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*Can IP Diplomacy be More than War by Other Means?*ⁱ

A Book Review of

“The Implementation Game: the TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries”

By Roya Ghafele¹

Bibliographic details: *The Implementation Game: the TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, by Carolyn Deere, published by Oxford University Press, 2009, 432 pages and available in hardback for 80\$. ISBN13: 9780199550616, ISBN10: 0199550611. Hardback, 432 pages. Price: \$80. Rupture factor: low.

The Implementation Paradox

In *“The Implementation Game, the TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries”* Carolyn Deere seeks to assess the global political dynamics prevailing in the post-TRIPS era. She analyzes the state of multilateral intellectual property diplomacy from 1995 to 2007 so to better comprehend the relationship between developing and developed countries. Deere sees in the TRIPS Agreement a highly contested political act that served primarily the interests of developed countries and multinational companies headquartered in developing countries. In doing so, Deere evolves on authors such as Sell and May who consider the TRIPS Agreement a victory of technology rich multinational companies, particularly pharmaceutical companies, which had vested interests in protecting their intellectual wealth from potential leverage in developing countries.ⁱⁱ Thus, the TRIPS Agreement is essentially an expression of corporate power and the realization of large corporations’ interests.

Through the TRIPS Agreement, imitation as a development strategy has been ruled out and developing countries are left with two alternatives: To either buy expensive foreign technology, promote the transfer of technology or to develop their own technology. Any other approach to use technological innovation as an engine of growth has been made void through the TRIPS Agreement. Thus, the TRIPS Agreement, which has been in force since 1995, has not only been

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the most important multilateral instrument for the internationalization of intellectual property law, but also a tool for the Globalization of technology.

By studying the dynamics of the implementation of the TRIPS Agreement Deere finds that many developing countries adopted more stringent intellectual property laws than necessary. Deere quotes the example of francophone Africa, which adopted some of the strictest copyright laws in the world. While Deere is more interested in documenting the political dynamics that led to such outcomes, she departs from an understanding that more stringent intellectual property laws prevent development because domestic innovators are not sufficiently protected from international competition. To Deere it therefore seems stunning that during the implementation phase of the TRIPS Agreement many developing nations have not acted in the best of their own interest, but adopted intellectual property regimes that serve more the interests of the developed world than of their own people.

What explains this Paradox?

Deere attributes the variation in TRIPS implementation to the interplay between international power pressures and the complex political dynamics within developing countries themselves.ⁱⁱⁱ Weaker intellectual property standards were not implemented because those wanting to advance the scope of intellectual property law used a wide range of tools to advance their interests. According to Deere, development aid with respect to intellectual property law was not given to help build local economies, but to help build an adequate infrastructure for business headquartered in the donors' region. Other tactics included threats to market access, strategic alliances and investments. Many developing countries were put under severe pressure and pushed towards strong intellectual property regimes through diplomacy based on a 'carrot-stick' approach.

On the other side, Deere argues, in many developing countries we find civil servants, politicians and diplomats who were more interested in preserving and advancing their own interests rather than those of their country. Tempted by a potential career at an international organization, such as WIPO, the prospect of a much higher salary or at least several sponsored trips to Europe or the U.S. (combining for example extensive shopping in Paris with an IP training workshop at the WIPO Academy in Geneva), makes the bureaucrats of many developing countries appear not too different from native Americans who, at the time, sold their land to white colonizers for glass pearls. Deere also argues that overarching issues related to bad governance, failed states and ongoing civil wars contributed to a systematic failure to adequately respond to the intellectual property challenge. In the case of francophone Africa for example Deere documents that four out of the sixteen Member countries of the African Organization of Intellectual Property (OAPI) were either facing a civil war or other political unrest at the time of the TRIPS implementation. Thus, there was no political support to assure that the implementation of intellectual property law fits the needs of the country. On top of that, intellectual property law was seen very much as a technical issue that could be left to the "experts." The majority of decision makers in developing countries did not grasp the strategic and decisive role that the right level of intellectual property protection plays for a country's innovation system. (The same can probably be said of decision makers in several developed countries, who at most instances do also not understand the institutional framework provided by IP for innovation based growth.) Thus, external power

pressures encountered weak domestic governance structures and turned the implementation of strong IP regimes into a rather smooth exercise. The case study that Deere offers on francophone Africa reads like a political satyr and may make a cynic laugh. Rather than a fight between two equal partners, Deere shows that the implementation of IP standards was very much a result of lack of interest among decision makers in the region:

Between 1995 and 1999 OAPI revised the regional framework for IP protection, the Bangui Agreement, to make it compliant with the TRIPS Agreement. In doing so, it received input from staff of WIPO, UPOV (International Union for the Protection of New Varieties of Plants), and INPI (the French Patent Office), as well as that of an external expert hired to undertake the principal revisions. Deere points to fraud in the way the contract is awarded to the consultant. He received the contract before the deadline for bidding for the work had expired. Essentially, the reader of Deere's book finds some Paris and Geneva based technocrats revising the Bangui Agreement with the support of a consultant who had been given the job without passing any particular screening process:

“While an official announcement calling for bids to complete this task was published in national newspapers in the region, the decision to hire Elkani, who had served for 19 years as OAPI's first Director General, preceded the deadline for tender submission.”^{iv}

The substantially revised Bangui Agreement is subsequently circulated through OAPI for comments to national IP offices. Deere finds no evidence of any informal or formal public consultation with relevant local stakeholders, no media coverage and no press releases from NGOs addressing the revision of the Bangui Agreement. Due to an overarching lack of concern about the legislation beyond expert circles (“policy making in a vacuum”), the text receives hardly any feedback and gets fairly quickly adopted by the respective member countries of OAPI. In several ways the Bangui Agreement extends the scope and terms of IP protection way beyond minimal requirements laid out under the TRIPS Agreement.

Documents Deere: “In the context of copyright for example, the revised agreement adopts a general term of protection of the life of the author plus seventy years (before it was plus fifty years). The new version of the Agreement also removes prior flexibilities regarding the translation of foreign works into local languages for educational purposes (a flexibility TRIPS provides and that is not used in the Bangui Agreement) and... also provides for TRIPS plus sanctions to punish circumvention to technological protection devices.”^v

Deere's case study of francophone Africa traces a sensitive picture of the political dynamics prevailing in the poorest regions of the world. Inadequate governance structures are reinforced in all areas of public policy making because of an overarching lack of interest, concern and awareness among decision makers, which makes foreign intrusion an easy game. The interests of those in power do not necessarily overlap with the public interest, which makes a thorough argument for the need of good governance, solid institutions and adequate regulatory conditions in developing countries.

It is a pity that she does not find the courage to follow this line of thought systematically throughout the book and occasionally lapses into the stereotypical rhetoric portraying *all*

developing countries as fighting for their rights. Deere quotes leading academics in her introductory chapter:

“Developing countries *protested* that the Agreement would consolidate corporate monopolies over the ownership of ideas, exacerbate the north-south technology gap, and perversely speed the transfer of capital from developing to developed countries.”^{vi}

The analysis she offers throughout the book offers however a more differentiated picture of developing countries’ political elites: One that produces politics by a mix of coincidence, lack of interest, the payment of lip services and an overarching drive for the fulfillment of personal goals rather than that of the state. In this sense, Deere advances our current understanding of the role of political elites in developing countries by eventually contradicting those very academics that she quotes herself in the introductory chapter.

TRIPS: A complex Political and Ideational Game

By assessing closely the dynamics of the implementation of the TRIPS Agreement, Deere advances the metaphor of TRIPS as a complex political game where proponents not only struggle for power, influence and market share, but are equally driven by their own narrow personal self interest, as well as inertia and an overall lack of awareness of the political dimension of intellectual property law. The actors in Deere’s book are involved in an ideational game that is by no means cooperative in character, but driven by competition, battles and wars. Certain actors seek to force their will on others because in doing so they can expand their own interests and maximize their benefits, which in most instances acts towards the detriment of the other players. Thus, the inherent rationale of the game is ‘my victory is your defeat’. To win the game; the word ‘war’ would more honestly reveal the complex struggle for the narrow pursuit of self interest; the players need to form strategic alliances, build camps, team up with likeminded actors and explore various strategies to achieve their goals, which, I repeat, in Deere’s conception of the ‘Implementation Game’ can only be achieved through the defeat of the other camp.

In seeking to document, describe and illustrate the dynamics of the ‘Implementation Game’ Deere deciphers two camps: Those wanting to expand the protection of intellectual property rights at the global level and those wanting to protect development goals. In the first camp she finds the governments of developed countries, particularly, the U.S.A, the E.U. and Japan, multinational companies, especially pharmaceutical companies and other high technology companies headquartered in the developed world, as well as IP professionals worldwide, which bring to the group not only the technical expertise, but also a strong determination to expand IP protection so to keep their own profits going. On the other side we find nongovernmental organizations, consumer groups, developing country governments, ‘pro-development’ think tanks and the anti-globalization movement in general. The ‘Implementation Game’ turns out to be a brutal fight, fought with unequal means between unequal partners. The unequal level playing field is further reinforced by different levels of funding available to pursue the interests of either group (to ‘fund the war’) and by the overall coherence of either group.

Story Telling as a Political Act

The 'Implementation Game' wants itself to be an "empirically-grounded scholarly analysis" of this war. Deere underpins her argument through historical documents, compilations of evidence and over one hundred interviews with stakeholders. Yet, in doing so, the book in itself becomes part of the game and is turned in just another instrument to fight the IP war, rather than a piece of work of a narrator who has some political distance from the events. Given Dr. Deere's engagement in 'IP watch', a Geneva based non profit news service, this comes as no surprise. While objectivity in the social sciences is in any case an illusion, it would have been helpful if Dr. Deere had laid out her political position at the beginning of the book so to allow the reader to grasp some of her own underlying views on IP.

The way this book is drafted illustrates the power of the narrator in telling one story, while silencing other stories.^{vii} In doing so, the narrator designs the story in a specific way and in the absence of other documentaries, the subjective narrative is transformed into some sort of truth we start to live by when talking about IP diplomacy. In this sense, this book could equally pass as a history book. It disposes of the same inherent challenges that all (hi)story writing faces: Namely that the narrator him/herself is captured in his/her own complex system of ideational power and can seek to reinforce or weaken the "game", but never escape it.

Perhaps I am asking too much from the author. The 'game' is played in an opaque way, no official rules can be found, it has no clear date of expiration, geographical scope or limitation of players, leaving the author herself with no choice than to be part of the 'game' and see herself being turned into a character in the play rather than the outside observer she wants to be. The border between the author and the 'game' systematically collapses and the book subtly, but clearly advances its own political agenda.

Says Deere in her introductory chapter: 'TRIPS... was a victory for multinational companies determined to boost IP protection in developing countries... developing countries... viewed the strengthened and binding international IP rules in the world system as an aggressive instrument into the preserve of domestic regulation that would reinforce existing inequalities.'^{viii}

In sketching out the international context of IP diplomacy in these terms, Deere's book offers a series of inherent assumptions that are not in-depth addressed in the book, such as that the IP system prevents developing countries from combining economic and social prosperity with technological advancement. Developing countries are very much presented as a monolithic block of technology followers which seem to dispose of rarely any means to leverage intellectual property for indigenous innovation.

"Countries with the lowest technical capacity on IP were particularly *vulnerable* to pro-IP capacity building.'^{ix}

Possibly, Dr. Deere could have reduced the exposure of her work to contemporary politics, by introducing a thorough methodological chapter on the role of ideational power in international relations. While her books makes at various instances reference to discourse analysis and power as a decisive factor in international affairs, a sound discussion of these theories would have not only helped her to avoid being perceived as biased, but also offered a rich empirical illustration of so far unproven theoretical concepts. It would have also been interesting to understand in greater detail how the interviews she conducted were incorporated into the text.

Finally, the role of the international bureau of the World Intellectual Property Organization (WIPO) in the “Implementation Game” could have been described in a more differentiated way. Deere only superficially touches upon the institutional crisis that the organization faced under the leadership of Dr. Kamil Idris, mentioning not more than that the,

“United National Joint Inspection Unit raised concerns about corruption and mismanagement... and that a further independent audit by Pricewaterhouse Coopers revealed serious problems in human resources management... which ultimately forced the early resignation of the Director General, Dr. Idris, in 2007.”^x

To the contrary, she emphasizes on many of the themes typically put forward by the “pro development” camp when documenting the role of WIPO in the implementation of the TRIPS agreement:

“WIPO emerges as a central actor. Urged on by the pro-IP companies that finance the majority of its budget, WIPO’s capacity building activities in developing countries generally focused on early and strict TRIPS compliance. By contrast, advice from international organizations such as UNCTAD and the WHO prioritized development and health issues, and promoted the use of TRIPS flexibilities. At WIPO, for instance, the main interlocutors were national IP offices, whereas WHO’s main partners were health ministries... WIPO’s capacity-building activities exemplified how economic and ideational power were combined to push for compliance with TRIPS.”^{xi}

This statement is misleading for various reasons. As a specialized agency of the United Nations system WIPO is bound, like the other agencies, to the overarching principles of the U.N. While an Agreement exists between the WTO and WIPO with respect to the TRIPS Agreement and related capacity building activities, the TRIPS Agreement is administered by the WTO and not by WIPO and remains therefore primarily under the auspices of an organization that is not a member of the U.N. system. Thus, it is correct that upon the request of Member countries WIPO offers technical cooperation so to comply with the TRIPS Agreement, the main focus of its development aid has under the leadership of the former Director General, Dr. Idris, been to promote IP as a “power-tool for economic, social and cultural development,” rather than to assure mere TRIPS compliance.

The budget of WIPO is not composed of donations from companies, as one may assume after reading Dr. Deere’s book, but WIPO sells to right holders, independently of size and background, a variety of services related to international IP protection. This may also be read as a way of taxing international corporations for IP protection. The revenues generated from these services are widely used to cross-subsidize the organization’s capacity building activities, which has at several instances been subject of debate among certain of its Member countries.

I also do not understand why Deere considers it an issue that WIPO’s main interlocutors are IP offices and not Ministries of Health. The way United Nations’ specialized agencies are organized is that they usually have as counterparts specialized government agencies in the respective Member country. The World Meteorological Organization (WMO) for example, maintains primarily contacts with national meteorological services. Rather than reiterate common themes of the anti-Globalization movement (i.e. WIPO is sponsored by multinational companies) it

would have been very interesting to learn how the institutional dynamics and potential rivalries between WIPO and WTO function and to which extent WIPO's technical cooperation was influenced by the institutional challenges the organization faced during the leadership of Dr. Idris.^{xii}

You don't buy a House to sue a Neighbor

My critique should not be understood as disproportionately negative. Overall, Dr. Deere's book is a well drafted, thoroughly researched documentary of the ideational power prevailing in international IP diplomacy. At many instances she offers original insights and it is no exaggeration to say it is very much the first book of its kind to offer a systematic ontology of the historical events that followed the TRIPS Agreement. Her work is a good read that is precise in both structure and style. In this sense the 'Implementation Game' is an exciting and occasionally amusing sketch of the current state of international affairs. If Dr. Deere wanted to take her work to the next level, she could assess some of the inherent assumptions her book is based on:

Can we finish the war currently prevailing in multilateral IP diplomacy?
Do we have a chance to move from the battle field to the negotiation table and explore jointly how intellectual property may work towards bridging the technology divide?

For me, intellectual property remains a fascinating tool. It is the primary means to build knowledge-based markets and turn otherwise unleveraged knowledge assets into property that can be sold, traded or donated. In my view the mere creation of innovation based market mechanisms through intellectual property rights may not necessarily be a bad thing. Rather than criticize the existence of market based dynamics, it is worthwhile exploring to which extent those dynamics may be leveraged for the promotion of development goals. As Deere illustrates, this was not the primary intention of the TRIPS Agreement. But in view of the fact that the Agreement is now in force, can one not be pragmatic and explore how to make the best of it?

One way to do this may be to engage corporations to link intellectual property to corporate social responsibility and ask to which extent licensing agreements can also take the needs of developing countries into consideration.

Is it feasible?

Yes, but what is needed is an understanding that intellectual property can do much more than simply prevent someone else from using the underlying technology it protects. Nobody buys a house to sue her/his neighbor, but to use it to live in it, rent it out or make it available for philanthropic purposes. Does it really take so much to get decision makers think about intellectual property along similar lines?

ⁱ C. von Clausewitz, "War is politics by other means", In: *The most important principles of the art of war to complete my course of instruction for his Royal Highness the Crown Prince*, (1812) Translated and edited by Hans W. Gatzke as "Principles of War, (1942), The Military Service Publishing Company

ⁱⁱ S. K. Sell, “Multinational corporations as agents of change: The Globalization of intellectual property rights,” (1999) in A. Cutler, V. Haufer and T. Porter (ed.) *Private authority and International Affairs*, Albany: State University of New York Press, pp. 169-197; S. K. Sell & C. May: “Moments in law: contestation and settlement in the history of intellectual property,” (2001) *Review of International Political Economy* 8 , pp. 467 – 500

ⁱⁱⁱ TRIPS book reviews. *IP Kat*, 24.8.2009, <http://ipkitten.blogspot.com/2009/08/trips-book-reviews.html>

^{iv} C. Deere, “*The Implementation Game: the TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*”, Oxford University Press (2009): Oxford, p. 260

^v C. Deere, *ibid*, p.259

^{vi} J. Stiglitz, “*Globalization and its Discontents*.” Allen Lane (2002): London, P. Drahos, “Global Property Rights in Information: The Story of TRIPS at the GATT”, (1995) *Prometheus*, 13/ 1, pp. 6-19, F. Beier & G. Schicker, “*From GATT to TRIPS: The Agreement on Trade Related Aspects of Intellectual Property Rights*.” Studies in Industrial Property and Copyright Law. Weinheim Press (1996): New York ; D. Matthews, “*Globalising Intellectual Property Rights: The TRIPS Agreement*.” Routledge (2002): London, S. Stewart, “Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice”, (1995) *International Organization* 49/ 2, pp. 315-349, E. Wolfhard, “International Trade in Intellectual Property: The Emerging GATT Regime,” (1991) *University of Toronto Faculty of Law Review*, 49/1, pp. 339-65

^{vii} R. Koselleck & W. D. Stempel, (ed.)“ *Geschichte—Ereignis und Erzählung*.” Fink (1973): Muenchen

^{viii} C. Deere, *ibid*, p.1 & p.8

^{ix} C. Deere, *ibid*, p.311

^x C. Deere, *ibid*, p.142

^{xi} Deere, *ibid*, p.182 & 309

^{xii} Deere, *ibid*, p.309