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Guide to Countertrade and International Barter

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Guide to Countertrade and International Barter†

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†A bibliography on barter and countertrade appears elsewhere in this issue. *See* Whisman, *Countertrade: A Selected Bibliography*, 19 INT'L LAW. 1013 (1985).

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I. Introduction

In the past several years, the use of barter and countertrade has grown to the extent that it now touches an estimated twenty to thirty percent of all international trade.[1] Some projections estimate that barter and countertrade may affect up to fifty percent of all international commerce by the year 2000.[2] The recent growth of the use of barter and countertrade as a means of finance and currency exchange appears in large part to be due to the world debt crisis and the strains it has brought to bear on the multilateral trading and international monetary system that has served most of the world since World War II.[3] This article examines the types of countertrade—its benefits and hazards, its recent growth and present as well as potential future use—with special attention paid to various practical and legal issues which should be addressed before participating in a countertrade transaction.

II. Definitions: Countertrade, Barter, and the Basic Types of Countertrade

Semantic problems often arise in discussing barter and countertrade because parties often use the words "barter" and "countertrade" inter-

1. For example, Undersecretary of Commerce for International Trade, Lionel Olmer, has estimated that 25 percent of world trade is now subject to countertrade. Hershey, *A Perilous Time for World Trade,* N.Y. Times, Aug. 1, 1982, § C, at 9, col. 1.
2. Briggs, *Back to Barter?*, FORBES, March 12, 1984, at 41, col. 1.
3. *See infra* text accompanying notes 62–77.

changeably and use different terminology to describe the various types of countertrade. It is thus appropriate at the outset to define the terms "countertrade" and "barter" and to describe the most important types of countertrade.

A. COUNTERTRADE

The term "countertrade" may be defined narrowly or broadly.[4] Generally, countertrade may be described as a technique by which one can obtain goods or services without necessarily having to use money.[5] A countertrade transaction usually consists of a parallel set of obligations in which the parties each undertake to sell goods or services to each other in separate, but related transactions.[6] Further, countertrade is essentially a set of rules which is imposed by one nation on trading partners from other nations who must comply with the rules if they wish to transact business.[7] Therefore, in a sense, countertrade obligations may be seen as a type of license to do business.[8]

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4. For examples of definitions of countertrade and breakdowns of the types of countertrade, see McVey, *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas,* 16 LAW & POLICY INT'L BUS. 1 (1984); P. VERZARIU, COUNTERTRADE, BARTER & OFFSETS 23–41 (1985); L.G.B. WELT, TRADE WITHOUT MONEY: BARTER AND COUNTERTRADE 15–27 (1984).

5. M. Botta, *Countertrade's Back for a While,* AMERICAN METAL MARKET, Sept. 7, 1984, at 3A, 11A, col. 1. Although countertrade transactions may and usually do involve the use of hard currency, since the seller's purchases from the buyer work toward offsetting the buyer's obligation to pay the seller, the actual hard currency outlay is minimized.

It should be noted that some countertrade transactions, in addition to being a way to trade with a minimum outlay of hard currency, may also at times be viewed as a form of currency exchange. For example, one American company sold breeding swine to a Latin American country for pesos since the Latin American buyer had no dollars. The American company used the pesos to purchase sugar from the country, which the company later sold to a Chicago food manufacturer for dollars. For the American company, which never had a use for the sugar, the deal was essentially a currency-trading transaction since the value of the deal was not in securing the sugar but only in the dollar value received for the sale of the sugar. Maidenberg, *Bartering Aids Poor Nations,* N.Y. Times, Jan. 17, 1983, § D, at 1, col. 3.

Similarly, some companies have used countertrade in an identical fashion to collect debt. For example, where a foreign debtor lacks dollars to pay an American creditor, the American creditor can accept payment in a foreign currency, use the currency to purchase foreign goods (to avoid foreign currency controls) and resell the foreign goods in the American market for dollars. Briggs, *supra* note 2, at 41. In addition, recent suggestions have been made to use countertrade to allow multinational banks to collect otherwise uncollectible sovereign debt through debt-for-equity or asset swaps. *Defusing the Debt Bomb the Less Painful Way,* Wall St. J., April 1, 1985, at 1, col. 5. Ironically, countertrade has also been used by some nations to avoid paying off their foreign debts.

6. Analysis of Recent Trends in U.S. Countertrade, Report on Investigation No. 332–125 under Section 332 of the Tariff Act of 1930, United States International Trade Commission Publication 1237 (1982), at 1.

7. Maidenberg, *supra* note 5.

8. *Id.*

Generally, countertrade is not a process codified by specific law.[9] Rather, it is usually a negotiation demand utilized to accomplish trade when the party making the demand possesses insufficient quantities of hard currency.[10] Countertrade, therefore, may be viewed as a means of finance[11] in which a buyer requires purchases from its seller as an offset to reduce or restrict the flow of scarce hard currency across the buyer's national boundaries.[12]

Countertrade transactions occur in a variety of forms and are referred to by a variety of names.[13] No single set of agreed-upon terms for the various types of countertrade exist: parties to countertrade transactions often use different terms to describe the same transaction, in part because of their frequently different economic perspectives or because they choose to emphasize one particular aspect of a given deal over another.[14] Generally, however, all forms of countertrade tend to share the common characteristic of a seller contracting to sell to a buyer in one contract and, in a separate but related agreement, contracting to buy from the buyer (or from whomever the buyer designates) goods or services equal to an agreed-upon percentage of the value of the original sales contract.[15]

Countertrade is normally required, requested or undertaken when (1) as mentioned earlier, one or both trading parties lack funds to pay or do not wish to use scarce hard currency reserves, (2) it helps sustain a nation's established export prices in the face of declining demand, or (3) a nation's exports have limited marketability in foreign markets with which trade is desirable. Today, many countries exhibit one or more of the above conditions.[16]

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9. L. G.B. Welt, Countertrade: Business Practices For Today's World Market, American Management Association Management Briefing (1982), at 45. However, this is not true in all cases. For example, Indonesia currently has a countertrade law which requires a seller's readiness to counterpurchase 100 percent of the value of its exports to Indonesia, either itself or through third parties acceptable to Indonesian authorities. *See infra* note 82; *see generally Why the Banks Have to Barter,* EUROMONEY TRADE FINANCE REPORT, May 1983, at 19; *see also infra* note 74 and text accompanying notes 78–86.
10. Welt, *supra* note 9, at 45.
11. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at v.
12. Welt, *supra* note 9, at 7.
13. *See infra* text accompanying notes 21–39.
14. Welt, *supra* note 9, at 13–14.
15. P. VERZARIU, S. BOZEK & J. MATHESON, EAST-WEST COUNTERTRADE PRACTICES: AN INTRODUCTORY GUIDE FOR BUSINESS, U.S. Department of Commerce, International Trade Administration (1978), at 3; *see also* Bracher, *If Countertrade Is Inevitable Make the Best of It,* THE BANKER, May 1984, at 70, col. 2.
16. P. VERZARIU, COUNTERTRADE PRACTICES IN EAST EUROPE, THE SOVIET UNION AND CHINA: AN INTRODUCTORY GUIDE TO BUSINESS, U.S. Department of Commerce, International Trade Administration, Office of East West Trade Development, 1980, at 2. Further, it should be noted that countertrade is often employed to fight protectionism in developed countries. Bracher, *supra* note 15, at 71, col. 1.

The foregoing definition of "countertrade" could easily be construed as not including barter, which, as is described in greater detail below,[17] does not involve any currency exchange, entails only one transaction, and normally occurs under free trade conditions. It is more usual in everyday parlance, however, to treat barter as one of the types of countertrade, in spite of the differences just mentioned. Therefore, for ease of exposition, that usage is adopted hereinafter unless the context indicates otherwise.[18]

One point to bear in mind while reviewing the typology of countertrade is that countertrade transactions tend not to be standardized, i.e., each one tends to be unique in some way. The categories of countertrade discussed immediately below thus should not be viewed as rigid, as mutually exclusive (with the possible exception of barter), or as all-inclusive: it is common to encounter hybrids,[19] and new varieties are constantly evolving to meet the needs of particular transactions.[20]

B. Barter and Other Types of Countertrade

1. *Barter*

Barter, also referred to as "swapping," is usually defined as a direct product-for-product (or service-for-service, or service-for-product, or product-for-service) exchange transaction without the use of money.[21] Under a classic barter arrangement, only two parties are involved, the terms of the transaction are agreed to in advance, and the goods or services are exchanged pursuant to a single contract, usually with the exchange occurring

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17. *See infra* text accompanying notes 21–23.

18. For a more thorough barter versus countertrade distinction, see D. Atkins, Countertrade, Clearing Arrangements, Reciprocity and Other Instruments of the New Bilateralism in International Trade, at 2, n.1. Paper presented at the Allied Social Sciences Association Meeting (Society of Government Economists), San Francisco, December 29, 1983. Mr. Atkins is an economist with the U.S. Congress Office of Technology Assessment. *See also* Seberger, *The Banking Provisions of the Export Trading Company Act of 1982,* 39 BUS. LAW. 475, 478, n. 10 (1984).

19. P. Verzariu, *supra* note 16, at 8.

20. One such example is known as industrial offset, in which a manufacturer-seller (usually a firm in a developed country) agrees to purchase from its buyer (often a foreign government) components or services necessary for the manufacture of the goods it intends to sell to the buyer—*i.e.*, a form of reverse compensation or buyback countertrade, practices described *infra* at text accompanying notes 24–36, *Why the Banks Have to Barter, supra* note 9, at 18. Industrial "offsets" mainly occur when a sovereign nation, in procuring military equipment or in contracting for the construction of a large-scale capital project, requires the foreign selling firm or firms to (1) purchase portions of the component parts to be used from the buyer-nation, (2) employ firms situated in the buyer-nation as subcontractors, (3) transfer technology to the buyer-nation, (4) invest in firms located within the buyer-nation, or (5) convey other types of economic benefits to the buyer-nation in return for the buyer-nation's granting of the contract to the supplier firm. McVey, *Quarterly World Countertrade Wrap-up,* INTERNATIONAL TRADE ALERT, Aug. 28, 1984, at 1BAP-3 n.6; Seberger, *supra* note 18, at 478, n. 10.

21. *See, e.g.,* Botta, *supra* note 5, at 3A, 11A, col. 1.

over a relatively short period of time, such as two years.[22] According to traders, barter is not now common in international trade.[23]

2. *Counterpurchase*

Counterpurchase, also known as "parallel barter,"[24] is a countertrade transaction which involves the counterdeliveries of goods that are normally nonresultant products, i.e., goods which are unrelated to the goods originally purchased. For example, the sale of a soft drink bottling plant in return for the purchase of vodka is a form of counterpurchase. The exchange of goods under a counterpurchase agreement generally takes place over a relatively short period of time, usually one to five years, and the value of the goods offered as counterdeliveries is usually less than 100 percent of the value of the original sales contract.[25] Normally, the amount of counterpurchase demanded is in inverse proportion to the importance of the goods to the buyer's country.[26] Each party usually pays cash for the goods or services it receives.[27]

Counterpurchase transactions are becoming increasingly popular and today often involve a third party, such as the countertrade department of a bank or trading company, which participates in the transaction to assume the original seller's purchase obligations.[28] Although a counterpurchase contract may require the purchase of specific goods at a set price, usually it instead identifies a list of goods which may be selected for purchase and the criteria for pricing rather than an actual fixed price.[29]

3. *Compensation*

Compensation, sometimes referred to as "buyback,"[30] "offtake"[31] or "industrial cooperation,"[32] involves repayment of the original purchase through the sale of a resultant, i.e., related, product. Thus, the original seller receives its payment in products derived directly from, or produced

22. Truell, *Barter Accounts for a Growing Portion of World Trade Despite Its Inefficiency,* Wall St. J., Aug. 15, 1983, at 21, col. 5–6; P. VERZARIU, *supra* note 16, at 11; M. Botta, *supra* note 5, at 3A, 11A, col. 1; *see also* Welt, *supra* note 9, at 15.

23. Truell, *supra* note 22 (the term "Barter" in Truell's title corresponds to the term "countertrade" as used herein); *Why the Banks Have to Barter, supra* note 9, at 18; M. Botta, *supra* note 5, at 3A, cols. 2–4.

24. Welt, *supra* note 9, at 15.

25. P. VEZARIU, *supra* note 16, at 7–8; Farrell, *Countertrade: A Special Kind of Buying and Selling,* PURCHASING WORLD, Nov. 1979, at 17.

26. Welt, *supra* note 9, at 17.

27. P. VERZARIU, *supra* note 16, at 7–8; Farrell, *supra* note 25, at 17.

28. Truell, *supra* note 22, at 21, col. 5–6; Welt, *supra* note 9, at 16.

29. Welt, *supra* note 9, at 16.

30. P. VERZARIU, *supra* note 16, at 8; Farrell, *supra* note 25, at 17.

31. *Why the Banks Have to Barter, supra* note 9, at 18.

32. Welt, *supra* note 9, at 19.

by, its original sale of technology, plant or equipment.[33] The sale of a turnkey oil refinery in return for the purchase of refined oil is an example of a compensation countertrade deal. Because payment is in the form of a resultant product, the time lag between the original sale and payment is somewhat lengthy and often lasts five to ten years or more.[34] Compensation agreements usually require that the original seller ultimately purchase an amount of resultant product which exceeds the value of the original export contract. Also, the dollar value of most compensation agreements is quite high, and, if measured by dollar value, compensation is the fastest growing form of countertrade today.[35]

Western companies often commit themselves to compensation agreements during periods of slack industrial development in the West as a way to secure major plant, equipment, or licensing sales. In some cases, compensation can also offer a guaranteed long-term supply of energy products, raw materials, or manufactured goods that may be difficult to obtain or are essential to a company's operation elsewhere. Additional profit may also accrue to the Western participant from sales that are not part of the compensation deal itself. For instance, it is common for the purchaser in a compensation agreement to satisfy its needs for the product that will finally be produced by buying the product from the seller until the purchaser can produce the product itself.[36]

4. *Switch Trading*

Switch trading, also known as "clearings," consists of a bilateral trade-and-payment agreement under which the value of goods exported from county X to country Y is not actually paid but is credited to country X on the clearing account and vice versa as goods are shipped in the other direction.[37] Usually there are provisions in a clearing agreement in which the outstanding balance and interest thereon is to be settled at the end of each year of

33. For example, the West German company which is participating in the construction of the Soviet gas pipeline, which will deliver Soviet natural gas from the Urengoy gas fields in Western Siberia to various West European countries, will be paid with Soviet natural gas. Truell, *supra* note 22; *see also* Welt, *supra* note 9, at 17–19; Lowenfeld, *Interface IV: Countertrade in Economic Relations Between East and West—An Introduction,* 5 J. OF COMP. BUS. & CAP. MKT. L. 329 (1983).

34. P. VERZARIU, *supra* note 16, at 8; Farrell, *supra* note 25, at 17.

35. Farrell, *supra* note 25, at 17. The Organization of Economic Cooperation and Development (OECD) has estimated that the value of compensation deals in East–West trade may have been as high as $ 30–35 billion for the years 1969–79. Welt, *supra* note 9, at 18.

36. Welt, *supra* note 9, at 19.

37. East European countries routinely enter into state-trading "clearings" agreements with each other and with Third World countries. They view switch trading as a necessary tool for economic planning including the planning of their foreign exchange balances. Atkins, *supra* note 18 at 12–13. For an example of how complex such transactions can be, see *Countertrade, Switch and Barter,* 11 INT'L CURRENCY REV. 60–63 (Nov. 1979), which describes East European switch trading with Third World countries such as India.

some other agreed-upon period.[38] Often the agreement may provide that the country with the surplus in bilateral trade can make available to a third party a portion or all of its clearing account. The third party which acquires rights to the clearing account surplus purchases goods from the country having the clearing account deficit and through a series of complex international transactions, converts these goods into hard currency.[39]

III. Historical Background

A. Origins and Growth of Countertrade

The modern era of countertrade began when countertrade helped the German economy overcome its post-World War I recession.[40] But the practice really first took hold after World War II, when the Soviet Union and its Eastern bloc allies took up countertrade to circumvent political and economic restrictions on East-West trade and when it was used as an informal *quid pro quo* arrangement between friendly nations in the West because Western bank credit was hard to obtain.[41] The United States government became actively involved in countertrade in 1950 with the development of the Department of Agriculture's barter program. In that program, the Commodity Credit Corporation, a government financing organization for United States agricultural exports, acquired agricultural commodities through the government's domestic price-support program and made them available for international barter transactions. During the seventeen-year lifetime of the program, more than $ 1.2 billion worth of United States agricultural commodities were exchanged for foreign materials for the United States' strategic stockpile and goods and services needed abroad by United States government agencies.[42]

Countertrade became an increasingly important method of international

38. *Why the Banks Have to Barter, supra* note 9, at 18. Today there are over eighty countries which operate government-controlled bilateral trading arrangements with at least one other country. Bracher, *supra* note 15, at 69, col.2.

39. P. Verzariu, *supra* note 16, at 11; Farrell, *supra* note 25 at 17.

40. P. Verzariu, *supra* note 16, at 2.

41. Maidenberg, *supra* note 5, at 1, col. 3; Truell, *supra* note 22, at 21, col. 5–6. For a brief overview of United States efforts to restrict trade with the Soviet Union and Eastern Europe at the end of World War II, see A. Lowenfeld, Trade Controls For Political Ends 4–13 (1977). During this same period, a web of international agreements between Western governments provided for the exchange of goods under bilateral clearing agreements and contributed to the recovery of many war-ravaged and impoverished national economies. P. Verzariu, *supra* note 16, at 2–3.

42. P. Verzariu, *supra* note 16, at 3; *U.S., Jamaica Sign Second Barter Deal Exchanging U.S. Dairy Goods for Bauxite,* 9 U.S. Import Weekly 352 (Nov. 30, 1983). *See also* Conditions That Limit Using Barter and Exchange to Acquire National Defense Stockpile Materials, Report to the Chairman, Subcommittee On Preparedness, Committee on Armed Services, United States Senate, GAO/RCED–84–24, Oct. 19, 1983.

trade during the 1970s, when a sharp rise in oil prices by the Organization of Petroleum Exporting Countries (OPEC) shook the world's trading system.[43] As the terms of trade deteriorated in most of the non-oil exporting Third World, starting with the explosion in costs of imported energy, countertrade was increasingly seized upon to compensate for these countries' lagging export earnings.[44] The 1970s was also a time of rapid industrial growth and increased production capacity in the Soviet Union and Eastern Europe. Despite this fast growth, however, these nations did not capture the needed market shares in the West to achieve positive trade balances. In order to reduce trade imbalances, foster exports and minimize the outflow of their limited hard currency reserves, the Soviet Union and Eastern Europe increasingly linked Western suppliers' sales to required purchases of Eastern goods.[45] As a result, countertrade activities by United States firms expanded during the 1970s, coinciding with the growth in trade between the United States and both Third World and Eastern European countries. During this period, both Third World and East European countries also increasingly adopted countertrade due to a combination of high levels of indebtedness to Western financial institutions and overvalued currencies.[46]

Countertrade has increased tremendously over the last several years and today is growing by leaps and bounds. Although the exact amount of worldwide business represented by countertrade is not known because such trade is not monitored,[47] current estimates are that it presently involves approximately 20 percent to 30 percent of all international trade,[48] up from an estimated 2 percent in 1977.[49] Indeed, according to a survey recently

43. Truell, *supra* note 22. OPEC's role in establishing a higher price for oil created unique conditions giving rise to countertrade. Ironically, many oil-producing countries today are looking to countertrade to finance their ambitious development plans following the recent decline in real oil prices. Welt, *supra* note 9, at 65. For example, Suadia, Saudi Arabia's national airline, plans to double the size of its fleet of Rolls Royce-engined Boeing 747s in a cashless deal worth almost $1 billion, in which Boeing will provide Saudi Arabia with ten planes and Rolls Royce will supply the country with forty engines in return for more than thirty-one million barrels of oil. It is believed this is the first time Saudi Arabia has become involved in a direct oil-for-goods deal (Young, *Saudis Pay in Oil for Rolls Deal,* London Times, July 19, 1984, at 15, col. 7), although another countertrade deal is reportedly being negotiated with France. *See Strength in Oil Prices Isn't Likely to Last, Many Analysts Think,* Wall St. J., April 23, 1985, at 1, col. 6.

44. Maidenberg, *supra* note 5.

45. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15.

46. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6.

47. Truell, *supra* note 22, at 21, col. 5–6; *see also* Martin & Ricks, *Countertrading Grows as Cash-Short Nations Seek Marketing Help,* Wall St. J., March 13, 1985, at 1, col. 6.

48. Briggs, *supra* note 2, at 41, col. 1. This estimate is provided by Mr. James Walsh, an economist with the U.S. Department of Commerce. *Id.*; *see also* Gruson, *Corporate Barter on the Upswing,* N.Y. Times, Feb. 20, 1983, § F, at 4, col. 3; *Quid Pro Quo,* THE ECONOMIST, Feb. 6, 1982, at 20; Welt, *supra* note 9, at 11–12.

49. Gruson, *supra* note 48, at 4, col. 3. The 2 percent figure comes from the U.S. Department of Commerce. *Id.*

completed by the National Foreign Trade Council Foundation, the number of reported transactions involving countertrade has increased at the rapid rates of 50 percent, 64 percent, and 117 percent in the last three years.[50] Present projections predict the growth of countertrade will continue and estimate that countertrade may affect up to 50 percent of world trade by the year 2000.[51]

As with worldwide countertrade, it is difficult to accurately measure the amount of United States imports which result from countertrade because such information can presently only be verified to the extent that United States firms voluntarily provide details about the import side of their countertrade transactions.[52] With this in mind, countertrade measured by United States imports was estimated to equal $279 million in 1980, a threefold increase over a 1974 estimate of $98 million.[53] On average, 8 percent of all United States exports are estimated to be presently subject to countertrade, with countertrade obligations varying widely from industry to industry.[54]

The number of foreign nations which either request or require some countertrade is also growing quickly. Today as many as eighty-eight countries request or require countertrade, up dramatically from twenty-eight countries three years ago and only fifteen countries in 1972.[55] In terms of specific types of countertrade, as of August 1983, seventeen countries insisted on counterpurchase as part of any trade agreement.[56]

World trade has arguably become the major economic issue of the 1980s, just as oil was for the last decade.[57] Attention is increasingly being given to the fact that the international financial system faces a ticking "debt bomb," represented by the over $700 billion which Third World and Eastern European countries owe to foreign banks and government agencies; and questions are increasingly being heard about the safety and soundness of the world banking system.[58] Indeed, the nine largest United States banks alone

50. Briggs, *supra* note 2, at 42, col. 1; *see also* S. Brown, *U.S. Firms' Countertrade Registered Dramatic Surge in 3 Years, Survey Shows*, AMERICAN METAL MARKET, Jan. 2, 1984, at 5.

51. Briggs, *supra* note 2, at 41, col. 1.

52. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 16. One reason the exact dollar value of trade affected by countertrade cannot be determined and is most likely understated is that many countertrade agreements between United States firms and foreign firms or governments are viewed as proprietary information and are never released to the public. *Id.* at v.

53. *Id.* at v & vi. These figures do not take into account countertrade obligations assumed by United States firms which were shipped directly to third-country markets.

54. Briggs, *supra* note 2, at 42, col. 1. While United States export sales subject to countertrade may average approximately 8 percent, the percentages vary widely from industry to industry, as exemplified by the aerospace industry where the figure is 47 percent. *Id.*

55. *Id.*

56. Truell, *supra* note 22, at 21, col. 5–6.

57. Farnsworth, *William Brock: Our Man for Trade*, N.Y. TIMES (Magazine), Nov. 13, 1983, at 126, 128.

58. *See, e.g., A Turbulent Rescue Role for The I.M.F.*, N.Y. Times, May 4, 1984, § D, at 1, col. 3.

are owed nearly four times their capital by forty-six countries, many of which are on the verge of defaulting on their debt obligations.[59]

The 1980s is also a time of growing recognition of United States dependence on trade to create jobs. However, in part because of world recession and shrinkage in international trade in the early 1980s, a new mercantilism appears to have surfaced in which each nation is attempting to gain an advantage for itself by selling more than it buys. Governments are competing with each other through a proliferation of export subsidies and import controls to try to build up trade balances. Their objective today is less to accumulate gold bullion than to generate—or at least preserve—jobs. And all this is happening at a time of high global unemployment.[60]

In recent years, four out of five jobs in the United States have been created in export industries. In 1982 alone, the export of manufactured goods accounted for one out of every five jobs in United States factories. In addition, foreigners buy the output of one out of three acres of United States farmland. Total United States exports and imports in 1983 represented more than twenty percent of the $3 trillion value of goods and services generated in the United States during the same year, against only 5 to 10 percent of the country's economic production fifteen years ago.[61] Given the increasing importance of foreign trade to the United States economy, if the United States is to continue its economic growth in the 1980s and beyond, it will need to continue to export its goods and services. Under present world

59. Farnsworth, *supra* note 57, at 128.

60. *Id. See generally,* Wm. R. Cline, ed., *Trade Policy in the 1980s,* Institute for International Economics, Washington, D.C. (1983), at 1–5. Indeed, it is this very mercantilist/protectionist attitude by Western industrial nations which in part has produced the demand for countertrade by many countries from the Third World. For instance, one extremely broad United States protectionist measure is the latest Multi-Fiber Agreement under which the United States will impose new restrictions on textile imports from Hong Kong, South Korea and Taiwan, limiting them to an annual increase of half a percent over the next four years. Bilateral deals either signed or to be signed with Mexico, Pakistan and Brazil will hold these countries to the same export levels permitted under the Multi-Fiber Agreement between 1978 and 1981. Other developing countries, including India, Sri Lanka, and the Philippines, will have to accept cuts in their quotas of textiles to the United States. Such restrictions retard these nations' economic growth, perpetuate poverty and perhaps even threaten world peace. R. Reich, THE NEXT AMERICAN FRONTIER, 186 (1983); *see also Tighter U.S. Rules Seen on Imports of Textiles,* N.Y. Times, July 31, 1984, § D, at 1, col. 4; *Textile Rules Jolt Hong Kong,* N.Y. Times, Aug. 7, 1984, § D, at 4, col. 1; *Textile Pleas By 13 Nations,* N.Y. Times, Aug. 8, 1984, § D, at 9, col. 1. Today, the United States protects approximately one-third of its manufacturing industry and large sections of agriculture from international competition. Hufbauer, *A Better Way to Get Trade Relief,* BUS. WK., July 16, 1984, at 14, col. 1; *see also The Making of Fortress America,* N.Y. Times, Aug. 5, 1984, at 1, col. 2. Many import controls by Third World nations are austerity measures required by the International Monetary Fund to enable debtor nations to have a positive balance of payments to pay off their outstanding debt. *See, e.g., A Turbulent Rescue Role for the I.M.F.,* N.Y. Times, May 4, 1984, § D, at 1, col. 3. The same, however, cannot be said of rising trade barriers in many industrial countries.

61. Farnsworth, *supra* note 57, at 128.

economic circumstances, this will require participation in countertrade by United States businesses.

B. Reasons for the Continued Growth of Countertrade

Requests for and requirements of countertrade are increasing both in Third World and East European countries in large part due to the world's present monetary and debt problems.[62] These problems are in part illustrated by the facts that collectively the Western world's commercial banks currently hold about $600 billion in debts from Third World and Eastern European countries and that these banks are having difficulty collecting payments due on an uncomfortably large portion of this amount.[63] As a consequence, credit is tight, and many nations lack the hard currencies they need to pay for imports of food, raw materials and capital goods.[64] In response to their lack of hard currency, countries are asking and in some instances demanding that, as a condition of trade, foreign vendors accept payment through countertrade.[65]

In addition to the need for acquiring necessities, countertrade practices have been fueled by the desire of many nations to reduce trade deficits and to continue their drive toward greater industrialization.[66] Further, countertrade has been used to foster exports,[67] to maintain or increase levels of employment, to prevent a further widening of a technology gap, and to stabilize the prices and demand for commodities exports. Also, some countries see countertrade as a hedge against rapidly fluctuating prices for imported commodities due to exchange rate swings.[68]

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62. Truell, *supra* note 22, at 21, col. 5–6.

63. Gilpin, *World Debt Refinancing and Its Impact on Banks*, N.Y. Times, June 18, 1983, at 29, col. 1.

64. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 2; Truell, *supra* note 22, at 21, col. 5–6; *see also* Kilborn, *U.S. Repays Banks $431 Million Debt Owed by 4 Nations*, N.Y. Times, March 17, 1984, § A at 1, col. 6.

65. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 15; Maidenberg, *supra* note 5, at 1, col. 3. In fact, countertrade, under bilateral government agreements, is being widely practiced by developing nations in trade among themselves. P. Verzariu, *supra* 16, at 3. For example, in one countertrade deal, India agreed to exchange 2 million metric tons of pelletized iron ore for Indonesian sponge iron, as well as nickel, tin and other nonferrous metals. India is also trading tractors and machinery to Zambia in exchange for copper, cobalt, zinc and other metals. *Growing Worries Over Buy-Back Deals*, Chemical Week, June 2, 1982, at 40, col. 1.

66. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 2, 10; *see also Growing Worries Over Buy-Back Deals*, *supra* note 65, June 2, 1982, at 38, col. 2.

67. Supported by inadequate export marketing networks and facing lagging demand and protectionist attitudes toward a number of their products in Western markets, developing countries are pressing countertrade demands as a means of creating markets for their exports as well as a substitute for cash payments for needed imports. P. Verzariu, *supra* note 16, at 3.

68. *Id.* at 10. Western inflation is a crucial element in the demand for countertrade in Eastern Europe since international commodity prices are determined in Western markets. Because

As countertrade demands have increased, Western firms have begun to compete with each other for sales both by complying with countertrade demands and by proposing innovative countertrade contracts themselves to finance their sales, thereby assisting in the expansion of the practice.[69] This competition is due in part to the desire by Western companies to maintain their sales volume, market share, and profit levels since, according to 1982 statistics, Third World countries alone purchased 40 percent of all United States exports—nearly 3 percent of United States GNP—and bought 28 percent of all exports by the industrial nations belonging to OECD.[70] In addition, governments of the industrialized West have both tolerated and even promoted countertrade to prevent potential defaults by debtor nations since such defaults would disrupt trade relationships, slow the growth of both industrialized and developing nations, and create possible foreign policy problems.[71]

Given the present growth of countertrade and the amount of money being invested by international trading companies, multinational corporations, and international banks in the establishment of companies to handle countertrade transactions,[72] both traders and government officials alike generally accept that countertrade will continue to play a significant role in world trade for at least the immediately foreseeable future.[73] Most Third World countries have instituted programs to further encourage countertrade,

East European state agencies normally decide on development, production and export goals every five years, when planned expenditures are exceeded due to unforeseen inflationary price increases in the West, the state agencies must either reallocate hard currency expenditures or look to alternative forms of financing for their prior planned purchases. Consequently, state agencies often look to countertrade. *Id.* Indeed, between 1970 and 1980 alone, countertrade arrangements covered 2,000 turnkey plants in a variety of industries in Eastern Europe and the U.S.S.R. *Id.* at vii. Today, about 50 percent of trade between the industrialized West and Eastern European countries is tied to some form of countertrade. Welt, *supra* note 9, at 12; *see also* P. VERZARIU, *supra* note 16, at 24.

69. For instance, a few United States companies are hoping to open up new construction projects by devising ways to help debt-strapped Third World countries with their financing problems. In Latin America, United States construction contractors, led by McDermott International Inc., are experimenting with barter and countertrade to unlock some potential business. McDermott already is grossing $700 million a year in countertrade in such commodities as steel, fertilizer and chemicals. In April 1984, it bought the international trading arm of West Germany's Coutinho, Caro & Co. to help dispose of the items it takes in compensation for work performed abroad. *The Shrinking World of U.S. Engineering Contractors*, BUS. WK., Sept. 24, 1984, at 88, col 1. For examples of other United States multinational corporations proposing innovative countertrade contracts to finance their sales, see Martin & Ricks, *supra* note 47, at 1, col. 6. Many Western businessmen are overcoming their distaste for countertrade simply because they cannot afford to ignore enormous markets in which this mode of trade has become a fact of life. Welt, *supra* note 9, at 3.

70. Gilpin, *supra* note 63, at 29, col. 1; Gruson, *supra* note 48, at 4, col. 3.

71. Gruson, *supra* note 48, at 4, col. 3.

72. *See infra* text accompanying notes 87–90.

73. Botta, supra note 5, at 3A, col. 1; *see also* Bracher, *supra* note 15, at 71, col. 2 and 69, col. 1.

and many Eastern bloc countries have announced plans for increased technological imports through countertrade.[74] Indeed, executives of several United States multinational companies believe that United States firms seeking sales in the Third World and Eastern bloc countries will most likely experience future countertrade demands in some form.[75] In addition, China, with a market of over one billion people, now considers countertrade a matter of policy.[76] Overall, countertrade is likely to continue to grow in the remainder of the 1980s since the underlying reasons for its expansion in the 1970s and early 1980s remain.[77]

C. COUNTRIES THAT REQUIRE COUNTERTRADE

Countertrade is increasingly being required under new laws passed by foreign governments.[78] Most nations insisting on countertrade are those with debt problems, such as Argentina, South Korea and Mexico.[79] Other countries that insist on countertrade include Algeria, Indonesia, Iran, Libya and Nigeria, nations which all demand counterpurchase when their state oil bodies negotiate contracts. While Libya and Iran have little foreign debt, the other states in this group owe about $47 billion abroad.[80] Some specialists even maintain that OPEC has been particularly important in encouraging countertrade arrangements as a way to shore up oil prices.[81]

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74. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at viii. For example, in addition to Indonesia's new countertrade law, *see supra* note 9, the government of Ecuador has decreed that all alcoholic beverage imports must be paid for with the export of bananas, the Malaysian government has begun a study of feasible countertrade deals, and the South Korean government has established a new interministry countertrade trade committee. *Government Ponders Countertrade Policy as Firms Face Increasing Demands for It*, 8 U.S. IMPORT WEEKLY 894, col. 2 (Sept. 14, 1983).

75. Generally, it is believed that low-tech products, such as consumer items, will require high levels of countertrade financing, and conversely, the purchase of high-tech items—especially computer and telecommunications equipment—will require lower levels of countertrade. Analysis of Recent Trends in U.S. Countertrade, supra note 6, at 4.

76. *See infra* text accompanying notes 84–85.

77. *See Government Ponders Countertrade Policy*, *supra* note 74, at 894, col. 2; *see also OECD Sees Debt Ills of the Third World Continuing to Grow*, Wall St. J., April 11, 1984, at 36, col. 4.

78. Truell, *supra* note 22, at 21, col. 5–6.

79. *Id.* For example, South Korea, due to its debt obligations, is stiffening its requirement that foreign companies selling military equipment to the country produce parts there or arrange exports of Korean goods. Northrop Corp. of Los Angeles, which won a contract to sell 68 F-5 fighters to Korea, has been assembling the aircraft there since 1980, while General Dynamics Corp. of St. Louis recently agreed to meet offset conditions for a $930 million contract it signed in 1981 to sell Korea 36 F-16 fighter planes by contracting to farm out manufacturing of certain fuselage sections to Daewoo Heavy Industries Ltd. *South Koreans Toughen Terms in Military Sales*, Wall St. J., April 17, 1984, at 38, col. 4.

80. Truell, *supra* note 22, at 21, col. 5–6.

81. *Id.* Many oil-producing countries are looking to countertrade to finance their ambitious development plans following the decline in real oil prices. Welt, *supra* note 9, at 65; *see* Young,

Indonesia appears to lead in all counterpurchase agreements, which it has insisted on since January 1982 for all foreign suppliers.[82] The United States Commerce Department is concerned about a possible domino effect of the Indonesian action. It fears that if Indonesia can find companies to deal with, Malaysia, Thailand, Singapore and others may follow suit.[83]

Recently China, despite having the sixth largest reserve of foreign exchange and gold in the world, as well as multibillion dollar trade surpluses every year since 1981, has pushed countertrade to link Chinese and Western business interests.[84] In addition to acquiring state-of-the-art technology and improving its global market ties, China is also using countertrade as a source of raw materials and capital for its provincial officials and plant managers when its five-year plan leaves them short.[85]

While some countries, like Indonesia and Romania, have general countertrade requirements set out in their laws, most countries impose countertrade demands based on internal directives or leave countertrade totally to the discretion of domestic organizations.[86]

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supra note 43, at 15, col. 7. Interestingly, some members of OPEC have also used countertrade to price-cheat in sales of oil to avoid the cartel's price restrictions. Since it is not necessary to specify the countertrade linkage in individual commodity contracts, the agreed cartel price can be specified as the stated nominal price in a seemingly unrelated transaction. D. Akins, *supra* note 18.

82. Truell, *supra* note 22. In January 1982 Indonesia announced that any foreign company wishing to do $500,000 or more of government tender business would have to purchase an equivalent amount of Indonesian products. Briggs, *supra* note 2, at 42, col. 3; *see also Government Ponders Countertrade Policy, supra* note 74, at 894, col. 2. Further, Indonesia has stipulated that the foreign exporter must dispose of the goods it receives from Indonesia in the exporter's home market. Welt, *supra* note 9, at 63.

83. Welt, *supra* note 9, at 63. Indeed, in June of 1983 Malaysia established countertrade guidelines for its government sector. Bracher, *supra* note 15, at 69, col. 1. To date, Indonesia's countertrade policy apparently has done more to cut imports than it has to foster exports. Briggs, *supra* note 2, at 42, col. 3. Nevertheless, countertrade's popularity continues to increase. In early 1984 Columbia embraced the concept of countertrade in a presidential decree and Australia is currently tightening up its countertrade guidelines. Bracher, *supra* note 15, at 69, col. 1; *see also* McVey, *Quarterly World Countertrade Wrap-Up, "Columbian Countertrade Program"*, INTERNATIONAL TRADE ALERT, Aug. 28, 1984, at 1B-AP-1. Similarly, Ecuador has recently expanded its formerly limited countertrade program. McVey, *Quarterly World Countertrade Wrap-Up, "Ecuadorian Countertrade Program,"* INTERNATIONAL TRADE ALERT, Aug. 28, 1984, at 1B-AP-1.

84. Cecchin & Kurz, *Chinese Countertrade Unravelled*, EUROMONEY TRADE FINANCE REPORT, August 1984, at 20, col. 1. Elder statesman Deng Xiaoping, State Planning Commissioner Hu Qiuli and Minister of Foreign Relations and Trade Chen Muhua have all endorsed countertrade and indicated that it has become a matter of policy as well as practicality. *Id.* The primary aim of Chinese policy in promoting countertrade is to obtain the best available technology and management skills from abroad and to gain access to worldwide distribution networks to sell Chinese products. *Id.; see also McDonnell's Deal With China*, BUS. WK., April 29, 1985, at 36, col. 2–3. *See also China's Aircraft Market*, N.Y. Times, June 24, 1985, § D, at 4, col. 1.

85. *Id.*

86. Welt, *supra* note 9, at 8. Many countries impose countertrade demands depending on the specific characteristics of the transaction being negotiated. *Id.*

D. Other Participants in and Examples of Countertrade

During the past several years, several international trading companies, large domestic corporations, and banking concerns have established separate divisions to handle countertrade transactions.[87] International trading companies have found countertrade often to be an inexpensive means of obtaining Third World commodities while still earning their customary fees.[88] United States multinationals, which had only five in-house trading organizations in 1974, had more than thirty by 1980.[89] And banks, such as Citicorp and London's Lazard Brothers, have established countertrade departments to compete with the large trading companies and to generate additional business for themselves in their traditional areas of expertise.[90]

Some examples of United States companies involved in countertrade include: Control Data Corporation, which began entering into countertrade transactions over ten years ago with its Control Data Commerce International, Inc., in order to enable cash-short countries to buy the company's computers;[91] Pepsico, which sold cola concentrate, syrup and a bottling plant to the Soviet Union in return for Soviet vodka;[92] General Electric, which in one 100 percent countertrade deal agreed to assist Romania in building a nuclear reactor in return for cement;[93] McDonnell Douglas,

87. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at vii, 31; Truell, *supra* note 22, at 21, col. 5–6. What has kept many United States corporations from engaging in countertrade in the past is the fact that it was largely unknown. Botta, *supra* note 5, at 3A, col. 1.

88. Truell, *supra* note 22, at 21, col. 5–6.

89. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at vii. In-house trading units are increasingly serving a full range of commercial activities including market research, market development, importing and exporting, customs documentation, financial arrangements and distribution *Id.*

90. Truell, *supra* note 22, at 21, col. 5–6 In addition, several bank holding companies are establishing export trading subsidiaries which have the potential to be used for countertrade. Two such bank holding companies, Chicago's Walter E. Heller International Corp. and Los Angeles' Security Pacific Corporation, appear to be convinced that trading will be profitable because it will allow them to earn fees by helping to expand exports of small and medium-sized United States customers that lack the resources to pursue overseas sales. Heller feels it is a natural extension of its business since it has relationships with hundreds of United States manufacturers and a network of finance and factoring units in twenty-four countries. Security Pacific anticipates that trading, besides earning profits, will generate an added flow of traditional international banking business such as financing, letters of credit, and collection services. *Banks Edge Into Export Trading*, Bus. Wk., Nov. 29, 1982, at 38.

91. *Countertrade and Barter Trade Seen as Promising Opportunities for New ETCs*, U.S. Export Weekly 697 (Feb. 1, 1983).

92. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 49. For other Pepsico countertrade efforts, see *Pepsico Renews Deal With Russians*, N.Y. Times, May 22, 1985; *Suddenly Business Is Banging on India's Door*, Bus. Wk., June 3, 1985, at 55, col. 1–2.

93. General Electric beat Hitachi and Siemens and won a $160 million contract from Romania to help build a nuclear power plant by agreeing to a 100 percent countertrade deal in which General Electric will be paid in Romanian cement that is being brokered by a German firm for use in Egypt. J. Naisbitt, Megatrends 67 (1982).

which sold DC–9 passenger jets to Yugoslavia in exchange for hams, bikes, crystals and fur coats;[94] and numerous other companies including Coca-Cola, Combustion Engineering, Dow Chemical, General Dynamics, General Electric, General Motors, Goodyear, International Harvester, Levi Strauss, Marathon Manufacturing Corporation, Occidental Petroleum, Philip Morris (via European subsidiaries), Textron, Thyssen Inc. (U.S.), Union Carbide and Westinghouse.[95]

Other Western industrialized nations are actively involved in countertrade. For example, Japan is building industrial complexes in several countries in the Middle East in exchange for oil; France and Canada have negotiated for Mexican oil imports paid for by their exports; England is negotiating the sale of Rolls Royce jet engines to Saudi Arabia in exchange for oil; and West Germany is negotiating long-term deals to export technological assistance and capital goods for oil.[96]

Perhaps the largest countertrade deal of all time was negotiated between 1981 and 1982 between the USSR and five West European countries for a supply of gas from the Urengoy gas fields in Western Siberia.[97] When complete, the natural gas project will produce 28 billion cubic meters of gas per year, about half of which will be exported to West European parties to the transaction in return in part for earlier Soviet imports of steel pipe,

94. *Government Ponders Countertrade Policy, supra* note 74, at 895, col. 1, *see also* Teitelman, *Buy a Jet, Get a Tourist*, FORBES, May 20, 1985, at 228, col. 2–3.

95. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 47–50. For a more extensive list of American companies involved in countertrade agreements, see *id.; see also*, Martin & Ricks, *supra* note 69, at 1, col. 6, for examples of various methods by which American multinational corporations are participating in countertrade to increase their export sales.

96. P. VERZARIU, *supra* note 16, at 4; Young, *supra* note 43, at 15, col 7. Japan, through the companies Komatsu and Mitsubishi, is also selling construction machinery to the Soviet Union in return for Siberian timber. Italy, through the state-owned company Italcantien, is selling $1.5 billion worth of frigats to Iraq in return for oil. Italy is also, through the company Technotrade, involved in a $500 million deal with China to expand China's mines and modernize a railroad in return for Chinese coal. Spain, through the company ENESA, is selling buses to Columbia in exchange for coffee. Britain's Rank Xerox is making copiers in India for sale to Moscow under the Soviet Union's clearing agreement with India. *New Restrictions On World Trade*, BUS. WK., July 19, 1982 at 119, col. 2. In addition, Austria's state-owned Voest-Alpine, in a $1 billion transaction, swapped steel and food for Iranian oil. *Voest Is Straining to Become a High-Tech Power*, BUS. WK., June 17, 1985, at 54, col. 2. For a more extensive list of countertrade agreements entered into by Western industrialized nations, *see* P. VERZARIU, *supra* note 16, at 78–102. Japan and some Western European nations poor in natural resources often use countertrade to assure adequate supplies of raw materials such as oil and natural gas. *Growing Worries Over Buy-Back Deals*, CHEMICAL WEEK, June 2, 1982, at 42, col. 1.

97. *Recent Developments in Compensation Trade in the ECE Region*, United Nations Economic and Social Council, Economic Commission for Europe, Committee on the Development of Trade (Thirty-first session, 6–10 December 1982) (Item 4(c) of the provisional agenda), Trade/R.444, at 405. The European countries involved in the deal are Austria, the Federal Republic of Germany, France, Italy and Switzerland. *Id.; see also Growing Worries Over Buy-back Deals*, CHEMICAL WEEK, June 2, 1982, at 42, col. 1.

compressors and other pipeline equipment used to construct the pipeline.[98] Another example of a relatively recent large countertrade transaction was the promise by a French consortium allied with a Canadian consortium to buy shoes, coffee and iron ore from Brazil as partial payment for the sale to Brazil of two communications satellites.[99]

E. THE UNITED STATES GOVERNMENT'S POSITION REGARDING COUNTERTRADE

All countries, including the United States, have trade laws and policies that affect their trade positions and work for or against their own interests. These laws and policies include, in part, tariff and nontariff barriers, subsidies, tax incentives, favorable accounting conventions, credit allocations, and military, environmental and foreign policies.[100] At present, the United States has few trade laws specifically concerning countertrade. For instance, there are no trade laws that provide for specific government jurisdiction over countertrade[101] or that enable United States trade officials to distinguish between imports resulting from countertrade agreements and imports resulting from non-countertrade trade agreements.[102]

This lack of countertrade trade legislation should not be interpreted to mean that the United States government has no interest in business participation in countertrade or that it has no attitude regarding it. On the contrary, the Reagan Administration, although it has yet to take a formal position on the practice, generally frowns on countertrade. Nevertheless, it is reluctant to actively interfere with the choices that United States businessmen have been making concerning the types of foreign trade contracts they

98. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 11–12.

99. *Brazil: Swapping Shoes and Coffee for Satellites*, BUS. WK., April 19, 1982, at 53, col. 1. The French consortium is made up of Aerospatiale, allied with Ford Aerospace and Communications, and the Canadian consortium consists of Spar Aerospace, working with Hughes Aircraft. *Id.* While the Brazilian deal is only one of a series of telecommunications contracts signed by developing countries around the world, Brasilia's demand for countertrade purchases by high-tech companies may set a precedent and influence upcoming orders. *Id.*

100. Lodge & Glass, *U.S. Trade Policy Needs One Voice*, 61 HARV. BUS. REV. 75, at 75 (1983). In the United States, the Commerce Department administers import and export controls, the Treasury Department enforces them through the Customs Office, and the Trade Representative's Office negotiates and has responsibility for setting and administering overall trade policy. Farnsworth, *supra* note 57, at 129.

101. M. Botta, *supra* note 5, at 11A, col. 3. This statement assumes that imports due to countertrade create no noticeable negative economic impact, since if they did, countertrade imports, like all other imports, would be subject to United States unfair trade practice legislation. *See generally* Zarin, *Countertrade and the Law*, 18 GEO. WASH. J. INT'L L. & ECON. 235 (1984).

102. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at viii. This is because customs entry documents require no explanation as to whether or not imports were obtained through a countertrade transaction. *Id.* at 16.

are willing to enter into.[103] While the Reagan Administration does not wish to encourage countertrade, it does want to increase United States exports to offset its chronic trade deficits and attendant balance-of-payments deficits.[104] At the same time, more countries are imposing countertrade requirements for the privilege of exporting goods and services to them.[105]

One reason United States government officials resist endorsing countertrade is because of the complexity involved in overseeing it.[106] For example, because at present United States trade officials have no way to determine which imports are the consequence of countertrade, United States imports resulting from countertrade can only be verified to the extent that firms participating in such transactions voluntarily provide details about their private countertrade deals.[107] Additional concern may stem from the fact

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103. M. Botta, *supra* note 5. The Reagan Administration is caught in a quandary between opposing countertrade on economic grounds and yet wanting its policies to be relevant to changing business conditions in the world. *Government Ponders Countertrade Policy, supra* note 74, at 893, col. 2. The United States government's attitude toward countertrade, as well as that of the Organization for Economic Cooperation and Development (OECD), has been negative, according to Frederick E. Howell, a Commerce Department economist, because it is seen as trade-distorting, protectionist, and economically inefficient. *Id.* at 893. Secretary of State George Shultz purportedly objects to the entire concept of countertrade, although supposedly some African specialists in the State Department favor it. *Id.* at 894, col. 1. In the words of Undersecretary of Commerce for International Trade Lionel Olmer: "[Countertrade] contravenes our commitment to an open international trade and monetary system," and "To the extent that it can the world should stay out of it." But Olmer also adds that the world has little choice but to continue negotiating countertrade deals, if only because they are essential to a large part of the global economy: "Countries that espouse countertrade do so out of economic necessity." *Growing Worries Over Buy-back Deals*, CHEMICAL WEEK, June 2, 1982, at 43, col. 1.

104. Maidenberg, *supra* note 5, at 1, col. 3. The United States trade deficit for all of 1984 was a record $123.3 billion, which dwarfed the prior record, set in 1983, when imports exceeded exports by $69.4 billion. *U.S. Trade Deficit Set Record In 1984*, N.Y. Times, Jan. 31, 1985, § A, at 1, col. 3.

105. *See supra* text accompanying notes 47–56 & 78–86.

106. M. Botta, *supra* note 5 at 11A. As stated by Geza Faketekuty, senior assistant U.S. Trade representative: "If all companies start setting up countertrade operations, the whole thing could become difficult to unravel. How can we maintain a sensible commercial policy if it becomes less and less clear what's happening out there." *Id.*

107. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at 16. Indeed, as admitted by Commerce Department economist Frederick E. Howell: "[The Commerce Department does not] have a handle on how much [countertrade occurs], but we do know it's growing rapidly." *Government Ponders Countertrade, supra* note 74, at 893, col. 2. To better understand how much countertrade is occurring in the United States, on its own initiative the Office of Industries of the International Trade Commission (ITC) is presently conducting a study entitled "Assessment of the Effects of Barter and Countertrade Transactions on U.S. Industries" [Study No. 322–185 (185th study under § 332(b) of the Trade Act of 1930, as amended [19 U.S.C. 1332(b)])]. The study is to cover all product sectors of the United States economy and is being carried out via questionnaire. The firms questioned are legally obligated to respond and are assured by the ITC that no data will be published which could identify them. The study results are expected to be published in the summer of 1985. Telephone conversation with Ronald DeMarines, Chief, Machinery and Transportation Equipment Branch, Officer of Industries, ITC, August 14, 1984; 49 Fed. Reg. 25316; *see also ITC Countertrade Study May Run Into Overlap Snag With Offsets Probe*, INSIDE U.S. TRADE, Aug. 31, 1984, at 5.

that countertrade may lead to increased tax evasion, bribery and unfair competition.[108]

Ironically, while deciding whether it should sanction countertrade activities, the Reagan Administration has itself been promoting a form of countertrade, known as "industrial offset," through United States Department of Defense international armaments cooperation policies which encourage "defense industry coassembly, co-production and various other countertrade activities" with other NATO-country defense firms.[109] In addition to weapons procurement, the United States government currently engages in international barter in the export of surplus agricultural goods.[110] Thus,

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In addition to the ITC barter and countertrade study, Congress recently enacted a law requiring the Executive Branch to submit a detailed report to Congress on the impact of offset transactions on the U.S. economy. The statutory provision, set forth in Section 309 of the Defense Production Act Amendments of 1984 (P.L. 98–265), was enacted as a result of increased interest in countertrade activities by Congressmen John LaFalce (D-NY) and Bruce Vento (D-Minn), and requires the Executive Branch to forward the final report to Congress by October 1985. McVey, *Quarterly World Countertrade Wrap-Up "U.S. Government Investigations of Countertrade Activities of U.S. Firms,"* INT'L TRADE ALERT, August 28, 1984, at 1B-AP-2. The Office of Management and Budget, which is responsible for the offsets study, has combined portions of its study with the ITC countertrade study.

108. *See infra* text accompanying notes 133–143.

109. Marsh, *Survey to Scrutinize NATO Cooperation*, AVIATION WEEK AND SPACE TECHNOLOGY, Sept. 13, 1982, at 95, col. 1. Today, Western governments, including the United States, engage routinely in compensatory transactions and offsetting sales and purchases in the armaments and aviation industries. P. VERZARIU, *supra* note 16, at 3. For example, Britain, Canada, France, West Germany, the Netherlands, Belgium, Spain and the United States have all agreed on a shared production program to build a standard frigate for NATO for the 1990s. Such joint production and procurement will supposedly result in a considerable reduction in individual construction costs and will strengthen the NATO alliance both politically and militarily. *NATO Feels Strain of Joint Projects*, N.Y. Times, April 29, 1984, § A, at 19, col. 1. McDonnell Douglas, as part of its contract to sell F/A-18 military aircraft worth $1.6 billion to Spain, engaged a marketing expert to develop export programs for every conceivable Spanish product. The company promised Spain, among other things, to increase Spanish exports to a "substantial portion" of the $1.6 billion over the next ten years. Briggs, *supra* note 2, at 41; *see also McDonnell's Aid for Spain*, N.Y. Times, May 29, 1984, § D, at 4, col. 5. Similarly, the Dutch government agreed to buy 57 additional General Dynamics F-16 aircraft valued at $780 million because General Dynamics increased the industrial offset it offered from 52 percent of the purchase price to 80 percent. The offsets offer by both General Dynamics and the United States government will be indirect offsets, *i.e.*, production work not directly related to the F-16, and will be available over a 10-year period. *Dutch Plan Follow-on F-16 Buy*, AVIATION WEEK AND SPACE TECHNOLOGY, Nov. 31, 1983, at 26, col. 1. Generally aerospace companies have had to practice countertrade for years. According to a survey completed recently by the National Foreign Trade Council Foundation, on average 47 percent of U.S. export sales in the aerospace industry are subject to countertrade. Briggs, *supra* note 2, at 42.

110. *Growing Worries Over Buy-back Deals*, CHEMICAL WEEK, June 2, 1984, at 43, col. 2; *see, e.g. U.S., Jamaica Sign Second Barter Deal, supra* note 42. The barter deal was only consummated after President Reagan's personal intervention. *Government Ponders Countertrade Policy, supra* note 74, at 894, col. 2. It is unclear whether this sort of transaction is an aberration or a coming trend in U.S. government policy. *Id.* While the Agriculture Department has an interest in trading surplus agricultural commodities, other agencies in the government are either opposed to barter or jealous of their respective powers, making a unified government pro-barter stance unlikely. *Id.* at 894, col. 1.

while the government tends to frown on the growth of private-sector countertrade transactions, it itself encourages and increasingly participates in countertrade deals in its own areas of interest.

Other Western governments essentially share the Reagan Administration's generally negative view of countertrade. For example, the Thatcher government of the United Kingdom and the government of the Federal Republic of Germany view countertrade as being potentially trade distortive, although they have no desire to interfere with the market judgments of private-sector firms as to whether or not to engage in the practice.[111] France, however, has actively intervened in countertrade activity. It has formed a group known as ACECO (Association pour la Compensation des Exchanges Commerciaux), comprised of bankers, industrialists and government officials to advise French companies how to handle compensation deals and to attempt to identify and prevent countertrade transactions that would be harmful to the French market.[112]

IV. The Virtues and Vices of Countertrade

A. The Virtues of Countertrade

There are numerous reasons for a nation or its traders to impose countertrade obligations: (1) to preserve hard currency; (2) to improve the balance of trade; (3) to gain access to new markets; (4) to expedite industrial expansion and upgrade manufacturing capabilities; and (5) to maintain prices of export goods.[113]

An exporter's motivations for participating in countertrade transactions include: (1) to take advantage of sales opportunities; (2) to gain a source of supply; (3) to gain prominence in new markets; and (4) to take advantage of tax and tariff laws.[114] An exporter may also engage in countertrade to gain an edge on its competition in its home market as well as in markets it exports to. For instance, a Western exporter may engage in countertrade and attempt to negotiate exclusive marketing, distributorship or importation rights in its home market as well as in other worldwide markets for all

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111. *Guidance for Exporters*, United Kingdom Dep't Trade and Industry, May 1984, at 12; Statement by Ulrich Mohrmann, Deputy Head of Section, Federal Economics Ministry, Federal Republic of Germany, 5 J. Comp. Bus. & Cap. Mkt. L. 327, 373 (1983).

112. Welt, *supra* note 4, at 79.

113. Welt, *supra* note 9, at 8–10. *see also* P. Verzariu, *supra* note 16, at iii. Countertrade has been widely adopted as a tool for (1) generating hard currency needed for new industrial projects in Communist countries, (2) fostering exports to the West, and (3) minimizing the outlay of the countries' scarce reserves of hard currency. *Id.* at 4. Countertrade also provides a short-term solution for developing nations' lack of cash and marketing skills. Truell, *supra* note 22. Further, countertrade is used by some countries to combat protectionism in developed countries. Bracher, *supra* note 15, at 71, col. 1; *see also* Lowenfeld, *supra* note 33, at 329 (1983).

114. Welt, supra note 9.

exports derived from the Western-supplied plant.[115] In addition, countertrade deals represent promising opportunities for emerging export trading companies.[116]

Countertrade lends itself to trading during recessionary periods. It helps developing nations obtain important foreign goods and developed nations to develop new markets for goods they might have difficulty marketing on a cash basis.[117] For example, countertrade has been a means of stimulating the United States exports, which have long been troubled by the lack of dollars in many potential foreign markets.[118] The exports of one company, General Electric, have soared to $4 billion from about $500 million in the past decade with much of the increase coming from countertrade operations.

Countertrade also acts as an interface, and facilitates a greater degree of economic interchange, between countries with nonmarket planned economics and those with market economies. For nations with planned economies, countertrade assists in providing continued supplies in constant quantities at fixed prices—a mitigation of the unpredictable behavior of Western markets—and in doing so does not alter the centralized economic system. At the same time, industrial countertrade allows Westerners to "invest" in countries whose centralized economic system or ideology might otherwise preclude such foreign investment.[119]

In sum, countertrade, though an imposed purchase obligation for the privilege of making a sale, can be advantageous to both parties for several reasons under the proper circumstances.

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115. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 13.

116. *Countertrade and Barter Trade Seen As Promising Opportunities For New ETCs,* U.S. EXPORT WEEKLY, 697 (Feb. 1, 1983). An export trading company's ability to buy overseas, not just to sell, is important to countertrade activities.

117. M. Botta, *supra* note 5. Many companies with unsold inventory or spare capacity have found barter to be a convenient way to attract cash-poor customers, to keep production lines rolling, to keep fixed costs distributed over more products, and to make profits higher. Gruson, *supra* note 48, at 4, col. 3. In the United States, the deregulation of some industries has extended domestic barter's domain. For example, recently United States airlines have exchanged empty seats for jet fuel, food, advertising and other goods and services. *Id.* Barter also appeals to international trading companies which often find countertrade a cheaper way of obtaining Third World commodities while still earning their customary fees. Truell, *supra* note 22. Perhaps the most active traders in the domestic barter market are the major oil companies, which annually exchange millions of barrels among themselves as a way of cutting transportation costs. The Shell Oil Company, for instance, pumps or imports nearly 850,000 barrels of crude oil a day and trades between 5 and 10 percent, balancing its books every quarter. In a typical exchange, Shell trades crude from its Utah wells, 900 miles from its closest refinery, to a western oil company. In return, Shell receives Persian Gulf oil from a tanker that will dock near one of Shell's Gulf Coast refineries. Gruson, *supra* note 48.

118. Maidenberg, *supra* note 5.

119. De Miramon, *Advantages and Disadvantages of Countertrade*, 5 J. COMP. BUS. & CAP. MKT. L. 347, at 348 (1983); *see also* Lowenfeld, *supra* note 33, at 330 (1983); Park, *Countertrade Requirements in East–West Transactions*, 5 J. COMP. BUS. & CAP. MKT. L. 335, 335 (1983).

B. Vices of Countertrade

Countertrade is opposed by its critics as a distortion of trade[120] that threatens to undermine the multilateral trading and international monetary system which has been used by most of the world since World War II.[121] Some critics even imply that it represents a dangerous return to bilateral trade which could threaten the world's political stability. These critics argue, as some historians do, that bilateral trade in earlier times justified and in part created conditions that led to imperialism and eventually war.[122] Other opponents suggest countertrade is inherently a violation of GATT principles,[123] as well as the guidelines laid down by the International Monetary Fund,[124] and the practice in general is widely viewed in the West as a disguised form of protectionism.[125]

Further, countertrade makes the export business more complex and adds

120. *U.S. Firms at Conference Given Warning Not to Violate U.S. Customs, Trade Laws*, 20 U.S. Export Weekly, 393–94 (Dec. 6, 1983). Many Western companies feel that their markets are being endangered by Western exporters which accept countertrade obligations because they believe countertrade has the potential of having a lasting and disrupting effect on the markets of certain Western producers whose goods the countertrade imports displace. P. Verzariu, S. Bozek & J. Matheson, *supra* note 15, at 14.

121. Fleming, *A Worry for Washington: Countertrade*, L.A. Times, June 7, 1983, at 4, col. 4.

122. *See* Briggs, *supra* note 2, at 41. Countertrade, as a departure from the mechanism of the market, is viewed by many as a regression to an earlier way of doing business. As a form of bilateral trade, as opposed to the multilateral system of trade that has been encouraged since the end of World War II, countertrade is seen as similar to earlier bilateral trade practices which made colonies an asset, not a liability. From "you buy from me, I'll buy from you," it is only a short step to "buy from me or else." Some historians believe Germany in 1914 and Japan in the 1930s and 1940s went to war largely because they wanted and needed protected markets for their goods and captive sources of raw materials. Pre-World War I nations excluded from favorable bilateral trading transactions often saw only two choices: either acquire colonies or go to war to force their goods on others. Cordell Hull, Franklin D. Roosevelt's Secretary of State from 1933 to 1944, and other statesmen of his time, crusaded for multilateral free trade as a means of peace and the welfare of nations. After World War II, the free world adopted a multilateral trading and international monetary system as embodied in the General Agreement on Tariffs and Trade and the Bretten Woods Agreement. *Id.; see also* A. Lowenfeld, Trade Controls for Political Ends 5 (1977); A. Lowenfeld, Public Controls on International Trade 14–15 (1979).

123. *U.S. Firms at Conference Given Warning, supra* note 120. There is a belief among some United States government trade experts that countertrade, especially if it is government-mandated, might be inconsistent with the GATT since it would appear to be a violation of the most-favored nation concept and often involves quantitative restrictions. *Government Ponders Countertrade Policy, supra* note 74 at 893, col. 2. For a discussion of the relationship between countertrade and the GATT, see *infra* text accompanying notes 169–173.

124. *See* Bracher, *supra* note 15, at 69, col. 2

125. Gruson, *supra* note 48, at 4, col. 3. Countertrade is considered a form of protectionism in that a seller is forced to purchase goods he would not otherwise purchase and later will not buy in a freely competitive market. *New Restrictions on World Trade*, Bus. Wk., July 19, 1982, at 118, col. 1. It is believed likely by some that countertrade imports will create increasingly protectionist pressures on Western markets, especially if worldwide sluggish economic conditions continue. P. Verzariu, S. Bozek & J. Matheson, *supra* note 15, at 42.

to transaction costs.[126] Indeed, some of the strongest complaints about countertrade come from smaller, medium-sized and specialized firms that are not equipped to dispose of countertrade goods.[127] Also, goods obtained by Western countries through countertrade often have either inflated prices or are priced lower than market value and threaten to saturate and disrupt Western markets.[128] Also, almost all exporters would prefer to be paid in cash since one misstep in timing in a countertrade deal can cause a loss.[129] In the words of Roderick Hills, former Chairman of Sears World Trade, Inc., a $100 million international trading company: "Anyone who uses countertrade or barter as a means of building a business, instead of as a means of overcoming trading or currency problems is asking for trouble. Too much can go wrong."[130]

For the nation or importer demanding a countertrade commitment as a condition of trade, countertrade does not necessarily stimulate improvements in the efficiency or quality of its production enterprises.[131] In addition, demands for countertrade often emphasize and serve only the temporary needs of developing economies, at the expense of the orderly, long-term development of selective export positions in individual foreign markets.[132]

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126. Fleming, *supra* note 121; *see also* Lowenfeld, *supra* note 33, at 331. Western companies are not generally enthusiastic about countertrade because it is risky and complicated. In addition to the inherent difficulties of negotiating and drafting contracts, financing, risk management and disposing of the counterpurchased goods, Western firms are hesitant to purchase goods that are different from (or inferior to) those they would ordinarily deal in. Welt, *supra* note 9 at 10–11. A few banks, such as Citicorp and London's Lazard Brothers, have assembled countertrade departments to compete with big trading companies. Yet some banks attack countertrade as inefficient and costly. For example, a senior official at Britain's National Westminster Bank feels countertrade is dangerous and distorts trade patterns. Thus, banks are divided on the cumbersome system's merits. Truell, *supra* note 22.

127. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 1.

128. Welt, *supra* note 9, at 11. Countertrade could potentially have an adverse effect where dumping laws do not exist. M. Botta, *supra* note 5; *infra* text accompanying notes 139–140. Other problems with countertraded goods include in part: (1) an insufficient volume of desirable products made available as counterdeliveries; (2) product liability insurance; (3) timely delivery; and (4) aftersale service. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 41–42. Also, countertrade goods in general seldom satisfy the import needs of Western exporters and often may saddle them with compensating goods of inferior quality or for which they have no need. The goods also may disrupt established supply sources and shift production capacity to the importing country. P. VERZARIU, *supra* note 16, at 41.

129. Maidenberg, *supra* note 5, at 1, col 3.

130. *Id.* Indeed, enough went wrong at Sears World Trade, Inc. that Roderick Hills resigned from the company and Sears Roebuck & Co., Sears World Trade, Inc.'s parent, placed Sears World Trade, Inc.'s entire operation under review. Dizard, *Sears' Humbled Trading Empire*, FORTUNE, June 25, 1984, at 71, col. 1

131. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 4; P. VERZARIU, *supra* note 16, at 1–2.

132. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 42. By stressing exports of lower-quality industrial goods resulting from a broad-based industrialization effort, many countries do not concentrate on manufacturing specific product mixes which could ensure them stable positions in foreign markets. Further, by not sharing in the marketing risk of counter-

Another problem with countertrade, at least from the perspective of Western governments, is the complexity of monitoring and regulating it,[133] especially because countertrade can lead to increased illegal tax evasion and bribery. In the area of domestic barter alone, the Intenal Revenue Service has found that where barter transactions are not reported—so as to hide income and avoid taxes—it is nearly impossible to know how often they occur.[134] Countertrade has the potential to be even more complex than domestic barter because transactions involving more than one country may involve the applicability of laws from more than one nation as well as the use of multiple currencies. This increases the potential for tax evasion. For example, countertrade tax evasion occurs when the exporter or importer distorts one or another of the real prices in the linked transactions. Because a nominal price on one commodity in a linked transaction can be balanced off against the nominal price on the other commodity, as well as against the set of rights and duties specified in the contract, this sort of nominal pricing can provide scope for considerable mischievous activity. For instance, United States import duties can be lowered if the value is artificially reduced. Income taxes can also be evaded if nominal profits help to reduce accounting profits, and complicated countertrade arrangements can substitute for more easily detectable transfer-pricing anomalies, with the consequence of lower tariffs or taxes payable by one or both parties.[135]

Countertrade deals can also be used to disguise illegitimate bribes through the nominal valuation of imports and exports. Thus, through countertrade, United States exporters can make improper payments to foreign officials and can circumvent the Foreign Corrupt Practices Act of 1977,[136] which criminalized United States extraterritorial bribery,[137] as well as the domestic laws of most nations which make the bribery of public officials a crime.[138]

Similarly, countertrade agreements may disguise the fact that goods are priced at below market value and thus may frustrate the domestic legislation

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trade goods, countries that demand countertrade often forego developing marketing skills and abdicate control on the destination and pricing of these goods. *Id.*

133. Botta, *supra* note 5, at 3A, 11A, col. 1.

134. Gruson, *Corporate Barter on the Upswing*, N.Y. Times, Feb. 20, 1983, § F, at 4, col. 3.

135. D. Atkins, *supra* note 18, at 11.

136. 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff (Supp. II 1978).

137. *See generally* Note, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U.J. INT'L L. POL. 645 (1981).

138. A United States company which inadvertently makes an "improper" payment through a countertrade transaction may be subject to the sanctions of the Foreign Corrupt Practices Act.

of some countries, such as the United States,[139] that prohibit dumping or subsidizing.[140] The United States International Trade Commission (ITC) has conducted an investigation of countertraded truck-trailer axles under the antidumping law. In a preliminary investigation, the ITC found that truck-trailer axles from Hungary were injuring United States truck-trailer axle products. However, a settlement was reached among the interested parties and no final investigation was conducted.[141] The ITC has occasionally examined countertrade products under § 406.[142] For example, imports of anhydrous ammonia from the Soviet Union were twice examined under § 406. The first time, in 1979, the ITC found these imports were disrupting the United States market for anhydrous ammonia but President Carter took no action regarding the ITC's finding. In 1980, following the Soviet Union's invasion of Afghanistan, the ITC conducted a second investigation. This time, the ITC, under its new membership, made a negative determination, and no relief was provided.[143]

Overall, countertrade presents potential problems that threaten to destabilize the international monetary system and the multilateral trading system used by most of the world since World War II. At the same time, however, even many of countertrade's critics recognize that it may be the only short-term alternative to a reduction in economic activity in many countries to levels which would give rise to social and economic instability.[144]

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139. M. Botta, *supra* note 5, at 3A, col. 1. Trade Agreement Act of 1979, 19 U.S.C. § 1173, *amended by* Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 (1984) (authorizing special antidumping duties to offset the amount by which imports to the United States undersell their home price or cost of production). *See generally* Price, *The Trade and Tariff Act of 1984: Analytical Overview*, 19 INT'L LAW 321 (1985), and Bello & Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 INT'L LAW 639 (1985).

140. *Protecting World Trade*, Business Week, July 19, 1982, at 194, col. 1. For example, in Western Europe, which has its own antidumping legislation, between May 1981 and June 1982 alone, 12 antidumping complaints involving countertrade shipments of chemicals from Eastern Europe were brought before the European Economic Community. *Growing Worry Over Buy-back Deals*, CHEMICAL WEEK, June 2, 1982, at 42, col. 2. *See also* Atwood, *EEC's New Measures Against Unfair Practices in International Trade*, 19 INT'L LAW. 371 (1985).

United States statutes concerning countervailing duties are contained in the Trade Agreements Act of 1979, 19 U.S.C. § 1671, *amended by* Pub. L. No. 98–573, 98 Stat. 2948 (1984) (authorizing special duties to offset foreign subsidies on imports into the United States).

141. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at viii.

142. Section 406 of the Trade Act of 1974, 19 U.S.C. § 2436 (1984), which provides for ITC investigation to determine whether the importation of "an article which is the product of a communist country" is causing market disruption of an article produced by domestic industry. Under the section, the President is authorized to impose remedies including, among other things, import duties and quotas. *Id.*

143. Analysis of Recent Trends in U.S. Countertrade, *supra* note 6, at viii.

144. *See Growing Worries Over Buy-Back Deals*, CHEMICAL WEEK, June 2, 1982, at 43, col. 1.

V. Selected Business and Legal Issues Involved in Countertrade

A. Negotiating Countertrade

Western companies that successfully conclude profitable countertrade transactions are generally those with broad international trade experience and those with the resources and commitment to pursue lengthy and thorough negotiations, anticipating potential problems and safeguarding against them.[145] Although the idiosyncracies of a particular transaction may indicate a different approach, a generally advisable negotiating strategy follows. The first step a company should take in preparing itself for a countertrade demand is to determine its own position—i.e., whether it will accede to such a demand if it arises and, if so, what percentage of the value of its original export sales it is willing to accept as a countertrade commitment. Also, a company should attempt to learn as much as possible in advance about the countertrade rules of the particular country or foreign trade organization with which it wishes to make sales.[146]

Once a company has determined its own position and has researched its potential buyer, it should attempt to determine at the outset of negotiations whether the transaction under discussion will involve any countertrade obligations, and if so, how much those requirements are likely to be.[147] If the potential buyer states there will be no countertrade commitment re-

145. Welt, *supra* note 9, at 24. *See generally* Grabow, *Negotiating and Drafting Contracts in International Barter and Countertrade Transactions*, 9 N.C.J. INT'L L. & COM. REG. 255 (1984). Sufficient resources and commitment are necessary to conclude a successful countertrade deal since it is estimated that 90 percent of countertrade proposals fall through before a final agreement is reached. This is primarily due to the uncertainties of countertrade and to the added elements of risk and difficulty which it presents. *Id.*; *see also Guidance for Exporters, supra* note 111, at 7. Among the risks of countertrade are: (1) loss of profits because the risks of countertrade have not been anticipated; (2) countertrade commitments to purchase large quantities of unmarketable goods without any means of disposing of them; and (3) cancellation of export orders because of the other party's failure to meet countertrade obligations. *Id.*

146. Welt, *supra* note 9, at 394. The importance of expert advice cannot be overemphasized. Even some very large companies have found themselves in major difficulties from taking on trading obligations in products and markets outside their own experience and expertise. *Guidance for Exporters, supra* note 111, at 15; *see generally* Dizard, *supra* note 130, at 71. One way a seller can determine the appropriateness of the product it hopes to export to a buyer is by conducting research on the purchasing country's economic plans. P. VERZARIU, S. BOZEK & J. MATHESON, supra note 15, at 25. Also, the establishment of close business relations through long experience with the given foreign trade organization will sometimes help in identifying the priority of the seller's exports and the adequate level of countertrade which is necessary to clinch the deal. P. VERZARIU, *supra* note 16, at 25.

147. P. VERZARIU, *supra* note 16, at 23; P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 17; Welt, *supra* note 9, at 24–25. If a seller has decided it will not accept any potential countertrade commitment it should so state at the outset of the negotiations. *Id.* If a seller is unable to determine if there will be a countertrade obligation, its eventual price quotation will necessarily need to be high to cover potential transportation and marketing expenses of potential later countertrade demands. P. VERZARIU, supra note 16, at 23.

quired, the seller should request that the buyer immediately sign an agreement to this effect as a gesture of good faith. By doing this, a company may be able to protect itself from wasting time and money negotiating only to later learn of a countertrade demand which it may then feel compelled to give in to because of the amount of time and expense already invested in the deal.[148]

Next, the seller should attempt to defer a final price quote for the deal until an agreement has been reached on the terms and conditions of the sale. If the terms are agreed upon early, the seller should request a written protocol agreement. If the buyer declines, it is a good indication that despite previous representations a request for countertrade will later arise.[149] Assuming countertrade is requested or required, it is usually good negotiating strategy to quote final prices only after the terms, conditions and the product range offered for countertrade are identified.[150]

When made, initial countertrade demands are usually high, but may be negotiated lower.[151] A seller can often negotiate to lower a buyer's countertrade requests by offering: (1) an extension of the repayment of the export contract; (2) an extension of the performance guarantees; (3) an expansion of training programs for the buyer's personnel; (4) an increase in other support services; or (5) guaranteed fixed prices over several years for all or part of any spare parts to be supplied under the contract's terms.[152] In some

148. P. VERZARIU, *supra* note 16, at 23. A buyer may wait until the last minute to make countertrade demands to lower its hard currency commitment. *Id.* A gambit referred to as "the double trapdoor" involves the buyer's receipt of a final price quote after which time the buyer informs the seller that higher authorities have demanded that the seller accede to a countertrade commitment as part of the deal. After the seller accedes to the demand, the buyer informs the seller that the authorities have shifted their position and will allow the purchase in hard currency, but then demands a reduction of the previously quoted price, since the added expenses associated with countertrade are no longer involved. Welt, *supra* note 9, at 26.

149. Welt, *supra* note 9, at 26.

150. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 17. Ideally, a seller should attempt to not obligate itself to dealing with only one foreign trading organization. *U.S. Firms At Conference Given Warning, supra* note 120, at 394. It is essential to know as much as possible about the products available for countertrade, including information about quantity, quality and reputation of the countertrade products. *Id.* A seller should beware that the list of countertrade products offered may be years old or unavailable because of prior commitments or limited production. P. VERZARIU, *supra* note 16, at 24; P. VERZARIU, S. BOZEK & J. MATHESON *supra* note 15, at 18; Welt, *supra* note 9, at 29–30. Unless the seller has a use for the countertraded goods itself, it will almost certainly have to dispose of the goods at a significant discount of the agreed upon price. This discount of "disagio" should be anticipated and built into the seller's price (though, of course, not revealed to the customer). A critical factor in determining the disagio is whether the countertraded goods are to be available CIF or FOB; some Comecon countries insist on the latter and on nominating their own shippers. *Guidance for Exporters, supra* note 111, at 16.

151. P. VERZARIU, *supra* note 16, at 23. For example, exports which are necessary to fulfill a buyer's 5-year plan or exports which help to increase a buyer's exports may ultimately require no countertrade or at most no more than 20–30 percent of the original sales purchase. *Id.*

152. *Id.* at 24.

instances, the seller may want to negotiate for purchases exceeding its countertrade obligation to be credited against future company sales.[153]

In negotiating countertrade obligations in general, countertrade should always be viewed in such a manner that, if the primary exporting portion of the agreement collapses, the counterpurchasing portion of the agreement will also become void.[154] A clause should be requested allowing a company to assign its countertrade obligations to a third party (such as an international trading house), and the seller should attempt to secure a contractual option to discharge a countertrade commitment through a fixed fee, in case for some reason the seller is unable to or would later prefer not to make its required purchases.[155] The seller should attempt to resist obligations to take back goods over a fixed period of time and should negotiate for a "best efforts" clause instead. Short of that, the seller should try to avoid an iron-clad obligation to take back specific products over a fixed period of time and instead should attempt to have the right to select from a list of numerous products over a relatively open period of time.[156] Further, and of extreme importance, the seller must ensure that all purchases from the buyer designated in the countertrade agreement will qualify as a satisfaction of the seller's countertrade obligation.[157]

It is critical to establish a definite and satisfactory understanding of which goods are to be supplied for countertrade, by whom, over what period, and at what prices. As mentioned, the seller should seek a wide range of

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153. Welt, *supra* note 9, at 29. Some East European trading entities have been known to allow purchasing credits to be transferred to third parties, but these are isolated cases and rarely allow for the transfer of the full value of sales. *Id.* It is sometimes prudent for a seller to use countertrade goods as a long-term source of supply since the buyer then incorporates these goods into its production plans and the seller thereby acquires additional sales leverage. Indeed, countertrade can be turned around in that a seller can link its purchases of the buyer's goods to future acceptance by the buyer of the seller's exports. P. VERZARIU, S. BOZEK & J. MATHESON, *supra* note 15, at 18–19. A long-term contract may be reached where Western and Eastern plants could stagger their expansions sequentially. In this way, they could provide each other with goods from their surplus capacities and time the expansions to conform to world market needs, thus optimizing capital investment. *Id.* at 14. Or, a Western firm can get a temporary supply source from the East or elsewhere until the Western firm decides to undertake expansion of its own production. *Id.* at 13–14.

154. *U.S. Firms at Conference Given Warning, supra* note 120, at 394.

155. *Guidance for Exporters, supra* note 111, at 15. However, it should be noted that if the countertrade obligation originally came from a ministerial directive to a foreign trade organization regarding the organization's assigned export quotas, payment of a fee in lieu of fulfilling the countertrade obligation could jeopardize future relations with the foreign trade organization. P. VERZARIU, *supra* note 16, at 24. It is best to ascertain, therefore, whether buying out of a countertrade obligation is acceptable before choosing to pay the fee if future sales in that market are a concern.

156. *U.S. Firms at Conference Given Warning, supra* note 120, at 394. In some instances sellers can request that countertrade goods be manufactured to the seller's specification, although this may involve an additional investment on the part of the seller. P. VERZARIU, *supra* note 16, at 24.

157. Welt, *supra* note 9, at 29.

countertrade goods of marketable quality, to be delivered—absent the seller's successful negotiation of a best-efforts clause—in agreed-upon quantities over an agreed-upon period, and priced to be competitive on the world market. To avoid potential problems, the agreement between the parties should make clear how to measure the value of the products each party is selling, and the seller should obtain the right to have its purchases from the buyer inspected by a third party prior to delivery.[158] If objective criteria for quality and price cannot be agreed upon, the seller should seek to include in the agreement general representations and warranties by the buyer that the goods offered will be competitive with goods of a similar nature sold from other sources within the market concerned.[159] The seller should seek the right to market its counterpurchases in the widest possible geographic area, and, if possible, should attempt to obtain concessions such as the exclusive right to sell in a market and receive most-favored-customer privileges.[160]

One key area of understanding to be settled before any contracts are signed is the enforceability of agreements. The seller must ensure that the sale and countertrade contracts are acceptable to *all* parties concerned on the buyer's side. If possible, the seller should insist that the agreement have the backup of the foreign government and that that government take an active interest in the fulfillment of the countertrade obligation. The seller should further ensure that sufficient flexibility is retained in the agreements to cover unforeseen developments and that acceptable arbitration procedures are established, preferably in a neutral country.[161]

Not surprisingly, it cannot be emphasized enough that adequate preparation, research, planning and patience are the primary ingredients to successfully negotiating a profitable countertrade agreement.

B. Countertrade Contracts

Most countertrade transactions are composed of three separate legal instruments that, when taken together, establish the terms and conditions of the deal. These parts are: (1) the original contract for the sale by the Western exporter; (2) the countertrade contract obligating the seller to make purchases from the buyer in the first contract; and (3) the protocol agreement that serves to link the two contracts.[162]

158. *U.S. Firms at Conference Give Warning*, *supra* note 120, at 394.
159. *Guidance for Exporters*, *supra* note 111, at 15–16.
160. *U.S. Firms at Conference Give Warning*, *supra* note 120, at 394.
161. *Guidance for Exporters*, *supra* note 111, at 15. For a more detailed overview and additional countertrade negotiating considerations, *see* Welt, *supra* note 4, at 29–37 and Verzariu, *supra* note 4, at 87–92.
162. Welt, *supra* note 9, at 32–33.

The protocol agreement—an agreement to agree—is drafted first and provides that each party commits itself to enter into its respective contract to purchase the other party's goods for hard currency. (This commitment may be secured with standby letters of credit or performance bonds.) In addition to assuring each party that one contract will not be signed without the other, the protocol agreement also assures the seller that his obligations under the second contract will terminate in the event of nonperformance or cancellation of the original purchase. The use of a protocol agreement, it should be noted, is not universal, and it is increasingly becoming common to encounter clauses in the two purchase contracts themselves used to link the contractual obligations together.[163]

When a protocol agreement is used, the first contract is usually a standard sale agreement. The second "countertrade" contract, however, is different in that it sometimes specifies that payments for deliveries be made in hard currency, and also provides for the purchase of goods at a later date, or over a period of time, rather than according to a definite schedule of delivery and payment.[164]

Eastern bloc countries usually present Western exporters with the Eastern country's form contracts while Third World nations often advise a Western exporter to draft its own proposed agreement. Whatever the case, it is usually of crucial importance that the countertrade contract be drafted clearly and unambiguously leaving nothing to later interpretation.[165] Copies of previously signed contracts involving the purchase of goods may sometimes be obtained from other businesses or from officials of the United States Department of Commerce or the Department of State.[166]

C. Capital Transfer Opportunities

Countertrade offers United States companies the potential to exercise numerous legitimate opportunities. For example, corporate treasurers and lawyers must contend with many governments that impose limits on the flow of capital across their borders.[167] One legal method multinational corporations may be able to use to avoid these currency controls involves a variation of switch trading and barter in which a company takes advantage of an

163. Welt, *supra* note 9, at 32–33.

164. *Id.*

165. *Id.*

166. For samples of countertrade contracts, see P. Verzariu, *supra* note 16, at 70–77. *See also* Welt, *supra* note 4, at 39–47, 209–38.

167. M. Sesit, *Funds Blocked Abroad by Exchange Controls Plague Big Companies*, Wall St. J., Dec. 3, 1984 at 1, col. 6; *Ways to Beat Exchange Rules*, Bus. Wk., Oct. 16, 1982, at 106, col. 1. Countries employ exchange controls in part to regulate capital flows across their borders, defend their currencies, and support restrictive monetary policies. The controls take different forms in different countries. *Id.*

imbalance in a bilateral trade arrangement between two countries. Assume, for example, that under a bilateral trade arrangement Hungary holds a $20 million credit for Spanish wine it does not really want. A multinational corporation recognizing this situation can use this opportunity to offer to supply Hungary with products Hungary desires but which it might not normally be able to purchase due to currency controls or a shortage of hard currency. The company could suggest and agree with Hungary to an exchange in which Hungary would receive $17 million worth of goods it wants in return for Hungary's $20 million paper claim on Spain. The $3 million difference would cover the cost of the deal. The company could then claim the $20 million worth of Spanish wine and ship it to Sweden, where it could be sold for krona, which are freely convertible to United States dollars.[168] Thus, by use of switch trading and barter, United States multinationals may be able legally to avoid other countries' currency controls and do business with countries which have such controls despite the impasses these controls appear to present.

D. The General Agreement on Tariffs and Trade (GATT)

The GATT is a multilateral agreement among sovereign nations designed to liberalize trade in goods by requiring that nations rely only on tariffs to provide trade protection and by providing for negotiations for the gradual reduction of tariffs.[169]

The rules of the GATT regulate the behavior of governments, not of individual private business entities. Therefore, if a private firm decides on its own to discriminate against imports or to impose certain conditions on the importation of goods, e.g., countertrade, the decision cannot be challenged under the GATT.[170] However, if discrimination against the importation of goods is imposed by government law or regulation, such conduct conflicts with a number of fundamental GATT rules. Indeed, a strong case can be made that when countertrade is government-prescribed, it violates a number of GATT provisions, including those (1) protecting against the nullification or impairment of tariff concessions, (2) requiring nondiscrimination

168. *Id.* The ability to utilize the type of collection-through-export described in the text is limited by restrictions imposed on such activities by many host nations via export licensing and similar laws. *See* McVey, *supra* note 4, at 25, n. 57.

169. Baker & Cunningham, *Countertrade and Trade Law*, 5 J. Comp. Bus. & Corp. Mkt. L. 376 (1983); *see also* K. Dam, The GATT: Law and International Economic Organization 19 (1970).

170. Gadbow, *The Implications of Countertrade Under the General Agreement of Tariffs and Trade*, 5 J. Comp. Bus. & Cap. Mkt. L. 355, 357 (1983).

(most-favored-nation and national treatment), and (3) prohibiting quantitative restrictions.[171]

As a practical matter, whether the GATT conflicts with state-prescribed countertrade or not, the GATT can do little at present to regulate such countertrade. This is in part because only a small number of Communist nations are members of the GATT.[172] Further, the GATT provides that quantitative restrictions *may* be imposed by GATT members facing a balance of payments squeeze pursuant to GATT Article XII, as well as by members with less developed economies pursuant to GATT Article XVIII. Thus, the GATT as presently drafted has little promise as a tool to regulate countertrade.[173]

E. Miscellaneous United States Legal Issues

Persons contemplating engaging in countertrade should, of course, bear in mind the potential applicability of any relevant national or local laws with respect to all aspects of the countertrade transaction. Examples of United States statutes that, together with any implementing regulations, might apply include: (1) the Export Administration Act;[174] (2) the Arms Export Control Act;[175] (3) the Atomic Energy Act of 1954 (export of certain nuclear materials);[176] (4) the Trading with the Enemy Act;[177] (5) the International Emergency Powers Act;[178] (6) the Smoot–Hawley Tariff Act (regarding goods produced with "convict labor" or "forced labor");[179] and (7) the various United States antitrust laws, including the Export Trading Company Act.[180] The preceding list does not exhaust the full range of

171. *Id.* at 358

172. Baker & Cunningham, *supra* note 169, at 376. As of the date of publication of this article, Cuba, Czechoslovakia, Romania, Hungary and Poland are the only Communist nations which belong to the GATT. *Id.*

173. Id. at 378.

174. Export Administration Act of 1979, 50 U.S.C. §§ 2401–2420, *amended by* Export Administration Amendments Act of 1981, Pub. L. No. 97–145, 95 Stat. 1727 (1984), continued in force by Exec. Order No. 12470, Fed. Reg. (1984), and by Presidential Notice of March 28, 1985, 50 Fed. Reg. 12,513 (1985).

175. 22 U.S.C. §§ 2751–2796c (1976 & Supp. IV 1980), *amended by* International Security and Development Cooperation Act of 1981, Pub. L. No. 97–113, 95 Stat. 1519.

176. 42 U.S.C. §§ 2011–2296 (1976 & Supp. IV 1980), *amended by* Department of Energy National Security and Military Applications of Technology Act of 1982, Pub. L. No. 97–90 §§ 210,211, 95 Stat. 1163, 1169, 1170 (1981).

177. 50 U.S.C. app. §§ 1–6, 7–39, 40–44 (1976 & Supp. IV 1980), *amended by* Federal Courts Improvement Acts of 1982, Pub. L. No. 97–164, § 160, 96 Stat. 25, 48.

178. 50 U.S.C. §§ 1701–1706 (Supp. IV 1980).

179. 46 Stat. 590 (1930); *see U.S. Bars Soviet Nickel*, N.Y. Times, Nov. 22, 1983, § D, at 1, col. 6.

180. Export Trading Company and Bank Export Services Acts, Act of October 8, 1982, Pub. L. No. 97–290, 96 Stat. 1233. For a discussion of United States antitrust laws in the context of countertrade, see McVey, *supra* note 4, at 37–39, 45–56.

United States laws potentially applicable to a given countertrade transaction, but it does indicate the complexity of the United States legal regime relevant to countertrade transactions.[181]

VI. Suggestions and Conclusions

First and foremost, the United States government should increase its efforts to study, measure and analyze countertrade and the role it presently plays in world commerce, in order to be able to develop a policy to deal with the practice. In formulating policy, the government must honestly examine its own involvement in countertrade, as well as that of businesses in the private sector of the economy, so as to determine what, if anything, should be done to ensure that countertrade is, on balance, beneficial to both United States and the world trade.

Ultimately, if it is decided that some form of regulatory action is warranted, consideration should be given to developing uniform policies within the West, possibly in the form of standard countertrade guidelines among the OECD countries. Such guidelines might address a variety of concerns, including: (1) the types of items which should be excluded from countertrade arrangements (*e.g.*, items being supported in the West, items subject to import restraints, or items subject to dumping or subsidy investigations); (2) the mechanisms for measuring the real price of counterpurchase items for the purpose of import duties, dumping/subsidy laws, or market-disruption analysis; and (3) the means of measuring and comparing credit terms, when associated with counterpurchase agreements, and the like.[182] On a narrower scale, the United States government should consider issuing insurance to help United States companies involved in countertrade (as well as other international commercial transactions) to minimize the risk of government invocation of United States unfair trade laws and the revocation of United States export licenses due to political dispute.[183]

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181. For a discussion of the United States legal framework relevant to countertrade, see Zarin, 18 GEO. WASH. J. INT'L L. & ECON. 235 (1984).

182. Lowenfeld, *supra* note 33, at 334; *see also* de Miramon, *supra* note 119, at 368–69. *Interface IV: East-West Countertrade Conference*, 5 J. COMP. BUS. & CAP. MKT. L., at 334 (1983); *see also* J. de Miramon, *Statement*, 5 J. COMP. BUS. & CAP. MKT. L., at 368–69 (1983).

183. Ehrenhaft, *Insuring U.S. Participants' Interests in Countrade*, 5 J. COMP. BUS. & CAP. MKT. L. 425–27 (1983).

Many companies purchase political risk insurance for countertrade deals called contract repudiation coverage. This coverage differs from similar conventional buy-sell transaction coverage only in its somewhat greater complexity. In countertrade deals, for either delivery or counterdelivery, it can offer protection against arbitrary, capricious and non-justified repudiation of any contract stemming from political events such as government embargoes, civil war, government-enforced contract repudiation and other similar contingencies. Coverage does not extend to commercial reasons for contract non-performance nor does it cover production quality problems. L. G. B. Welt, TRADE WITHOUT MONEY: BARTER AND COUNTERTRADE, 251–52

One's evaluation of countertrade often depends on whether one is more inclined to view trade as a political tool or as a system for the efficient allocation of resources. As a matter of national policy, countertrade offers a substantial avenue for creating and strengthening East–West and North–South economic relationships. However, countertrade may also work to distort the market's function as an indicator of comparative advantage, in part because it is bilateral rather than multilateral and in part because it tends to mask differences in price and quality as well as the cost of credit.[184]

Indeed, in many ways countertrade is a contradiction. Although countertrade undermines multilateral trading, it is the recent failures of the multilateral trading system which have in part given rise to countertrade and expedited its growth. While multilateral trading may provide the best long-term economic advantages for the global economy, the world must live through the short-term. While countertrade can distort trade, it can also enhance trade. Although countertrade may be seen as protectionist, it is also in part a response to protectionism and is often used to open new markets. While countertrade can be used to avoid the payment of debts, it can also be used to collect otherwise uncollectible debts to the benefit of debtor and creditor alike. Although countertrade is largely opposed by governments in the West, it is frequently used by the same governments in the purchase and sale of military equipment. It is this contradictory nature of countertrade that has thus far prevented United States government officials from establishing a clear and coordinated policy toward the practice, or even determining what countertrade's role should be in United States foreign trade. Only now, by attempting to understand countertrade, can the United States hope to direct it in ways that foster the growth of international trade, a stronger world economy and greater international political stability.

(1984). *See Countertrade, Barter & Offsets, id.*, at 93–100, for an overview of risks and their prevention when participating in countertrade.

184. Lowenfeld, *supra* note 33, at 332.