III. INTERNATIONAL COUNTERTRADE

International countertrade: preliminary study of legal issues in international countertrade: report of the Secretary-General (A/CN.9/302) [Original: English]

CONTENTS

INTRODUCTION

1. The Commission, at its eleventh session (1978), decided to include in its programme of work the subject of international barter and exchange (A/33/17, paras. 67-69).[1] At its twelfth session (1979), the Commission, on the basis of a report of the Secretary-General entitled "Barter or exchange in international trade" (A/CN.9/159), adopted the view that barter-like transactions took too many different forms to admit of regulation by means of uniform rules. However, it requested its secretariat to include in the studies then being conducted in respect of contract practices consideration of clauses of particular importance in barter-like transactions. The Commission also requested the secretariat to approach other organizations within the United Nations system engaged in studies on such transactions, and to report to it on the work being undertaken by those organizations (A/34/17, paras. 21 and 22). At its seventeenth session (1984), the Commission discussed a report of the Secretary-General that reported on the activities of international organizations relative to barter-like transactions (A/CN.9/253). In that discussion, a number of delegations indicated that they attached great importance to the subject and that further consideration of it would be useful. It was agreed that, in the light of a report on the developments in the field to be prepared by the secretariat, the Commission might consider whether concrete steps in the field should be undertaken by it (A/39/17, para. 132).

2. At its nineteenth session (1986), the Commission, on the basis of a note by the Secretariat (A/CN.9/277), considered its future work in the area of the new international economic order. In the context of that discussion the Commission decided that the secretariat should place a preliminary study on the subject of countertrade (a term used instead of barter and similar terms to reflect current international usage) before the Commission at a future session (A/41/17, para. 243).

3. The present report contains the preliminary study on legal issues arising in countertrade requested by the Commission. Paragraphs 111 to 113 discuss the question whether, and if so in what way, the Commission should engage in further work on this subject.

[1]Report of the United Nations Commission on International Trade Law on the work of its eleventh session (1978), *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17).

I. Concept of the study

A. *Description of subject-matter of the study*

(a) *Definition of countertrade transaction*

4. A countertrade transaction, as it is normally understood, is a composite transaction in which one party supplies, or procures the supply of, goods or other economic value to the second party, and, in return, the first party agrees to purchase or procures to be purchased from the second party, or from a party designated by the second party, goods or other economic value, so as to achieve an agreed ratio between the reciprocal performances.

5. While many countertrade transactions involve the mutual purchase of goods, other transactions involve the furnishing of services or the sale of a factory or similar production facility coupled with a commitment to purchase some or all of the output (usually referred to as a buy-back) or the purchase of manufactured goods of large value with a commitment that some portion of the component parts will be manfactured in the purchaser's country (usually referred to as an offset).

(b) *Commercial objectives of international countertrade*

6. There are several different commercial objectives that may be sought by engaging in countertrade transactions. Among the more prominent are the following: First, countertrade may be a financing mechanism in that the proceeds realized or expected to be realized from an export are used to finance an import. This usually arises when the import is to be paid in a convertible currency, and the importer's country is short of such currencies. Secondly, a party who has difficulties marketing his own products may, by linking his imports to exports, secure outlets for his products. Thirdly, countertrade may be used as an instrument of industrial development, for example when countertrade is made part of an industrial co-operation arrangement (such as co-production, product specialization or joint venture) or if it attracts foreign investments or technology to areas of the importer's interest.

(c) *Extent of countertrade in international trade*

7. Economic circumstances prompting parties to enter into countertrade transactions exist in all types of economic, social and political systems. As a result, an appreciable share of international trade is conducted by use of such arrangements. Countertrade has been a regular feature of trade between socialist countries of Eastern Europe and Western developed countries for a number of years. Countertrade has also been used in trade between developed countries, in particular in sectors involving products of high technology and high value. In the past decade, the increasing shortage of foreign currency, the need to preserve or gain access to international markets and the desire to stimulate industrial development have caused countertrade to be used increasingly by developing countries. The situation today seems to be such that

> "countertrade is now common between developing countries, between developed and developing countries and between developed countries. Moreover, it is taking place irrespective of whether there exists an institutional framework, i.e. governmental agreements, for it or not."[2]

B. *Scope of the study*

8. Legal issues that arise in countertrade transactions are of two types. One type of issues concerns governmental regulation in the area of countertrade. The other type concerns private law matters.

(a) *Governmental regulation*

9. Governmental regulation of countertrade may be carried out through rules providing, for example, that certain types of imports must be paid for only through a countertrade arrangement, or that certain types of local products are prohibited from being offered in countertrade, or that state trading agencies are to explore the possibility of countertrade when negotiating certain types of contract. Other such rules may relate to an institutional framework through which countertrade must be channelled. It has been, for example, characteristic of planned economy States that only a limited number of enterprises have been authorized to enter into countertrade transactions and that ministerial organs supervising a particular sector have had prerogatives in approving a countertrade transaction.

10. Such legal rules are frequently directed to one contracting party only and often do not directly affect the content or the legal effect of the contract concluded by that party. In other instances the regulation may affect the contract; for example, by limiting the freedom of the parties as to the content of a contract term.

11. Governmental regulation of that nature is strongly influenced by national governmental policies, and it is unlikely that a unification or harmonization of such laws may be achieved. Therefore, this report does not attempt to analyse the content of those legal rules. However, such rules are referred to in this study whenever they affect the contractual relations of the parties.

(b) *Private law*

12. Private law issues may originate either in respect of a contract covering one of the segments of the countertrade transaction, i.e. individual supplies of goods or services under the transaction, or from the overall countertrade agreement co-ordinating those segments. While the contractual arrangements governing the individual segments of countertrade transactions are cast in the form appropriate to the subject-matter of that segment, i.e. contracts of sale, construction, licence, services, or work and labour, the overall countertrade agreement is a contractual arrangement in which the parties agree on elements of the contracts governing the individual segments of the transaction and on the relationship among those segments.

13. The majority of the private law issues arising from the contracts governing individual segments of a countertrade transaction are the same as those arising in similar contracts concluded as discrete and independent transactions. Therefore, there is no need to deal with those legal issues in this study except to the extent that they are affected by the fact that they arise in the context of a countertrade transaction.

14. The countertrade agreement, on the other hand, gives rise to issues that are typical of or especially important to countertrade and that are solved by approaches developed in countertrade practice. It is primarily on those issues that this study will focus.

C. *Universal treatment of issues*

15. In discussing private law issues of international countertrade the question arises whether they may be treated as a universal phenomenon or whether there exist regional particularities that require a differentiated treatment. Several observations may be made on this question.

16. First, there exists an extensive countertrade practice in a wide range of industrial sectors in trade between planned economy States in Eastern Europe and Western market economy States. It is characteristic of East-West transactions that similar contract approaches and solutions are often used, and that those similarities often extend to several countries. This is largely due to the fact that countertrade has a tradition in Eastern Europe, that countertrade in Eastern Europe is conducted by a small number of specialized foreign trade organizations, that the countertrade transactions are monitored by the competent administrative organs and that issues of East-West countertrade are relatively often discussed in commercial and legal publications.

[2]Countertrade, Background note by the UNCTAD secretariat, Trade and Development Board, Committee on Economic Co-operation among Developing Countries, TD/B/C.7/82, 28 August 1986, para. 7.

17. Secondly, countertrade is less frequently used in trade between parties from developed market economy countries than in inter-regional trade and the transactions tend not to consist of the ordinary exchange of goods. Many of the countertrade transactions that are concluded between parties from developed market economy countries involve the sale of specialized high technology products of exceptionally high value (e.g. a power plant or aircraft). Such countertrade transactions often take the form of a direct or indirect offset transaction. Nevertheless, private law issues or solutions involved in countertrade transactions between parties from developed market economy countries, whether for the ordinary exchange of goods or of the offset variety, do not appear to be essentially different from those involved in inter-regional countertrade transactions.

18. Thirdly, even though countertrade with parties from developing countries is a phenomenon that, in comparison with countertrade in some other regions, does not have such a long tradition, as noted by a specialized publication,

> "A remarkable feature of the spread of CT [countertrade] world-wide has been the ease with which concepts developed for the highly institutionalized countertrade environment of Eastern Europe have been transferred to the much less regulated economies of the Third World countries."[3]

One reason for this appears to be the fact that many parties in industrially developed countries that have acquired expertise in East-West countertrade, in particular international trading houses, have in recent years expanded their operations to developing countries. Perhaps of greater importance is that the basic motives for engaging in countertrade and the basic constellation of interests of the parties to such contracts do not show regional particularities, and the contracts do not reveal legal issues essentially different from those involved in countertrade in other regions.

19. A conclusion to be drawn from this is that the present report, covering contractual aspects of countertrade, should deal with countertrade as a universal phenomenon raising common legal issues.

D. *Terminology*

20. Writings on international countertrade do not use a uniform terminology in referring to particular types of countertrade. The lack of uniformity may be a consequence of differing commercial linguistic usage or of the use of different criteria for classifying countertrade practice. This is manifested by the use of the same expression for distinguishable types of countertrade practice or of different expressions for a given kind of practice. Terms that are often used either as synonyms for countertrade or to describe various types of countertrade are barter, compensation, counter-purchase, offset, buy-back and switch transactions. It is not necessary in this report to make distinctions between them for the purposes of describing and analysing the legal issues involved.

21. It is necessary, however, to define for the purposes of this report certain terms that are used herein. Since the scope of this report is global and since it will cover various forms of countertrade, the terms used are broad so as to cover countertrade in different economic or regional contexts. In addition, account has been taken of the fact that countertrade transactions are not limited to reciprocal sales of goods but may include other types of contract.

(a) *Parties to countertrade*

22. The following expressions have been chosen to denote parties to a countertrade transaction: the term *exporter* or *counter-importer* will be used for the person supplying (i.e. exporting) goods or services, and being obligated to purchase (i.e. to counter-import) other goods or services in return; the term *importer* or *counter-exporter* will be used for the person purchasing (i.e. importing) goods or services, and having a right to supply (i.e. to counter-export) other goods in return. It may be noted that in many cases the importer and the counter-exporter is the same person and that this may also be the case with the exporter and the counter-importer. However, it also occurs that the exporter designates another person to perform the counter-import obligation, or that the importer agrees that another person will counter-export instead of the importer.

23. The term exporter is used in some writings to denote the economically or technologically stronger countertrading party, and the term importer for the weaker party. The reason for such usage is that it frequently occurs that the party who exports first, and assumes an obligation to counter-import at a later time, is the party from a developed country, who is assumed to be the stronger party, whereas the party who imports first, and secures for himself a right to counter-export at a later time, is the party from a developing country, who is assumed to be the weaker party. However, it increasingly occurs, in particular in countertrade with the least developed countries, that it is the party from the developing country that exports first, since he may not be allowed to import goods until he has earned the necessary convertible currency by an export. Therefore, in order to make the meaning of the terms in this report clear, it should be emphasized that the term exporter signifies only that he is the supplier under the first contract to be concluded. By the same reasoning, the term importer refers to the other party to the first contract. The terms counter-importer and counter-exporter refer to the parties to the second contract. Although the export contract and the counter-export contract are seldom concluded at the same time, when they are, it is a matter of indifference in the context of this report as to which party is referred to as the exporter and which one as the importer.

[3] *Strategies for Countertrade Success*, prepared and published by Business International S.A., Geneva, Switzerland, November 1986, 3.

(b) *Contracts in countertrade*

24. The contracts entered into by the parties are referred to by names consistent with the names of the parties, i.e. *export* and *import contract* for the first contract entered into and *counter-export* and *counter-import contract* for the second contract entered into. In this report these contracts are usually referred to in the singular even though there may be several such contracts on both sides of the countertrade transaction. The countertrade aspect of the transaction, which involves the obligation to enter into future export or counter-export contracts and provides for the relationship between the two contracts, is set forth in a *countertrade agreement*. This agreement is usually set forth in a separate document, but the term countertrade agreement is used in this report for this set of obligations even when they are found in the export contract.

(c) *Subject-matter of countertrade*

25. The subject-matter of countertrade contracts may be finished products, production equipment, industrial works, technology, or various services such as carriage of goods, tourist services or maintenance and repair. The term goods will be used for simplicity to cover all such subject-matters.

E. *Sources of information*

26. It has been noted in a previous report to the Commission that, despite the increasing number of studies that have been devoted in recent years to international countertrade, "the dearth of available barter-like contracts in practice makes it difficult to undertake an analysis of the various types of clauses found in such contracts" (A/CN.9/253, para. 20). Other organizations have had similar experience. For example, as noted by the UNCTAD secretariat, "it should not be surprising that factual information is hard to come by. There is no systematic reporting of countertrade, and parties are usually reluctant to divulge information" (TD/B/C.7/82, para. 9).

27. The secretariat of the Commission has based the present study on various sources. One source has been a collection of countertrade contracts that was the result of a request by the Secretary-General directed to Member States of the United Nations to provide the Commission's secretariat with relevant contract materials and a similar request by the Secretary of the Commission to a number of individuals in different regions of the world. Information has also been derived from writings dealing with or touching upon legal issues of international countertrade. In addition, members of the secretariat consulted informally with individuals having expertise in this type of trade.

II. Contractual approaches to countertrade

28. A preliminary question for the parties to a countertrade transaction is how to structure the contracts for the export and the counter-export segments of the transaction. In particular, it should be decided whether the export and the counter-export side of the transaction will be covered by definite contracts concluded concurrently, or whether an export contract should be concluded first, leaving the counter-export contract to be concluded in a definite form at a later stage.

29. Typical variations regarding this question may be classified into the following groups: barter, matched contracts, unified contract and countertrade agreement.

A. *Barter contract*

30. Barter contracts in the strict legal sense of an exchange of goods for goods are occasionally used in international trade. Parties dealing in commodities may trade equivalent amounts located in different parts of the world in order to secure supplies closer to the point of ultimate use or delivery to their customers, thereby saving on transport costs. Barter contracts in the strict legal sense are also used on occasion in countertrade transactions for the exchange of different types of goods. The primary reason appears to be to avoid or to reduce transfers of money in connection with contract deliveries.

31. There are difficulties in the use of barter in countertrade transactions. The conclusion of a barter contract requires that the value of the goods to be exchanged be comparable, which in turn implies that the quality and quantity of the goods must be precisely defined at the time of the conclusion of the contract. However, such contract precision about future deliveries in both directions is often not commercially feasible. Furthermore, if the contract does not state the monetary value of the goods, it is difficult to provide a satisfactory monetary relief when one party delivers goods that do not conform to the contract and it is not practical for the party in default to cure the defect in performance. Even if monetary relief can be calculated, either because there is a reference price in the contract or a sufficiently objective price standard exists, the awarding of monetary relief may contravene the basic purpose of concluding a barter contract.

32. Since a delivery of goods constitutes the compensation for a delivery in the other direction, any failure to deliver or non-conforming delivery may provide a ground for non-performance of a reciprocal delivery. Since it is seldom feasible to arrange for simultaneous deliveries of the two counter-purchases, such an intensive interrelation between the deliveries may, instead of effectively stimulating contractual discipline, have a disruptive effect on planned deliveries, especially since it may be more complicated to arrange for security of performance in a barter contract than in a sales contract. For example, barter limits the use of a documentary letter of credit, the device normally used in international sales of goods to ensure that one obligation has been performed as a condition to the performance of the counter-obligation.

33. As to other types of security that may be used in barter, such as a bank guarantee, the mechanism for exercising the guarantee in the barter context would normally be more cumbersome than in a straightforward transaction. The reason is that a guarantee clause in a barter contract would often call for guarantees of both promises to deliver. If both guarantees were "on demand", a party not faithful to the contract could effectively deter the other party from calling one guarantee by threatening to call the other guarantee himself. While similar cross-guarantee situations can arise in sales transactions, they are not as inherent to the basic transaction.

34. As a result of these difficulties, barter contracts are relatively seldom used as the legal form for international countertrade.

B. *Matched contracts*

35. The parties may conclude two independent contracts that do not refer to each other, the first for the supply of goods in one direction, and the second for the supply of goods in the other direction. The only link between the contracts is that the willingness to conclude one contract depends on the conclusion of the other. However, because this link is not reflected in the contracts, the obligations under each contract apply independently.

36. Matched contracts may be the preferable procedure to follow when the countertrade aspect of the transaction can be left to the continuing business relationship between the parties or when the two contracts can be concluded simultaneously. Since each contract is concluded and administered separately, all of the normal methods of securing performance are available. A difficulty arising in the supply of goods in one direction may be treated in the context of that contract alone, without necessarily affecting obligations in the other contract.

37. Matched contracts are not, however, widely used for arranging countertrade transactions. The very essence of the countertrade transaction is the need or desire to link the import and export of goods. Therefore, unless the two matched contracts can be concluded at the same time, some mechanism to induce or require the conclusion of the subsequent contract is needed. Even when the two matched contracts can be concluded at the same time, one party may wish to have some mechanism to link the performances under the two contracts.

C. *Unified contract*

38. A technique that is probably written about more in the literature than used in practice is to embody both sales agreements into a single contract. Such a contract differs from a barter contract in that both deliveries of goods are priced in terms of a monetary value and, normally, the obligations to pay for each of the deliveries would be stated. The contract would differ from the use of matched contracts in that both contractual obligations to deliver and pay would be set forth in the same document and would obviously be linked to one another.

39. While the use of this technique has been advocated in the past as a means of ensuring the existence and fulfilment of the countertrade obligation, it presents many technical difficulties. In addition to the need to set forth all of the contractual obligations as to description of the goods, quantity and quality that have been mentioned in respect of barter and matched contracts, the difficulties arising out of linking so closely together the different contractual obligations that were described in connection with the barter contract also arise in the case of a single sales contract, though perhaps not to quite the same degree. Because of these difficulties, official export financing and credit insurance agencies are usually reluctant, if not unwilling, to finance or insure such transactions.

D. *Countertrade agreement*

40. As a result of these difficulties most countertrade transactions are characterized by the existence of a countertrade agreement setting forth as many of the details of the countertrade commitment as can then be agreed upon. One of three basic patterns might be followed, depending on the extent to which the parties are ready to conclude the definitive export and counter-export contracts for the individual segments.

(a) The countertrade agreement might be entered into prior to the conclusion of any definitive export contract. The countertrade agreement might specify the total monetary value of the purchases to be made in each direction, indicate in general terms the types of goods to be purchased, specify the currency in which the goods are to be priced and payment is to be made and specify the procedures for payment. One common provision when this pattern is followed is that the price is to be paid into a blocked account that can be used only for payment for counter-imports. Such a provision not only reduces concerns over the expenditure of foreign exchange, but it also pressures the exporter to conclude counter-import contracts so as to procure those goods for use or re-sale, thereby realizing the currency to pay for his own export under the agreement.

(b) The export contract and the countertrade agreement might be concluded simultaneously. The countertrade agreement may be set forth in the export contract, although this appears to be rare in practice. It can include all of the obligations mentioned above, except the obligation to enter into an export contract.

(c) The countertrade agreement, the export and the counter-export contracts might be concluded simultaneously. In this case the countertrade agreement will contain only those provisions agreed between the parties linking the export and counter-export contracts. When the countertrade agreement is contained in the

same document as one or both of the contracts, the resulting document would fall within the category of a matched or unified contract as described above.

III. Completion of incomplete contract

41. One of the primary legal problems in countertrade arises out of the fact that the parties typically do not know which goods are to be delivered to fulfil the countertrade commitment, and may not even know the exact nature of the goods to be delivered in the export contract. As a result, it is a salient characteristic of countertrade agreements that they typically do not embody a definite description of all the performances required by the parties, but rather provide a framework on the basis of which the parties should agree on the missing contract terms at a later stage. If such subsequent agreement is not reached, the result of a lack of definiteness of contract terms may be that it is impossible to determine whether the agreement has been breached and, thus, the aggrieved party may have limited or no means to obtain relief.

42. Different approaches may be taken in the countertrade agreement as to the nature of the commitment to conclude the subsequent contract. At the one extreme are cases in which the parties provide only that a party will purchase from the other party unspecified goods, the amount of which may be specified in monetary terms. Such open-ended commitments appear to be used only when the importer has reason to expect the exporter to live up to the commitment for commercial reasons and when it is not important to the importer to be more specific as to the goods to be sold as the countertrade equivalent.

43. A variant of a commitment which indicates only the value of the future contract but not the goods is found in a countertrade scheme involving a transferable document referred to as an international trading certificate (ITC). The ITC would confer on the holder a right to sell goods, up to the amount specified in the ITC, to a party in the ITC-issuing country without an import licence, and it would constitute a guarantee by the issuing authority that convertible funds would be available for payment. The countertrade transaction would begin by the export of goods from the country which requires countertrade exports as a condition for the importation of goods. An ITC would be issued to the exporter by an authority such as the central bank. The authority would issue such an instrument in order to stimulate the export of that particular type of goods. The exporter would hand the ITC over to the foreign importer who would be free to rely on the instrument himself or to transfer it to another party. Such a scheme represents an effort to facilitate countertrade by multilateralizing it.[4]

44. At the other extreme are cases in which the parties provide guidelines for the conclusion of the definite export or counter-export contract, and, as those guidelines become more specific, the countertrade agreement approaches the point at which delivery of the goods becomes legally enforceable.

45. The typical cases, however, lie between the two extremes. In a typical case, a countertrade agreement provides a degree of definiteness to some terms of the future contract with an expectation that the incomplete contract will be supplemented so as to become legally enforceable.

A. *Contract terms to be supplemented*

46. Two kinds of contract terms of the future contract may be distinguished. One kind are the essential terms which must be present for the contract to be legally binding. The other kind are terms that are not essential for the contract to be legally binding, but are regarded by the parties to be necessary or useful for the implementation of the contract.

47. It is in the nature of countertrade transactions that the economically most important terms that are likely to be left indefinite in the countertrade agreement are also the terms that are essential to conclude a legally binding contract. For example, under many legal systems the essential contract terms in a contract of sale, a contract typical of countertrade, are those referring to the description, quantity and price of the goods. It is advisable that the countertrade agreement should include as many of those terms as possible and give as clear guidance as possible to the manner in which the other terms should be determined. Such guidance will help the parties in their future efforts to complete the contract. Such guidance may also be sufficiently clear to serve itself to determine any missing terms of the contract.

48. However, the vast majority of all the terms that might be found in a contract for the international sale of goods are not essential in order to conclude a legally binding contract. Nevertheless, they are included in typical contracts because of their importance to the proper implementation of the contract; indeed, on occasion, to any realistic possibility of implementing the contract at all. This is more true of international contracts of sale than of domestic contracts of sale, and would seem to be even more so in respect of countertrade transactions. The general rules of law, including the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the "United Nations Sales Convention"), will supply those legally non-essential terms that are not supplied by the parties in their contract or contracts; nevertheless, the parties should give careful attention to ensuring that all the terms necessary for a good contract relationship are provided.

49. In the case of countertrade transactions in which some of the goods are undetermined at the time the countertrade agreement is concluded, those terms of the eventual export or counter-export contracts that can be settled are often included in the countertrade agree-

[4]UNCTAD doc. TD/B/C.7/82, referred to in note 2 above, paras. 52-56.

ment. For example, the countertrade agreement may provide how payment is to be made, even though the goods and their price may still be unknown.

B. *Means of contract supplementation*

50. When the countertrade agreement leaves open a contract term, the contract may be supplemented on the basis of rules in the applicable law providing a standard or guideline for contract supplementation. For example, many legal systems may provide a solution when the parties have not settled the price of goods, their quality or the time within which the contract is to be performed. The solution may be, for instance, that the price should be the one "generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned", or that the goods should be "fit for the purposes for which goods of the same description would ordinarily be used", or that the contract is to be performed "within a reasonable time after the conclusion of the contract" (articles 55, 35(2)*(a)* and 33*(c)* of the United Nations Sales Convention).

51. Nevertheless, such contract supplementation provided by the applicable law may be a source of difficulty in the implementation of a countertrade agreement. Such difficulty may arise, for example, out of divergencies among legal systems as to the techniques of supplementation, as to the role of the court, the arbitral tribunal, or the parties in determining the missing term, as to the judicial control over a supplementation of the term, or as to the cases where such supplementation may be resorted to.

52. In view of such difficulties, parties to countertrade transactions often provide in the countertrade agreement a standard or guidelines for contract supplementation. The following contractually agreed ways for determining a missing contract term may be distinguished: (1) reference to a standard; (2) determination by a party to the contract; (3) agreement to negotiate; (4) determination by third person.[5] In international countertrade, the counter-export goods and the price are the most important questions left indefinite by the countertrade agreement.

(a) *Reference to standard*

53. Legal systems normally recognize as valid a provision that the price or other contract term may be determined by reference to a standard such as a formula, tariff, quotation, rate, index, statistics, or some other factor not influenced by the will of either party.[6]

54. The proposition that legal systems normally recognize contractual standards is unreserved where the application of the standard involves a computation, or other objective method to arrive at the contract term. However, where the application of the standard requires judgement or discretion, the position of legal systems is less certain and uniform in that a standard requiring a degree of judgement or discretion in its application may in some legal systems be considered too indefinite to produce a contract term.[7]

(b) *Determination of term by party to contract*

55. There is a strong tendency in many legal systems to recognize the validity of clauses empowering a party to the contract to determine a term of an obligation. However, the tendency is subject to qualification.[8]

56. As to the determination of the quantity of goods to be delivered under a contract, legal systems generally recognize that, in principle, this could be left to a party, but the authorization should be limited, or is deemed to be limited, to a reasonable or good faith determination in the context of that which has been agreed between the parties.[9]

57. Many legal systems would recognize the power given to a party to set a price if it was limited by such concepts as reasonableness, good faith or fairness. Under some legal systems, an ambiguous authorization would be considered to imply a standard of reasonableness. Other legal systems require the freedom to determine the price to be limited by a more definite standard.[10]

(c) *Agreement to negotiate*

58. Countertrade agreements often contain clauses indicating a commitment of the parties to negotiate with a view to reaching an agreement on one or more contract terms. Such commitments may relate to any contract issues, including the price, quality or quantity of goods, or time periods for delivery.

59. An agreement to negotiate which does not result in a subsequent agreement will normally, because of its indefiniteness as regards the content of agreement to be reached, not be given effect by a court or an arbitral tribunal.[11] Nevertheless, a party in breach of an agreement to negotiate may be responsible for any

[5]For a fuller comparative legal discussion of these means of contract supplementation see R. B. Schlesinger (General Editor), *Formation of Contracts*, A Study of the Common Core of Legal Systems (Conducted under the Auspices of the General Principles of Law Project of the Cornell Law School), Oceana Publications, Dobbs Ferry, New York, Stevens & Sons, London, 1968, vol. I, 84-91 (general report) and 433-534 (reports on particular legal systems).

[6]Schlesinger, *Formation of Contracts*, vol. I, referred to in note 5, 87. It should be noted, however, that the use of a particular standard may make the obligation invalid where the standard is prohibited by law (e.g. some legal systems do not permit the use of a gold standard or a standard based on the level of wages).

[7]It seems that, for example, French law requires a greater degree of definiteness of a standard than some other legal systems; see M. Fontaine, Aspects juridiques des contrats de compensation, *Droit et pratique du commerce international*, tome 7, no. 1, mars 1981, 195; and B. Mercadal, La détermination du prix dans les contrats, *Droit et pratique du commerce international*, tome 5, no. 3, sept. 1979, 443-448.

[8]Schlesinger, *Formation of Contracts*, vol. I, referred to in note 5, 88 and, *passim*, 433-534.

[9]*Ibid.*

[10]*Ibid.*, 89 and, *passim*, 433-534.

[11]*Ibid.*; nevertheless, where the agreement to negotiate refers to the price, under some legal systems the price may be determined as if there were a clause providing for a reasonable price (this is expressly provided, for example, in sec. 2-305(1)*(b)* of the Uniform Commercial Code of the United States of America).

damage arising from the breach. However, in order to establish such a breach, the obligation to negotiate must be based on definite terms.

60. In order to increase the effectiveness of clauses envisaging future agreement, parties might incorporate in them various additional elements. Such elements may be in particular the following:

(a) a "best efforts" or "good faith" clause laying down criteria to be observed in the negotiations;

(b) more specific guidelines, such as a provision that no undue prejudice should arise to either party from the contract to be concluded, or that the contract should be negotiated on the basis of the prevailing market conditions, or that the contract should support certain specified commercial objectives of a party;

(c) a procedure to be observed by the parties in the negotiations; the procedure might specify, for example, the party who is to submit a contract offer, time periods for submitting it, issues to be covered by it, or the form or means of its transmission;

(d) the kinds of goods on which the negotiation process would focus or to which it would be limited;

(e) a reference to a standard, possibly with a tolerance range, from which a contract offer should not depart; such a standard may refer to issues such as price, quality, or conditions of delivery;

(f) the time within which an agreement must be reached, and beyond which negotiations will be deemed to have failed;

(g) instances where a party would be considered no longer under the duty to negotiate or in breach of the duty; such instances may occur, for example, when the counter-exporter has not accepted any of the offers that met agreed conditions, or when a party has not made any such offer;

(h) consequences of unsuccessful negotiations; possible solutions may be, for example, prolongation of the time period in which the countertrade obligation must be fulfilled, or the triggering of a contract provision on penalties or liquidated damages. The clause may also provide for a differentiation among consequences, depending on the reason for the failure to reach an agreement.

61. While no procedure for negotiation or guidelines as to the result to be achieved can ensure success, particularly if one party does not wish the negotiations to succeed, it can enhance the likelihood that two parties who are negotiating in good faith will succeed. Furthermore, the more specific the negotiation clause, the easier it would be to show that the other party acted in bad faith if negotiations were to fail. As suggested above, the negotiation clause might differentiate between various consequences of a failure to complete the negotiations successfully depending on the reason for the failure to reach agreement. Even if the consequences of a failure to reach agreement because of the bad faith of one of the parties are not specified in the contract, in some legal systems bad faith in the negotiations may give rise to an action for damages. However, the party claiming damages would often find it difficult to quantify those damages. Therefore, the likelihood that an agreement to negotiate could be enforced by the usual legal means is slim.

(d) *Determination of term by third person*

62. Legal systems generally recognize the right of the parties to agree that a term of an obligation will be fixed by a third person.[12] There are, however, differences among legal systems concerning such an agreement. For example, while some legal systems recognize that an arbitral tribunal or even a court may be entrusted with the fixing of a contract term, others permit it only if it is not performed as part of arbitral or judicial proceedings. Other divergencies relate to cases where the parties cannot agree on the person who is to supplement the contract or where the designated person fails to act. In these cases, under some legal systems, the parties have no recourse to a procedure for designating or replacing the person, and have to accept the consequences of the fact that the term of the obligation has not been determined. Under other legal systems, the court may, in some circumstances, appoint the third person under a procedure analogous to the one for appointing an arbitrator, or, if the missing term is the amount of a price, treat the case as if there were an agreement for a reasonable price. There are also differing approaches in legal systems to the availability and extent of court control over a decision by the third person.[13]

IV. Provisions in countertrade agreement relating to content of contract to be concluded

63. Where a countertrade agreement does not directly determine the content of a term of the counter-export, but instead provides a procedure for arriving at such a term, the agreement may contain substantive guidelines regarding the term. Such guidelines may concern in particular the type of possible counter-export goods, their quality, quantity and price.

A. *Type of goods*

64. When the parties to a countertrade transaction do not commit themselves to a particular type of counter-export goods, the guidelines concerning possible counter-exports are frequently expressed in the form of a list attached to or contained in the countertrade agreement indicating goods which may be purchased to fulfil the countertrade commitment. Such a list is drawn up by the counter-exporter or by the officials of the counter-exporter's country. In the former case it may indicate the goods the counter-exporter produces or in which he trades. In the latter case the list may include other goods which the relevant officials wish to see exported in countertrade transactions. The list may also originate from the counter-importer, who is thus expressing the

[12] Schlesinger, *Formation of Contracts*, vol. I, referred to in note 5, 88.
[13] *Ibid.*, 88, 497, 513.

scope of his readiness to counter-import. Alternatively, the list may be the result of a synthesis of the views of both parties on the future counter-export.

65. The list may go beyond a simple enumeration of the goods. It may, for example, lay down a structure of the counter-export. For instance, some types of countertrade transactions, such as indirect offset transactions, may provide directives as to the regions within the counter-exporting country from which a certain value must be counter-imported, or the industries that will be recognized as counter-exporters, or the minimum trade that must be generated in each of those industries. There are also examples in counter-purchase transactions of lists specifying a counter-export structure. Such a list may specify, for example, the percentage of goods to be counter-imported from the importer and the percentage that may be bought from other suppliers.

66. Another variety of guidelines may deal with the origin of counter-export goods. For example, it may be provided that any such goods must be of domestic origin or may originate only from particular suppliers. Since industrial products may contain significant imported value or value originating from other suppliers, the guidelines would often specify criteria for determining the origin of the goods.

67. While a mere list expressing the various possibilities regarding counter-export, without constraining the parties to any particular goods, does not in itself give the basis for an enforceable contract due to lack of definiteness, such a list in the countertrade agreement may be part of a binding contract obligation. For example, the importer may give a guarantee that some or all of the listed goods will be available for shipment should the parties agree on the terms of delivery.

68. Such a guarantee is most likely to be given, or to be a reasonable implication from the terms of the countertrade agreement, when the importer produces or sells the type of goods in question. The importer is likely to refrain from giving such a guarantee, and it may not be a reasonable implication from the terms of the countertrade agreement, when the possible counter-exports cover a broad range of goods or when the goods are not to be supplied by the importer himself but by an enterprise over which the importer has no control.

B. *Quality of goods*

69. Concern over the quality of goods to be offered for counter-export is one of the major problems in countertrade transactions. If the goods are not known when the countertrade agreement is concluded, or are known only by broad categories, precise statements of quality cannot be made. The statement of quality may be limited to broad generalizations, such as that the goods must be of merchantable, export or prime quality. Any more precise statement of required quality would be left to the export or counter-export contract where the specific goods to be delivered are described. This procedure will often be completely satisfactory when the goods offered for counter-export are commodities or manufactured goods with highly standardized levels of quality.

70. However, when the exporter claims that the goods offered for counter-export are of such a low quality that he cannot either use or re-sell them or that they are worth less than the price at which they are offered, a quality standard worded in general terms may not provide an adequate means of measuring whether the counter-exporter is offering goods in conformity with the countertrade commitment. Where the exporter has a choice as to the goods to be taken for counter-export, a disagreement as to whether certain goods are of the requisite quality may not be serious. However, if the importer insists that the goods offered are to be taken for counter-export, the entire countertrade transaction is called into question. It may not be possible to come to agreement on the subsequent export and counter-export contracts and both parties may believe that the other party is not in good faith. The effect on one segment of the countertrade transaction of an alleged breach of contract in other segments of the transaction is discussed in section V.

71. A special problem arises in respect of goods to be counter-exported in connection with a buy-back transaction, where the exporter has exported a production facility such as a factory and agreed to purchase some or all of the resulting production over a period of time. The extent to which the goods can be described depends, at least in part, on the range of products that could be produced by the facility. A mine could produce only the ore to be found at that mine. A factory could normally produce a range of products. The specific products might change over the period of the buy-back commitment. Moreover, quality specifications for manufactured goods must often be more precise than for more generic goods.

C. *Quantity of goods*

72. When a countertrade commitment refers to goods of one specified type, the quantity of such goods would normally be specified in, or could be calculated on the basis of, the clause in the countertrade agreement determining the extent of the countertrade commitment. When the countertrade agreement provides for several possibilities concerning the type of counter-export goods, the quantity of each possible type of goods would often not be stipulated in the countertrade agreement. In such a case the quantities of counter-export goods, determined in one or more counter-export contracts, would have to be in conformity with the clause in the countertrade agreement determining the extent of the countertrade commitment. The countertrade agreement may also specify in such a case the procedure by which the counter-exporter or the counter-importer will determine the exact quantities of each type of goods that are to be taken.

D. *Extent of countertrade commitment*

73. The extent of a countertrade commitment is frequently expressed by a monetary value. The value may be expressed as a percentage of the value of the export goods or as an absolute amount; in these cases, the countertrade agreement may contain a clarification as to whether certain outlays, such as those for freight, insurance, public charges or financing costs form part of the value. Sometimes, however, the countertrade commitment may be quantified by reference to a specific quantity of a given type of counter-export goods.

74. In countertrade transactions with successive deliveries (e.g. in buy-back transactions), in long-term transactions, or in transactions where the counter-exporter's financing costs are uncertain at the time of the conclusion of the countertrade agreement (e.g. because of a floating-rate credit arrangement), clauses are sometimes present providing for an increase or decrease of the countertrade commitment depending on movements of prices or financing costs. In the case of capital goods it may be agreed that the commitment will be increased in proportion with expenses for spare parts or technical assistance.

75. Under some circumstances, when the exporter has made prior purchases from the importer, the guidelines regarding quantity of counter-exports may include a concept often referred to by the expression "additionality". The essential principle here is that the only purchases by the counter-importer that will be considered as fulfilling the countertrade commitment will be those that exceed the usual, or traditional, quantities purchased by the counter-importer from the counter-exporter or in the counter-exporting country. When the transaction is between two individual enterprises, the issue of additionality may be solved by agreeing on the quantity that is to be regarded as the usual or traditional purchase. Where, however, the arrangement gives to the counter-importer a latitude in choosing the goods or the supplier, the additionality clause may have to be more elaborate; it may be based on parameters such as trade statistics, indexes and trends, or it might be left to a third person or body to determine the purchases that are deemed to be additional.

E. *Price of goods*

(a) *Means of setting the price*

76. The problems of setting forth the price in the countertrade agreement are similar to those in respect of the quality of the goods. If the goods to be delivered under the export and counter-export contracts are known, a definitive price may be stated. If those goods are to be delivered at some time in the future, a standard or procedure for determining the price may be used instead, especially in the case of manufactured goods. If the goods to be delivered under either the export or the counter-export contract are not known, a standard or procedure for determining the price must be provided. Some of the standards or procedures that might be used for determining the price and their particular application to countertrade transactions are set forth below.

77. *Price quoted in a market of goods of standard quality.* Where there exists a regular reporting of prices of goods of standard quality, as, for example, in an international exchange, the parties may link the price of the future counter-export deliveries to such a price standard. This method may also be used where the standard refers to a component part of the counter-export goods, provided that the price of the component is in a constant relation with the price of the final product.

78. *Production cost.* The parties may agree to base the counter-export price on production costs of an agreed producer. In such a case it may be appropriate for the contract clause to address issues such as the elements constituting the cost standard, the increases and decreases of the reference costs that should be translated into an adjustment of the counter-export price, or the cost movements that should not be so translated.

79. *Counter-importer's resale price.* Another possibility is to agree that the counter-export price will be proportional to the price charged by the counter-importer to its distributors. The questions that may arise in such a situation may include the treatment of any differences among the prices charged to distributors, charges that constitute the reference price, and the method of verifying the information on the resale prices.

80. *Most-favoured-customer clause.* Where the counter-exporter is supplying the counter-export goods to several customers, it may suit the expectations of the parties if the counter-exporter grants the counter-importer the most favourable price. Such a clause may indicate the means to be used to ascertain who was the most favoured customer in regard to the goods in question and address the question of comparability between the reference price and the counter-export price.

81. *A competitor's price.* The price clause may be linked to the price of a competitor producing the same goods as those that will be counter-exported. Such a clause might indicate how the reference producer should be identified, which elements are to be included in or excluded from the reference price, and the manner of obtaining price information.

82. *Average price.* The counter-export price may be calculated as an average of several comparable prices. This is an approach that has in practice received considerable recognition. A clause of this type may address the following: the number of quotations to be obtained by each party, the entities, countries or regions from which quotations may or should be obtained, the quality or quantity of goods to which the quotations should refer, the method of ensuring the

comparability of the quoted prices, any formula for calculating the average, or the procedure to be used if quotations are not available.

83. A price formula may be based on a single price standard. However, the parties may combine two or more standards in various ways. For example, a price clause may provide for the price to be determined by one standard but for there to be a comparison of prices determined in accordance with other standards. If the difference in result reaches an agreed amount or percentage, there may be a procedure for adjusting the price to be paid. Another possibility may be to provide for the calculation of the price according to two or more formulae with a formula for calculating an average or for determining the decisive price. When the counter-export goods have yet to be determined, the possible choices may call for different price clauses.

(b) *Some issues to be dealt with in a price standard clause*

84. In any of the foregoing cases the parties sometimes provide a time-frame for various stages of the price-setting procedure and indicate the point of time when the price clause should crystallize. The details of such a provision would depend, *inter alia*, on whether the price is to be determined only once or periodically. The provision may be linked to the placing of an order, the finalization of the counter-export contract, or the delivery of goods.

85. Another issue that may be considered in practice is the possibility that the structure of the standard price may not be the same as the structure of the counter-export price. For example, the two prices may differ as to whether the buyer has to bear, in addition to the agreed amount, the costs of transportation, insurance or a public charge, or whether it is the seller who has to bear these outlays. Where such a difference exists, the price clause may contain a formula to make the two cases comparable.

86. The quantity of goods may also be a consideration affecting the price. When the countertrade agreement envisages a quantity that is higher or lower than the quantity range on which the price standard is based, the price formula may have to ensure adjustment.

87. Furthermore, parties may agree to reflect in the price formula a party's commercial risk. Examples of such risks may include the counter-importer's resale risk, or a risk of a party that the price to be determined would be less favourable than the free market price. This risk factor may be reflected in the price clause by a percentage to be added to or deducted from the amount of the standard price.

(c) *Currency and means of payment*

88. It would be normal for the export and the counter-export goods to be priced in the same currency, which may be the currency of one of the two countries involved or it may be that of a third country, especially a third country with a freely convertible currency used in international trade. The choice of the currency in which payment is to be made may depend on the means by which payment is to be made.

89. If payment for one or more of the deliveries is to benefit from a special export credit arrangement or export credit guarantees, that segment of the transaction, and perhaps the entire transaction, may have to be priced in a particular currency. If payment for individual segments of the transaction is to be made to a blocked account for use only for imports in conformity with the countertrade agreement, the currency in which the goods are priced takes on the nature of a unit of account. The most important technical factor in choosing the relevant currency would be the ease with which prices for the goods in that currency could be determined and with which any remaining balance at the completion of the countertrade transaction could be disposed of.

V. Relationship between export contract, countertrade commitment and counter-export contract

90. Since the economic motives for engaging in countertrade can be satisfied only if both the export and the counter-export contract are concluded and performed as envisaged, it is possible to consider them as one contract, albeit a composite one. It may well be a universal rule that complete non-performance by one party of his contractual obligations in a contract of sale authorizes the other party not to perform his, and authorizes a formal avoidance of the contract. It may also be a universal rule that non-performance of one's own obligations and avoidance of the contract is not authorized when the failure of the other party is not sufficiently serious.

91. In a simple sales contract these rules lead to the conclusion that the buyer is not obligated to pay for the goods if they are not delivered at all or they have sufficiently serious defects, but is obligated to take and pay for them if they are delivered with less serious defects. It is a separate question whether the buyer could withhold payment of any portion of the price because of the defects.

92. One of the issues frequently raised in discussions of the legal issues of countertrade is whether this paradigm of the simple sales contract should be applied to the countertrade transaction. It is generally suggested that the legal answer depends on the drafting of the contracts by the parties, i.e. that it is a matter within the control of the parties.

A. *Non-performance of export contract*

93. In the normal case the exporter is primarily interested in the performance of the export contract. If that contract is not performed, he would have no reason to wish to conclude or perform the counter-

export contract. The importer is often interested in performance of both the export contract and the counter-export contract. Therefore, even if the export contract is not performed, the importer often wishes the counter-export contract to be performed.

94. It appears that the most frequent solution found in practice is for the two obligations to be linked; the countertrade commitment ceases to have effect if the export contract does not come into force or is not performed. Most often it is provided for by a clause in the countertrade agreement rather than by a clause in the export contract.

95. There are, however, transactions where the contract terms do not provide for such a dependency of the countertrade commitment on the performance of the export contract. When the export and counter-export contracts are incorporated in separate and independent agreements, the logical interpretation is that the countertrade commitment remains binding irrespective of the performance of the export contract. This conclusion is less clear when the countertrade commitment is contained in the countertrade agreement but nothing is said as to the dependency of the countertrade commitment on performance of the export contract.

B. *Non-performance of countertrade commitment*

96. If the countertrade commitment is not performed, the question is whether the importer may suspend or delay payment under the export contract. In favour of a negative answer is that the amount of the export contract price often exceeds by far the importer's prejudice resulting from the absence of counter-export. When this is the case, the withholding of payment under the export contract on the ground that the countertrade commitment has not been performed may be seen to be a disproportionate consequence.

97. Moreover, the risk of non-payment would be considerably increased if the importer might refuse payment because of an obstacle affecting the performance of the countertrade agreement. The risk of such a withholding of payment may increase the exporter's difficulties in finding a person who would be willing to finance the export or to insure a risk of non-payment since such a risk is a circumstance extraneous to the export contract and difficult for the interested financial institutions to assess.

98. However, a possibility that payment under the export contract may be withheld until the countertrade commitment has been performed constitutes an effective incentive for the exporter to meet that commitment. Moreover, performance of the counter-export contract may be vital to the importer as a source of financing to pay for the goods under the export contract. The interplay of the foregoing considerations often results in one of the following two contractual approaches to this problem.

99. One approach is based on giving preference to the exporter's interest in maintaining the independence of his claim for the export price from the countertrade commitment. Such independence is normally sought to be achieved by incorporating the export contract and the countertrade agreement in distinct documents. Furthermore, there is either no mention in the export contract of the counter-export contract, or there is a positive statement that the export contract is to be performed irrespective of the performance of the counter-export contract. In such a case, the importer's interest in having security in the performance of the countertrade commitment would normally be met by a clause in the countertrade agreement providing for a penalty or liquidated damages, possibly secured by a bank guarantee, to cover the possibility that the exporter might not meet his countertrade commitment.

100. The other approach is based on giving preference to the importer's interest in preventing the exporter from receiving the export price until the exporter has met the countertrade commitment. Under this approach, the importer would normally deposit the export price in an account, and the release of the money from the account would be subject to contractually agreed conditions. Such a mechanism is predicated on the principle that the money may be used only as payment for counter-export goods. Alternatively, the relevant contract terms may provide that, under certain circumstances, the money will be released to the exporter after deduction of any penalty or liquidated damages in favour of the importer. It should be noted, however, that, in view of the cost involved in immobilizing money in the account, the use of such an arrangement becomes less likely the longer the time period provided for meeting the countertrade commitment.

C. *Counter-export and termination of countertrade commitment*

(a) *Existence of counter-export*

101. In order to ensure that purchases made by the exporter from the importer are credited to fulfilment of the countertrade commitment, the countertrade agreement and the counter-export contract may refer to one another. Any provisions in the countertrade agreement relating to the content of counter-export contracts will be significant in establishing whether a purchase by the exporter should be considered a counter-export contract in the sense of the countertrade commitment. Such provisions may indicate, for example, the type, quality or origin of goods, the structure of counter-exports or the concept of additionality. In addition, the counter-export contract or a document accompanying its performance (e.g. a document evidencing receipt of the counter-export goods, invoice, or a mutually agreed account evidencing export and counter-export deliveries) may provide that the amount of the contract is to be credited against the countertrade commitment. Sometimes the parties also agree that among the documents to be presented for the collection of payment under the letter of credit should be a counter-exporter's statement

that the payment fulfils or reduces the counter-importer's countertrade commitment.

(b) *Absence of counter-export*

102. A countertrade commitment is normally terminated by the performance of the counter-export contract. The question may also arise whether and under what circumstances the countertrade commitment might terminate even if no counter-export contract has been concluded, or even if the counter-exporter has not delivered under a concluded counter-export contract.

103. When the negotiation of a counter-export contract has not been successful, the *prima facie* conclusion may be that the countertrade commitment continues to be binding until a counter-export is performed. If it is shown that the importer acted within an agreed negotiation procedure, and that the substance of his contract proposals were within agreed guidelines, the likely conclusion would be that the exporter has not fulfilled the countertrade commitment. If, however, it is shown that any such procedures or substantive guidelines have been violated by the importer, the conclusion might be drawn that the exporter is no longer under a duty to continue negotiations concerning a counter-export contract.

104. Another situation in which there may be a disagreement as to whether the countertrade commitment should be terminated or reduced may arise when the counter-exporter fails to deliver under a counter-export contract. In such a case it may be argued that, in so far as the counter-exporter has breached his obligation to deliver, the commitment to counter-import should cease to be binding on the exporter. A more far-reaching argument might be that non-delivery under the counter-export contract, irrespective of whether the counter-exporter is responsible for it, should terminate the countertrade commitment.

105. In order to avoid such a controversy, parties sometimes include in the countertrade agreement or in the counter-export contract provisions dealing with the effect of a non-delivery of goods under the counter-export contract on the countertrade commitment. Sometimes such provisions also cover the effect of a non-delivery when the counter-exporter can show, for example, that the non-delivery was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. Furthermore, the provisions may address the case of partial delivery, in particular the question whether the countertrade commitment continues to be binding with respect to the non-delivered part.

D. *Drafting of contracts to express desired relationship*

106. The answer to the question whether a contractual segment of a countertrade transaction, i.e. the export, the countertrade commitment or the counter-export, is to be interpreted on its own terms, independently from another segment, or whether there is a relationship between the segments, is influenced by the drafting structure of the transaction.

107. When the different contractual segments are embraced by one contract, the different contract obligations are likely to be seen as parts of one network of obligations. If, in such a case, the parties wish to ensure separation between transaction segments, special provisions would be necessary. However, even if special provisions of this nature are included in a contract, the transaction might nevertheless be interpreted in a way favourable to the interrelationship of obligations, particularly if those special provisions are not formulated in a precise way.

108. When separate contracts are used, the interpretation is likely to be that, *prima facie*, each contract is to be applied on its own terms. Any relationship between contracts would have to be expressly stipulated. Nevertheless, there exists the view that an intention of the parties to arrange a countertrade transaction may lead to an interpretation that, despite the presence of separate contracts, the transaction segments might be interpreted as a unit.[14] However, in so far as such a view is applicable to the transaction, it appears that, in accordance with the principle of freedom of contract, the separation may be ensured by an express provision to that effect in the transaction documents.

109. If the parties wish to establish a certain relationship between separate contracts, they may so provide explicitly. For example, the countertrade agreement may provide that it forms an integral part of the export contract; or, the export contract may provide that its entry into force is suspended until the entry into force of the countertrade agreement. It may be noted that such broad contract language may result in an interpretation that the exporter's obligation to deliver the export goods and his commitment to conclude a counter-import contract are interrelated, and that, as a consequence, the exporter, in order to be able to hold the importer responsible for a breach of an obligation under the export contract, must not be in breach of his countertrade commitment.

110. Another example of a provision linking transaction segments is a stipulation in the countertrade agreement according to which, if there is an obstacle to the delivery under the export contract, the countertrade commitment ceases to be binding on the exporter. Alternatively, the counter-export contract may make reference to the countertrade agreement specifying, for instance, that the payment under the contract is to be deducted from the amount of the countertrade commitment or that a breach of the duty to deliver under the contract will result in a reduction of the countertrade commitment.

[14] O. Capatina, Considérations sur les opérations de contre-achat dans les relations de commerce extérieur de la Roumanie, *Droit et pratique du commerce international*, tome 8, no. 2, 1982, 179.

VI. Conclusion

111. The conduct of countertrade often requires the ability to resolve difficult problems of a commercial nature and to co-ordinate the undertaking and performance of obligations that are disparate in nature and in time and that must often be undertaken by parties who are not parties to the countertrade agreement. This calls first of all for commercial skill in conducting these transactions. It also calls for skill in drafting the contractual agreements that structure the transactions, whether or not those contractual agreements are fully enforceable through the use of the usual legal means.

112. The Commission may wish to consider whether it would wish to prepare a legal guide on drawing up countertrade contracts that would include, in addition to the essentially legal discussion presented in the present report, advice on the practical problems of drawing up such contracts. If the Commission were to decide to prepare such a legal guide, it might wish to request the secretariat to prepare a draft outline of its contents and such further preliminary studies as seemed appropriate. If the Commission were to do so, the secretariat would consult with a group of experts with adequate representation from the different regions. The draft outline and preliminary studies might be presented to the Commission at its twenty-second session or, if the Commission thought it appropriate, to a Working Group.

113. The Commission might, on the other hand, conclude that the preparation of a legal guide on the practical problems of drawing up countertrade contracts would not contribute significantly to the unification or harmonization of international trade law, which is the mandate of the Commission. If the Commission were to so decide, it might conclude that the preparation of the present report constituted a useful contribution by the Commission to those who draw up such contracts, and that the subject might be deleted from the future programme of work.