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The Need for a United States Countertrade Policy

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The Need for a United States Countertrade Policy

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I. INTRODUCTION

Countertrade is a form of international trade which involves payment partially or in full with goods rather than with money.¹ It is clearly growing and becoming an increasingly important part of the international business environment. More than sixty-one governments have policies which encourage countertrade practices to some extent.² Between 1980 and 1984, the value of countertrade between the United States and Europe quadrupled, and the value of such arrangements between the United States and Asia more than tripled.³ Although traditionally used in East-West trade,⁴ recently countertrade has been spreading to Third World trade transactions. Developing countries use countertrade as a means of increasing their exports at a time when protectionism by developed countries and falling international prices are creating huge trade imbalances for them.⁵

Although many do not prefer to do business through countertrade, trade experts have concluded that world economic conditions have made

¹ As defined by Polly Coe, director of marketing for Contitrade Services, in *Transactions Useful in Cases of Foreign Exchange Shortages, But Caution Advised*, 9 U.S. IMPORT WEEKLY (BNA) No. 20, at 679 (Feb. 22, 1984) [hereinafter cited as *Transactions*].

² U.S. INT'L TRADE COMM'N, PUB. NO. 1766, ASSESSMENT OF THE EFFECTS OF BARTER AND COUNTERTRADE TRANSACTIONS ON UNITED STATES, at vi, (1985) [hereinafter cited as USITC (1985)].

³ Dunne, *U.S.-Europe barter trade increases fourfold*, Financial Times (London), Oct. 31, 1985, at 6, col. 8.

⁴ *GATT Report Finds Barter Accounts For Up to 40% of World Trade, Is Still Rising*, 9 U.S. IMPORT WEEKLY (BNA) No. 34, at 1071 (May 30, 1984) [hereinafter cited as *GATT Report*]. According to a report from the GATT, fifteen percent of all countertrade transactions take place with the Soviet bloc (East-West trade).

⁵ See Elliot, *Pakistan selects companies for counter trade project*, Financial Times (London), Nov. 7, 1985, at 7, col. 1. See also Dullforce, *Gatt sees mores signs of trend to bilateral trade*, Financial Times (London), Nov. 6, 1985, at 8, col. 1. India and other developing countries say that the increased protectionism (decreasing their access to markets) is, in effect, forcing them to move toward bilateral deals. *Id.*

countertrade a necessary financing mechanism for countries that cannot pay cash for their imports. In order to trade with these countries and to open up new markets in countries with limited resources, United States companies must educate themselves about the advantages and drawbacks of countertrade. Countertrade by United States firms raises a host of legal issues, including the application of United States trade laws, anti-trust laws,⁶ and other federal regulatory concerns.⁷ Countertrade arrangements are subject to the application of United States trade laws.⁸ The current official United States government policy is sometimes contradictory. Nevertheless, the Administration's opposition to countertrade, especially government-mandated countertrade, seems to represent the dominant position.

This Comment suggests that instead of opposing countertrade as an impediment to multilateralism, the official policy should concentrate on the practicalities of helping United States businesses who engage in countertrade. Although the government and many members of the business community do not like countertrade, the more flexible and well-versed they become on countertrade and its ramifications, the more able they will be to take advantage of the opportunities created by countertrade and to steer clear of the potential pitfalls lurking therein. The United States government may have some justification for remaining fairly neutral with regard to voluntary arrangements and in opposing countertrade if it is government-mandated. Yet the increasing popularity of countertrade worldwide and the rising number of countries which mandate countertrade suggest that the United States government should reconsider its position and take affirmative steps to develop a cohesive Administration policy to aid those United States firms who choose to engage in countertrade transactions.

First, this Comment will define countertrade and discuss the reasons for its expansion. Second, it will examine the present United States policy, including the application of United States trade laws to countertrade. Finally, it will conclude that the government policy should focus on educating United States firms on the practicalities, the opportunities and the problems created by countertrade.

⁶ A discussion of the application of United States antitrust laws to countertrade is beyond the scope of this paper. For a discussion of this topic see McVey, *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas*, 16 LAW & POL'Y IN INT'L. BUS. 1, 45-46, 55-56 (1984).

⁷ See *id.* at 35-56.

⁸ The warning comes from Commerce Department economist James Walsh. *Administration Opposes Forced Barter, Countertrade But Not Voluntary Deals*, 9 U.S. IMPORT WEEKLY (BNA) No. 2, at 58 (Oct. 12, 1983) [hereinafter cited as *Administration*].

II. BACKGROUND

A. General Definition

Countertrade encompasses the "entire range of practices whereby one country requires another to purchase from it as a condition for allowing that country to sell to it."⁹ Barter is the simplest form of countertrade, but countertrade usually takes the form of more complex arrangements.¹⁰ Most countertrade deals involve two or more contracts that carefully describe the terms of the exchange. These agreements generally involve a party who sells technology or goods to a buyer and in turn contractually agrees to purchase goods equal in value to a specified percentage of the original sales contract.¹¹

At first, the main emphasis of countertrade was on East-West trade. Communist countries have been using countertrade as a way of circumventing the problem of their nonconvertible currencies, which hampers their hard currency trade with developed countries like the United States.¹² In 1976, the United States Department of Commerce reported that an estimated twenty-eight percent of East-West trade was countertrade; the estimate rose to thirty-eight percent in 1981.¹³ According to one expert, about fifty percent of all East-West trade currently involves some form of countertrade.¹⁴

In this context, countertrade arrangements involve the extension of credit by a Western bank or company to a government agency or state bank within the Communist country.¹⁵ The Western bank, which may be a government entity such as the Export-Import Bank, provides the Eastern trade partner with the initial capital to pay its Western trade

⁹ Gadbow, *The Implications of Countertrade Under the General Agreement on Tariffs and Trade*, 5 J. COMP. BUS. & CAP. MKT. L. 355, 356 (1983).

¹⁰ Some of these include counterpurchase, compensation agreements, offset, bilateral clearing agreements, and switch trading. For a general discussion of barter, compensation agreements, offset, and bilateral clearing agreements, see P. VERZARIU, INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, INTERNATIONAL COUNTERTRADE: A GUIDE FOR MANAGERS AND EXECUTIVES, at 8-15 (1984). For a general discussion of counterpurchase see P. VERZARIU, INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, COUNTERTRADE PRACTICES IN EAST EUROPE, THE SOVIET UNION AND CHINA: AN INTRODUCTORY GUIDE TO BUSINESS, at 7-8 (1980).

¹¹ ECONOMIC RESEARCH SERVICE, INT'L ECON. DIV., U.S. DEP'T OF AGRIC., BARTER OF AGRICULTURAL COMMODITIES, 5 (1982) [hereinafter cited as IED REPORT].

¹² Grabow, *Negotiating and Drafting Contracts in International Barter and Countertrade Transactions*, 9 N.C.J. INT'L L. & COM. REG. 255, 255 (1984).

¹³ Welt, *An Introduction to Countertrade*, in COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE '80s, 2 (P. Ehrenhaft chair 1984).

¹⁴ *Id.*

¹⁵ See IED REPORT, *supra* note 11, at 5.

partners for the equipment, technology, and construction costs.¹⁶ The loans are then retired over several years in hard currency from the Eastern partner's output or from specified goods stated in the contract.¹⁷ One of the Western trading partners would typically handle the sale of the goods in the West.¹⁸

Despite its traditional use in East-West trade, in the 1980s a wide variety of nations have made significant efforts to promote and expand countertrade.¹⁹ This international expansion of countertrade has affected North-South trade²⁰ as well as other types of trade. Less developed countries (LDCs) use countertrade to ensure export sales which help their balance of trade and enables the LDCs to acquire the sophisticated technology and industrial goods necessary to develop a domestic manufacturing infrastructure. In this context, countertrade is a financing tool which provides an alternative means of purchasing imports when traditional payment forms such as cash or credit are unavailable²¹ because of foreign exchange shortages or low currency values.²² In addition to spreading to North-South trade, the following list supplied by the United States International Trade Commission (USITC) demonstrates the great variety of nations which use countertrade: oil-poor developing countries such as Israel, Jamaica, and Turkey; oil-rich developing countries such as Indonesia, Malaysia, Mexico, and Saudi Arabia; newly industrialized countries such as Korea and Singapore; traditional East European users such as East Germany, the Soviet Union, Poland; and even developed market economies such as Australia, Belgium, Canada, and Japan.²³

A general characteristic of the various countertrade arrangements is that countertrade stems from necessity.²⁴ Although countertrade is technically never forced upon companies because they have the choice of not entering into the transaction, one party always acknowledges that if it does not agree to some type of a barter deal, the whole transaction itself

¹⁶ Potter, *East-West Countertrade: Economic Injury and Dependence Under U.S. Trade Law*, 13 LAW & POL'Y IN INT'L BUS. 413, 417 n.20 (1981).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ USITC (1985), *supra* note 2, at vii.

²⁰ Many Third World nations turn to countertrade because of balance of payments problems. See generally Walsh, *Countertrade: Not just for East-West any more*, 17 J. WORLD TRADE L. 3 (1983).

²¹ *Transactions*, *supra* note 1, at 679.

²² McVey, *Countertrade and Barter: Alternative Trade Financing By Third World Nations*, 6 INT'L TRADE L.J. 197, 197 (1980-81).

²³ USITC (1985), *supra* note 2, at vii. See also *id.* at 123-38 for "Countertrade Policies and Practices in Selected Countries."

²⁴ GATT Report, *supra* note 4, at 1071.

would fall through.²⁵

B. Types of Countertrade Transactions

1. Barter

Barter is the direct exchange of goods or services without any transfer of cash.²⁶ In a barter transaction, the two parties determine the value of the goods and/or services to be exchanged.²⁷ After the contracting parties decide upon the quantity of the goods or services to be exchanged and the delivery dates, each party fulfills its obligation.²⁸ The time period for a barter agreement is usually short, typically less than one year, to avoid world price fluctuations favoring one party or another.²⁹ Western firms rarely engage in pure barter, however, because of the difficulty of exactly matching needs on both sides.³⁰

2. Counterpurchase

Counterpurchase links the value of exports and the value of imports of unrelated products, transaction by transaction.³¹ In a counterpurchase agreement, one party sells goods or services to the other party and contractually agrees to make a reciprocal purchase of generally non-resultant products. This means that the counter-delivered goods are not a product of the supplied technology but are often raw materials or light manufactured items.³² The reciprocal purchase obligation, which the Western company must generally fulfill within one to five years, is usually for an amount less than one hundred percent of the original sale value.³³ Some transactions, however, stipulate that the reciprocal purchase obligation equal or even exceed the original value of goods supplied, in which case the seller takes the full contract price plus interest with the goods to be marketed in the West.³⁴

Counterpurchase agreements benefit both developing and developed

²⁵ *Id.*

²⁶ Grabow, *supra* note 12, at 259. One example of barter is the West German Volkswagen Company's exchange of 10,000 cars in return for various East German products. *Id.*

²⁷ USITC (1985), *supra* note 2, at 3.

²⁸ *Id.*

²⁹ *Id.* at 3-4.

³⁰ Grabow, *supra* note 12, at 259. See also P. VERZARIU, INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, INTERNATIONAL COUNTERTRADE: A GUIDE FOR MANAGERS AND EXECUTIVES, at 9 (1984).

³¹ Walsh, *supra* note 31, at 4.

³² IED REPORT, *supra* note 11, at 6.

³³ USITC (1985), *supra* note 2, at 1.

³⁴ Kaza, *The Importance of Barter in East-West Trade Seen Growing In '80s*, Wall St. J., Mar. 18, 1980, at 10, col. 3.

countries.³⁵ Developing countries especially use counterpurchase to minimize their balance of payments deficits.³⁶ Some countries require counterpurchase when their state oil bodies negotiate contracts: Algeria, Indonesia,³⁷ Iran, Libya and Nigeria are examples.³⁸ Developed countries use counterpurchase as a means to boost exports to foreign markets where foreign exchange shortages exist.³⁹

3. *Compensation*

Unlike counterpurchase agreements which link exports and imports of unrelated products, compensation (or buyback) agreements link exports and imports of related products.⁴⁰ The total monetary value of a compensation transaction is often much higher than the total monetary value of a counterpurchase transaction.⁴¹ In such an agreement, the Western trading partner exports the machinery and technology needed to build a plant.⁴² In return, the Western supplier receives, over the term of the bilateral contract, payment in the form of a predetermined amount of the resultant output.⁴³ The goods are often produced according to the Western supplier's designs and may be incorporated into products which the Western supplier himself produces.⁴⁴ A more complicated compensation arrangement involves exports of services, both managerial and technical, financed by export credits, repayable in resultant output.⁴⁵ Yet another type is called a "develop-for-import compensation arrangement" which involves exports of equity loans repayable in related output, usually equal to a share of equity held.⁴⁶

Compensation arrangements involve greater costs and risks for the Western supplier than either counterpurchase or pure barter transac-

³⁵ They often involve a third party, such as a countertrade department of a bank, or a state trading organization, or a trading company, which assumes the exporter's obligation. Truell, *Barter Accounts for a Growing Portion of World Trade Despite Its Inefficiency*, Wall St. J., Aug. 15, 1983, at 21, col. 2. An example of a counterpurchase arrangement is McDonnell Douglas' sale of jet aircraft to Yugoslavia in exchange for buying various Yugoslavian goods, including canned hams and leather coats. Grabow, *supra* note 12, at 258.

³⁶ Walsh, *supra* note 20, at 4.

³⁷ Indonesia leads requires that all government imports in excess of \$500,000 be compensated by Indonesian products. USITC (1985), *supra* note 2, at 130.

³⁸ Truell, *supra* note 35, at 21, col. 2.

³⁹ Walsh, *supra* note 20, at 4.

⁴⁰ Walsh, *supra* note 20, at 5. See generally, USITC (1985), *supra* note 2, at 3-4.

⁴¹ USITC (1985), *supra* note 2, at 3.

⁴² Potter, *supra* note 16, at 46.

⁴³ *Id.*

⁴⁴ Park, *Countertrade Requirements in East-West Transactions*, 5 J. COMP. BUS. & CAP. MKT. L. 335, 336 (1983).

⁴⁵ Walsh, *supra* note 20, at 5.

⁴⁶ *Id.*

tions.⁴⁷ The main reason for the greater risk is that compensation agreements are long-term arrangements which entail transferring complex technology and setting up entire facilities for production.⁴⁸ Also, compensation agreements generally run from five to twenty years or more,⁴⁹ while counterpurchase deals typically continue for shorter periods.⁵⁰ In addition, the reciprocal purchase commitment is often one hundred percent or more of the original contract value.⁵¹

Despite the risks, compensation agreements can be advantageous for both developed countries, as well as developing countries. Developed countries that have a policy of assuring stable supplies of essential imports use import compensation arrangements.⁵² In addition to ensuring the long-term supply of critical raw materials or manufactured goods to developed nations, compensation agreements also provide substantial sales of equipment and production facilities to the LDCs.⁵³ Another advantage of compensation arrangements is that they can preserve or increase a company's competitive edge. Finally, compensation agreements may permit a Western company to manufacture goods in nations where labor is cheaper than labor in the Western company's own country.⁵⁴

Despite these benefits, compensation arrangements sometimes face heavy criticism in the West, especially by the Western unions which charge that such transactions export Western jobs to the East.⁵⁵ Some business executives argue that products received in compensation are often dumped on Western markets. They assert that these products erode the profit margins of Western manufacturers of the same products and thereby threaten their existence.⁵⁶

On the other hand, Eastern European nations and the Soviet Union favor compensation or buyback arrangements in which the products that are traded form the payments for one of the parties.⁵⁷ The main incentive behind compensation trading for Eastern European nations is their desire to exploit the marketing networks of the West.⁵⁸ The best-known

⁴⁷ Grabow, *supra* note 12, at 258.

⁴⁸ *Id.*

⁴⁹ USITC (1985), *supra* note 2, at 3.

⁵⁰ IED REPORT, *supra* note 11, at 6.

⁵¹ *Id.*

⁵² Walsh, *supra* note 20, at 5.

⁵³ Grabow, *supra* note 12, at 258.

⁵⁴ IED REPORT, *supra* note 11, at 6.

⁵⁵ Kaza, *supra* note 34, at 10.

⁵⁶ *Id.*

⁵⁷ Truell, *supra* note 35, at 21.

⁵⁸ Kaza, *supra* note 34, at 10. This is the view expressed by specialists at a Leipzig, East Germany trade fair.

example of a compensation agreement is the Soviet gas pipeline deal between several European countries and the Soviet Union.⁵⁹ The European countries agreed to supply technology, equipment, and capital to the Soviet Union for the Soviets to build a transcontinental pipeline between Siberia and Western Europe. The Soviet Union in return agreed to sell the European countries natural gas from the pipeline.

4. *Offset*

Offset is another type of countertrade.⁶⁰ Offset arrangements have barter-like components because they involve forced technology transfer or co-production in return for buying products from the supplier.⁶¹ Industrialized countries commonly use offset for the specific purpose of aircraft and military-related procurement.⁶² A typical offset arrangement may involve either subcontracting, licensing production in the buyer country, or buying goods and services in return.⁶³

5. *Bilateral Clearing Agreements*

Countertrade can also take the form of bilateral clearing agreements (sometimes called Evidence Accounts). Bilateral clearing agreements are arrangements between two parties in which purchases are automatically credited against a company or a country's sales.⁶⁴ The parties involved in these agreements usually have foreign exchange controls and shortages of foreign currency.⁶⁵ They enter into a bilateral agreement to exchange goods and/or services over a specified time period, commonly one year.⁶⁶ Each party provides a list of what it offers for trade, and each country's foreign trade bank keeps a ledger in which it records credits and debits in accounting units stated in terms of currency.⁶⁷

For transactions outside the Eastern bloc, the value of the goods is

⁵⁹ Grabow, *supra* note 12, at 259.

⁶⁰ What distinguishes offset from other forms of countertrade is that it is not contractual, but involves an agreement called a Memorandum of Understanding (MOU). U.S. INT'L TRADE COMM'N, PUB. NO. 1237, ANALYSES OF RECENT TRENDS IN U.S. COUNTERTRADE, 8 n.1 (1982) [hereinafter cited as ITC COUNTERTRADE ANALYSIS].

⁶¹ *U.S. Firms At Conference Given Warning Not to Violate U.S. Customs, Trade Laws*, 9 U.S. IMPORT WEEKLY (BNA) No. 10, at 390 (Dec. 7, 1983) [hereinafter cited as *U.S. Firms*].

⁶² *Id.* at 390.

⁶³ *House Panel Tells Commerce, Treasury, USTR Officials To Provide Offset Data*, 9 U.S. IMPORT WEEKLY (BNA) No. 34, at 1071 (May 30, 1984) [hereinafter cited as *House Panel*]. For example, the Department of Defense may use offset as a condition for the sale of United States defense articles. IED REPORT, *supra* note 11, at 6.

⁶⁴ L. WELT, *TRADE WITHOUT MONEY: BARTER AND COUNTERTRADE*, 25 (1984).

⁶⁵ *Id.* at 97.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25-26.

measured in a hard currency like the Swiss franc or the United States dollar.⁶⁸ For transactions within the Council of Mutual Economic Aid (CMEA) countries, the value of goods is measured in "transferable rubles."⁶⁹ If a country does not purchase enough goods to balance its accounts within the set time limitation, it receives clearing credits.⁷⁰ Although stated in terms of currency, clearing credits cannot be redeemed for currency.⁷¹

6. *Switch Trading*

To use these clearing credits, the country or company with the surplus clearing credits must resort to "switching" all or part of its clearing account to an interested third party at discounted prices.⁷² This process is called switch trading. The third party is often a switch trading house which uses the credits to buy goods from the country in deficit.⁷³ Through a complicated series of deals, often involving barter, the switch trading house obtains goods that can be sold for much-desired hard currency. After deducting a sizable discount for its efforts, the switch trading house transfers the hard currency proceeds to the party with the original account surplus.⁷⁴

Most Third World countries have bilateral clearing arrangements.⁷⁵ Although the LDCs usually engage in bilateral clearing arrangements among themselves, some LDCs have such arrangements with more developed Eastern bloc countries.⁷⁶ In addition, two members of the Organization for Economic Development (OECD) have bilateral clearing arrangements: France has special arrangements with its former colonies, and Greece has a bilateral clearing arrangement with Iraq.⁷⁷

C. Countertrade Expansion

The use of countertrade has risen dramatically over the last several years. More than eighty-five countries now initiate countertrade.⁷⁸ Each

⁶⁸ *Id.* at 26.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 26-27. See generally USITC (1985), *supra* note 2, at 4-5.

⁷³ *Id.* at 27.

⁷⁴ *Id.*

⁷⁵ *Id.* at 97.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *NFTC Survey Shows Dramatic Rise in Trade Transactions Through Non-Money Payments*, 9 U.S. IMPORT WEEKLY (BNA) No. 13, at 499 (Jan. 4, 1984) [hereinafter cited as *NFTC*]. The NFTC survey was of 110 United States exporters.

year from 1981 to 1984, the number of countertrade transactions grew by 50, 64 and 117% respectively.⁷⁹ Estimates of countertrade as a total percentage of world trade vary widely, as the following figures illustrate. According to one source, countertrade represents about one-third of the world's commerce, approximately 700 billion dollars.⁸⁰ On the other hand, a GATT economist estimates that countertrade represents a maximum of five percent of total international trade.⁸¹ The International Monetary Fund (IMF) estimates an even lower figure, only one percent of total world trade.⁸² By the year 2000, one-half of all world trade will involve some kind of countertrade, according to a Commerce Department estimate.⁸³

It is difficult to determine what effect the worldwide growth in countertrade has had on United States trade. The exact dollar value of United States trade affected by countertrade cannot be determined because United States firms are not required to report this information.⁸⁴ Furthermore, an estimated seventy-two percent of the countertrade goods "never reach the United States but are disposed of through overseas affiliates and subsidiaries."⁸⁵

Ninety-six percent of the participants in a recent National Foreign Trade Council survey said that they expected the use of countertrade to continue.⁸⁶ The United States exporters cited world economic conditions, lack of foreign exchange, the debt position of developing countries, export expansion, and the need for technology transfer and economic development as reasons for the continued use of countertrade.⁸⁷ Changes in international economic conditions within the last fifteen years have brought about hard currency depletions for many countries.⁸⁸ A rapid rise in the cost of key imports, such as energy, has greatly depleted supplies of hard currency that countries need to pay for imports and to meet expanding needs.⁸⁹ In addition to the countertrade initiator's scarcity of foreign exchange, the additional opportunity for that country to acquire

⁷⁹ *Id.*

⁸⁰ L. WELT, *supra* note 64, at 1-2.

⁸¹ Suro-Bredie, *U.S. Government Views on Countertrade* in COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE 80's 10 n.2 (P. Ehrenhaft chair 1984).

⁸² *Id.* at 10 n.3.

⁸³ Welt, *supra* note 13, at 2.

⁸⁴ Suro-Bredie, *supra* note 81, at 10.

⁸⁵ NFTC, *supra* note 78, at 499. This statement is from W.A. Bussard, director of NFTC's countertrade project which conducted the survey of 110 United States exporters.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ McVey, *supra* note 22, at 197.

⁸⁹ *Id.* at 197-98.

desired imports makes countertrade appealing.⁹⁰ Countertrade also facilitates export expansion by concealing the decrease in price from creditors and existing customers.⁹¹

In addition to increased Western trade with both nonmarket economies (NMEs) and LDCs, the rising use of countertrade can be attributed to its use as a financing tool for one or both of the parties to the transaction.⁹² Difficulties in obtaining short-term export financing have compelled many heavily indebted developing countries to use countertrade.⁹³ Countertrade presents an important alternative to paying cash for imports, whenever increasing amounts of foreign exchange are required for servicing foreign debt.⁹⁴ Countertrade has also been used as direct payment to compensate for any discrepancies in the exchange value of imports and exports.⁹⁵

Several factors add to the financing problems of developing countries experiencing balance of payments difficulties. World recession exacerbates the hard currency position of Third World countries because it leads to lower commodity prices and thereby reduces foreign exchange earnings for many developing countries.⁹⁶ The tightening of underwriting conditions on trade-credit insurance provided by the Foreign Credit Insurance Association (FCIA) to United States exporters has been another aggravating factor.⁹⁷ In addition, protectionist "import relief" measures in the United States and other Western industrialized countries aim to protect key domestic industries and their respective labor forces from lower-priced Third World imports.⁹⁸

Experts predict a continued rise in countertrade as a means of dealing with the foreign debt problem.⁹⁹ Countertrade appeals almost equally to both developing countries short of cash and to the international banks wary of extending them credit.¹⁰⁰ Therefore, although countertrade can be costly, Western companies have found that it can

⁹⁰ Kravis, *Statement*, 5 J. COMP. BUS. & CAP. MKT. L. 409, 409 (1983).

⁹¹ *Id.*

⁹² *GATT Report*, *supra* note 4, at 1071.

⁹³ *Growth of Countertrade in Mexico, Brazil Highlights 'Nonconventional' Trade Session*, 9 U.S. IMPORT WEEKLY (BNA) No. 28, at 905, 907 (Apr. 18, 1984) [hereinafter cited as *Growth of Countertrade*]. This statement is from Don Haendel of the Office of General Counsel, United States Department of the Treasury.

⁹⁴ *Id.* at 906.

⁹⁵ *GATT Report*, *supra* note 4, at 1071.

⁹⁶ *Transactions*, *supra* note 1, at 679.

⁹⁷ The Foreign Credit Insurance Association is an insurance syndicate backed by the United States Export-Import Bank. *Growth of Countertrade*, *supra* note 93, at 907.

⁹⁸ McVey, *supra* note 22, at 198.

⁹⁹ *Growth of Countertrade*, *supra* note 93, at 907.

¹⁰⁰ Truell, *supra* note 35, at 21.

provide an appropriate financing tool in cases where it has been estimated that cash or credit payment is impossible to arrange.¹⁰¹

III. UNITED STATES POSITION ON COUNTERTRADE

A. Current Government Position

1. *Current Official Policy*

Although in practice, United States government departments and agencies may sometimes take inconsistent policy stances regarding countertrade, the Administration does have an official position on countertrade. Officially, the United States government sees countertrade as a distortion of free trade and contrary to the best interests of the contracting parties in the long run.¹⁰² Although the United States government would be neutral to a countertrade transaction "voluntarily agreed to between two parties,"¹⁰³ it views countertrade as "costly, cumbersome and restrictive."¹⁰⁴ Companies must increase their prices by approximately ten percent in order to complete such transactions.¹⁰⁵ As a general rule, the United States government finds countertrade acceptable if it "reflects market forces," and involves the swapping of goods for goods, each valued at market prices.¹⁰⁶

The Office of the United States Trade Representative (USTR) recently described the United States government position on countertrade:

1. The U.S. Government generally views countertrade as contrary to an open, free trading system. However, as a matter of policy, the U.S. Government will not oppose U.S. companies' participation in countertrade arrangements unless such action could have a negative impact on national security.
2. The U.S. Government will provide advisory and market intelligence service to U.S. businesses, including information on the application of U.S. trade laws to countertrade goods.
3. The U.S. Government will continue to review financing for projects containing countertrade/barter on a case-by-case basis, taking account of the distortions caused by these.
4. The U.S. Government will continue to oppose government-mandated countertrade and will raise these concerns with the relevant governments.

¹⁰¹ See *Transactions*, *supra* note 1, at 679.

¹⁰² P. VERZARIU, INT'L. TRADE ADMIN., U.S. DEP'T OF COMMERCE, INT'L COUNTERTRADE: A GUIDE FOR MANAGERS AND EXECUTIVES, at iii (1984).

¹⁰³ *Administration*, *supra* note 8, at 58.

¹⁰⁴ This quote is from Commerce Department economist James Walsh. See also Verzariu, *supra* note 102, at iii.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

5. The U.S. Government will participate in review of countertrade in the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), and the General Agreement on Tariffs and Trade (GATT) . . .
6. The U.S. Government will exercise caution in the use of its barter authority, reserving it for those situations which offer advantages not offered by conventional market operations.¹⁰⁷

In the late 1970s and early 1980s, countertrade became less responsive to market forces than countertrade arrangements had been during the early 1970s.¹⁰⁸ The Organization for Petroleum Exporting Countries oil embargo, concurrent material shortages of the early 1970s and slower world economic growth are among the factors causing the shift to less reliance on market factors.¹⁰⁹ The combination of these factors has led developing countries to protect their balance of payments by mandatory counterpurchases, and developed countries to boost exports with mixed credits and soft loans tied to buyback agreements.¹¹⁰

The United States government strongly opposes foreign government policies that impose mandatory countertrade requirements because it takes the position that such practices are "economically inefficient and impede the free flow of trade and investment."¹¹¹ The United States government is concerned that "mandated countertrade may generate excess world productive capacity in certain products."¹¹² As a result, the United States follows the policy of asking foreign governments which require countertrade for consultations.¹¹³ For instance, along with the governments of other industrial countries, the United States government has made strong "representations" to the Indonesian government protesting its 100 percent countertrade requirement for government procurement contracts over \$750,000.¹¹⁴ Countertrade is becoming increasingly mandated by foreign government legislation. The Commerce Department estimates that as many as seventeen countries require a counter-

¹⁰⁷ USITC (1985), *supra* note 2, at 68-69. The USTR description came in testimony before a subcommittee of the House Committee on Banking, Finance and Urban Affairs. *Id.*

¹⁰⁸ Walsh, *supra* note 20, at 10.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 11.

¹¹¹ McVey, *supra* note 6, at 64. Quote is from James Walsh, a countertrade generalist in the Commerce Office of Trade and Finance.

¹¹² *U.S. Continues to Oppose Mandated Policies, But Will Provide Information, Official Says*, 2 INT'L. TRADE REP. (BNA) No. 24, at 797 (June 12, 1985) [hereinafter cited as *Information*]. Statement is by Carmen Suro-Bredie of the USTR's Office.

¹¹³ *U.S. Firms*, *supra* note 61, at 389. According to Commerce Department economist Walsh, the United States government has held consultations with Mexico, South Korea, Brazil and Indonesia. *Administration*, *supra* note 8, at 58.

¹¹⁴ *Administration*, *supra* note 8, at 58.

trade commitment as part of any trade transaction with them.¹¹⁵ The United States government believes that government-mandated countertrade is especially discriminatory to small businesses, since only larger multinationals can afford to set up in-house countertrade units or hire the lawyers, and market and financing experts necessary to manage such transactions.¹¹⁶

2. Ambiguities in Government Position

Despite the United States government's professed opposition to countertrade, especially government-mandated countertrade, its competing objective of "gaining a broader multilateral consensus on problems caused by countertrade,"¹¹⁷ makes it unlikely that the United States government will take a country mandating countertrade before the General Agreement on Tariffs and Trade (GATT).¹¹⁸ An interagency group developing a policy on countertrade and barter suggested that as a matter of policy, the United States government will not oppose United States companies' participation in countertrade arrangements unless the participation could have a negative impact on national security.¹¹⁹

a. Countertrade by the federal government

The federal government's response seems even more confusing given its stance that it will neither encourage nor discourage countertrade deals which private firms negotiate without government interference.¹²⁰ According to the Assistant Secretary of Commerce for Trade Development, countertrade is economically inefficient, but the federal government should not interfere with the ability of a United States business to engage competitively in international trade.¹²¹ In fact, the federal government itself has engaged in a number of forms of countertrade for years. Barter programs have traditionally been used to facilitate trade in products that were hard to export, to acquire strategic materials, and to establish trade relations with countries which were forced to barter because of a shortage of convertible currency.¹²²

¹¹⁵ Grabow, *supra* note 12, at 262 n.21.

¹¹⁶ *Id.*

¹¹⁷ *Id.* Statement is by Suro-Bredie, Director of North-South Affairs in the Office of the USTR.

¹¹⁸ *U.S. Firms*, *supra* note 61, at 389.

¹¹⁹ *Countertrade: Indonesian Official Explains Linkage Policy, U.S. Government in Opposition*, 9 U.S. IMPORT WEEKLY (BNA) No. 4, at 161 (Oct. 26, 1983) [hereinafter cited as *Indonesian Official*].

¹²⁰ P. VERZARIU, *supra* note 102.

¹²¹ McVey, *supra* note 6, at 64.

¹²² Note, *Bauxite for Butter: The U.S.-Jamaican Agreement and the Future of Barter in U.S. Trade Policy*, 16 LAW & POL'Y IN INT'L BUS. 239 (1984).

Interest by the United States Department of Agriculture has been reviving recently in the United States Barter Program. For instance, in January of 1984, the Department of Agriculture signed the third major bilateral transaction with Jamaica under which the United States exchanged surplus dairy products, metals and cash for Jamaican bauxite.¹²³ The Department of Defense also engages in forms of countertrade. It often uses offset countertrade arrangements in which it requires foreign suppliers to try their best to hire subcontractors from the United States and to buy components from United States firms.¹²⁴

b. Federal government assistance

In addition to engaging in some forms of countertrade itself, the federal government also provides limited assistance to United States firms that want to engage in countertrade. Despite its continued opposition to government-mandated countertrade and any deals that affect national security, the United States government will give limited help to United States entities that want to learn about the countertrade requirements of foreign governments which mandate countertrade.¹²⁵ Although the Commerce Department has previously made its assistance available to United States firms wishing to engage in countertrade, it has not been very open about the availability of such aid.¹²⁶ The Commerce Department seems to be increasing its awareness that countertrade is "becoming part of the reality of the market, and governments will continue to require it, and economic conditions make it likely to continue for many years to come We are advising companies, as to what they are facing in other countries."¹²⁷ Yet the Commerce Department is quick to point out that the purpose of the federal government assistance is not to educate a firm on the mechanics of successfully negotiating and completing countertrade transactions.¹²⁸ Instead, it believes that companies must use private sector experts and consultants for that purpose.¹²⁹

c. Conflicting signals

Trying to determine the true Administration policy on countertrade

¹²³ *Id.* at 241-42.

¹²⁴ McVey, *supra* note 6, at 65.

¹²⁵ *Id.*

¹²⁶ See *Indonesian Official*, *supra* note 119, at 161. Only a few years ago, one of the government's few experts on countertrade said that "we don't go out and advertise" the existence of such Commerce Department assistance. *Id.*

¹²⁷ *Information*, *supra* note 112, at 797.

¹²⁸ *Id.*

¹²⁹ *Id.*

is difficult, given various departments' stances on the subject. The extent to which the government will get involved is unclear. In addition to the Commerce Department's view stated above, the Treasury Department advocates free trade with traditional cash sales.¹³⁰ In the view of the Treasury Department, forced countertrade is contrary to an open free trading system and detrimental in the long-run to the United States as well as developing countries. As a result, the United States government is trying to think of ways to oppose mandated countertrade such as that which Indonesia imposes.¹³¹ But the desire for free trade and the resulting opposition to such countertrade deals is tempered by the concern that the business will slip to other countries' firms.¹³² The practice of requiring foreign companies to transfer technology or manufacture their products in the country to which they are selling is becoming widespread in industrialized nations as well as developing countries.¹³³

From the viewpoint of the Department of State, barter is "inefficient and potentially harmful to U.S. foreign relations,"¹³⁴ for the following reasons:

First, barter is inefficient compared to cash transactions because of the additional cost of locating a suitable trading partner.

Second, by masking the price of a transaction, barter may be used to take advantage of a less sophisticated trading partner or to conclude a sale at a price lower than a party is willing to openly acknowledge.

Third, barter bypasses the government appropriations process and thus, in effect engages the government in speculation in commodities futures.

Fourth, sales from the . . . strategic stockpile . . . can have a seriously disruptive effect on international markets by displacing the exports of other nations. This is especially undesirable when the affected country is a developing country with which good relations are important. Finally, barter may violate the GATT if it is the equivalent of dumping or subsidizing our exports.¹³⁵

From the viewpoint of the Customs Service, nothing is inherently wrong with countertrade.¹³⁶ Yet it cautions companies importing countertraded goods into the United States against violating United States law.¹³⁷ One reason for this caution is that "with all the secrecy surrounding much of countertrade, and its dramatic rise in world trade,

¹³⁰ *Barter Becomes Big Business in World Trade*, N.Y. Times, July 26, 1981, at F15, col. 1.

¹³¹ *Indonesian Official*, *supra* note 119, at 161.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Note, *supra* note 122, at 257.

¹³⁵ *Id.* at 257 n.125.

¹³⁶ *U.S. Firms*, *supra* note 61, at 389.

¹³⁷ *Id.*

the threat of fraud may be growing, too."¹³⁸ The ways an importer of record can get into trouble with Customs include giving false informations and failing to disclose information if a countertrade product is later determined to have been undervalued.¹³⁹ The Customs Service has the legal right to know what kind of transaction is occurring because that information may be important in determining the value of the imported goods.¹⁴⁰

It is difficult for an importer to determine the value of countertraded merchandise. Section 402 of the Tariff Act of 1930, as revised by the Trade Agreements Act (Section 402), regulates the valuation of goods entering the United States.¹⁴¹ Five methods—one primary method and four secondary methods—determine customs value.¹⁴² The primary method equates the customs value with the transaction value of the imported merchandise, the price actually paid or payable for the merchandise when sold for exportation to the United States with certain adjustments.¹⁴³

According to Section 402, when the transaction value is unavailable, Customs officials must consider secondary valuation methods in a pre-determined order.¹⁴⁴ The first alternative is to use the previously accepted and adjusted "transaction value of identical merchandise"¹⁴⁵ sold for export to the United States and exported at approximately the same time as the goods being valued.¹⁴⁶ The next alternative is to use the "transaction value of similar merchandise."¹⁴⁷ If these three value standards are inapplicable, the customs value is determined on the basis of deductive value¹⁴⁸—a price determined depending upon when and in what condition the merchandise concerned is sold in the United States—or computed value¹⁴⁹—a sum which includes the cost of materials and processing, an amount for profit and general expenses, and provisions for a few other costs—in that particular order, unless the importer chooses to reverse them.¹⁵⁰ If none of the five methods work to determine a

¹³⁸ *Id.* Statement is by Fred McGreevy of the Customs Fraud Investigation Center.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 19 U.S.C.A. § 1401a (1982).

¹⁴² Abbey, *Valuation of Countertraded Merchandise* in COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE '80s 58 (P. Ehrenhaft chair 1984).

¹⁴³ *Id.* See 19 U.S.C.A. 1401a(b) (1985 Supp.).

¹⁴⁴ *Id.*

¹⁴⁵ 19 U.S.C.A. § 1401a(c) (West 1985 Supp.).

¹⁴⁶ Abbey, *supra* note 142.

¹⁴⁷ 19 U.S.C.A. § 1401a(c) (West 1985 Supp.).

¹⁴⁸ See 19 U.S.C.A. § 1401a(d) (West 1985 Supp.).

¹⁴⁹ See 19 U.S.C.A. § 1401a(e) (West 1985 Supp.).

¹⁵⁰ Abbey, *supra* note 142, at 58.

value, Customs officials may base a value on any one of those methods with reasonable adjustments.¹⁵¹

Applying the transaction value to countertraded merchandise is difficult.¹⁵² If a transaction is not considered to be a sale, then the transaction value cannot apply and a secondary means must be used to determine dutiable value.¹⁵³ Although transaction value could apply in a pure barter transaction by stipulating terms in the contract, transaction value may not apply where the imported goods are part of a more complicated countertrade transaction than pure barter, such as a compensation deal. Yet often the same circumstances which necessitate structuring a transaction without any money changing hands also eliminates the usefulness of secondary valuation methods.¹⁵⁴

Because of these difficulties in valuing countertraded merchandise in complex countertrade transactions, the potential for customs fraud through the under-or-over-valuation of goods looms large.¹⁵⁵ One expert on countertrade has stated that "[t]here's a lot of dumping going on . . . the problem is the government has not been able to put its hands on it because it is not continuous dumping; it's dumping once or twice."¹⁵⁶ To address this potential problem, the United States Custom Service is making a major effort to monitor countertrade. As a result, it is advisable for companies that have questions about the end value of a countertraded good to submit a written request for an opinion to the Office of Rulings and Regulations at the United States Customs Service.¹⁵⁷

d. Congressional action

In addition to various Executive agencies espousing different views on countertrade, Congress has also acted on matters relating to barter and countertrade. It has enacted several pieces of legislation which permit the President or Secretary of Agriculture to barter or exchange privately-owned agricultural commodities or Commodity Credit Corporation (CCC)-owned commodities for strategic and critical materials produced abroad, or for services and supplies which United States

¹⁵¹ 19 U.S.C.A. § 1401a(f) (West 1985 Supp.); See also Abbey, *supra* note 143, at 59.

¹⁵² Abbey, *supra* note 142, at 60.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Difficulties in Marketing Products May Result in Dumped Goods, Conference Told*, 9 U.S. IMPORT WEEKLY (BNA) No. 2, at 74 (Oct. 12, 1983) [hereinafter cited as *Difficulties*]. The warning comes from Leo Welt, president of Welt International Corp. at a New York Chamber of Commerce seminar on barter and countertrade.

¹⁵⁷ Replies can be expected within ninety days. The address is 1301 Constitution Ave., N.W., Washington, D.C. 20229. *U.S. Firms*, *supra* note 61, at 389.

agencies abroad need for their operation.¹⁵⁸ Congressional interest in barter transactions stems from two areas: a national security concern for rebuilding the United States strategic mineral stockpile, and an agriculture-related concern for the need of United States farmers to export surplus agricultural goods.¹⁵⁹ The eventual purpose of stockpiling the goods acquired through barter is to "preclude a costly and dangerous U.S. dependence upon foreign sources of supply in times of national emergency."¹⁶⁰

In recent years, numerous bills have been proposed requesting the President to authorize more barter transactions.¹⁶¹ During the 99th Congress, eleven bills dealing with United States government barter to promote the export of United States agricultural commodities through the CCC with the goal of acquiring strategic materials or expanding markets were proposed and in some cases enacted.¹⁶² Although the 98th Congress did not enact any definitive barter bills, it did show an interest in certain kinds of countertrade by including in the Defense Production Act Amendments of 1984 Section 309, which requires the President to submit a "report on the impact of offsets on the defense preparedness, industrial competitiveness, employment and trade of the United States" to certain congressional committees.¹⁶³

3. *Objections to Administration Policy*

According to a former Commerce official, "it's a myth that the world economy is functioning as a free movement of trade."¹⁶⁴ Facing this reality makes it easier to understand why some countries and firms turn to countertrade. Current credit constraints on trade financing,¹⁶⁵ "LDC import restrictions through exchange-rate policies and hard-currency repatriation,"¹⁶⁶ and International Monetary Fund conditionality requirements¹⁶⁷ are just some of the factors hindering the free operation of market forces in the world economy. These factors encourage poor developing countries to conserve their foreign exchange and to improve their trade balances which in turn forces them to resort to counter-

¹⁵⁸ USITC (1985), *supra* note 2 at 73, 76. For a list of such acts, see *id.* at 76.

¹⁵⁹ *Id.*

¹⁶⁰ USITC (1985), *supra* note 2, at 76.

¹⁶¹ *Administration*, *supra* note 8, at 59.

¹⁶² USITC (1985), *supra* note 2, at 77. For a list, see p. 77.

¹⁶³ *Id.*

¹⁶⁴ *Administration*, *supra* note 8, at 59.

¹⁶⁵ P. VERZARIU, *supra* note 102, at iii, v.

¹⁶⁶ USITC (1985), *supra* note 2, at 43.

¹⁶⁷ *Id.* at 42.

trade.¹⁶⁸ In addition, the protectionist sentiment building in the United States and other industrialized countries is driving many of the developing countries to countertrade.¹⁶⁹

A pragmatic reason for rethinking the government position is that many United States suppliers simply will not get paid unless they are willing to engage in countertrade and take full or partial payment in the form of goods.¹⁷⁰ This has prompted businessmen to urge the United States government to “‘stop daydreaming, . . . face the situation,’” and use counterpurchases to try to reduce the trade deficit with Japan.¹⁷¹ They see countertrade as a “stable and ongoing practice . . . a profitable marketing tool rather than a necessary evil.”¹⁷²

B. Application of the GATT and United States Trade Laws to Countertrade

A clear, cohesive government policy is needed so that United States exporters will know what is impermissible under the United States trade laws when they are involved in a countertrade deal. In order to understand the present policy, it is necessary to look at how trade laws apply to countertrade transactions. United States trade laws are particularly important because domestic industries faced with new competition seek relief under those laws.¹⁷³ Simultaneously, these same United States trade laws pose a danger to United States firms who have made heavy investments in long-term countertrade arrangements;¹⁷⁴ such dangers can include the dissolution of their transactions, the assessment of special duties, and the imposition of import restrictions.

1. *Countertrade and the GATT*

Before examining United States trade laws, a brief look at the General Agreement on Tariffs and Trade (GATT) is necessary because it provides the framework for the national antidumping and countervailing duty laws of Member States.¹⁷⁵ The question central to a countertrade analysis is the extent to which countertrade practices are consistent with

¹⁶⁸ *Administration*, *supra* note 8, at 59.

¹⁶⁹ *Id.* at 58.

¹⁷⁰ *Id.*

¹⁷¹ *Administration Urged to Adopt Formal Policy To Reflect Countertrade As Ongoing Practice*, 2 INT'L TRADE REP. (BNA) No. 36, at 1129 (Sep. 11, 1985) [hereinafter cited as *Policy*].

¹⁷² *Id.*

¹⁷³ Baker & Cunningham, *Countertrade and Trade Law*, 5 J. COMP. BUS. & CAP. MKT. L. 375, 375 (1983).

¹⁷⁴ *Id.* at 375.

¹⁷⁵ *Id.* at 384. The GATT provides this framework in its Article VI.

the GATT. This assessment is difficult, however, because countertrade practices have not been seriously considered within the context of the GATT for several reasons.¹⁷⁶ First, the effectiveness of the GATT in dealing with countertrade is limited because much countertrade is done by Communist countries which generally do not participate in GATT.¹⁷⁷ The Soviet Union has not joined, nor have many of the Eastern European countries. Some countries with state-controlled economies, however, have shown new interest in joining the GATT.¹⁷⁸ Second, since the volume of trade with state-controlled economies has been relatively low, the United States government and private companies, in an effort to encourage trade, have refrained from complaining heatedly about countertrade practices.¹⁷⁹

Countertrade agreements are generally acceptable under the trade rules of the GATT because acceptability depends not on the arrangement itself, but on its motivation.¹⁸⁰ The countertrade deals which, do, however, present problems for a liberal, multilateral trading system are those transactions undertaken not for voluntary economic reasons but because the foreign government mandates countertrade.¹⁸¹ The United States government opposes government-mandated countertrade because it is undertaken for "other-than-economic objectives, resulting in governmental interferences with international market forces."¹⁸² Even if the countertrade requirement is not expressed in a foreign government's formal legislation, if state-trading organizations consistently invoke countertrade, such action may be enough to give rise to a presumption that it is a governmental practice.¹⁸³

From a practical standpoint, the United States government has not applied the GATT rules strictly nor has it rigidly resorted to the GATT panel for adjudication of violations.¹⁸⁴ Due to the relative ease in obtaining waivers and the likelihood that restrictive practices not expressly covered by the GATT will not be proscribed, it may be difficult to pursue and remedy a countertrade practice which may violate the GATT.¹⁸⁵

¹⁷⁶ Gadbow, *supra* note 9, at 355.

¹⁷⁷ Baker & Cunningham, *supra* note 173, at 355.

¹⁷⁸ *Id.*

¹⁷⁹ Gadbow, *supra* note 9, at 355.

¹⁸⁰ Walsh, *supra* note 20, at 355.

¹⁸¹ *Id.*

¹⁸² P. VERZARIU, *supra* note 102, at vi.

¹⁸³ Liebman, *New Directions in U.S. Law in COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE '80s* 258 (P. Ehrenhaft chair 1984).

¹⁸⁴ *Id.* at 261 n.58.

¹⁸⁵ *Id.*

2. Application of United States Trade Laws to Countertrade

While the GATT says little about countertrade, the more pressing threat comes from the application of United States trade laws to countertrade goods.¹⁸⁶ An attorney advising a United States exporter must note at the outset that no United States statute directly addresses countertrade. Furthermore, United States trade laws do not distinguish between countertrade imports and cash sale imports resulting from conventional trade contracts.¹⁸⁷ Although domestic manufacturers and the United States government have brought very few cases even when countertrade deals have been proliferating, a countertrade transaction is not immune from the trade rules.¹⁸⁸ Thus, a United States exporter must be alert to laws which domestic manufacturers may use to seek relief from the exporter's countertraded imports and which thereby jeopardize the exporter's investment in a countertrade agreement. Although United States exporters are generally familiar with United States export laws, they often lack knowledge and experience with United States import laws and consequently are in danger of missing the possible legal violations applicable to a countertrade transaction.¹⁸⁹

The main United States trade laws which apply to a countertrade transaction are the Antidumping Law,¹⁹⁰ the Countervailing Duty Law (CVD),¹⁹¹ Escape Clause,¹⁹² and the Section 406 Market Disruption Statute.¹⁹³ These trade laws apply to all United States import transactions, not just those connected with countertrade. The laws take on special importance in countertrade transactions because countertrading companies often need to sell large quantities of sometimes undesirable products in a short period of time.¹⁹⁴ This burden in turn results in pressures to sell countertrade imports at very low prices in the United States or in a foreign market.¹⁹⁵

a. Antidumping law

The Antidumping Law aims to stop private unfair trade practices by

¹⁸⁶ *U.S. Firms*, *supra* note 61, at 389.

¹⁸⁷ ITC COUNTERTRADE ANALYSIS, *supra* note 60, at viii.

¹⁸⁸ *U.S. Firms*, *supra* note 61, at 389.

¹⁸⁹ *Id.*

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

¹⁹¹ 19 U.S.C.A. § 1671-1677h (West 1982 & 1985 Supp.)

¹⁹² 19 U.S.C.A. § 2251 (1985 Supp.).

¹⁹³ 19 U.S.C. § 2436 (1982).

¹⁹⁴ *McVey*, *supra* note 6, at 36.

¹⁹⁵ *Id.*

preventing discriminatory export pricing.¹⁹⁶ Subtitle IV of the Tariff Act of 1930, as amended, imposes a special assessment duty on products sold in the United States at less than fair value, defined as less than the amount the foreign manufacturer charges for the same goods in the home market.¹⁹⁷ This practice is called underselling.¹⁹⁸ The special duty is assessed in addition to all regular duties which the law imposes if the sale of such products cause or threaten material injury¹⁹⁹ to a United States industry, or materially retard its establishment.²⁰⁰ If the Secretary of Commerce finds that the merchandise is being sold at a dumping price in the United States, and the International Trade Commission (ITC) finds material injury or threat thereof, or material retardation of the establishment of an industry, then the Secretary issues an "Antidumping Order," ordering the assessment and collection of special dumping duties by United States Customs officers at ports of entry.²⁰¹

To determine the existence of dumping, the Antidumping Law specifies the criteria used to compare the "foreign market value" and the United States price. Especially pertinent for countertrade is the special rule²⁰² for determining the domestic value of the NME exports in antidumping cases.²⁰³ The antidumping administrators may use either the domestic or export prices charged by producers in a free market economy²⁰⁴ for similar products, or the constructed value of similar goods

¹⁹⁶ Baker & Cunningham, *supra* note 173, at 383.

¹⁹⁷ 19 U.S.C.A. §§ 1671-1677h (West 1982 & 1985 Supp.).

¹⁹⁸ *Id.*

¹⁹⁹ Liebman, *supra* note 183, at 216-17. "Material injury to an industry does not have to necessarily occur at a nationwide level. The Commission is authorized to divide the United States into separate product markets if producers within those markets sell almost all of their product within their market area and the demand in the market is not supplied to any substantial degree by producers located elsewhere in the country. In such an instance material injury or the threat thereof could be found if there is a concentration of dumped merchandise into an isolated market." *Id.*

²⁰⁰ *Dumping Duties*, [Reference File] INT'L TRADE REP. (BNA) No. 49, at 37:0102 (Sep. 19, 1984) [hereinafter cited as *Dumping Duties*].

²⁰¹ *Id.*

²⁰² The special rule does not explain which countries are to be considered "state-controlled economies." Baker and Cunningham, *supra* note 173, at 386. The only guideline it gives is that the rule applies wherever a country's economy is "state controlled" to an extent that sales or offers of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value by the regular methods set out in 19 U.S.C. § 1677b(a) (1982).

²⁰³ 19 U.S.C. § 1677b(c) (1982).

²⁰⁴ Prices are to be determined from those in a market economy "at a stage of economic development comparable to the state-controlled-economy country from which the merchandise is exported." 19 C.F.R. 353.8(b)(1) (1984). See Baker & Cunningham, *supra* note 173, at 386. The regulations permit the use of prices and constructed value in "noncomparable" free-market countries only if a comparably developed country cannot be found. 19 C.F.R. 353.8(b)(2) (1984). The prices and cost must be "suitably adjusted for known differences in the costs of material and labor." *Id.* Finally, when no other option remains, antidumping administrators are to use the market price established

produced in a comparably developed free-market-country as defined in the regulations.²⁰⁵ The preferred method of determining the home market price of the NME good is the domestic price charged in a comparably developed free market economy country.²⁰⁶

For those firms involved in countertrade with NMEs, the sweeping discretion conferred on the administrators of the antidumping laws causes great uncertainty. The broad administrative discretion mainly comes in the form of the United States Commerce Department's ability to reach its desired result by characterizing as not-comparable those home-market prices that are too high or too low and thereby excluding them.²⁰⁷ The key to NME antidumping cases is to decide "which free-market country is comparable to which NME."²⁰⁸ This decision is often subject to political discretion, as the case of *Electric Golf Cars from Poland* demonstrates.²⁰⁹ Initially, Polish costs were compared with those of a Canadian manufacturer.²¹⁰ Then, five years later after much protest, the Polish costs were compared with Spanish costs, but the case was eventually dropped "in light of changed circumstances" for failure to show material injury.²¹¹ In this case, administrative discretion benefitted the NME exporter because the Polish manufacturer ended up undercutting United States prices without suffering any dumping liability.²¹²

Although there have been dumping investigations involving imports from a Communist country, only one has involved a countertrade contract. In *Truck Trailer Axles from Hungary*,²¹³ the Commission found in a preliminary investigation that truck-trailer axles from Hungary materially injured United States truck-trailer axle producers by sale of axle and brake assemblies at less than fair value.²¹⁴ To determine the fair value of the axle-and-brake assemblies, the Commission compared the United

by United States manufacturers. 19 C.F.R. 353.8(b)(3) (1984); see Baker & Cunningham, *supra* note 173, at 386.

²⁰⁵ Baker & Cunningham, *supra* note 173, at 386.

²⁰⁶ *Id.* If there are no suitable prices to compare, the constructed value of similar goods produced in a comparable developed free-market country may be used. And if no comparable country produces similar goods, antidumping administrators may price the NME's various factors of production in a free-market country and by adding them all up, derive a price indicative of what it would have been charged in the free market country if it produced such a good. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Hayward, *Contracting for Countertrade: Recognizing and Avoiding the Pitfalls* in COUNTER-TRADE AND TRADING COMPANIES: TRADE TRENDS IN THE '80s 87 (P. Ehrenhaft chair 1984).

²¹⁰ *Id.*

²¹¹ 45 Fed. Reg. 39,581 (1980); 45 Fed. Reg. 52,780 (1980). See Hayward, *supra* note 209, at 87.

²¹² Baker & Cunningham, *supra* note 173, at 388.

²¹³ 46 Fed. Reg. 46,152 (1981).

²¹⁴ *Id.*

States price, as determined by the purchase price, with the foreign market value, as determined by the constructed value of such or similar merchandise in a "‘non-state-controlled,’ or free market country."²¹⁵ Because a settlement was reached between the parties, no final valuation took place and no dumping duties were assessed.²¹⁶

From the perspective of domestic industries seeking relief, the Antidumping Law has failed to prevent countertrade injuries.²¹⁷ The domestic industries opposing countertrade claim that the marginal pricing prevalent in countertrade agreements generally will not violate the antidumping standards. They also see the Commerce Department's lack of a method to calculate the value of the reciprocal contract as a further inadequacy.²¹⁸ In the opinion of some domestic producers, then, the antidumping laws operate largely in favor of NMEs.

There are, however, arguments to counter the dumping complaints. It is commonly believed that the United States party engaged in a countertrade deal may face the temptation to dump the countertrade imports and therefore be subject to the imposition of antidumping duties. Yet, countertrade is often conducted at market prices, and goes through "market channels" without any "big discounts."²¹⁹ One way to avoid the potential problem of dumping complaints might be to sell goods bought under a counterpurchase agreement in markets outside the United States where markets for the goods from a particular countertrading country may already exist.²²⁰

b. Countervailing duty law

The Countervailing Duty law (CVD)²²¹ complements the Antidumping Law by providing a penalty for another often-used foreign unfair trade practice, the foreign subsidization of exports.²²² The CVD Law imposes an additional duty on an imported product equal to the amount of net subsidy when the Secretary of Commerce determines that a country or citizen is providing, directly or indirectly, a subsidy of the manufacture, production or exportation of merchandise imported into the

²¹⁵ *Id.* at 46, 153.

²¹⁶ ITC COUNTERTRADE ANALYSIS, *supra* note 60, at 36.

²¹⁷ Baker & Cunningham, *supra* note 173, at 387; Potter, *supra* note 16, at 426.

²¹⁸ Baker & Cunningham, *supra* note 173, at 388.

²¹⁹ *Difficulties*, *supra* note 156, at 388. Statement of George Horton, senior vice-president of Metallgesellschaft Services, a firm which arranges countertrade transactions.

²²⁰ *Id.*

²²¹ 19 U.S.C.A. § 1671 (West 1982 & 1985 Supp.).

²²² *Countervailing Duties*, [Reference File] INT'L TRADE REP. (BNA) No. 49, at 40:0101 (Sep. 19, 1984) [hereinafter cited as *Countervailing Duties*].

United States.²²³ With a few exceptions, the International Trade Administration (ITA) of the Department of Commerce must also determine that an industry in the United States is materially injured, threatened with material injury, or its establishment is materially retarded by reason of imports of such merchandise.²²⁴ Unlike antidumping duties, which always require a showing of "material injury" to a domestic industry, CVDs "do not require proof of material injury in the case of subsidized exports from countries which (i) are not parties to the GATT code on subsidies, (ii) have not otherwise made an appropriate commitment directly to the United States . . . or (iii) have not received unconditional [most-favored nation] (MFN) status," (such as Venezuela).²²⁵ Consequently, with regard to some NMEs and LDCs, no material injury need be proved.²²⁶

Nevertheless, the CVD Law has not been easily applied to imports from NMEs or LDCs. The Commerce Department's 1984 landmark decision—that CVD Law cannot be applied to imports from NME countries—underscored this difficulty.²²⁷ Petitioners appealed the Commerce Department's actions to the Court of International Trade (CIT), claiming that subsidies can be found in non-market economy cases.²²⁸ Petitioners sought a remand to the Commerce Department for examination of the specific allegations.²²⁹ On appeal, the CIT rejected the Commerce Department's conclusions and held that the CVD "was plainly intended to apply to all countries."²³⁰ Perhaps now the CVD Law will be applied

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

²²⁴ The Countervailing Duty Law defines material injury as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982). It directs the Commission to consider, among other factors, the following:

- (i) the volume of imports of the merchandise which is the subject of the investigation.
- (ii) the effect of imports of that merchandise on prices in the United States for like products, and
- (iii) the impact of imports of such merchandise on domestic producers of like products.

19 U.S.C.A. 1677(7)(B) (1982).

²²⁵ Hayward, *supra* note 209, at 87-88.

²²⁶ *Id.* at 88. For example, imports from Argentina and Mexico which are not signatories of the GATT subsidies code may be subjected to countervailing duties "without the showing of material injury that is required in the case of Brazilian imports." *Id.*

²²⁷ *Commerce Ruling that CVD Law Does Not Apply to Non-Market Economy Cases Appealed to CIT* [Current Reports] 1 INT'L. TRADE REP. (BNA) No. 4, at 97 (July 25, 1984) [hereinafter cited as *Commerce Ruling*]. The challenged rulings were *Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,370 (1984), *Carbon Steel Wire Rod from Czechoslovakia*; and *Carbon Steel Wire Rod from Poland, Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,374 (1984).

²²⁸ *Commerce Ruling*, *supra* note 227, at 97.

²²⁹ *Id.*

²³⁰ *Countervailing Duties*, *supra* note 222, at 40:0105 citing *Continental Steep Corp. v. United States* and *Amax Chemical, Inc. and Kerr-McGee Chemical Corp. v. United States*, slip op. 85-77, July 30, 1985 7 ITRD 1001.

with more frequency and efficacy to imports from NME countries.

c. Escape clause

Unlike the Antidumping and CVD Laws which are premised on free trade principles and which aim at wiping out unfair advantages, escape clause provisions attempt to offer relief from the "certainties of free trade obligations."²³¹ Section 201 of the Trade Act of 1974 addresses the problem of injury to an industry resulting from import competition, which does not rise to the level of an unfair trade practice. The United States has written the escape clause of Article XIX of the GATT into Section 201 of the Trade Act of 1974.²³² Section 201 requires the ITC to recommend import restrictions, including tariffs or quotas, on goods imported "in such increased quantities as to be a substantial cause²³³ of serious injury, or the threat thereof" to a United States industry.²³⁴ If the ITC affirmatively finds that an article is causing injury, it recommends to the President that import relief be granted. The President may then change or nullify the ITC decision,²³⁵ but the President's decision is, in turn, subject to review by Congress.²³⁶

An international legal advisor should be aware that relief under the Section 201 escape clause may be available regardless of whether an unfair trade practice or a government subsidy causes the injury.²³⁷ For relief from injury by imports from non-Communist countries, Title II of the Act provides either import relief or adjustment assistance²³⁸ to firms, workers and communities, or both.²³⁹ Since the purpose of the escape

²³¹ Baker & Cunningham, *supra* note 173, at 383.

²³² 19 U.S.C.A. § 2251 (West 1982 & 1985 Supp.). See Baker & Cunningham, *supra* note 173, at 379.

²³³ Imports being the "substantial cause" of injury is the key to an escape clause proceeding. 19 U.S.C.A. § 2251(b)(2) (West 1982 & 1985 Supp.) sets forth the economic factors which the ITC uses to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause or serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. 19 U.S.C. § 2251(b)(1) (1982). "Substantial cause" means a cause which is "important and not less than any other cause." 19 U.S.C. § 2251(b)(4) (1982). According to the ITC, the increased imports must be more than just one of the many causes of equal weight to be an important cause of the serious injury; for example, if the imports are one of only two equally-weighted factors, they probably constitute an important cause. *Escape Clause (Safeguards)*, [Reference File] INT'L TRADE REP. (BNA) No. 49, at 58:0103 (Sep. 19, 1984) [hereinafter cited as *Escape Clause*].

²³⁴ Hayward, *supra* note 209, at 89.

²³⁵ *Id.*

²³⁶ 19 U.S.C.A. § 2253(c) (West 1982 & 1985 Supp.).

²³⁷ Potter, *supra* note 16, at 425.

²³⁸ As an alternative to import restrictions, adjustment assistance to workers and firms is authorized in some cases. *Escape Clause*, *supra* note 233, at 58:0101.

²³⁹ 19 U.S.C. § 2251(a)(1)(B) (1982). Relief from injury due to imports from Communist coun-

clause is not to be a permanent protectionist provision against foreign imports, but to help workers and firms make adjustments to increased imports which are substantially injurious, the import restrictions imposed are to be of limited duration.²⁴⁰ If the ITC investigates and makes an affirmative finding that an article is causing injury, the President provides some form of import relief.²⁴¹ Any such relief must end after five years, unless extended.²⁴² The President may extend the relief for one period not exceeding three years, and only at the then existing level.²⁴³ Also, if the proclamation of relief is for a period of greater than three years, it must be gradually phased down starting no later than three years from the date the relief started.²⁴⁴

An important feature of the escape clause is its heavily political nature. Use of the escape clause invites retaliation because "[e]xporting countries affected by such a protective measure are licensed to retaliate by suspending 'substantially equivalent concessions.'"²⁴⁵ In addition to inviting retaliation by foreign countries, a Section 201 escape clause proceeding may also be fraught with Executive-Congressional disagreement. As stated earlier, if the ITC makes an affirmative finding of injury and recommends relief, the President may modify or nullify the relief, and then Congress may in turn overturn the action.²⁴⁶

tries is available only in the form of "import relief" and not adjustment assistance. *Escape Clause*, *supra* note 233, at 58:0101. This article will discuss the market disruption statute in the next section.

²⁴⁰ *Escape Clause*, *supra* note 233, at 58:0101.

²⁴¹ Once the injury standard is met, the forms of relief which the President shall provide, unless he determines that provision of such relief is not in the national economic interest, are provided in 19 U.S.C. § 2252(a)(1)(A) (1982):

- (1) increase in, or imposition of, duties on the article causing or threatening to cause injury;
- (2) tariff-rate quotas;
- (3) modification of, or imposition of, any quantitative restrictions on the import into the U.S.;
- (4) orderly marketing agreements with foreign countries limiting the export from foreign countries and import into the U.S. of such articles;
- (5) any combination of the above.

19 U.S.C. § 2253(a) (1982).

²⁴² 19 U.S.C. § 2253(h)(1) (1982).

²⁴³ 19 U.S.C. § 2253(h)(3) (1982).

²⁴⁴ 19 U.S.C. § 2253(h)(2) (1982).

²⁴⁵ Baker & Cunningham, *supra* note 173, at 378.

²⁴⁶ 19 U.S.C.A. § 2253(c) (West 1982 & 1985 Supp.). Section 2253(c), concerning Congressional actions with regard to the provision of import relief, was amended in 1984 to state that the action recommended by the ITC shall take effect upon the adoption by both Houses of Congress of a concurrent resolution disapproving the action taken by the President or his determination not to provide import relief under 19 U.S.C. § 2252(a)(1)(A) (1982) because it is not in the national economic interest of the United States. *Id.*

An additional development concerning Section 201 actions was H.R. 5952, 98th Cong., 2d Sess. (1984), Rep. Schulze's recently proposed bill requiring Congress to approve certain presidential decisions. The Section 201 legislative veto replacement would require Congressional approval of the President's import relief determination in cases if they differ from the ITC's recommendations. The

d. Section 406 market disruption statute

Section 406 of the Trade Act is procedurally similar to Section 201, but substantively different from it. Section 406 provides a less demanding standard to justify relief than the Section 201 requirement.²⁴⁷ Section 406 provides a special escape clause that applies only to imports from a Communist country.²⁴⁸ Relief is available if the imports are "increasing rapidly, either absolutely or relatively" and if they are "are a significant cause of material injury, or threat thereof" to a domestic industry.²⁴⁹ It is easier for a domestic company to prove under Section 406 that imports of an article, which is similar to or directly competitive with an article produced by a domestic industry, are increasing rapidly and are a significant cause or threat of material injury than to satisfy the more stringent Section 201 standard.²⁵⁰

The procedure to obtain relief under Section 406 parallels the one under Title II for dealing with import injury resulting from foreign countries' imports in general.²⁵¹ As with Section 201, Section 406 requires the ITC to grant relief when increased imports cause domestic injury.²⁵² Even though the importation in question cannot be challenged as unfair, both sections also provide remedies against imports causing injury to domestic industry.²⁵³ Here again, the President may override the ITC's recommendation of relief²⁵⁴ if he finds it is contrary to the economic interest of the United States; Congress in turn may veto the President's action.²⁵⁵ If the President prescribes an orderly marketing agreement as a remedy, the remedy must be entered within sixty days after the import relief determination date, as contrasted with ninety days in proceedings

bill further states that if Congress should decline to adopt the required joint resolution of approval, or if the President fails to sign it, then the ITC's original recommendation for import relief would be implemented. *Schulze Introduces Bill Requiring Congress to Approve Certain Presidential Decisions*, [Current Reports] 1 INT'L TRADE REP. (BNA) No. 2, at 36-37 (July 11, 1984). H.R. 5952, 98th Cong., 2d Sess. (1984) was introduced to the House on July 6, 1984 and then sent to the House Ways and Means Committee's Subcommittee on Trade. No action has been reported.

²⁴⁷ *Market Disruption By Communist Countries*, [Reference File] INT'L TRADE REP. (BNA) No. 49, at 64:0101 (Sep. 19, 1985) [hereinafter cited as *Market Disruption*].

²⁴⁸ 19 U.S.C. § 2436 (1982).

²⁴⁹ *Id.*

²⁵⁰ Section 201 requires proving that increased imports are a "substantial cause of serious injury or the threat thereof." 19 U.S.C. § 2252(a) (1982).

²⁵¹ *Market Disruption*, *supra* note 247, at 64:0101.

²⁵² Baker & Cunningham, *supra* note 173, at 379.

²⁵³ *Market Disruption*, *supra* note 247, at 64:0102.

²⁵⁴ ITC must make a report within three months after the date on which a petition is filed or a request or resolution is received, as opposed to six months under Title II. 19 U.S.C. § 2436(a)(4) (1982).

²⁵⁵ Baker & Cunningham, *supra* note 173, at 379.

under Title II. If the President finds that emergency action is necessary, he may proclaim import relief without waiting for the determination of the ITC under Sections 2252 and 2253.²⁵⁶ The President's emergency action is terminated or altered if the ITC later comes up with a negative determination on market disruption,²⁵⁷ or if it recommends a different form or amount of import relief and the President makes a determination accordingly.

This highly political process under Section 406 "indirectly addresses countertrade by addressing imports from Communist countries."²⁵⁸ A significant percentage of countertrade transactions has traditionally involved trade with Communist countries.²⁵⁹ Although the ITC has not used Section 406 often, the ITC did subject the imports by Occidental Petroleum Corporation (Occidental) of anhydrous ammonia from the U.S.S.R. under a countertrade agreement to a Section 406 proceeding twice in one year. Under the twenty-year fertilizer counterpurchase agreement arranged in 1973 between Occidental and the Ministry of Foreign Trade of the U.S.S.R., Occidental agreed to buy approximately four million metric tons of ammonia and related fertilizer products from the Soviets each year from 1978-1997, in exchange for one million tons of super-phosphoric acid annually.²⁶⁰ The agreement provided that the Soviets must use a portion of the revenues from the sale of the Soviet ammonia to repay the \$900 billion which the Soviet Government borrowed from the United States Export-Import Bank and other United States and foreign banks to build the ammonia production facilities and transportation facilities.²⁶¹ The agreement also provided that Occidental would transfer to the Soviets certain equipment, technology and design services relating to the building of the Soviet plants.²⁶²

The ITC investigations of the ammonia imports present an excellent example of the danger that Section 406 poses to long-term countertrade.²⁶³ In 1973, the United States government reviewed and approved the arrangement, which the President then endorsed. Occidental then took several steps to avoid disrupting the domestic market for ammonia:

- (i) The agreement stipulated that the ammonia prices were to be no lower than prevailing market prices.

²⁵⁶ 19 U.S.C. § 2436(c) (1982).

²⁵⁷ *Id.*

²⁵⁸ ITC COUNTERTRADE ANALYSIS, *supra* note 60, at 35.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Baker & Cunningham, *supra* note 173, at 380.

- (ii) The agreement provided for importing steady quantities of ammonia, which were to increase over the first five years and then level off.
- (iii) Over the period of the agreement, the quantities would never be greater than ten percent of United States consumption and would begin to decline as a percentage of United States consumption in the middle 1980s.²⁶⁴

In 1979, five years after the United States endorsed the agreement, but only one year after Occidental began to derive benefit from its investment, a Section 406 investigation began. A petition for import injury was filed on behalf of twelve United States producers and one United States distributor of anhydrous ammonia.²⁶⁵ In October of 1979, the ITC recommended a three-year quota after determining by a three-to-two vote that market disruption had occurred and that a risk of dependence existed.²⁶⁶ In December 1979, President Carter rejected the ITC's recommendation and decided that provision of import relief to the United States producers and distributors was not in the national economic interest.²⁶⁷

One month after his denial of relief, however, President Carter reversed his decision following the Soviet invasion of Afghanistan,²⁶⁸ stating that "recent events ha[d] altered the international economic conditions" under which he made his original determination.²⁶⁹ The President then ordered a new ITC investigation and found that emergency action was necessary, imposing a one-year interim emergency quota on ammonia imports.²⁷⁰ The emergency quota would limit the quantity of anhydrous ammonia entering the United States from January 24, 1980 through January 24, 1981 to one million short tons.²⁷¹

In the second Section 406 investigation which the ITC conducted within the same half year on imports of Soviet ammonia, the ITC voted three-to-two that market disruption did not exist and ended the President's temporary quota.²⁷² The ITC found "no indications whatsoever that imports of Soviet ammonia were a significant cause of material in-

²⁶⁴ *Id.*

²⁶⁵ 44 Fed. Reg. 71,809 (1979).

²⁶⁶ Potter, *supra* note 16, at 439. The dissent in the first case and majority and concurring opinion in the second case constitute the ITC interpretation of Section 406 as applied to countertrade cases. 45 Fed. Reg. 27,570, 27,574 (Apr. 1980).

²⁶⁷ 44 Fed. Reg. 71,809 (1979).

²⁶⁸ 45 Fed. Reg. 3,875 (1980).

²⁶⁹ *Id.*

²⁷⁰ ITC COUNTERTRADE ANALYSIS, *supra* note 60, at vii.

²⁷¹ 45 Fed. Reg. 27,570 (1980).

²⁷² U.S. INT'L. TRADE COMM'N, PUB. NO. 1051, ANHYDROUS AMMONIA FROM THE U.S.S.R. (1980).

jury or the threat thereof to the domestic industry.”²⁷³ As a result, the ITC provided no relief.

In the end, “the case was over but there were no winners.”²⁷⁴ In addition to huge legal fees on both sides, “domestic ammonia producers obtained no relief and Occidental saw its twenty billion dollar trade agreement brought to the brink of dissolution twice in a single year.”²⁷⁵ Although the ITC ultimately found no injury and lifted all quotas, Occidental had suffered a loss of time, energy and money.²⁷⁶ Such an unpredictable and politically volatile application of Section 406 causes uncertainty for countertraders and jeopardizes their long-term investments in countertrade arrangements.

IV. THE NEED FOR A CONSISTENT, WORKABLE POLICY ON COUNTERTRADE

The United States needs a consistent, workable policy on countertrade. The United States government’s goal of multilateralism, consistent with GATT principles, conflicts with a desire to support United States companies engaged in countertrade. This conflict of interests, which sometimes exists between exporters and governments in Western countries,²⁷⁷ prevents the United States government from openly supporting countertrade. Yet the present official policy—that countertrade creates overall distorting effects on the flow of goods and services worldwide, and that fiscal policies and incentives represent better ways to improve the trade balance than the production-sharing joint ventures and protectionist policies which countertrade engenders²⁷⁸—belies economic reality.

A. Economic Realities

1. *Debt Problems of LDCs*

Countertrade has become a necessary option for developing countries to pay for their imports. In the words of an international business consultant, “nobody likes countertrade, but less developed countries are without cash and commodity *X* is coming out of their ears. It’s the one medium of exchange the LDCs have when they need manufactured

²⁷³ 45 Fed. Reg. 27,570, 27,572 (1980).

²⁷⁴ Baker & Cunningham, *supra* note 173, at 380.

²⁷⁵ *Id.*

²⁷⁶ Hayward, *supra* note 209, at 90. See 44 Fed. Reg. 71,809 (1979) and 45 Fed. Reg. 27,570 (1980).

²⁷⁷ deMiramon, *Statement*, 5 J. COMP. BUS. & CAP. MKT. L. 367, 368 (1983).

²⁷⁸ L. WELT, *supra* note 64, at 75.

goods and they have borrowed up to the hilt.”²⁷⁹

Developing countries presently have debt of about \$700 billion, which means that these countries will face a heavy debt service burden for years to come.²⁸⁰ As a result, the prospect is for sustained and severe pressure on the LDCs' trade accounts, as a large share of their export earnings continues to be diverted to debt service.²⁸¹ For example, in 1983, Mexico, Brazil and Argentina paid debt service costs equal to about fifty percent of their combined 1983 export earnings, which after subtracting substantial essential imports of food and energy leaves very little for the imports needed to sustain economic activity.²⁸²

The brunt of developing country adjustment cannot be borne much longer by developing country trade accounts.²⁸³ The combination of recessions, which undercut political support for economic adjustment programs, and a rapid drop in lending, which prevents access to necessary imports to pursue economic adjustment goals and required investment, lead countries to try to meet export targets by selling whatever products they have.²⁸⁴ These developing countries often try to sell their products by countertrade.

2. *Monetary Importance of Countertrade*

Another economic reality requiring a consistent pragmatic United States policy on countertrade is that countertrade is important monetarily to United States firms and industries. The ITC recently completed an analysis of the effects of the increasing involvement of United States industries in countertrade transactions.²⁸⁵ In its report, the ITC estimated that “almost \$5.5 billion in total U.S. exports resulted from countertrade (excluding offset) agreements during 1980-84, and approximately \$4.6 billion dollars worth of goods and services are currently planned for export during 1985-2000.”²⁸⁶ Non-offset countertrade exports for United States firms almost quadrupled from \$285 million in 1984, to about \$1.4 billion in 1984.²⁸⁷

²⁷⁹ *Administration*, *supra* note 8, at 58. Statement by John C.L. Donaldson, international business consultant.

²⁸⁰ Olmer, *New Directions in Trade Finance* in COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE '80s 17 (P. Ehrenhaft chair 1984). Lionel H. Olmer served as Under Secretary for International Trade in the Department of Commerce for four and a half years.

²⁸¹ *Id.*

²⁸² *Id.* at 18.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ USITC (1985), *supra* note 2.

²⁸⁶ *Id.* at ix.

²⁸⁷ *Id.*

The ITC reports that United States imports from non-offset countertrade totaled \$1.8 billion during 1980-1984.²⁸⁸ Imports resulting from countertrade (including military offsets), which peaked in 1984 at \$525 million represent an "insignificant share of total United States imports."²⁸⁹ This share was only about 0.1 percent of total United States imports of goods and services for the year. Nonmilitary-related countertrade imports (as opposed to military-related countertrade imports) make up the vast majority of imports from countertrade—almost all of countertrade imports in 1980 and approximately eighty percent (\$420 million) of the total figure in 1984.²⁹⁰

Consistent with a 1982 ITC analysis of recent trends in countertrade, which suggested that countertrade may in fact be advantageous to United States trade because "countertrade exports exceed imports,"²⁹¹ these figures for 1980 to 1984 confirm that projection. The 1985 ITC report states that the "total value of United States exports obtained under nonmilitary countertrade exceeded that of United States imports."²⁹² In the period from 1980 to 1984, total United States countertrade exports (excluding offsets) were greater than countertrade imports in each year except 1980.²⁹³ In each year from 1982 to 1984, the United States has had an annual trade surplus in nonmilitary countertrade, rising from \$538 million in 1981 to \$1.5 billion in 1982, and then declining to \$940 million in 1984.²⁹⁴ Furthermore, United States exports associated with countertrade generally far exceed United States imports from United States countertrade obligations and well exceed the value of such obligations.²⁹⁵

In a time of reduced export demand because of foreign exchange shortages and foreign import reduction programs,²⁹⁶ export promotion merits priority attention.²⁹⁷ Countertrade promotes exports because it

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ ITC COUNTERTRADE ANALYSIS, *supra* note 60, at vii.

²⁹² USITC (1985), *supra* note 2, at x.

²⁹³ *Id.* In 1980, nonmilitary countertrade figures represented a trade deficit of \$38 million, resulting from countertrade imports of \$323 million and countertrade exports of \$285 million. *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* The obligation agreement is the part of a countertrade deal associated with the underlying export sales agreement in which the exporter agrees to fulfill certain obligations; fulfillment of the obligation agreement may stretch out for a period as long as ten years or more. *Id.* at viii. For example, in 1984, countertrade imports represented only 19 percent of total obligations for that year. *Id.* at ix.

²⁹⁶ *Id.* at viii.

²⁹⁷ Ehrenhaft, *Insuring U.S. Participants' Interests in Countertrade*, 5 J. COMP. BUS. & CAP. MKT. L. 425, 436 n.40 (1983).

helps United States firms develop long-term associations with foreign buyers, who in turn serve as local producers or distributors.²⁹⁸ The United States must seriously consider countertrade as a viable trade tool. Figures such as a \$21 billion drop in net United States exports to Latin America between 1981 and 1983, which translated into 500,000 United States jobs lost, illustrate this point.²⁹⁹ One of countertrade's attractions is that it would expand the potential market for United States goods. United States firms would be able to sell goods or services in foreign markets where buyers lack the resources to pay for their purchases.³⁰⁰ Given the projections on countertrade and United States export needs, the United States government must develop some workable policy to address the issues created by countertrade and to help United States firms who want to get involved in countertrade.

Countertrade could be a way for Western enterprises to expand into Eastern markets as well as Latin American markets. It is not just the East which needs Western technology and goods. The idea that countertrade is imposed upon unwilling United States companies is not entirely correct, if the Polish case is any indication. Even without any specific legislation or policy requirements favoring countertrade, United States enterprises took the initiative in a majority of countertrade arrangements between Polish and United States entities during 1982 and the first half of 1983.³⁰¹ United States companies had a demand for Polish coal, sulphur, cement and ham.

Thus, contrary to popular misconceptions, Westerners sometimes seek to use countertrade. Especially where the arrangement involves the production of minerals, Western countries and parties often seek buybacks and production-sharing joint ventures more often than do LDCs.³⁰² As much as forty-three percent of the buyback goods imported by the OECD countries from Eastern Europe are energy products, for which there is a steady demand in the West.³⁰³ Another thirty percent consists of intermediate goods, mostly chemicals, which also can be eas-

²⁹⁸ *Id.*

²⁹⁹ *World Bank President Raps Protectionism, Calls Auto VRA with Japan Self-Defeating*, 9 U.S. IMPORT WEEKLY (BNA) No. 34, at 1070 (May 30, 1984). A. W. Clausen is president of the World Bank until expiration of his term in June 1986.

³⁰⁰ Ehrenhaft, *supra* note 297, at 425.

³⁰¹ Wujek, *Polish Conception of Countertrade*, in COUNTERTRADE AND TRADING COMPANIES: TRADE TRENDS IN THE '80s 29 (P. Ehrenhaft chair 1984). This information comes from the results of a survey conducted by the Polish Embassy's New York office relating to countertrade proposals in 1982 and the first half of 1983 between Polish and American entities. *Id.*

³⁰² L. WEIT, *supra* note 64, at 98.

³⁰³ Soltysinski, *Statement: In Defense of Countertrade*, 5 J. COMP. BUS. & CAP. MKT. L. 341, 342 n.9 (1983).

ily sold in Western markets.³⁰⁴

These arrangements, called develop-for-import or resource diplomacy, arise where a Western government, which wants to ensure a guaranteed supply of a certain raw material or strategic mineral, offers low-cost loans to finance the countertrade deal.³⁰⁵ Then, Third World countries accept Western participation in a mineral project conditioned upon the subsidy element in the credit arrangements. For example, France, Germany and Japan subsidize exploration costs by certain private firms in return for a commitment from the resource-rich country to a part of any discovery.³⁰⁶

Countertrade also appeals to Western banks and trading companies. Banks see money-making opportunities in countertrade in a time of declining loan business.³⁰⁷ Trading companies find that countertrade is often a cheaper means of obtaining Third World commitments while still earning their customary fees.

3. *Protectionist Actions of Developed Countries*

The protectionist actions of developed countries overlap both economic and political considerations. Rising protectionism in the United States and other developing countries may be forcing developing countries to engage in countertrade.³⁰⁸ Western legislators and importers have taken steps to greatly decrease the risks of market disruption and cut-throat competition from countertraded goods in the domestic marketplace.³⁰⁹ Legislators have provided Western competitors with a variety of special relief measures; some, like Section 201, are available even in the absence of proof of material injury.³¹⁰

B. Political Considerations

Because some developing countries are short on cash and credit needed for conventional trade deals, using countertrade may be a valuable tool in improving relations with developing countries.³¹¹ In this sense, countertrade can serve foreign policy goals by easing political ten-

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ L. WELT, *supra* note 64, at 99.

³⁰⁷ Truell, *supra* note 35, at 21, col. 1.

³⁰⁸ *Administration, supra* note 8, at 58. See, e.g., 26 *Senators Back Bipartisan Trade Bill*, N.Y. Times, Nov. 21, 1985, at 17, col. 1.

³⁰⁹ Soltysinski, *supra* note 303, at 343.

³¹⁰ *Id.* See *supra* note 213 and accompanying text.

³¹¹ Note, *supra* note 122, at 259.

sions and facilitating normal relations.³¹² Countertrade, especially in the form of offset, can also facilitate the acquisition of critical materials and thereby promote United States national defense goals.³¹³

In addition to playing a role in United States trade relations, a clear Administration policy would alert countertraders to the political nature of some of the import relief measures which could be imposed upon their countertraded goods.³¹⁴ A clear policy would also make them aware of possible retaliatory measures by foreign governments. It is not fair to put all the blame on foreign governments, who allegedly demand countertrade.³¹⁵ Countertrade is not always competition from abroad; it sometimes results from competition between United States firms abroad to offer more attractive offset deals.³¹⁶ Concern over countertrade is more than just a question of "simple protectionism;" concern over the issue "cuts to the root causes of policies and trade relations with allies."³¹⁷

C. Unique Risks

Given the complex economic factors, the protectionism which countertrade engenders, and the political ramifications of engaging in countertrade, a policy is needed to educate United States countertrade participants about the unique risks involved on each of these levels. Long-term countertrade arrangements are especially vulnerable to the possibility that United States export or import restraints may be imposed on the merchandise or services moving in either direction, well before the entire deal is completed.³¹⁸

Products may be subjected to import quotas or ceilings, or they may be barred entirely from importation into certain sources.³¹⁹ Companies should be particularly careful when engaging in countertrade involving import-sensitive goods such as textiles, leather goods and watches.³²⁰ They should also be cautious about dumping the goods, especially if large quantities offered at a low price are involved. They must take great care to avoid underpricing or suddenly raising the volume of the imported goods.³²¹ Furthermore, quotas apply to goods on the basis of their ori-

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See *supra* notes 44, 52-53, 55-59 and accompanying text.

³¹⁵ *House Panel*, *supra* note 63, at 1072. (Statement of Rep. Bruce Vento).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Ehrenhaft, *supra* note 297, at 425.

³¹⁹ Hayward, *supra* note 209, at 84-85.

³²⁰ *U.S. Firms*, *supra* note 61, at 390.

³²¹ Soltysinski, *supra* note 303, at 343. See *supra* note 265 and accompanying text.

gin, regardless of the nationality of their owner or of the importer.³²²

In addition to import quotas, competitors of United States countertrade participants may initiate actions under a number of United States trade laws.³²³ A prime example of United States import restraints being imposed during the term of a countertrade arrangement was Occidental's potential loss of payments from the U.S.S.R. due to actions initiated by United States competitors to prevent or limit Occidental's receipt of payment.³²⁴ Another major risk is the revocation of United States export licenses due to political disputes.³²⁵ The Department of Commerce's Office of Export Administration must issue a validated export license before a United States firm may export commodities or technology to (CMEA) countries³²⁶ or the People's Republic of China.

Customs duties pose another risk. Although most imports from LDCs may currently enter the United States free of duty under the Generalized System of Preferences,³²⁷ imports from Eastern bloc countries which are not entitled to MFN treatment³²⁸ are subject to United States duty rates that at thirty to forty percent may seem surprisingly high to a supplier accustomed to dealing with rates applicable between GATT partners.³²⁹ Also, MFN status is always subject to review and may be withdrawn, as was the case with Poland.³³⁰

In addition to federal laws and customs duties creating potential problems for countertrade imports, United States countertraders may face problems relating to the products themselves. The goods may be subject to governmental or other national standards in proposed countries of importation, such as the United States Food and Drug Administration's or the Department of Agriculture's requirements on food products.³³¹ The buyer may be unable or unwilling to comply with these standards. Even if no regulatory standards apply to the goods, the sup-

³²² For example, the current quota on imports of Japanese cars affect General Motors affiliates Isuzu and Suzuki, as well as other Japanese producers. Hayward, *supra* note 209, at 85.

³²³ See *supra* notes 196-228 and accompanying text.

³²⁴ Ehrenhaft, *supra* note 297, at 426.

³²⁵ *Id.* at 427.

³²⁶ The CMEA, established in 1949, includes Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Rumania, Yugoslavia, and U.S.S.R.

³²⁷ Hayward, *supra* note 209, at 85.

³²⁸ *Id.* (all Eastern bloc countries except Hungary and Romania).

³²⁹ Hayward, *supra* note 209, at 85-86.

³³⁰ *Id.* at 86. See 47 Fed. Reg. 49,005 (1982).

³³¹ For example, under the Food, Drug & Cosmetic Act, food products offered in countertrade may be refused admission if they appear to have been manufactured, processed or packed under unsanitary conditions, if they are forbidden or restricted in their country of production or export, or if they are adulterated, misbranded, or in violation of drug requirements. Hayward, *supra* note 209, at 84.

plier may not be able to sell the products purchased under countertrade because such goods may be surplus, obsolete, or of poor quality.³³² In addition, the supplier may be faced with buying and disposing of goods in markets in which the supplier is totally unfamiliar.³³³ Finally, the supplier's lack of sales people trained to handle their additional role of purchasing may hinder the buying and disposing of goods quickly and efficiently.³³⁴ Therefore, it is essential for the successful negotiation and completion of a countertrade deal that a company thoroughly research market potential and be assured of a corporate commitment to the project before engaging in a countertrade deal.³³⁵

D. Suggested United States Government Action

The Administration must be realistic and take affirmative steps to help United States firms who choose to engage in countertrade to develop the necessary expertise for completion of a successful deal. The United States government must recognize that "countertrade is emerging as a major form of international commerce in its own right,"³³⁶ and that it can be a viable trade tool for promoting business abroad. Rather than seeing countertrade as a necessary evil, the United States government should instead look at the opportunities it can create and the costs of failing to recognize the importance of countertrade.³³⁷

Some developments by private entities in the United States are occurring to help United States companies contemplating countertrade. These include the development of export trading companies, spurred in part by passage of the Export Trading Company Act,³³⁸ in-house countertrading organizations of multinationals and special units of law firms specializing in international law.³³⁹ Although these developments are helpful, they are not enough to enable companies to develop an expertise on their own, especially smaller firms which can not afford some of these costly services. In order to close a major deal, companies often agree to countertrade without full knowledge of all the consequences.³⁴⁰

This Comment suggests several concrete steps which the United

³³² *Id.* at 83.

³³³ *Id.* at 82-83.

³³⁴ *Id.* at 82.

³³⁵ *Transactions*, *supra* note 1, at 678.

³³⁶ *Austrian Conference Suggests Countertrade Growing on Own, Not Just as Alternative*, 1 INT'L. TRADE REP. (BNA) No. 15, at 488 (Oct. 17, 1984) [hereinafter cited as *Austrian Conference*].

³³⁷ *Policy*, *supra* note 171, at 1129.

³³⁸ 15 U.S.C.A. § 4001-4021 (West 1982 & 1985 Supp.).

³³⁹ USITC (1985), *supra* note 2, at 68.

³⁴⁰ L. WILIT, *supra* note 64, at 81.

States government can take to develop a coherent, practical policy. Indications that the federal government is rethinking its position is shown by the initiation of government-conducted studies on countertrade and barter. The Office of the United States Trade Representative (USTR), which is responsible for coordinating trade policy within the United States government, recently chaired an interagency committee³⁴¹ to develop a policy on barter and countertrade. The administration should continue to encourage such studies and carefully consider their recommendations.

This author particularly advocates the interagency committee's recommendation that the government provide advisory and market intelligence services to United States businesses, including information on the application of United States trade laws.³⁴² It must do more than simply make information available on the countertrade requirements of foreign countries. The advisory and market intelligence services should give suggestions on how to lessen the risks of countertrade, for example: (1) becoming familiar with how the trading partner does business; (2) doing a detailed analysis and considering a number of factors; (3) becoming familiar with the product; (4) involving purchasing personnel in the analysis of the countertrade obligations; (5) what to do about determining the purchase price; (6) what quality considerations to make; and (7) the possibility of obtaining insurance from either the Overseas Private Investment Corporation or private insurers.³⁴³

In addition to providing advisory and informational services, the government should take note of the Canadian government's steps to deal with countertrade. Although the Canadian government objects to countertrade as an economically inefficient reversion to bilateralism, it "recognizes it as a fact of life."³⁴⁴ Certain Canadians are urging the Canadian government to take action to help Canadian exporters in foreign markets by increasing the use of countertrade.³⁴⁵ With the rising importance of barter in international trade, the lack of government ex-

³⁴¹ The Committee was composed of representatives of the Departments of Commerce, Agriculture, State, Treasury, Labor, Justice, Defense, Interior, Transportation, and Energy, the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, the International Development Cooperation Agency, the Export-Import Bank, the Overseas Private Investment Corp., and the United States International Trade Commissions. Suro-Bredie, *supra* note 81, at 12.

³⁴² *Id.*

³⁴³ Hayward, *supra* note 209, at 98.

³⁴⁴ *NFTC*, *supra* note 78, at 500.

³⁴⁵ *Canada—Loss of Countertrade Exports, Need for More Protection Against Unfair Competition Noted*, [Current Reports] INT'L. TRADE REP. (BNA) No. 6, at 161-62 (Aug. 8, 1984) [hereinafter cited as *Canada*]. Statement by Stuart Smith, chairman at the Science Council of Canada.

pertise on barter and countertrade is causing Canada to lose out on export business.³⁴⁶

Consequently, the Canadian government is considering several ways to deal with countertrade. Possible actions include setting up an information center run by the private sector, or allowing Canadian banks to take a more active role in countertrade.³⁴⁷ A Science Council of Canada survey suggested that the federal government amend certain provisions of the Bank Act that forbids Canadian Banks from taking title to goods temporarily during trade transactions, which thereby effectively precludes their participation in countertrade deals.³⁴⁸ In addition, there is some support for the federal government to establish a countertrade section within the Department of External Affairs to advise and guide Canadian industries.³⁴⁹ The motivation behind these suggestions is the need to "develop greater expertise on countertrade [F]irms . . . have turned down jobs because of the complications of countertrade."³⁵⁰

The United States government should recognize, as did the Canadian government, that some firms may be forced to turn down jobs because they lack the expertise on countertrade.³⁵¹ Instead of refusing to educate United States firms on the mechanics of completing a countertrade transaction and insisting that firms should use private consultants,³⁵² the United States government should use its expertise to make up for the severe shortage of skilled competent countertraders.³⁵³ Although the volume of countertrade has been growing rapidly, there are few knowledgeable traders who have experience and success at negotiating successful countertrade deals.³⁵⁴

In addition, the need for insurance in export trade is threefold: (1) the overwhelming debt problem in many developing countries; (2) the trade recession; and (3) the government direction of many trade transactions.³⁵⁵ Since governmental and quasi-governmental export credit agencies are not insuring against countertrade risks, exporters apparently are turning to the private insurance market which, though more expensive than government credit, has no requirements about the goods' origin.³⁵⁶

³⁴⁶ *Id.*

³⁴⁷ *NFTC*, *supra* note 78, at 500.

³⁴⁸ *Canada*, *supra* note 345, at 162.

³⁴⁹ *Id.*

³⁵⁰ *Id.* Statement by Stuart Smith, Chairman of the Science Council of Canada.

³⁵¹ *See id.*

³⁵² *See Information*, *supra* note 112, at 797.

³⁵³ *Austrian Conference*, *supra* note 336, at 488.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

If the United States companies are willing to take the risks of engaging in countertrade, then the federal government should provide advice and guidance. Even if the United States government does not go as far as the Canadian government, it should set up training programs and information exchanges. The Administration should advertise the Department of Commerce's offer of assistance in setting up countertrade deals rather than keeping such aid a secret. In addition, it could set up an information center run by the private sector, as the Canadian government considered doing.

The government must be open to suggestions that the government initiate, and if necessary, operate a plan of countertrade insurance.³⁵⁷ Businessmen have cited the refusal of governmental credit institutions, such as the United States Export Bank, to insure against countertrade risks as a "serious complication of the business."³⁵⁸ Furthering the United States goal of increased exports, United States participants in countertrade have a good claim to protection against risk of government reaction to imports, especially when the government has promoted and often insured the initial exports.³⁵⁹ The proposed insurance would protect exporters against political risks arising from acts of the United States government that threaten countertrade transactions.³⁶⁰ One suggestion is to create an expanded version of the insurance plan of the Export-Import Bank.³⁶¹

On a broader level, the government should also continue to pursue reaching bilateral or multilateral agreements on countertrade.³⁶² Even an opponent of countertrade recognized that one way to fight the more troublesome effects of countertrade might be to set operating standards for countertrade through multilateral negotiations with the trading partners.³⁶³

V. CONCLUSION

Given the economic realities of the world economy and the need to promote United States exports, the confusion about the application of

³⁵⁷ Ehrenhaft, *supra* note 297, at 224-26.

³⁵⁸ *Austrian Conference*, *supra* note 336, at 488. The businessmen referred to here are participants in a September 1985 International Marketing Information System seminar on countertrade and offset for the aerospace, energy and defense industries.

³⁵⁹ Ehrenhaft, *supra* note 297, at 427.

³⁶⁰ *Id.* at 486.

³⁶¹ *Id.* at 430. The author also considers other existing programs as models: Overseas Private Investment Corporation (OPIC), Federal Credit Insurance Association (FCIA), Agriculture and Food Act of 1981. *Id.* at 428-30.

³⁶² See *House Panel*, *supra* note 63, at 1072.

³⁶³ de Miramon, *supra* note 277, at 368.

United States trade laws to countertrade, and the risks and complexities of countertrade arrangements, the federal government should help United States firms become knowledgeable about countertrade. Once there is a clear policy and readily available assistance, the firms themselves can make an educated decision about whether the merits of countertrade outweigh the disadvantages for them.³⁶⁴ Despite the expenses and risks involved, there are a number of reasons to engage in countertrade. On the whole, Western firms would not engage in countertrade if they did not find it profitable.³⁶⁵ Opposing countertrade will not curtail its growth, nor stop other countries with serious financial and economic problems from mandating it. Opposition merely prolongs and worsens the lack of United States expertise on countertrade.

By using countertrade, an export sale is made that otherwise would not be made.³⁶⁶ The government should openly try to help those United States firms who have chosen to take on a countertrade deal by helping them steer clear of the pitfalls. Furthermore, the Administration should attempt to bring together disparate department pronouncements into a consistent, workable policy. The lack of such a policy poses a barrier to trade.

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³⁶⁴ According to countertrade expert, Leo G.B. Welt, companies are never forced to countertrade. Instead, they face a choice: "to bow out of contract negotiations, or as the case may be, a particular market altogether; to negotiate price discounts or other concessions in lieu of assuming countertrade obligations; or to agree to countertrade obligations." L. WELT, *supra* note 64, at 81.

³⁶⁵ Lowenfeld, *Interface IV: Countertrade in Economic Relations Between East and West—An Introduction*, 5 J. COMP. BUS. & CAP. MKT. L. 329, 331 (1983).

³⁶⁶ *Id.*