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Are Governmentally Imposed Countertrade Requirements Violations of the GATT?

Vincene Verduń†

Introduction

Money is a universal commodity and the primary contemporary vehicle used to facilitate trade. Markets preceded money, however, since there is no need for money without markets.¹ Barter, the primitive market behavior that took place before money, was a process that entailed people swapping goods for goods and services for services.² Barter transactions are necessarily more cumbersome than transactions involving money because of the difficulty of matching parties who desire to trade their goods or services for those of another trader. There are also problems of divisibility³ and quality of goods.⁴

Given barter’s drawbacks, some economists in the 1960’s were prepared to relegate barter to a position of desuetude.⁵ The late 1960’s, however, saw the emergence in the international marketplace of a new form of barter, known as countertrade. Countertrade is used to describe a variety of transactions that make the sale of goods in an importing country contingent upon the exporter’s past or future purchases of goods produced in that country. In some transactions, the original sales are paid for with cash, but the sales are coupled with an agreement by the seller to purchase goods in the future. Other agreements do not involve the exchange of money at all, but only the exchange of goods. Transactions involving countertrade were recently estimated to constitute fifteen

† Assistant Professor of Law, University of Detroit.
2. Id.
3. Barter transactions require both parties to trade items of equal value. If a horse is worth 50 chickens, then the horse trader must find someone with 50 chickens. A chicken trader with only 25 chickens is not a good trading partner for the horse trader since the horse cannot be divided in two and retain its value. Exchanges involving money, which has been divided into very small denominations, do not present this divisibility problem.
4. The quality problem arises in modern countertrade when the products bargained for are not in line with products received. It is often difficult, though, to return substandard products because of the ongoing nature of the relationship between the traders and because the purchase of the unsatisfactory product is related to the sale of another product. See infra note 69.
5. R. TIMBERLAKE & E. SELBY, supra note 1, at 3.
to twenty percent of trade between OECD countries and East European
countries, and five to ten percent of total world trade.

Part I of this Article describes the recent boom in countertrade, in
particular, governmentally imposed countertrade requirements, and dis-
cusses its economic impact on the world marketplace. Part II raises the
question of whether governmentally imposed countertrade requirements
constitute trade restrictions inconsistent with the General Agreement on
Tariffs and Trade (GATT). The conclusion reached is that the prohibi-
tion on nontariff barriers contained in Article XI of the GATT is broad
enough to include countertrade within its proscription. But although
Article XI may thus serve as a potential instrument by which the increas-
ing use of countertrade could be regulated, the appropriateness of such a
course of action in light of economic circumstances present in the cur-
rent international marketplace remains an open question.

I. The Boom in Countertrade

A. Emergence of Modern Countertrade

Although countertrade emerged as a major component of world trade
in the late 1970's, the modern era of countertrade began during the

6. The Organization of Economic Cooperation and Development (OECD) was formed in
1948 to promote economic growth and development among West European and North Ameri-
can countries.

7. INTERNATIONAL MONETARY FUND, 1983 ANNUAL REPORT ON EXCHANGE AR-
RANGEMENTS AND EXCHANGE RESTRICTIONS 46 n.26. This estimate was made by the
OECD.

8. INTERNATIONAL MONETARY FUND, 1985 ANNUAL REPORT ON EXCHANGE AR-
RANGEMENTS AND EXCHANGE RESTRICTIONS 41 [hereinafter cited as 1985 IMF REPORT].

According one estimate, 10-20% of all world trade is done through some form of counter-
trade. P. VERZARIU, U.S. DEPT. OF COMMERCE, INTERNATIONAL TRADE ADMINIS-
TRATION, COUNTERTRADE PRACTICES IN EAST EUROPE, THE SOVIET UNION AND CHINA: AN INTRODUCTORY GUIDE TO BUSINESS 5 (1980). Researchers at GATT estimate that 40% of
South/South trade is settled on a commodity-swapping basis. See Tomorrow Cowrie Shells,
THE ECONOMIST, Dec. 25, 1982, at 84. All of these estimates point out, though, that the
nature of countertrade transactions makes it inherently difficult to determine the extent of the
practice.

A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. The GATT is an inter-
national agreement designed to facilitate the reduction of international trade barriers. Its goal
is the reciprocal reduction of tariffs and, in order to make such reductions effective, the elimi-
nation of nontariff barriers such as quotas. J. JACKSON, WORLD TRADE AND THE LAW OF
GATT 29 (1969). Thirty-three countries signed the original GATT agreement on October 30,
1947. As of this writing, 90 countries have officially accepted the GATT. In addition, one
country has accepted it provisionally and 31 countries apply it de facto. GATT also refers to
the international organization, based in Geneva, which supervises the regime created by the
agreement.

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post-World War I depression. The collapse of the gold standard adjustment mechanism led to the inconvertibility of many currencies and the imposition of foreign exchange controls by many governments. Since inconvertible money is little better than no money at all, traders resorted to barter in order to consummate otherwise impossible international transactions.

International bartering continued throughout the post-World War II era, and many countertrade practices were formalized over time. In the United States, for example, the Commodity Credit Corporation Charter Act (CCC) and Section 303 of the Agricultural Trade Development and Assistance Act of 1954 contained provisions authorizing the Secretary of Agriculture to barter away surplus agricultural commodities owned by the CCC in order to procure strategic supplies for a national emergency stockpile. The barter program thrived for seventeen years, fostering contracts worth more than $1.2 billion. It was suspended in 1973 only when CCC stocks were largely depleted and the national stockpiles no longer justified the need for a barter program. Western governments still routinely engage in compensatory transactions, offsetting sales with purchases in the armaments and aviation industries.

The barter contract has evolved along with the nature and frequency of the barter transaction. The barter boom of the 1970's brought about creative hybrids of this ancient practice accompanied by sophisticated contractual arrangements. The governments of importing countries frequently imposed complicated countertrade terms upon traders, and such transactions assumed dominant roles in the world marketplace.

B. The Forms of Countertrade

The term "countertrade" embraces a broad and diverse collection of trading arrangements. It "encompasses any commercial arrangement in which purchases are made to offset sales as a means to reduce or restrict

11. P. VERZARIU, supra note 8, at 2.
15. The Act also authorized barter agreements to obtain foreign-produced supplies and services for United States agencies operating abroad.
16. P. VERZARIU, supra note 8, at 3.
17. IED STAFF REPORT, supra note 12, at 13.
18. P. VERZARIU, supra note 8, at 3.
the flow of scarce hard currency across national boundaries."19 Unlike pure barter, which eliminates the use of money completely,20 counter-trade involves money in all but a very few transactions.21 Countertrade can be classified into several categories, including counterpurchase, compensation, counterproduction, bilateral clearinghouse arrangements, and switch trading. A particular transaction may exhibit similarities to one or more of these groups.

1. Counterpurchase arrangements require exporters from the exporting state to purchase exports from the importing country. They are frequently mandated by the foreign trade organization (FTO) of a state with a non-market economy (NME) or by the government of a less-developed country (LDC).22 A series of contracts are used to consummate the arrangement.23 First, the seller and buyer contract for the initial sale of the goods. The deal includes a cash settlement.24 In a separate contract, the seller agrees to buy goods produced in the buyer’s country in an amount whose value is either equal to or some part of the value of the first contract. A third financial instrument involving the seller’s bank and the buyer’s bank, which usually includes credit guarantees or insurance, is necessary.25 Often the goods purchased by the seller (counter-deliverables) are chosen from a range of products offered by the purchaser at the time of the contract. If an FTO is involved, sometimes the counter-deliverables can be chosen from a different FTO than that of the purchaser. Such an arrangement is called linkage.26

19. L. Welt, Countertrade: Business Practices for Today’s World Market 7 (1982). Countertrade has also been defined to include “all foreign trade transactions in which an exporter commits himself to take products from an importer (or the importer’s country) in full or partial payment.” Business Int’l Corp., Threats and Opportunities of Global Countertrade 3 (1984).

20. L. Welt, supra note 19, at 15.

21. Id. at 9. Pure barter is usually found in trade between non-market countries and poor developing countries. Western countries occasionally engage in the practice when there is a double coincidence of wants with nearly equivalent values. See id. at 15.

22. NME will be used to describe collectively Eastern Bloc countries (which include Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, and the Soviet Union) along with Yugoslavia, Cuba, Vietnam, and China. Developing countries with or without state-controlled economies are described by the abbreviation LDC.

FTO’s conduct foreign trade activities for countries in the East Bloc. There is an FTO associated with each major industry. Traders have to negotiate deals with the FTO of the industry related to the transaction. FTO’s are responsible for conducting negotiations with foreign firms and have the power to execute contracts. See P. Verzariu, supra note 8, at 8.


24. Id. at 150-51.

25. Id.

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The 1970 deal between Yugoslavia and McDonnell Douglas involving the purchase of DC-9 transports is an example of counterpurchase. McDonnell Douglas agreed to serve as a U.S. marketing specialist for Yugoslav products in order to help Yugoslavia obtain the U.S. dollars necessary to pay for the DC-9's. By 1976, McDonnell Douglas had promoted the sale of over $16 million worth of Yugoslav products, including ham (which it sold in its own cafeterias), steel pipe, iron castings, leather goods, hand tools, and rubber products. Although the arrangement was somewhat less formal than many counterpurchase schemes, the transactions were clearly interdependent.

2. Compensation is the fastest growing form of countertrade in terms of dollar value. Multinational companies often discover that in order to sell equipment or machinery to a foreign government, the seller must agree to buy back or market some percentage of the production output that the equipment generates. Frequently, the equipment is sold for cash, with a side contract committing the seller to purchase a certain quantity of products produced. Compensation became popular in the late 1960's in contracts between Western corporations and East European countries. The OECD countries' compensation exports of plant and machinery to the Soviet Union and six East European countries between 1969 and 1980 attained a level of $30 billion to $48 billion. The value of East European counter-deliverables generated from those sale agreements was between $35 billion and $42 billion.

3. Counterproduction, a related form of countertrade, involves a multinational corporation setting up and supplying the equipment for an industrial plant in the receiving country. That country's FTO then contracts to purchase the output of the plant. For this arrangement to be of real benefit to the corporation, the state receiving the plant and equipment must pay for the products in hard currency. Otherwise, the corporation's use of the purchasing power generated by the sales would be limited to trade with countries willing to accept that currency in

28. L. Welt, supra note 19, at 18.
30. L. Welt, supra note 19, at 18.
32. Allan & Hiscock, supra note 23, at 151. For an example of counterproduction described as a joint venture, see the Regulations on Foreign Investment in the Socialist Republic of Vietnam, Decree No. 115/CP, described in Quigley, Vietnam’s Legal Regulation Of Foreign Trade and Investment, 6 INT’L TRADE L.J. 24 (1980-81).
counterproduction is less popular than compensation and has been used primarily in trades with East Bloc countries.

4. Countries can also arrange to trade with each other without using money through *bilateral clearinghouse* accounts. In these types of transactions, two countries agree to import a set volume of goods from each other over a period of time. The agreement specifies the goods to be exchanged and the exchange ratio. At the end of the period an accounting is made. Any imbalance, called a "swing," can be made up by a hard currency payment, by the issuance of a credit against the next year's clearing account, or by sales to third parties.

5. States' desires to eliminate the swing or trade imbalance has resulted in a form of countertrade known as *switch trading*. In switch trading a third country is involved. For example, countries W and E have a bilateral clearinghouse agreement. Country W discovers that it has no use for a certain value of products scheduled for exchange under the agreement, or country W may discover that it has a trade surplus for other reasons. W can transfer its swing to a switch trading house which uses the credits in a series of transactions that eventually result in a hard currency exchange.

C. *Why Countertrade?*

All of these carefully developed arrangements are evidence of the willingness of companies and states to trade with one another in transactions involving more than a mere exchange of money. The recent proliferation of countertrade agreements is a strong indication that all parties involved are sufficiently attracted to the benefits of countertrade to accept its burdens. This modern form of barter has thus become extremely popular, even though money is more efficient and easier with which to deal.

The traditional explanation for the popularity of countertrade is that barter reemerges during periods of economic stagnation, when money becomes scarce, or when other forms of market imperfections are present. Principally, countertrade results when currencies decrease in convertibility and states find themselves unable to obtain the hard foreign currency needed to conduct international trade. But although currency

33. L. Welt, *supra* note 19, at 23.
34. ITC Analysis, *supra* note 29, at 6-7. Exchange ratio refers to the relative values established for the products set aside for trade.
35. Id. at 7.
38. See L. Welt, *supra* note 19, at 7-8; IED Staff Report, *supra* note 12, at 12.
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shortages may constitute the primary impetus for countertrade, they do not sufficiently explain the magnitude of the current practice. Since billions of dollars of countertrade transactions have been consummated with multinational corporations and countries experiencing no currency exchange problems, other factors obviously play a large role.

The existence of surplus goods makes countertrade an attractive option to many governments. States with price support programs often use barter to reduce excess supplies while minimizing the price reductions which would result from selling the surplus on the open market. The artificially high price for the surplus goods can be maintained by inflating the prices of the goods for which they are exchanged. If the United States, for example, had surplus non-fat dried milk as a result of its agricultural production support programs and attempted to sell that surplus on the world market, the price of dried milk would fall, defeating the purpose of the program. If, instead, the United States arranged to trade the dried milk for Jamaican bauxite, an exchange rate could be negotiated assigning a premium price to the bauxite, resulting in the sale of the dried milk at a discount while its high price is seemingly maintained.

Countertrade has also developed in order to ensure continued access to scarce commodities. Two countries can exchange essential resources, assuring both parties ample supplies for a specified time period. Countertrade has been a particularly common method, for example, of ensuring oil supplies. Similarly, compensation deals can provide multinational

39. Most countertrade transactions have one or more parties who are an LDC or an NME. With respect to the NME's, the Council for Mutual Economic Assistance (COMECON or CMEA) acts a giant clearinghouse for countertrade among its members. New Restrictions on World Trade, Bus. Wk., July 19, 1982, at 118, 121. The NME's discussed in this article are also members of CMEA. See supra note 22. NME's cope with the foreign exchange problem by not draining their scarce currency resources in trade among themselves. Countertrade between LDC's and NME's is less organized, but their mutual currency problems draw them into an array of countertrade arrangements.

40. IED STAFF REPORT, supra note 12, at 7-8.


Countertrade has similarly been used by OPEC to deceptively maintain an artificially high world oil price. Through the manipulation of exchange ratios, an OPEC country can use countertrade to sell oil effectively below the OPEC price. Countries take advantage of this practice to lower prices and thereby attract customers without officially violating price guidelines, since the value of the imported goods is not stated in monetary terms. L. WELT, supra note 19, at 9. See also Barter Deals Cut the Price of Oil, Bus. Wk., May 12, 1975, at 30.

42. IED STAFF REPORT, supra note 12, at 7.

43. By negotiating sales of supplies and equipment as a side deal to oil purchases, Japan was able to create exports and jobs during the oil crisis. This helped to minimize the impact of increasing oil prices on Japan's industries. Similarly, Germany increased investments in oil exporting countries in exchange for oil, and France traded arms for oil. See Janeway, The Opportunities for Bartering are Endless, INFOSYSTEMS, Sept. 1979, at 88.
corporations with guaranteed sources of supply of output from production facilities in NME's or LDC's, usually on particularly favorable terms. Since the buy-back provisions extend for periods of up to twenty-five years, the corporation can lock in the price and the source of supply for a substantial period of time.

Countertrade is also used by LDC's and NME's to effectuate the transfer of goods, services, and technologies while minimizing the impact of such transfers on the trade balances of the importing country. Oil-importing LDC's in particular have suffered hard currency shortages in the wake of the 1970's oil price increases. Many such states view countertrade as a way to fulfill their import needs despite currency depletion. Fluctuating demand for the exports of LDC's also cause them to look to countertrade as a way to control variations in their import capacity. By tying imports to exports, they stabilize their ability to implement industrialization. LDC's also often erect tariffs and strict import licensing criteria in order to encourage multinational corporations to locate plants within the LDC, rather than to merely export goods to the country.

NME's use countertrade when they have exceeded expenditures designated in their five year plans prior to meeting their expansion goals. In the 1970's, the Soviet Union and the East Bloc countries embarked on industrial modernization plans, greatly increasing demand for capital goods from the West. NME planners hoped to offset this demand by expanded industrial production. Poor implementation of the programs and lack of demand for East Bloc products led to serious balance of trade problems. As a result, the central planning apparatus in each country demanded that its foreign trade organization impose countertrade obligations as a prerequisite to trade. Others have suggested that NME's favor countertrade both because of the shortage of foreign currency and because NME planners tend to think in terms of output as opposed to money.

45. Id. at 198.
46. See L. Welt, supra note 19, at 58.
47. See Fontheim & Gadbaw, Trade-Related Performance Requirements under the GATT-MTN System and U.S. Law, 14 LAW & POL'Y INT'L BUS. 129, 130-32 (1982).
48. ITC ANALYSIS, supra note 29, at 10.
49. L. Welt, supra note 19, at 46.
50. Barter is Respectable, supra note 36, at 429.
D. Government Involvement in Countertrade

While countertrade can occur between private parties, governmentally imposed countertrade requirements arouse special concern. Government involvement in countertrade can take a variety of forms. Governments can directly or indirectly impose countertrade requirements. They can also assist domestic companies in negotiating countertrade arrangements with countries that do impose countertrade requirements. Finally, governments can actively look for countertrade opportunities in order to improve trade balances and business vitality during times of economic recession or currency fluctuation. Although government involvement may take more than one of these forms, NME's and LDC's have commonly engaged in the first variety of government involvement. Western governmental involvement has more frequently been of the latter two varieties.

France is an example of a Western government which actively promotes countertrade transactions. L'Association Pour la Compensation des Echanges Commerciaux (ACECO) was formed by the French government in 1978. It consists of bankers, industrialists, and government officials who advise French companies on how to handle countertrade transactions. In the early 1980's, TECNIP, France's state-owned engineering and construction company, developed its own trading department and negotiated a compensation deal with the People's Republic of China that involved construction of a brewery and buy-back of beer. The French government has become involved in countertrade both in an advisory role and by active pursuit of arrangements beneficial to French companies.

The governments of Germany and Japan have also used countertrade to help decrease trade deficits and increase domestic productivity. In the late 1970's, some analysts attributed those countries' excellent trade positions, despite the world-wide recession, to their effective use of countertrade. The governments of both countries successfully swapped job-creating exports for oil imports. These deals both increased productivity and helped to assure each country a supply of oil in an unstable marketplace. Japan provided $160 million worth of supplies and equipment for

52. For examples of governmental involvement in North-South countertrade, see Walsh, Countertrade: Not Just For East-West Any More, 17 J. WORLD TRADE L. 3, 6-8 (1983).
54. Barter Deals Gaining Favor in International Contracting, ENGINEERING NEWS REC., Sept. 9, 1982, at 69 (also describing countertrade requirements made by governments of Indonesia and Libya).
oil exploration to Indonesia, in return for one-half of the oil produced. Germany offered increased investment in the United Kingdom in exchange for increased supplies of North Sea oil to be processed in Germany. Germany and Japan have similarly exchanged technology for oil with Mexico.\[56\] In the 1970's, as a result of increased OPEC oil prices, Germany and Japan experienced the same currency drain as other oil-importing countries. However, the impact upon their economies proved less dramatic because of their governments' effective use of countertrade to promote exports which offset the increased cost of oil imports.

The governments of NME's and LDC's that are actively involved in countertrade may enforce their policies either directly, or indirectly—such as by granting import licenses only to importers who have met informal countertrade requirements.\[57\] Countertrade is encouraged, for example, by nearly all NME's, but it is legally imposed only in Romania.\[58\] Similarly, most LDC's do not directly mandate countertrade, but encourage countertrade by denying import licenses for categories of goods produced domestically.\[59\] As one observer has noted:

Countertrade mandates can originate from a variety of government-related sources in the Third World: trade regulations, banks, investment boards, tax regulations, tax review boards, ministries of finance, ministries of trade, state-owned corporations and state trading firms. Though practices vary from country to country, all lesser developed countries have investment screening boards which frequently mandate countertrade.

These boards often do not explicitly impose export performance criteria on investment proposals. But almost always, in the absence of such explicit criteria, export performance requirements are informally imposed.\[60\]

Because of the nature of their political systems, Western governments are less able to intervene and promote countertrade deals than are governments of countries where the economy is state-controlled. For example, when the United States entered into barter deals to trade away agricultural surpluses, the government did not negotiate the barter directly. Offers to export products held by the Commodity Credit Corporation were solicited from private United States firms.\[61\]

56. Id.
59. See L. WELT, supra note 19, at 46-54.
61. IED STAFF REPORT, supra note 12, at 13.
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E. The Effects of Countertrade on Competition and Economic Efficiency

Although "[t]he origins of money are lost in antiquity," the efficiency of money over barter led most primitive societies to develop currencies at an early stage of development. The fungibility and divisibility of money give a trader freedom to select between a wide variety of products with little concern for the needs of the seller beyond the price. The advantages of currency notwithstanding, countertrade has developed as a tool upon which many modern governments have relied extensively. Yet, although there may be short-term policy considerations which lead a government to adopt countertrade requirements, such practices are economically inefficient and, in the long run, ultimately restrict rather than expand trade.

According to Ricardo's classic doctrine of comparative advantage in international trade, a country will export products in which it has comparative production efficiency and it will import products in which it has a comparative productive disadvantage. In this way, each country maximizes its productivity by using its resources most efficiently. The world marketplace, accordingly, operates efficiently because the individual countries' efficient production translates into lower prices and better quality for every traded good. Resources are freed for production of more goods, expanding the overall level of world trade.

Countertrade and barter, however, can introduce inefficiencies into trading relationships that reduce mutual advantages from trade and actually restrict the level of world trade. The long-term trade restrictive effect of countertrade or barter can be analyzed in two ways. First, when money is used as the medium of exchange, income derived from one exchange can quickly be returned to the marketplace for use in new trades. If, however, a trader is required to take goods instead of money, the trader must either convert those goods into money, by finding a buyer willing to pay money for them, or exchange the goods for other goods. If the trader opts for the latter course, but cannot use the goods received in

63. Id.
64. See supra notes 22-36 and accompanying text.
66. See P. LINDERT & C. KINDLEBERGER, INTERNATIONAL ECONOMICS ch. 2 (7th ed. 1982).
67. Id.
68. See, e.g., D. GOWLAND, INTERNATIONAL ECONOMICS ch. 2 (1983).
exchange for the original goods, the trader must repeat the process until he or she receives either usable goods or money. Barter thus slows down the exchange process, resulting in increased costs in the form of higher transaction, information, and opportunity costs. A portion of the "gains from trade" are lost in this inefficient form of non-money exchange.

Second, countertrade can produce long-term inefficiencies by encouraging investment in forms of production in which a country lacks comparative advantage. Normally, consumers seek to purchase from the producer who sells at the lowest price with the highest quality. Efficient producers are encouraged to produce more while less efficient producers face pressures either to leave the market, thereby diverting their resources to different production, or to increase their efficiency. Countertrade interferes with this market mechanism and results in less efficient production. For example, a consumer may have to purchase from a higher cost/lower quality seller who will accept the purchaser's countertrade demands. In the short-term, both parties to the trade may appear to benefit, but in the long-term, an inefficient seller is encouraged to remain in production, rather than diverting its resources to more highly productive uses.

69. According to practitioners, there are a host of hidden expenses and problems associated with countertrade:

1. Countertrade involves time-consuming negotiations. Particularly in the case of NME's, rivalry among the various foreign trade organizations may cause expensive delays in negotiation and delivery. In addition, the market value of the goods involved in the transaction may change during the negotiating process. See IED STAFF REPORT, supra note 12, at 9.

2. As in any transaction, it is difficult to assess the quality of goods received in countertrade deals. It is much more difficult than in other deals, however, to reject countertraded items as being of insufficient quality. Id.

3. Goods subject to countertrade must frequently be discounted in order to resell them. To accommodate that discount, the value given them in the countertrade negotiations must be marked up. Fluctuations in the market price or the discount rate can cause loss of profit. See Black, Barter Surfaces as International Trade Tool, IRON AGE, Nov. 2, 1972, at 39.

4. Shipping fees, agent fees, and currency discounting can also reduce profits. Id.

70. See P. LINDERT & C. KINDLEBERGER, supra note 66, at ch. 8.

71. For example, assume Producer A from Country A and Producer B from Country B both produce fish hooks. Producer A produces at a total cost of $.01 per hook and sells the hooks for $.015 per hook. Producer B produces hooks at a cost of $.012 per hook and sells them for $.016 per hook. Producer A's hooks are sturdier and easier to use than Producer B's hooks. Consumer C from Country LDC imports fish hooks and receives offers for sale from Producers A and B. Consumer C decides to purchase from Producer A, who applies for an import license. Consumer C and Producer A are informed by the licensing authority of Country LDC that no license will be issued unless Producer A agrees to purchase a specified dollar amount of products produced in Country LDC. If Producer A is unwilling to accept the terms of the deal, but Producer B is, these non-market considerations will determine the outcome of the transaction. Moreover, because of the likelihood Producer B will experience difficulties in marketing the countertraded goods, it will probably increase its price an additional amount.

72. In the example above, consumers in Country LDC pay more for the fish hooks. Producer B is encouraged to stay in the business of producing fish hooks even though it is a less
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Countertrade thus frequently results in a different match of buyers and sellers from what would have resulted in a "money-only" transaction. Although in bilateral terms, trade is facilitated on a one-shot basis, the multilateral trading regime is harmed. This corrosive effect of countertrade on the multilateral trading system has evoked many expressions of concern. According to Jacques de Miramon, the OECD Trade Director:

From the point of view of the general interest of OECD countries, which is to safeguard an open multilateral trading system, countertrade is backward: it runs counter to the progress made in liberalising trade since the last World War. It is a return to bilateralism through a modernised barter system. It recalls the restricted choice that is characteristic of wartime economies and compartmentalised markets, whereas the policies pursued successfully for the last thirty years by the OECD countries have aimed at opening markets, increasing opportunities for trade and improving commercial practices.\(^7\)

Similarly, the International Monetary Fund has expressed concern about the impact of increased government-sponsored countertrade on the world trade system:

[T]he proliferation of [countertrade] practices is detrimental to the maintenance of the multilateral system of trade and payments. Countertrade practices may entail many of the undesirable restrictive and discriminatory practices traditionally associated with bilateralism . . . .\(^74\)

Countertrade ultimately constitutes a retreat from the post-World War II multilateral trading regime. Thus, the GATT, which created and formalized that regime, should be examined as a possible tool for limiting the growth of countertrade.

II. Countertrade and the General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade is the most influential international mechanism available for the regulation of international trade. Through GATT, member states monitor the activities of one another in an effort to promote a less restricted world marketplace. The efficient allocation of resources and the maximization of economic output are widely recognized as the most important goals of the GATT.\(^75\)

\(^{73}\) De Miramon, *supra* note 31, at 15.
\(^{74}\) 1985 IMF Report, *supra* note 8, at 41.
\(^{75}\) J. Jackson, *supra* note 9, at 5.
Lacking meaningful direct sanctions, GATT achieves its purposes through the concept of mutually advantageous and reciprocal trade concessions. Most Favored Nation (MFN) status, the GATT's cornerstone, is a shorthand phrase used to describe the process whereby one state grants to another state trade advantages equal to the most favorable concessions granted to any other state. The effect is that artificially imposed trade barriers such as tariffs and quotas lose their impact on one MFN country's ability to compete with another MFN country for a share of the importing country's market. The concept of MFN permeates the GATT, carrying with it a mandate of equal treatment and non-discrimination. That sense of fairness has become a part of the GATT review process and is reflected in decisions of the Contracting Parties.

The coercive power of the GATT is limited by its status as an agreement among sovereign states. The Contracting Parties recognize that they are judging the activities and trade practices of a sovereign, and if prevailed upon too egregiously, that sovereign may ignore the Agreement or withdraw. As a result, the Contracting Parties have evidenced a gentle touch in addressing violations of the GATT. The lack of enforcement methods has led to discrepancies between the practices of the Contracting Parties and the technical rules of the GATT. When such divergencies occur, the reaction often has been either to change the GATT rule, or to ignore the practices, hoping for a return to an adherence to the rule.

76. Id. at 16. GATT's primary sanctions are:

(1) The withdrawal of concessions substantially equal in value to the amounts lost as a result of the violation of the GATT. See GATT, supra note 9, arts. XII, XIX, XXIII, and XXVIII.

(2) Notice and consultation requirements upon the advent of certain changes in trade policy. See id. arts. VI, XIII, XIX, XXII, XXIII, XXIV, and XXV.

(3) Imposition of duties against violators. See id. art. VI.

77. J. JACKSON, supra note 9, at 519.

78. J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 515 (1977). See also J. JACKSON, supra note 9, ch. 11.

79. "The Contracting Parties" designates all the members of GATT, acting as a body, as opposed to "a contracting party," which designates an individual member of GATT. When a contracting party believes that the actions of another contracting party are inconsistent with the Agreement, the Agreement calls for the disputing parties to consult with one another. If the consultation does not result in a satisfactory resolution, either contracting party can request that the Contracting Parties study the matter. The Contracting Parties through the GATT Council (an administrative organ appointed by the Contracting Parties to administer the Agreement) appoints a Panel. The Panel studies the problem, reviews reports submitted by all contracting parties involved in the dispute, and prepares a report for the Contracting Parties that includes the Panel's recommendations. See J. JACKSON, supra note 9, at 124-25.

80. Id. at 16.

81. See generally id. ch. 29.
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As suggested above, countertrade is an increasingly common trade practice which is ultimately inefficient and trade-restrictive. The issues of countertrade and its effects on the world trading regime, however, are currently receiving relatively little attention under the GATT. This section will examine whether countertrade is inconsistent with the GATT. The language of the Agreement, case history, and economic analysis suggest that contracting parties could work within the framework of the Agreement to reverse the trend toward countertrade.

A. The Scope of the GATT’s Prohibition on Non-Tariff Barriers

1. The Terms of the GATT

Countertrade has been criticized by GATT as a distortion of multilateral trade and an impediment to economic efficiency. The question addressed herein is whether countertrade is a restrictive trade practice already prohibited by the explicit terms of the Agreement.

Article XI of the GATT prohibits the institution of trade restrictions other than duties, taxes, or other charges. Quotas are the primary target of Article XI. Quotas are the most severe barriers to trade since they absolutely prohibit trade; after the designated quota amount of a particular product is imported, no more units of that product are allowed into the country imposing the quota until the commencement of a new quota period. While tariffs, duties, and taxes affect the competitive price of the product and may affect the market position of the exporter, trade

82. But see GATT, Countertrade and the General Agreement on Tariffs and Trade, Doc. CG.18/W/80 (March 30, 1984), noted in S. ANTARIA, N. KIRMANI & A. PETERSON, TRADE POLICY ISSUES AND DEVELOPMENTS 78 (IMF Occasional Paper No. 38, 1985). In this report, the GATT Secretariat concludes that while countertrade in and of itself does not violate the GATT, “governmental measures that require, stimulate or take the form of countertrade, or that react to countertrade, can be inconsistent with obligations under the General Agreement or the Codes.”

83. Birley, Can’t Pay? Will Pay, But In Sultanas, EUROMONEY, May 1983, at 187. Although often criticized by states, many governments have reconciled themselves to countertrade as a necessary evil and have begun to provide advisory services. Id.

The Director-General of GATT, Arthur Dunkel, has warned against bilateralism and sectoralism in trade policy, with direct reference to countertrade: “A foreign trade policy has to consider national trade needs globally; as sectoral arrangements proliferate, coherent policymaking becomes impossible, and economic efficiency is lost at every stage.” GATT’s Director-General Warns Against Bilateralism and Sectoralism in Trade Policy, GATT FOCUS, March 1982, at 4.

84. Article XI picks up where Article II, which establishes tariff schedules, leaves off. Entitled “General Elimination of Quantitative Restrictions,” Article XI deals with trade restriction other than tariffs. Paragraph 1 provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. (Emphasis added).
nonetheless continues. With quotas, however, the entry of products beyond the quota amount is barred.

Tariff concessions resulting in the reduction of tariffs are ineffective in achieving the goal of promoting trade if a party is unable to trade as a result of non-tariff barriers. Quotas and other forms of well-cloaked trade restrictions thus operate to reduce the value of mutual tariff reductions. Exporters cannot sell their goods if they are unable to overcome hidden barriers to trade, such as governmentally imposed countertrade requirements.

Article XI and its companion Articles XII, XIII, and XIV pertain to quantitative restrictions. These articles are more complex, and were more difficult to draft and negotiate, than any other group of regulations in the Agreement. The United States was determined to eliminate quotas through the GATT, and the elimination of quantitative restrictions has been described as the Agreement's most significant contribution to world trade.

Countertrade usually does not involve quotas, but nonetheless may fall within the scope of Article XI. Article XI refers to "prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures . . . ." Even though the primary intent of the drafters was to eliminate quotas, they also intended to reach other forms of trade restrictions or prohibitions not involving quotas. The language in Article XI thus applies to restrictive trade practices other than formal quotas. Furthermore, the Notes and Supplementary Provisions...
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to the GATT define the terms “import restrictions” or “export restrictions” to include “restrictions made effective through state trading operations.”\textsuperscript{91}

2. Application of Article XI

Such language suggests that an expansive interpretation should be applied to the mandate of Article XI. However, caution must be exercised in the application of the GATT provisions to trade practices, for as Professor Jackson suggests:

The starting point of any interpretation or application is of course the words of the treaty itself. Even at this beginning point, however, it must be recognized that certain clauses of GATT do not reflect the currently accepted practice . . . . [E]ven though appropriate clauses in GATT are discovered to be relevant to a particular situation, the extent to which a particular clause has been accepted by nations, or applies to their particular practices in the face of the large number of exceptions possible, is a complex question which must be approached with considerable caution.\textsuperscript{92}

Thus, prior to concluding that Article XI applies to trade restrictions other than quotas, such as governmentally imposed countertrade requirements, the reality of international practices should be examined. Any use by the Contracting Parties of Article XI to challenge trade restrictions other than quotas would serve as a good indication that member states perceive Article XI to have a broader scope. Such perceptions of member states with regard to the application of Article XI to governmentally imposed countertrade requirements are perhaps more important than a concise interpretation of the language of the treaty.

Despite the common view that there is no stare decisis in international law,\textsuperscript{93} under the GATT previous practice has an important influence on the interpretation and application of the treaty. Even so, the applicability of the treaty to a situation should not be rejected merely because the treaty section was not applied to those facts previously. While looking for evidence that Article XI applies to trade restrictions other than quotas, the possibility of new developments should not be foreclosed.


This Article focuses primarily on Article XI because the close relationship between government-mandated countertrade and the restrictions prohibited in Article XI. The strongest argument that countertrade violates the GATT is based on Article XI.

91. \textit{GATT}, supra note 9, Annex I, Ad Articles XI, XII, XIII, and XVII.
92. J. Jackson, supra note 9, at 19-20.
Most invocations of Article XI have been in response to quotas. In three recent cases, however, contracting parties have invoked this provision in seeking relief from non-quota trade restrictions.

a. **French Restrictions on Hong Kong Products**

According to a Working Panel report adopted in 1983, France has developed a unique, non-quota method of restricting imports. In an effort to reduce a wave of imports from Hong Kong, several classes of imported products were effectively restricted by France, without imposition of a quota, by withholding or slowing down approval of import licenses on those products. The United Kingdom claimed, on behalf of Hong Kong, that this practice constituted discriminatory bilateral treatment of Hong Kong.

France defended its actions by asserting that economic and social concerns gave rise to the restrictions. The United Kingdom argued in response that exceptions to Article XI should be limited to measures described in paragraph two of that article, and that all other “prohibitions or restrictions other than duties, taxes or other charges” were forbidden. It denied that any provision was made for exemptions based upon economic or social grounds.

The Panel agreed that France violated Article XI and Article XIII, because the French import licensing procedure resulted in import restrictions with the same impact upon imports as a quota. For the present analysis, the notable aspect of the France-Hong Kong controversy was

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94. *E.E.C. Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, CONTRACTING PARTIES TO *THE GENERAL AGREEMENT ON TARIFFS AND TRADE*, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 30TH SUPP. 129 (1984) [hereinafter cited as *Hong Kong Products*].

95. Id. at 132.

96. The exceptions in paragraph 2 of Article XI are:

   The provisions of paragraph 1 of this Article shall not extend to the following:
   
   (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
   
   (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
   
   (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
   
   (i) to restrict the quantities of the like domestic product permitted to be marketed or produced . . .
   
   (ii) to remove a temporary surplus . . .
   
   (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

GATT, supra note 9, art. XI.


98. Id. at 140.
the willingness of the Contracting Parties to look beyond the direct imposition of quotas to other indirect means of establishing import restrictions which violate the provisions of Article XI.

b. *The Canadian Foreign Investment Review Act*

In a second case, government policies with a far less directly restrictive effect on imports were held not to violate Article XI. Under the “Canadian Act,” potential foreign investors in Canada were required to gain prior authorization from the Canadian government. That approval was contingent upon factors which included the use of Canadian products and labor in the venture, Canadian ownership, the effect upon productivity, and competition with existing Canadian business. In order to gain government approval, investors were required to agree to “undertakings” that included the purchase of Canadian products, the manufacture of products in Canada, and the development of exports.

The United States challenged the Canadian requirements as discriminatory against foreign investors. The Canadian Act was reviewed by a GATT panel after consultations between Canada and the United States failed to resolve the dispute. The United States requested the Panel to find that the Canadian Act obliged foreign investors: (1) to purchase goods of Canadian origin in preference to imported goods; (2) to manufacture goods which would otherwise be imported; and (3) to export specified quantities or proportions of their production. Article XI was among the provisions in the GATT which the United States claimed the Canadian Act violated, arguing that the purchase undertakings operated as a restriction on the importation of products into Canada.

The Panel adopted the Canadian position that the GATT distinguishes between measures affecting the importation of products which are regulated in Article XI and those affecting imported products which are dealt with in Article III. Since the purchase undertakings did not actually prevent the importation of goods, the Panel reached the conclusion that they were consistent with Article XI. The United States’ decision to

100. *Id.* at 142-44.
101. *Id.* at 140.
102. *Id.* at 146.
103. *Other GATT articles used by the U.S. to argue against the Canadian Act were Articles III(4), III(5), XVII(1)(c), and XXIII. Id.* at 146.
104. *See id.* at 152.
105. *Id.* at 162.
106. *Id.* at 163. The report states:
The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the Contracting Parties, any evidence justifying such an
invoke Article XI to challenge the policy, however, remains significant. In addition, even though the Panel did not accept the U.S. argument, neither did it openly reject the applicability of Article XI to the Canadian policy.\textsuperscript{107}

c. \textit{U.S.-Canada Patent Dispute}

In another Panel report adopted the same year, Canada complained of a United States International Trade Commission order excluding from importation into the United States certain automotive spring assemblies which had been found to violate a United States patent.\textsuperscript{108} Canada asserted that “[t]he exclusion order . . . was inconsistent with the obligations of the United States under Article XI(1) . . . .”\textsuperscript{109} The United States contended that “it was not the intent of Article XI to prohibit restriction[s] on products found to infringe a patent or to violate other national laws of general applicability.”\textsuperscript{110}

The Panel decided that the United States’ exclusion was not inconsistent with Article XX(d), reaching no conclusion on the application of Article XI.\textsuperscript{111} Again, it is noteworthy that Canada invoked Article XI to challenge a practice which did not involve quotas. The United States, in turn, did \textit{not} argue that Article XI should be restricted in its application to quotas, but instead maintained that the exclusion fell outside Article XI.\textsuperscript{112}

In both of the Canada-United States disputes, the parties indicated a willingness to apply the language of Article XI quite broadly to non-quota trade barriers. The cases discussed above do not resolve the extent of Article XI’s applicability to different import restrictions that do not involve quotas. They support the proposition, however, that the Article should be interpreted as being consistent with the most obvious meaning of its language. The France-Hong Kong controversy also demonstrates

interpretation of Article XI. For these reasons, the Panel, noting that purchase undertakings do not prevent the importation of goods as such, reached the conclusion that they are [not] inconsistent with Article XI:1.

\textit{See also id.} at 165 (“the Panel reached the conclusion that they [the purchase undertakings] are not inconsistent with Article XI:1 . . . .”). The Panel did conclude that the Canadian Act was inconsistent with Article III(4). \textit{Id.} at 160-61.

\textsuperscript{107} The Panel’s decision clearly implies that had the purchase undertakings “prevent[ed] the importation of goods as such” they would have been found to violate Article XI, even though they were not quotas. \textit{Id.} at 163.


\textsuperscript{109} \textit{Id.} at 119.

\textsuperscript{110} \textit{Id.} at 123.

\textsuperscript{111} \textit{Id.} at 124-28.

\textsuperscript{112} \textit{Id.} at 123.
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the willingness of the Contracting Parties to identify trade restrictions regardless of form.

This view that Article XI is broadly interpreted by GATT members is further supported by the Contracting Parties' consistent reference to the quotas challenged under the Article as "import restrictions." To the extent that the use of terminology sometimes compartmentalizes analysis of a particular subject, Article XI has not been constrained by reference to its application to quotas. Since Article XI has always been applied to import restrictions (many of which happen also to be quotas), there is room to infer that it should apply to import restrictions which are not quotas. The question remains, then, whether Article XI should be invoked against countertrade.

B. Is Countertrade a Restrictive Trade Practice Under Article XI?

If the Contracting Parties attach to Article XI its literal meaning, governmentally mandated countertrade can be characterized as a trade restriction inconsistent with Article XI. Countertrade, whether or not governmentally mandated, is often claimed to expand trade by creating markets where they would otherwise not exist; however, as illustrated above, countertrade may create markets where they should not exist and simultaneously close off other markets to willing buyers through the imposition of restrictive trade conditions. Governmentally imposed countertrade has an adverse impact upon competition in the world marketplace because it forces purchasers to make choices based upon the willingness of the seller to accept the terms of countertrade, rather than choices based upon market factors. When countertrade is made a condition to trade, it has a restrictive impact upon both the buyer and seller.

In a typical counterpurchase transaction, the seller discovers at some point in the negotiating process that in order for its trading partner to consummate the deal, that seller must agree to buy or market its trading partner's products. In some cases, the counterpurchase requirement takes the form of a demand. Mexico and Brazil, for example, have specific laws permitting import licenses for certain products only in exchange for an export sales contract of equal or greater value. In cases where such laws are applicable, countertrade requirements clearly impose quid pro quo conditions that restrict trade only to those countries

113. See supra text accompanying notes 62-74.
114. ITC Analysis, supra note 29, at 3.
115. Id. at 2. The references in the text to Brazil and Mexico are intended to be illustrative only. No connotation that either country is in violation of the GATT is intended. Mexico, of course, is not a member of GATT.
willing or able to accept the conditions. Thus these countertrade requirements can actually bar trade, in violation of Article XI.

Governments that impose countertrade requirements argue that they use countertrade to create export markets. These countries rely on the marketing expertise of large corporations to market counter-deliverables in the hope that domestic firms will learn marketing strategies and maintain the markets.\footnote{116} Although a secondary market may be created for the counter-deliverables, this possibility does not remove the burden of the countertrade requirements on the initial transaction. The creation of new secondary markets is an extraneous concern that cannot justify countertrade’s restrictive effect upon trade any more than the social and economic concerns invoked by France in the \textit{Hong Kong Products} case could justify barring Hong Kong products through non-quota barriers.\footnote{117}

The counterpurchase requirements imposed by Mexico and Brazil are made effective through their licensing procedures and are similar to the tactics employed by France to effectuate discriminatory quotas against Hong Kong.\footnote{118} The result of the licensing practices of all three countries is to keep out imports. Unlike the French quotas, though, the Mexican and Brazilian licensing laws’ bar is not outright, but applies against any trader unable to meet the countertrade requirements by marketing an offsetting volume of Brazilian or Mexican goods. In the \textit{Hong Kong Products} case, as well, the goal of French policy was to reduce a net imbalance in imports over exports. The result in the case is a discriminatory bar of imports from all countries whose companies refuse to accept the condition. The licensing procedures of France, Brazil, and Mexico thus have similarly trade restrictive results. Goods that French, Mexican, and Brazilian consumers may want and are willing to pay for are banned at the border. The practices of Mexico and Brazil are as violative of Article XI as the licensing procedures implemented by France.

There are other similarities between the effects of governmentally imposed countertrade requirements and quotas that the GATT was designed to prevent. Countertrade requirements are not as rigid as quotas, but they can be equally prohibitive for companies lacking a use or marketing mechanism for the counter-deliverables.\footnote{119} Public authorities determine the sources of imports under quota systems without regard to

\footnote{116} \textit{Id.}
\footnote{117} See supra note 95 and accompanying text.
\footnote{118} See supra notes 94-98 and accompanying text.
\footnote{119} One author has suggested that countertrade has the same effect as a quota and, as a result, Article XI should apply:
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market factors. Similarly, countertrade requirements frequently give priority to the willingness of a trading partner to accept the countertrade arrangement, rather than to factors such as quality, cost, or price. Countertrade requirements thus result in transactions based upon political negotiations. This places trade in the midst of political conflict and burdens trade among nations in a manner that the drafters of the GATT attempted to avoid:

Finally, Q.R. [quantitative restriction] makes all international commerce a matter of political negotiation—goods move, not on the basis of quality, service and trade, but on the basis of deals completed country by country, product by product, and day by day between public officials. All economic relation[s] between nations are moved into the area of political conflict.120

Thus, since governmentally mandated countertrade is trade restrictive, and a proper interpretation of Article XI would apply its regulations to trade restrictions beyond quotas, countertrade requirements clearly constitute violations of the GATT.

C. Challenging Countertrade Under GATT

Given countertrade's inconsistency with the principles of the GATT, governmentally imposed countertrade requirements may be addressed at two levels under the existing GATT framework. First, as in the Hong Kong Products case, specific government countertrade requirements may be submitted to the GATT consultation and arbitration process. As Ambassador David McDonald, Deputy United States Trade Representative, has suggested, "countertrade is an indirect means of licensing imports that should be dealt with within the GATT monitoring, consultation, and arbitration machinery like any other trade restriction."121 If the Contracting Parties were to accept the argument that governmentally imposed countertrade requirements are inconsistent with Article XI, the

Government-mandated countertrade is a de facto restriction on access to a foreign market, and because countertrade restrictions are often directed at specific products, the restrictions cause effects similar to those produced by quotas on such products. For example, countertrade practices mandated through linkages of import and export licensing entitlement systems constitute, in effect, a quota on imports subject to adjustment based on the level of exports and would appear to contravene the restrictions on quotas promulgated in Article XI.

Zarin, supra note 51, at 243-44.


121. New Restrictions on World Trade, supra note 39, at 119.
customary sanction would be to request the discontinuance of the practice or to approve the withdrawal of equivalent concessions.¹²²

The withdrawal of equivalent concessions alone, however, would result in an increase in barriers to trade between the countries involved and a decrease in economic efficiency. Furthermore, merely requesting the discontinuance of the practice is not likely to produce the result desired. Countries impose countertrade requirements for compelling policy reasons and are likely to resist ceasing such practices.

Alternatively, countertrade could be addressed at a broader level at a future GATT round of trade negotiations, similar to the Tokyo Round.¹²³ Such negotiations may offer a more desirable alternative to filing complaints within the GATT organizational framework. In the process of trade negotiations, countertrade requirements could be exchanged for desirable concessions from other countries. For example, Brazil might agree to eliminate countertrade requirements if Japan and the United States were to agree to eliminate tariff surcharges on certain agricultural products. Brazil could generate valuable trade concessions in this fashion. Yet bargaining for reduction in countertrade practices would, in effect, reward countries for having imposed such requirements in violation of the GATT. If, on the other hand, countertrade does not become the subject of negotiation, market conditions will not improve for the exporter in the future.

There is, therefore, no painless way to eliminate countertrade. Formal action resulting in a finding that countertrade is inconsistent with Article XI would most likely result in the trade-inhibitive removal of concessions. Negotiations will inevitably “reward” those governments requiring countertrade for actions that their trading partners should regard as violations of the GATT. Lack of action will allow the further growth of barter, with its resultant inefficiencies.

The most desirable result under the circumstances may well be for countries affected by governmentally imposed countertrade requirements not to make formal complaints under the GATT. This would avoid both potential removals of concessions and the tainting of future negotiations by a formal report establishing countertrade requirements as inconsistent with the Agreement. Short of formal action, however, the injured parties

¹²² This sanction is in line with suggestions made in Panel Reports and is fairly typical of sanctions under the GATT. The affected parties would be expected to consult with each other first in order to attempt to resolve the matter. See supra note 79.

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should openly acknowledge the trade-restrictive effects of governmentally mandated countertrade and negotiate accordingly.

Conclusion

As the practice of countertrade continues, governments committed to a free, multilateral trade framework must ask what, if anything, should be done about it. One response is to continue to do nothing, allowing countertrade's continual expansion, as it has in the past twenty years. For many, that response is unsatisfactory, both because it is contrary to the goal of a competitive world market and because it undermines the progress made in the past forty years (commencing with GATT) in achieving a portfolio of multilateral and bilateral treaties promoting free trade.

One vehicle available to challenge governmentally imposed countertrade requirements is the GATT. The GATT applies only to members, however, and many NME's are not members. Moreover, even if the Contracting Parties determine that countertrade is inconsistent with the GATT, sanctions are limited. The Contracting Parties are likely to suggest further consultation among the parties involved, or at most the suspension of concessions. The latter option, though, creates additional trade barriers, contrary to the primary purpose of the GATT.

It is probably better for all parties if the injured states do not formally refer the issue of countertrade practices to the Contracting Parties. Thus, countertrade need not acquire the label of a GATT violation. Rather, governmentally imposed countertrade requirements are best treated as a negotiated item in future trade rounds. Members could then negotiate for the removal of countertrade requirements while eliminating other trade barriers in return. Similar trade negotiations could be initiated with non-GATT members that practice countertrade.

124. Cuba, Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia are members of GATT. However, the Soviet Union and China, which account for a substantial portion of East/West countertrade, are not bound by the GATT.
125. See GATT, supra note 9, arts. XXII and XXIII(1).
126. See id. art. XXIII(2), which states in part:

If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.
Ultimately, however, trade negotiations will not resolve the underlying problems which give rise to countertrade practices in the first place. Many LDC’s suffer from currency shortages due to lack of industrialization or demand for their products. Western nations continue to impose restrictions on the exports from LDC’s in their attempt to protect domestic industries. The currency shortages suffered by the NME’s are also likely to persist as long as their output-oriented philosophies prevail. Until these underlying conditions are altered, the incentives to engage in countertrade will persist.