

COMMENTS

THE APPLICATION OF THE GENERAL AGREEMENTS ON TARIFFS AND TRADE TO THE COUNTERTRADE PRACTICES OF LESS-DEVELOPED AND DEVELOPING COUNTRIES: PROPOSED AMENDMENTS TO THE GATT

Countertrade¹ is a trade practice which has experienced a surge

1. "Countertrade" refers to the trade practice whereby a country links the quantity and/or value of its imports to that of its exports. Lowenfeld, *Interface IV: Countertrade in Economic Relations*, 5 J. COMP. BUS. CAP. MARKET L. 329 (1983). Countertrade transactions arise in a number of different forms. ORGANIZATION FOR ECONOMIC COOPERATION DEVELOPMENT, EAST-WEST TRADE: RECENT DEVELOPMENTS IN COUNTERTRADE 9 (1981) [hereinafter cited as OECD]. The types of countertrade transactions discussed in this article are a) counterpurchase, b) product buy-back, and c) offset. Each of these transactions has its own type of contractual arrangement and its own distinct set of advantages and disadvantages.

Counter-purchase transactions are often complex and normally involve two mail contracts and a linking contract or protocol. UN COMMISSION ON INTERNATIONAL TRADE LAW, U.N. Doc. A/CN.9/253, paras. 22-24 (1981) [hereinafter cited as UNCITRAL]. In these types of transactions the primary exporter agrees to purchase goods, at a later time, from the buyer in some amount proportional to exports. McVey, *Countertrade and Barter: Alternative Trade Financing by Third World Nations*, 14 INT'L TRADE L.J. 197, 202 (1981). For example, in 1976 Pepsico contracted to sell a certain quantity of Pepsi to the USSR and agreed to buy, at a later time, a certain amount of vodka in return. Weigand, *International Trade Without Money*, HARV. BUS. REV. Nov.-Dec., 1977 at 28, 34.

Product buy-back transactions are often very complex and require long periods for performance (often 10 to 20 years). Nelson, *Countertrade: The Return of Barter*, BUSINESS INTELLIGENCE PROGRAM, No. 1025, Dec. 1977, at 1, 3. In these transactions, the primary exporter sells equipment or an entire plant which is used to manufacture products. *Back to Barter*, THE ECONOMIST, Dec. 14, 1974, at 53. The importing country will pay for this equipment or plant with the goods the plant or equipment produces. For example, Levi-Strauss agreed to sell a plant and product designs to Hungary. As payment for the plant and accompanying designs, Levi agreed to take a certain percentage of the product (blue jeans) the plant manufactured each year. Welt, *Countertrade Gains Popularity as an International Trade Tool*, BUS. AM., July 14, 1980, at 12, 15.

In offset agreements, the exporter agrees to obligate itself to take measures, which will compensate the costs the importing country incurs in buying products. In one example of an offset arrangement, the primary exporter sells goods to the importing country and, in order to offset the cost of these goods, agrees to aid in marketing export goods from the importing country. U.S. INTERNATIONAL TRADE COMM'N, PUB. NO. 1237, ANALYSIS OF RECENT TRENDS IN U.S. COUNTERTRADE 9 (1982) [hereinafter cited as USITC]. The advantages of offset arrangements are that the importing country receives assistance in promoting its goods and in finding markets abroad, while the primary exporter has a market for its goods. The

of growth in recent years.² Because countertrade deals often go unrecorded, or otherwise remain secret,³ estimates on the percentage of world trade covered by countertrade vary from one percent to forty percent of all international trade.⁴ Many government trade regulations, mainly those of less-developed and developing countries, require up to one hundred percent of the value of certain imports to be paid with products manufactured or produced in their home market.⁵ In 1984 the Colombian government established countertrade as a special system of its commercial trade.⁶ In 1981 the government of Indonesia began requiring those foreign companies awarded contracts with the Indonesian government to export Indonesian products in an amount equivalent in monetary value to the products imported.⁷ In 1982 the United States exchanged large amounts of powdered milk for Jamaican bauxite.⁸

The recent rise in the use of countertrade has been attributed to

major disadvantage with this type of transaction is that the primary exporter may have to tie up a significant amount of its marketing resources to fulfill its part of the bargain. *Id.* at 8-9.

2. WASHINGTON INTERNATIONAL BUSINESS REPORT, March 19, 1984, at 1 [hereinafter cited as WIBR].

3. Jones, *North/South Countertrade: Barter and Reciprocal Trade with Developing Countries*, ECONOMIST INTELLIGENCE UNIT 27 (Special Report No. 147, 1984). Secrecy is only one of the problems surrounding the making of estimates on the extent of global countertrade. The fact that definitions of countertrade differ compounds the problems in making such estimates. Paper Prepared by A.P. Giles, Boodle & King, 22 Grosvenor Square, London, England 1 (1983) (copy on file with California Western International Law Journal).

4. Jones, *supra* note 3, at 26. A recently released study by the International Trade Commission indicates that of \$127 billion in export sales only 5.6% involved sales contracts with an associated countertrade. U.S. INTERNATIONAL TRADE COMM. PUB. NO. 332-185, ASSESSMENT OF THE EFFECTS OF BARTER AND COUNTERTRADE TRANSACTIONS ON U.S. INDUSTRIES, at viii (Oct. 1985).

5. Jones, *supra* note 3, at 86. Further, the requirements may involve varying degrees or levels of government intervention. These degrees or levels progress from informal governmental pressure to import or export licensing schemes. Walsh, *Countertrade: Not Just for East-West Anymore*, 18 J. WORLD TRADE L. 3, 6-8 (1984).

6. President of the Republic of Colombia, Decree no. 370, 1984, issued February 15, 1984. This presidential decree set out definitions of countertrade the Republic was to engage in, and set forth the system by which countertrade was to be used. Presidential Decree no. 1429 of 1984 provided that the requirements set forth in Decree no. 370 may be satisfied either in goods or services "subject to the rules established in the pertinent parts of said Decree." Decree no. 1429, 1984, issued June 11, 1984 (Bogata) Colombia. General Resolution no. 504, 1984 of the General Director of the Colombia Institute of Foreign Trade sets forth the requirements and procedures for approval of specific countertrade transactions. General Resolution 504, 1984, issued March 29, 1984.

7. McVey, *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas*, 16 LAW AND POL'Y INT'L BUS. 3, 10 (1984). Many other countries have also instituted similar requirements on importers. Jones, *supra* note 3, at 82-95.

8. Banks, *The Economics and Politics of Countertrade*, 6 THE WORLD ECONOMY 160 (1983).

a number of factors. The most significant of these is the shortage of available hard currency in less-developed and developing countries.⁹ Some of the other, more significant problems also contributing to the increase in the use of countertrade are: under-industrialization,¹⁰ balance of payments deficits,¹¹ and the need to increase foreign markets for domestically produced goods.¹² As long as these problems continue, the use of countertrade will remain an integral part of international trade.¹³

Although countertrade has a number of short term advantages for less-developed and developing countries,¹⁴ its long term effects on world trade are more serious and significant.¹⁵ The major shortcomings most often associated with countertrade transactions are their inherently discriminatory nature,¹⁶ their bilateral effect,¹⁷ the con-

9. McVey, *Countertrade and Barter: An Introductory Analysis*, Paper prepared for the American Association of Exporters and Importers 8 (1983) (copy on file with California Western International Law Journal). This shortage in currency is due to the energy problems developing countries faced in the oil shortages of 1979-1980. Downey, *Countertrade*, Paper prepared for the Fall Institute on Current Issues in International Financial Transactions 3 (Oct. 26, 1984) (copy on file with California Western International Law Journal).

10. McVey, *supra* note 1, at 202. A major effect of the under-industrialization of less-developed and developing countries is their increasing attempts at promoting exports to stimulate industrial growth. Countertrade is viewed by these countries as a means of increasing exports. Banks, *supra* note 3, at 166-67. Countertrade is also seen as a means of facilitating transfers of technology, which in turn stimulates growth of the industrial base. McVey, *supra* note 1, at 202.

11. Walsh, *supra* note 5, at 4.

12. Downey, *supra* note 9, at 4. The reason for the existence of such needs is that countries using countertrade to market goods have faced a build-up of protectionism in developed countries. *Id.* at 4-5. An equally if not more prominent reason is the inherent deficiencies and lack of quality in the goods these countries produce. McVey, *supra* note 9, at 7.

13. USITC, *supra* note 1, at 9. This report states that the problems which cause the increase in the use of countertrade still exist and that, as long as they do exist, United States firms should expect to encounter countertrade requirements. It is only when the economic problems are resolved that the trade "symptoms" will go away. Address by Lionel H. Olmer, Under Secretary for International Trade, U.S. Department of Commerce, *Financial Times* Conference in Washington, D.C., 3, 6-7 (Jan. 24, 1984) (copy on file with California Western International Law Journal).

14. There are many short term advantages to countertrade. Because a country can preclude paying cash for the goods it imports by using its domestically produced goods, countertrade serves to overcome currency shortages while also aiding in the promotion of exports. Further, by aiding in the promotion of exports, countertrade also helps to increase the country's industrial base. VERZARIU, *INTERNATIONAL COUNTERTRADE: A GUIDE FOR MANAGERS AND EXECUTIVES*, at v (1984).

15. Kyung, *Countertrade: Trade Without Cash*, FIN. & DEV., Dec. 1983, at 14.

16. Countertrade requirements are naturally discriminatory in that certain countries will impose them on a country or group of countries (due to the resources or technology these countries may possess) while not imposing the same or similar requirements on other countries (because these countries do not possess any valuable resource or technology). Czinkota & Tal-

stricting effect they have on international trade,¹⁸ and the reduction of available currency necessary to pay foreign debts.¹⁹

At present, there is no international trade agreement containing provisions expressly directed at countertrade.²⁰ The General Agreements on Tariffs and Trade,²¹ though designed to deal with the trade practices of its member States,²² contains no provision expressly concerning countertrade.²³ However, because of the many detrimental and disruptive effects countertrade has on international trade,²⁴ some of GATT's provisions can be interpreted as applicable.²⁵ Consideration of the basic goals GATT is designed to achieve is necessary to such an interpretation.

One of the goals of GATT is to reduce the tariff and non-tariff barriers²⁶ imposed by its signatory nations.²⁷ GATT is also aimed at

bot, *GATT Regulation of Countertrade: Issues and Prospects*, NATIONAL CENTER FOR EXPORT-IMPORT STUDIES, STAFF PAPER NO. 20, at 6 (July 1985).

17. WIBR, *supra* note 2, at 1. Countertrade, because it places obligations on an exporter and bilateralizes trade, causes parring up of countries on transactions. The problem here is that the international economic community is striving to free itself of bilateralized trade and replace bilateralism with a system of multinational trading. *Id.*

18. Countertrade transactions leave exporters with a second deal to complete; the goods received as payment must now be marketed and sold. The exporters' ability to generate income is hindered by the countertrade transaction because they must complete a second transaction (the countertrade deal). This state of affairs has the effect of tying up the marketing resources of the exporters. This problem is aggravated by the fact that exporters are often left with goods of low quality which are difficult to sell. UNCITRAL, *supra* note 1, at 10; Lowenfeld, *supra* note 1, at 330.

19. Suro-Bredie, *U.S. Government Views on Countertrade*, OFFICE OF THE U.S. TRADE REPRESENTATIVE 3, *reprinted in*, EHRENHAFT, COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE 1980's, at 12 (1984).

The reduction of currency available to pay current debts is an express concern of the International Monetary Fund (IMF). The IMF is concerned because currency is not generated by the sale of a country's goods; where countertrade is involved, the country will face further difficulty in repaying its foreign debt. Jones, *supra* note 3, at 41-42.

20. Kyung, *supra* note 15, at 16. The U.N. Commission report suggests that the complexities involved with countertrade, and the variety of forms they may take, make it difficult to formulate any type of uniform regulations. UNCITRAL, *supra* note 1, at 12.

21. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5), (6), T.I.A.S. 1700, 55 U.N.T.S. 187, *reprinted in*, H.R. Doc. 29-617, 93d Cong. 2d Sess. (1974) [hereinafter cited as GATT].

22. Czinkota & Talbot, *supra* note 16, at 1.

23. Kyung, *supra* note 15, at 16.

24. See *supra* notes 14-19 and accompanying text.

25. *USSR - Mexico Committee Will Oversee Barter Relations; Compensation Pact Set*, II COUNTERTRADE OUTLOOK, no. 16, at 1, 3, Apr. 23, 1984 [hereinafter cited as CTO].

26. Preamble to GATT, *supra* note 21, at 1; see also, K. GUPTA, A STUDY OF GENERAL AGREEMENT ON TARIFFS AND TRADE 24 (1967). Tariff barriers are duties which a country imposes on the imports coming to it from other countries. They are generally used to protect the domestic market of the country's locally produced goods. Non-tariff barriers are the restrictions and obligations imposed on the importation of products (other than tariffs) usually

the promotion of the unconditional most favored nation principle.²⁸ The basic tenet of this principle is that a State giving special rights and privileges to one member nation²⁹ must give equal preference to all other members.³⁰ Other purposes of GATT include raising the standard of living among its signatories,³¹ ensuring a steady growth of real income in these countries,³² and liberalizing world trade.³³

Because the provisions of GATT apply only to actions taken by the governments of its signatories, these provisions will only apply to transactions involving some form of government intervention.³⁴ Therefore, in order for GATT to apply to a countertrade requirement, such a requirement must be imposed by some form of governmental intervention or policy.³⁵

This Comment will begin with an analysis of GATT's unconditional most favored nation principle.³⁶ This discussion will consider how this principle applies to countertrade's inherently discriminatory nature. Next, GATT's requirement of publication of trade regulations³⁷ will be considered. An analysis of this provision is included

having the effect of increasing the cost or risk to the exporter. See generally Hufbauer, Erb & Starr, *The GATT Codes and the Unconditional Most Favored Nation Principle*, 12 L. & POL'Y INT'L BUS. 59, 66 (1980).

27. GATT has 85 member nations and 16 de facto members. It is intended to apply to State practices, not to those of private individuals or corporations (unless the corporation is State controlled). Gadbow, *The Implications of Countertrade Under the General Agreements on Tariffs and Trade*, 5 J. COMP. BUS. CAP. MARKET L. 355, 357 (1983). CTO, *supra* note 25, at 3.

28. GUPTA, *supra* note 26, at 24.

29. Member State refers to a State that is a signatory or de facto member of GATT.

30. GUPTA, *supra* note 26, at 24.

31. *Id.*

32. *Id.*

33. *Id.*

34. See *supra* note 27. This becomes especially important with respect to developing countries since the governments of these countries are often involved in trade. VERZARIU, *supra* note 14.

35. Gadbow, *supra* note 27, at 357.

36. The basic postulate of the unconditional most favored nation principle is stated in Article I:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the methods of levying such duties and charges, and with respect to all rules and formalities connected with importation and exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 21, at 224.

37. The publication requirement is contained in Article X:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or

because countries often fail to publish their trade regulations concerning countertrade requirements.³⁸ An analysis of the prohibition on quantitative restrictions³⁹ will follow.⁴⁰ Requirements regarding export subsidies⁴¹ will then be discussed.⁴² This discussion will include consideration of the ways in which countertrade practices may constitute export subsidies, thereby potentially violating GATT. Finally, consideration will be given to the nullification and impairment

the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Id. at 238.

38. Where the countertrade requirement is merely an informal type of pressure placed on a firm, it is likely to go unpublished. Walsh, *supra* note 5, at 7.

39. Article XI prohibits the use of quantitative restrictions. This Article provides in pertinent part:

1. No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 21, at 239.

40. Quantitative restrictions are limitations or restrictions placed on the amount of a product permitted to be imported into a country. COMMITTEE FOR ECONOMIC DEVELOPMENT, NON-TARIFF DISTORTIONS OF TRADE (Sept. 1969) [hereinafter cited as CED].

41. Article XVI restricts the use of subsidies. It provides in pertinent part:

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in any manner which results in that contracting party having more than an equitable share of world export trade in that product account being taken of the shares of the contracting parties in such trade in the product during a previous representative period. . . .

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to the buyers in the domestic market.

GATT, *supra* note 21, at 248-49.

42. A full and exact definition of export subsidies was considered by GATT and determined to be impractical. Low, *The Definition of Export Subsidies in GATT*, 16 J. WORLD TRADE L. 375 n.1 (1982). For a general description of what measures may constitute a subsidy see *infra* text accompanying notes 161-65.

provisions of GATT.⁴³ This discussion will focus on how countertrade practices may effectively nullify or impair the rights of GATT signatories. Furthermore, a central part of the analysis of each GATT article in this Comment will focus on the special consideration GATT gives to less-developed and developing countries.⁴⁴

This Comment will analyze GATT with respect to whether the countertrade practices of less-developed and developing countries violate its provisions. It will point out the ambiguities inherent in the application of GATT to the countertrade requirements of these countries. A clarification of the ambiguities and conflicts between the obligations and rights of developed, less-developed, and developing countries will be provided where possible. Proposed clauses and amendments will also be offered to resolve these conflicts and ambiguities as they are pointed out.

I. ARTICLE I: GENERAL MOST FAVORED NATION

Article I of GATT provides that each nation imposing import requirements on, or giving preferential treatment to, one member nation, must take the same action with all other countries.⁴⁵ The purpose of the unconditional most favored nation principle is to replace the system of preferential treatment with a system of multinational trade.⁴⁶ Many agreements subsequent to the formation of GATT have failed to recognize the unconditional most favored nation principle⁴⁷ or have replaced it with a *conditional* most favored nation principle.⁴⁸ However, there is no indication that any treaty or agree-

43. The nullification and impairment provision of GATT is embodied in Article XXIII:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this agreement, or
- (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

GATT, *supra* note 21, at 261-62.

44. The preferences GATT affords less-developed and developing countries arise under the provisions of Article XII, *infra* note 106.

45. Article I, *supra* note 36.

46. Hufbauer, *supra* note 26, at 60. *See also*, GUPTA, *supra* note 26, at 26.

47. Hufbauer, *supra* note 26, at 59-60.

48. *Id.* at 60-61. The conditional most favored nation principle is not a return to bilateral trade but merely makes the granting of concessions conditional on reciprocal concessions. The

ment has completely obviated the force of the most favored nation requirement.⁴⁹

The typical countertrade transaction may violate the most favored nation principle. For example, State *X* is a less-developed African nation having extensive tin reserves. It buys large amounts of grain from State *Y* which is a developed country having a vast amount of marketing technology. In order for State *Y* to sell grain to State *X*, it is required to offset the amount State *X* pays for the grain by marketing some of its tin. State *X* also buys grain from State *A*, however, since State *A* has no special marketing technology, it is not required to aid State *X* in the marketing of its tin. The offset requirement imposed on State *Y* is discriminatory since it is not imposed on State *A* as well. In this way, the requirement becomes a type of preferential treatment of State *A*. If all three countries are signatories of GATT,⁵⁰ State *X* has violated the most favored nation provision. However, GATT affords special preferences to less-developed countries due to their economic underdevelopment. It is in light of these preferences that difficulties arise in interpreting the applicability of the most favored nation provision.⁵¹

Many of the preferences afforded to less-developed countries are set forth in GATT's principles and objectives.⁵² One important ob-

multilateral nature of the most favored nation principle remains. This is so because all member nations are free to enjoy preferences by the granting of the requisite condition. *Id.*

49. GATT: *Ministerial Declaration on the World Trading System*, 22 INT'L LEGAL MATERIALS 445 (1983). In fact, in 1982 the GATT signatories reaffirmed their commitments under GATT through a declaration adopted by consensus. *Id.*

50. A country must be a signatory of GATT in order to be subjected to its provisions.

51. The most favored nation provision is reproduced, in pertinent part, *supra* note 36. This conflict was also implied in Gadbow, *supra* note 27, at 364. *See also*, Czinkota & Talbot, *supra* note 16.

52. These preferences are set out in Article XXXVI which provides in pertinent part:

1. The contracting parties,
 - (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;
 - (b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, volume of their exports, and the prices received for these exports;
 - (c) noting, that there is a wide gap between the standards of living in less-developed countries and in other countries;
 - (d) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about rapid advance in the standards of living in these countries;
 - (e) recognizing that international trade as a means of achieving economic and social development should be governed by such rules and procedures and

jective of GATT is to raise the standard of living in less-developed countries.⁵³ Further, GATT recognizes that joint action of member countries is necessary to achieve this objective.⁵⁴ Countertrade may aid a country in economic development by promoting that country's exports⁵⁵ while it also enables that country to acquire goods which it could not otherwise purchase because of a lack of available currency.⁵⁶ When the economy of a country develops, its standard of living should likewise improve.⁵⁷ Therefore, by promoting exports and creating greater access to world goods, countertrade aids in fulfilling GATT's objective of raising the standard of living of a less-developed country.⁵⁸ In this way, according to GATT's principles and objectives, developed countries should adopt countertrade as a measure necessary to aid less-developed countries in achieving economic development.⁵⁹

measures in conformity with such rules and procedures as are consistent with the objectives set forth in this Article;

- (f) noting that the contracting parties may enable less-developed contracting parties to use special measures to promote that trade and development; agree as follows.

2. There is a need for rapid and sustained expansion of the export earnings of the less-developed contracting parties.

....

5. The rapid expansion of the economies of the less-developed parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favorable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

....

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

GATT, *supra* note 21, at 275-76.

53. *Id.* at para. 1(a).

54. *Id.* at para. 1(d).

55. Countertrade allows a country to acquire a market for goods which face stiff competition and would otherwise be unmarketable. *See also, supra* note 12 and accompanying text. In this way, a country's access to world markets is increased through countertrade. Lowenfeld, *supra* note 1, at 330.

56. *See generally supra* note 14 for a discussion of the benefits of countertrade in economic development. Countertrade allows a country to retain its hard currency, and promote the exportation of domestic products, thereby aiding it in economic development. Banks, *supra* note 8, at 164-67.

57. The raising of the standard of living of less-developed countries is of primary importance to GATT. *See* GATT art. XXXVI, *supra* note 52, at para. 1(a).

58. *Id.* at para. 1(b) specifically provides that the "export earnings of the less-developed contracting parties can play a vital part in their economic development." *Id.* As stated, countertrade aids in the promotion of a country's exports, *see supra* notes 14 and 53-54. In so doing, countertrade fulfills the objectives set out in this paragraph.

59. GATT's principles and objectives recognize the gap between the standards of living of these two types of countries. It also recognizes that joint action of the contracting parties is

One of GATT's commitments requires the developed contracting parties⁶⁰ to give "active consideration to the adoption of 'other measures' . . . to [increase] imports from less-developed CONTRACTING PARTIES."⁶¹ Further, all signatories are required to take action to increase the availability of world markets to less-developed countries.⁶² In so doing, all nations are required to collaborate in analyzing the development plans of less-developed countries with a view toward devising "concrete measures to promote the development of export potential."⁶³

Developed countries are required to promote the countertrade practices of less-developed countries if such practices constitute "other measures" as contemplated in GATT's commitments sec-

necessary to "further the development of the economies of less-developed contracting parties." Art. XXXVI, *supra* note 52, at para. 1(d).

60. Contracting parties refers to the members of GATT acting jointly. See Yusuf, "Differential and More Favourable Treatment": *The GATT Enabling Clause*, 14 J. WORLD TRADE L. 488 n.1 (1980).

61. These obligations are enumerated in Articles XXXVII and XXXVIII. Article XXXVII provides in pertinent part:

3. The developed contracting parties shall:

....

- (b) give active consideration to the adoption of other measures designed to provide for greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;
- (c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

GATT, *supra* note 21, at 278.

Article XXXVIII provides in pertinent part:

1. The contracting parties shall collaborate jointly, within the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.

2. In particular the contracting parties shall:

- (a) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

....

- (c) collaborate in analyzing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed. . . .

Id. at 278-79.

62. Article XXXVIII, *supra* note 61, at para. 2(a).

63. *Id.* at para. 2(c).

tion.⁶⁴ Since countertrade increases the imports from less-developed countries,⁶⁵ it is arguably an "other measure" within the meaning of GATT. This argument is supported by the fact that the Annex to the commitment provisions states that the "other measures" referred to might include measures "to encourage consumption of products" or to introduce "measures of trade promotion."⁶⁶ Since countertrade is a means of promoting a country's products,⁶⁷ it falls within the measures which "encourage consumption" and is a "measure of trade promotion."

Because of the principles, objectives and commitments of GATT, an ambiguity arises regarding whether less-developed countries may impose their countertrade requirements on developed countries in a discriminatory manner. This ambiguity exists because other provisions of GATT allow less-developed and developing countries to take measures which facilitate their economic development provided that such measures are taken in a non-discriminatory manner.⁶⁸ By mandating that requirements be applied without discrimination, and prohibiting deviation from the most favored nation principles in governmental assistance to economic development, the ambiguity in GATT concerning the obligations of developed countries becomes apparent.⁶⁹

Authority outside of GATT also indicates that less-developed countries cannot be discriminatory when they adopt permitted meas-

64. *Id.*

65. *See supra* notes 14, 53-55 and accompanying text.

66. The Annex to Article XXXVII paragraph 3(b) provides: "The other measures referred to in this paragraph might include steps to promote domestic structural changes, to encourage consumption of particular products, or to introduce measures of trade promotion." GATT, *supra* note 21, at 298.

67. *See supra* notes 14, 55-57 and accompanying text.

68. Aside from Article I's most favored nation provisions, two other provisions of GATT require that measures taken to promote economic development be employed in a non-discriminatory way. Article XIII requires that quantitative restrictions be applied on a nondiscriminatory basis, and Article XVIII allows countries to deviate from other GATT provisions. However, paragraph 20 of Article XVIII specifically forbids the use of discriminatory measures.

69. Article XIII, which prohibits the discriminatory application of quantitative restrictions for correcting balance of payments, provides:

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly restricted.

GATT, *supra* note 21, at 243. Article XVIII, which allows for governmental assistance for economic development, is set out *infra* note 81.

ures under one of GATT's exceptions.⁷⁰ However, the GATT Enabling Clause⁷¹ states that the preferences offered in GATT's principles, objectives, commitments, and joint action requirements⁷² may be inconsistent with the most favored nation principle.⁷³

The Enabling Clause was adopted in recognition of the fact that less-developed and developed countries need not be treated equally.⁷⁴ The drafters of the clause believed the developed countries had more resources, more industry, and stronger economies, and were therefore in a better position to carry out international trade than less-developed countries.⁷⁵ The Enabling Clause speaks of the *preferences* afforded to less-developed and developing countries. However, it does not refer to any *obligations* developed countries may have toward less-developed countries.⁷⁶ Therefore, it does not aid in determining whether developed countries are obligated to adopt measures which violate the most favored nation principle.⁷⁷

In light of the rationale behind the Enabling Clause, however, it is likely that the obligations of developed countries⁷⁸ may be imposed in a manner inconsistent with the most favored nation principle. This is true in spite of the fact that other provisions of GATT prohibit the application of economic development measures in a discriminatory fashion. In support of this theory, it is urged that developed countries have the best resources available to meet the challenge of increasing exports and promoting the trade of less-developed countries. Since there is uncertainty about the obligations of developed countries concerning countertrade and its discriminatory application, there should be an amendment to the principles, objectives, commitments and joint action requirements to clarify these obligations and

70. CTO, *supra* note 25, at 4.

71. See generally Yusuf, *supra* note 60.

72. These joint action requirements are set out in Article XXXVIII, *supra* note 61. They relate to those actions which all contracting parties are required to take regarding the economic development of the less-developed member nations.

73. The Enabling Clause reads in pertinent part: "Notwithstanding the provisions of Article I of [GATT] the contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties." Yusuf, *supra* note 60, at 488.

74. *Id.* at 492.

75. *Id.*

76. *Id.* at 507.

77. With this, less-developed countries would be permitted to take a wider range of action. However, the developed countries would not be obligated to accept any measure which violated GATT provisions.

78. The obligations referred to here are listed in Articles XXXVI-XXXVIII, *supra* notes 52 and 61.

preferences.⁷⁹ This provision could be modeled after those parts of the present Enabling Clause which relate to preferences for developing countries.⁸⁰ It would thus read:

In light of the objectives of this Agreement, the developed member States must recognize the right of developing and less-developed member States to deviate from the most favored nation principle announced in Article I.

GATT's provision for governmental assistance in economic development prohibits deviation from the most favored nation provisions.⁸¹ These prohibitions make it clear that such a country cannot be discriminatory in adopting measures to aid in economic develop-

79. Developing countries called for the promulgation of an enabling clause to provide a basis in GATT for the clarification of preferences afforded them. *See generally* Yusuf, *supra* note 60, at 487-91.

Such an enabling clause should likewise be provided to clarify the obligations of developed countries in providing less-developed countries with market access and to promote trade with these countries.

80. *See supra* note 73 and accompanying text.

81. GATT's provisions for governmental assistance in economic development are embodied in Article XVIII. This Article states in pertinent part:

1. The contracting parties recognize that the attainment of the objectives of the Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry, and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

4. (a) Consequently, a contracting party the economy of which can only support low standards of living and is in the early stages of development shall be free to deviate temporarily from the provisions of the other Articles of this Agreement. . . .

9. In order to safeguard its financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4(a) of this Article may, subject to the provisions of paragraph 10 and 12, control the general level of imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in light of

ment. However, since the developed countries are best able to facilitate the development needs of less-developed and developing nations, it follows that the most favored nation principle should not apply to the obligations imposed on the developed countries. Therefore, this amendment would only apply to the obligations imposed on *developed* countries.

II. ARTICLE X: PUBLICATION AND ADMINISTRATION OF TRADE REGULATION

GATT's provisions on the publication and administration of trade regulations require the contracting parties to publish regulations, requirements, and/or prohibitions on imports so that governments and traders may become acquainted with them.⁸² An example of an unpublished countertrade requirement that violates this provision is the set of informal requirements Israel imposes on foreign traders through public pressure.⁸³ This "public pressure," however, is only one way in which countries impose countertrade requirements without publicizing them. Another method is used by Brazil which encourages its companies to engage in countertrade and enforces this requirement by periodically publishing its companies' balances of trade.⁸⁴

GATT does not provide any exemptions from the publication requirement.⁸⁵ This is because one of GATT's goals is to develop and liberalize free trade among its member nations.⁸⁶ By failing to publish trade regulations and requirements, especially those dealing with countertrade, other countries face many unexpected burdens. These countries may not be prepared to overcome the hardship imposed by unpublished regulations. If trade regulations go unpublished, importers are unable to gauge their marketing resources in a

its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial interests of any other contracting party.

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from Articles I, II, and XIII of this agreement. The provisions to paragraph 10 of this Article shall be applicable to any restriction under this section.

GATT, *supra* note 21, at 250-57.

82. These requirements are found in Article X, *supra* note 37.

83. Walsh, *supra* note 5, at 7.

84. *Id.*

85. There is no literature which discusses exceptions for less-developed or developing countries and no viable argument can be made for one under the present GATT. The liberalization and advancement of free trade are concepts to which secrecy of regulation is, or should be, foreign.

86. GUPTA, *supra* note 26, at 26.

manner which enables them to effectively deal with the marketing requirements in a particular transaction.

III. ARTICLE XI: QUANTITATIVE RESTRICTIONS

GATT provides an almost complete ban on quantitative restrictions.⁸⁷ A quantitative restriction is a limitation placed on the amount of goods permitted to be imported into the country imposing the restriction.⁸⁸ Specific types of quantitative restrictions include absolute prohibitions on imports, import quotas, and import licensing schemes.⁸⁹ The quantitative restrictions imposed on any product, whether through import licensing schemes,⁹⁰ or "other measures,"⁹¹ are "in principle," prohibited.⁹²

A countertrade requirement may constitute a type of quantitative restriction.⁹³ Conditioning the granting of an import license on the acceptance and fulfillment of a countertrade requirement amounts to a quantitative restriction.⁹⁴ Such a requirement is an import licensing scheme.⁹⁵ These schemes are specifically prohibited by GATT which disallows restrictions on the importation of any product "whether made effective through . . . import or export licenses."⁹⁶ However, import licensing schemes are only one way countertrade requirements may take the form of a quantitative restriction.

87. G. VERBIT, *TRADE AGREEMENTS FOR DEVELOPING COUNTRIES* 56 (1969). The prohibition is not complete because of the express GATT provisions permitting limited use of quantitative restrictions in Article XII.

88. CED, *supra* note 40, at 15.

89. Art. XI, *supra* note 39, at para. 2.

90. Import licensing schemes place tremendous administrative strain on governments imposing such schemes. This situation places burdens and hardships on exporters having to deal with the licensing and resultant government administrative problems which themselves lead to a certain amount of arbitrariness. Because of the arbitrariness associated with licensing, firms are often unable to project levels of expected trade. BELASSA, *THE STRUCTURE OF PROTECTION IN DEVELOPING COUNTRIES* 91-92 (1971).

91. This term is found in Art. XI, para. 1. *See supra* note 39.

92. CTO, *supra* note 25, at 3. The term "in principle" is used because it is necessary to look at the spirit of GATT. *See generally* Czinkota & Talbot, *supra* note 16. In doing so, it is easy to see that quantitative restrictions are per se invalid. From this point, it is then necessary to find express exceptions for the use of quantitative restrictions and if none exist the practice is strictly prohibited.

93. Liebman, *Comment: GATT and Countertrade Requirements*, 18 J. WORLD TRADE L. 252, 254 (1984); Gadabaw, *supra* note 27, at 361; CTO, *supra* note 25, at 3.

94. CTO, *supra* note 25, at 3. Countries often require importers to obtain permission from the government to import goods. The permission granted is an import license.

95. Import licensing schemes exist where the government of a country conditions the granting of an import license on the fulfillment of a certain number of requirements. BELASSA, *supra* note 90, at 91-92. *See also supra* note 91 and accompanying text.

96. Art. XI, *supra* note 39, at para. 1; Downey, *supra* note 9, at 34.

A countertrade requirement will also constitute a quantitative restriction where it has the effect of limiting the quantity of a product to be imported.⁹⁷ This limitation becomes manifest when a firm can only import a quantity of products the value of which is equal to that which it can export.⁹⁸ For example, Ecuador restricts the quantity of alcohol permitted for import (by a firm or country) to the imported alcohol's equivalent value in bananas taken or sold in export by that same firm.⁹⁹ Such a requirement may amount to a limitation on the quantity of alcohol permitted to be imported.¹⁰⁰ This restriction, however, may be within a realm of action permitted by GATT.

One of the primary objectives of GATT is the expansion of world trade.¹⁰¹ Quantitative restrictions were prohibited by GATT because they were considered to be incompatible with this objective.¹⁰² When a government restricts the amount of a product it will allow into its country, the expansion of trade is correspondingly restricted.¹⁰³ Those importers who sell products to countries requiring some form of countertrade experience a reduced market as a result of these restrictions.¹⁰⁴ These restrictions, however, are often imposed by countries with weak economies.¹⁰⁵ Because of this the provisions of GATT which grant privileges and exceptions to such countries must also be considered.

Actions which would otherwise be a violation of the prohibition on quantitative restrictions may be excused because GATT allows countries to impose quantitative restrictions for balance of payments purposes.¹⁰⁶ Countries may impose quantitative restrictions if they

97. Liebman, *supra* note 93, at 254.

98. *Id.* The inability here often results from the fact that goods required to be exported are often unmarketable or otherwise difficult to sell. This difficulty has the obvious effect of limiting the amount that can be marketed and, accordingly, the countertrade requirement limits the amount of import.

99. Walsh, *supra* note 5, at 6. Note, however, that in the Ecuadoran trade policy, alcohol is considered a luxury or an "unnecessary" item.

100. It is conceivable that bananas, a commodity, may be easy to sell. However, in a more practical sphere, if a countertrade requirement is being imposed in an effort to export bananas, it is likely that a glut or surplus exists on the market.

101. GUPTA, *supra* note 26, at 88.

102. *Id.*

103. *Id.*

104. By imposing a countertrade requirement, the importer must tie up resources to meet the obligations and will thereby lose the use of these resources for completing other, more conventional sales.

105. The term "weak economies" refers to the economies of less-developed and developing countries. McVey, *supra* note 9, at 4-5.

106. Article XII provides in pertinent part:

are needed to safeguard their "external financial position."¹⁰⁷ This exception, however, is subject to limitations.

This provision only allows quantitative restrictions to be imposed to forestall threats to, or to increase very low amounts of, monetary reserves.¹⁰⁸ Where they are imposed under this provision, the quantitative restrictions must be relaxed as the need for them diminishes.¹⁰⁹ Thus, imposition of quantitative restrictions is permitted for

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:
- (i) to forestall the imminent threat of, or to stop a serious decline in its monetary reserves, or
 - (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

- (b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate such restrictions when conditions would no longer justify institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

....

- (c) Contracting parties applying restrictions under this Article undertake:
- (i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;
 - (ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade. . . .

....

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the contracting parties shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balances of payments of which are tending to be exceptionally favorable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

GATT, *supra* note 21, at 240-43.

107. Roessler, *The GATT Declaration on Trade Measures Taken for Balance of Payments Purposes*, 12 CASE W. RES. J. INT'L L. 383 (1980). See also art. XII, *supra* note 106, at para. 1.

108. Art. XII, *supra* note 106, at para. 2(a).

109. Roessler, *supra* note 107, at 383.

the equalization of balance of payments deficits.¹¹⁰ However, the type of quantitative restriction that can actually be imposed is not clearly explained in GATT.¹¹¹ GATT does provide that restrictions "which expand rather than contract international trade" are desirable.¹¹²

Countertrade places a number of constraints on a country in a particular transaction,¹¹³ and may contravene the GATT provision related to the expansion of world trade.¹¹⁴ Further, where trade requirements restrict rather than expand international trade, the provisions of GATT require that the application of other measures should be sought.¹¹⁵ In light of this, if other methods are available which have a less restrictive effect on international trade, and if they may be practically adopted, they should be given preferential application over other more restrictive trade practices like countertrade.¹¹⁶

GATT provides that the "[c]ontracting parties applying restrictions . . . undertake . . . to avoid unnecessary damage to the commercial or economic interests of any other contracting party."¹¹⁷ In the Ecuadoran countertrade requirement,¹¹⁸ this provision applies where a country exporting alcohol to Ecuador could not dispose of a substantial amount of Ecuadoran bananas but had an abundance of its own alcohol available for sale.¹¹⁹ In that example, the economic interests of the exporting country would be damaged since it would not be able to satisfy the countertrade requirement.¹²⁰ There may, however, be alternative measures of which GATT would be more tolerant.

The contracting parties prefer the use of surcharges over trade

110. By using goods rather than currency to buy imports, a country will thereby retain the currency it would otherwise have to expend. Thus, through the use of countertrade, a country can equalize the amount of money it pays out with the amount it takes in. The value of the goods received through countertrade is considered payment for the goods exported. The goods imported are thus treated as income for those exported. Consequently the balance of payments becomes equalized by these transactions.

111. Art. XII, *supra* note 106.

112. *Id.* at para. 3(a).

113. See *supra* notes 1, 15-18 and accompanying text.

114. Art. XII, *supra* note 106, at para. 3(a).

115. *Id.* Paragraph 3(a) states that measures which expand world trade should be applied wherever possible.

116. *Id.*

117. *Id.* at para. 3(c)(i).

118. See *supra* note 94 and accompanying text.

119. Walsh, *supra* note 5, at 6.

120. This results from the failure of the exporter to generate revenue from alcohol sales which would in turn stimulate its economy.

restrictions in correcting balance of payments deficits.¹²¹ There are many reasons for this preference. Surcharges have a less disruptive effect on international trade than do quantitative restrictions.¹²² Further, the administration of surcharges is less complex than the administration of certain types of quantitative restrictions;¹²³ and the revenue from surcharges goes directly to the country imposing them.¹²⁴ In addition, surcharges are preferred because some countries using quantitative restrictions may realize windfall profits while others lose out in the transaction.¹²⁵ Since surcharges have a less disruptive effect on international trade, less-developed and developing countries find them more readily accepted by other GATT members than either countertrade requirements or some other, more restrictive measure.¹²⁶ In light of the foregoing, it appears that GATT would be more tolerant of surcharges than of quantitative restrictions. GATT's provisions granting privileges to certain members and exceptions to certain obligations, however, permit the use of quantitative restrictions, not surcharges, for the purpose of correcting balance of payments problems.¹²⁷

Countertrade requirements, while potentially a form of quantitative restriction, may be permitted if applied to safeguard or correct balance of payments deficits.¹²⁸ GATT, however, presents a further limitation in its provision allowing the use of quantitative restrictions for balance of payments purposes. It states that "[i]f there is a persis-

121. Vincke, *Trade Restrictions for Balance of Payments Reasons and the GATT: Quotas v. Surcharges*, 13 HARV. INT'L L.J. 289, 291-92 (1972).

122. The disruptive effect of quantitative restrictions is caused by a number of factors which are produced when a country imposes schemes which themselves amount to quantitative restrictions. These include:

1. A sharp increase, or potential increase, of imports from particular sources;
2. These products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the exporting country;
3. There is a serious damage to domestic products or threat thereof;
4. Price differentials referred to in paragraph [ii] above do not arise from governmental intervention. . . .

VERBIT, *supra* note 87, at 58-59.

123. Vincke, *supra* note 121, at 312-13.

124. *Id.*

125. *Id.*

126. *Id.* at 291-92.

127. Roessler, *supra* note 107, at 388. Article XII, *supra* note 106, and Article XVIII, *supra* note 81, speak only in terms of using quantitative restrictions not surcharges. *Id.* These are the only provisions in GATT which expressly permit the imposition of quantitative restrictions. Other provisions could, however, be construed as allowing the use of quantitative restrictions, such as Article XVIII, *supra* note 81; Article XXXVI, *supra* note 52; and Articles XXXVII-XXXVIII, *supra* note 61.

128. CTO, *supra* note 25, at 3.

tent and widespread application of import restrictions . . . which is restricting international trade . . . the CONTRACTING PARTIES shall initiate discussions to consider what other measures might be taken."¹²⁹ According to the language of this provision, the restrictive nature of countertrade, and the detrimental effect it has on international trade, may make it unavailable as a corrective measure for overcoming balance of payments problems.¹³⁰

However, Article XII's balance of payments provision is only one of the GATT exceptions less-developed and developing countries may use to justify their adoption of quantitative restrictions. GATT's provisions relating to governmental assistance to economic development may also allow a country to apply quantitative restrictions in order to safeguard its balance of payments.¹³¹ It is arguable that the equalization of balance of payments is not, however, the only purpose to which a quantitative restriction, specifically countertrade, may be applied.¹³²

GATT states that its aims would be facilitated by progressive development of the economies of the contracting parties and particularly those countries "with low standards of living . . . in the early stages of economic development."¹³³ Further, protective or "other measures" affecting imports may be taken in order to *implement* programs of economic development.¹³⁴ GATT's provision for governmental assistance allows a country with a low standard of living to *impose quantitative restrictions for developmental purposes*.¹³⁵ It further provides that any restrictions must be imposed in such a way that unnecessary damage to the commercial or economic interests of the contracting parties is avoided.¹³⁶ It is therefore unclear whether countertrade requirements could be imposed as quantitative restrictions under the assertion that they would further the developmental purposes of less-developed and developing countries. This is because

129. Art. XII, *supra* note 106, at para. 5.

130. The measures considered by the contracting parties collectively under paragraph 5 are similar to those which should be taken into consideration by the country imposing the quantitative restriction when it makes the initial determination to impose the quantitative restriction under paragraph 3 of Article XII. *See also, supra* note 115 and accompanying text.

131. Art. XVIII, *supra* note 81.

132. Whether surcharges may be tolerated under GATT for these purposes, is not within the scope of this Comment.

133. Art. XVIII, *supra* 81, at para. 1.

134. *Id.* at para. 2.

135. GOLT, *DEVELOPING COUNTRIES IN THE GATT SYSTEM* 25 (1978). This is a notable extension beyond the use of quantitative restrictions solely to overcome difficulties with balance of payments.

136. Art. XVIII, *supra* note 81, at para. 10.

countertrade has a twofold effect. Though countertrade may help a country developmentally,¹³⁷ it may also damage the economic interests of other contracting parties.¹³⁸

Countertrade often requires an exporter to take goods from the country to which it exports as payment for those products it sells to that country.¹³⁹ As a result of this requirement, the exporter may be left with goods for which no market exists due to, among other things, their poor quality or overabundance.¹⁴⁰ The exporter may then end up flooding a market with products at a greatly reduced price.¹⁴¹ Countertrade may also occur in the form of a country mandating that exporting countries aid in marketing the goods of the less-developed or developing countries.¹⁴² In this case, the exporter is required to tie up resources which would otherwise be used to generate income.¹⁴³ Consequently, countertrade requirements may be damaging to the economies of the exporting country or, in some cases, of a third country.¹⁴⁴ While aiding in a country's development, thereby fulfilling the developmental objective of GATT, countertrade also upsets the trade position of other nations. This ultimately undercuts GATT's objective of protecting the economic interests of its member nations.¹⁴⁵

The provision for exceptions, the limitations placed on these exceptions, and their interrelation with the objectives of GATT make

137. These benefits are described *supra* note 14.

138. Countertrade may result in a country dumping its exports where such actions would not normally be possible. Suro-Bredie, *supra* note 19, at 3. Also, countertrade may lead to discrimination and distortion. *Id.*

139. Nelson, *supra* note 1, at 3.

140. UNCITRAL, *supra* note 1, at 10.

141. Banks, *supra* note 8, at 176-77. The problems surrounding this situation become manifest when the products which flood the market are generally produced in the exporter's own country.

142. USITC, *supra* note 1, at 8-9. This is a common type of offset requirement.

143. See *supra* note 104 and accompanying text.

144. This is damaging to a country's economy for two reasons. First, although a deal is being made that may not have otherwise occurred, the exporter is unable to generate new income because of the obligations arising from the offset or other related requirements. See *supra* note 1 for a description of what these obligations entail. Second, the exporter may eventually end up selling the goods in its own domestic market at prices lower than the prevailing market rate, as discussed *supra* note 128.

The damage to a third country would result where the exporter, rather than sell the goods in its home market, sells them in the market of other countries (a practice commonly referred to as switch trading). This practice may be restricted by the country imposing the offset where it has a market in those countries where the exporter attempts to execute such sales.

145. These economic interests are outlined by Gupta as centering around developing the full use of the resources of the world, and expansion of production and international trade. GUPTA, *supra* note 26, at 24.

the applicability of the governmental assistance provision unclear with respect to the countertrade requirements (in the form of quantitative restrictions) of less-developed and developing countries. In the governmental assistance provision,¹⁴⁶ as in the balance of payments provision,¹⁴⁷ limitations are placed on exceptions to less-developed and developing countries in order to protect the economic and commercial interests of other countries as well as world trade.¹⁴⁸ The restrictive nature of countertrade, coupled with the benefits it affords those less-developed and developing countries engaging in the practice, make it difficult to ascertain how the provisions allowing governmental assistance in economic development apply.¹⁴⁹ There is no provision explaining whether meeting developmental needs should take precedence over expanding trade.¹⁵⁰

The preferences and exceptions afforded less-developed and developing countries by GATT's provisions for governmental assistance and balance of payments, add fuel to the fire of ambiguity in light of the obligations placed on developed countries under GATT's principles, objectives, commitments, and joint action requirements.¹⁵¹ The problem of interpreting the obligations these other provisions impose on developed countries lies in determining whether developed countries must accept the countertrade requirement of a less-developed or developing country as one of the "other measures" contemplated in these provisions.¹⁵² The instances of some form of governmentally mandated countertrade continue to increase.¹⁵³ There is therefore a corresponding increase in the need to clarify the application of the exceptions in the articles of GATT for underdeveloped nations in the use of countertrade as a quantitative presentation.

146. Art. XVIII, *supra* note 81.

147. Art. XII, *supra* note 106.

148. GUPTA, *supra* note 26, at 148-56.

149. *Id.* The problem is made clear in the following argument: When countertrade is used, while potentially causing disruption in the world market and some injury to the countries upon which it is imposed, the countries that engage in countertrade will develop. With the development of these countries, all other countries will eventually benefit. Therefore, though there are short term harms, there are long term gains that will compensate for such harms. *Id.*

150. There is no indication in Article XVIII that the objective of meeting the developmental needs of less-developed and developing countries should be accorded priority over the objective of expanding world trade, or vice-versa.

GUPTA, *supra* note 26, at 26, indicates that the most fundamental objective of GATT is the expansion of world trade. He also notes, however, that restrictive trade practices are essential to the development of developing countries. He then goes on to say that the objective of expanding world trade is not valid "in the context of the less developed countries." *Id.*

151. See art. XXXVI, *supra* note 52, and arts. XXXVII-XXXVIII, *supra* note 61.

152. See *supra* notes 46-80 and accompanying text.

153. See text accompanying notes 2-8.

A provision or amendment should be added to Article XI to ensure that restrictive measures taken by less-developed and developing countries do not violate GATT. This provision should read:

1. Any action taken under another Article of this Agreement shall not be considered to violate this Agreement provided:
 - a) That such action is taken to further the objective sought to be promoted by the Article under which it is taken; and
 - b) That the action is taken in full accordance with the provisions of that Article.
2. Where the action is taken by a less-developed or developing member State, the developed member States must facilitate the success of such action pursuant to Articles XXXVI-XXXVIII.

The terms of this amendment would clarify the application of the provisions relating to governmental assistance and balance of payments and their relation to GATT's principles, objectives, commitments, and joint action requirements. Action of underdeveloped nations which would otherwise violate Article XI would be permitted as long as it is taken pursuant to the objectives of the relevant article. Further, the obligations of developed member States would be clarified under the facilitation requirement of paragraph 2.

IV. ARTICLE XVI: SUBSIDIES

Article XVI provides that subsidies should be avoided.¹⁵⁴ If subsidies are used, they must not increase the market for a country's products beyond the share that country would have had if the subsidies had not been used.¹⁵⁵ GATT's subsidies provisions further state that no country should grant a subsidy which results in the sale of a product for export at a price lower than that for which it is sold in the domestic market.¹⁵⁶ Limitations are placed on the use of subsidies because of the detrimental effects they have on world markets.¹⁵⁷

The general objection to the use of subsidies is directed at the

154. Subsidies may take form in a number of different ways including direct financial assistance, tax remission programs or tax reimbursement, foreign exchange retention schemes, and multiple exchange rates. GUPTA, *supra* note 26, at 132.

155. Art. XVI, *supra* note 41, at para. 2.

156. *Id.* at para. 3.

157. These effects include the dumping of goods into a country at prices lower than prevailing market rates. This dumping has the effect of increasing the competitiveness of a product solely as a result of government intervention. The full use of available resources for producing these goods is correspondingly limited or decreased.

distorting effect they have on world market prices.¹⁵⁸ This distortion becomes manifest when a government subsidy allows an exporter to reduce the price of its product as a result of factors outside the influence of natural market forces.¹⁵⁹ It is the relief from a tax or the grant of a tax credit, among other things, that causes a reduction in the market price of the subsidized product and not any influence created by the market.¹⁶⁰ One example of a countertrade practice constituting a subsidy and illustrating this objection is Indian export promotion.¹⁶¹ India allows credits, grants licenses, and reduces taxes on companies which promote exports through countertrade.¹⁶² The market price of the products exported by such companies is distorted because it is reduced¹⁶³ as a result of government grants not because of any factor relating to the product's quality or competitiveness.¹⁶⁴

A specific objection to subsidies is that they cause products to enter the market at reduced prices and compete with products from other countries not granting subsidies.¹⁶⁵ This violates GATT's prohibition on subsidies because the subsidy causes products to enter a market at artificially reduced prices.¹⁶⁶ GATT's provisions on subsidies are further violated if the reduced price caused by the subsidy creates a greater market for the product.¹⁶⁷ This is because GATT expressly prohibits utilizing a subsidy which has this effect.¹⁶⁸

In analyzing the application of GATT's subsidy provision to less-developed and developing countries, it becomes necessary to distinguish between *compensatory* export subsidies and *pure* export sub-

158. Schwartz & Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972).

159. The most obvious natural market force is basic supply and demand. Another such market force is centered around the quality of the subsidized product and its corresponding competitiveness.

160. For a good discussion of how subsidies distort trade and may operate as a corrective measure for economic development, see Shwartz & Harper, *supra* note 158, at 831-32.

161. Walsh, *supra* note 5, at 7.

162. *Id.*

163. The reduction on the price of goods results from the granting of relief from taxes or the granting of other privileges.

164. See *supra* note 159 and accompanying text.

165. Schwartz & Harper, *supra* note 158, at 840.

166. The specific provision of GATT which is violated in such a situation is Article XVI, paragraph 4, *supra* note 41.

167. The language of paragraph 3, in this regard, is mandatory. See *supra* note 41, at para. 3.

168. *Id.* Article XVI, paragraph 3 expressly prohibits the granting of subsidies when doing so has the effect of causing the subsidized product to have a greater market share than would otherwise exist.

sidies.¹⁶⁹ Compensatory export subsidies involve grants by a country to its domestic suppliers to alleviate the existing internal governmental pressure which reduces the competitiveness of domestic products.¹⁷⁰ Such a subsidy has the effect of easing this internal burden thereby reducing the costs to the supplier arising from the internal governmental pressure.¹⁷¹ A pure export subsidy, on the other hand, is granted to an exporter merely as an aid or incentive to export.¹⁷² No internal government controls or restrictions having an effect on the market price of the subsidized product are being imposed.¹⁷³ The subsidy is granted solely to decrease costs to the seller and aid in his venture to export.¹⁷⁴

It is the pure form of export subsidy that GATT seeks to reduce or eliminate.¹⁷⁵ This is because the pure subsidy causes a reduction in price, and a correspondingly greater market for subsidized products, without fully utilizing available resources.¹⁷⁶ With the reduction or elimination of pure subsidies, prices remain economically competitive without being distorted by government policies.¹⁷⁷

It is difficult to determine whether a countertrade practice which takes the form of a subsidy, like the Indian countertrade requirement,¹⁷⁸ is permitted under GATT's exceptions for less-developed or developing countries. This difficulty arises when the restrictions on the application of subsidies are analyzed in light of the preferences and exemptions given to less-developed and developing countries. Countertrade may cause a reduction in the market price of the product countertraded¹⁷⁹ and may also increase the market share of the traded product beyond that which it would have had

169. VERBIT, *supra* note 87, at 149.

170. *Id.* For example, where a tax is imposed on domestically manufactured products, such a tax may reduce the competitiveness of those products. The competitiveness of the product is reduced because the price is higher as a result of the tax, whereas, the price of products coming from countries not imposing such taxes will be correspondingly lower. *Id.*

171. This is accomplished simply by lifting governmental restraints on domestic products. *Id.*

172. *Id.* at 149-50.

173. *Id.*

174. *Id.*

175. *Id.*

176. Schwartz & Harper, *supra* note 158, at 840.

177. GUPTA, *supra* note 26, at 132.

178. See *supra* text accompanying notes 161-62.

179. This reduction may be due to the need for the exporter to market the goods of that country. Because of this necessity, the exporter must reduce the prices of the goods to meet the burden of marketing them. See also, *supra* note 144.

otherwise.¹⁸⁰ Clearly such a practice would violate the prohibition on subsidies.¹⁸¹ The countertrade practice may, however, also aid that country in its quest for economic development,¹⁸² and in so doing, fulfill the objectives, principles and commitments of GATT.¹⁸³

Arguably, less-developed and developing countries could grant subsidies by availing themselves of GATT's provisions regarding governmental assistance in economic development.¹⁸⁴ In so doing, these countries could take actions which otherwise violate their obligations under GATT.¹⁸⁵ This provision recognizes the need for the economic development of countries having a low standard of living¹⁸⁶ by permitting them to temporarily deviate from other provisions of GATT.¹⁸⁷ It is not clear, however, whether these deviations can be made from obligations other than those relating to restrictive practices.¹⁸⁸ Since subsidies are distorting and potentially damaging, *but are not restrictive*, this ambiguity must be considered.¹⁸⁹

Most of the provisions relating to governmental assistance are couched in terms of relief from prohibitions regarding restrictive practices.¹⁹⁰ Where countertrade is used as a subsidy, and not a restrictive trade measure, it is not certain whether developing countries can aver to the governmental assistance provision for an exemption from their obligations under GATT.¹⁹¹

180. This may be because the countertraded goods are unmarketable and, were it not for the countertrade requirement, would go unsold.

181. Art. XVI, *supra* note 41.

182. *See supra* notes 1 and 14.

183. *See supra* notes 52 and 61.

184. Art. XVIII, *supra* note 81.

185. GUPTA, *supra* note 26, at 148.

186. Art. XVIII, *supra* note 81, at para. 1.

187. *Id.* Paragraph 4 allows countries to deviate temporarily from the other provisions of GATT, such as Article XVI, *supra* note 41.

188. Restrictive practices, as discussed here, include import quotas, tariffs and import licensing schemes.

189. *See supra* notes 160-65 and accompanying text.

190. The provisions of Article XVIII, *supra* note 81, allow for exceptions to prohibitions on quantitative restrictions. The emphasis behind the Article XVIII provisions is the economic development of developing countries. This emphasis recognizes that trade restrictions are "almost indispensable for developing countries." GUPTA, *supra* note 26, at 26. Gupta further points out that the contracting parties, in granting these concessions, recognized the need of developing countries to take measures affecting imports. *Id.* at 26-27. It is therefore likely that the contracting parties intended developing countries to take restrictive measures to aid in development, but not to facilitate this objective through subsidies or other "non-restrictive methods."

191. Article XVIII, para. 13, *supra* note 81, allows a country to impose trade measures in order to increase a standard of living. Paragraph 14 of the same article, however, in referring to paragraph 13 speaks in terms of *imports* and measures taken affecting them. The foregoing

This provision or an amendment attached thereto, should clarify whether the deviations permitted relate solely to restrictive trade practices or are permitted for all the practices sought to be extinguished by GATT.¹⁹² It is arguable that the governmental assistance provision is only intended to apply to restrictive or protective measures designed to aid a country in economic development.¹⁹³ This is because the contracting parties recognized that the economic development of countries entitled to invoke the provisions for government assistance would best be realized through "protective or other measures affecting imports."¹⁹⁴ The amendment or provision should indicate that the Article does not apply to the use of subsidies. It would read thus:

The deviations permitted under the provisions of this Article relate only to those Articles of this Agreement which relate to restrictive trade practices, including, but not limited to, quantitative restrictions, tariffs, and import licenses. Such deviations shall not include measures affecting exports from the country taking advantage of the deviation.

Where the countertrade requirement of a less-developed country (resulting in subsequent benefits to private corporations) is imposed on a developed country, determining the application of GATT's provisions is again unclear.¹⁹⁵ GATT's objectives, principles, commitments and joint action requirements impose particular obligations on developed contracting parties.¹⁹⁶ These obligations include taking measures which aid in the economic development of less-developed countries.¹⁹⁷ An analysis of the obligations of developed countries and of the privileges afforded less-developed countries discloses ambiguities regarding the use of subsidies by less-developed countries.

There is no passage in the provisions relating to GATT's objectives, principles, commitments and joint action requirements specifying that developed countries must accept or promote a subsidy as a

discussion of subsidies demonstrates that subsidies effect and relate to exports. Paragraph 19 relates to the imposition of measures to promote an industry, which appears to address subsidies and therefore permit them. Upon close scrutiny it appears that this paragraph also relates only to the use of restrictive measures. It is important to recognize that these provisions relate to, and apparently limit, what otherwise appears to be a blanket consent to deviation in paragraph 3 of Article XVIII.

192. In light of the discussion, *supra* note 190, this provision should limit the applicability of the Article XVIII exceptions to restrictive trade practices.

193. GUPTA, *supra* note 26, at 148.

194. *Id.* at 148-49. Again, subsidies affect exports not imports.

195. Art. XXXVI, *supra* note 52. Arts. XXXVII-XXXVIII, *supra* note 61.

196. *See supra* notes 52 and 61.

197. *See supra* notes 71-73 and accompanying text.

measure designed to aid less-developed countries.¹⁹⁸ This deficiency makes it difficult to determine whether a developed country must acquiesce in a less-developed country's countertrade practices which constitute pure export subsidies. In analyzing the terms of the objectives, principles, commitments and joint action requirements, developed countries are obligated to take "appropriate action" for providing "improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties."¹⁹⁹

Where countertrade takes the form of a subsidy providing countries with increased access to world markets,²⁰⁰ it constitutes the type of "appropriate action" contemplated in GATT's joint action requirements.²⁰¹ Thus, developed countries would not only be obligated to acquiesce in a less-developed country's use of countertrade, they would be required to take measures to aid in its promotion!²⁰² A provision or amendment to GATT's objectives, principles, obligations and commitments should describe what type of measures the contracting parties intended developed countries to adopt in order to aid less-developed countries in economic development. The Annex to Article XXXVII aids in the determination of what measures less-developed and developing countries may adopt.²⁰³ In light of this description the amendment should include subsidies but limit their use in light of the other GATT objectives. This will clarify whether subsidies and, more specifically countertrade are considered as intended measures along with the acceptance and promotion of restrictive trade practices.

V. ARTICLE XXIII: NULLIFICATION AND IMPAIRMENT

GATT's nullification and impairment provision, when viewed in light of the obligations and exceptions for less-developed and devel-

198. This Article states the obligations of countries *in general*. However, the obligations of developed countries are not mentioned or specified in Article XVI nor is any reference made to obligations arising under Articles XXXVI-XXXVIII.

199. The material appearing in quotes is taken from Article XXXVIII, *supra* note 61.

200. This increase may be due to the marketing of otherwise unmarketable goods, or from affirmative actions taken by developed countries to aid in providing such access by participating in the practice. See *supra* note 162.

201. See *supra* note 61.

202. The provisions giving rise to such obligations are found in Articles XXXVII, para. 3(b) and XXXVIII, para. 2(c), *supra* note 61. Such a requirement may involve subsidies otherwise prohibited by Article XVI, *supra* note 41.

203. In light of the language in the Annex to Article XXXVIII, *supra* note 64, subsidies may be specifically provided for as a "measure of trade promotion."

oping countries, creates a number of difficulties in interpreting the respective obligations of member States regarding countertrade agreements.²⁰⁴ This Article provides that where a country considers that

any benefit accruing to it . . . under this agreement is being nullified or impaired or . . . impeded as the result of . . . (a) failure of another party to carry out its obligations under this agreement, or (b) the application . . . of any measure whether or not it conflicts with the provisions of this agreement, or (c) the existence of *any other situation* . . . [such] country may take the matter up with the CONTRACTING PARTIES . . . who will make a ruling on the matter.²⁰⁵

This clause was placed in GATT as a "catch all" provision.²⁰⁶ It is designed to protect countries from any measure that may nullify or impair their rights and privileges.²⁰⁷ The nullification and impairment provision is an attempt to deal with the unreasonable trade practices of some of the contracting parties.²⁰⁸ It is, however, internally ambiguous. This provision presents two relatively defineable situations²⁰⁹ delineating when the remedies called for in the Article may be invoked.²¹⁰ First, it provides that the remedies may be invoked when a country fails to carry out its obligations under GATT.²¹¹ Second, it invokes remedies when a country carries out a measure which nullifies or impairs the rights or privileges of any other contracting party "whether or not it conflicts with the provisions of this Agreement."²¹² It then provides the ambiguous "omnibus" term that is broad in scope and vague in meaning and application.²¹³ Exactly what situations are to be covered by the term "other measure" is not evident.²¹⁴ Further, there is no provision specifically stating which types of trade measures or trade requirements

204. Art. XXIII, *supra* note 43.

205. GATT, *supra* note 21, at 260-61 (emphasis added).

206. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 461-63 (1975).

207. *Id.*

208. *Id.*

209. Art. XXIII, *supra* note 43, at para. 1(a) and (b).

210. Hudec, *supra* note 206, at 462-63. When either of these two situations occurs the country must enter into consultations with the contracting parties to explain why the provisions are being violated, in other words, why measures have been taken which are nullifying or impairing the rights and privileges of other countries. *Id.*

211. Art. XXIII, *supra* note 43, at para. 1(a). Previous discussions indicate, however, that it may be unclear what these obligations are.

212. *Id.* at para. 1(b).

213. *Id.* at para. 1(c).

214. Hudec, *supra* note 206, at 464.

constitute a valid basis for nullification or impairment of a right or privilege.²¹⁵ This is an especially important consideration to a country mandating a countertrade requirement since such a requirement could fall under any one of the three paragraphs in the nullification and impairment provision.

Where a countertrade requirement violates the most favored nation principle,²¹⁶ constitutes a quantitative restriction²¹⁷ or takes the form of a direct government subsidy,²¹⁸ the country imposing such a requirement may be failing to carry out its obligations under GATT.²¹⁹ These activities fall within the purview of the first provision of GATT's nullification and impairment Article.²²⁰ Where the countertrade requirement does not violate any of the articles of GATT,²²¹ it may still fit within the second provision if it nullifies or impairs the rights and privileges accruing to another contracting party.²²² This is because that provision allows application regardless of whether the measure violates any other article of GATT.²²³ If the countertrade requirement does not fall within either of these categories, its mandate may be considered as the "existence of any other situation" as contemplated by the third provision of the nullification and impairment Article.²²⁴

The exceptions afforded less-developed and developing countries complicate the applicability of the nullification and impairment provisions to the countertrade requirements of these countries. Because of these exceptions, it is not clear whether less-developed and developing countries may be permitted to take actions that "nullify or impair" a country's benefits under GATT. For example, when India imposes its licensing scheme to promote its countertrade,²²⁵ it may be nullifying the importer's rights to free trade without the hinderance

215. Parties are merely entitled to consultation when they consider that the benefits accruing to them from the provisions of the Agreement are being nullified or impaired.

216. See *supra* note 36.

217. See *supra* note 37.

218. See *supra* note 106.

219. These obligations arise under Articles I, XI, and XVI respectively. Again, however, the mere invocation of any one of these practices may not, of itself, be a violation of a specific obligation.

220. Art. XXIII, *supra* note 43, at para. 1(a).

221. This may be the case if the requirement is excused or exempted by the articles of the agreement providing preferences.

222. Art. XXIII, *supra* note 43, at para. 1(b).

223. *Id.* at para. 1(c).

224. *Id.*

225. Walsh, *supra* note 5, at 7.

of quantitative restrictions.²²⁶ By requiring countertrade participation before a license will be issued, India is restricting the importation of products by the other contracting parties.

GATT allows less-developed and developing countries to apply restrictions in order to safeguard their balance of payments.²²⁷ The provision which grants this exception to the prohibition on quantitative restrictions, however, limits the occasions when such actions are permitted. Restrictions can *only* be applied to the extent necessary to correct balance of payments problems.²²⁸ Also, these restrictions must be gradually reduced as the need for them dissipates.²²⁹

The nullification and impairment provision appears to further limit the availability of quantitative restrictions. However, whether quantitative restrictions can be imposed to correct balance of payments problems, even if doing so would result in the "nullification or impairment" of the benefits of GATT, is not clearly articulated in that provision. A developing country may impose a countertrade requirement which causes an exporter to ship a smaller quantity or value of products than without the requirement.²³⁰ For example, the Ecuadoran countertrade requirement²³¹ may cause an exporter to ship a smaller quantity of alcohol because he can only market a certain amount of bananas.²³² This results in an impairment of the benefits accruing to the exporter because the countertrade requirement restricts the exporter's ability to export the amount of alcohol available.²³³ It is therefore not evident from the provisions of GATT whether the nullification and impairment provision takes precedence over the provisions exempting quantitative restrictions for balance of payments purposes.

It must again be noted that GATT also allows less-developed and developing countries to deviate from their obligations in order to facilitate economic and commercial development through govern-

226. This nullification exists when the exporter must comply with the countertrade requirement, whereas, if the prohibitions on quantitative restrictions provided in Article XI, *supra* note 39, were adhered to, the exporter would not have to do so.

227. Article XII, *supra* note 106, at paras. 1 and 2.

228. *Id.* at para. 2(a).

229. *Id.* at para. 2(b).

230. *See supra* note 178.

231. Walsh, *supra* note 5, at 6.

232. *See supra* notes 98-99 and accompanying text.

233. If the prohibition on quantitative restrictions were adhered to, the exporter would be able to ship all the alcohol he could deliver rather than be restricted in this quantity by his ability to market bananas.

mental assistance.²³⁴ In analyzing the provisions regarding governmental assistance for economic development, it is uncertain whether a country can deviate from GATT to facilitate economic development when such deviations also “nullify or impair” benefits accruing to other contracting parties.²³⁵ Here, as with the exceptions for balance of payments purposes, no provision is made concerning whether the nullification and impairment provision takes precedence over those provisions relating to exceptions for governmental assistance. This deficiency makes the ambiguity of rights and obligations more pronounced since the nullification and impairment provision proscribes actions which “nullify or impair . . . [rights] whether or not they conform to the other Articles of [the] Agreement.”²³⁶ Thus, an offset requirement may be permissible as a measure of governmental assistance in order to facilitate economic development. If it “nullifies or impairs” benefits accruing to other countries, however, it could be prohibited under the nullification and impairment provision.

A further source of confusion revolves around the difficulty presented by interpreting the exceptions provided to less-developed countries under GATT's principles, objectives, commitments, and joint action requirements. These articles do not indicate what trade practices developing countries are obligated to tolerate despite the fact that such practices are nullifying or impairing their rights under GATT.²³⁷ Thus, it is unclear whether developed countries must acquiesce in violations of GATT even though such actions may “nullify or impair” the benefits that those countries would otherwise receive. This acquiescence may be required as a result of the obligations these countries face in aiding in the economic development of less-developed countries.²³⁸

There is little history behind the nullification and impairment provision to aid in its interpretation.²³⁹ The ambiguities and deficiencies in the provisions of this Article further the difficulty of interpretation. It is necessary, therefore, to add provisions addressing less-developed and developing countries which clarify the applicability of the nullification and impairment Article.²⁴⁰ This provision or

234. Art. XVIII, *supra* note 81, at paras. 2, 9.

235. This ambiguity is more pronounced with regard to trade measures which deviate from those provisions of GATT relating to other than restrictive trade practices.

236. *Id.* at para. 1(c).

237. Art. XXXVI, *supra* note 52, and arts. XXXVII-XXXVIII, *supra* note 61.

238. See *supra* notes 52 and 61.

239. Hudec, *supra* note 206, at 463.

240. This clarification is especially necessary regarding the applicability of Article XXIII

amendment should state when the nullification and impairment provision takes precedence over the privileges given to less-developed and developing countries.

The articles of GATT which permit less-developed and developing countries to take measures to aid in their economic development²⁴¹ are likely intended to take precedence over the nullification and impairment provision. This is because GATT's primary objective is to develop the economies of less-developed and developing countries.²⁴² To meet this objective the amendment or provision regarding nullification and impairment should read:

No provision of this Article diminishes the rights of those countries granted preferences under this Agreement from taking full advantage of such preferences. No provision of this Article is to be construed as having precedence over, or precluding, any preference granted to less-developed member nations nor developing member nations under any other Article of this Agreement.

VI. CONCLUSION

This Comment analyzed five GATT articles and their effect on the countertrade practices of less-developed and developing countries. The analysis of each of these articles was made in light of the special consideration GATT gives to these countries. This consideration arises out of the GATT objective of developing the economies of less-developed and developing countries. Also, GATT imposes particular requirements on the developed contracting parties to aid the less-developed and developing countries in economic development.²⁴³ Because of this, less-developed and developing countries can adopt trade practices and otherwise violate GATT provisions provided, this is done to further their own economic development.

The most favored nation provision contains an ambiguity concerning whether less-developed and developing countries can adopt countertrade requirements in spite of their discriminatory nature.²⁴⁴ A proposed amendment was presented which helps to clarify this ambiguity.²⁴⁵ GATT's requirements regarding the publication and

to countertrade practices. This need exists because of countertrade's dual effect of aiding countries in economic development while, at the same time, restricting and injuring the trade of other, especially developed, countries.

241. Art. XVIII, *supra* note 81.

242. GUPTA, *supra* note 26, at 24-28.

243. Art. XXXVI, *supra* note 52; arts. XXXVII-XXXVIII, *supra* note 61.

244. *See supra* notes 52-77 and accompanying text.

245. *See supra* text accompanying notes 78-82.

administration of trade regulations were also analyzed.²⁴⁶ It was then determined that countries cannot impose countertrade regulations without publishing them.²⁴⁷

An analysis of GATT's prohibition on quantitative restrictions was conducted with regard to how countertrade requirements constitute quantitative restrictions,²⁴⁸ and whether they can be imposed by less-developed and developing countries.²⁴⁹ An ambiguity was found and a proposed amendment offered to aid in clarification.²⁵⁰

GATT's article regarding subsidies was analyzed as to whether countertrade practices constitute subsidies²⁵¹ and, if so, when and how they can be imposed.²⁵² It was also found to contain ambiguities and an amendment was proposed to clarify them.²⁵³

Finally, the provisions concerning the nullification and impairment of the rights of GATT's member nations were analyzed.²⁵⁴ There, a proposed amendment was offered to clarify whether countertrade practices can be imposed by less-developed and developing countries despite the fact that the rights of other member nations are being nullified or impaired.²⁵⁵

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246. *See supra* notes 82-86 and accompanying text.

247. *See supra* notes 85-86 and accompanying text.

248. *See supra* notes 97-100 and accompanying text.

249. *See supra* notes 101-20, 128-53.

250. *See supra* text accompanying note 153.

251. *See supra* notes 161-64 and accompanying text.

252. *See supra* notes 165-77 and accompanying text.

253. *See supra* notes 178-203 and accompanying text.

254. *See supra* notes 204-10 and accompanying text.

255. *See supra* notes 216-42 and accompanying text.

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