy interests of the United States”).

181. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1177 (2007) (“[T]here are strong reasons, rooted in constitutional understandings and institutional competence, to allow the executive branch to resolve issues of international comity . . .”).

182. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

183. *Id.*

184. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

to the risk of future technological fragmentation from a breakdown in FRAND licensing, the effects on society and the economy stretch beyond the United States. The burdens will probably be felt most by the socioeconomically disadvantaged. This suggests that an analogous analysis to the Major Questions Doctrine might be needed to properly account for international comity in this particular type of dispute whenever the pendulum swings back the other way. But international comity is a doctrine, rather than a law, and such *Chevron*-style analysis, even if used, would likely still be too amorphous to properly guide courts.

Even if not from the Executive, greater guidance about an AnSI's potential to damage international comity would still benefit courts. Sections 483 and 484 of the *Restatement (Fourth) of Foreign Relations Law of the United States* might be able to give courts such guidance.¹⁸⁵ Mandatory grounds for nonrecognition in section 483 include the deciding court lacking personal or subject-matter jurisdiction, or the judicial system that rendered the decision “not provid[ing] impartial tribunals or procedures compatible with fundamental principles of fairness.”¹⁸⁶ This recalls the language in *Hilton v. Guyot* discussing the recognition of a foreign judgment that helped guide the development of international comity doctrine in the United States.¹⁸⁷

Discretionary grounds for nonrecognition in section 404 include: (1) a lack of adequate notice; (2) fraud or the lack of adequate chance to present a full case; (3) the judgment being contrary to U.S. public policy; (4) the judgment conflicts with another final judgment; (5) the decision conflicting with the parties' agreement to resolve the dispute in another forum; (6) the inconvenience to the party if the jurisdiction was based on personal service; (7) the circumstances lending doubt to the integrity of the rendering court; (8) the proceedings being inconsistent with “fundamental principles of fairness;” or (9) the courts in the state of origin not recognizing U.S. judgments.¹⁸⁸ While some of the factors overlap with the aforementioned tests, these discretionary grounds can serve as a useful guide for assessing whether an AnSI is necessary because they were drafted with considerations of international comity in mind. Once again, it is worth noting the similarities to previously referenced *Hilton v. Guyot*.¹⁸⁹

185. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. §§ 483-484 (AM. L. INST. 2018).

186. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 483 (AM. L. INST. 2018).

187. See *supra* note 94 and accompanying text.

188. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 484 (AM. L. INST. 2018).

189. See *supra* note 94 and accompanying text.

FRAND disputes and related anti-suit injunctions are truly a worldwide problem. Looking beyond the United States, courts in Germany and India have been willing to issue anti-anti-suit injunctions to counter anti-suit injunctions. In Germany, where anti-suit injunctions are forbidden, the Higher Regional Court granted an anti-anti-suit injunction to prevent the defendants from seeking an anti-suit injunction in the United States.¹⁹⁰ This preemptive anti-anti-suit injunction does not fall quite neatly into the analyses U.S. courts take with anti-suit injunctions. In India, the Delhi High Court responded to a global anti-suit injunction secured by the defendant against the plaintiff in a Wuhan court by issuing an anti-anti-suit injunction based only on personal jurisdiction over the defendant.¹⁹¹ This is a far broader standard than those U.S. courts use. Similar approaches by other countries might result in an injunction spiral.

The next Section will exit the courtroom to examine the arbitrability of FRAND disputes, assessing the benefits and drawbacks of taking these disputes outside the courts.

B. FRAND or Foe: Arbitration to Save Working Relationships

While litigation is often used to resolve disputes between licensors and licensees, arbitration may prove to be a more fruitful path. This is because the ability to have expert arbitrators, a higher degree of confidentiality, and an arbitration award with widespread acceptance by national courts might resolve disputes more efficiently.¹⁹²

In FRAND disputes, the patents at issue often originate in a number of different jurisdictions. This is often the basis for courts granting anti-suit injunctions and AnSIs, as noted above. Arbitration, however, presents no such territoriality problem. Parties, by consenting to the arbitration, grant the tribunal jurisdiction over the issues in the dispute. The ability to assess entire patent portfolios is another advantage arbitration has over litigation.¹⁹³ This advantage would make FRAND arbitration much more efficient than litigation.

190. Greta Niehaus, *First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration*, KLUWER ARB. BLOG (Feb. 28, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/02/28/first-anti-anti-suit-injunction-in-germany-the-costs-for-international-arbitration/> [https://perma.cc/B959-X2BY].

191. Interdigital Tech. Corp. v. Xiaomi Corp., High Court of Delhi, I.A. 8772/2020 in CS(COMM) 295/2020 (Oct. 9, 2020); see Rajeev Aggarwal & Prateek Badhwar, *India: The Epiphany Called Anti-Suit and Anti-Anti-Suit Injunctions*, MONDAQ (June 24, 2021), <https://www.mondaq.com/india/trials-appeals-compensation/1082770/the-epiphany-called-anti-suit-and-anti-anti-suit-injunctions> [https://perma.cc/L7EZ-SFFJ].

192. See *supra* notes 114–119 and accompanying text.

193. Picht & Loderer, *supra* note 36, at 579.

Another issue in the FRAND context is that the litigants will very likely cross paths again on a related issue. Implementers and SEP holders are a relatively small community. Unlike personal injury cases where plaintiff and defendant can litigate and forever go their separate ways, industries like telecommunications are far less suitable for parties who wish to part ways. There, six companies hold the vast majority of SEPs in the 5G standard.¹⁹⁴ They will likely have to collaborate with implementers in the future. While litigation often burns bridges, alternative dispute resolution tools like arbitration are meant to maintain, and perhaps strengthen, those relationships if compromises can be reached.

The WIPO Center and the ICC International Court of Arbitration have experience in resolving FRAND disputes through alternative dispute resolution.¹⁹⁵ These are two reputable institutions that might serve as a model for ad hoc arbitrations if the parties favor a bespoke form of arbitration. This tailoring, however, is not an option in China because the country does not allow ad hoc arbitration,¹⁹⁶ and it is also the jurisdiction that has spurred the use of anti-suit injunctions in FRAND litigation.¹⁹⁷ This is a concern because the anti-suit injunctions issued in China have been the source of several AnSIs, including the litigation involving Samsung and Ericsson, along with the injunction granted in India.¹⁹⁸

There is also some concern, given the relatively nondiverse pool of arbitrators in general, that resolving FRAND disputes in arbitration might allow arbitrators' bias to work against Chinese implementers. This, however, is a problem shared by many judiciaries that hear FRAND disputes. In fact, one of the suggested reasons for the increase in anti-suit injunctions in the FRAND context was the U.K. Supreme Court's decision setting a global FRAND rate unfavorable to Chinese implementers in *Unwired Planet*, which was discussed above in Section I.A.2.¹⁹⁹ If SSOs require WIPO Arbitration, however, this might be less of an issue. In 2020, Shanghai coordinated with WIPO to resolve international intellectual property disputes before Shanghai courts

194. Weissberger, *supra* note 32.

195. Picht & Loderer, *supra* note 36, at 582.

196. MOSES, *supra* note 109, at 10.

197. See Yu et al., *supra* note 64, at 1578–87 (describing China's adoption of the anti-suit injunction in FRAND litigation).

198. See *supra* notes 69–76, 191 and accompanying text

199. Jing Jing He, Annie Xue & Melissa Feng, *Could (China-Based) Arbitration Save the FRAND Rate Setting Game?*, COMPETITION POLY INT'L 5 (Mar. 29, 2021), <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/03/9-Could-China-Based-Arbitration-Save-the-FRAND-Rate-Setting-Game-By-Jing-He-Annie-Xue-Melissa-Feng.pdf> [https://perma.cc/7R6N-B99F].

through WIPO Mediation.²⁰⁰ This receptivity and collaboration with WIPO suggests that Chinese courts might be less concerned about seemingly unfavorable arbitral awards rendered before a WIPO tribunal than before a foreign court that had previously issued decisions hostile toward Chinese companies.²⁰¹

While the arbitrability of patent rights is contested in several jurisdictions, it is possible that patent validity might also be adjudicated in a FRAND arbitration. Unlike courts, arbitral tribunals can seek to prevent the award from affecting all parties interacting with the license and only rule on bilateral infringement.²⁰² This is termed *inter partes*.²⁰³ Therefore, the ruling does not affect the rest of the world with respect to the contested patent, only the parties involved in the arbitration. This would allow arbitration to step in to mediate the dispute between the parties and make a judgment on patent validity, but only within the context of the facts between the parties before the tribunal. While this does not allow the party whose patent is infringed upon the right to claim the patent's validity against everyone, it would effectively circumvent the jurisdiction stripping problem that courts face when examining patent portfolios involving patents granted in other nations.

The foregoing discussion details the different anti-suit injunction tests used by U.S. circuit courts, their application in granting AnSIs, and their potential effect on international comity. It also addresses the potential for injunction spirals that could prevent the parties from litigating altogether and the reasons that arbitration could prove to be valuable to parties involved in FRAND licensing. In the next Part, the proposed solution will draw upon the previous tests and discretionary grounds for nonrecognition of foreign judgments in creating a new test specifically for AnSIs. It will then propose SSOs require SEP holders and standard implementers use WIPO Arbitration as a failsafe in the event of an impasse in litigation.

200. *Mediation for Intellectual Property and Technology Disputes Pending Before Courts in China*, WIPO, <https://www.wipo.int/amc/en/center/specific-sectors/national-courts/china/spc.html> (last visited May 7, 2022) [<https://perma.cc/JHF9-H8TM>].

201. See He et al., *supra* note 199.

202. Picht & Loderer, *supra* note 36, at 586:

If a tribunal holds a patent to be invalid or not infringed with bilateral effect only, the patent owner is, in principle, no longer entitled to royalties from the other party to the proceeding. The outcome does not, however, automatically have an effect vis-à-vis competitors of the implementer and potential other licensees of the patent owner. Consequently, vis-à-vis such other market participants, the patent continues to offer a chance for its owner to collect royalties, and for the implementer it provides at least a certain shielding effect against competition from non-licensing market participants.

203. Greenbaum, *supra* note 20, at 1112.

III. SOLUTION

A. Setting a Standard for FRAND AnSIs

In the FRAND context, where worldwide industries might be upended, U.S. courts should use the restrictive approach to assessing anti-suit injunctions, as outlined by the Second Circuit in *China Trade*.²⁰⁴ Rather than use the same test again,²⁰⁵ AnSIs should face even greater scrutiny, where international comity considerations become the thumb on the scale in favor of either granting or denying an injunction. Sections 483 and 484 in the *Restatement (Fourth) of Foreign Relations Law* should guide the inquiries into whether the granted, or potential, foreign injunctions should be countered with an AnSI.

This Note previously discussed the possibility of courts using an approach to FRAND disputes similar to the Major Questions Doctrine to address changes in executive preference regarding SEP licensing remedies.²⁰⁶ The Supreme Court's recent further embrace of the Major Questions Doctrine,²⁰⁷ although in the environmental context where the national and international ramifications are more severe than lessened technological compatibility, suggests courts may be willing to adopt this position. Yet this would also require courts to prescribe to the idea that SEP licensing disputes fall under foreign relations to the extent that the judiciary should defer to the Executive in the first place. A way to entirely bypass this roadblock is for Congress to pass a law clearly directing courts on how treat anti-suit injunctions and AnSIs in the context of SEP licensing disputes. While legislative solutions are typically infeasible, there is a chance a solution to this issue might appeal to senators on both sides of the aisle.²⁰⁸

In March 2022, a bipartisan group of senators introduced the Defending American Courts Act.²⁰⁹ The Act seeks to prevent foreign interference, specifically anti-suit injunctions, that preclude persons from bringing patent infringement claims in the United States or appealing those decisions.²¹⁰ It was introduced as a reaction to the rise

204. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

205. See *supra* notes 147–152 and accompanying text.

206. See *supra* Section II.A.3.

207. See *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2610 (2022) (“Under our precedents, this is a major questions case.”).

208. S. 3772, 117th Cong. § 1 (2022). The bill is sponsored by Republican Senator Thom Tillis on behalf of Republican Senators Tom Cotton and Rick Scott along with Democratic Senators Chris Coons and Mazie Hirono. *Id.*

209. *Id.*

210. *Id.*

of anti-suit injunctions issued in China.²¹¹ Through enhanced damages and attorney's fees, the bill seeks to deter foreign courts from issuing anti-suit injunctions.²¹² As Professors Contreras, Yu, and Yang note in *Transplanting Anti-Suit Injunctions*, the proliferation of the injunction's use in China occurred because it followed the U.S. and U.K. courts' example.²¹³ Professor Contreras also questions what other repercussions might flow from this legislation.²¹⁴ Furthermore, the anti-anti-suit injunction might already be a stronger disincentive to seeking an anti-suit injunction than treble damages or attorney's fee awards. Unlike those methods, the injunction might completely preclude litigation. Given the bipartisan appetite for legislation, however, it might be more productive if a bill was introduced codifying the restrictive test for anti-suit injunctions and a stricter test, outlined below, for granting AnSIs in SEP litigation.

1. A Stricter Test for Granting AnSIs

A court's analysis would proceed as outlined below. First, it would determine whether: "(1) the parties [are] the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined."²¹⁵

Once that traditional threshold requirement is met, a court would use elements of the D.C. Circuit's conservative test, the *China Trade* factors, and the sections on mandatory and discretionary grounds for nonrecognition of foreign judgments in the *Restatement (Fourth) of Foreign Relations Law* to determine whether an AnSI should be granted.

211. See Press Release, Thom Tillis U.S. Sen. for North Carolina, Tillis, Coons, Cotton, Hirono, and Scott Introduce Bipartisan Bill to Prevent the Chinese Communist Party from Stealing Am. Intel. Prop. (Mar. 10, 2022), <https://www.tillis.senate.gov/2022/3/tillis-coons-cotton-hirono-and-scott-introduce-bipartisan-bill-to-prevent-the-chinese-communist-party-from-stealing-american-intellectual-property> [<https://perma.cc/2LQJ-79PN>].

212. See S. 3772, 117th Cong. § 2 (2022) (directing courts finding infringement to presume "the infringement is willful" when calculating damages and that "the action is exceptional" when determining attorney fees).

213. See Contreras et al., *supra* note 64, at 1578 (explaining how "intrusions, or potential intrusions, on China's judicial sovereignty" by U.S. and U.K. courts understandably encouraged Chinese courts to seek similar "ASI-like mechanism[s]"); see also Jason Rantanen, *A Guest Post by Prof. Contreras: A Statutory Anti-Anti-Suit Injunction for U.S. Patent Cases?*, PATENTLY-O (Mar. 18, 2020), <https://patentlyo.com/patent/2022/03/contreras-statutory-injunction.html> [<https://perma.cc/6RYF-BE54>] (noting that the authors, Contreras, Yu, and Yang, argued that "Chinese courts effectively 'transplanted' ASIs to China from the U.S. and UK").

214. Rantanen, *supra* note 213 ("One risk of unilateral measures such as [the Defending American Courts Act] is that they could trigger reciprocal actions by other countries that could cause more harm than good to U.S. companies and markets.").

215. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

The court must find that “(1) the non-U.S. action could prevent U.S. jurisdiction or threaten a vital U.S. policy; and (2) U.S. domestic interest outweigh concerns of international comity.”²¹⁶

The court would then use the following factors to assess international comity concerns: “[(1)] a threat to the issuing court’s in rem or quasi in rem jurisdiction; . . . [(2)] adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment;”²¹⁷ (3) a lack of adequate notice; (4) likelihood of fraud or the lack of adequate chance to present a full case; (5) the decision conflicting with the parties’ agreement to resolve the dispute in another forum; (6) the circumstances lending doubt to the integrity of the rendering court; (7) the proceedings being inconsistent with “fundamental principles of fairness;” or (8) the courts in the state of origin not recognizing U.S. judgments.²¹⁸

Generally, as the “anti” is upped, more factors must be met to issue an AnSI. The exact number and weighting will still be left to the discretion of a court because it is conceivable that an especially egregious violation of one factor might warrant an AnSI, even if multiple other factors are not violated. Providing the court some discretion keeps within a strict test the spirit of international comity as a blend of standards and rules.²¹⁹ This test, which becomes harder to meet as “n” increases, corresponds to the progressively more damaging nature of AnSIs.

Of the three approaches to granting anti-suit injunctions, the liberal approach is most likely to favor a race to maximize the “n” in AnSIs. Under the liberal test, more anti-suit injunctions are likely to be granted because international comity is weighted less.²²⁰ A more restrictive approach is the least likely to create an injunction spiral because the fewest number of anti-suit injunctions will be granted under that approach.

If the test outlined in this Section is codified into law by Congress, it will provide courts concrete guidance on how to handle international comity issues when they consider granting AnSIs in SEP licensing disputes. It will also send an important message to foreign courts: one of judicial restraint. This is important because given the

216. Shaknes, *supra* note 15, at 97; Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984).

217. *China Trade*, 837 F.2d at 35 (alteration in the original).

218. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 484 (AM. L. INST. 2018).

219. See Dodge, *supra* note 82, at 2124 (“A review of the international comity doctrines in American law shows that many take the form of rules rather than standards . . .”).

220. Shaknes, *supra* note 15, at 98.

nature of FRAND licensing, standards, and SEPs, the United States will not be able to solve this problem alone.

International cooperation on FRAND licensing will be necessary. Courts of foreign jurisdictions should ideally do everything possible to avoid stepping on each other's metaphorical toes. One scholar has suggested that courts only have jurisdiction in FRAND disputes over patents issued within their territorial borders.²²¹ Yet this does not seem to be what is happening around the world. In February 2022, the Hague District Court found it had international jurisdiction over a FRAND dispute that involved "only foreign plaintiffs and where three out of the four co-defendants were equally foreign," suggesting its willingness to set a global FRAND rate.²²²

So long as leading FRAND litigation fora continue to grant anti-suit injunctions and AnSIs, others will likely follow suit. Customary international law must begin somewhere. It was Justice Brandeis who put forth the idea of states as the laboratories of democracy within the United States.²²³ In the international context, the United States, as a leader among world economies and technological progress, should express similar courage to take the first step in backing away from upping the "anti."

2. The Remaining Danger

Given the international nature of the problem, it is impossible to escape the possibility that even if the United States was to back away from issuing anti-suit injunctions and AnSIs, foreign courts might issue injunctions preventing litigants from using the United States as a forum. For example, the German anti-anti-suit injunction, mentioned above in Section II.A.3, was granted when the defendants were only contemplating requesting an anti-suit injunction in the United States in the Northern District of California.²²⁴ Similarly, a French court did the same by granting an anti-anti-suit injunction when faced with a possible anti-suit injunction leveled against it also in the Northern District of California.²²⁵ But it is worth noting that perhaps the

221. See Greenbaum, *supra* note 20, at 1117.

222. Robert Hardy, *Dutch Court Has International Jurisdiction in FRAND Matter Primarily Involving Foreign Parties*, NAT'L L. REV. (Feb. 14, 2022), <https://www.natlawreview.com/article/dutch-court-has-international-jurisdiction-frand-matter-primarily-involving-foreign> [<https://perma.cc/ZR92-RQL6>].

223. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

224. Niehaus, *supra* note 190.

225. *Id.*

European courts might not have felt the need to issue that injunction if the Ninth Circuit had a stricter test. India's approach gives it far greater latitude in issuing anti-suit injunctions and AnSIs.²²⁶ Other countries with such expansive approaches will likely issue such injunctions with more frequency than the United States if it does show restraint.

Here, the AnSI test described above becomes a valuable guide for U.S. courts. If a party threatens to secure an anti-suit injunction or AnSI in a foreign jurisdiction, the U.S. court can ensure that international comity concerns are thoroughly considered before acting on an AnSI. The strict nature of the test will, hopefully, prevent courts from finding many instances where an AnSI is justified. If multiple factors are met, however, U.S. courts should feel within their power to act to protect national interests or an unwitting party. It is conceivable, much as the Western District of Texas has secured a substantial number of patent cases,²²⁷ a circuit might adopt a liberal approach to issuing anti-suit injunctions and AnSIs to similarly capture a significant number of FRAND disputes. This would likely set off an injunction spiral, and once the ramifications to society and the economy are felt, it could potentially draw the ire of the Executive. This suggests more is needed than just a stricter test, and it is why legislation would yield the most effective results because the test would be applied uniformly across circuits.

As noted above, U.S. courts adopting a stricter test to assess AnSIs might have results beyond this country's borders.²²⁸ Yet it is also essential that U.S. courts stay vigilant to protect their jurisdiction if threatened and retain their ability to act equitably if a party before it is subjected to unfairness before a foreign court. This leaves us with a world where parties involved in FRAND disputes may feel safer from surprise anti-suit injunctions or AnSIs, but it is one where the risks to trade and technological compatibility remain to some extent. It is also possible that enough AnSIs might be issued to effectively preclude litigation entirely. To address these issues, parties should be incentivized to make use of international commercial arbitration.

226. See *supra* note 191 and accompanying text.

227. See Robyn Ast-Gmoser & Anthony Blum, *A Race Between West Texas and Delaware for the Patent Venue of Choice*, JD SUPRA (Mar. 10, 2021), <https://www.jdsupra.com/legalnews/a-race-between-west-texas-and-delaware-1379225/> [<https://perma.cc/5R95-ED4M>] (describing how the District of Delaware supplanted the Eastern District of Texas and how the Western District of Texas is challenging its claim to the patent throne).

228. See *supra* notes 224–225 and accompanying text.

B. With FRANDs Like These: Arbitration as a Failsafe

For the reasons outlined above in Part II.B, FRAND arbitration has strengths where FRAND litigation falls short.²²⁹ SSOs should require that parties include arbitration clauses in FRAND licensing agreements as a failsafe if parties' FRAND litigation reaches an impasse because of AnSIs. This impasse would be a situation where litigation is essentially prevented in any forum because sometimes even adopting the most stringent of tests may not be enough to prevent the undesirable outcome of upping the "anti." The impasse triggering requirement allows parties to retain a significant degree of autonomy in resolving the dispute initially, whether before a court, through one of the other alternative dispute resolution tools mentioned above in Part I.D, or through arbitration of their own choice.²³⁰

Imagine if an anti-suit injunction is granted even after applying a restrictive or conservative approach. Yet a foreign jurisdiction that finds anti-suit injunctions contrary to public policy, as civil law countries do, might issue an anti-anti-suit injunction.²³¹ If issued with enough breadth, this second injunction could, on its own, foreclose litigation. If it does not, this action might set off further AnSIs, resulting in an injunction spiral. This worst-case scenario is one in which a sufficient number of injunctions are issued with enough breadth to prevent litigation anywhere in the world. In that event, alternative dispute resolution remains the best option.

While SSOs amending their patent policy resulted in a substantial number of negative letters of assurance,²³² this change would likely be less controversial. Rather than attempting to define a "reasonable rate" as the IEEE did in 2015, this approach allows parties to take their dispute to court first and only mandates arbitration when the litigation involves AnSIs that could preclude litigation altogether, like in the Samsung and Ericsson case mentioned in Part I.²³³ Rather than proceeding in one forum and running the risk of sanctions in another, this would allow the parties an alternative forum in the form of the internationally recognized WIPO Center.

In keeping with the multinational spirit of SSOs, arbitrations should be held before WIPO experts. The WIPO Center has gained acceptance around the world as a reputable organization before which

229. *See supra* notes 192–193, 199–203 and accompanying text.

230. *See supra* Part I.D.

231. *See supra* note 66 and accompanying text.

232. *See supra* notes 43–47 and accompanying text.

233. *See supra* Section I.B.2.

to resolve disputes.²³⁴ Arbitrators should be chosen from neutral countries (those with no patents on the line) or one arbitrator should be selected from each party's home country with a neutral tiebreaker. The parties will have to pay for the institutional rules; however, they will benefit from the efficiency with which an institution operates in comparison to an ad hoc system. Given the arbitration is administered by an institution, it also remains an option in China where ad hoc arbitration is not permitted. The arbitral awards issued by the WIPO Center will also be enforceable in courts around the world under the New York Convention. This is quite unlike the results of foreign judgments, which may not be recognized for a variety of reasons. Some of those have been outlined in the discussion involving mandatory and discretionary grounds for nonrecognition of foreign judgments.²³⁵ And considering the increased use of anti-suit injunctions in China, arbitration before WIPO, which has found approval in the country, would likely be more acceptable than a different institution. Further, the nature of arbitration, unlike an adversarial trial proceeding, is more collaborative and mutually satisfying for the involved parties. This would ideally create a better working relationship between the licensor and licensee within the relatively small industries involved in FRAND licensing. For these reasons, it would benefit parties to a FRAND dispute to seek out WIPO Center arbitration before a litigation impasse is reached.

Arbitration might seem like the best way to deal with FRAND disputes and, at this point, the possibility of SSOs mandating arbitration and bypassing the court system entirely might seem tempting.²³⁶ Professors Lemley and Shapiro have suggested mandatory baseball arbitration for some time now; however, arbitration alone might prevent the parties from getting their fullest possible remedy because some patent rights are not arbitrable.²³⁷ Notably, China, Germany, France, and the Netherlands all find "patent validity to involve non-arbitrable matters of public policy," and the New York Convention does not require courts to recognize awards that conflict with public policy.²³⁸ Therefore, the contractual dispute may be resolved through arbitration, but patent validity cannot. In addition, an arbitral award is only binding on the parties involved and, unlike a court

234. Picht & Loderer, *supra* note 36, at 582; He et al., *supra* note 199.

235. See *supra* notes 186–189 and accompanying text.

236. It is also worth noting that consolidating these international disputes might conflict with antitrust laws, which is beyond the scope of this Note. For further discussion, see Greenbaum, *supra* note 20, at 1113–14.

237. Picht & Loderer, *supra* note 36, at 585–86; Lemley & Shapiro, *supra* note 20, at 1138.

238. Greenbaum, *supra* note 20, at 1112.

decision, has no power against third parties.²³⁹ Therefore, a patent properly found invalid in an arbitration is only invalid between the parties to the arbitration but still valid with respect to the rest of the world. This Note proposes parties attempt to resolve the matter first by litigation because of the likelihood of patent validity issues springing up in a FRAND dispute. So, it seems that litigation still has a role to play, but arbitration is a worthy complement.

As proposed by Professor Jorge Contreras, a FRAND rate-setting tribunal might be the ideal long-term solution.²⁴⁰ A centralized body would hopefully create transparency and clarity worldwide, providing all SEP licensors and licensees a neutral forum in which to resolve their disputes before experts. Given SSOs' unwillingness to wade into the meaning of FRAND, however, it seems unlikely such a tribunal will be formed by the standard setters themselves. If such a body was created, it would likely have to sit within another international nongovernmental organization that is widely respected on matters of intellectual property. In that space, the major player is WIPO. A tribunal would likely have many of the same characteristics of the WIPO Center's FRAND dispute resolution tools. That is why this Note suggests use of the WIPO Center's mechanisms if litigation fails because of AnSIs. If such a body was to emerge and SSOs mandated all disputes be adjudicated before it, it would hopefully create a system with greater clarity and predictability.

While the world awaits a FRAND solution, the problem of anti-suit injunctions and AnSIs remains, and the specter of injunction spirals looms large. Then there is the added danger of future technological fragmentation and its probable harmful effects on global connection, particularly for the least well-off in society. In the interim, U.S. courts should apply, and Congress should codify, a restrictive test for anti-suit injunctions and a stricter test for AnSIs, with elevated scrutiny as courts up the "anti" in the FRAND context. To appropriately acknowledge the danger to international comity, SSOs should require that parties use arbitration as a failsafe if litigation reaches an impasse. This combination of litigation and arbitration would be far more beneficial to the FRAND licensing regime than maintaining the status quo in granting AnSIs and more practicable than requiring all disputes be arbitrated.

239. See 35 U.S.C. § 294(c) ("An award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person."); see also Greenbaum, *supra* note 20, at 1113 (claiming "limited effect given to arbitral determinations of patent validity conflicts with the FRAND 'non-discrimination' requirement").

240. Contreras, *supra* note 20, at 756–57.

CONCLUSION

FRAND licensing disputes over SEPs present many challenges to the international community. These disputes involve legal issues in fields ranging from patent to trade to antitrust law. The increased willingness of courts around the world to grant anti-suit injunctions and AnSIs in FRAND litigation poses a serious threat to international comity. A breakdown in international comity over disputes involving SEPs poses a serious risk to the technological compatibility that has arisen because of the widespread adoption of standards. While this is worthy enough of concern on its own, the suspicion of foreign courts' judgments could extend beyond the patent realm and cause further breakdowns in foreign relations.

To head off this possible spiral, this Note argues that the social and economic ramifications of FRAND disputes are of enough weight that courts should take a restrictive approach to granting anti-suit injunctions and an even more restrained hand in granting AnSIs by heavily weighting international comity concerns using concrete factors. To send a stronger message of judicial restraint to the rest of the world, Congress should codify these tests. But if enough AnSIs are granted that litigation reaches an impasse, this Note also suggests SSOs require the use of international commercial arbitration by the WIPO Center as a failsafe. This would allow a court whose jurisdiction has been stripped to take defensive measures but still ensure that the litigants do have a place to go to resolve the dispute. Institutional arbitration led by the WIPO Center may serve as a more neutral tool to balance partiality concerns compared to arbitration based in one country or ad hoc arbitration. In this way, litigation and arbitration may work together to maintain the technologically interoperable world we rely on today.

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