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UNITED NATIONS GENERAL ASSEMBLY



Distr.
GENERAL

A/CN.9/253
22 March 1984

ORIGINAL: ENGLISH

2828

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Seventeenth session
New York, 25 June-13 July 1984

CURRENT ACTIVITIES OF INTERNATIONAL ORGANIZATIONS IN THE FIELD OF BARTER AND BARTER-LIKE TRANSACTIONS

Report of the Secretary-General

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INTRODUCTION

1. At its eleventh session in 1978 the Commission, in its decision on its new programme of work, decided to include as a priority item the subject of international barter and exchange. 1/ At its twelfth session the Commission had before it a report of the Secretary-General entitled "Barter or exchange in international trade". 2/ The Commission decided to request 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 engaged in studies on such transactions, and to report to it on the work being undertaken by these organizations. 3/
2. This report is submitted in response to the request of the Commission at its twelfth session. It constitutes a part of the series of reports on the work of other organizations in particular areas of international trade law, pursuant to the decision of the Commission at its fourteenth session. 4/

I. BARTER OR BARTER-LIKE TRANSACTIONS

3. The needs of some countries to finance their imports have led importers from these countries to resort to barter or barter-like transactions. Such transactions may facilitate the importer to develop markets for his own exports in the exporter's country or in third countries, and also help to reduce foreign exchange costs. While barter or barter-like transactions are particularly common in East-West trade, over the last ten years they have also become more common in North-South trade.

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), paras. 67-69 (Yearbook of the United Nations Commission on International Trade Law, vol. IX, 1978, part one, II, A).

2/ A/CN.9/159.

3/ Report of the United Nations Commission on International Trade Law on the work of its twelfth session (1979), Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17), paras. 21 and 22 (Yearbook of the United Nations Commission on International Trade Law, vol. X, 1979, part one, II, A).

4/ Report of the United Nations Commission on International Trade Law on the work of its fourteenth session (1981), Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 100 (Yearbook of the United Nations Commission on International Trade Law, vol. XII, 1981, part one, A).

4. Barter, in its strict legal sense, is generally defined as a transaction which provides for a direct exchange of goods of approximately equal value between two parties, with no money involved. Such barter transactions, which were employed extensively immediately after the Second World War, are today less often used, because it is difficult to find two parties prepared to make a simultaneous or near-simultaneous exchange of goods of equivalent value.

5. Barter-like transactions are those transactions which have as a basic characteristic a linkage, legal or otherwise, between exports and imports of goods or services in addition to, or in place of, financial settlement. In contrast to barter, a barter-like transaction is often effected by more than one contract. The terms used in available documents and literature to describe various types of barter-like transactions include counter-trade, contra-trade and linked transactions. Although there is no generally accepted definition of these terms, the Economic Commission of Europe (ECE) has used the term "counter-trade" as the generic term covering both barter and barter-like transactions, "counter-purchase" to designate short- and medium-term transactions involving an original sales contract and a counter-purchase agreement, and "product buy-back" to designate long-term industrial co-operation agreements where compensation is in whole or in part effected by the purchase of resultant products. ^{5/}

6. Multilateral barter-like transactions: In addition to bilateral counter-purchase transactions and buy-back transactions, multilateral forms of barter-like transactions which involve more than two parties also occur. An exporter in State A may conclude an agreement to supply X goods to an importer in State B with the coming into force of this agreement made subject to the conclusion or performance of another agreement between an exporter in State B and an importer in State A for the supply of Y goods. Such transactions are sometimes called conjunctive transactions and are concluded in connection with an interstate bilateral clearing agreement with the aim of preventing an undesired surplus in the payment balance of one of the States party to the clearing agreement. Where both the contracts are made interdependent, such transactions are sometimes called reciprocal transactions. Where interdependent agreements are concluded between parties in different States, the value of the goods exchanged between the two States is equal, and no interstate bilateral clearing agreement exists between those States, the monetary obligation may be settled by each of the importers paying the exporter from his State in their local currency, thereby excluding the need for any international payment. Such kinds of transactions are sometimes known as compensation transactions or multilateral barter transactions.

^{5/} A useful description of the terminology in use in different countries and for different types of transactions is found in the report of the Economic Commission for Europe, "Counter-trade practices in the ECE region" TRADE/R.385.

II. WORK OF INTERNATIONAL ORGANIZATIONS

A. United Nations organizations1. United Nations Economic Commission for Europe (ECE)

7. The subject of counter-trade was first discussed by the ECE at the twenty-seventh session of the Committee on the Development of Trade in 1978, in the context of the Committee's "Review of recent and prospective trends, policies and problems". 6/ At the conclusion of its discussion, the Committee invited its secretariat to prepare a report for submission to the twenty-eighth session of the Committee that would define and describe the use of counter-trade practices in the ECE region. 7/

8. Part of the report prepared pursuant to this request, which was entitled "Counter-trade practices in the ECE region", 8/ contained a typology of counter-trade arrangements, a description of the main practices encountered in the ECE region and a brief assessment of trends in various sectors. Part two dealt with policies at the national and international levels in the field of counter-trade, and examined the role and the motives of enterprises and organizations engaged in this type of activity. Contractual and financial aspects were also dealt with in the second part of the study. Two addenda to the report, prepared by the joint unit of the ECE secretariat and the United Nations Centre for Transnational Corporations (CTC), dealt with counter-trade practices in specific industries. 9/

6/ ECE/TRADE/130.

7/ Ibid., para. 24(1).

8/ TRADE/R.385.

9/ "East-west industrial co-operation in the automotive sector and counter-trade arrangements", TRADE/R.385/Add.1. In view of the close connections between counter-trade and industrial co-operation in the automotive sector, a part of the report was concerned with the terminology, typology and economic significance of various forms of counter-trade.

"Institutional arrangements at the national level for counter-trade in selected western countries", TRADE/R.385/Add.3. This report examined some of the forms of counter-trade practiced by western chemical producers and plant engineering and contracting firms, including buy-back of resultant or related products and counter-purchase arrangements of non-resultant and often unrelated products.

9. Following discussion of this report the ECE Committee decided to convene an Ad Hoc Meeting on Compensation Trade to be held in 1981. 10/

10. In addition to the report previously submitted to the twenty-eighth session of the ECE Committee, four additional reports were submitted to the Ad Hoc Meeting on Compensation Trade:

- "Large-scale and long-term compensation agreements in East-West trade": 11/ The purpose of this report was to review the main developments which had taken place since 1968, when the first large-scale and long-term arrangements were signed between East and West enterprises.

- "Reciprocal trading arrangements at the western enterprise level, with special reference to East-West trade": 12/ This report examined a representative sample of organizational forms and trading practices currently in use within various industrial and commercial sectors.

- "Short- and medium-term linked transactions in East-West trade": 13/ This report reviewed the main types of short- and medium-term linked transactions found in East-West trade.

- "Counter-trade practices in the chemicals industry: the experience of selected western chemicals/producers and plant contractors in East-West trade". 14/

11. The report of the Ad Hoc Meeting on Compensation Trade 15/ and a note by the secretariat entitled "Recent developments in compensation trade in the ECE region" 16/ containing updated information relevant to compensation trade in the ECE region and a discussion of the problems and perspectives of this type

10/ ECE/TRADE/136, Annex 1, Work area 15.1.1. The preparatory meeting for the Ad Hoc Meeting on Compensation Trade was held from 4-7 May, and from 2-4 September 1981, at which the provisional agenda for this meeting was drawn up. See TRADE/AC.18/1.

11/ TRADE/AC/18/R.1. A study by the Joint CTC/ECE Unit of the ECE secretariat.

12/ TRADE/AC.18/R.2. A study by the Joint CTC/ECE Unit of the ECE secretariat.

13/ TRADE/AC.18/R.3. A study by the Joint CTC/ECE Unit of the ECE secretariat.

14/ TRADE/R.410. A study by the Joint CTC/ECE Unit of the ECE secretariat.

15/ TRADE/AC/18/2.

16/ TRADE/R.444. A study by the Joint CTC/ECE Unit of the ECE secretariat.

of trade were submitted to the thirty-first session of the ECE Committee held in 1982. The ECE Committee decided to convene a Special Experts' Meeting on Compensation Trade in the summer of 1983 and to return to the subject at its thirty-second session in December 1983. 17/

12. The Special Experts' Meeting had before it a study entitled "Compensation trade in the ECE region: a survey of quantitative estimates". 18/ The Meeting also discussed the practical problems encountered in compensation trade by both eastern and western operators, in particular small and medium-sized enterprises.

13. At the most recent ECE Committee on the Development of Trade meeting held in December 1983, the subject of compensation agreements was considered in the context of a "Review of recent and prospective trends, policies and problems in intra-regional trade: a profile of the East-West trade of the USSR". 19/

14. It will be seen that the ECE Committee on the Development of Trade has since 1979 had an active interest in barter-like transactions as they are used in East-West trade. Its studies and reports have described the various forms in which these transactions take place and have served a useful role in clarifying the terminology, typology and economic significance of these transactions.

2. United Nations Industrial Development Organization (UNIDO)

15. The subject of compensation and buy-back agreements was considered by a UNIDO Expert Group Meeting on Industrial Financing, in 1978 20/ and, subsequently, by a UNIDO Expert Group Meeting on Buy-back Agreements, in 1979. 21/ Both meetings were in the context of financing industrial development in the developing countries.

16. As part of the background material for the study Industry 2000 - new perspectives, 22/ published by UNIDO for the Third General Conference of UNIDO in 1980, two studies on barter-like trade and investments were published. 23/

17/ ECE/TRADE/144, para. 46.

18/ TRADE/AC.19/R.1. A study by the Joint CTC/ECE Unit of the ECE secretariat.

19/ TRADE/R.442/Add.5.

20/ ID/WG.287/10

21/ UNIDO/EX.78.

22/ UNIDO/IOD/324, vol. 1, International financial flows.

23/ "Barter-related investment mechanisms", ibid., p. 351; and "The interdependence of aid and trade on a barter-like basis with economic relations of Sino-Soviet bloc countries", ibid., p. 362.

B. Work of other organizations

1. Organization for Economic Co-operation and Development (OECD)

17. The OECD Secretariat has published various studies on compensation transactions related to major industrial contracts. 24/

2. Work of academic research centres

(a) Centre de Droit des Obligations:
Working Group on International Contracts

18. The Working Group on International Contracts (Louvain) studied the legal aspects of compensation contracts. The results of this study were reflected in a report published in 1981. 25/ The report considers the nature of counter-purchase and buy-back transactions and some of the clauses found in such transactions.

(b) Fondation pour l'Etude du Droit et des Usages du Commerce International (FEDUCI)

19. FEDUCI (Paris) sponsored a colloquium on "Aspects juridiques des contrats de compensation", in 1982. In addition, a number of articles on "industrial barter agreements" were published under its auspices in International trade law and practice. 26/

24/ E.g., Counter-trade practices in East/West economic relations, OECD, Paris (1979); East-West trade in chemicals, OECD, Paris (1980); and East-West trade: recent developments in countertrade, OECD, Paris (1981).

25/ M. Fontaine, "Aspects juridiques des contrats de compensation", International trade law and practice, vol. 7, (1981), p. 179.

26/ Marcel Fontaine, "Les contrats de contre-achat", International trade law and practice, vol. 8, (1982), p. 161; Octavian Capatine, "Considérations sur les opérations de contre-achat dans les relations de commerce extérieur de la Roumanie", ibid., p. 175; Patrick Rothey, "Les contrats de buy-back", ibid., p. 187; Pascal Durand-Bartez, "Le troc dans le commerce international et les opérations de 'switch'", ibid., p. 195; and Albert Previsani, "Coopération industrielle et compensation". ibid., p. 209.

III. SOME LEGAL ASPECTS OF BARTER-LIKE TRANSACTIONS

20. 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. It has been pointed out in an ECE study that: 27/

"Despite the increasing number of studies which have been devoted in recent years to this phenomenon [compensation trade], the analysis of compensation trade is fraught with considerable difficulties. These difficulties are for the most part attributable to reasons of commercial confidentiality (which limits the scope of available information) and to the different meanings attached to the notion of compensation in various countries (which restrict the comparability of whatever data are available)".

21. While the comment in the ECE study was made to explain the difficulty of analyzing the economic effects of barter-like transactions, it applies equally well to the legal aspects of these transactions. The following is a review of only some of the legal aspects of barter-like transactions as found in published documents and literature on the subject. 28/

A. Counter-purchase transactions

22. A counter-purchase transaction often involves two separate agreements, i.e. the original sales contract and an agreement on the part of the primary exporter to counter-purchase an agreed amount of goods. If the counter-purchase goods can be identified with sufficient specificity at the time of the original transaction, a counter-purchase sales agreement for those goods may also be concluded at that time if the parties do not wish to

27/ "Compensation trade in the ECE region: a survey of quantitative estimates". TRADE/AC.19/R.1, para. 3.

28/ Some of the documents published by ECE, UNIDO and OECD which are cited in this study contain some discussion on the legal aspects of barter-like transactions as understood in this study. The work of the Centre de Droit des Obligations and of FEDUCTI, is the most thorough source of information on the legal aspects of barter-like transactions. Another significant source of information are the publications by Business International S.A. which include the following: Current countertrade policies and practices in east-west trade - a group research study, Business International S.A., Geneva, 1976; Doing business in eastern Europe - operating techniques, vols. 1 and 2, Business International S.A., Geneva, 1977; Selling turnkey plants and equipment to eastern Europe, Business International S.A., Geneva, 1979; and Payment practices in eastern Europe, Business International, Geneva, 1980. See also, Thomas B. McVey, "Countertrade and barter: alternative trade financing by third world nations", International trade law journal, vol. 6, (1980-81), p. 197.

conclude a barter transaction. If not, the parties may agree only that the primary exporter will purchase goods up to a certain value, with the specific goods to be determined in the future. At the time the counter-purchase goods are agreed on, a suppletive counter-purchase sales agreement will be concluded.

23. Even though the economic nature of a counter-purchase transaction may anticipate a minimal net exchange of money, each of the two agreements is usually priced in an agreed currency. This aids in accounting for the transaction, and lays a basis for such matters as customs duties.

24. When the counter-purchase agreement simply specifies that goods up to a certain value are to be purchased in the future, there can be difficulties both in regard to the administration of the contract and in regard to its legal effects. When the goods to be counter-purchased are not specified in detail, there may later be disagreement as to the nature and quality of goods which are to be delivered under the agreement. If the description, quantity and price of the goods are not specified, or a means to determine them is not agreed on in the original contract, some legal systems may even refuse to recognize either that a contract is in existence or that there is an obligation to conclude a contract in the future.

25. The primary exporter may be required to counter-purchase goods for which he has little use and is not equipped to sell. To overcome this difficulty an assignment of the rights and obligations under the counter-purchase agreement is often made to a third party who specializes in such transactions. The anticipated involvement of a third party may call for different terms of the counter-purchase agreement than would be the case if the primary exporter intended to take the counter-purchase goods himself.

26. Most reported counter-purchase agreements contain penalty clauses for the failure to counter-purchase the goods as required. The penalty was usually based on the percentage of the value of the goods to be counter-purchased. A concern often expressed by those obligated to counter-purchase goods was that they might have to pay the penalty even though the reason they have not accepted the goods was their belief that the goods did not meet the necessary standards of quality. A penalty provision may also be included to render the seller under the counter-purchase contract liable for failing to deliver goods of the required quality or for late deliveries.

27. One of the primary legal concerns in connection with counter-purchase transactions is whether the two or more related agreements should be considered legally separate or whether a failure by one party to perform his obligations under one agreement should affect the other party's obligations under another agreement. The conclusion of two or more agreements may even make it possible to argue that the original sales contract and the counter-purchase agreement are legally separate. In general, the seller under a counter-purchase agreement prefers them to be considered together, since he might have to pressure the primary exporter to accept goods under the counter-purchase agreement. The primary exporter tends to prefer separate treatment so that disputes in regard to the counter-purchase agreement would not affect the original sales contract. On the other hand, however, if the original sales contract is terminated for any reason, he may not wish to continue to be obligated under the counter-purchase agreement. Third parties

to whom the rights and obligations under the counter-purchase agreements have been assigned may have an interest that the agreement be treated separately since they may already have made arrangements in anticipation that the counter-purchase agreement would be executed.

B. Product buy-back transactions

28. Product buy-backs occur in long-term industrial co-operation agreements for the acquisition of plants, equipment or natural resources. These agreements which usually include licensing or transfer of technology necessary to operate the items purchased, are considerably more complicated than those for the ordinary counter-purchase of goods or services. Furthermore, their long-term nature often makes it difficult to specify in the contract all of the matters which will arise during the course of the contract. Although this is true of all contracts for the acquisition of large industrial works, particular difficulties arise in connection with the buy-back aspect of the transaction.

29. In a buy-back agreement the goods to be purchased by the primary exporter are usually the resultant product from the plant to be supplied by him. To this extent the buy-back agreement tends to be more specific than is a counter-purchase agreement.

30. However, since the buy-back obligation does not commence until the plant or equipment is installed and operating and it usually extends over a long period of time, there are particular difficulties in establishing the price. According to an ECE study, ^{29/} there does not appear to be any accepted formula for calculating the price of counter-deliveries under buy-back agreements as the pricing formula may depend on the types of buy-back products.

31. The UNIDO Expert Group Meeting on Buy-back Agreements, held in 1979, suggested some methods of pricing and made the following main observations: ^{30/} "(i) Products should be supplied at best market prices plus appropriate commissions; (ii) Each shipment needs a separate agreement on pricing through negotiation; (iii) Fix prices on the basis of the calculated price with an escalation clause which would go into force through renegotiations if the deviation would exceed, for instance, + 10%; (iv) Competitive bidding (offers); and (v) . . . ; and (vi) Periodic price fixing (every 3, 6 or 12 months) could be agreed upon."

32. Since the goods to be purchased under the buy-back agreement are usually the product of the plant or equipment installed under the primary contract, the obligations under the buy-back agreement would usually be legally linked to the obligations under the primary contract.

^{29/} "Counter-trade practices in the chemicals industry: The experience of selected western chemicals/producers and plant contractors in East-West trade". TRADE/R.410, para. 34.

^{30/} UNIDO/EX.78, para. 4.

IV. CONCLUSION

33. There have been attempts by parties to overcome various obstacles interfering with the development of trade, existing in the field of international payments, by resort to the mechanism of barter or barter-like transactions. However, most of the studies on the subject tend to indicate that problems encountered in such transactions are far more economic and financial than legal. Moreover, even if an international uniform regulation were desired, the complexity of these transactions and their variety may militate against such a possibility. At the same time, any general conclusion may be somewhat hazardous in the absence of a sufficient volume of contracts that are easily available. The Commission may wish to take note of the intention of the Secretariat that it will continue to monitor developments in this field.