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INTELLECTUAL PROPERTY, HUMAN RIGHTS AND DEVELOPMENT: THE ROLE OF NGOS AND SOCIAL MOVEMENTS, by **Duncan Matthews**. Edward Elgar, 2011. 286 pp. Hardback \$125.00.

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Non-governmental organizations (NGOs) fall within the diffuse family of the “non-”, including non-state actors more broadly.¹ As observed astutely, “[a]ny attempt to define NGOs in positive rather than negative terms is problematic, beyond the observation that they tend to be private citizens’ groups established to further certain common objectives of their members. The objectives pursued by NGOs differ considerably.”² Neither market nor state, the third space inhabited by these types of organizations defies attempts at positive articulation, at least within the state-centric rubrics of international law or international relations.

This famously amorphous negative domain thus requires further specification, if only to make better sense of its many moving parts. In his book, **INTELLECTUAL PROPERTY, HUMAN RIGHTS AND DEVELOPMENT: THE ROLE OF NGOS AND SOCIAL MOVEMENTS**, Duncan Matthews, a Professor of Intellectual Property Law at Queen Mary, University of London, achieves this necessary particularity by exploring the impact of NGOs within global intellectual property (IP) regimes. Further narrowing the inquiry, he focuses on “public action NGOs” engaging in “non-governmental public action by, and on behalf, of disadvantaged people and [their] impact . . . in reducing poverty and exclusion” (p.11). In examining this subset of NGO activity, he employs three additional analytical frames: (1) the specific IP domain of public health, contrasted with agriculture, genetic resources, and traditional knowledge (AGRTK); (2) the relationship of these two distinct IP regimes

to the typically separate legal domains of human rights and/or development; and (3) the impact of the relevant NGOs within developing as well as industrialized states. This last dimension means that this book is the culmination of an ambitious comparative methodological inquiry—covering different perspectives not just between NGOs located in the global North and South, but also among emerging economies that have been major norm generators through their international as well as domestic IP initiatives.

About a decade ago, the UK Commission on Intellectual Property Rights (CIPR) issued a ground-breaking report on the interplay between IP, human rights and development.³ Chaired by the late John H. Barton, an American IP scholar, the CIPR analyzed the existing global intellectual property legal regimes from the perspective of their impact on lesser advantaged states and populations. It attempted to bridge the gap between the current instrumental and utilitarian emphasis within IP discourse and the universal, natural rights-inflected language of human rights⁴ and, in this regard, noted the contributions of NGOs. In this study, Matthews goes far beyond a mere nod to these efforts. Front and center of this book are NGOs operating not only within Geneva-based international IP norm-setting as it relates to human rights and development, but also within various national contexts within selected developing countries.

Matthews makes several distinct contributions to the existing literature on the role of NGOs in global governance. His sustained focus on public interest NGOs adds much-needed depth to the growing literature on NGOs generally. He explores the reasons underlying differences among NGO strategies within three developing countries: South Africa, Brazil and India. These case studies also provide a common platform for further elaboration of and support for two widely acknowledged network organization approaches to this area: coalition-building and framing theories (pp.5-9).⁵ And in the course of providing all of the above, Matthews also accomplishes one important (although possibly thankless) task: he provides a clear and concise descriptive summary of relevant treaty frameworks and other legal provisions for both IP and human rights.

Each of the book's strengths is significant. It is truly an achievement to have simultaneously navigated so many analytical vectors and technical intricacies demanded by IP. Yet although descriptively and analytically successful, the book is perhaps insufficiently critical of its normative implications. This suggests that a network organization approach to NGOs may be in need of complementary theories or further development on its own. Reviewing this book provides signposts for additional possible lines

of theoretical elaboration useful for the study of all transnational non-state actors, including the public action NGOs scrutinized here.

Liberally sprinkled throughout this book are sidebars containing excerpts of significant primary source material. Chapters on public health (Chapter 2), AGRTK (Chapter 3) and human rights (Chapter 7) can stand alone as reference tools for these legally and technically challenging areas. The area of AGRTK can be especially arcane and baroque, consisting of overlapping multiple IP global regimes such as breeder's rights and protection of plant genetic resources by patent or *sui generis* laws. In addition to these IP regimes, AGRTK is governed by environmental and biosafety regimes, not to mention the food security, poverty reduction and sustainability aspects that are critical to any development focus (pp.52-91).⁶ The book easily clarifies and summarizes these different domains, and moreover provides a short historical overview of each.

Matthews includes an abundance of material on developing country NGOs in addition to the more accessible international NGOs based in various sectors of the global North. With the assistance of Viviana Muñoz Tellez,⁷ who is currently a Geneva-based policymaker, he participated in “over 60 interviews with representatives of NGOs, broader social movements, indigenous communities, and local communities in developing countries,” as well as their counterparts in industrialized countries (pp.7-8). The resulting narratives resist essentializing⁸ the “South” or “developing countries” as one monolithic bloc with indistinguishable histories and motives.

In the public health arena, for example, Matthews describes how South Africa's government was pressured by NGOs with roots in the previous anti-apartheid and gay rights movements, which then turned their efforts towards a campaign for access to affordable medicines by “[s]eeking recourse to the human rights principles enshrined in the South African Constitution” (p.103). By contrast, Brazil's emergence from dictatorship in the mid-80s as a result of social movements for democracy led to its establishment of a universal health care system, including a commitment to access to affordable medicines. One consequence is that by the mid-90s, Brazil was one of a handful of countries with a policy of universal access to anti-retroviral treatment for HIV/AIDS (pp.125-30). However, this policy eventually collided with the patent protection mandated by TRIPs Article 27, which sets forth that “patents shall be available and patent rights enjoyable without discrimination as to . . . the field of technology.”⁹ To implement its obligations under TRIPs, Brazil introduced protection for pharmaceuticals, an area that was previously unprotected (p.129),¹⁰ along

with compulsory licensing provisions to balance the stronger patent protection (p.130). The role of Brazilian NGOs co-evolved with the government's strong commitment to public health. While local NGOs had a less prominent role than their South African counterparts in addressing the initial policy conflicts between patents and public health, they (like the South Africans) began to mobilize in response to U.S. challenges to these compulsory licensing provisions and, in doing so, relied on the language of human rights contained within the Brazilian constitution (pp.133-34).

India's colonial legacy led to a commitment by its government in 1970 to exclude from patent protection essential goods such as pharmaceuticals (p.164). Like Brazil, the Indian government was obligated to modify this approach in the mid-90s in response to TRIPS. It then collaborated with an expert panel—not exactly a NGO, but still a non-state actor in the form of the aptly named National Working Group on Patent Laws (p.166), which in turn became an institutional locus for public debate on the conflict between patents and public health. This non-state institution influenced Indian Supreme Court rulings by pointing out, *inter alia*, that the new obligations with respect to patent law could conflict with the Indian constitutional provision on the right to life (p.167).

Through these and other case studies, Matthews points to both similar and different catalysts for social movements cohering into NGO activity. In all three countries, for example, NGOs were mobilized by the TRIPS Agreement's insistence on patent protection for pharmaceuticals as well as the right to health recognized by their respective constitutions. They also all fulfilled a need for advocacy and assistance in technical subject matter that may not be easily understood by civil society. But these NGOs also had differing roles vis-à-vis their governments, based on specific cultural, political and historical contexts. In weaving together these comparative approaches to public health and IP, Matthews also gives brief but critical background to important IP and development disputes, at both international and national levels. Most of the legal literature focuses on the former, especially the work of NGOs around the Development Agenda in the World Intellectual Property Organization (WIPO). Of course, Matthews discusses the Development Agenda (pp.248-50), but does not limit himself to this obvious international initiative by developing countries.

The primary theoretical framework of this book is fairly straightforward: Matthews claims that coalitions between NGOs and developing countries “may provide a counterweight to the traditionally close relationship between industry groups and developed countries...” (p.6). He also relies on what he calls the “corollary” to coalition-building theory: “framing”

(pp.7-8). Using the language of human rights, for instance, NGOs were able to re-frame the property-oriented, technical and economically instrumental language of IP favored by industrialized blocs into a more public interest-oriented and less parochial discourse—one that substantively impacted IP law and policy-making by and within developing countries. The result is that IP is now connected more explicitly not just to human rights regimes but also to the production of other public goods such as global public health and environmental sustainability.

The book provides much evidence to support the use of both coalition-building and framing as two critical tools used to turn IP towards a larger horizon of public interest goals. In the area of farmers' rights, for example, Matthews traces the important influences of international NGOs on UN-led initiatives in the area of food security through the language of "farmers' rights," which includes, among other things, the "right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture" and "the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture" (pp.60, 74-84). On a domestic level in India, the sustained activity of NGOs resulted in a decision by the Indian government to implement a *sui generis* system rather than a patent system for protection of plant genetic resources—no small victory (p.195). The normative core of Matthews' comparative approach is an implicit commitment towards greater involvement by civil society within the often faceless machinations of global law and policy-making. NGOs may not have the ability to make treaties but, in partnership with states, they can affect public norm-setting, interpretation and implementation. The book is replete with concrete instances of this process. Thus the book's successes are considerable. It adds a tremendous amount to our sense of how NGOs operate on the ground. It is exceedingly well-documented and detailed, and demonstrates the power of coalitions and framing.

However, the subject matter may have outgrown the existing theoretical approaches. Social science literature on NGOs dates to the mid-1990s, around the same time that many of these global IP issues became highly politicized areas of law. NGO scholarship is dominated so far by coalition-building, network organization or nodal governance theories (hereinafter network theories), including framing theories. Early work by Margaret Keck and Kathryn Sikkink from an international relations perspective focused on "networks . . . motivated primarily by *shared principled ideas or values* (transnational advocacy networks)."¹¹ As they put it, "[w]hat distinguishes principled activists of the kind we discuss in this volume is the

intensely self-conscious and self-reflective nature of their normative awareness. No mere automatic “enactors,” these are people who seek to amplify the generative power of norms, broaden the scope of practices those norms engender, and sometimes even renegotiate or transform the norms themselves.”¹² In this account, the outcome of the policy efforts of NGOs is assumed without analysis to be laudable. Similar thematic concerns and assumptions underlie Matthews’ project of exploring public action NGOs.

While successful in predicting whether and how these networks operate (p.201),¹³ network theories of NGOs and other non-state actors typically omit discussion of accountability, legitimacy and representation. These qualities are arguably essential to any public policy-making sphere, whether of states or non-state actors such as NGOs intervening on behalf of the public in the name of the public interest.¹⁴ The burgeoning number and influence of NGOs both domestically and internationally,¹⁵ particularly their influence in the domain of development,¹⁶ make assessment along these governance dimensions crucial. While one might agree with the substantive positions taken by many of the so-called public action NGOs highlighted in Matthews’ book, he neither critically evaluates the scientific bona fides of their advocacy positions, nor suggests any criteria of legitimacy for evaluating their impact. In the area of AGRTK, for example, NGO advocates have been deeply concerned with transgenic technology coupled with food industry concentration in the global North.¹⁷ However, some recent academic critiques claim that Northern (particularly European) NGOs have exported industrialized countries’ attitudes towards environmental risk assessment to developing countries, without fully considering possible benefits to the rural poor of transgenic technology within these countries.¹⁸ While state actors are fallible, so too are non-state actors such as NGOs.¹⁹ Thus NGOs may have too little accountability for the human rights claims they make on behalf of others, and moreover may not be fully representative of those others for whom they claim to speak.²⁰ And although their expertise may be of great assistance, particularly in technically complex areas, their legitimacy ought to be measured by the same evidence-based policy-making standard that is expected of state actors.²¹ This is especially the case where NGOs serve in a co-regulatory capacity with states, rather than simply an advocacy role as seems to be the case with most of the NGOs studied in Matthews’ book. Indeed, Matthews does not differentiate explicitly between the different possible roles that NGOs play within global IP regimes, ranging from consultative activities and technical assistance (emphasized here) to engaging in more overt regulatory strategies (perhaps under-emphasized).

Even if governance attributes such as accountability or legitimacy are satisfied, can the value added to the law-making process by NGOs be justified within a state-centered framework of international law? A global administrative law framework derived in part from international relations theory and political philosophy could provide some normative scaffolding for the assertion of human rights on behalf of third parties by NGOs.²² It would also supplement a network theory approach in important ways. One significant question is whether public action NGO activity is qualitatively different from the actions of other non-state actors such as intergovernmental organizations or for-profit firms or any combination of these and state actors.²³ For example, does the work of these public action NGOs fill a need not otherwise occupied by other subjects of transnational law?

A possible, partial answer suggested by global governance theory is that NGOs inhabit a space opened by simultaneous market and government failure.²⁴ Along similar lines, a liberal economic analysis of non-profit organizations might predict that “N[G]Os produce certain public goods desired by one or some segments of the society, but not by a majority. According to this theory, the more diverse a society is, the more extensive the N[G]O sector is likely to be.”²⁵ Evidence uncovered by Matthews seems to provide some support for these views. All extant theories of NGOs—whether influenced by network, global governance, market-government failure or other approaches—could benefit from detailed case studies such as those explored by Matthews. What legal scholars can bring to the table in this interdisciplinary scholarly endeavor is precisely what Matthews provides: a deep understanding of the law (rather than “norms” more generally) and a nuanced understanding of how NGOs can affect different aspects of formal legal regimes. Legal scholars can also illustrate how raw state power may be tempered by legal institutions and legal rules around which social movement goals may coalesce through the efforts of non-state actors such as NGOs.

NGOs pierce the monopoly of states on legitimate political representation. Despite their location in the terminological realm of the “non-,” these institutions have contributed constructively and materially to global regulation of knowledge goods via their linkage of IP, human rights and development. Professor Matthews has deftly and meticulously contributed to our growing grasp of civil society actors and their expanding influence within global legal regimes. This is no minor feat, either for him or the subjects of this book.

ENDNOTES

¹ Philip Alston, The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? in Philip Alston ed., *NON-STATE ACTORS AND HUMAN RIGHTS 3* (Oxford University Press, 2005).

² Menno T. Kamminga, The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?, in Philip Alston ed., *NON-STATE ACTORS AND HUMAN RIGHTS*, 93-111 (Oxford University Press, 2005); see also Jens Steffik and Claudia Kissling, Why Co-operate? Civil Society Participation at the WTO, in Christian Joerges and Ernst-Ulrich Petersmann eds., *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW*, 135, 142-43 (Hart Publishing, 2011); Rephael Harel Ben-Ari, The 100-Year Story of Ameliorating a Formal Normative Status for International Non-Governmental Organizations (1912-2012): Contextual Historical Analysis of Past and Present Attempts (unpublished work-in-progress on file with author).

³ Report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), available at: www.iprcommission.org.

⁴ Typical of this attempt is the following excerpt from the CIPR executive summary: “The conferring of IP rights is an instrument of public policy, which should be designed so that the benefit to society (for instance through the invention of a new drug or technology) outweighs the cost to society (for instance, the higher cost of a drug and the costs of administering the IP system). But the IP right is a private one, so the financial benefits and costs fall on different groups within society. The IP right is best viewed as one of the means by which nations and societies can help to promote the fulfilment of human economic and social rights. In particular, there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP protection. IP rights are granted by states for limited times (at least in the case of patents and copyrights) whereas human rights are inalienable and universal.” Id.

⁵ See Margaret E. Keck and Kathryn Sikkink, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 35* (Cornell University Press, 1998); see also John Braithwaite

and Peter Drahos, *GLOBAL BUSINESS REGULATION* 31 (Cambridge University Press, 2000).

⁶ See, e.g., the International Union for the Protection of New Varieties of Plants (“UPOV”) (1961, 1978, 1991); the International Treaty on Plant Genetic Resources (“ITPGR”) (2001); the Convention on Biological Diversity (“CBD”) (1992); the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) (1994). See also Keith Aoki, *SEED WARS: CASES AND MATERIALS ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY* 69-90 (Carolina Academic Press, 1983) (also discussing the International Undertaking on Plant Genetic Resources for Food and Agriculture).

⁷ Muñoz Tellez is currently a Programme Officer at the South Centre, an intergovernmental organization of developing countries based in Geneva, Switzerland. See also Duncan Matthews and Viviana Muñoz-Tellez, *Bilateral Technical Assistance and TRIPS: The United States, Japan and European Communities in Comparative Perspective*, 9 *J. World Intell. Prop.* 629, 649-50 (2006).

⁸ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990).

⁹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, Legal Instruments—Results of the Uruguay Round, art. 27, 33 *I.L.M.* 1125 (1994) at: <http://ow.ly/8W4B1> [hereinafter TRIPS] Article 27.

¹⁰ Ironically, Brazil complied with TRIPS with provisions that arguably went beyond its minimum obligations, with respect to date of implementation (it did not take advantage of the 10 year transitional period for developing countries) and overly-strong pipeline protection for patent applications. Matthews at pp.129-30.

¹¹ Margaret E. Keck and Kathryn Sikkink, *supra* note 5, at 35 (“these relations can be characterized as forms of transnational networks, but we distinguish three different categories based on their motivations: (1) those with essentially instrumental goals, especially transnational corporations and banks; (2) those motivated primarily by shared causal ideas, such as scientific groups or epistemic communities; and (3) those motivated

primarily by shared principled ideas or values (transnational advocacy networks).”

¹² *Id.*

¹³ Matthews at p.201 (“Evaluating Network Success or failure . . . Networks influence politics at different levels because the actors in these networks are simultaneously helping to define an issue area, convince policymakers and publics that the problems thus defined are soluble, prescribe solutions, and monitor their implementation. We can think of networks being effective in various stages: (1) by framing debates and getting issues on the agenda; (2) by encouraging discursive commitments from states and other policy actors; (3) by causing procedural change at the international and domestic level; (4) by affecting policy; and (5) by influencing behavior changes in target actors”).

¹⁴ See, e.g., Steve Charnovitz, *Accountability of NGOs in Global Governance* 38, *Geo. Wash. U. Legal Studies Res. Paper No. 145* at 5-6 (May 4, 2005), available at <http://ssrn.com/abstract=716381>; Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *American Political Science Review* 29 (2005).

¹⁵ See Kamminga, *supra* note 2 at 97 (noting “more than 2,500 NGOs currently have consultative status with ECOSOC” and estimating “number of domestic NGOs . . . into the millions.”); see also Tony Hill, *Three Generations of UN-Civil Society Relations*, *Global Policy Forum* (April 2004), available at: www.globalpolicy.org/component/content/article/177-un/31824-three-generations-of-un-civil-society-relations.html (By 2003, a total of 2,350 separate NGOs had gained consultative status within the UN system).

¹⁶ See François Bourguignon, *Development at a Turning Point*, in Jean-Paul Fitoussi and Joseph E. Stiglitz eds., *THE G20 AND RECOVERY AND BEYOND: AN AGENDA FOR GLOBAL GOVERNANCE FOR THE TWENTY-FIRST CENTURY* 121-126 (Paris Group, 2011) (“The total amount of funds channeled towards developing countries by these ‘private’ actors was recently estimated to be around \$ 50 billion a year, 40 per cent of total DAC aid”).

¹⁷ See, e.g., Mary K. Hendrickson and William D. Heffernan, *Opening Spaces Through Relocalization: Locating Potential Resistance in the Weaknesses of the Global Food System*, 42 *Sociologia Ruralis* 347 (2002).

¹⁸ See, e.g., Sakiko Fukuda-Parr, *The Role of Government Policy: For Growth, Sustainability and Equity*, in Sakiko Fukuda-Parr ed., *THE GENE REVOLUTION: GM CROPS AND UNEQUAL DEVELOPMENT* 227-28 (Routledge, 2008) (“[W]hat are the interests of the stakeholders in the developing countries, of local seed companies, research institutions . . . and last, but not least, the farmers themselves? . . . Alternatively, where are the interest groups for a pro-poor agenda?”); see also Robert Paarlberg, *STARVED FOR SCIENCE: HOW BIOTECHNOLOGY IS BEING KEPT OUT OF AFRICA* (Harvard University Press, 2008); Ronald J. Herring, *Stealth Seeds: Bioproperty, Biosafety, Biopolitics*, in Ronald J. Herring ed., *BIOTECHNOLOGY AND THE POOR: BIOTECHNOLOGY IN DEVELOPMENT STUDIES* (Routledge, 2007).

¹⁹ For an analogous analysis of policy discourse in the public health arena, see Cynthia M. Ho, *ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENT AND RELATED RIGHTS* (Oxford University Press, 2011).

²⁰ See, e.g., Paarlberg, *supra* note 18 at 99, 126-46 (UN organizations such as FAO and UNEP influenced by NGOs advocating against transgenics); see *id.* at 100-06 (faulting NGO advocates of “food production for domestic and local markets based on peasant and family farmer diversified and agroecologically based production systems” for emphasizing sustainability at the expense of poverty-reduction).

²¹ See Kamminga, *supra* note 2 at 110 (noting that “not all NGOs are praiseworthy” but also claiming that “[b]y contributing the views of civil society, they confer badly needed legitimacy on the international system. . . . By contributing expertise, NGOs also help to improve the quality of international decisions. Many subjects of international conferences have become so technical that numerous States, not only the smaller ones, find it hard to muster the necessary specialist knowledge. Furthermore, by providing their information and expertise for free, NGOs offer significant savings to the inter-State system. Many underfunded IGO programmes would not be able to carry out meaningful activities without the substantive input received from NGOs”).

²² See Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Prob.* 15, 43 (2005) (“These different models of international ordering can be juxtaposed to three different normative conceptions of the role of global

administrative law: internal administrative accountability, protection of private rights or the rights of states, and promotion of democracy.”).

²³ Id. at 20 (“Five main types of globalized administrative regulation are distinguishable: (1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid intergovernmental–private arrangements; and (5) administration by private institutions with regulatory functions.”).

²⁴ See Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 *Wisc. L. Rev.* 227, 232 (“The rise or creation of new governance systems can be seen as a response to two broadly different kinds of impetus or background conditions. The first of these—sometimes referred to in the literature as strategic uncertainty—is the need to address complex policy problems which have not shown themselves to be readily amenable to resolution whether through hierarchy, market, or otherwise...); see also Jyh-An Lee, *The Greenpeace of Cultural Environmentalism*, 16 *Widener Law Review* 1, 38 (2010) (positing that non-profit organizations arise when there is contract failure, market failure and government failure).

²⁵ Lee, *supra* note 24 at 39 (citing Burton A. Weisbrod, *THE VOLUNTARY NONPROFIT SECTOR: AN ECONOMIC ANALYSIS* 67-68 (Lexington Books, 1977)).

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