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*A Review of* SONIA E. ROLLAND, DEVELOPMENT AT THE  
WORLD TRADE ORGANIZATION  
(Oxford Univ. Press 2012)

**NICOLAS LAMP\***

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## I. INTRODUCTION

The objective of the book is to “analyze the nature and content of developing countries’ rights at the WTO” and to “consider whether such rights could evolve from their current status as exceptions to a more coherent system of rules fully integrated in the WTO legal regime that would more effectively address developing countries’ demands”.<sup>1</sup> Rolland posits two paradigms for situating development in the WTO legal regime. Under the “idiosyncratic” paradigm, development is a second-order concern that is addressed in an *ad hoc* manner through case-by-case fixes in the design and application of WTO rules. Under the “normative co-constituent” paradigm, by contrast, development is a core objective of the trading system, normatively on par with trade liberalisation, and is integrated systematically into everything the WTO does. The thrust of Rolland’s argument is that the GATT and WTO have largely adopted the “idiosyncratic” approach to development, and that moving to the “co-constituent” model is necessary and desirable to ensure the continued viability of the multilateral trading system. In this review, the author will first provide a summary of the book and highlight its outstanding contributions. This will be followed by addressing a central conceptual question, namely, what can count as the “development provisions” of the WTO agreements. Next, two other aspects of the book will be discussed in more detail, namely, its analysis of the differentiation of members and legal commitments in the WTO and the distinction between the idiosyncratic and normative co-constituent paradigms.

## II. SUMMARY OF THE BOOK

The book is organised in four parts comprising twelve chapters. The first part is devoted to the meaning of development and its place in international law. Chapter 1 gives a historical overview of different strands in development economics and traces the emergence of more comprehensive (i.e., not purely economic) conceptions of human development, as well as the law and development movement. A point of note that emerges from this overview is the debate between those developmental economists who see developing countries as being at an early stage of an organic and self-propelled process of development along well-known trajectories, and those who see developed and developing economies as inter-dependent parts of a single economic system, the inequalities of which can only be overcome through a fundamental transformation of the system.<sup>2</sup> As Rolland points out later in the book, these two conceptions of how development occurs have strong affinities with the idiosyncratic and the normative

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<sup>1</sup> SONIA E. ROLLAND, *DEVELOPMENT AT THE WORLD TRADE ORGANIZATION* 1 (2012) [hereinafter ROLLAND].

<sup>2</sup> *Id.* at 19.

co-constituent paradigms, respectively. Another theme of the chapter that also plays an important role in Rolland's overall analysis is the “inadequacy of one-size-fits-all development theories”.<sup>3</sup>

Chapter 2 considers the role of international institutions in development policy. It briefly surveys the Mandates System of the League of Nations, trade preferences, commodity agreements, the development-related work of the United Nations (UN) and its agencies. It further discusses the attempts to establish a New International Economic Order and the activities of the Bretton Woods institutions, as well as the work of regional development banks and the role of development objectives in South-South trade agreements. Rolland finds that the mandates and institutional features of these organisations and regimes have led them to embrace either the co-constituent paradigm, as in the case of South-South regional trade agreements (RTAs), development banks and to some extent the UN, or to adopt the *ad hoc* model, as in the case of the International Monetary Fund (IMF) and the World Bank. In particular, Rolland observes, that “South-South RTAs boldly recognize the deep and complex relationship between trade liberalization and development”.<sup>4</sup> Rolland concludes, “When developing countries are free to define the trade and development relationship, the result differs from the predominant approaches at the WTO, the World Bank, and the IMF, and even the UN”.<sup>5</sup>

The second part of the book is devoted to the framing of ‘development’ at the GATT and the WTO. Rolland's major claim in this part of the book is that the kind of concerns expressed by developing countries regarding the operation of the multilateral trading system have changed very little over the past six decades, and have their root cause in the “missing trade and development link in the GATT 1947”.<sup>6</sup> Chapter 3 traces the relationship between trade liberalisation and development through the history of the trading system. The first section compares the provisions of the GATT and the Charter of the International Trade Organization (ITO), and identifies “two fundamentally different visions of multilateral trading”<sup>7</sup> in these two documents. In particular, Rolland argues that “the ITO Charter endeavour[ed] to establish a *collective economic system*”, in that it “abolishe[d] the mercantilist logic of country-versus-country competition and present[ed] economic growth through trade and employment as a collective policy”.<sup>8</sup> The GATT, by contrast, was “in line with traditional reciprocal trade

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<sup>3</sup> *Id.* at 21.

<sup>4</sup> *Id.* at 58.

<sup>5</sup> *See id.*

<sup>6</sup> *Id.* at 59.

<sup>7</sup> *Id.* at 63.

<sup>8</sup> *Id.* at 64.

agreements such as those negotiated bilaterally by the United States” and was, as a result, infused with a “mercantilist ethos” that would contribute to the marginalisation of developing countries throughout the history of the GATT.<sup>9</sup> The next section of the chapter explores what Rolland calls the “UNCTAD legacy”<sup>10</sup> for the GATT. For Rolland, this legacy consists in the addition of Part IV on “Trade and Development” to the GATT in the mid-1960s and the decision to allow derogations from the most-favoured-nation obligations for the granting of trade preferences in favour of developing countries in the early 1970s. Rolland finds that these initiatives had little practical effect (in the case of Part IV and other GATT amendments) or came with considerable downsides (in the case of preferences) and, in any case, did not amount to a “systematic” integration of development into the GATT system.<sup>11</sup> The chapter concludes with brief discussions of the Tokyo and Uruguay Rounds.

Chapter 4 examines how a member state acquires the status of a “developing” or “least developed” member at the WTO. While WTO members have traditionally been entitled to self-designate as “developing”, acceding members have increasingly been denied the benefits associated with this status in accession negotiations. For example, acceding developing countries are regularly asked to take on market access commitments for goods and services that are more extensive and stringent than the market access obligations of other developing – and in some cases even developed – WTO members. Moreover, acceding members are sometimes obliged to join plurilateral agreements in which membership for existing members is optional, and have to implement WTO agreements without transition periods. In the way that accession negotiations take place, Rolland sees another lost opportunity to tackle the trade/development relationship.

Chapter 5 surveys the participation of developing countries in trade negotiations since the establishment of the WTO. Rolland argues that developing countries have been able to assert themselves more forcefully in negotiations by taking a more active role in setting the agenda of negotiations, submitting an increasing number of negotiating proposals, and organising themselves in coalitions. The chapter shows how some issues of interest to developing countries, such as the transparency of the negotiations, duty-free/quota-free market access for products from least-developed countries (LDCs), and cotton subsidies were eventually addressed in the negotiations. At the same time, it documents how the major players have increasingly turned to bilateral and regional trade agreements as the Doha Round negotiations have failed to produce results.

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<sup>9</sup> *Id.* at 64-65.

<sup>10</sup> UNCTAD stands for United Nations Conference on Trade and Development.

<sup>11</sup> ROLLAND, *supra* note 1, at 72.

The third part of the book discusses what the author characterises as the “development provisions” of the WTO agreements, i.e., the rules that provide special and differential treatment to developing countries.<sup>12</sup> According to the author, these rules are “the principal tool for development at the WTO”, but their interpretation and implementation remains “uncertain”.<sup>13</sup> The central argument of chapter 6 is that many provisions affording “special and differential treatment” (SDT) to developing countries could be interpreted in a way that would make them more operational than they are currently seen to be. In particular, Rolland suggests that provisions that have been widely understood as merely hortatory, such as the “best efforts” clauses in Part IV of the GATT, could be read as imposing at least a duty of due diligence, and in some circumstances a full-fledged substantive obligation, and could thereby be given legal effect. Chapter 6 also introduces a typology of SDT provisions and documents how frequently they have been used by WTO members. Rolland notes that recourse to SDT has decreased in recent years. Her overall conclusion is that “the use of SDT best illustrates the idiosyncratic approach to the trade and development relationship, where exceptions and derogations are used on an *ad hoc* basis, with no underlying principle”.<sup>14</sup>

Chapter 7 undertakes a thorough survey of all instances in which development provisions have been invoked in WTO dispute settlement, covering both original and compliance proceedings, as well as arbitrations under Article 21.3(c) (reasonable period of time for implementation) and 22.6 (level of retaliation rights) of the Dispute Settlement Understanding (DSU). Rolland concludes that WTO panels and the Appellate Body “have been more receptive to development arguments when they were tied to a specific SDT provision, particularly when the latter embodied well-defined obligations”.<sup>15</sup> For Rolland, this tendency only to consider development in dispute settlement where there is a specific textual hook is indicative of a “preference for the idiosyncratic, *ad hoc* treatment of the trade and development relationship”.<sup>16</sup> Rolland proposes that panels and the Appellate Body should adopt a more teleological approach to the interpretation of the WTO agreements that would take full account of the objective of sustainable development in the preamble to the Marrakesh Agreement and of developments in public international law generally.

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<sup>12</sup> The author relies on a compilation of SDT provisions produced by the WTO Secretariat at the request of the Committee on Trade and Development; *See* Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat*, WT/COMTD/W/77 (Oct. 25, 2000).

<sup>13</sup> ROLLAND, *supra* note 1, at 105.

<sup>14</sup> *See id.* at 135.

<sup>15</sup> *Id.* at 139.

<sup>16</sup> *Id.* at 186.

Chapter 8 explores the consideration given to development issues in international treaties and tribunals other than the WTO. The first section surveys SDT provisions in regional trade agreements and international environmental agreements, while the second section documents a wide range of instances in which development arguments have been made in international adjudication, primarily in investor-state arbitrations. Rolland finds that while RTAs often contain “more operational and more refined regulatory instruments to deal with development disparities” than the WTO agreements,<sup>17</sup> international adjudicators have generally shown “little sympathy to development arguments”.<sup>18</sup>

The final chapter of this part of the book is concerned with the impact of the “institutional processes” of the WTO on its developing members. The chapter covers decision-making procedures, the negotiating process, and the WTO’s administrative work. Rolland’s chief concern is to investigate whether developing countries are effectively represented and able to participate in these activities. Rolland finds that the power ostensibly given to developing countries through the one-member-one-vote system is “purely theoretical” and is “overshadowed by political processes”,<sup>19</sup> as votes are practically never called. Instead, all decisions are made by consensus, and the political costs of breaking the consensus are often unpalatably high. At the same time, the author identifies several ways in which developing countries would be at a disadvantage in case a vote was actually called. The section on the negotiating process briefly surveys the respective benefits and drawbacks of request-and-offer-based and formula-based negotiations, and provides a more extensive discussion of the single undertaking concept, i.e., the rule that nothing is agreed until everything is agreed. Rolland finds this to be a “double-edged sword”<sup>20</sup> for developing countries: while it was used during the Uruguay Round to force developing countries to accept wide-ranging commitments, it now gives them the leverage to ensure that issues of primary concern to them remain on the agenda. The third section analyses developing countries’ participation in WTO bodies. Using statistical tools, Rolland confirms the view that most developing countries are not very frequent participants in the day-to-day activities of the WTO.<sup>21</sup> More positively, Rolland finds that the diversity of the WTO Secretariat has increased significantly since the organisation’s early days, with an “impressive” number of new recruits from developing countries and LDCs.<sup>22</sup>

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<sup>17</sup> *Id.* at 212.

<sup>18</sup> *Id.* at 211.

<sup>19</sup> *Id.* at 216.

<sup>20</sup> *Id.* at 226.

<sup>21</sup> *Id.* at 238.

<sup>22</sup> *Id.* at 239.

The fourth part of the book takes a forward-looking perspective, examining the likely impact of the current Doha Round negotiations on the trade-development relationship (Chapter 10), gauging the challenges of “mainstreaming” development more comprehensively at the WTO (Chapter 11), and presenting a number of proposals to this end (Chapter 12). Chapter 10 provides a comprehensive overview of proposals on SDT advanced by developing countries over the past decade. These proposals seek to give more detail to and reinforce existing SDT provisions; create new SDT clauses; extend transition periods under existing agreements; make SDT provisions more obligatory; and protect the value of preferences. While Rolland finds useful elements in some of these proposals, such as reporting requirements and review mechanisms for the implementation of SDT provisions, she faults others for being either “strikingly similar in form to existing SDT clauses”,<sup>23</sup> politically unrealistic, or legally ineffective. Ultimately, Rolland questions whether SDT can “ever be anything other than a set of carve-outs and exceptions that are costly for developing countries to negotiate and that implicitly, if not explicitly, tend to marginalize them within the trading system”.<sup>24</sup>

Chapter 11 starts from the observation that “no reasoned methodology has emerged for deciding how development concerns should be addressed at the WTO”,<sup>25</sup> the chapter seeks to map these concerns. The first section recalls the three main objectives of SDT provisions, namely, promoting North-South trade, creating policy space for developing countries, and, as a subsidiary objective, increasing South-South trade. Rolland concludes that, while South-South trade has recently received the most attention, all the objectives remain relevant and need to be addressed. The second section considers two proposals to give development a more central place in the multilateral trading system: A Kenyan proposal for an “Agreement on Trade and Development” and academic proposals to “mainstream development” in the WTO’s work. Rolland concludes, “the state of thinking on how to integrate development at the core of WTO policies is more one of identifying the problems than of proposing solutions”.<sup>26</sup> The third section reviews the implications of the move towards regional and bilateral trade agreements for developing countries’ position in the WTO. While Rolland sees many positive spill-overs from South-South agreements, she argues that developing countries are more vulnerable when dealing with developed countries in a bilateral context, and that bilateral and regional agreements have been used by developed countries to “divide and rule” developing countries<sup>27</sup> and to impose “WTO-plus” obligations

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<sup>23</sup> *Id.* at 251.

<sup>24</sup> *Id.* at 260.

<sup>25</sup> *Id.* at 264.

<sup>26</sup> *Id.* at 273.

<sup>27</sup> *Id.* at 276.

on them, i.e., obligations that are more onerous than comparable WTO commitments. In the final section of the chapter, Rolland asks whether development is part of the WTO's mission. She introduces the distinction between strategic and normative linkage, with the former denoting strategic trade-offs between different negotiating subjects and the latter describing subject matters that are substantively linked and impact each other. Rolland notes that while developing countries have used strategic linkage to "insist on resolving matters of primary interest to them", particularly relating to agricultural subsidies,<sup>28</sup> a number of their negotiating proposals also seek to establish a normative link between trade and development. Overall, Rolland sees considerable costs for developing countries in the "strategic linkage route", as they have to "constantly expend bargaining chips to maintain development-related issues on the agenda and inject development-friendly features in every relevant legal instrument, concession, and discipline".<sup>29</sup> Normative linkage, by contrast, would provide a "focal point and legal basis for addressing trade-related aspects of development at the WTO".<sup>30</sup> Apart from the question of how to "link" trade and development, Rolland examines whether the WTO has the legal tools and the practical resources to address development issues. Rolland notes that the WTO "already administers legal tools that directly and indirectly affect development and members' development policies" and that it is a "serious concern" whether these rules are "supportive or even mindful of development issues".<sup>31</sup> She further notes that a "fundamental reshaping of the rules may be necessary", but is unlikely to happen. Rolland concludes: "it is unclear whether the WTO has the tools to further any kind of development mission in the framework of the agreements as they stand".<sup>32</sup> Rolland then notes what she sees as the relatively limited resources available to the WTO Secretariat to lend support to developing countries, and considers whether co-operation with other international organisations could remedy those shortcomings.

The final chapter presents the author's proposals for "recasting the trade and development relationship at the WTO".<sup>33</sup> Rolland offers five such proposals. The first set of proposals aims to reform the possibilities for exceptions and derogations from WTO rules. On the one hand, Rolland proposes that access to SDT should be subject to particular multilaterally agreed-upon benchmarks and triggers ("multilateral SDT"<sup>34</sup>); on the other hand, Rolland suggests that developing members could make use of reservations and interpretative declarations

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<sup>28</sup> *Id.* at 283.

<sup>29</sup> *Id.* at 284.

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 285.

<sup>33</sup> *Id.* at 290.

<sup>34</sup> *Id.* at 292.

to “customize” those WTO agreements which do not explicitly exclude that option (“unilateral SDT”<sup>35</sup>). The second set of proposals seeks to introduce more general differentiation into WTO law. Rolland first considers various suggestions to scale WTO commitments based on a member’s economic situation, either relative to other members or in absolute terms. Under the first option, each member would take on more extensive commitments with respect to members that are poorer than itself and fewer commitments with respect to richer members (so-called “asymmetric opt out”).<sup>36</sup> Under the second option, members falling below a certain GDP per capita threshold would be allowed to impose a “development facilitation tariff” in excess of their scheduled tariff bindings; this tariff could be higher the poorer the country is.<sup>37</sup> While Rolland notes that differentiation is “already gaining ground in the WTO culture”, she sees this as “unprincipled, *de facto* differentiation” that stands in the way of “more radical general differentiation models” like the ones she discusses.<sup>38</sup>

The third set of proposals concerns the DSU. In Rolland’s view, “the dispute settlement system is best placed to expound the relationship between trade and development”.<sup>39</sup> Rolland’s main suggestion is that development should be recognized as an “overarching interpretative principle”. Rolland sees the principle that members must employ the “least trade-restrictive measure” as a potential model; thus, WTO disciplines could be read to “require domestic measures to also be least development-restrictive”.<sup>40</sup> The fourth set of proposals addresses the “single undertaking” that currently governs WTO negotiations, i.e., the rule that nothing is agreed until everything is agreed (by all members). Rolland considers two ways of modifying the negotiating approach: WTO members with small shares of world trade could be permitted to opt out of certain agreements, allowing them to concentrate their energy on the negotiation of those agreements of most importance to them. Alternatively, the single undertaking could be limited to a subset of agreements, allowing negotiations in other areas to proceed at their own pace. Finally, Rolland considers the option of getting rid of the single undertaking altogether. Rolland ultimately concludes that, while the single undertaking in its current form has become problematic, it should be modified rather than

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<sup>35</sup> *Id.* at 294.

<sup>36</sup> For this proposal, Rolland relies on Andrew Charlton, *A Proposal for Special and Differential Treatment in the Doha Round* (Working Paper for the WTO SDT Working Group, 2005) (on file with Sonia Rolland).

<sup>37</sup> For this proposal, Rolland relies on Yong-Shik Lee, *Facilitating Development in the World Trading System – A Proposal for Development Facilitation Tariff and Development Facilitation Subsidy*, 38(6) J. WORLD TRADE 935 (2004).

<sup>38</sup> ROLLAND, *supra* note 1, at 302.

<sup>39</sup> *See id.* at 304.

<sup>40</sup> *Id.* at 308.

abandoned, since a trading system operating purely on an “opt-in basis” would leave developing countries with little leverage.

The fifth set of proposals aims to empower developing countries at the institutional level. Rolland’s focus is on empowering coalitions of developing countries in WTO negotiations and decision-making. While she praises the support that the WTO Secretariat has been giving such groupings, she laments, “the WTO has afforded virtually no legal recognition to groups formed for the purpose of negotiation”.<sup>41</sup> Rolland acknowledges that many developing countries are already members of groups, but suggests, “greater formalization would improve transparency and the participation of members with limited institutional and financial capacity”.<sup>42</sup> Rolland considers that, for such formalization to occur, self-identification would have to be replaced by group-formation on the basis of “predetermined, objective criteria”. The ultimate aim would be to have negotiated texts approved by the groups before they would be submitted to the entire membership. Rolland suggests that, through participation in such groups, smaller countries “would be relatively more powerful”.<sup>43</sup>

### III. THE BOOK’S CONTRIBUTION TO THE LITERATURE

To this reviewer, the book makes at least three outstanding contributions to the academic literature and to the on-going debate about the place of development at the WTO. The first contribution is the author’s proposal to re-examine the legal value of “best efforts” provisions and other broadly framed clauses in favour of developing countries in the WTO agreements. These provisions, including in particular Part IV of the GATT, are often dismissed as merely hortatory, as not “operational”, and as hence incapable of grounding a legal obligation. Rolland convincingly argues for a different view. The examples cited by Rolland of how similarly worded provisions have been interpreted in the context of international environmental and human rights law are highly instructive for the trade context – for instance, the observation by an Australian justice that “there is a distinction between a discretion as to the manner of performance and a discretion as to performance or non-performance. The latter, and not the former, is inconsistent with a binding obligation to perform”.<sup>44</sup> The jurisprudence and literature cited by Rolland provide a good starting point for reconsidering how WTO members’ rights and obligations under “best efforts” provisions such as those in Part IV of

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<sup>41</sup> *Id.* at 320

<sup>42</sup> *Id.* at 322.

<sup>43</sup> *Id.* at 324.

<sup>44</sup> Rolland cites this passage from *Commonwealth v. Tasmania* (“Tasmanian Dam Case”), (1983) 158 CLR 1, ¶132, *in* ROLLAND, *supra* note 1, at 121.

the GATT should be understood.

A second outstanding contribution is Rolland's nuanced discussion of the need and potential for differentiating WTO commitments, including by modifying the single undertaking approach to negotiations. Rolland's proposal that WTO members meeting particular benchmarks should be allowed to opt out of particular agreements ("less than unanimity"), or that not all agreements should be included in the single undertaking ("partial linkage") are particularly pertinent<sup>45</sup> (313f).<sup>46</sup> While the *de jure* differentiation that Rolland argues may, to some extent, already be happening *de facto* [see *infra* Part V], Rolland's proposal would add much-needed transparency to the process, reduce its complexity, and potentially change the dynamics of the negotiations for the better.

A third important contribution of the book is the distinction between the two paradigms for situating development at the WTO. As is evident from the negotiating documents cited in the book, this distinction articulates a concern that some developing countries themselves have expressed, namely, that development concerns have mostly been accommodated through exceptions to general rules, rather than being a central objective of the WTO lawmaking process. While one may quibble with the details of the distinction [*infra* Part VI], it provides a useful and productive frame of reference for a discussion of development in the WTO.

#### IV. WHAT ARE WTO'S "DEVELOPMENT PROVISIONS"?

An important conceptual question for a book that sets out to "analyze the nature and content of developing countries' rights at the WTO" (1) and, for this purpose, examines the WTO's "development provisions", is the question of what can count as "developing countries' rights" and "development provisions" in the WTO context, and should thus be included in the analysis. Rolland's answer to this question merits closer scrutiny. For her, developing countries' rights are primarily embodied in those WTO provisions that explicitly provide SDT to developing countries – in other words, developing countries' rights are primarily *exceptions* in favour of developing countries.<sup>47</sup> Thus, the "WTO's development provisions" analysed in the third part of the book are almost exclusively provisions explicitly

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<sup>45</sup> ROLLAND, *supra* note 1, at 313-14.

<sup>46</sup> Rolland has previously outlined her proposals in an article. See Sonia E. Rolland, *Redesigning the Negotiation Process at the WTO*, 13(1) J. INT'L ECON. L. 65 (2010).

<sup>47</sup> ROLLAND, *supra* note 1, at 1 (In her introduction, Rolland states that the objective of the book is to analyse whether developing countries' "rights could evolve *from their current status as exceptions* to a more coherent system of rules fully integrated in the WTO legal regime.") (emphasis added).

providing SDT to developing countries. This conceptual choice must be questioned for at least two reasons.

First, it is not at all clear that the most significant rights that developing countries have at the WTO are embodied in provisions affording them special and differential treatment. Recall that, on Rolland's account, the "development dimension" at the WTO comprises three broad objectives: promoting North-South trade, preserving domestic policy space for developing members, and, to a lesser extent, facilitating South-South trade.<sup>48</sup> At least with regard to the first objective, the provisions of the WTO agreements constraining *developed* countries' ability to use trade barriers against exports from developing countries and to rely on subsidies to compete with developing countries' products would appear to be just as significant, if not more significant, for the development prospects of developing countries. However, as Rolland does not conceptualise these provisions as "development provisions", the book does not analyse their adequacy in any detail.

The importance that developing countries themselves attach to these provisions is evident both in the negotiations and in dispute settlement. While Rolland rightly documents the considerable efforts made by developing countries to reform SDT provisions in the Doha Round, one key objective of developing countries in these negotiations has been to further constrain developed countries' use of agricultural subsidies, in particular agricultural export subsidies. Rolland mentions the importance that developing countries attach to progress on this front several times in passing,<sup>49</sup> but does not see it as an indication that the rights that developing countries have (or hope to acquire) under the core provisions of, say, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture are just as significant for understanding the ways in which WTO law can promote development as the SDT provisions that Rolland analyses.

Rolland's analysis of developing countries' activities in dispute settlement is similarly skewed. Rolland discusses cases such as *EC – Export Subsidies on Sugar*<sup>50</sup>

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<sup>48</sup> ROLLAND, *supra* note 1, at 110, 265.

<sup>49</sup> Rolland, *supra* note 1, at 328 (For example, in the conclusion to the book, Rolland mentions the following long-standing demands of developing countries: "a realignment of agricultural support policies in developed countries, better access for 'tropical products' from developing countries, a roll back on tariff escalation clauses, and other similar schemes that have stifled developing country exports of manufactures").

<sup>50</sup> Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005) (*adopted* May 19, 2005).

and *US – Upland Cotton*<sup>51</sup> in the context of the consideration given to development arguments made in the implementation phase of these disputes (with respect to the reasonable period of time for implementation (DSU Article 21.3 (c)) and the level of suspension of concessions (DSU Article 22.6). While these issues are no doubt important, surely the “rights” under the SCM Agreement and the Agreement on Agriculture that allowed the developing country complainants in these cases to prevail in the first place, giving these countries the power to effectively constrain the use of agricultural subsidies by the EC and the US, are of no less relevance to an analysis of the ways in which WTO law can safeguard developing countries’ interests.

It is true that the terms on which much of developing countries’ exports enter developed country markets are those of preferential regimes which are not binding as a matter of WTO law, and that the practical usefulness of the market access rights accruing to developing countries under the WTO agreements, as well as of the opportunity to enforce those rights through the dispute settlement system, is thus much diminished.<sup>52</sup> However, WTO rules protect developing countries’ exports in manifold other ways – against the arbitrary administration of trade remedy laws, against subsidised production in developed and third country markets, against discrimination, to name but a few examples – and it is not clear on what basis Rolland excludes these rules from her analysis of developing countries’ rights at the WTO. Certainly the fact that these rights accrue not only to developing countries, but to all WTO members, does not suffice as an explanation – just because rights accrue to all WTO members does not imply that these rights cannot be supportive of development. This is not to say that these rules promote North-South trade – and hence the development of developing countries – as much as they could, only that an assessment of how WTO law relates to development that takes no account of these rules is necessarily incomplete.

Second, even within the narrow category of rules providing SDT to developing countries, Rolland’s analysis is incomplete in that it focuses almost exclusively on the SDT provisions that appear as such in the WTO agreements – and thereby

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<sup>51</sup> Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) (adopted Mar. 21, 2005).

<sup>52</sup> See Hunter Nottage, *Trade and Development*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE, 481-504, 498 (Daniel Bethlehem et al. eds., 2009), for the argument that developing countries have not benefitted fully from the WTO dispute settlement system because “a significant portion of developing-country trade occurs under rules that are not part of enforceable WTO law”, namely, preferential schemes authorised under the Enabling Clause or waivers. See Lorand Bartels and Christian Häberli, *Binding Tariff Preferences for Developing Countries under Article II GATT*, 13(4) J. INT’L ECON. L. 969 (2010), for a proposal to make preferences binding.

misses those parts of the WTO agreements in which the bulk of SDT is embodied: the schedules of specific commitments. The principal way in which developing countries have been accorded SDT over the course of the history of the GATT and the WTO is through non-reciprocity (or rather: less-than-full reciprocity) in tariff negotiations. As a result, the tariffs of many developing country members of the WTO are bound at levels that are much higher than the corresponding bindings of developed countries – in fact, developing countries’ tariff bindings frequently exceed the levels at which these tariffs are actually applied by substantial margins. In addition, many developing country tariffs on industrial products remain completely unbound.<sup>53</sup> While Rolland mentions the high bound tariffs of most developing countries and the substantial gap between their bound and applied levels in her discussion of the prospects for South-South trade,<sup>54</sup> she apparently does not regard these as a significant flexibility. Instead, she repeatedly portrays GATT Article XVIII as the only major flexibility available to developing countries in the GATT context (the “main”, and “for some time the only” “flexibility instrument”;<sup>55</sup> “virtually the only safeguard mechanism available”<sup>56</sup>). Arguably, however, the mere technicality that SDT in tariff negotiations is explicitly articulated only in the negotiating modalities, and only manifests itself in the resulting legal texts in differences in the quantity and level of tariff bindings, should not obscure the substantial flexibility that it provides – a flexibility that is all the more valuable for not being saddled with the burdensome substantive and procedural requirements that beset Article XVIII.

In the course of the Doha Round, SDT in negotiating modalities has only become more pervasive. A cursory glance at a negotiating document such as the draft modalities for agriculture (which Rolland cites in a different context) reveals that virtually every reduction co-efficient (for tariffs and subsidies) is substantially higher for developed countries than for developing countries, entailing lighter liberalisation commitments for the latter.

Hence, it is only by virtually ignoring the SDT that is embodied in the schedules of specific commitments attached to the GATT (and the GATS) and in relation to the current negotiations in the negotiating modalities that Rolland can paint a picture of SDT provisions as “marginal in scope”, “relatively insubstantial”,<sup>57</sup> and amounting to no more than “limited carve-outs”.<sup>58</sup> While it is

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<sup>53</sup> The situation is different with respect to agriculture; all tariffs were bound in the course of the Uruguay Round.

<sup>54</sup> ROLLAND, *supra* note 1, at 254.

<sup>55</sup> *Id.* at 113.

<sup>56</sup> *Id.* at 132.

<sup>57</sup> *Id.* at 270.

<sup>58</sup> *Id.* at 290.

debatable whether the tweaking of reduction coefficients and other forms of less-than-full reciprocity that have long characterised multilateral trade negotiations are a useful and effective way to accommodate the different levels of development of WTO members, the resulting differential commitments are almost certainly more significant in terms of providing flexibilities to developing countries than the SDT provisions that are at the centre of Rolland's analysis.<sup>59</sup>

In sum, the author's conclusion that development has a marginal place in the WTO's legal architecture is, at least in part, a consequence of how she conceptualises "developing countries' rights" and the WTO's "development provisions". To put it bluntly: if you define SDT provisions as "the principal tool for development at the WTO",<sup>60</sup> then define SDT provisions "as a set of *ad hoc* rules, exceptions, and derogations",<sup>61</sup> you will likely find that the WTO addresses development in an *ad hoc* and unprincipled manner. Both of these conceptual

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<sup>59</sup> An example for the use of the flexibility provided by high tariff bindings is the decision by Mercosur in December 2011 to allow its member countries to temporarily raise tariffs on 100 goods up to the levels at which they are bound at the WTO. In June 2012, Mercosur increased the number of tariff lines that could be raised to 200. According to news reports, for most products this implied a tariff rate increase from 22% (the level of Mercosur's common external tariff) to 35% (WTO tariff binding). See *Acciones Puntuales en el Ámbito Arancelario por Razones de Desequilibrios Comerciales Derivados de la Coyuntura Económica Internacional*, MERCOSUR/CMC/Dec. N° 39/11, Dec. 20, 2011, available at [http://www.adau.com.uy/innovaportal/file/8775/1/dec\\_0392011\\_es\\_acciones\\_puntuales\\_-\\_ultima\\_version.pdf](http://www.adau.com.uy/innovaportal/file/8775/1/dec_0392011_es_acciones_puntuales_-_ultima_version.pdf), and MERCOSUR/CMC/Dec. N° 25/12, June 29, 2012, available at [http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/5FE6C07B6BDBF54E83257B1A007EF3AB/\\$File/DEC\\_025-2012\\_ES\\_Acciones%20Puntuales%20Desequil%20Co merc.pdf](http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/5FE6C07B6BDBF54E83257B1A007EF3AB/$File/DEC_025-2012_ES_Acciones%20Puntuales%20Desequil%20Co merc.pdf) for the Mercosur decisions; See Shane Romig, *South American Trade Group Raises Import Tariffs*, WALL ST. J., Dec. 21, 2011; Jonathan Saxty, *Argentina Proposes Increasing Mercosur Common External Tariff*, VP, May 22, 2012. The 2012 National Trade Estimate Report on Foreign Trade Barriers, published by the Office of the United States Trade Representative, at 39, notes with respect to Brazil:

Brazil's MFN applied tariff rate averaged 11.64 percent in 2011. Brazil's average bound rate in the WTO is significantly higher, at 31.4 percent. Given the large disparities between bound and applied rates, U.S. exporters face significant uncertainty in the Brazilian market because the government routinely changes tariffs to protect fledgling domestic industries from import competition or to manage prices and supply.

The trade policies of the Mercosur countries in general and Brazil in particular strongly suggest that, at least for these developing countries, the possibility to increase tariffs is a more significant and convenient flexibility than the safeguards provided by, say, GATT Article XVIII.

<sup>60</sup> ROLLAND, *supra* note 1, at 105.

<sup>61</sup> *Id.* at 291.

choices are questionable, however. It is not at all clear that SDT provisions are the most important way in which WTO law promotes development; general WTO rules constraining developed countries' use of trade barriers and subsidies may be just as significant. And SDT provisions do not merely take the form of limited exceptions to general rules; instead, differential treatment has been a pervasive feature of negotiating modalities that has resulted in significantly lighter market access commitments for developing countries. This is not to say that the way in which developing countries' interests are reflected in WTO law is satisfactory; it is only to say that, in order to find out whether this is so, one would have to analyse a wider set of WTO rules than is analysed in the book.

## V. DIFFERENTIATION OF MEMBERS AND COMMITMENTS

As pointed out above, further differentiation of the legal obligations of WTO members is one of the key proposals advanced in the book to give development a more central place in the WTO's legal architecture. Rolland convincingly demonstrates how the single undertaking could be modified to achieve such differentiation. She also acknowledges that differentiation is already a practical reality in WTO negotiations ("As it often seems to be the case with sensitive issues at the WTO, practice has taken the lead on the political or legal acknowledgement of new trends").<sup>62</sup> However, she arguably gives a misleading account of how differentiation is being accomplished in WTO negotiations.

Rolland examines the Doha Round draft modalities for agriculture and non-agricultural market access (NAMA). She finds that:

Both propose different thresholds and 'bands' of commitments depending on the situation of members. Members would fall within one of several bands depending on the amount of domestic support, the level of their bound duties, etc, and would then be bound by different reduction/increase formula. The categorization of states in those bands roughly corresponds to the countries' wealth and economic makeup so that similarly situated countries generally fall in the same band. The stated objective is to impose less onerous commitments on some developing countries whilst still moving all WTO members in the general direction of trade liberalization.

Differentiation, then, is deeply embedded in the proposed commitments and, importantly, it does not fall along the lines of the simple developed/developing/LDC categories. The focus is already shifting from formal legal categories to economic benchmarks.<sup>63</sup>

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<sup>62</sup> *Id.* at 297.

<sup>63</sup> *Id.* at 298.

The draft modalities for agriculture indeed envisage “tiered reduction formulas” for tariffs and subsidies.<sup>64</sup> However, the effect of those formulas is precisely the opposite of what Rolland describes: They are designed to *harmonise* WTO members’ legal obligations, not to *differentiate* them. Thus, the higher the tier into which a member’s tariff or subsidy binding falls, the greater the amount by which that member has to reduce its tariff or subsidy binding. The tiered formulas envisaged in the draft modalities for agriculture are harmonisation formulas: the result of applying them is to more closely align members’ legal commitments. It might well be correct to say that “similarly situated countries generally fall in the same band”. However, what this means in practice is that developing countries would, on average, fall into higher bands, implying *greater* reduction commitments. If *one* tiered formula was all there was, developing countries’ commitments would thus on average be *more* onerous than developed countries’ commitments.

But it is not all there is. Rather, differentiation is achieved the old-fashioned way, by having different formulas, tiers, reduction coefficients, and exemptions for different *categories* of countries. What is remarkable about the Doha Round draft modalities for agriculture is the sheer number of such categories. Thus, the modalities differentiate commitments for developed countries, developing countries, recently acceded members (RAMs), very RAMs, small low-income RAMs with economies in transition, net food-importing developing countries (NFIDCs), small vulnerable economies (SVEs) and LDCs. In addition, there are some instances in which WTO members are individually identified as subject to a commitment or eligible for an exemption.<sup>65</sup> There appears to be no readily discernable pattern pursuant to which WTO members are assigned to one of the categories: developed and developing countries self-identify; very RAMs and small low-income RAMs with economies in transition are explicitly identified in the modalities themselves; LDCs are recognized as such by the Economic and Social Council of the UN, but some individually named countries are given access to some of the LDC exemptions by the modalities<sup>66</sup>; NFIDCs are identified in a list

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<sup>64</sup> The following discussion will be limited to the draft modalities for agriculture, since these appear to be what Rolland is describing in these paragraphs – the draft NAMA modalities do not envisage a tiered formula with “different thresholds and ‘bands’ of commitments depending on the situation of members”, but rather a so-called “Swiss formula” with different coefficients for different categories of countries. However, since both the tiered formula and the Swiss formula are harmonization formulas, my argument applies *mutatis mutandis* to the draft NAMA modalities as well.

<sup>65</sup> Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.4, 5 n.2, 15 nn.10-11, 17 n.15, 20 n.17, 21 nn.19-20 (Dec. 6, 2008)[hereinafter Revised Draft Modalities for Agriculture].

<sup>66</sup> *Id.* at 5, n.2.

maintained by the Committee on Agriculture<sup>67</sup>; the only category of countries that is clearly identified on the basis of economic benchmarks is the category of SVEs<sup>68</sup> – although several members not meeting these benchmark are given access to SVE treatment as well.<sup>69</sup>

In sum, Rolland is correct that the practice of WTO negotiations is moving towards increasing differentiation. However, this differentiation is not achieved through formulas *per se*, but rather by applying different formulas to different categories of countries. Moreover, in the definition of the categories, objective economic indicators still play a marginal role at best.

#### VI. IDIOSYNCRASY OR NORMATIVE CO-CONSTITUENT: WHAT IS THE “OTHER” OF “DEVELOPMENT”?

One of the reasons why Rolland’s distinction between an idiosyncratic paradigm and a normative co-constituent paradigm for integrating development into WTO law appears productive to this reviewer is that it encourages reflection about the objectives and the “normal” operation of international trade law. What are the objectives that trade law pursues when it is not concerned with development (i.e., most of the time, if it is operating under the idiosyncratic paradigm)? What are the objectives with which development has to be integrated under the co-constituent paradigm?

Rolland’s account suggests two alternative answers. The first is that the “traditional objective” of trade law is “trade liberalization”. On this view, the idiosyncratic paradigm in the WTO context plays out as follows: trade law is concerned with liberalising trade, and accommodates development concerns at the margins, through (sometimes temporary) exceptions from its general trade liberalising disciplines. The second answer is that the “normal” way of making trade law – through the reciprocal exchange of concessions – has had the

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<sup>67</sup> See Revised Draft Modalities for Agriculture, *supra* note 65, at ¶7. The last version of the document is Committee on Agriculture, *WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (“The Decision”)*, G/AG/5/Rev.10 (Mar. 23, 2012).

<sup>68</sup> See Revised Draft Modalities for Agriculture, *supra* note 65 at ¶157 and Annex I. (SVEs are defined on the basis of their share of world merchandise trade (no more than 0.16 per cent), share of world trade in non-agricultural goods (no more than 0.10 per cent) and share of world agricultural trade (no more than 0.40), averaged over the 1999-2004 period).

<sup>69</sup> *Id.* at 15 n.11. (This is done on the basis that the treatment “could be deemed to be broadly comparably appropriate”).

incidental effect of marginalising development concerns, simply because, under this system, development countries did not have the leverage to shape the law according to their interests (see, e.g., “the incorporation of development-oriented provisions in WTO rules remains primarily a political bargaining exercise”; “[t]he mercantilist ethos of the GATT is significant for developing countries because it contributed to their marginalization ...”; under a “strategic linkage” framework, developing countries have to “constantly expend bargaining chips to maintain development-related issues on the agenda and inject development-friendly features in every relevant legal instrument, concession, and discipline”). On this reading, the idiosyncratic treatment of development is not due to the primacy given to other goals, but is simply a by-product of lawmaking governed by reciprocity.

There are complications with both stories. As I have argued above, trade liberalisation and development are not simple antipodes. At the very least, trade liberalisation by developed countries should be conducive to development. Moreover, trade law pursues many objectives beyond trade liberalisation narrowly conceived, such as non-discrimination, fair competition, and the sound administration of trade remedy laws, to name but a few. The relationship between these objectives and development is complex; focusing exclusively on the objective of trade liberalisation to establish the idiosyncratic treatment of development in the trade regime almost certainly oversimplifies things. With regard to reciprocity, the pervasive differential treatment that is the norm in on-going trade negotiations is a far cry from the “Talion-like legal system (an eye for an eye)”<sup>70</sup> that Rolland still sees at work.

That being said, it is clear that, whether one sees the objective of trade liberalisation or the principle of reciprocity as the cause of the idiosyncratic treatment of development at the WTO, Rolland’s proposal of a general differentiation of WTO commitments would move the trading system further in the direction of the co-constituent paradigm, as most developing countries, and certainly the poorest, would be free to reject any legal obligations that they do not see as conducive to their development, and reciprocity – a principle that is arguably hostile to the principled consideration of any objective – would take even more of a back seat than it already does.

One is left wondering, however, whether the idea of a principled consideration of development in the trading system could not be taken even further. The author’s proposals for integrating development into WTO law revolve primarily around systematically exempting developing countries from legal obligations. On this view, concern for development largely manifests itself in the *absence* of legal

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<sup>70</sup> ROLLAND, *supra* note 1, at 309.

obligations. What receives much less attention is the question of whether we need different *kinds* of obligations.

In this respect, the author misses the opportunity to consider what is probably the most important development-related innovation in legal technique to come out of the Doha Round negotiations so far: the special and differential treatment section of the draft negotiating text on trade facilitation.<sup>71</sup> Instead of simply allowing developing countries to opt out of commitments, the draft negotiating text establishes a link between the obligations of developing countries on the one hand and their implementation capacity on the other hand, effectively making the provision of technical assistance by developed countries a pre-condition for the respective obligations of developing countries to take effect.<sup>72</sup> In addition, developing countries are given wide discretion to determine their own technical assistance needs and implementation schedule. The draft agreement has been hailed for “placing emphasis – and onus – on the creation of enhanced capabilities as opposed to mere temporary carve-outs”<sup>73</sup> and thereby “putting every Member in a position to actually implement the envisaged measures”.<sup>74</sup> When the agreement is eventually implemented – negotiations have been advancing despite the bleak prospects for concluding the Round as a whole, and implementation as a standalone agreement is a frequently discussed possibility – developing countries will benefit from the lower transaction costs of their trade without having to bear undue implementation burdens.

In sum, the draft agreement on trade facilitation arguably embodies many of the features of the co-constituent paradigm as described by Rolland: individually modulated, flexible commitments that are, in the event of capacity constraints, conditional on the receipt of targeted technical assistance. The fact that the author overlooked this quite pertinent illustration of the approach to development that she advocates is unfortunately symptomatic of a more general shortcoming of the book. In a number of places, the analysis appeared to this reviewer to be too

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<sup>71</sup> The latest version of the document is Negotiating Group on Trade Facilitation, *Draft Consolidated Negotiating Text*, TN/TF/W/165/Rev.14, at 29-36 (Dec. 7, 2012).

<sup>72</sup> See *id.* Section II, 2.1, (establishing different “categories of commitments” for developing countries and least-developed countries. Category C commitments only have to be implemented after a transitional period and “upon the acquisition of implementation capacity through the provision of technical and/or financial assistance and support for capacity building”) (brackets omitted); See also *id.* Section II, 2.2 (provides that developing and least-developed Members “shall determine, on an individual basis, the provisions to be included under Categories A, B and C.”).

<sup>73</sup> Nora Neufeld, *WTO Negotiations on Trade Facilitation – Lessons for the Future? New Perspectives for and from the Developing World*, in *DEVELOPING COUNTRIES AND THE WTO. POLICY APPROACHES 296* (Gary P. Sampson & W. Bradnee Chambers eds., 2008).

<sup>74</sup> *Id.* at 283.

cursory to support the author's conclusions and inferences. Overall, the book offers many interesting ideas and valuable insights. However, it would have benefited from a more developed conceptual discussion, a more in-depth exploration of key episodes in GATT/WTO history, and closer attention to the current practice of WTO negotiations.