



# Balanced IP Enforcement in the context of Global Health and Food Security

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“without effective enforcement, IPRs are nothing but empty shells” – R. Hilty







**primary norms enact substantive rights and obligations, while secondary norms enable the fulfillment of those rights and obligations**

**It is in the combination of primary and secondary norms where the constitutive characteristic of the legal system lies (H.L.A. Hart)**

**Two groups of norms that interact... Idea of dynamism**

**Enforcement as a process of weighing and balancing rights and interests of different nature**



**In *eBay*, SCOTUS differentiated “the creation of a right” from “the provision of remedies for violations of that right”**

**Enforcement describes an action, not a pre-established outcome: other norms, principles and objectives enter into play**



**Since the exercise of intellectual property rights ultimately stops parties doing things ('the right to exclude'), the use of (negative) injunctions is very much part of the way those rights are in practice, exercised – and litigated**





**Judge's work  
may resemble  
to that of a  
potter**

**Enforcement as a  
process of weighing  
and balancing rights  
and interests of  
different nature**

**Discretion is  
central in  
remedies of equity**

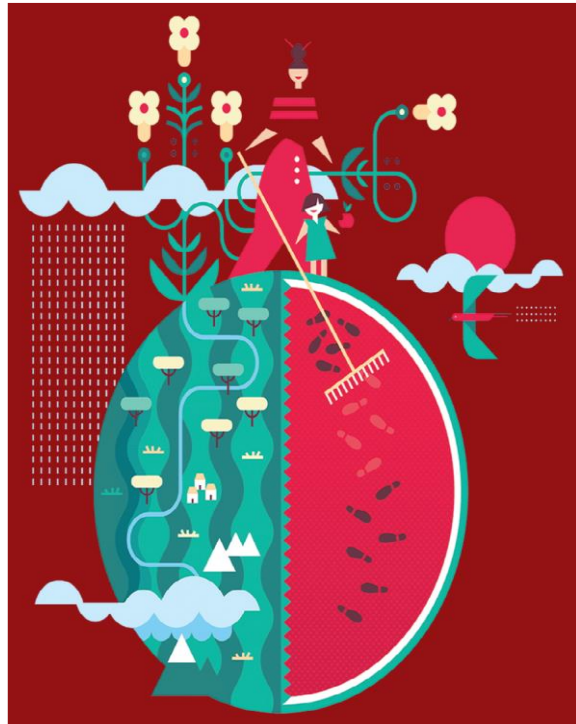
**UK** “the Court should in appropriate circumstances take into account the interests of persons who would be affected by the grant of the injunction. That may involve considering the interests of the public” - *Chirton Corp vs Organon Teknika Ltd* [1995]

**India** “Courts have to tread with care [when] pharmaceutical products and more specifically life saving drugs are involved. In such cases, the balancing would have to factor in unknowns such as the likelihood of injury to non-parties and the potentialities of risk of denial of remedies” *F. Hoffmann-LA Roche AG v. Cipla Ltd (Delhi High Court)*

**US** “hemophiliacs could suffer if there is any delay in bringing recombinant Factor VIII:C to the market (...) In addition, recombinant technology may ultimately provide a more economical and efficient source of Factor VIII:C than human or porcine plasma”. *Scripps v. Genetech*



# Food fraud & agro counterfeiting

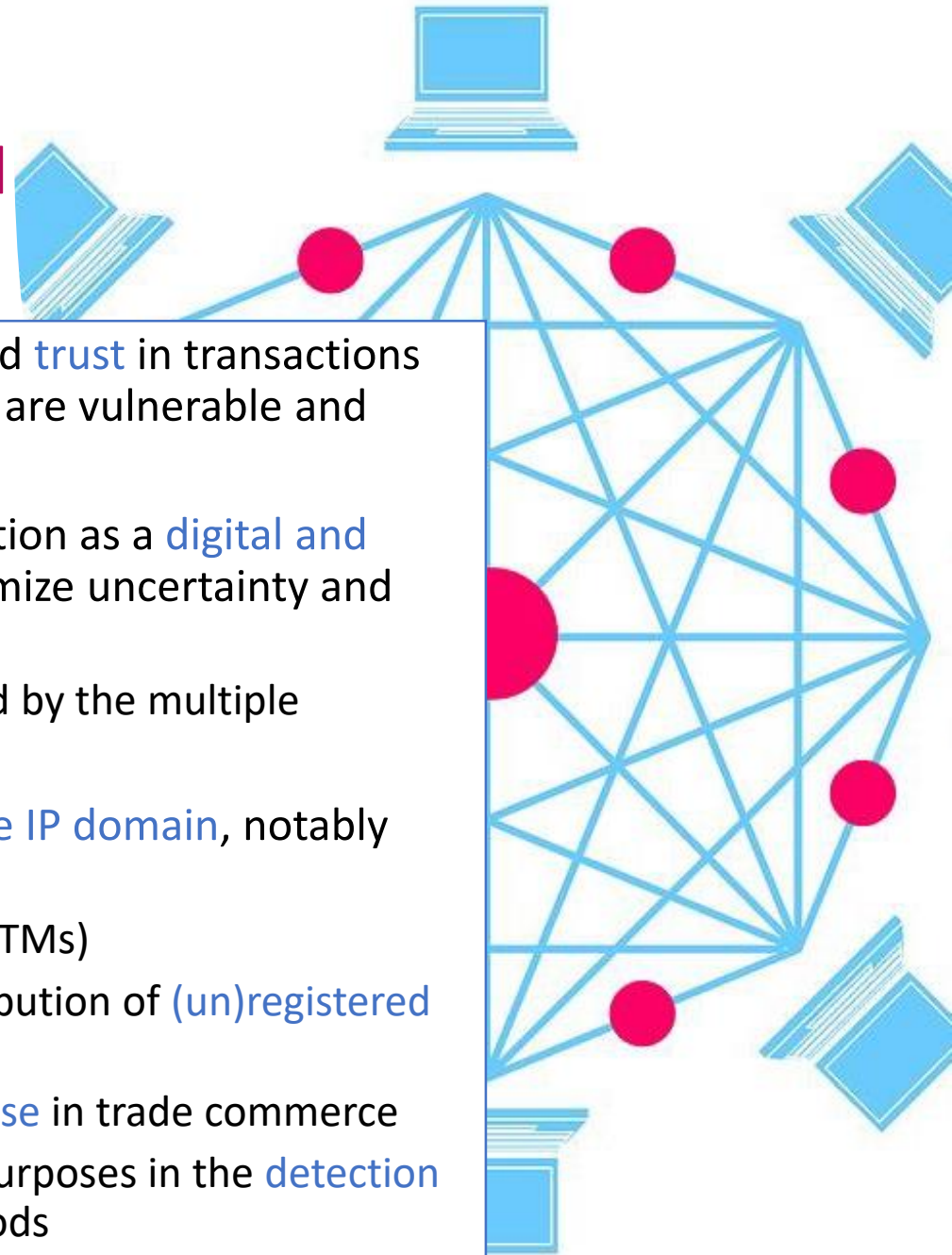


- Illegal pesticides, herbicides and seeds can endanger public health, food safety, environmental protection and development
  - High quality agricultural inputs such as hybrid seeds, fertilizer and herbicide = productivity = improve food security and reduce poverty
  - 70% of the African population living under US\$1.25 per day is engaged in smallholder farming (Ashour et al 2017)
  - 13.9% of herbicides in the EU market are illegal (OECD, 2019) / in African countries the percentage reaches 30% (Ashour, 2017)
- IP infringement is an important component of food fraud and illegal agri-food products
  - Keeping track of the origin and genuine nature of products would enhance food security



# From centralized and vulnerable to decentralized and immutable

- Institutions have traditionally ensured trust in transactions by acting as intermediaries, but they are vulnerable and increase costs
- Distributed ledger technologies function as a digital and transparent institution of trust, minimize uncertainty and disintermediate with a shared ledger
  - transactions verified and validated by the multiple computers
- DLTs can play an important role in the IP domain, notably when enforcing IP rights
  - Provenance authentication (Gis – TMs)
  - Controlling and tracking the distribution of (un)registered IP
  - Evidence of genuine and/or first use in trade commerce
  - Authentication and provenance purposes in the detection and/or retrieval of counterfeit goods



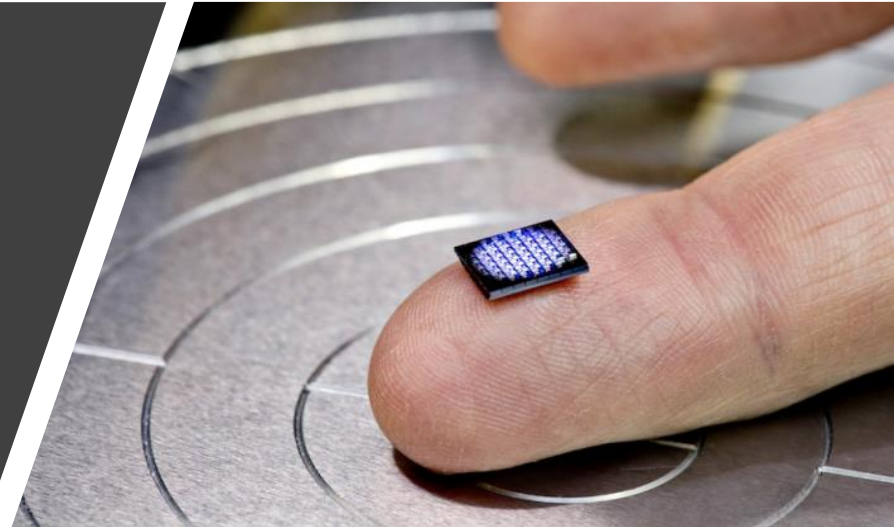
- Supply chain actors can identify and **examine the product's movement**
- Data available on the **quality, safety and sustainability** of goods
- Ability of DLTs to
  - **trace** a product's provenance
  - **carry** attributes in each transaction
  - **ensure** its traceability offers huge improvements for
    - food **safety**
    - combating food **fraud**
    - reducing friction at the **border**

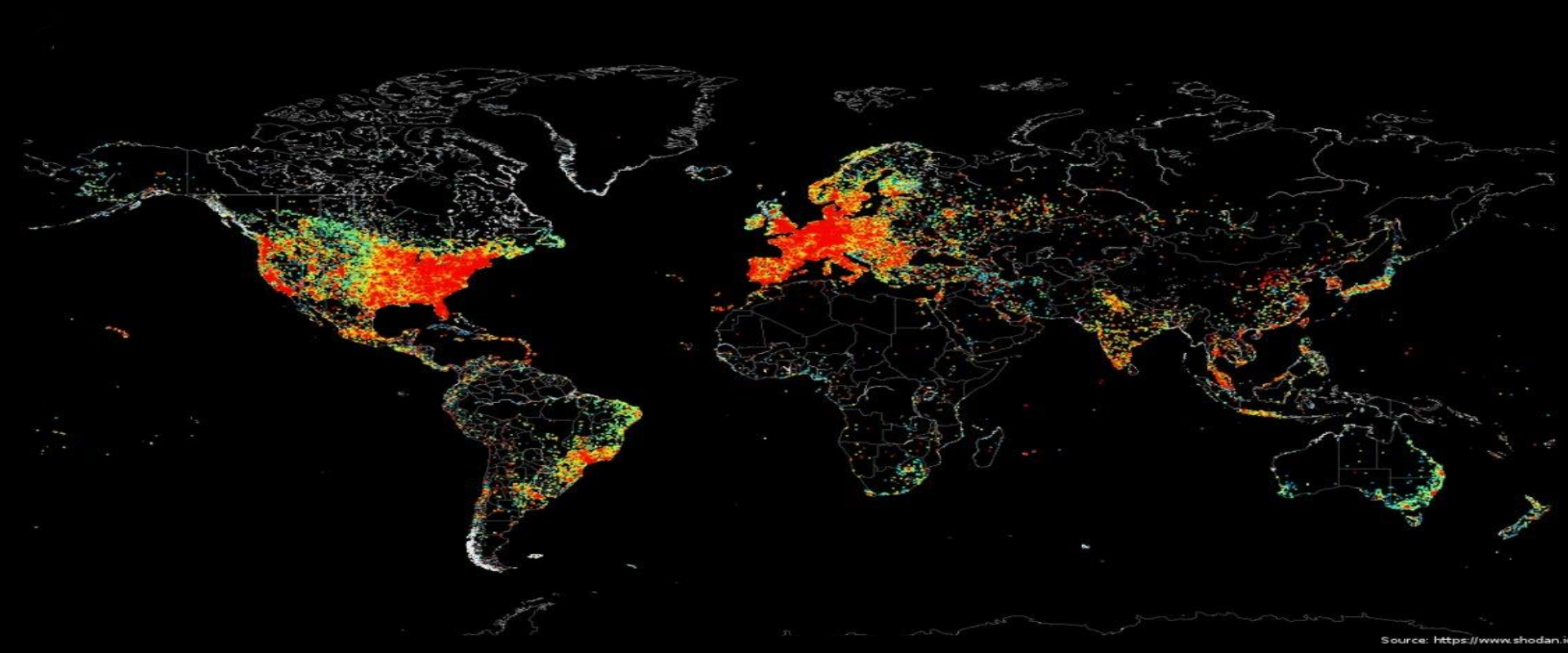




# The need to ensure correlation between the goods and the DLT

- While the transaction data can be traced, the physical movement needs to be tracked through such an immutable product-process link
- Several options exist:
  - End-user verification
    - coin-scratch code to verify (sms)
    - QR code on the product's packaging
  - Radio frequency identification (RFID) chips
  - Crypto-anchors (tampered-proof digital fingerprints)





Source: <https://www.shodan.io>

## Challenges

- **Technical challenges**
  - The evolution of DLTs has led to the development of both public and private DLTs, which both use different consensus algorithms to validate data entries
  - Understanding the technicalities of each DLT will determine the technology's success and impact on the ground. This highlights the importance of open-source platforms
- **Internet connectivity**
  - DLTs can only be applied as long as an internet connection is available: roughly four billion people do not have access to the internet (ITU, 2018)
  - Only 19 % of people in least developed countries have access to Internet (ITU, 2018)





An inclusive perspective

There is enough space for adjustment

... clearly in TRIPS, which requires an overall satisfactory level of intellectual property enforcement but leaves ample margin guided by Arts 7 & 8







## **(Lost in) Transplantation**

Positive implementation may not be possible when transplantation is intense

Nothing bad in proposing IP laws that have worked elsewhere...

... but what's the point in proposing only some parts of those laws?

Proposals lacking balance do not reflect the law of nations making those proposals and do not necessarily favor right holders, who may also become infringers at any time

# Guidance for balanced IP Enforcement



## Policy

“To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns (....)”

**Recommendation 45  
WIPO Development  
Agenda.**



## Normative

Effective, fair and equitable intellectual property enforcement procedures: principle of public international law, international IP law, and law.

**Article 41 of TRIPS  
Agreement**



## Judicial

“flexibility rather than rigidity has distinguished [equity]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs”

***SCOUTS, eBay Inc. et al.  
v. MercExchange (2006)***





**Thank you!**

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