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UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
GENERAL

A/CN.9/332/Add.1
14 March 1990

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-third session
New York, 25 June - 6 July 1990

INTERNATIONAL COUNTERTRADE

Draft legal guide on drawing up contracts in
international countertrade transactions: sample chapters*

Report of the Secretary-General

Addendum

I. INTRODUCTION TO LEGAL GUIDE

[The legal guide would have an introductory chapter describing the origin, purpose, approach and structure of the guide. It is suggested that it should be the last chapter to be drafted. At that time the structure of the legal guide would be clear including such issues as which chapters it would have, whether each chapter would be preceded by a chapter summary, and whether the guide would in some instances set forth illustrative contract provisions.]

In preparing the chapters the secretariat has, where appropriate, included suggestions as to how certain issues in a countertrade transaction might be settled. Three levels of suggestion have been used. The highest level is indicated by expressions to the effect that the parties "should" take a particular course of action. It is used only when that course of action is a logical or legal necessity. This level is used sparingly in the legal guide. An intermediate level is used when it is "advisable" or "desirable", but not logically or legally required, that the parties adopt a particular course of action. Formulations such as "the parties may wish to consider" or

*The text contained herein is a first draft prepared by the secretariat for consideration by the Commission as part of the preparatory work on the draft legal guide on drawing up contracts in international countertrade transactions and should not be regarded as stating the views of the Commission.

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"the parties might wish to provide", or the contract "might" contain a particular solution, are used for the lowest level of suggestion. The wording used for a particular suggestion may be, for drafting reasons, varied somewhat from that just indicated; however, it should be clear from the wording what level of suggestion is intended.

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE

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A. Transactions covered

1. Countertrade transactions dealt with in the legal guide are those international contractual arrangements under which one party supplies goods, services or technology to the second party, and, in return, the first party purchases or procures the purchase of an agreed amount of goods, services or technology from the second party, or from a party designated by the second party. (For the sake of simplicity, the legal guide will refer only to "goods" as the subject-matter of countertrade transactions, although the subject-matter of a given transaction may include services or technology.) A distinctive feature of these transactions is the existence of a link between the supply of goods in the two directions in that the conclusion of the contract or contracts for the supply of goods in one direction is conditioned upon the conclusion of the contract or contracts for the supply in the other direction. When the parties enter into contracts in opposite directions without expressing such a link between them, the contracts, as regards contractual rights and obligations of the parties, cannot be distinguished from straightforward independent transactions. Therefore, the legal guide deals only with transactions that express in a contractual form such a link between the contracts constituting the countertrade transaction.

2. Beyond this basic definition, countertrade transactions display a number of differing features. The differences concern such matters as the contractual structure of the transaction, the time sequence of conclusion of the component contracts, the underlying commercial interests of the parties, and other commercial and technical characteristics of the transactions. The legal guide takes into account that countertrade transactions display these differing features and that these features will affect the drawing up of the various contracts.

3. A countertrade transaction may be contractually structured in different ways. Often, the supply of goods in each direction is covered by a distinct contract. In such a case the link between these segments arising from the fact that the conclusion of the contract in one direction is conditioned upon the conclusion of the contract in the other direction may be expressed in an agreement separate from those contracts. In other cases that link may be expressed in a contract clause that is integrated into one of those contracts. In yet other cases, the whole transaction, i.e. the reciprocal supplying of goods and the stipulation expressing the link between the segments of the transaction, is incorporated into one contract (e.g., a barter contract). The legal guide discusses the implications of the choice of a particular contract structure or the choice of a particular contract form (see chapter III, "Contracting approach").

4. Furthermore, the contracts for the supply of goods in the two directions may be concluded at different points of time or they may be concluded simultaneously. When they are concluded at different points of time, which is often the case, the parties conclude an agreement expressing a commitment to conclude the future contract or contracts for the supply of goods. Such an agreement may be entered into together with the conclusion of the initial contract for the supply of goods in one direction or it may be entered into prior to the conclusion of any supply contract. When the parties agree simultaneously on the supplies in both directions, the agreement between the parties would not include a commitment to conclude future contracts, but would establish a relationship between the performances due from each party. The legal guide refers to the particular sequence of the conclusion of the supply contracts when this is required by the context of the discussion.

5. Another aspect of the variety of countertrade transactions is the degree of interest the parties may have in the different segments of a countertrade transaction. In some transactions one of the parties is interested only in the export of its goods and would prefer to be free to decide whether to import goods from the other party. In other transactions, the parties consider the supply of goods in the two directions as being in their mutual interest. There are also transactions in which, at the outset of the transaction, a party perceives a commitment to conclude future contracts as a concession to the other party, but subsequently comes to regard that commitment as a benefit. The legal guide takes into account such possible differing degrees of interest that the parties may have in the different parts of the countertrade transaction and the impact that such differing degrees of interest may have on the contract or contracts.

6. Furthermore, a broad distinction among countertrade transactions may be made depending on whether the goods supplied in one direction are used in the production of the goods to be supplied in the other direction or whether no such technological link exists between the reciprocal deliveries. The legal guide will cover both of those varieties of countertrade and will make reference to a particular variety whenever appropriate.

7. A further distinction may be made on the basis of the number of the parties involved in a transaction. In some cases, the reciprocal deliveries of goods under the transaction are carried out between the same two parties. In other cases, on one side of the transaction, or on both, the roles of the seller and of the buyer are assumed by different persons. The legal guide addresses the contractual issues that are raised by the involvement of more than one party on either or both sides of a transaction.

B. Terminology

8. Terminology used in practice and in writings to describe countertrade transactions and the parties involved in them varies greatly. A prevailing terminology has not developed. The following paragraphs establish a terminology used in the legal guide for different varieties of countertrade transactions, parties and contracts in countertrade.

1. Varieties of countertrade

9. The discussion in the legal guide is relevant to different commercial types of countertrade. In most instances, the contractual issues addressed in the legal guide are the same for all commercial types of countertrade transactions, and the discussion in the legal guide generally does not distinguish among types of countertrade. However, in some contexts the discussion is particularly relevant to a commercial type of countertrade. Therefore, the terms used to denote such types of countertrade are explained below. The criteria used to distinguish the types of countertrade are based on commercial, technical and legal aspects of the transaction.

10. Barter. In practice the term "barter" is used with different meanings. The term may refer, for example, to countertrade transactions in general, to an intergovernmental agreement addressing mutual trade in particular goods between identified partners, or to countertrade in which trans-border flow of currency is eliminated or reduced or where a single contract governs the mutual shipments of goods. The legal guide uses "barter" in a strict legal sense to refer to a contract involving a two-way exchange of specified goods in which the supply of goods in one direction replaces, entirely or partly, the monetary payment for the supply of goods in the other direction. Where there is a difference in value in the supply of goods in the two directions, the settlement of the difference may be in money or in other economic value.

11. Counter-purchase. This term is used to refer to a transaction in which the parties, in connection with the conclusion of a purchase contract in one direction, enter into an agreement to conclude a sales contract in the other direction, i.e. a counter-purchase contract. Counter-purchase is distinguished from buy-back in that the goods supplied under the first purchase are not used in the production of the items sold in return.

12. Buy-back. This term refers to a transaction in which one party supplies a production facility, and the parties agree that the supplier of the facility, or a person designated by the supplier, will buy resultant products from the purchaser of the facility. The supplier of the facility often provides technology and training and sometimes component parts or materials to be used in the production.

13. Offset. Transactions referred to in the legal guide as offsets normally involve the supply of goods of high value or technological sophistication. Under a "direct offset" the contract for the supply of goods in one direction is combined with an agreement that the supplier will purchase from the other party component parts of, or products related to, those goods. Sometimes the supplier would also agree to provide technology or investment for the production by the other party of the component parts. Such direct offsets are also referred to as industrial participation or industrial

co-operation. The expression "indirect offset" typically refers to a transaction where a governmental agency that procures, or approves the procurement of, goods of high value requires from the supplier that counter-purchases are made in the procuring country or that economic value is provided to the procuring country in the form of investment, technology or assistance in third markets. The counter-export goods are not technologically related to the export goods (i.e., they are not components of the export goods, as in direct offset, and they are not resultant products of the facility provided under the export contract, as in buy-back). The governmental agency often stipulates guidelines for the offset, for example, as to the industrial sectors or regions that are to be assisted in such a way. However, within such guidelines, the party committed to counter-purchase or to providing such assistance is normally free to choose the contracting partners.

2. Parties to countertrade transaction

14. Exporter or counter-importer. The term "exporter" or "counter-importer" is used for the party who is - under the first contract to be concluded - the supplier, i.e. the exporter, of goods, and who has entered into a commitment with the other party to purchase, i.e. to counter-import, other goods in return. One or the other term is used depending on the context in which the party is mentioned. It should be noted that in some countertrade transactions the exporter and the counter-importer are the same party, while in others the exporter and counter-importer are different parties.

15. Importer or counter-exporter. The term "importer" or "counter-exporter" is used for the party who is - under the first contract to be concluded - the purchaser, i.e. the importer, of goods, and who has entered into a commitment with the other party to supply, i.e. to counter-export, other goods in return. One or the other term is used depending on the context in which the party is mentioned. As in respect of the exporter and the counter-importer, in some countertrade transactions the same party is the importer and the counter-exporter. Sometimes, however, one party imports and another party counter-exports.

16. In some writings the term "exporter" is used to denote the party from an economically developed country, who often supplies goods of technological content that normally cannot be obtained in the other party's country. The term is used irrespective of whether the "exporter" supplies first and agrees to purchase later or whether the "exporter" makes an "advance purchase" from the other party in order to enable that other party to raise funds needed for a subsequent purchase of goods from the "exporter". The term "importer" is used in those writings to denote the party from a developing country. To underline that meaning, such writings may use terms such as "primary" or "western exporter" or "developing country importer".

17. A distinction based on economic or regional considerations is not used in the present legal guide. One reason is that the guide covers both intra-regional and inter-regional countertrade. Thus, distinctions used in discussions of inter-regional countertrade, in which the issues tend to be considered primarily from the perspective of one of the parties, would not be suitable since the legal guide advises both parties whatever may be their relative economic strength or background. Furthermore, terms based on the time sequence of the conclusion of contracts are more suitable since, for the

purpose of discussing the contractual role and interests of parties, the question of primary significance is whether the party has already sold its goods and has promised to purchase goods from the other party, or whether the party, having purchased goods, has not sold its goods yet.

18. Purchaser, supplier or party. The legal guide frequently uses the term "purchaser", "supplier" or "party" to refer to parties purchasing and supplying goods in a countertrade transaction. When reference is made to a party who is committed to purchase or supply goods but has not yet done so, the legal guide may use the terms "party committed to purchase goods" and "party committed to supply goods". Such terminology is employed when the discussion in the legal guide is relevant to the contractual position of a party purchasing or supplying goods irrespective of whether the purchase or supply in one direction takes place before or after the purchase or supply in the other direction. The order in which the shipments take place would not affect the contractual position and risks of the parties when the parties commit themselves to conclude contracts for the supply of goods without stipulating the sequence in which those contracts are to be concluded. Such terminology also covers cases in which the contracts for the supply of goods in the two directions are concluded concurrently and in which the sequence of the contracts cannot serve as a terminological criterion.

3. Component contracts of a countertrade transaction

19. Countertrade agreement. The countertrade agreement is the basic agreement which sets forth several stipulations concerning the type of countertrade transaction being entered into and the manner in which it is to be implemented. In practice, the countertrade agreement is referred to by a variety of names, such as "frame agreement", "countertrade protocol", "letter of intent", "umbrella agreement", "memorandum of understanding", "letter of undertaking", or "counterpurchase agreement". The countertrade agreement usually contains the commitment of the parties to enter into the future contracts required to fulfil the objective of the transaction ("countertrade commitment", see para. 20 below). In addition to the countertrade commitment, the countertrade agreement is likely to contain other stipulations on issues such as the type, quality and quantity of the goods, price of the goods, time period of fulfilment of the countertrade commitment, payment, restriction on resale of goods, participation of third persons in the transaction, liquidated damages or penalties, security for performance, interdependence of obligations in the transaction, choice of law, and settlement of disputes. The countertrade agreement may be embodied in a discrete instrument or it may be included in a contract for the shipment of goods. When the parties agree simultaneously on the terms governing the supply of all the goods in both directions, the countertrade agreement would contain a stipulation expressing the link between the concluded contracts and possibly other stipulations, but would not contain a countertrade commitment.

20. Countertrade commitment. This term is used to refer to the commitment of the parties to enter into a future contract or contracts. Depending on the circumstances, those future contracts may relate only to the shipment in one direction or to the shipments in both directions. The degree to which the countertrade commitment is definite depends on the amount of detail contained in the countertrade agreement concerning the terms of the future contracts.

21. Export, import, counter-export, and counter-import contracts. The contracts for the supply of goods entered into by the parties would be referred to by names consistent with the names of the parties, i.e. "export" or "import" contract for the first contract entered into, and "counter-export" or "counter-import" contract for the contract entered into subsequently. The contracts in each direction may be referred to in the singular even though there may be several such contracts on both sides of the countertrade transaction.

22. Supply contracts. In the cases mentioned above where no clear criterion exists for distinguishing between the exporter and the importer, or where the context requires a general reference to any party to the countertrade transaction, and in which the term "party" or "parties" to the countertrade transaction may be used, the contracts for the supply of goods between the parties may be referred to as "supply contracts".

23. Countertrade transaction. This term is used to refer to the whole countertrade arrangement containing the related supply contracts and any countertrade agreement.

C. Focus on issues specific to countertrade

24. The contracts for individual supplies of goods under a countertrade transaction generally resemble contracts concluded as discrete and independent transactions. In some cases, however, the content of a contract is affected by the fact that it forms part of a countertrade transaction. For example, when the proceeds of a contract in one direction are to be used to pay for the contract in the other direction, the two supply contracts may contain payment provisions particular to countertrade. Therefore, the guide does not deal with supply contracts except to the extent that they contain provisions typical of countertrade.

25. The questions specific to or of particular importance for international countertrade are concentrated in the countertrade agreement. The legal guide focuses on questions raised in drawing up the countertrade agreement. Where necessary, reference is made to drawing up a provision in a supply contract that is influenced by the fact that the contract is part of the countertrade transaction.

26. Some of the issues dealt with in the legal guide are essential in establishing a countertrade transaction. For example, the parties would have to choose a contracting approach, express in appropriate form their commitment to engage in reciprocal trade, and specify the extent of the commitment. Solutions to certain other questions dealt with in the legal guide, while not necessarily essential, would help to ensure proper implementation of the transaction. Such questions include: the time period for the fulfilment of the countertrade commitment, type, quality, quantity and price of the countertrade goods, payment mechanism, participation of a third person in the fulfilment of the countertrade commitment, restrictions on resale of countertrade goods, security for performance, liquidated damages and penalties, possible effect on the countertrade transaction of problems arising in an individual contract for the supply of goods, choice of law, and settlement of disputes. The parties intending to enter into a countertrade transaction are advised to address the essential questions. As to the other questions that are not necessarily essential but may be helpful in the

implementation of the transaction, the parties will have to judge whether and to what extent the contractual solutions discussed in the legal guide are relevant to the circumstances of the given case.

D. Governmental regulations

27. In some countries countertrade is subject to governmental regulations. Such regulations, which may derive from international agreements, are closely linked with national economic policies and as a result vary from country to country and are likely to be changed more often than rules of contract law. Governmental regulations may promote or restrict countertrade in a variety of ways. For example, it may be provided that certain types of imports must be paid for only through a countertrade arrangement, that state trading agencies are to explore the possibility of countertrade when negotiating certain types of contracts, that certain types of local products are prohibited from being offered in countertrade, or that foreign currency payments into the country must not be restricted. Other such rules may relate to exchange controls or to the authority of an administrative organ to approve a countertrade transaction. Some regulations may be specifically oriented to countertrade, while others may be more general, but with an impact on countertrade. Some regulations are directed to one contracting party only and do not directly affect the content or the legal effect of the contract concluded by that party. In other instances the regulation may limit the parties' freedom of contract.

28. The legal guide advises parties to take into account such governmental regulations. Since the regulations are disparate and are often changed, advice is given, where appropriate, in the form of a caveat rather than in any detailed discussion of the substance of the applicable regulations.

E. Universal scope of legal guide

29. The legal guide treats the legal issues arising from countertrade at the universal level, in view of the fact that the motives for engaging in countertrade, the interests of the parties involved, and the private law questions do not reveal regional particularities. To the extent there exist regional differences in contract practices, they concern in particular the frequency of use of certain commercial types of countertrade and the elaborateness and refinement of contractual solutions.