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Book Review
**Power and Ideas: North-South Politics of
Intellectual Property and Antitrust**
By Susan K. Sell
State University of New York Press, 1998, pp. 289

REVIEWED BY LUCIO LANUCARA*

INTRODUCTION

Issues of intellectual property and antitrust have steadily become more integrated in the last couple of decades.¹ After the end of colonialism, such issues rapidly became relevant in the dialogue between the industrialized North and the developing South. In fact, the developing countries soon concluded that the prevailing modes of technology transfers and business practices favored the richer countries and their corporations, and that they, therefore, needed to redefine the rules underlying those transactions.²

Susan K. Sell, in her recent study *Power and Ideas: North-South Politics of Intellectual Property and Antitrust (Power and Ideas)*, analyzes these issues from a political history perspective. She attempts to explain how changes in the balance of power and the spread of ideas have affected the negotiation, adoption, and implementation of an international set of rules on intellectual property and antitrust. *Power and Ideas* is an opportunity to revisit an important historical period in international relations and to acquire a better understanding of the development of North-South politics. Sell explores both the reasons behind the outcome of negotiations for a New International Economic Order (NIEO) and the changing attitudes of developing countries

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1. For an understanding of the connections between antitrust and intellectual property issues in the 1980s and in the 1990s, see W.L. Fugate, *Antitrust Aspects of International Patent and Technology Licensing*, 5 J.L. & COM. 433 (1985), and J. H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade after the GATT's Uruguay Round*, 20 BROOK. L. REV. 75 (1993).

2. See SUSAN K. SELL, *POWER AND IDEAS, NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 57-64 (1998).

in the wake of diplomatic failures and the sweeping economic crisis during the 1980s.

The book is much more about methods of political analyses than about intellectual property and antitrust issues. The author herself, in the introductory chapter, indicates that her work attempts to validate her systematic approach in lieu of the traditional theories of political analysis.³ This premise affects the structure of the book. Sell analyzes negotiations within three political events: (1) establishment of an international code for the transfer of technology; (2) reform of the Paris Convention for the Protection of Industrial Property (Paris Convention); and (3) adoption of an international code of conduct on restrictive business practices. Sell sharply separates and independently treats these legally historic events, but intends them to buttress her overall political theory. The facts thus do not stand on their own but, instead, become a part of her theoretical model.

Power and Ideas is divided into six chapters, complemented by a short introduction and more substantive conclusions. The first two chapters introduce the book's aim, the relevant historical background, and the traditional methods of analysis. The third chapter analyzes the negotiations for an international code of conduct regarding the transfer of technology. The fourth chapter describes the attempt to revise the Paris Convention. The fifth and sixth chapters analyze the negotiation, adoption, and use of the United Nations Conference on Trade and Development (UNCTAD) Code of Conduct for the control of restrictive business practices and provide further historical information on the adoption of antitrust and intellectual property laws in developing countries. The book concludes by expounding the role of ideas in the adoption and implementation of intellectual property protection and antitrust rules in the developing world.

I. INTERNATIONAL POLITICS AND POLITICAL ANALYSES

Sell's reflections focus upon the historical events surrounding the negotiations undertaken by industrialized and developing countries since the

3. *Id.* at 5-6.

1970s.⁴ She reviews the complete political failure that the developing countries encountered in these negotiations and the new attitudes and policies those countries adopted in the 1980s under the pressure of globalization and sweeping international economic crisis. Sell investigates not only the results of, but also the reasons for, such failures. She outlines the causes for different political strategies and varying degrees of law enforcement in the fields of intellectual property and antitrust within developing countries.⁵ Sell posits that ideas and perceptions of policy goals prove fundamental in shaping historical developments and thus merit careful attention. In short, her thesis argues the necessity of a historical approach that examines ideas, power relationships, and structures of States.

To achieve her goal, Sell initially refers to the other traditional theories of political analysis that evaluate history based on balances of power or calculations of interests. She then exposes their inadequacies and, throughout the remainder of her work, attempts to demonstrate the superiority of her own analytical model—namely, Interpretivist Neoliberalism.⁶ Sell criticizes several methods of analysis but focuses primarily on two significant theories, Structural Neorealism and Neoliberal Institutionalism.⁷ Sell argues that both mainstream analyses fail to provide a complete description of political developments and to explain the different political outcomes where countries have similar power relationships precisely because these methods fail to consider the role of ideas. According to Sell, Structural Neorealism, by concentrating only on the structure of power relationships, ignores the diversity of responses in national policies and the changes sought in the multilateral system. Neoliberal Institutionalism, by focusing solely on how national self-interest drives the international order, disregards how a nation's perception of self-interest can change in different times and areas of law.⁸ As Sell concludes, “analyses that focus solely on power considerations or

4. These negotiations occurred in the following years: 1974-1985 (international code on the transfer of technology), 1980-1984 (revision of the Paris Convention), 1975-1980 (UNCTAD Code on restrictive business practices).

5. SELL, *supra* note 2, at 176-216.

6. *Id.* at 21.

7. *Id.* at 12-14 (mentioning other theories such as Structural Marxism and World System Theory, and also asserting that these theories suffer from the same deficiencies as neorealist theories).

8. *See id.* at 17-27.

instrumental calculations of interests obscure as much as they reveal.⁹ On the other hand, Interpretative Neoliberalism, by recognizing the relationship between ideas and interests, reveals the content of national interests, how they are perceived and defined, and how they change over time.¹⁰ For this reason, only the latter theory explains the policy changes and political reactions of developing countries during these negotiations.

Sell's work is extremely accurate in this section. She describes Interpretivist Neoliberalism thoroughly and supports it with well-documented facts that clearly delineate the limits of other possible theories. The conflicts between the different possible methods of analysis are clear even to those not familiar with political science scholarship. Furthermore, the factual evidence is well-composed. In every chapter, Sell combines the description of events with an analysis of ideas, suggesting the impossibility of understanding facts without considering ideas. In sum, this section fully achieves the goals of introducing the reader to complex issues of political analyses and supporting, in a convincing manner, the main theory of the book.

II. NEGOTIATIONS FOR AN INTERNATIONAL CODE ON THE TRANSFER OF TECHNOLOGY

Sell initially explains why negotiations for an international code regarding the transfer of technology became particularly relevant in the 1970s international scene. After World War II, the international economic order promoted by the United States favored an unprecedented growth of trade; during that period, technology transfer was market-led, like any other utility, and policymakers in developing countries did not regard it as a crucial international political issue. In the 1950s and 1960s, however, developing countries gradually challenged the prevailing system of foreign investment and technology transfer led by multinational corporations on the grounds that it was designed to favor only the corporation without taking into account the advancement of developing countries. Finally, in the late 1960s and early 1970s, many developing countries adopted regional and national legislation

9. *Id.* at 39.

10. *Id.* at 25.

to regulate the transfer of technology in a manner coherent with their own policy goals.¹¹

Sell shows how such developments led Third World countries to seek the establishment of a NIEO in which foreign investment, technology transfer, and economic development were all considered. The gradual awareness of ideas about technological transfers, which led the developing countries to adopt a unified approach, assumed a position of relative weakness within developed countries. Developed countries experienced slower economic growth and feared that developing countries would exacerbate the situation by adopting unilateral actions on some commodities, similar to those restrictions adopted by the Organization of Petroleum Exporting Countries (OPEC).¹²

Once again, the starting point of Sell's political analysis is the role of interests and ideas. Sell, using such a historical background, explains the dynamics of the negotiations, the interests at stake, and the policy goals that arose during the adoption of an international code of conduct for the transfer of technology. She describes in detail the negotiations that took place between the Group of 77¹³ and the industrialized bloc. She demonstrates that the leading policies and ideas of the developed countries were to avoid or limit the relevance of any agreement. For this reason, even when the momentum was favorable to the developing countries, who had been able to "set the agenda" of the international negotiations, it was not possible to reach any substantial result. The change of leadership in the United States, the bureaucratic inefficiencies of UNCTAD, and the world economic crisis primarily caused this negotiative failure.¹⁴

Sell analyzes the actions of three subjects: developing countries, developed countries, and the negotiators. The developing countries, taking advantage of their situation of relative power, and hoping to implement the ideas supporting their redefinition of policies, attempted to reach a binding agreement on the transfer of technology that would give the State the power

11. *Id.* at 79. Sell refers particularly to the legislation adopted by the Andean Pact, a group of countries within the Andean Common Market (ANCOM). In 1970, the Andean Pact adopted Decision 24, which first addressed the issue of technology inputs, patents, and trademarks with an express focus on development issues rather than market issues. Other leading legislation included the Andean Pact's Investment Code, or the ANCOM Investment Code. Sell further mentions legislation adopted by Mexico, Brazil and Argentina. *Id.* at 81-86.

12. *See id.* at 66-76.

13. The so-called "Group of 77" was the negotiating bloc of the developing countries in the UNCTAD forum. *Id.* at 67.

14. *Id.* at 98.

to “balance” the position of force of international corporations. The North, intimidated by this economic and political scenario, was forced to accept negotiations, but never shared the views at the base of the NIEO. The negotiators tried to reach acceptable compromises, but finally faced a loss of faith in UNCTAD by both groups.

Sell carefully identifies the tension between interests and ideas. She subsequently provides a clear and descriptive review of the dramatic shifts of power in the 1980s and the redefinition of interests by developing countries under the pressure of massive international recession. Using Sell’s principles, it is easy for the reader to understand why the redefinition of policies was determined not only by the new social and economic conditions, but also by the example set by the “Asian Tigers,” who developed dramatically in the span of only a few years by liberalizing trade restrictions and establishing favorable conditions for foreign investment.¹⁵ The pressures of economic crisis and the example set by many Asian countries preceded the change in attitude by the United States under the Reagan administration. This attitude was sharply hostile to the NIEO and to the bureaucracy of the UNCTAD, a conference perceived as too partisan in favor of the developing countries.¹⁶

Sell, in this section, capably explains how the unresolved issues in the negotiation exposed irreconcilable differences between the developed countries and the Group of 77. For instance, whereas developing countries believed the final document should be binding, developed countries contended that only a non-binding agreement would be acceptable.¹⁷ Sell mainly focuses on the political meaning of the events. Goals, policies, and ideas of the three main actors—developed countries, developing countries, and negotiators—serve as the object of the narration. Sell succeeds in coherently developing her plot in favor of her historical approach. The focus on the political aspects of the events, however, partially ignores the substantial

15. *Id.* at 102-06.

16. *Id.* at 101.

17. On most issues, positions were sharply different. For instance, while developed countries identified restrictive business practices with anti-competitive behavior in the sense commonly understood in the majority of antitrust laws, developing countries considered restrictive business practices to include all those practices that could have negative effects on development. Sell describes in great detail how the development of negotiations was a history of power in which the developing countries had to make a series of concessions to the more inflexible developed countries. In the end, the substantial change in the proposed code made it uninteresting even to the countries that had promoted its adoption. The impossibility to go any further with the negotiations had a strong psychological impact comparable, in negative, to the impact OPEC fostered by supporting the action of the Group of 77 in the early 1970s. *Id.*

economic and legal issues, which elucidate the connections between events and the causes of political and ideological development.

III. NEGOTIATIONS FOR THE REFORM OF THE PARIS CONVENTION

Sell opines that the attempt to amend the Paris Convention is similar to the attempt at a code for technological transfers. The negotiations for the reform of the Paris Convention occurred between 1980 and 1984. The bloc of developing countries hoped to draft a code allowing State control over the use of patents similar to the ones already existing in many countries. In particular, the developing countries were concerned with what they considered abuses of patents by recipients—mainly, not using the patents or getting them only for the purpose of excluding competitors from a market.¹⁸

Sell succeeds in describing the different interests and ideas supporting the actions by the States and the resulting imbalance of power. The tension was primarily between the Organization for Economic Cooperation and Development (OECD) and the developing countries. Among the industrialized countries, very few showed sympathy toward the position of the developing countries.¹⁹ Negotiations continued mainly because of the insistence from UNCTAD, but with little, if any, enthusiasm from the OECD and with the developing countries unable to force a change in the situation. The remedies finally proposed were relatively weak when compared to the initial requests by the developing countries. Sell goes on to consider how the outcome was reversed dramatically by a redefinition of interests, in this case led by the Reagan administration. While initially adhering to the OECD line (avoiding the adoption of any binding and substantial rule), the United States—under increasing lobbying pressure from its industrial groups—decided to consider the issue of intellectual property under the General Agreement on Tariffs and Trade (GATT), obtaining significant

18. Constantine Vaitsos, economist and head of the Andean Pact Secretariat's policies on foreign investment and technology, had a leading role in developing and implementing the ideas representing developing countries' primary opposition to the current regime of patent protection. *Id.* at 110-11.

19. *See id.* at 123 (listing Canada, Australia, New Zealand, Portugal, Spain, and Turkey as the only developed countries that initially showed empathy toward the positions of the developing countries).

success with the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement.²⁰

Sell again successfully exposes the interaction between power and ideas. The negotiation began with a momentum of ideas from the developing countries, supported by a condition of relative power. The incapacity to transmit acceptance over their ideas, the introduction of new, opposing ideas by the Reagan administration, and the general reversal of power resulted in another failure for the Third World.²¹ Once again, the facts would suggest that, as Sell affirms, an analysis based solely on power relationships could not explain the different behaviors between OECD countries and the United States. Similarly, an analysis based only on national interests would fail to grasp the forces behind their reshaping.

IV. THE ADOPTION OF THE UNCTAD CODE ON RESTRICTIVE BUSINESS PRACTICES

The chapters dedicated to the adoption of the UNCTAD Code on Restrictive Business Practices and to the different approaches on antitrust and intellectual property defense issues are the least satisfactory. In fact, the potential force of Sell's argument in comparing intellectual property and competition is not fully exploited. Had the link between the two areas of law and policy been better analyzed, the divergent policies adopted by the developing countries would have strengthened her point that ideas remain preeminently important. In addition, some data regarding trade and legislation refer merely to 1991 and, given the fast pace of events in this decade, cannot be considered very indicative.²²

The history of restrictive business practices is quite unique. Sell's treatment attempts to demonstrate how, given similar power relations, a different development of ideas and diverging policy choices can nevertheless result. One particular feature of the negotiation of restrictive practices is that it actually resulted in the adoption of a code. However, as far as developing

20. *Id.* Several works analyze TRIPS and its perspectives. See, e.g., J. H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the Trips Agreements*, 29 N.Y.U. J. INT'L L. & POL. 11 (1997); E.M. Fox, *Trade, Competition, and Intellectual Property—TRIPS and Its Antitrust Counterparts*, 29 VAND. J. TRANSNAT'L L. 481 (1996).

21. See SELL, *supra* note 2, at 130-39.

22. This is particularly true for the chart regarding the status of antitrust legislation in developing countries, as updated to August 1991. See *id.* at 202-03.

countries were concerned, the outcome remained unsatisfactory, since the approved document reflected only the interests of the developed countries, which set the agenda and forced the adoption of a favorable document.²³ Sell, in a richly documented description of events, points out that, since the Code's inception in 1980, it has represented a clash between the most powerful bloc, which fully achieved its aims, and the developing countries, which remained bitterly disappointed. Approaches toward the Code's adoption strongly diverged. The North wished to validate its approach to antitrust law, while the South contested what it considered to be negative enterprise behavior.²⁴ Even after its adoption, the Code's reinterpretation by the Reagan administration evinced more clearly the complete fiasco for the South.²⁵

Sell explains that the Code soon lost its imprimatur. Between 1980 and 1989, when consensus from both developed and developing countries completely evaporated, the Code became a "dead letter."²⁶ At the end of 1989, however, the developing countries began drafting and implementing legislation based on provisions of the Code. Such an outcome, according to Sell, is attributable to the proposed redefinition of national interests and consequent adoption of ideas by developed countries. The need to improve efficiency in an environment steadily more competitive and frequently pressured by recession forced those countries to open their markets entirely to market economy.

At this point, the history of antitrust and intellectual property protection diverges. During the 1980s and 1990s, the new emphasis on deregulation, privatization, and globalization reshaped national interests in the developing countries, but only in the antitrust field. In particular, the economic crisis in the 1980s forced developing countries to embrace elements of a market model to advance their developmental goals. The same concerns, however, never applied to intellectual property issues. Developing countries, while keeping their reservations about intellectual property protection, began approving antitrust rules as useful tools of economic policy.

Sell accurately notes that an analysis that considered merely power relations would not explain the differences between antitrust and intellectual property. For example, in the field of intellectual property, the United States

23. *Id.* at 157-58.

24. *Id.* at 145-48.

25. *Id.* at 159-62.

26. *Id.* at 171-73.

has obtained international codification to its approach both in the North American Free Trade Agreement (NAFTA) and in the TRIPS Agreement. The United States also has succeeded in using coercive diplomacy to force many developing countries to strengthen intellectual property protection.²⁷ The States that adopted this legislation merely as a consequence of power pressure, however, have refused to enforce them because the ideas represented failed to transfer. On the other hand, these same countries have reshaped their position on antitrust, voluntarily adopted legislation, and actually enforced it.

Unfortunately, Sell seems to commit a systematic error not unlike that found in the theories that she initially refutes. That developing countries have maintained their old views within intellectual property, despite the pressures of economic crisis and globalization, is regularly reported but not investigated. Moreover, Sell never considers the economic reasons that effectuate different attitudes toward the antitrust approach; she merely reports the switch of ideas. It would have been useful to include economic factors within her analysis and to show their relevance to developing countries that advanced antitrust and intellectual property provisions based on their proposed function of domestic markets. Sell realizes that new ideas motivate redefinition of national interests, but never fully explains how economic considerations fuel or limit these new ideas.

CONCLUSION

Sell's work rests on two concepts—namely, the historical reconstruction of events and the demonstration of the power of ideas. Sell, however, emphasizes them differently. As she explains in her introduction, she is primarily interested in demonstrating the role of ideas and proving the accuracy of her systematic method. The events described merely provide an occasion to uphold her analytical approach.

This imbalance between the two leading concepts affects the structure of the book. In fact, while the role of ideas is demonstrated very accurately, in some cases, the book lacks a deeper analysis of the legal and economic issues underlying the events. In particular, Sell rarely accurately analyzes the negotiated provisions on transfer of technology, protection of patents and

27. *Id.* at 182-88. For an example of the recently adopted legislation for patent protection, see E.S. Flores Troy, *The Development of Modern Frameworks for Patent Protection: Mexico, a Model for Reform*, 6 TEX. INTELL. PROP. L.J. 133 (1998).

anticompetitive conduct, or the underlying economic implications. The obvious connections between antitrust and intellectual property issues, even if hinted at in the conclusion of the book, are not fully developed during the narration. As a result, Sell's work—in itself remarkable for the amount and depth of information and for the clarity of its exposition—misses the chance to reflect on the even more significant meaning of the partially diverging outcomes in implementation of rules on antitrust and intellectual property protection in the developing countries. These limitations, which are concedingly inevitable given the focus of her book, nevertheless obscure some of the reasons for the relations of power, the reshaping of policy and national goals, and the interface between intellectual property and antitrust. These issues could have further strengthened the arguments that Sell employs to support her political analysis.

Despite these limitations, *Power and Ideas* remains a pleasant, well-organized, and resourceful book. It clearly reveals Sell's political science background and has value both as a useful political history of little known events in the twentieth century and as a well-written essay about methods of political analysis. In addition, Sell's work provides a precious source of information on the diplomatic efforts in antitrust and intellectual property negotiations, which otherwise remains very difficult to find.²⁸ *Power and Ideas* succeeds in reinforcing the assertion that, in the current wave of globalization, ideas play a crucial role. In fact, as economies and legislation become more amalgamated and integrated, the perception of national goals and interests often makes the difference. How countries define goals and interests influences their implementation of increasingly homogenous rules. Power relations between States also tend to become less meaningful as economies and interest groups become increasingly borderless. Sell's work, by supporting an analysis especially concerned with ideas, provides an important tool for a better understanding of the globalized world.

28. In many cases, the bibliographic material is complemented with interviews Sell personally held with American diplomats, international diplomats, and UNCTAD high bureaucrats. See SELL, *supra* note 2, at 231-61.

