

Human Rights and the WTO: The Case of Patents and Access to Medicines by HOLGER HESTERMEYER [Oxford University Press, Oxford, 2007, 369 pp, ISBN 978-0-19-955217-7 (p/bk)]

It would be an understatement to say that this is not the first book dealing with the manner in which the WTO manages (or mismanages) human rights but nevertheless, this work succeeds in adding substantially to the existing body of academic literature. The subtitle of Hestermeyer's new book—*The Case of Patents and Access to Medicines*—indicates the novel approach of his thesis, as compared to more traditional volumes on this topic which address possible conflicts of norms between the human rights and trade regimes as a whole. Together with for example Haugen's work on *The Right to Food and the TRIPS Agreement*,¹⁸ it may herald a new generation of WTO and Human Rights studies, consisting of books which focus on one particular aspect of the world trade regime, thoroughly analyse it and work out specific solutions.

This book is Dr Holger Hestermeyer's doctoral thesis (accepted at the University of Hamburg in 2006) which explains its structure and objective.¹⁹ It is not intended as a practitioner's guide—although both WTO negotiators and trade law practitioners would do well to read it as guidance for future negotiations and formulations of legal arguments in this area. First and foremost, it is a magnificently conducted academic exercise, an example for all who are or wish to be doing research in this or related areas of WTO law. In some respects the core argument of this book reflects what for example Abbott, Musungu and Ranjan argue in their chapter on 'The Right to Health' in *Human Rights and International Trade*:²⁰ it is possible to integrate human rights and trade law principles in the context of TRIPS through reliance on the rule of reason and the right to health. International economic rules, they argue, permit such integration if they are interpreted while taking into account human rights rules. The major contribution of Hestermeyer's book is not only to reaffirm this assertion but also to go beyond it by effectively examining *how* international trade rules, specifically the TRIPS agreement, can and ought to be interpreted.

The book is divided into five chapters. First, the author sets out the background of the debate, focusing mainly on the access to medicines crisis faced in countries that are being hit hard by the HIV/AIDS pandemic. He then broadens the spectrum to include potential bird flu or anthrax catastrophes and their impact on stringent patent laws. Secondly, the book offers its readers a thorough overview of the current patent rules in force: their history, their rationales, general international norms on patents and specific TRIPS Agreement standards. The third step is an equally meticulous investigation of human rights status of the concept 'access to medicine', its background, interpretation and international instruments, in particular the International Convention on Economic Social and Cultural Rights.

The fourth chapter sets out the core problem which forms the centre of this book: the conflict between patents and access to medicine. The author starts by examining the parameters within which a conflict of norms might take place: the interference of patents with access to medicine due to price effects, the justification for this interference and its effects on third parties. The third section addresses this potential clash of norms by establishing a clear terminology before developing an interesting novel concept of 'factual hierarchy of regimes', analysing the current discourse on hierarchy in international law and *jus cogens*. The book points out that the 'normative hierarchy' of international law—ie norms with a legally superior value—is poorly developed and limited to the rather narrow concept of *ius cogens* and Article 103 of the UN Charter. The author contrasts this to what he calls the 'factual hierarchy of regimes' contending that different regimes in international law benefit from enforcement systems that differ in their effectiveness. When a conflict between regimes arises, a rational State is more likely to comply with a strong

¹⁸ HM Haugen, *The Right to Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, Leiden, 2007).

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²⁰ F Abbott, S Musungu and P Ranjan, 'Right to Health' in T Collier, J Pauwelyn and E Bürgi (eds), *Human Rights and International Trade* (OUP, Oxford, 2005).

regime than with a weak regime. Running counter to notions familiar from national constitutional law, this might lead to States respecting international economic law rather than human rights law, because violations of the former can result in concrete sanctions, whereas violations of the latter sadly often result in a mere 'naming and shaming' of the country at issue.

The fifth and final chapter forms the culmination of the book: the establishment of a theory of access to medicine as a human right within the current WTO order, starting with an analysis of the WTO dispute settlement system as a whole and the flexibilities offered by the TRIPS Agreement in particular. The different options as to what the optimum level of patent protection should be are examined very elaborately, especially the role of compulsory licenses, so that these rules serve as a means of balancing human rights and patents under TRIPS. The argument is that although the flexibilities in TRIPS can be interpreted liberally in order to advance access to medicine (and the reference to human rights is helpful in this respect), there also exist opposing arguments which advocate a more restrictive approach. Hestermeyer asserts that due to the resulting legal insecurity, many developing countries currently refrain from extensively relying on the flexibilities, preferring instead solutions with a smaller litigation risk. Also, relevant developments in the Doha Round negotiations are systematically analysed in order to better assess to what extent strict TRIPS rules could be waived or amended on the basis of human rights considerations. The closing section briefly deals with possible upcoming problems, for example as posed by bilateral investment treaties.

Throughout the book, the author argues forcefully for the development of appropriate legal tools to enable the dispute settlement body to use the whole panoply of international norms at its disposal. He thereby goes beyond advocating the mere use of human rights norms as an interpretative aid and explains how such norms could effectively be applied in trade dispute settlement. Some other commentators have instead focused on conflicts of norms and expressed a much more pessimistic view on the possibility of reconciling human rights and WTO norms within the current system. One example is Marceau's article on WTO Dispute Settlement and Human Rights, stating that 'in the event of irreconcilable conflict between a WTO provision and human rights law, and/or between a specific application or implementation by a WTO Member and human rights law, WTO adjudicating bodies cannot reach a conclusion that a human rights provision has superseded a WTO provision.'²¹ However, when both lines of reasoning are measured and weighed against one another, it is clear that Hestermeyer's approach has the upper hand. While avoiding the pitfalls of over-enthusiasm, it goes beyond merely claiming that trade and human rights norms are compatible, by showing *how* they can be reconciled. Based upon a meticulous examination of case law and literature on the topic, the author searches for specific and feasible solutions within the current international system, and ultimately provides us with a very well-structured, logically sound and hence very persuasive argument in favour of his position. This volume is a must-read for anyone working on TRIPS, and even beyond this core interest group, any academic or practitioner interested in the interaction between different fields of international law will find this book a rewarding read.

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²¹ G Marceau, 'WTO Dispute Settlement and Human Rights' [2002] 13 EJIL 4, 813.

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