Li, Xuan

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RESEARCH PAPERS

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WCO SECURE: LESSONS LEARNT FROM THE ABORTION OF THE TRIPS-PLUS-PLUS IP ENFORCEMENT INITIATIVE

Xuan Li*

SOUTH CENTRE

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* Dr. Xuan LI is the Programme Coordinator of the Innovation, Access to Knowledge and Intellectual Property Programme (IAKP) at South Centre, Geneva, Switzerland (li@southcentre.org). The views expressed is this paper are the personal opinion of the author, and do not reflect the position of the South Centre and its Member States. All errors and omissions in this study are the author's sole responsibility.

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LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
G8	Group of 8 developed countries
IP	Intellectual property
IPRs	Intellectual property rights
SECURE	Provisional Standards Employed by Customs for Uniform Rights Enforcement
TOR	Terms of Reference
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UPU	Universal Postal Union
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

EXECUTIVE SUMMARY

Promoting TRIPS-plus-plus standards on IP enforcement has been a priority of developed countries in recent years through multilateral, regional and bilateral negotiations.[1] Compared to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the ongoing TRIPS-plus-plus IP enforcement initiative can be regarded as the second generation of international IP rule making initiative, as TRIPS is considered as the first generation of international treaty which consolidated the international IP regime and laid down minimum global standards of harmonization of IPRs. Among various initiatives promoted by interest groups of developed countries at World Customs Organization (WCO), World Health Organization (WHO), Universal Postal Union (UPU), G8, Anti-Counterfeiting Trade Agreement (ACTA), etc, the negotiation on the Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE) at the WCO represented one of the most significant attempts to establish TRIPS-plus-plus initiatives on IP enforcement. It enshrines provisional enforcement rules and procedures for right-holders on one critical aspect of the intellectual property rights enforcement: border measures.

The objective of this research paper is to extract lessons from the negotiation process of SECURE, an initiative to promote TRIPS-plus-plus standards on IP enforcement at the WCO, and assist developing countries in addressing the emerging global challenges in IP enforcement initiatives. Although the proponents of SECURE had adopted a fast-track approach for its speedy conclusion, effective coordination among developing countries foiled the attempt to adopt the SECURE draft at the June 2008 WCO Council and led to the suspension of the SECURE Working Group at the WCO Policy Commission in Argentina in December 2008. This battle gives us good reason to reflect deeply on the whole process of negotiations and come up with visionary plans for future challenges and struggles for the sake of developing countries' own long-term sustainable development.

The SECURE working draft contains a Section on "IPR Legislative and Enforcement Regime Development", which proposes 12 standards of IP enforcement. If the proposed SECURE standards are adopted, these twelve standards included in SECURE would represent a significant departure from the TRIPS agreement in terms of subjects, scope and measures of protection, disposal methods and member states obligations and rights. Moreover, the proposed SECURE standards may disrupt normal trade of non-infringing goods by re-delineating the responsibilities of determination of IP infringement among various authorities. Under the TRIPS, it is the authority of a judicial body, rather than the customs administrations to dispose of or destroy the infringed goods. When compared to the adopted recommendation of the WIPO Development Agenda, the proposed SECURE draft accords more benefits and less obligations to right-holders at the cost of other stakeholders, which is inconsistent with the call for a more balanced IP protection mechanism for all stakeholders in Recommendation 45 of WIPO Development Agenda. The balanced mechanisms under TRIPS have been by-passed under the SECURE standards, thus affecting the flexibilities contained in TRIPS.

Such a legal framework poses potentially, a serious economic threat to developing countries. Once adopted for implementation, SECURE would be detrimental to the economic growth of developing countries. Such an economic impact can be viewed from two sides: i) within their territory, there will be increased obligations for the customs administration of developing countries, which will lead to higher enforcement costs within these countries; and ii) externally, developing countries would

[1] "TRIPS-plus" generally refers to commitments that go beyond those already included or consolidated in the TRIPS Agreement. "TRIPS-plus-plus" is to highlight the extent of the significant departure of SECURE from existing TRIPS Agreement regarding border measures.

face new types of trade barriers and their enterprises are likely to face greater uncertainties due to new trade barriers.

South-South cooperation played a critical role in reshaping the dynamics of the SECURE negotiation. With timely intervention and effective coordination, developing countries first prevented the adoption of the SECURE draft at the 2008 WCO Council and later had the SECURE suspended at the WCO Policy Commission in December 2008, which reversed the attempt to push through new TRIPS-plus-plus standards by developed countries at the WCO. However, although the SECURE Working Group has been suspended, the Secretariat has recommended to the Policy Commission that a new body be set up under a Permanent Technical Committee or the Enforcement Committee to develop a practical means of supporting Customs administrations in conducting IPR-related controls. This implies a possibility that the discussion on TRIPS plus substantive standards may be revived by means of an internal forum-shopping strategy at the WCO. The experience of SECURE negotiations shows that, among others, closer coordination and effective response among developing countries is not only possible but also imperative, and a global monitoring mechanism is necessary to take the pre-cautionary approach and ensure that the responsive actions be taken collectively.

I INTRODUCTION

Thirteen years ago, interest groups in developed countries pushed hard and successfully incorporated TRIPS Agreement into the World Trade Organization (WTO) framework. This was the first international treaty which consolidated the international IPR regime, and laid down minimum global standards of harmonization of intellectual property rights (IPRs). The distorted outcome of the TRIPS negotiations has contributed to the serious imbalance of rights and obligations between the developed and developing countries. However, many instruments are available to unlock the fetters of the TRIPS regime. Development of flexible and optimal intellectual property (IP) enforcement policy is one of the key instruments. From an economic perspective, the policies of enforcement and protection are mutually reinforcing, usually leading to the same effect of maximization of national interests. From a legal perspective, although the policy of IP protection has found its way into international agreements, the enforcement policy was primarily left to domestic legislation. For developing countries, this legal freedom means that there are possibilities to counter the imbalance posed by the international IP regime to the benefit of their long-term development.

Given the policy space and special status that IP enforcement policies might entail, developed countries and their interest groups earnestly began another round of negotiations on setting global IP enforcement standards in multilateral, regional and bilateral forums. Since the negotiating capacity of developing countries at the WTO and World Intellectual Property Organization (WIPO) is relatively stronger, and the developed countries had not yet achieved their IP enforcement objectives through the negotiation process therein, the developed countries launched simultaneous initiatives in other international or regional forums such as the WTO, the WCO, UPU, WHO, ACTA as well as the G8, bypassing the WTO process in order to impose TRIPS-plus-plus standards. Under this forum-shopping strategy, the intention of the North is to break the sticky situation through the back-door. If TRIPS can be seen as the first generation of international IP rules negotiation, the ongoing TRIPS-plus-plus IP enforcement initiative can be regarded as the second generation of international IP rule making.

The current strategy of developed countries for promoting IP enforcement negotiations bears some similarities to that of 13 years ago when pushing for incorporation of TRIPS into the WTO rule system, but it also presents some new features. What is common in both strategies is the tactic of forum-shopping. At that time, 'the shopping approach' was used to establish a link between WIPO and WTO. By incorporating the relatively weak WIPO treaties into the WTO, which has a relatively stronger power of enforcement, the interest groups concerned wanted to standardize, legalize and internationalize their policy objectives. The current strategy of IP promotion by developed countries is a simultaneous, multi-pronged offensive at regional, global and bilateral levels, as reflected by the attempts to cut in the weaker links and craft new IP enforcement laws and standards (voluntary or factual). Once accomplished, developed countries would sell these standards in other forums, with the purpose of eventually turning them into mandatory arrangements. The negotiation on the SECURE at the WCO represented one of the most significant attempts to establish TRIPS-plus-plus initiatives on IP enforcement. It enshrines provisional enforcement rules and procedures for right-holders on one critical aspect of the intellectual property rights enforcement: border measures. The standards included in SECURE represent a significant departure from the TRIPS agreement. The key content is to revise customs regulations with expansion of the authorities of customs administrations, and re-delineate the boundary of customs and other stakeholders. If SECURE were adopted, these TRIPS-plus-plus measures would increase the power and authority of national border and customs authorities to seize goods which are suspected of infringing intellectual property rights. For developing countries, SECURE primarily poses a five-fold threat: (1) it appears to be outside the boundary of the WCO's mandate and responsibility; (2) it could undermine the delicate balance as enshrined in the TRIPS as far as the role of customs is concerned; (3) it is contaminated with quite a number of TRIPS-plus-plus elements; (4) it is obviously slanted towards the interests of right-holders to the potential detriment of other parties; (5) the lack of transparency and participation of developing countries and observers from

inter-governmental organizations and NGOs in the process. The adoption of SECURE standards would allow developed countries to gradually legalize international TRIPS-plus-plus rules without resorting to amending the TRIPS agreement itself.

Aiming to fast-track SECURE at the WCO, a series of SECURE Working Group meetings were organized with a view to concluding all technical discussions within a year. However, due to effective coordination among developing countries, a major setback for developed countries occurred when the WCO Council, held in June 2008, failed to adopt SECURE and decided to send the text back to the Working Group for further examination. Eventually, a suspension of the SECURE Working Group occurred in December 2008. This suspension should be viewed as an interim success for developing countries however, as other forum-shopping initiatives remain. Negotiation of the SECURE is over but the risk of a TRIPS-plus-plus initiative still remains for developing countries in the form of internal forum-shopping strategies. Furthermore, a technical group, which poses potentially an even greater threat to developing countries will be set up to continue to deal with IP enforcement.

This paper is intended to extract lessons from the negotiation process of SECURE and assist developing countries in addressing the emerging challenges in IP enforcement initiatives at the WCO. It provides the background on WCO SECURE and the latest review of the negotiation process of SECURE in Section II. In Section III, it analyzes legal and economic implications of the SECURE text. Section IV presents the negotiation and coordination of developing countries on SECURE with conclusions in Section V.

II WCO SECURE: THE ORIGIN AND EVOLUTION

Promoting TRIPS-plus-plus IP enforcement has been high on the agenda of the USA and EU governments in recent years through multilateral and bilateral negotiations. The EU-US Summit in April 2007 and G8 Summit in June 2007 included this topic in its agenda on the information exchange on IPR protection and enhancement of IPR enforcement and put forward a number of concrete measures including enhanced international cooperation and information exchange. As a relatively small international organization, WCO was chosen to promote IPR protection ideas from the perspective of developed countries (Figure 1). The WCO, which represents 174 customs administrations, is an international organization with its headquarters in Brussels. It has a mandate to provide technical assistance to customs administrations and serves as a forum where delegates representing a wide variety of members can tackle customs issues on an equal footing.[2] Thus, the mandate of WCO has been limited to providing technical assistance to implement existing norms, rather than norm-setting activities.

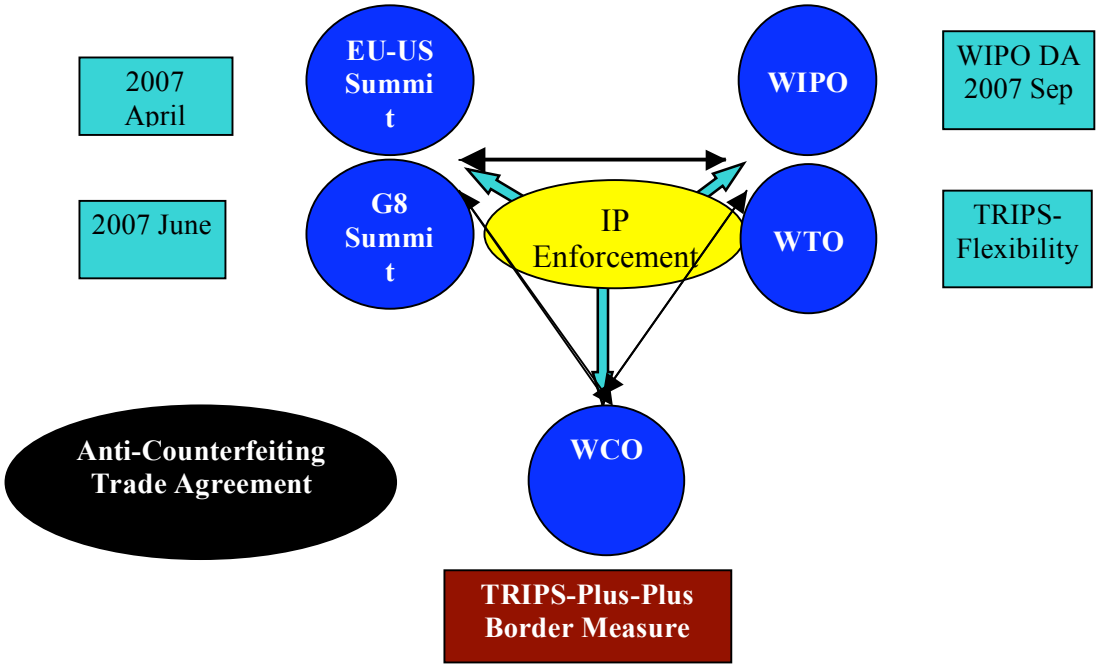
The SECURE working draft is a working document of the SECURE Working Group established by the WCO Enforcement Committee. It is comprised of an introduction and four sections, i.e. section I (IPR Legislative and Enforcement Regime Development), section II (Co-operation with the Private Sector), section III (Risk Analysis and Intelligence Sharing), and section IV (Capacity Building for IPR Enforcement and International Co-operation). Among these, Section I of the SECURE Working Draft, "IPR Legislative and Enforcement Regime Development", is the key component of the working draft, which contains 12 standards of IP enforcement. The expected outcome of the formulation of SECURE Working Group at the WCO is to introduce a set of TRIPS-plus-plus standards on border measures of IP enforcement.

The SECURE working draft can be characterized as follows: (i) lack of a clear and agreeable definition of IP infringement; (ii) absence of appeal and review mechanisms; (iii) unduly expanded scope of protection; (iv) absence of exemption and limitation provisions; (v) significantly enhanced rights of right-holders without a proper balance between different stakeholders; (vi) expanded power of customs authorities without properly identified obligations; (vii) enforcement costs substantially shifted to States; (viii) customs administrations generally lack the means to determine whether IP infringements exist, in particular, they have no capacity to address the complex legal and technical issues involved in patent infringement determination; (ix) the enhanced power that right-holders would enjoy may lead to serious trade barriers, as the simple allegation of infringement of intellectual property rights may be enough to block legitimate competition; (x) trade in a wide range of products, including medicines, may be seriously distorted.

As an international organization of 174 member states, the WCO SECURE initiative has un unusual origin at a meeting of the G8 group of developed countries.[3] The July 2005 declaration of the G8 summit leaders, urging collective and concerted international action to combat counterfeiting and piracy, empowered the WCO through a political boost to substantially increase their mandate to develop IP enforcement legislation. In order to address the concerns of G8 and enhance global resources to combat counterfeiting and piracy, the WCO launched its SECURE Programme in February 2007 following detailed discussions with business partners, for instance, Philips. Consequently, the business partners were granted exceptional status to participate in the SECURE negotiation on an equal footing with WCO Members, in contradiction of WCO policy which clearly states that only Members can tackle Customs issues on an equal footing.

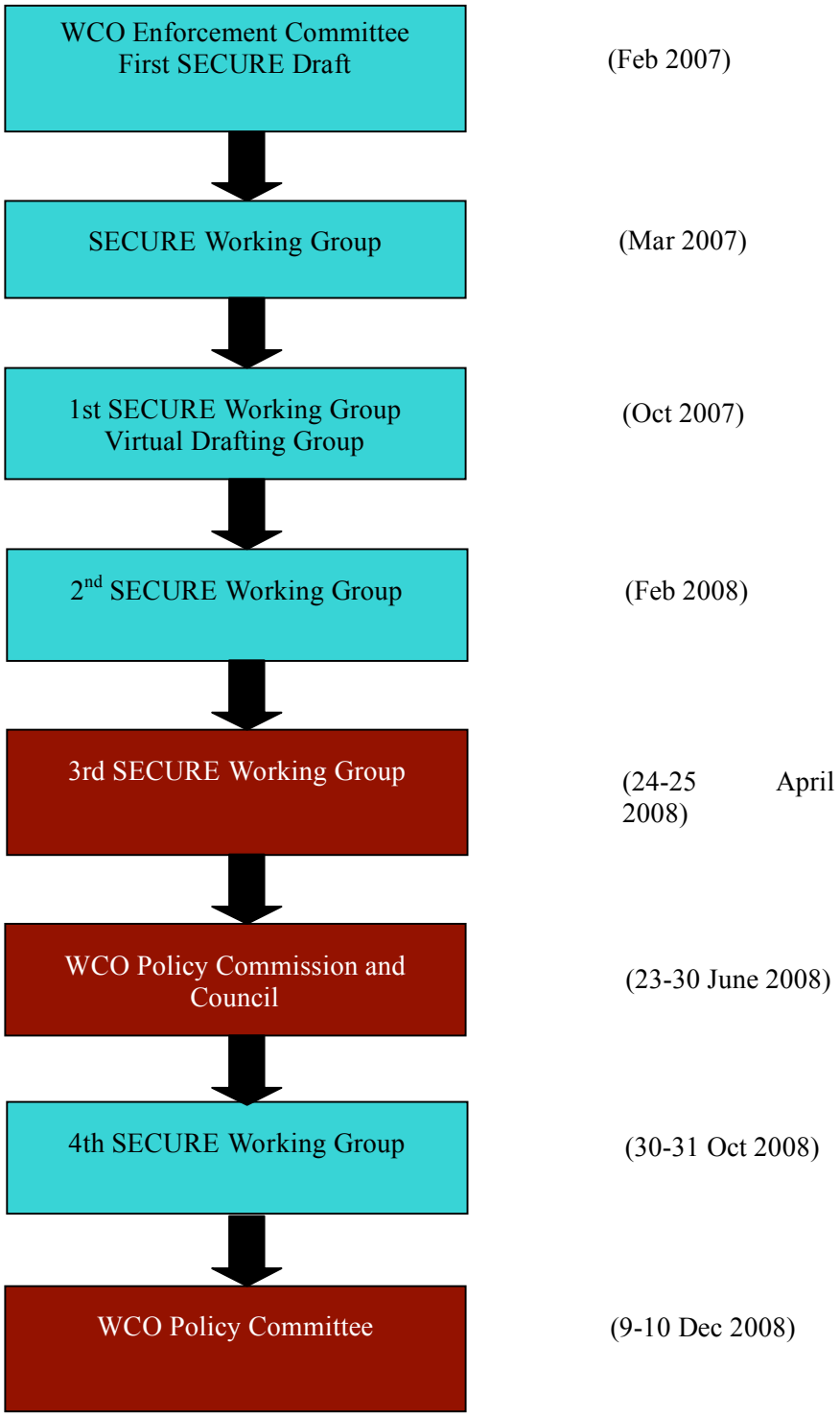
[2] "Our Profile", World Customs Organization, http://www.wcoomd.org/home.htm
[3] The reference to the G8 Summit was explicitly made in the draft SECURE text of 24 April 2008.

Figure 1: Why the WCO?



The negotiation process of SECURE at the WCO lasted one year and ten months and involved four working group meetings, two Council sessions and three meetings of the Policy Commission. The first draft of the SECURE standards was made public at the 26th Session of the WCO Enforcement Committee held in February 2007. One month later, a Working Group on SECURE, under the supervision and guidance of the WCO Policy Commission was created by the WCO IP Working Group. Subsequently, the draft text of SECURE was sent to member countries for comments, to be submitted for consideration by the WCO Policy Commission and Council by June 2007. In accordance with the decision of the WCO Council, the Working Group held its first meeting in October 2007 and convened a meeting of the Virtual Drafting Group. The meeting decided to hold the 2nd and the 3rd Working Group meetings in February and April 2008 respectively with a view to adopting SECURE at the 2008 Council Session. The WCO Council sessions (111th-112th) were held on June 26-28, 2008, shortly after the WCO Policy Commission (59th session) on June 23-25, 2008, decided to send the document back to the SECURE Working Group and instructed the SECURE Working Group to continue its examination of the Provisional SECURE Standards document, instead of the adoption of the SECURE. Consequently, the 4th SECURE Working Group meeting was held on 30-31 October 2008, followed by the WCO Policy Commission held in Argentina on 9-10 December 2008. (Figure 2)

Figure 2: The Evolution of SECURE Negotiations at the WCO



III LEGAL AND ECONOMIC ANALYSIS OF THE SECURE WORKING DRAFT

III.1 Legal Analysis of SECURE Working Draft

III.1.1 Legal Comparison between SECURE Standards and WTO TRIPS Provisions

The 12 Standards under Section I of the SECURE Working Draft essentially correspond to Section 4 of Part III of the TRIPS Agreement, namely, Articles 51 to 60, dealing with Special Requirements Related to Border Measures. This chapter compares the rules and mechanisms of SECURE with the TRIPS Agreement and highlights the TRIPS-plus-plus elements of the SECURE standards.

Part III, Section 4 of the TRIPS Agreement established international obligations for WTO Members to introduce border measures for the protection of IPRs. The section establishes the procedure and conditions under which a customs authorities may, at the request of right-holders, suspend the release into circulation (seize at importation) of any suspected counterfeit trademark or pirated copyright goods. The 12 standards under Section I of the SECURE Working Draft essentially correspond to Section 4 of Part III of the TRIPS Agreement.

(1) SECURE Standard 1

> "Customs Administrations should have the legal authority to enforce IPR laws against goods which are suspected of violating IPR laws whenever such goods are deemed under national law to be under Customs control including, but not limited to:
>
> - Import;
> - Export;
> - Transit;
> - Warehouses;
> - Transhipment;
> - Free zones;
> - Duty free shops;"[4]

Article 51 of the TRIPS Agreement (*Suspension of Release by Customs Authorities)* states that "Members shall, in conformity with the provisions set out below, adopt procedures to enable a right-holder, who has valid grounds for suspecting that the *importation* of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods."[5] The customs administration requirement under the TRIPS agreement is compulsory only with respect to importation. However, the scope of SECURE standard 1 is much broader than the TRIPS Agreement, as the Standard 1 extends the enforcement from import to all types of transaction, including but not limited to export, transit, warehouses, transhipment, free zones, duty free shops, etc.

[4] SECURE, as of 25 April 2008.
[5] TRIPS Agreement.

(2) SECURE Standard 2

It is proposed that "National legislation may extend the scope of Customs IPR legislation from trademark and copyright to other intellectual property rights"[6] under SECURE Standard 2. However, according to Article 51 of the TRIPS Agreement, the procedures for border measures are compulsorily to be made available to "counterfeit trademark or pirated copyright goods". As clearly defined in footnote 14 to Article 51, the definition of "counterfeit trademark goods" only refers to *registered* marks as "counterfeit trademark goods" means "any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation."[7]

Thus, the intention of Standard 2 of SECURE is to extend the scope of Customs IPR legislation not only from a registered mark to all trademarks including the trademark in question under the law of the country of importation, but also to extend the protection from trademark and copyright to all other types of intellectual property rights, e.g., goods that infringe a patent, plant variety rights, geographical indicators, etc. In any case, unlike the TRIPS Agreement, no exemption is provided for goods put on the market by or with the consent of the right-holder under Standard 2.

(3) SECURE Standard 3

It is proposed that "Customs Administrations should have clear and transparent procedures for all aspects of intellectual property rights enforcement"[8] under SECURE Standard 3. However, Article 51 of the TRIPS Agreement only requires that WTO Members make available a procedure before competent authorities related to *suspension of the release of goods*. It thus extends the authority of customs administrations from suspension of the release of goods to other types of procedures, e.g., penalty.

(4) SECURE Standard 4

It is proposed that "with respect to requests from rights holders for Customs intervention, Customs Administrations should develop standardized forms requesting information consisting of basic, standard data at reduced costs to rights holders."[9]

Article 52 of the TRIPS Agreement contains detailed requirements regarding the application from right-holders to initiate a procedure for customs intervention. It is the obligation of the right-holder to provide evidence and satisfy the customs authority to accept the application. Under TRIPS Agreement, there is no obligation to make a determination for custom authority, but to any determination concerning the period during which the matter is considered active.[10]

Compared to Article 52 of the TRIPS Agreement, Standard 4 intends to make the procedure of initiating Customs intervention automatic (self-executive), without scrutiny of Customs Administration, to determine whether the application is accepted. While granting IP rights holders simplified procedures, it removes the obligations of right-holders to provide adequate evidence to satisfy the competent authorities that there is, prima facie, an infringement of the right-holder's IPR. Under Standard 4 of SECURE, neither definition of cost nor justification of reduced costs to rights holders is provided. It is not clear under what condition the information will be provided. There is no

[6] SECURE, as of 25 April 2008.
[7] TRIPS Agreement.
[8] SECURE, as of 25 April 2008.
[9] Ibid.
[10] TRIPS Agreement.

clarity regarding what constitutes the information of "basic and standard data" and why only basic data is required.

(5) SECURE Standard 5

"Customs administrations should designate a central office or contact point to facilitate the lodging and handling of the requests for intervention."[11] Under this Standard, a single contact point governing applications should be designated by Customs authority. According to Article 41 (5) of the TRIPS Agreement, however, WTO Members are not required to divert limited law enforcement resources to IP enforcement. Under the Millennium Development Goals, while more efforts should be made in realizing the objectives of poverty reduction, hunger elimination and health concern, developing nations are spending more limited resources on endeavours related to the enforcement of IP.

(6) SECURE Standard 6

"Where national legislation provides for de minimis exemptions from IPR enforcement against infringing goods imported by travelling passenger, quantities of exempted goods should be as low as possible consistent with available resources."[12]
Article 60 of the TRIPS Agreement states that "WTO Members may exclude from the application of the above provision (border measures) small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments."[13]

Article 60 of the TRIPS Agreement takes into consideration the practical difficulty of enforcing border measures regarding small non-commercial shipments of infringed goods, in particular in travellers' private luggage. It thus excludes the small quantities of goods from the obligation of application of border measures. As de minimis imports may impose a high administrative burden on customs authorities, Article 41 (5) of the TRIPS Agreement becomes relevant as it provides that WTO members are not required to divert law enforcement resources to IP enforcement. However, under Standard 6 of SECURE, it establishes a principle that the quantities of exempted goods should be "as low as possible".

(7) SECURE Standard 7

Standard 7 states that "customs Administrations have legal authority, in accordance with relevant international agreements, to act, either at the request of the rights holder, or upon their own initiative, to detain or suspend the release of goods in respect of which they have acquired prima facie evidence that IPR is being infringed while protecting the legal rights of all (relevant) economic operators."[14]

Article 58 of the TRIPS Agreement establishes procedures and conditions related to Ex Officio Action, in the absence of a legal basis for ex officio action. Ex officio measures are those taken upon the initiative of the competent authorities without a request by the right-holder or other interested party. Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed: It requires that where such measures exist in the national law of a WTO member: (a). the importer and right-holder must be promptly notified; (b). remedial measures may be taken against public authorities and officials who did not act in good faith.[15]

Two "balances" maintained in Article 58 of the TRIPS are affected by Standard 7 of SECURE. On the one hand, the balance between rights and obligation of customs authority is breached. The purpose of Article 58 is not to impose ex officio measures but to provide a framework for such

[11] SECURE, as of 25 April 2008.
[12] Ibid.
[13] TRIPS Agreement.
[14] SECURE, as of 25 April 2008.
[15] TRIPS Agreement.

measures where they exist. However, while Standard 7 expands the right of customs authority to take action upon its own initiative, it intends to remove the obligations of customs authority and officials from remedial measures when they did not act in good faith. On the other hand, the balance between rights of right-holders and importers is also breached. Article 58 ensures the minimum rights of notification for both importer and the right-holder regarding the suspension. However, while Standard 7 specifies the right of right-holders to make a request, the importers minimum right of prompt and proper notification is decreased.

(8) SECURE Standard 8

"Customs Administrations should adopt procedures enabling them to provide to rights holders free of charge samples of suspicious goods to determine the counterfeit nature of those samples. The rights holders making that request should bear the responsibility and the related costs for those samples. The liability for those samples then passes to the rights holder."[16]

According to Article 52 of the TRIPS Agreement, it is the obligation of the right-holder to provide evidence and satisfy the customs authority in order to make a determination. To satisfy, two types of evidence should be provided, (a) a prima facie infringement of an IPR under the laws of the country of importation (b) a sufficiently detailed description of the goods to enable customs authorities to identify the goods in question. However, taking Standard 4 and Standard 8 together, SECURE intends to reverse the obligations between customs administration and right-holders related to the evidence by requesting customs administrations to provide samples of suspicious goods to the right-holder, and for the right-holder to determine the counterfeit nature of those samples.

Articles 53 and 55 of the TRIPS Agreement provide that the release of the goods is possible if no judicial provisional measure is issued confirming the suspension.

(9) SECURE Standard 9

It is proposed that "customs administrations should have legal authority, where applicable and appropriate, to transmit to the rights holder information regarding the detention or the suspension of release of the goods." [17]

Article 54 of the TRIPS Agreement states that "the importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51."[18] Thus, the importer is entitled to be notified of the suspension of the release of the goods under the TRIPS Agreement. Also, under the TRIPS Agreement, the custom administration has no legal authority to transmit to the rights holder information regarding the detention of infringing goods. However, according to Standard 9, while customs is given the authority to transmit information concerning the detention, no safeguard is available for importers regarding the right of notification of suspension *and* detention.

(10) SECURE Standard 10

According to Standard 10, "customs administrations should establish measures to ensure the detention or seizure of goods infringing intellectual property rights. Customs administrations should ensure transparency in the procedures for detention and seizure."[19] However, detention and seizure are not included under the TRIPS agreement.

Standard 10 also specifies "when authorized to dispose of goods…."[20] In comparison, under Article 59 of the TRIPS Agreement, "without prejudice to other rights of action open to the right-

[16] SECURE, as of 25 April 2008.
[17] Ibid.
[18] TRIPS Agreement.
[19] SECURE, as of 25 April 2008.
[20] Ibid.

holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction *or* disposal of infringing goods in accordance with the principles set out in Article 46."
Article 46 of the TRIPS Agreement states that "…the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner …or, destroyed."

There are several deviations from the TRIPS Agreement. Under the TRIPS, (a) the competent authority is a judicial body, rather than a customs administration as opposed to SECURE Standard 10 which grants Customs the right to order detention and seizure of goods. SECURE Standard 10 therefore expands the authority of the customs administration. (b) only a competent body has the authority to determine either destruction *or* disposal of infringing goods. However, Standard 10 regulates that customs administrations are granted the authority to destroy all infringing goods. (c) TRIPS established the procedure that any order to destroy or dispose of the goods is subject to a right of review by the importer or other defendant and without prejudice to the right-holder's rights of action.[21] However, no such review is provided under the so-called best practice SECURE.

(11) SECURE Standard 11

According to Article 51 of the TRIPS Agreement, Customs authorities have the right to suspend the release of suspected goods into free circulation on valid grounds. Authority is expressly limited to the suspension of release into free circulation, goods suspected of counterfeit trademark or pirated copyright, on valid grounds. However, under Standard 11 of SECURE, customs administrations will have the authority to detail, move, or seize IPR infringing goods. Moreover, while specifying that the burden of fee on right-holders should not be unreasonable, there is no security for other stakeholders.

(12) SECURE Standard 12

Under Article 61 of the TRIPS Agreement, Members shall provide for criminal procedures and penalties to be applied, at least in cases of wilful trademark counterfeiting or copyright piracy for commercial scale. However, under Standard 12 of the SECURE, Customs administration will have legal authority to impose deterrent penalties against entities knowingly involved in the importation/exportation of goods under Customs control which violate *any* IPR laws.[22]

Table 1 below summarizes the differences between the SECURE draft and the TRIPS Agreement, and highlights the TRIPS-plus-plus elements of the former.[23]

[21] Vrins, Olivier and Schneider, Marius (Eds.), (2006) '*Enforcement of Intellectual Property Rights through Border Measures Law and Practice in the EU*', Oxford University Press, pp58.
[22] SECURE, as of 25 April 2008.
[23] Li, Xuan (2008), '*SECURE: A Critical Analysis and Call For Action', South Bulletin*, Issue 15, 16 May 2008

Table 1
Comparisons of SECURE and TRIPS Provisions

SECURE	Issue	TRIPS Agreement	Comments
Standard 1	Scope	Article 51	Extends the scope from "import" to "export, transit, warehouses, transhipment, free zones, duty free shops", etc.
Standard 2	Definitions	Article 51	Extends the protection from trademark and copyright to all other types of intellectual property rights
Standard 3	Procedures	Article 51	Extends the procedure from "suspension of the release of goods" to other types of procedures
Standard 4	Application and right of Information	Articles 52, 57	Unclear definition of "costs to right-holders" and no justification why the costs to right-holders should be reduced? Removes the obligations of right-holders to provide adequate evidence to satisfy the competent authorities that there is prima facie an infringement to initiate the procedure.
Standard 5	Central Office	Article 41	A single contact point governing applications should be designated by Customs authorities, which imposed additional burden. Under Article 41 (5) of the TRIPS Agreements, however, WTO Members are not obliged with respect to the distribution of limited resources as between enforcement of IPR and the enforcement of law in general.
Standard 6	*de minimis* import	Article 60	Establishes a principle that the quantities of exempted goods should be "as low as possible".
Standard 7	Ex Officio	Article 58	• Expands the right of customs authorities to take action upon own initiatives, but removes the obligations from remedial measures when they did not act in good faith, • Specifies the right of right-holders to make a request, but the importers minimum right of being notified promptly and properly is decreased.
Standard 8	Application	Articles 52, 58	Reverses the burden to provide evidence from the right-holders to customs administration. • Under TRIPS, it is the obligation of the right-holders to provide evidence and satisfy the customs authority to make determination. • To satisfy, two evidences should be provided, (a) a prima facie infringement of an IPR under the laws of the country of importation (b) a sufficiently detailed description of the goods to enable customs authorities to identity the goods in question.
Standard 9	Notification	Article 54	• Under TRIPS, the importer and the applicant shall be promptly notified of the suspension of the release of goods • Under SECURE, no safeguard is available for importers regarding the right of notification of suspension and detention
Standard 10	Remedies	Article 59	• Under TRIPS, (a) it is the authority of judicial body, rather than customs administration to dispose or destroy the infringed goods (b) it is upon the decision of the competent body to determine either destruction or disposal of infringing goods (c) it established the procedure that any order to destroy or dispose of the goods is subject to a right of review by the importer or other defendant and without prejudice to the right-holders' rights of action. • Under Standard 10, it (a) expands the authority of customs administration, (b) it regulates that all infringing goods shall

			be destroyed.
Standard 11	Disposal	Article 51	Under SECURE, (a) Customs administration has authority to detail, move, or seize IPR infringing goods, (b) while specifying that the burden of fee should not be unreasonable on right-holders, there is no security for other stakeholders.
Standard 12	Criminal procedure	Article 61	• Under TRIPS, Members shall provide for criminal procedurals and penalties for…trademark counterfeiting and copyright piracy on a commercial scale. • Under SECURE, Customs administration has legal authority to impose deterrent penalties against entities knowingly involved in the importation/exportation of goods under Customs control which violate *any* IPR laws.

Compared with the TRIPS agreement, the proposed SECURE standards are IP enforcement border measures that represent a significant departure from TRIPS provisions in terms of subject, scope and measures of protection, disposal methods and member states obligations and rights.

Firstly, the proposed SECURE standards expand the subject and scope of enforcement of IPRs. Enforcement by customs administration under the TRIPS agreement is compulsory only with respect to importation (Article 51). However, the scope of SECURE Standard 1 is much broader than the TRIPS Agreement, as Standard 1 extends the enforcement from importation to all types of transaction, including but not limited to export, transit, warehouses, transhipment, free zones, duty free shops, etc. Regarding the scope of protection, it is proposed under SECURE Standard 2 that "National legislation may extend the scope of Customs IPR legislation from trademark and copyright to other intellectual property rights."[24] However, the procedures for border measures under TRIPS are required to be made available to "counterfeit trademark or pirated copyright goods" only (Article 51). As clearly defined in footnote 14 to Article 51, the definition of "counterfeit trademark goods" only refers to *registered* marks as "counterfeit trademark goods" meaning "any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation ."[25].

Secondly, the proposed SECURE standards tend to favour the right-holders, thus affecting the balance between the right-holders and importers under TRIPS. The balanced mechanisms under TRIPS have been by-passed under the SECURE standards, thus affecting the flexibilities contained in TRIPS. According to Article 52 of the TRIPS Agreement, it is the obligation of the right-holders to provide evidence and satisfy the customs authority to make the determination whether a product is a counterfeit. The aim of the TRIPS Agreement is to ensure that customs authorities would not impede legitimate trade and prevent right-holders from taking undue advantage of the border seizures and detentions to delay legitimate trade. To satisfy Article 52, two evidences should be provided, (a) a prima facie infringement of an IPR under the laws of the country of importation; (b) a sufficiently detailed description of the goods to enable customs authorities to identify the goods in question. However, when the SECURE Standards 4 and Standard 8 are read together, they point to an intention to shift the burden of proof from the right-holders to the customs administration by requesting customs administrations to provide samples of suspicious goods to right-holders, and for right-holders to determine the counterfeit nature of those samples.[26]

[24] SECURE, as of 25 April 2008.
[25] TRIPS Agreement.
[26] Standard 4 proposes that "with respect to requests from rights holders for Customs intervention, Customs Administrations should develop standardized application forms requesting information consisting of basic, standard data at a cost not exceeding the costs of the processing of the application. ... The initial period should be extended by simple notification, including evidence of the continuing right and prima facie evidence of infringement." Standard 8

Thirdly, the proposed SECURE standards may disrupt normal trade of non-infringing goods by re-delineating the responsibilities of determination of IP infringement among various authorities. Under the TRIPS, it is the authority of a judicial body, rather than the customs administrations to dispose of or destroy the infringed goods. It falls upon the competent body to determine either destruction or disposal of infringing goods, as stated in Article 46 that "the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner … or, destroyed." It also established the procedure that any order to destroy or dispose of the goods is subject to a right of review by the importer or other defendant and without prejudice to the right-holders' rights of action.[27] However, under Standard 10, while expanding the authority of the customs administration, it also regulates that all infringing goods should be destroyed. Therefore, the proposed border measures for the enforcement of IPRs embedded in the SECURE standards may significantly disrupt legitimate trade of non-infringing goods. Notably, SECURE provides no mechanism for appeal and review, which is destructive to the fairness of a system.

III.1.2 Comparison between SECURE and WIPO Development Agenda

The adoption of 45 Recommendations of the Development Agenda during the General Assembly of the WIPO in 2007 was a historic achievement. It integrates the key concept of "development" into the functioning of the World Intellectual Property Organization and serves as a guiding principle to translate the concept of development into IP practices in both international and national contexts.

The 45 adopted recommendations for action are categorized into six clusters: Cluster A: Technical Assistance and Capacity Building; Cluster B: Norm-setting, flexibilities, public policy and public domain; Cluster C: Technology Transfer, Information and Communication Technologies and Access to Knowledge; Cluster D: Assessment, Evaluation and Impact Studies; Cluster E: Institutional Matters including Mandate and Governance; and Cluster F: Other Issues.[28] In particular, Recommendation 45 (Cluster F) specifies that the Wipe's approach to enforcing IPRs should be undertaken "in the context of broader societal interests", with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".[29] We should be aware of the fact that Recommendation 45 cross-references Article 7 of the TRIPS Agreement, which explicitly states that the protection and enforcement of intellectual property rights should be "to the mutual advantage of producers and users of technical knowledge in a manner conducive to social and economic welfare."

Compared to the recommendation of the WIPO Development Agenda, the proposed SECURE draft accords more benefits and less obligations to right-holders at the cost of other stakeholders, which is inconsistent with the call for more balanced IP protection mechanism for all stakeholders in Recommendation 45 of WIPO Development Agenda.

III.1.3 Legal Effect of SECURE

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proposes that "Customs Administrations should adopt procedures enabling them to provide to rights holders free of charge samples of suspicious goods to determine the counterfeit nature of those samples…"SECURE, as of 25 April, 2008.

[27] Biadgleng and Munoz (2008), '*The Changing Structure and Governance of Intellectual Property Enforcement*', Research Papers No. 15, South Centre.

[28] "The 45 Adopted Recommendations under the WIPO Development Agenda", WIPO, www.wipo.int

[29] Recommendation 45: "To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the TRIPS Agreement." www.wipo.int

Currently, the SECURE standards are proposed for implementation on a voluntary basis. However, developing countries should consider this issue in the broader context of the global strategy of developed countries in IP negotiations. The customary tactics of developed countries tends to be at first breaking the weakest link by promoting new standards on a voluntary basis, and then making them compulsory through subsequent multilateral, bilateral or regional negotiations.

The proposed SECURE standards of the WCO, if adopted, would have far reaching consequences. Although it was claimed to be non-compulsory with no legal effect, it has been a pattern for developed countries to promote new international regulations first on a voluntary basis before transforming them to compulsory regulations. Once SECURE is eventually adopted, it could be expected that developed countries will promote these standards in multilateral (WTO, WIPO), regional and bilateral negotiations. This was the case for the Framework of Standards to Secure and Facilitate Global Trade (SAFE) adopted by WCO in 2001, which was initially introduced on a voluntary basis and is currently being transformed into compulsory standards.

III.2 Economic Impact Assessment of the SECURE Working Draft

III.2.1 Optimal IP Enforcement Regime

Establishing and strengthening the enforcement of IPR is a costly exercise both in terms of budgetary outlays and the employment of skilled personnel. The enforcement cost should be borne by private parties as IPR is a private right in nature, and enforcement activities ought to be planned on a cost-effective basis from a socially optimal perspective aiming at achieving optimal IP enforcement.[30]

'Cost-effective approach' is a fundamental principle to determine the optimal level of IP regime and enforcement in a country. As IPRs create some static losses in the form of deadweight loss or consumer welfare losses, they must be regulated in a way to increase the dynamic gains achieved through the granting of IPRs, i.e. creation of new products and process through constant innovation. It is also evident that static losses involve rent seeking activities by right-holders which could lead to monopoly rents and transfer of welfare gains from consumers to producers (right-holders). The optimal IP enforcement strategy is one that balances the marginal cost of achieving compliance with the marginal benefit that derives from doing so. It should create appropriate incentives that maximize the discounted net present value of the difference between the social benefits and the social costs of information creation, including the costs of administering the system.[31] As IP is a private right, the cost of its protection should be borne by right-holders without costing the public resources of governments, as specified by TRIPS.

III.2.2 Economic Impact of SECURE

The economic impact of SECURE on developing countries could be at least twofold: (i) within their territory, there will be increased obligations for the customs administration and increased cost of enforcement; (ii) externally, the developing countries enterprises are likely to face greater uncertainties due to new trade barriers.

On the former issue, the impact should be assessed based on a cost-effect analysis of implementing TRIPS-plus-plus measures. As IP is a private right, the cost of its protection should be borne by right-holders without costing public resources. It is argued by many that border measures for intellectual property enforcement would give rise to an increase of financial expenses and the need for

[30] South Centre (2008), '*Who Should Bear the IP Enforcement Cost*?', Policy Brief, No. 12.
[31] Maskus, Keith E.(2000), '*Intellectual Property Rights in the Global Economy'*, Institute for International Economics, Washington, D.C.

more human resource inputs. It may also lead to some internal restructuring and shifts of focus and priorities in a given customs office. At present, the matter of fact is that many customs authorities in developing countries are facing the challenge of adapting to the changes in their roles while coping with the difficulties of limited availability of human, financial and material resources. In terms of capacity building, developing countries in general and LDCs in particular need sufficient time and resources to prepare and update the dynamic contents of training for their competent functionaries, including customs officials, in accordance with relevant provisions of the TRIPS Agreement. It should be noted that developing countries have no legal obligation to extend border measures beyond the requirements of the TRIPS Agreement on a mandatory basis, but may choose to do so if they are able and willing. They should undertake a careful analysis and thorough consideration before making the decision whether or not to extend the scope of customs involvement on IPR enforcement beyond the TRIPS provisions. In this exercise, it is suggested that particular attention should be given to such factors as availability of various resources needed, actual level of customs capacities, institutional constraints, potential disruption to normal trade, and possible abuse by IP right-holders, etc.

Against the backdrop of its traditional role of revenue collection mainly in the form of import duties, today customs is required to perform more and more duties, including acting as an IPR enforcement agency. It is reasonable to say that this new function entails costs and these costs could be even huge vis-à-vis the various constraints in developing countries. Thus developing countries are faced with uncertainty about the full implications of rising pressure on customs administrations to enhance IPR enforcement. Thus, customs and border authorities in developing countries are entitled to technical assistance and capacity building in the form of, among others, continuous and intensive training, and transitional periods through which to gain first-hand experience in implementing the system for border control of counterfeit and pirated goods as provided in the TRIPS Agreement. In this process, special attention should be paid to guard against any possible abuses by either IP right-holders or customs officials and other parties. It is of critical importance that the measures of implementation concerned by customs should not constitute new barriers to trade. Under SECURE, due to unclear delineation of the cost concept, the direct and indirect costs of IP enforcement are being charged to the government and the public.

On the second issue, if SECURE is adopted, customs and IP holders would be accorded higher than appropriate powers in international trade. In the case of customs, with the new powers acquired under SECURE, developed countries would be able to put in place new border barriers to restrict imports from developing countries. Moreover, with more powers accorded to IP holders, the exports from developing countries would be easily treated as “suspected” infringements and be blocked or even destroyed by the customs. Since there is no dispute resolution mechanism and channel for appeal put in place, the exports from developing countries are more likely to be treated unfairly.

In sum, the proposed SECURE standards will lead to higher enforcement costs within the developing countries; and externally, it would incur new types of trade barriers for developing countries. Once adopted for implementation, SECURE would be detrimental to the economic growth of developing countries. It is important to maintain adequate policy space for now and in the future as part of short-term and long-term development objectives. It is necessary for developing countries to at least maintain the acquired rights and be on guard for any change in the international trade order that may be detrimental to their interests.

IV. WCO SECURE NEGOTIATION PHASES: COORDINATION AND OUTCOME

South-South cooperation played a critical role in reshaping the dynamics of the SECURE negotiation. The proponents of SECURE had adopted a fast-track approach for its speedy conclusion. However, effective coordination among developing countries foiled the attempt to adopt the SECURE draft at the June 2008 WCO Council and led to the suspension of the SECURE Working Group at the WCO Policy Commission in Argentina in December 2008. Be cautioned however, that although SECURE Working Group has been suspended, the Secretariat has recommended to the Policy Commission that a new body be set up under Permanent Technical Committee or the Enforcement Committee to develop a practical means of supporting Customs administrations with the conduct of their IPR-related controls, which implies a possibility that the discussion on TRIPS plus substantive standards may be revived by means of an internal forum-shopping strategy at the WCO. Overall, the negotiation process of SECURE can be divided into three phases. The first phase was from the preparation of the first SECURE draft by WCO Enforcement Committee to the convention of the 2nd SECURE Working Group (February 2008-March 2008); the second phase was from the 3rd SECURE Working Group meeting to WCO Policy Commission and Council sessions (23 April 2008-28 June 2008); and the third phase was from the 4th SECURE Working Group meeting to WCO Policy Commission 50th session in Argentina in December 2008. During the first phase, developing countries were mostly in a passive and reactive position, while during the second phase, with strong backing of the South Centre, delegates from developing countries became alerted to the serious potential consequences of SECURE. During the third phase, developing countries were able to closely coordinate with each other and actively participate in the SECURE negotiation process, which consequently changed the dynamics.

IV.1 Phase I: February 2007 - March 2008

The evolution of WCO SECURE during this phase was rather speedy, matching the eagerness of the Secretariat to have SECURE adopted at the WCO Council in June 2008. Two reasons accounted for the fast track of negotiation: first, strong Secretariat-driven approach, representing the interests of business groups of developed countries, and second, little awareness of developing countries.

The WCO Secretariat expected to follow the footprints of the adoption of the Framework of Standards to Secure and Facilitate Global Trade (SAFE), i.e. requiring members to sign voluntarily a declaration of intent to implement this IPR model legislation for better enforcement of IPR border measures. The eagerness of developed countries to press for the adoption of SECURE at WCO's annual Council Session in June 2008 has its own political background and strategic considerations. Developed countries have met well founded resistance from the developing countries in IP negotiations under WTO and WIPO, which do have certain mandates to negotiate IP regulations. Given the resistance in Geneva, developed countries therefore shifted the battlefield this time to the WCO, which is relatively unknown to the international community for setting IP regulations. With this back door strategy, it was intended to complete the technical negotiations on SECURE within a few months, which is unusually speedy compared to the pace of other negotiations under WTO and WIPO. Notably, the process involved no participation of inter-governmental organizations, such as the South Centre.

Under the decision of the WCO Council, the WCO organized the first Working Group meeting in October 2007 and convened the Virtual Drafting Group meeting. However, the overall awareness from developing countries on the IP initiative at WCO was limited, except for countries like South Africa, which proposed at the Virtual Drafting Group meeting to assess the status of IPR in developing and least developed countries, and called for full participation of the enterprises and the public in the

WCO initiated reforms. In February 2008, the second Working Group meeting was held with a view to adopting SECURE draft at the 2008 Council Session in June. Till then, little voice was conveyed by developing countries.

IV.2 Phase II: 23 April 2008 - 30 June 2008

Phase II is the crucial period and turning point of the negotiation process of SECURE. During this phase, with the participation of the South Centre as observer of the 3rd SECURE Working Group meeting, the awareness of developing countries was addressed and amplified, and activities of intensive coordination among developing countries was organized consecutively. Contrary to the expectation of developed countries to have SECURE adopted at the WCO Council 111th-112th session, the SECURE was sent back to the Working Group for revision.

IV.2.1 Negotiation Process

On 23-24 April 2008, the third Working Group on SECURE was held at the WCO, which was targeted as the last round of technical discussions by developed countries before its submission for approval by the Council. South Centre participated in this negotiation session, and was the only observer representing the interests of developing countries. During the 3rd SECURE Working Group, the negotiation received strong resistance from a few developing countries with the powerful political and technical support from the South Centre, while others seemed to remain silent in the meeting room. Some WCO developing country members stated their opposition to the Introduction and the IPR legislative development of the SECURE working document. Regarding the Introduction, there were mainly two issues, namely the reference to the G8 Summit and the wording on the heath hazards of IP infringed goods and parts. On the issue of reference to the G8 Summit, China and Brazil proposed its deletion, while US and Japan favoured its retention. The decision was to delete the reference to the G8 Summit. On the issue of "products which expose the public to serious health and safety risks, there have been cases of pharmaceutical products and prescription medicines manufactured from inferior, inactive or dangerous ingredients or auto and aircraft parts which do not meet safety standards", China proposed its deletion, while Japan insisted on its retention. It was decided to submit the issue to the Council for further deliberation. Regarding 12 standards of the SECURE, a few developing countries including Brazil, Ecuador and China presented a number of suggestions to modify the draft text of proposed SECURE standards, particularly Standards 1, 2, and 10.

The WCO Policy Commission and Council held their annual meetings on June 23-25, and June 26-28, 2008 respectively. After intensive debates, the Policy Commission "asked [the Council] to instruct the SECURE Working Group to continue its examination of the Provisional SECURE Standards document, reporting to the Policy Commission in December 2008."[32] During the WCO Policy Commission 59th session on 23-25 June 2008, there were attempts by the SECURE Working Group Chair and the European Commission to send back to the Working Group only the bracketed parts of the Standards text. These attempts were rejected by developing countries like Argentina. Moreover, during the Policy Commission discussions in June 2008, among other efforts, India made a firm position representing the view of Asia and Pacific Region that a TRIPS-plus-plus instrument is not acceptable and that further discussion was a must on the whole text. As a consequence, the Policy Commission made the recommendation to the WCO Council that the SECURE draft should be sent back to the Working Group.

The WCO Council is the highest decision-making body of the WCO and the Policy Commission has the mandate to make recommendations for approval by the Council. The Policy Commission consisted of 24 members: Chairman of the WCO Council (Finland), six Vice Chairs of the Council

[32] Report of the Policy Commission, 59th Session, SP0280E1b, World Customs Organization, Brussels, 25 June 2008

that also act as representatives of the six customs regions, namely, Canada (Region: South America, North America, Central America & the Caribbean), India (Region: Far East, South & South East Asia, Australasia & the Pacific Islands), Ireland (Region: Europe), Jordan (Region: North of Africa, Near & Middle East), Mozambique (Region: East & Southern Africa) and Senegal (Region: West and Central Africa), and 17 elected member states, namely, France, Japan, Nigeria, Norway, Russian Federation, Rwanda, Saudi Arabia, Slovenia, United Kingdom, United States, Argentina, Italy, Republic of Korea, Mexico, New Zealand, Singapore and Spain . Decisions of the Policy Commission can be adopted by a majority vote consisting of two-thirds of the members present. Though the membership of the Policy Commission is dominated by developed countries, the expected adoption of the SECURE standards as pushed by developed countries did not happen due to the effective coordination among developing countries. With the recommendation of WCO Policy Commission, the WCO Council decided to send back the SECURE draft to the working group for continued discussion. The SECURE Working Group was to "continue its examination of the Provisional SECURE Standards document, reporting to the Policy Commission in December 2008".[33]

IV.2.2 Coordination

Given the emergent situation that the decisive moment of SECURE would be June 2008 when the WCO would hold its annual Council session and in view of the lack of awareness of the forum-shopping strategy of developed countries to set new IP norms at the WCO as well as the legal and economic implications of TRIPS-plus-plus standards of IP enforcement for developing countries, the South Centre made an urgent call for the G77 and China to mobilize for concerted efforts to prevent the adoption of the SECURE in its current format for the sake of defending their legitimate interest and policy space.[34] The coordination involved activities of communication between the Brussels and Geneva missions, missions and capitals, as well as different governmental authorities in the capitals of developing countries. The effectiveness of the coordination was reflected during the Policy Commission discussions. Figure 3 features the coordination process at Phase II among the developing countries concerned.

The coordination strategy of developing countries focused on two dimensions: (a) Procedural issue: challenging the incompletion of the present SECURE Working Group agenda; (b). Substantive issue: challenging the so-called best practice. Some distinct features of procedural errors caught more attention at this phase: First, the proposed SECURE exceeded the scope of the WCO mandate. The prevailing international IP laws do not accord customs to exercise such enforcement rights, nor delegate authority to the Working Group to amend the international IP laws. For instance, there are no provisions in the TRIPS agreement to cover the exports and goods in transit, while the proposed SECURE accord protection to all these goods. Second, the Working Group meeting was initiated and driven by the WCO Secretariat, instead of member countries. As an inter-governmental organization, WCO initiatives should have been driven by its member countries. The meeting was dominated by the WCO Secretariat, and the Chairman of the Working Group attempted to sideline some developing countries such as Brazil. Brazil formally requested suspension of the meeting and challenged the Chairman of the Working Group for his abuse of power, lack of fairness and credibility, and attempt to deprive Brazil of the rights to express its views. Third, there was a lack of transparency in the deliberation process. While excluding non-governmental organizations, the WCO Secretariat discretely provided access and seats to some private enterprises and accorded them the same right of participation and intervention as the member countries. Although the Working Group stated that WCO would engage and cooperate with WIPO, OECD, WHO for the IPR enforcement (paragraph 4 of the Introduction), none of the above organizations was present at the meeting. South Centre was the only inter-governmental organization which acquired the right to participate as an observer shortly before the start of the meeting. Fourth, the meeting had neither established deliberation procedures nor agreed

[33] Report of SECURE Working Group, World Customs Organization, 2008.
[34] Policy Note on SECURE: A Critical Analysis and Proposed Strategy, Innovation and Access to Knowledge Programme, South Centre, May 2008

terms of reference. Since most of the participating officials were at the technical level and did not have adequate experience in multilateral IP negotiations, the WCO Secretariat, though without statutory authority, was able to manipulate the process. The legitimacy of the meeting has therefore been questioned. [35]

IV.2.3 Outcome: Decision concerning SECURE at Policy Commission (59th session)

During June 26-28 2008, due to the effective coordination among developing countries, the WCO Council in its 111th-112th meeting decided to instruct the SECURE Working Group to continue its examination of the Provisional SECURE Standards document instead of adopting it. This is a clear reversal of the previous situation when the whole process was driven unilaterally by developed countries. The Decision concerning SECURE under agenda item VI of WCO Policy Commission is as follows:

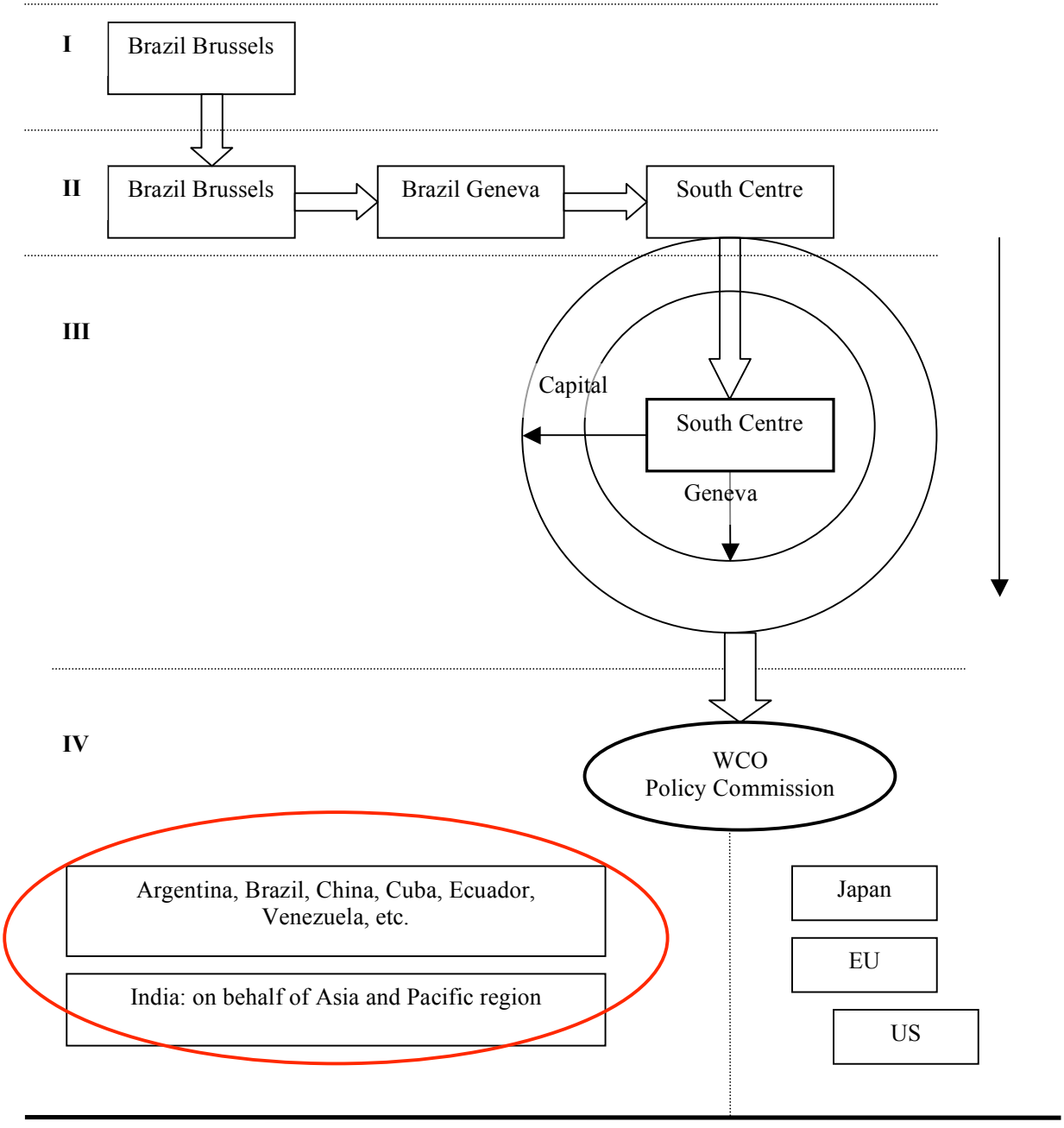
- Following a discussion, the Chairperson of the SECURE Working Group indicated that in the event that the Policy Commission decided to send the document back to the SECURE Working Group, it should provide clear guidance in order to assist the Working Group and not slow down its work.

- In conclusion, the Chairperson emphasized the importance of the file; and on the basis of the positions expressed by the delegates, indicated that the Council would be asked to instruct the SECURE Working Group to continue its examination of the Provisional SECURE Standards document, reporting to the Policy Commission in December 2008.[36]

[35] South Centre Background note on Strategies for the upcoming meetings of the World Customs Organization meetings on Standards to Counter IP Rights Infringements, 5 June 2008

[36] Report of the Policy Commission, Policy Commission, 59th Session, SP0280E1b, World Customs Organization, 25 June 2008

Figure 3: Phase II of the WCO Coordination Process (April 2008 - 28 June 2008)



Outcome: SECURE was sent back to the Working Group

IV.3 **Phase III: 29 June** 2008 - 10 December 2008

Phase III was the period to consolidate the outcome of the last Council session and achieve the goal of terminating the problematic SECURE process. Two meetings were held during this phase: first, the 4th SECURE Working Group meeting held in Brussels during 30-31 October 2008; second, the 50th session of the Policy Commission held in Argentina on 9-10 December 2008. During this phase, developing countries were well-informed about the implication of the proposed SECURE and better-organized regarding their collective actions.

IV.3.1 Negotiation Process

The 4th Working Group meeting was scheduled for 30-31 October 2008 under the decision of WCO Council session in June 2008. The decision of the WCO Council provided both an opportunity and a challenge for developing countries to reshape the negotiation dynamics. With the decision of the WCO Council, developing countries were in a relatively advantageous position as all items including the standards under the SECURE were entirely open for discussion. The challenge for developing countries was how to take advantage of this momentum and push the negotiation process in the direction of a favourable outcome for them. During the 4th SECURE Working Group meeting, developing countries like Brazil, China, India, Ecuador and others argued that the SECURE Working Group did not have any mandate to discuss the 13 draft Voluntary Standards for IPR Enforcement by Customs which it had been discussing in its previous meetings. Developing countries opposed re-opening any substantive discussion on these standards without any agreement on the mandate of the SECURE Working Group in the first place. Thus, the focus of the meeting was shifted to the job of providing terms of reference for the SECURE Working Group. As expected, the views of the participants were too divided to generate a consensus on this issue. Hence, the 4th meeting of the SECURE Working Group concluded without adoption of any Terms of Reference (TOR) or any discussion on substantive issues.

On 9-10 December 2008, the Policy Commission 60th session was held in Argentina. The Policy Commission was informed that the SECURE Working Group, established by the Council in June 2007 to deal with IPR issues, had become deeply embroiled in difficulties related to its TOR, essentially because of a perceived fear that the Group's work on standard-setting might be used as a means of enlarging the obligations imposed on countries by the WTO TRIPS Agreement. Against that background, the Secretary General Elect proposed that the standard-setting work be set aside and that in place of the SECURE Working Group, a new body be set up under the Permanent Technical Committee or the Enforcement Committee to develop practical means of supporting Customs administrations with the conduct of their IPR-related controls.[37]

IV.3.2 Coordination

In the South Centre Policy Note on the WCO 4th SECURE Working Group meeting, it was suggested that the goal of the participation of 4th SECURE Working Group should be re-framing the mandate and role of the SECURE Working Group, limiting its mandate and activities to be TRIPS compliant, and assisting in helping customs to implement the TRIPS standards. Strategically, developing countries should focus upon discussing the TOR at the 4th SECURE Working Group so that until Members reach an agreement on the mandate to discuss IP related functions of customs and study whether it may be necessary to establish TRIPS plus standards on border measures, there should be no discussion on substantive issues. Consequently, a series of coordination meetings were organized in Geneva, Brussels and capitals with the participation of developing country delegates. During the 4th SECURE Working Group, for the first time, the discussion on the Draft TOR was included as an

[37] 60th Session of the Policy Commission, Summary of Outcomes, WCO

agenda item for discussion before any discussion on substantive issues. With the well-organized coordination, the participation of developing countries was active and effective, and the meeting ended amidst a stalemate with no consensus on the TOR of the Working Group.[38]

To prepare the 60th Session of the Policy Commission, the WCO Secretariat produced a document[39], which proposed possible approaches that the Policy Commission may take to carry the discussions forward in spite of the stalemate at the SECURE Working Group. Pointing to the stalemate at the SECURE Working Group, the Secretariat document concludes that it is unlikely that the SECURE Working Group would reach a consensus and that future meeting of the Working Group is expected to be equally unproductive. Consequently, the Secretariat invited the Policy Commission to recommend to the WCO Council the following:

1) Setting aside further efforts to develop Provisional SECURE Standards by cancelling the February and April 2009 meetings of the SECURE Working Group, and

2) Invite the WCO Council to instruct an appropriate body to develop best practice IPR guidelines for customs administrations. The Secretariat proposal suggests that such an appropriate body can be a new Working Group under the Permanent Technical Committee of the WCO.

In the context of the proposal made to the Policy Commission by the WCO Secretariat, and recognizing the positive sign that the SECURE Working Group was to be cancelled, the South Centre suggested that the strategic objective of the developing countries should focus now on ensuring that no further discussion on IP enforcement standards by the WCO be revived through the Policy Commission in any other technical body of the WCO in case it would by-pass the scrutiny of developing countries in the SECURE Working Group.[40]

IV.3.3 Outcome

The World Customs Organization held the 4th meeting of the Working Group on SECURE in Brussels on 30-31st October, 2008. This session, for the first time, discussed the draft TOR. Due to the strong participation of developing countries and wide gaps between the positions of members, it was unable to generate any consensus on the TOR. No decision was made as to whether any action is requested from the Policy Commission.

On 9-10 December 2008, the WCO Policy Commission agreed that:

- "the SECURE Working Group would not meet again pending a decision by the Council at its June 2009 Session on the way forward";

- the Secretariat would prepare draft Terms of Reference for a new WCO body to deal with customs IPR issues, which would be finalized by the Policy Commission prior to their submission to the Council.[41]

Therefore, while developing countries have been able to forestall further discussion on the Provisional SECURE Standards in the SECURE Working Group by questioning its legitimacy and

[38] South Centre Policy note on Strategies for the Upcoming World Customs Organization 4th Meeting of the Working Group on the Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE), to be held on 30-31 October 2008, Brussels.
[39] SP0284E1, 60th Session, World Customs Organization, 26 November, 2008,
[40] South Centre Policy Note on Strategies for the Upcoming Session of the WCO Policy Commission with regard to the Future Direction of the Working Group on the Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE) (To be held on 9-10 December, 2008, Buenos Aires, Argentina), 1 December 2008
[41] 60th Session of the Policy Commission, Summary of Outcomes, World Customs Organization, December 2008.

mandate, the Secretariat's proposal suggests that the Policy Commission may revive discussions on the substantive standards by setting aside the SECURE Working Group and recommending that the WCO Council constitute an appropriate body like a Working Group under the Permanent Technical Committee to develop best practice guidelines on IP enforcement for customs administrations. Therefore, there is a possibility that the discussion on TRIPS plus substantive standards in the form of best practice or others may be revived through a new body by having the matters discussed in the SECURE Working Group as a basis for discussions. This approach ignores the fact that in view of the lack of any mandate of the SECURE Working Group to discuss the substantive standards, the substantive discussions held at the SECURE Working Group are a nullity and accordingly void *ab initio* and the same cannot be the basis for new discussions on the issue of IP enforcement standards by a different committee in the same organization.

Moreover, it is questionable whether the Policy Commission is the appropriate forum and has the mandate to revive the discussions on substantive issues through a new body? First, participation of the developing countries in the deliberations of the Policy Commission is severely restricted. Of the 17 members of the Policy Commission, the EU has 7 members while the US and Canada has two of the three seats that are assigned to North and Central America and the Caribbean region. Only 7 of the members are from developing countries. Therefore, in the absence of adequate representation of the developing countries in the Policy Commission, there is a reasonable probability that the concerns of the developing countries may not be given adequate consideration in the Policy Commission. This is particularly alarming because though the Policy Commission merely receives reports from technical bodies like the SECURE Working Group and forwards the same to the WCO Council along with its recommendations, generally the WCO Council rubber stamps the recommendations of the Policy Commission. Secondly, there is no specific mandate which empowers the Policy Commission to do anything more than merely noting the developments in the SECURE Working Group and forwarding the same to the Council. In fact, at the last SECURE Working Group meeting it was agreed that the Policy Commission will *receive* the report of the SECURE Working Group. It is necessary to ensure that the Policy Commission does not go beyond this and make recommendations to the Council which may effectively legitimize the standard setting process.[42]

[42] South Centre Policy Note on Strategies for the Upcoming World Customs Organization Policy Commission's 60th Session with regard to the Future Direction of the Working Group on the Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE), (To be held on 9-10 December, 2008, Buenos Aires, Argentina), 1 December 2008.

V. CONCLUSION

The negotiation of SECURE at the WCO represents so far one of the most significant attempts of TRIPS-plus-plus initiatives on IP enforcement. It enshrined provisional enforcement rules and procedures for right-holders on one critical aspect of intellectual property rights enforcement: border measures. Given the sticky situation in traditional negotiation forums at the WIPO and WTO due to well coordinated positioning among developing countries to achieve their TRIPS-plus-plus IP enforcement initiatives, developed countries have strategically shifted the battlefield to other international forums, notably the WCO, which is relatively unknown to the international community as a forum for setting IP regulations and has actually no mandate to negotiate intellectual property legislation. Under this forum-shopping strategy, the intention of the North is to break the situation through the back-door, i.e. revising customs regulations with expansion of the authorities of customs administrations, and re-delineate the boundary of customs and other stakeholders. The implication of SECURE could be profound. If SECURE were adopted, these TRIPS-plus-plus measures would increase the power and authority of national border and customs authorities to seize goods that are suspected of infringing intellectual property rights, and is slanted towards the interests of right-holders to the potential detriment of other parties. South-South cooperation played a critical role in reshaping the dynamics of the SECURE negotiation. The effective coordination of developing countries has successfully foiled the attempt of SECURE at this stage. This battle gives us good reasons to reflect deeply on the whole process of negotiations and come up with visionary plans for future challenges and struggles for the sake of their own long-term sustainable development. With timely intervention and effective coordination, developing countries first prevented the adoption of the SECURE draft at the 2008 WCO Council and later had the SECURE terminated at the WCO Policy Commission in December 2008, which reversed the expected outcome of pushing through new TRIPS-plus-plus standards by developed countries at the WCO. The experience of SECURE negotiation is, among others, that closer coordination and effective response among developing countries is not only possible but also imperative, and a global monitoring mechanism is necessary to establish to take pre-cautionary measures on various initiatives. For the time being, it is gratifying to note that SECURE was suspended at the 60th session of the WCO Policy Commission. However, new attempts by developed countries to promote TRIPS-plus-plus agenda on international IP enforcement regulations are still underway. Close monitoring of the development as well as timely coordination among developing countries for more effective counter-efforts are very important and necessary.

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