AN INTRODUCTION TO THE LEGAL, POLITICAL, AND ECONOMIC ASPECTS OF COUNTERTRADE

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I. INTRODUCTION

The world market for western goods is exploding. The fall of the soviet empire, the transformation of eastern economies to free market systems and the continuing needs of lesser developed countries have created vast new markets for western products ranging from blue jeans and big macs to high technology. Western companies, eager to meet the demand, are rapidly expanding business operations and seeking new strategies in the blossoming markets.

But there are problems. One of the major obstacles facing western companies is that customers in the new markets do not have any useful currency to exchange for goods and services. A Russian company may need American equipment, but its rubles are non-convertible and virtually worthless to a U.S. seller.[1] Faced with the dilemma of a good customer with only bad money, innovative U.S. firms have turned to the oldest form of exchange to get the deal done: Countertrade.

Countertrade can be generally defined as a transaction which provides for the reciprocal exchange of goods or services.[2] It normally occurs out of necessity when a buyer does not have the hard currency or credit with which to purchase needed commodities. Opinions differ as to whether countertrade is good or bad for the world trading system. Critics claim that countertrade is inefficient, costly and distorts world market forces.[3] Proponents argue that countertrade is a second best alternative to no trade at all and that numerous benefits flow from its use.[4] Whether judged good or bad, most people agree that countertrade is flourishing in the new global economy as an alternative form of international trade.[5]

II. FORMS OF COUNTERTRADE

Countertrade transactions can be divided into three major classifications: A simple exchange of goods or services, commonly known as barter; an exchange of goods or services for the right and obligation to receive goods or services in the future, known as counterpurchase; and an exchange of goods or services for the right and obligation to receive output from the original goods or services provided, known as buy-back or compensation.

B. Barter

Barter is the simplest of the three types of transactions. It is a direct exchange of goods or services under a single contract without any transfer of cash.[6] The mechanics of a barter transaction are straightforward. The parties determine the value and quantity of the goods or services to be exchanged, set the delivery dates and fulfill their obligations.[7] The time period for performance is typically short (less than one year) to avoid price fluctuations.[8] Financial documents such as letters of credit are not required in barter transactions, although the parties may use performance bonds or standby letters of credit to guarantee performance.[9]

Western firms rarely engage in pure barter transactions due to the difficulty of exactly matching the needs of each party.[10] However, barter occupies a significant place in North-South and South-South trade[11], and accounts for roughly forty percent of all Lesser Developed Country trade.[12]

The relative inflexibility of pure barter transactions can be relaxed through the use of "swaps", "bilateral clearing arrangements" and "switch trading." Swaps occur when goods destined for one party are transferred or "swapped" to another party for benefits such as a reduction in transaction costs. For example, if Mexico has agreed to ship oil to Germany and the Ukraine has agreed to ship oil to Cuba, a swap might be arranged which sends Mexican oil to Cuba and Ukrainian oil to Germany.[13]

In a bilateral clearing arrangement, a running account is kept of all import and export barter transactions which occur between two trading partners.[14] At the end of a fixed period, any deficit in the account (called the "swing") is settled between the parties.[15] If an outside third trader is allowed to eliminate the swing by taking unacceptable goods and exchanging them for goods which are acceptable to the surplus party, a "switch trade" has occurred.[16]

C. Counterpurchase

Counterpurchase is more complex than barter and is the most common form of countertrade.[17] In a counterpurchase, the parties agree to reciprocal purchases of goods or services for cash within a given period of time,[18] usually one to three years.[19] Counterpurchase requires two separate contracts which are linked together by a third contract called a protocol.[20] The goods which the original seller is required to take in return are often of inferior quality. The original seller therefore may turn to different methods of disposing of the goods such as using the goods internally or selling the goods to a trading company at a discount.[21]

D. Compensation

Compensation is similar to counterpurchase with the addition that the goods received are related to the goods sold. The most common form of compensation is known as "buy-back."[22] In a buy-back, the seller delivers goods such as equipment, a factory or technology and receives output from the equipment, factory or technology as payment.[23] Compensation agreements generally involve large amounts of money and are for long periods of time.[24] Due to the size of the investment and length of the term, compensation agreements usually result in a greater risk to Western firms than do barter or counterpurchase. Compensation is the fastest growing form of countertrade[25] and draws the least objection from Western governments. A compensation agreement, like a counterpurchase agreement, involves two separate contracts linked by a protocol agreement.[26]

III. ADVANTAGES AND DISADVANTAGES OF COUNTERTRADE

Countertrade results in several significant advantages to both parties to the transaction. The most obvious benefit is that it preserves the ability of the parties to trade goods even when convertible currency and credit are lacking.[27] If current estimates are accurate,[28] billions of dollars in annual international trade would be lost if countertrade did not exist.

A. Advantages of Countertrade

Countertrade gives unique benefits and advantages to the seller of goods. A company willing to engage in countertrade can penetrate new markets and expand sales potential in existing markets.[29] Business relationships can be created and strengthened by the willingness to accept the purchaser's domestically produced goods as payment.[30] Additionally, countertrade can be used to obtain a steady, long-term supply of raw materials. For example, in the mid 1970's, Occidental Petroleum obtained a reliable, low cost, twenty year supply of ammonia by entering into a countertrade agreement with the Soviet Union.[31] Commentators have also suggested that a company can use countertrade to lower its tax and tariff obligations by understating a transaction's nominal value.[32]

Perhaps the greatest benefits of countertrade are received by the purchaser of the goods. Countertrade preserves scarce hard currency[33] and improves the balance of trade in the importing country.[34] Lesser developed countries can take advantage of the distribution and marketing networks of the companies they countertrade with to distribute their products.[35] Additionally, countertrade often results in a significant transfer of technology and know how from seller to buyer which upgrades the buyer's manufacturing capabilities. For example, in a countertrade involving cola syrup for vodka, Pepsico taught a german vodka maker how to make their vodka bottles more marketable through the use of screw caps and different labels.[36]

B. Disadvantages of Countertrade

But countertrade also has a number of drawbacks for the trading parties. Countertrade usually costs more than a cash transaction.[37] Commissions must be paid to middlemen and goods must often be discounted for sale when they are of inferior quality. Further, if a company receiving goods as payment cannot use them internally and the company does not have an established marketing network in place, disposal of the costs may be costly and difficult. The risk of non-performance often is higher in a countertrade because both parties have a duty to deliver and accept goods. Additionally, when the contract term is long, price fluctuations of the goods can adversely affect the trade.

IV. ECONOMIC ANALYSIS OF COUNTERTRADE

Beyond the issues of advantage or disadvantage to the immediate trading partners, controversy exists whether countertrade is good or bad for the world economy as a whole. The issue becomes particularly relevant when countries consider national policies which favor, oppose or remain neutral on countertrade. Opponents contend that countertrade is distortionary, discriminatory and is generally a negative force in the world trading system. Proponents claim that countertrade expands world trade by offering a second best solution to problems created by market imperfections.

A. Countertrade as a Global Detriment

The primary argument of critics is that countertrade distorts the general equilibrium of the world market by promoting the production of unwanted goods and by removing competitive forces.[38] This criticism is mainly directed toward mandatory countertrade, which is countertrade required by government policy. The thrust of the argument is that when countertrade is mandated by a government, the range of potential product suppliers is narrowed to the one company willing or chosen to engage in the countertrade. With the supplier chosen, cost and price competition between other potential product suppliers is eliminated. Further, when a deal is struck concerning certain goods, production will continue regardless of whether a natural market exists and regardless of whether the goods are being produced at the lowest cost. Therefore, goes the argument, countertrade supports the inefficient production of unwanted goods.[39] When these goods are sold in foreign markets, further disruption occurs as discounted goods undercut products produced through the traditional market forces of cost, price, supply and demand.

Critics also contend that countertrade can constrict global competitive forces in at least two other areas. First, long term countertrade agreements, particularly buy back agreements, can restrict the supply of certain raw materials and adversely affect market prices.[40] Second, countertrade agreements containing resale restrictions reduce competition by limiting potential markets for the goods received in a countertrade.[41]

B. Countertrade as a Global Benefit

The proponents of countertrade respond to these persuasive economic arguments through the technique of confession and avoidance. Supporters argue that while the criticisms of countertrade may well be valid in a perfect equilibrium market system, the global economy is not and has never been in perfect equilibrium.[42] Rather, supporters point out, the global marketplace is full of market imperfections such as tariffs, quotas, duties, illiquidity and other restraints and impediments on trade.[43] Countertrade provides a temporary cure for market imperfections by allowing trade to occur when the traditional market and monetary system has broken down.[44]

Finally, proponents argue that the trade distortionary effects of countertrade are greatly offset by its trade enhancing capabilities.[45]

C. Economic Analysis of Countertrade

Both critics and supporters of countertrade have valid points. Countertrade most certainly has global economic benefits. It facilitates trade when currency is not convertible and preserves whatever scarce hard currency is on hand. Countertrade leads to market *efficiencies* by placing the marketing function with the company best equipped to distribute and sell the products. Further, countertrade actually increases flexibility during conditions of economic distress and can protect against inflation and exchange rate swings.[46] Finally, countertrade which occurs at market prices has little to no distortionary effects on the world market. On the other hand, countertrade transactions do disturb traditional market forces by eliminating competition and by inducing artificial demand for certain products.

So what is the proper answer to the question of whether countertrade is good or bad for the world economy? The answer appears to turn upon whether the good outweighs the bad for the particular transaction. And that question, in turn, seems to depend on whether the countertrade is voluntary or mandatory and whether it is short term or long term.

Short term voluntary countertrades appear to be good for the world economy. Voluntary countertrades are undertaken primarily because one of the countries lacks convertible currency or is short on hard currency. Although voluntary countertrades can be long term, they are usually short term solutions to market imperfections. Short term voluntary countertrades have minimal distortionary effects because they do not create an artificial demand for unwanted goods. The problem is not non-marketable goods, but rather a lack of medium of exchange. Further, the trade enhancement effects of short term voluntary countertrades usually outweigh any distortionary effects which do exist. Not only does a trade occur which otherwise would not, the marketing of countertraded products infuses new hard cash reserves in the lesser developed country and assists it in joining (or rejoining) the world marketplace.

Mandatory countertrades are a different story. These countertrades are undertaken primarily to market goods which otherwise cannot be sold. The trade distortionary effects therefore are likely to be much greater. For example, mandatory countertrades have a tendency to preserve industries and products which should be allowed to die a natural common market death. Through mandatory countertrades, inefficient producers are allowed to survive and inferior products are foisted upon the world market. Further, mandatory countertrades are likely to have longer terms and are more likely to contain restrictions on resale of goods. In short, the trade distortionary effects of mandatory countertrade often outweigh the benefits to the immediate traders, particularly when the agreement extends past the point needed to correct a short term market imperfection.

V. U.S. POLICY TOWARD COUNTERTRADE

The United States government has a mixed policy toward countertrade which reflects both its potential advantages and disadvantages.

A. Official United States Policy

Officially, the United States considers countertrade to be distortionary and contrary to an open, free trading system. It views countertrade as "costly, cumbersome and restrictive" when it does not reflect market forces.[47] The U.S. particularly opposes governmentally mandated countertrade because it generates excess capacity for world goods and impedes the free flow of trade and investment. The U.S. government will formally protest mandated countertrade and request "consultations" with other governments to discourage the practice.[48]

B. Practical United States Policy

On the other hand, U.S. policy in practice reflects the realities of the current world trading environment. The U.S. will not oppose a countertrade transaction entered into by a U.S. company unless it threatens national security.[49] The U.S. even provides advisory and market intelligence services to U.S. businesses on countertrade, including information on the application of U.S. trade laws.[50] Government financial assistance is available to U.S. countertraders, although it is somewhat difficult to find and is generally reserved for countertrades which reflect market forces.[51] In short, although U.S. policy neither encourages nor discourages countertrade, it reflects the practical necessity of assisting U.S. companies to compete effectively against foreign traders in the area of countertrade.

C. United States Involvement in Countertrade

United States policy is reflected in its own involvement in countertrade. The U.S. government has for years engaged in countertrade to exchange food for strategic materials, to facilitate the trade of hard to export goods, and to establish favorable relations with countries lacking convertible currencies.[52] The Department of Defense engages in offset countertrade agreements which encourage foreign suppliers to hire U.S. subcontractors and to use American made parts.[53] The United States Congress has passed several pieces of legislation which allow the President and Secretary of Agriculture to exchange agricultural commodities for strategic materials needed from abroad.[54] These laws stem from the two pronged policy of replenishing the United States strategic stockpile and encouraging exports by American farmers.[55] According to U.S. officials, the countertrade practiced by the government is consistent with U.S. policy because it is pragmatic, optimizes economic benefits for U.S. citizens[56] and reflects market forces.[57]

D. Analysis of United States Policy on Countertrade

Commentators have both praised and criticized U.S. policy on countertrade. Supporters believe that U.S. policy properly strikes the balance between discouraging inefficient mandated countertrade and favoring efficient voluntary countertrades which keep American companies competitive in the world market.[58] Critics claim that the U.S. government has not been aggressive enough in promoting and educating American companies on the risks and potentials of countertrade and that a "consistent, workable policy" is needed.[59] Given the increase in international countertrade in general and the increase in governmentally mandated countertrade in particular, the U.S. government may need to revise its policies to help U.S. businesses compete more effectively against foreign firms that are ready, willing and able to engage in countertrade.

IV. U.S. TRADE LAWS AFFECTING COUNTERTRADE

A United States company which engages in countertrade should be aware of the major trade laws which relate to countertrade. Although no U.S. law specifically regulates countertrade by name, four different U.S. laws regulate imports. Since the goods received as payment in a countertrade transaction are sometimes imported back into the U.S., these laws can become applicable. The four primary trade laws which can affect countertrades are the anti-dumping law[60], countervailing duty law[61], Section 201 Escape Clause[62] and Section 406 market disruption statute[63].

A. Anti-Dumping Law

The anti-dumping law is designed to protect against the unfair trade practice of selling imports below fair market value in order to increase market share. When the U.S. government finds that products are being sold for less than fair market value and are causing or threatening material injury to a domestic market, special duties are imposed to raise the price back up to market levels. Fair market value is the amount that the products are being sold for in the foreign market.[64] When the foreign market is a non-market economy, the fair market value can be determined by the domestic or export prices charged in a market economy for similar products.[65] U.S. companies which countertrade need to beware of the anti-dumping regulations when they are forced to sell a great many goods at discounted prices.

In practice, the anti-dumping statute is not effective in regulating countertrade transactions. The majority of products received as payment in a countertrade are sold overseas or used internally and therefore are not subject to domestic anti-dumping duties.[66] Further, the pricing methods used in a countertrade contract often diminish the probability that an anti-dumping duty will be applied. For example, a U.S. trader often increases the contractual price of its own goods to compensate for the amount the trader will have to discount the inferior imported goods he accepts for resale. The price of the imported goods is correspondingly increased in the contract so the transactions will balance. Since the U.S. government usually looks just at the U.S. (inflated) contract price (and not the actual discounted resale price) of the imported good, the goods are rarely found to be priced at below fair value.[67] Finally, anti-dumping proceedings require separate findings by two different governmental agencies[68] and are usually lengthy. Countertrades are generally short term and are usually long over with before the U.S. government can adequately respond through administrative action.

B. Countervailing Duty Law

The countervailing duty law, in general, is intended to protect U.S. markets against products which are subsidized by home governments. When the Secretary of Commerce determines that a country has been subsidizing the manufacture of imported goods and that a U.S. industry is materially injured or threatened with material injury, the Secretary can impose countervailing duties.[69] The countervailing duty is calculated to eliminate the beneficial effects of the subsidy. The problem with applying this law to countertrade is that it is often difficult to determine if a good has been subsidized, particularly in trades involving multiple swaps.[70] Countertraded goods therefore are often able to evade the countervailing duty law.

C. Section 201 Escape Clause

The last two trade laws potentially governing countertrades are both contained in the Trade Act of 1974. The first, Section 201 (Escape Clause), addresses the problem of import competition which does not rise to the level of an unfair trade practice. Section 201 authorizes the President to impose import restrictions such as quotas and tariffs on goods imported "in such increased quantities as to be a substantial cause of serious injury, or a threat thereof"[71] to U.S. industry. The trade restrictions are intended to provide temporary relief to displaced American companies, communities and workers.[72]

D. Section 406 Market Disruption Statute

The final trade law, Section 406 of the 1974 Trade Act, is similar to Section 201 but is easier to use and applies only to imports from communist countries. Whereas Section 201 requires a finding of *substantial* injury, Section 406 only requires a finding of *significant* injury.[73] If imports are found to be causing or threatening a significant material injury and the number of imports is increasing rapidly, the President is authorized to impose trade restrictions.[74] This trade restriction has been the most effective means of regulating long term countertrade transactions.[75]

In sum, companies engaging in countertrade will probably not encounter an adverse ruling under the anti-dumping and countervailing duty laws. The potential trade restrictions which can be imposed under the Escape Clause and Market Disruption Statute, however, should be of greater concern. Companies engaging in long term countertrades, particularly with communist countries, must be aware that the import of goods expected as repayment could be jeopardized by quotas and additional duties.

VI. COUNTERTRADE AND GATT

The General Agreement on Tariffs and Trade[76] (GATT) is a multinational treaty designed to promote international trade through the reduction of trade barriers. The GATT prohibits bilateral trading agreements in general and bilateral trading which discriminates against other trading partners in particular.[77] A general goal of the GATT is to remove governmental interference from the international trading process. Since countertrade mandated by a government generally involves a special agreement between two trading partners and interference by the government, an issue exists whether mandated countertrade is a violation of the GATT.

The GATT does not specifically prohibit countertrade. Still, some commentators have suggested that mandated countertrade violates several GATT principles, including the prohibition against quantitative restrictions and the principles of Most Favored Nation and National Treatment[78].

A. Quantitative Restrictions

Article XI of the GATT contains the rule against quantitative restrictions. This Article provides in relevant part that "[n]o 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...." The argument suggesting a GATT violation is that mandatory countertrade creates a restriction to trade other than "duties, taxes or other charges" because it links import licenses to the acceptance of exports.[79] The response to this argument is that Article XI was primarily designed to eliminate quotas.[80] Since countertrade does not limit the amount of imports and actually allows trade to expand, countertrade does not violate Article XI. Respondents further argue that if countertrade is restrictive from a quantitative standpoint, its trade enhancement greatly outweighs its trade restrictions.[81]

B. Most Favored Nation Principle

The GATT Most Favored Nation principle mandates nondiscrimination by requiring contracting parties to treat each other equally with regard to advantages, favors, privileges and immunities.[82] Critics argue that countertrade is inherently discriminatory because it imposes conditions that not all trading partners can equally meet.[83] For example, most small businesses do not have the marketing or financial capability to accept difficult to sell products as payment. Proponents respond that countertrade is not discriminatory because the conditions do not *per se* exclude any nation or company from participating.[84] Proponents further argue that since countertrade imposes burdens and not benefits, the Most Favored Nation principle is not relevant.[85]

C. National Treatment Principle

The GATT principle of National Treatment requires that contracting parties treat imported goods "no less favorable" than those of national origin.[86] Some commentators argue that countertrade violates the National Treatment principle because goods imported through countertrade are treated less favorable than similar internal goods which do not have to be linked to exports.[87] The response to this argument is that the National Treatment principle prohibits only internal regulation and does not apply until the imported goods have cleared through customs.[88] The export requirement imposed initially as a condition to import the goods is therefore irrelevant.

D. Applicability of GATT to Countertrade

As a practical matter, the GATT will rarely affect countertrade. Most countertrade transactions are with communist countries which are not signatories to the GATT and with lesser developed countries which have countertrade exemptions.[89] Further, voluntary countertrades are not prohibited by GATT.[90] In the rare instance when a mandatory countertrade does run afoul of GATT principles, it is unlikely that a formal protest will be lodged. The relatively low volume and amount of countertrade has led to ambivalence of enforcement. Further, the success of a protest is unlikely due to the ease of obtaining a waiver and the low probability that conduct not expressly prohibited by GATT will be considered a violation.[91] Although suggestions have been made to include countertrade in the current Uruguay Round of the GATT negotiations, the low priority of countertrade makes its inclusion unlikely.

VII. CONTRACTUAL ISSUES IN COUNTERTRADE

A countertrade transaction requires the use of contractual agreements. A lawyer responsible for drafting countertrade documents for a western company must be aware of the usual clauses that go into a countertrade contract and their potential drafting problems. The primary contractual issues are product choice, market limitation and transferability, quantity of goods, price, commitment time and penalty clauses.[92]

The importing country will usually try to restrict the list of products available for counterpurchase to those products which it cannot otherwise sell. The proposed available list also may be quite specific to limit the product options of the western company. If the importing country does not have a great need for the western product being exported, it can insist on a one hundred percent countertrade requirement of less desirable products.

The western company, on the other hand, should negotiate for a wide ranging list of available products. The product descriptions should be kept general to increase the flexibility of product choices. If the western company is offering a scarce commodity or one that is particularly important to the importing country, a lower countertrade percentage and a broader list of available products can be negotiated.

The importing country may attempt to place geographic limitations on the resale of its countertraded goods to protect existing markets and existing distributors. The western company should insist that no resale restrictions be included in the contract. Not only will a resale restriction eliminate potential markets for the goods, third parties such as trading houses often will not accept products for resale if the contract contains a marketing restriction.[93]

The quantity of goods to be received as payment in a counterpurchase is usually expressed in terms of percentage of value of the western goods rather than in currency amounts or in number of units.[94] The greater the demand for the western good, the lower the percentage of goods that must be taken as payment.

The price terms in a countertrade contract should be expressed as a formula or other general criteria rather than as a fixed price. For example, the contract might specify that the price should be an "acceptable international market price at the time of delivery."[95] This method, although not very definite, is preferable because the exact goods to be taken as payment are generally unknown and product prices will usually fluctuate over the term of the countertrade. The western company should also insist on a most favored customer clause in the contract which provides for a price that equals the lowest price being charged to other customers by the importing country.[96] Such a clause will protect the western company from competing in other markets against lower priced products sold by the importing country.[97]

The contract should include the time frame within which the western country must purchase the importing country's goods. The western company will generally want a long period of time and the importing country will want its goods purchased for hard currency as soon as possible. Counterpurchase agreements are generally from six months to three years.[98] Industrial compensation agreements can run as long as twenty years.[99]

The western company should consider inserting a penalty (or escape) clause into the contract which will control in the event the company is unwilling or unable to fulfill its countertrade obligations. Such a clause limits the company's exposure for breach of contract to a predetermined amount.[100] Often the importing country will require the western company to furnish a bank guarantee for the penalty amount.[101]

Countertrade agreements by their nature will involve two complications not normally found in contracts governing the sale of goods for cash between private parties. First, countertrade agreements and actions for their breach can get extremely complicated. This is because in a countertrade each party is both a buyer and seller of goods and each is potentially entitled to the full range of both buyer's and seller's remedies.[102] Second, a countertrade is usually entered into with a government or a governmental agency. The western company therefore needs to be aware of the possible effects of sovereign immunity[103] and other governmental defenses such as the Act of State Doctrine.[104]

VII. RECENT DEVELOPMENTS IN AND FUTURE OF COUNTERTRADE

Practitioners are continuing to develop new and innovative uses for countertrade. In July of 1990, the M.W. Kellogg Company was considering building an ammonia plant in Chile that could run off purge gas from a methanol plant funded by its parent company.[105] Since a bank was unlikely to loan money to finance the construction, Kellogg began looking for a source in the developed world that would make an equity investment in return for ammonia production. This potential use of countertrade extended the traditional buy-back arrangement to include third party financing.

Another new countertrade technique is the practice of using future excess capacity to finance present market share. For example, a manufacturer with an idle factory or an airline with extra seats can exchange their future excess capacity for something they can presently use. This countertrading technique increases both short term cash flow and long term market share.[106]

As American firms and trading companies become more familiar with countertrading, this alternative means of exchange should become more flexible and complex. Several different countries may have clearing accounts with a wide range of products available for trade. If a bilateral swap is not possible due to unmatched customer needs, a trading company can mix, match, and swap products in several different trading accounts. For example, if India needs Russian oil but the Russians do not want India's textiles and spices, a trader could work a swap which sent the textiles and spices to the United States, with United States grain going to Russia to balance the accounts. If many different countries maintain countertrade clearing accounts, a trader can negotiate a maze of related internal transfers to complete a deal.

VIII. CONCLUSION

Countertrade is both the oldest and the newest way of trading goods in the world. Its use is currently on the rise, in large part due to third world debt problems and the lack of convertible currencies in eastern countries hungry for western goods.

American companies should investigate and become more knowledgeable on the potential of countertrade. Since many foreign countries now mandate countertrade to some degree, companies insisting on cash may find themselves excluded from many business opportunities. The United States government will provide some, but not much, assistance on countertrade transactions.

Countertrade has proven itself to be a necessary and versatile alternative to traditional methods of trade financing. Although it will never again become the primary method of international exchange, countertrade may be an almost perfect substitute in an imperfect world.

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[1] The currencies of non-market economies are inconvertible because they have no relationship to world prices. *See* Verrill, *Countertrade and Section 406: Statutory Disruption of Trade*, in Interface Two: Conference Proceedings on the Legal Framework of East-West Trade 337 (1982). The currencies of Lesser Developed Countries (LDCs) are unattractive because they are generally overvalued for domestic reasons. *See* Assessment of the Effects of Barter and Countertrade Transactions on U.S. Industries, USITC Pub. 1766, Inv. No. 333-185, at 43-44 (1985) [hereinafter USITC Pub. 1766].

[2] *See* Kostecki, *Should One Countertrade?*, 21 Journal of World Trade Law 7 (1987) [hereinafter *Should One Countertrade?*].

[3] *See* Walsh, *Countertrade: Not just for East-West Any More,* 17 J. World Trade L. 3, 4 (1983) (countertrade is distortionary); see also McVey, *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas,* 16 Law & Pol'y In Int'l Bus. 1 (1984) [hereinafter *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas*].

[4] *See* Zeller, *Countertrade, the GATT, and the Theory of the Second Best,* 11 Hastings Int'l and Comparative Law Review 247, 249 (1988) [hereinafter *Countertrade, the GATT, and the Theory of the Second Best*].

[5] The United Nations has recently estimated that "ten to twenty percent of all world trade is done through countertrade, and that the practice is growing." *See U.S. Still Against Playing Active Role in Barter, Countertrade, Officials Say,* BNA International Trade Daily, November 6, 1991.

[6] *See* Welt, *Unconventional Forms of Financing: Buy-Back/Compensation/ Barter*, 22 New York Univ. J. of Int'l Law and Politics 461 at 462 (1990) [hereinafter *Unconventional Forms of Financing*].

[7] *See* USITC Pub. No. 1766, *supra* note 1, at 3.

[8] *Id.* at 3-4.

[9] *See* L. Welt, Trade Without Money: Barter and Countertrade at 18 (New York: Law & Business, 1984) [hereinafter Trade Without Money].

[10] *See* Grabow, *Negotiating and Drafting Contracts in International Barter and Countertrade Transactions,* 9 N.C.J. Int'l L. & Com. Reg. 255 at 259 (1984) [hereinafter *Negotiating and Drafting Contracts in International Barter and Countertrade Transactions*].

[11] *See Countertrade, the GATT, and the Theory of the Second Best, supra* note 4, at 249.

[12] *See* Schwenk, *North-South Barter Trade,* Barter in the World Economy 94 (B. Fisher & K. Harte eds. 1985).

[13] *See, e.g.,* USITC Pub. 1766, *supra* note 1, at 45.

[14] *See* Lochner, *Guide to Countertrade and International Barter*, 19 Int'l Law. 725 at 731, 732 [hereinafter *Guide to Countertrade and International Barter*].

[15] *See Countertrade, the GATT, and the Theory of the Second Best, supra* note 4, at 250.

[16] *See* Verdun, *Are Governmentally Imposed Countertrade Requirements Violations of the GATT?*, 11 Yale J. Int'l L. 191 at 196 (1985) [hereinafter *Are Governmentally Imposed Countertrade Requirements Violations of the GATT?*].

[17] *See East-west countertrade: A necessary evil,* The Economist p. 79, November 25, 1989.

[18] *See Unconventional Forms of Financing, supra* note 6, at 462.

[19] *See* Miramon, *Countertrade: A Modernized Barter System,* 114 OECD Observer 13 (1982).

[20] *See Unconventional Forms of Financing, supra* note 6, at 462.

[21] *See* McVey, *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas,* 16 Law & Pol'y Int'l Bus. 6 (1984).

[22] See McVey, *Overview of the Commercial Practice of Countertrade*, Barter in the World Economy at 16 (1985).

[23] *See* Guyot, *Countertrade Contracts in International Business,* 20 Int'l Law. 921 at 948 (1986).

[24] *See Countertrade, the GATT, and the Theory of the Second Best*, *supra* note 4, at 249.

[25] *See* Welt, Countertrade Business Practices for Today's World Market 14 at 18 (1982).

[26] *See* Welt, *Unconventional Forms of Financing, supra* note 6, at 462.

[27] *See* Lowenfeld, *Interface IV: Countertrade in Economic Relations Between East and West: an Introduction,* 5 J. Comp. Bus. & Capital Market Law 329, 331 (1983) [hereinafter *Interface IV*].

[28] Figures as high as one half trillion dollars have been estimated. *See* Mishkin, *Countertrade -I*, International Business Lawyer 402 (October, 1989) [hereinafter *Countertrade-I*].

[29] *See* Trade Without Money, *supra* note 9 at 12-14.

[30] *See Interface IV, supra* note 27, at 330.

[31] *See Chemical Click for Oxy*, Chemical Week, May 21, 1975, at 25.

[32] *See Guide to Countertrade and International Barter*, *supra* note 14, at 745.

[33] *See Unconventional Forms of Financing, supra* note 6, at 468.

[34] *See* Trade Without Money, *supra* note 9, at 12.

[35] *See Unconventional Forms of Financing, supra* note 6, at 468.

[36] *See* Dornberg, *Big Slump in East-West Trade*, Dun's Rev., Apr. 1978, at 116.

[37] The Department of Commerce has estimated that companies must increase their prices by approximately ten percent to complete a countertrade. *See* P. Verzariu, Int'l

Trade Admin., U.S. Dep't of Commerce, Int'l Countertrade: A Guide for Managers and Executives, at iii (1984).

38 *See* Note, *U.S. Countertrade Policy: Is it Economically Sound?* 19 Geo. Wash. J. Int'l L. & Econ. 829 at 843 (1985) [hereinafter *U.S. Countertrade Policy*].

39 *Id.* at 853.

40 *Id.* at 843.

41 *Id.* at 842, 843.

42 *See Countertrade, the GATT, and the Theory of the Second Best, supra* note 4, at 255.

43 *Id.* at 256-263.

44 *Id.* at 256.

45 *Id.*

46 *Id.* at 260.

47 *Administration Opposes Forced Barter, Countertrade But Not Voluntary Deals*, 9 U.S. Export Weekly (BNA) 58 (Oct. 12, 1983).

48 Walsh, *The U.S Stand on Countertrade,* Across the Board, March 1984, at 40 [hereinafter *The U.S Stand on Countertrade*].

49 USITC Pub. 1766, *supra* note 1, at 68, 69.

50 *Id.*

51 *See* Note, *The Need for a United States Countertrade Policy*, 7 Northwestern J. of Int'l L. 113 at 128 (1985) [hereinafter *The Need for a United States Countertrade Policy*].

52 *See* Note, *Bauxite for Butter: The U.S.- Jamaican Agreement and the Future of Barter in U.S. Trade Policy*, 16 Law & Pol'y in Int'l Bus 239, 240 (1984).

53 *See Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas, supra* note 3, at 65.

54 *See* USITC Pub. 1766, *supra* note 1, at 73, 76 (1985).

55 *Id.*

56 *See The U.S. Stand on Countertrade, supra* note 48, at 41.

[57] *Administration Opposes Forced Barter, Countertrade But Not Voluntary Deals*, 9 U.S. Export Weekly (BNA) 58 (Oct. 12, 1983).

[58] Note, *U.S. Countertrade Policy: Is It Economically Sound?* 19 Geo. Wash. J. Int'l L. & Econ. at 870 (1985).

[59] Comment, *The Need for a United States Countertrade Policy*, 7 Northwestern Journal of International Law & Business 113 at 156 (1985).

[60] 19 U.S.C.A. §§ 1671-1677h, (West 1982 & 1985 Supp.).

[61] 19 U.S.C.A. §§ 1671-1677h, (West 1982 & 1985 Supp.).

[62] 19 U.S.C.A. 2251, (1985 Supp.)

[63] 19 U.S.C.A. § 2436 (1982).

[64] 19 U.S.C.A. § 1671-1677h, (West 1982 & 1985 Supp.).

[65] 19 U.S.C.A. § 1677b(c) (1982).

[66] *See* USITC Pub. No. 1766, *supra* note 1, at ix-x.

[67] *See* Zarin, *Countertrade and the Law*, 18 Geo. Wash. J. Int'l L. & Econ. 236 at 253 (1984) [hereinafter *Countertrade and the Law*].

[68] The International Trade Commission must make a preliminary finding of material injury and the Commerce Department must find that dumping has occurred. 19 U.S.C.A. § 1673b (West 1982 & 1985 Supp.).

[69] 19 U.S.C.A. § 1671(a) (West 1982 & 1985 Supp.).

[70] *See Countertrade and the Law*, *supra* note 67, at 260.

[71] 19 U.S.C.A. § 2251 (West 1982 & 1985 Supp.).

[72] 19 U.S.C.A. § 2251(a)(1)(b) (1982).

[73] 19 U.S.C. § 2436 (1982).

[74] *Id.*

[75] Section 406 was invoked twice in one year on a long term countertrade between Occidental Petroleum Corporation and the Ministry of Foreign Trade of the U.S.S.R. *See Anhydrous Ammonia From U.S.S.R.*, U.S. Int'L Trade Comm'n Pub. No. 1006 at 3 (1980).

[76] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

[77] *See Id.* art. XI, para. 1; art. XXXXII, para. 2.

[78] *See Are Governmentally Imposed Countertrade Requirements Violations of the GATT?*, *supra* note 16, at 207.

[79] *See* Roessler, *Countertrade and the GATT Legal System*, 19 J. World Trade L. at 605 (1985) [hereinafter *Countertrade and the GATT Legal System*].

[80] *See Are Governmentally Imposed Countertrade Requirements Violations of the GATT?*, *supra* note 16, at 205.

[81] *See* Liebman, *Comment: GATT and Countertrade Requirements*, 18 J. World Trade L. 252 at 258, 259 (1984) [hereinafter *Comment: GATT and Countertrade Requirements*].

[82] GATT, *supra* note 76, art. I(1).

[83] *See Comment: GATT and Countertrade Requirements, supra* note 81, at 253.

[84] See Gadbaw, *The Implications of Countertrade under the General Agreement on Tariffs and Trade*, 5 J. Comp. Bus. & Capital Markets L. 355 at 359 (1983).

[85] *See Countertrade and the GATT Legal System, supra* note 79, at 605.

[86] GATT, *supra* note 76, art. III(4).

[87] *See* Czinkota & Talbot, *GATT Regulation of Countertrades: Issues and Prospects*, 1 Int'l Trade J. 155 at 160 (1986).

[88] *See Countertrade, the GATT, and the Theory of the Second Best, supra* note 4, at 274.

[89] *See U.S. Countertrade Policy, supra* note 38, at 841.

[90] *Id.* at 840, n. 107.

[91] *See The Need for a United States Countertrade Policy, supra* note 51, at 134.

[92] *See Countertrade -I, supra* note 28, at 403.

[93] *Id.*

[94] *See Negotiating and Drafting Contracts in International Barter and Countertrade Transactions, supra* note 10, at 266.

[95] *Id.*

[96] *See Countertrade -I*, *supra* note 28, at 403.

[97] *Id.*

[98] *See The Need for a United States Countertrade Policy*, *supra* note 51, at 118.

[99] *See* USITC Pub. 1766, *supra* note 1, at 3.

[100] *See Countertrade-I*, *supra* note 28, at 403.

[101] *Id.*

[102] *See* Erma, *Countertrade-II*, International Business Lawyer 405 (October, 1989).

[103] The Foreign Sovereign Immunities Act was enacted to clarify when a federal court could acquire jurisdiction over a foreign state. 28 U.S.C. § 1330 (1976).

[104] The Act of State Doctrine is a judicially fashioned rule which confers presumpative validity on certain acts of foreign states by "rendering non-justiciable claims that challenge such acts." *See Chuidian v. Philippine National Bank* 734 F. Supp. 415 (C.D.Cal. 1990).

[105] *See Countertrade: Coming into View*, 238 Chemical Marketing Reporter at 5, July 23, 1990.

[106] *See Funding Overseas Expansion The Cash-Flow-Friendly Way*, Business International Money Report (January 20, 1992).