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INTERNATIONAL COUNTERTRADE

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

Report of the Secretary-General

Addendum

III. CONTRACTING APPROACH

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

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A. Choice of contract structure

1. A preliminary question the parties have to address is the contract structure of the countertrade transaction. The parties may embody the obligations in regard to the shipments of goods in the two directions in one contract or they may incorporate those obligations into separate contracts.

1. Single contract

2. Under a single contract approach the parties conclude one contract for the flow of goods in the two directions. Such a single contract may take the form of a barter contract or the form of a merged contract that contains all the contractual terms governing the reciprocal shipments.

(a) Barter contract

3. As noted in chapter II, "Scope and terminology of legal guide", paragraph 10, the legal guide uses the term barter in its strict legal sense to refer to a transaction involving an exchange of goods for goods, so that the supply of goods in one direction entirely or partly replaces the monetary payment for the supply of goods in the other direction. In a barter contract there is no need for a countertrade commitment since the parties agree at the outset of the transaction on all the contract terms for the shipments in the two directions. If the goods to be supplied in one direction are agreed to be of the same value as the goods to be supplied in the other direction, no monetary payment would be made. If the values are agreed to be different, the difference may be settled by monetary payment or by further delivery of goods. The parties may or may not express the value of the goods in monetary terms. If they do so, the attachment of a price to the goods serves to compare the value of the deliveries. The parties may have to express the value of shipments in monetary terms due to customs or other administrative requirements.

4. A factor that is often the main reason for using barter is that the use of barter eliminates or reduces the need for currency transfers. It may be noted, however, that the avoidance of currency transfers may also be achieved through the use of other contractual forms, namely, the parties may conclude separate sales contracts in each direction and agree to set off their mutual payment claims (such setoff of mutual claims is discussed in chapter IX, "Payment", paragraphs ___ to ___).

5. There are several considerations that the parties may take into account in deciding whether to cast their countertrade transaction in the form

of a barter contract. One consideration is that the conclusion of a barter contract implies a comparison between the values of the goods to be exchanged, which in turn implies that the type, quality and quantity of the goods should be specified at the time of conclusion of the contract. Conclusion of a barter contract would not be feasible when the parties are not in a position to agree at the same time on the type, quality and quantity of the goods to be shipped in the two directions.

6. Another factor to be considered is the possible reluctance of a party to ship the goods before being certain that the other party will ship goods. Payment against the presentation of shipping documents or the opening of a documentary letter of credit, devices used with other types of contracts to address such a concern, cannot be used in barter since neither delivery is payable in money. Simultaneous deliveries, which might be a solution to take care of this kind of concern, are seldom feasible in international commerce. As a result, a party may delay shipping until the other party has shipped because of a concern that the other party might not ship. Such a delay may cause an inconvenience to both parties: to the party that has planned to deliver the goods at the agreed time and is burdened with the possession of the goods and to the party who does not receive the goods in time. The parties may overcome these concerns by providing for a guarantee or a stand-by letter of credit to assure the party who has shipped of compensation in the event that the other party fails to ship (the use of guarantees or stand-by letters of credit for this purpose is discussed in chapter XII, "Security for performance", paragraphs 38 and 45).

7. A further consideration is that under a barter contract the value of the goods to be shipped in one direction is often measured by the goods to be shipped in the other direction, rather than in terms of the market price for each shipment. The absence of a price in a barter contract or the use of prices that do not reflect the market prices might cause a difficulty when non-conforming goods are delivered under a barter contract. If in such a case monetary compensation is regarded as the appropriate relief, the absence in the contract of a market price, or of any price at all, could lead to disagreement over the amount of the compensation. The stipulation of a price other than the market price may also give rise to a difficulty in calculating customs duties when they are based on the market value of the goods.

(b) Merged contract

8. The term "merged contract" is used to describe the case in which the parties embody in one contract all the terms covering the obligations of the parties to ship goods to each other and to pay for the goods they have received. If the parties agree to set off their claims for payment under a merged contract, the difference between a merged contract and a barter contract, under which one shipment constitutes compensation for the other shipment, would be diminished. As in barter, there is no need in a merged contract for a countertrade commitment since the deliveries to be made in the two directions are covered by definite contract terms.

9. Many legal systems appear to give weight to the contract structure of the transaction in determining whether the obligations are interdependent. In such systems, if the mutual obligations are merged into one contract, the mutual obligations are likely to be considered as interdependent so that non-delivery, refusal to take delivery, or non-payment relating to a shipment

in one direction may be invoked as a reason for suspending or refusing performance in the other direction. Furthermore, termination of an obligation in one direction, whether or not a party is responsible for the termination, may be interpreted as entitling a party to terminate an obligation in the other direction. If the parties using a merged contract approach wish to keep the obligation to ship goods in one direction and the corresponding payment obligation independent from the obligations relating to the shipment in the other direction, they should use unambiguous language to that effect. Further discussion on the question of interdependence of obligations is found in chapter XIII.

3. Separate contracts

10. When the parties use separate contracts for the shipments in the two directions, they would use one of the following approaches: (a) the export contract and the countertrade agreement are concluded simultaneously and the counter-export contract is concluded subsequently; (b) the countertrade agreement is concluded prior to the conclusion of any definite supply contracts; and (c) the separate supply contracts for the shipment in each direction and the countertrade agreement establishing a relationship between them are concluded simultaneously.

11. The obligation to ship goods in a particular direction in a countertrade transaction may be fulfilled by two or more different contracts, which may involve different buyers and sellers. While such a situation affects the contractual structure of a given transaction, it does not affect the nature of the discussion in this chapter. Therefore, references in the singular to a supply contract, as well as to an export or counter-export contract, also cover the situation in which more than one contract is concluded for the shipment of goods in a particular direction.

(a) Export contract and countertrade agreement concluded simultaneously

12. The parties often finalize a contract for the shipment in one direction (export contract) before they are able to reach agreement on the contract for the shipment in the other direction (counter-export contract). Parties using this contracting approach may face a broad range of issues specific to countertrade. In order to assure conclusion of the counter-export contract, the parties conclude, simultaneously with the conclusion of the export contract, a countertrade agreement containing the commitment to conclude the counter-export contract. The primary purpose of the countertrade agreement in such cases is, in addition to stating the countertrade commitment, to outline the terms of the future contract and establish procedures for concluding and carrying out supply contracts. Possible issues to be addressed in such a countertrade agreement are enumerated below in paragraphs 22 to 33.

13. The contents of the countertrade agreement would be influenced by the degree to which the parties are able to define the terms of the future contract. It is advisable that the countertrade agreement be as definite as possible concerning the terms of the future contract, in particular regarding the type, quality, quantity and price of the countertrade goods, in order to increase the likelihood that the countertrade commitment will be fulfilled. To the extent that the parties are not in a position to settle the terms of

the counter-export contract in the countertrade agreement, they are advised to establish guidelines within which the terms are to be agreed upon and procedures for negotiation (for the discussion on negotiation procedures and on definiteness of the countertrade commitment see below, paragraphs 39 to 61).

14. The content of the countertrade agreement would also be influenced by the degree of interest the parties have in the shipments in the two directions. In many cases the exporter is primarily interested in the conclusion of the export contract, and the countertrade commitment results primarily from a desire to secure the export contract. In other cases, the importer purchases goods from the exporter in order to enable the exporter to finance the counter-import. In yet other cases, each side is particularly interested in obtaining the goods being offered by the other side. Because the interests of the parties vary in such a manner, the content of the countertrade agreement may vary from case to case with respect to issues such as sanctions for non-fulfilment of the countertrade commitment, payment mechanisms, procedures for concluding the future contract and for monitoring fulfilment of the countertrade commitment, and interdependence of obligations.

15. The simultaneous conclusion of an export contract and a countertrade agreement is an approach frequently used in counter-purchase, buy-back or offset transactions. In the case of the counter-purchase transaction, the parties may not yet know what type of goods would be counter-exported. In the case of a buy-back, the parties may not be able to agree on such terms as price or quantity because of the long time period between the conclusion of the contract for the export of the production facility and the beginning of production of resultant products. In an offset transaction, the parties may not know what type of goods will be counter-exported or the identity of the counter-exporters.

16. The use of this contracting approach raises the question whether to include the terms of the countertrade agreement in the export contract or to embody those terms in a separate instrument. The choice of the parties in this regard may have an effect on the degree to which the obligations stipulated in the export contract and the obligations set forth in the countertrade agreement are considered to be interdependent. When there is such interdependence, a delay in the fulfilment or non-fulfilment of the countertrade commitment may provide the importer with a justification for suspending payment of the amounts due under the export contract or for deducting corresponding damages from the payment due under the export contract. Similarly, the exporter may regard a delay in payment for the export contract as a ground for delaying fulfilment of the countertrade commitment. Furthermore, delayed payment under the counter-export contract might prompt the importer to delay payment under the export contract.

17. If the obligations relating to the export and to the countertrade commitment are embodied in separate contracts, it appears that many legal systems would consider the two sets of obligations to be independent, except to the extent specific contract provisions establish interdependence. In other legal systems the export contract and the countertrade agreement may, despite the use of separate contracts, be considered to be interdependent on the ground that the obligations of the parties embodied in the two contracts form part of a single transaction. When the parties wish to avoid

interdependence of obligations between the export contract and the countertrade agreement, or when they wish to limit interdependence to particular obligations, it is advisable that they embody the export contract and the countertrade agreement in separate contracts. When, despite the use of separate contracts, it is uncertain whether the obligations under the export contract and the countertrade agreement would be considered independent, it is advisable that the independence of the obligations be clearly expressed in the countertrade agreement.

18. The parties may wish to establish, by express contract clauses, an interrelationship between particular obligations arising out of the export contract and out of the countertrade agreement, while keeping other obligations independent. The parties may, for example, agree that refusal to take delivery under the export contract or termination of the export contract permits the exporter to terminate the countertrade agreement, and that non-fulfilment of the countertrade commitment by the counter-importer entitles the counter-exporter to deduct an agreed amount as liquidated damages or penalty from payments due under the export contract. Further discussion on the question of interdependence is found in chapter XIII.

(b) Countertrade agreement concluded prior to conclusion of definite supply contracts

19. The conclusion of a countertrade agreement may be the first step in the transaction prior to the conclusion of any definite supply contracts in either direction. The aim of the countertrade agreement in such a case is to express the commitment of the parties to conclude supply contracts in the two directions and to establish procedures for concluding and implementing those contracts. In order to achieve the envisaged level of shipments in the two directions, it is advisable that the countertrade agreement be as definite as possible concerning the terms of the contracts to be concluded in the two directions (for a discussion on negotiation procedures and on definiteness of the countertrade agreement see below, paragraphs 39 to 61). The parties may also wish to establish mechanisms for monitoring and recording the level of trade and to provide sanctions for a failure to fulfil the countertrade commitment. The need for such sanctions may be diminished if the parties agree that their countervailing claims for payment for the shipments in each direction will be set off rather than paid for individually (see chapter IX, "Payment", paragraphs ___ to ___). Such a payment mechanism would provide an incentive to both parties to order goods from each other and thereby attain the level of trade envisaged in the countertrade agreement. The incentive is derived from the fact that a party who has shipped goods and holds a trade surplus will be stimulated to order goods from the other party in order to be compensated for its own deliveries. These and other issues that the parties may wish to address in a countertrade agreement entered into prior to the conclusion of any supply contract are set out below in paragraphs 22 to 33.

(c) Export contract, counter-export contract and countertrade agreement concluded simultaneously

20. When the parties simultaneously conclude a contract for the supply of goods in one direction and another contract for the supply of goods in the other direction, and there is no indication in the contracts that there is a relationship between them, the contracts would appear on their face to be independent of one another even if one party or both parties regarded the

conclusion of one contract as a condition for the conclusion of the other contract. When, however, the parties wish to give contractual effect to an intention that the conclusion of one contract be conditioned upon the conclusion of the other, i.e. when they wish to structure the contracts in the two directions as a countertrade transaction, the parties should conclude a countertrade agreement expressing that relationship.

21. This contracting approach raises a limited number of issues since it does not involve a countertrade commitment. The main issue in this contracting approach is the manner in which the obligations of the parties with respect to the shipments in the two directions are to be linked by provisions in the countertrade agreement. There is no need to deal in the countertrade agreement with various issues related to the fulfilment of the countertrade commitment (in particular the type, quality, quantity or price of the countertrade goods, time schedules of fulfilment of countertrade commitment, security of performance or liquidated damages or penalties supporting the countertrade commitment). The issues that the parties may wish to address in a countertrade agreement concluded simultaneously with the definite supply contracts in the two directions are set out below in paragraphs 34 to 36.

B. Contents of countertrade agreement

1. Countertrade agreement with countertrade commitment

22. Countertrade commitment. The essential feature of a countertrade commitment is a stipulation by which the parties undertake to negotiate in order to conclude one or more supply contracts. In order to add definiteness to the commitment and to increase the likelihood of its fulfilment, parties often include in the countertrade agreement provisions concerning terms of the anticipated contract, negotiation procedures designed to facilitate fulfilment of the countertrade commitment, sanctions for the failure to conclude the contract, and other provisions to ensure the proper carrying out of the countertrade transaction. Negotiation procedures and means for providing definiteness to the commitment are discussed in paragraphs 37 to 61. Other types of clauses that parties may wish to consider including in a countertrade agreement are enumerated below (paragraphs 23 to 33) and elaborated in the following chapters of the legal guide.

23. Type, quality and quantity of goods. In order for the countertrade commitment to be meaningful, it is particularly important that the countertrade agreement be as specific as possible as to the type, quality and quantity of the countertrade goods. Clauses in the countertrade agreement addressing these issues are discussed in chapter V.

24. Pricing of goods. Since the parties are often not in a position to set the price of the countertrade goods at the time the countertrade agreement is concluded, they may establish guidelines and procedures for setting the price at a later date. Such provisions help to prevent delays in the conclusion of supply contracts and provide pricing flexibility in long-term countertrade transactions. Issues relating to pricing clauses are addressed in chapter VI.

25. Fulfilment of countertrade commitment. A basic question to be addressed in the countertrade agreement is the length of time to be allowed for fulfilment of the countertrade commitment. In some cases, the parties establish mechanisms for monitoring and recording fulfilment of the countertrade commitment. Chapter VII discusses provisions relating both to the length of the fulfilment period and to monitoring and recording mechanisms.

26. Participation of third persons. The parties may wish to involve third persons, either as suppliers or purchasers, or both, of countertrade goods. In such cases the countertrade agreement may contain provisions concerning participation by third persons. Those provisions could determine the manner in which the third persons would be selected and the legal effect of the involvement of third persons on the obligations undertaken by the parties to the countertrade agreement. Issues to be dealt with in the countertrade agreement relating to participation of third persons are discussed in chapter VIII.

27. Payment. When payments for the shipments in each direction are kept independent, no payment issues specific to countertrade are raised. However, when the parties wish to link the payments for the shipments in the two directions so that the proceeds of the contract in one direction are used to pay for the contract in the other direction, they would have to include in the countertrade agreement provisions on the manner in which payment is to be linked. A discussion of contractual aspects of various types of linked payment mechanisms is found in chapter IX.

28. Restrictions on resale of goods. The freedom of a party to resell goods purchased in a countertrade transaction may sometimes be restricted by contractual agreement between the supplier and the purchaser of the goods. The purchaser may be restricted as to the territory of resale, as well as to the terms of resale (e.g., resale price or packaging). Clauses in the countertrade agreement concerning such restrictions are discussed in chapter X.

29. Liquidated damages and penalties. In order to limit disagreements as to the extent of damages resulting from a breach of the countertrade commitment, the countertrade agreement may stipulate a sum of money due from a party upon failure to fulfil the commitment to purchase or make available countertrade goods. The use of such clauses in a countertrade agreement is addressed in chapter XI.

30. Security for performance. The parties may use guarantees to support fulfilment of the countertrade commitment, as well as the proper performance of individual supply contracts concluded pursuant to the countertrade commitment. The use of guarantees to support the fulfilment of the countertrade commitment, or the obligation to pay under a liquidated damages or penalty clause, raises issues to be addressed in the countertrade agreement. In transactions in which the parties limit payments in cash by exchanging goods for goods or setting off countervailing payment claims, the countertrade agreement may stipulate the use of guarantees to cover liquidation of an imbalance in the flow of trade. Issues to be addressed in the countertrade agreement when the parties wish to use guarantees to support fulfilment of the countertrade commitment and liquidation of an imbalance in trade are discussed in chapter XII.

31. Interdependence of obligations. The parties may wish to address in the countertrade agreement the question of the interdependence of their obligations pertaining to the shipments in one direction with their obligations pertaining to the shipment in the other direction. This question becomes relevant when a difficulty arises in the conclusion or performance of a supply contract. Provisions of this type are examined in chapter XIII.

32. Choice of law. The parties may wish to agree upon the law to be applied to the countertrade agreement or to the supply contracts. Provisions of this nature are discussed in chapter XIV.

33. Settlement of disputes. Chapter XV examines issues to be considered in preparing dispute settlement clauses for countertrade agreements.

2. Countertrade agreement without countertrade commitment

34. When the parties simultaneously conclude separate contracts for the entire supply of goods in the two directions, there is no need for a countertrade agreement containing either a countertrade commitment to conclude future contracts, or clauses on the type, quality, quantity or price of the goods, liquidated damages or penalties to be paid for failure to conclude supply contracts, or guarantees to support the countertrade commitment.

35. The primary purpose of the countertrade agreement in this case would be to establish a link between the contracts in the two directions, namely, that the conclusion of a contract in one direction is conditioned upon the conclusion of a contract in the other direction. The countertrade agreement may provide that a problem in the performance of one contract would have an effect on the obligation to perform the contractual obligations in the other direction (clauses establishing a link of this type are discussed in chapter XIII). The parties may also establish a link between the contracts by structuring payment for the two contracts in such a way that the proceeds of the shipment in one direction would be used to pay for the shipment in the other direction. Linked payment mechanisms of this type are discussed in chapter IX.

36. In addition, the countertrade agreement may address issues such as restrictions on the resale of countertrade goods (chapter X), participation of third persons in the countertrade transaction (chapter VIII), choice of law (chapter XIV) and settlement of disputes (chapter XV).

C. Countertrade commitment

37. The degree to which the parties commit themselves to enter into a supply contract may range from a commitment to exercise "best efforts" to conclude a supply contract to a firm commitment to enter into a supply contract. Under a "best efforts" commitment, also referred to as "serious intention", the commitment of the parties is limited to negotiating in good faith, and the parties retain the discretion to refuse all contract offers that they consider unacceptable.

38. If the parties wish to increase the likelihood that a supply contract will be concluded, they should include in the countertrade agreement procedures to be followed in their negotiations (see paragraphs 39 to 42,

below) and clauses setting out, as definitely as possible, the terms of the future contract (paragraphs 43 to 61).

1. Negotiation procedures

39. Countertrade agreements may set forth with varying degrees of procedural detail the manner in which negotiations are to be carried out. Specifying the negotiation procedures increases the probability that the negotiations will lead to a successful outcome. This would be particularly true where the nature of the negotiations is likely to be complicated, either because of the subject matter of the eventual contracts or because of the number of persons who might be involved in those negotiations.

40. At a minimum, the countertrade agreement might provide that a party would be obligated to respond to contract proposals by the other party. More specific procedures would address issues such as: the party who is to submit a contract offer; questions to be covered by a contract offer; time periods for submitting it; the form, means or frequency of communication; the time period for reply; the time within which an agreement must be reached, and beyond which negotiations will be deemed to have failed. Furthermore, the parties may provide that in certain circumstances a party would be relieved of the duty to negotiate (e.g., when that party has made an offer meeting the agreed conditions and it has not been accepted, or, if the other party was to make the offer, when no such offer has been made).

41. The stipulation of negotiation procedures such as those mentioned in the previous paragraph may also increase the possibility that a party who has not negotiated in good faith could be held responsible for the failure to conclude a contract. Such procedures could enable an aggrieved party to demonstrate, for example, that the other party refused to negotiate, imposed conditions to negotiate that the party could not properly impose, used unfair dilatory tactics, reopened discussion on issues already agreed upon, negotiated with other parties when it was improper to do so, or prematurely broke off negotiations.

42. However, procedural stipulations alone do not ensure that negotiations will be successful or that a party interested in the conclusion of the contract will be able to obtain relief in the event the negotiations do not succeed. A party who refuses to enter into a contract can avoid liability by showing adherence to the negotiation procedures. The most effective way to increase the likelihood of succeeding in the negotiations and of having a basis for obtaining relief in the event the negotiations fail, would be to increase the definiteness of the countertrade commitment. This would be done by stipulating in the countertrade agreement, to the degree possible, the terms of the future contract.

2. Providing definiteness to countertrade commitment

(a) General remarks

43. Commitments to enter into supply contracts often do not stipulate in a definite manner the terms of the contracts to be concluded. Frequently the parties do not know the type of goods that will be the subject of the future supply contracts or what the terms of delivery will be. Even if the parties might be able to set out in the countertrade agreement terms of the future

supply contract, they sometimes forego doing so because they expect each party to live up to the commitment to conclude a future contract, though the terms of that contract may not be defined in great detail in the countertrade agreement.

44. A lack of definiteness may result in delays or uncertainties in negotiating a supply contract in view of the potentially broad scope of the negotiations. Furthermore, it may be difficult to establish whether a party who has refused a contract offer is in breach of the countertrade commitment.

45. Sometimes the parties are not in a position to be more definite about the terms of the anticipated supply contract than to provide that the contract terms should be fair or in accordance with the prevailing market conditions. Such provisions may be helpful when countertrade goods of a standard quality are agreed upon, thereby enabling a fair price to be ascertained. If, however, the type of countertrade goods is not settled or if the countertrade goods are products that do not have a standard price, such a "fair terms" commitment may not substantially enhance the position of the party interested in the conclusion of the contract. In such cases opinions may differ as to what contract terms are fair, thereby protracting the negotiations and making uncertain the success of a claim against the party refusing to conclude the contract.

46. Terms of a future supply contract may be specified in the countertrade agreement, or the countertrade agreement may provide guidelines for settling terms of the future contract. As the countertrade agreement becomes more definite with respect to the terms essential for the existence of an enforceable contract, the agreement approaches the point at which the parties have settled all the terms of the supply contract and postponed only the act of signing the contract.

47. Many legal systems contain rules to which the parties may resort in order to provide definiteness to a contract clause. For example, numerous legal systems provide a solution when the parties have not settled the price of the goods; the solution may be, for instance, that the price should be the one "generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned" (article 55 of the United Nations Convention on Contracts for the International Sale of Goods). Another example may be the rule on the quality of the goods to be delivered under the contract when the contract has not settled that issue; the rule in article 35(2)(a) of the above-mentioned Convention is that the goods should be "fit for the purposes for which goods of the same description would ordinarily be used". In some legal systems the parties may, within certain limits, resort to a court for the purpose of determining such a contract element. In other legal systems, however, the courts are not competent to intervene in this manner in a contractual relationship.

48. Although such means for contract supplementation exist in many legal systems, they normally do not provide a solution in all cases of indefiniteness. The contract elements left indefinite in the countertrade agreement may not lend themselves to being made definite by reference to the applicable law. For example, if the parties have not agreed on the type of goods to be counter-exported, it would probably be impossible to determine the type on the basis of the applicable law. Where the type of goods has been settled, the criteria provided in the applicable law concerning the price of

the goods may not lead to a clear solution. Furthermore, such contract supplementation is subject to uncertainty arising out of divergencies among legal systems as to the techniques of supplementation, the role of the courts, the arbitral tribunal, or the parties in determining the missing term, or as to the judicial control over the result of the supplementation. In any case, reliance on such means for contract supplementation tends to be more useful for purposes of dispute resolution than it is for contract implementation. As a result, the parties may wish to consider the contractual means discussed below for providing definiteness to a contract term left open in the countertrade agreement.

(b) Contractual means of providing definiteness

49. The terms that are often left indefinite in the countertrade agreement and with respect to which contractual means for completing indefinite terms may be particularly useful are the type, quality, price and quantity of the countertrade goods. The contractual means that the parties may consider for completing any one or more of those terms are discussed in a general manner in subsections (i) through (iii) below. In other parts of the legal guide, these contractual means will be referred to in specific contexts.

(i) Standards or guidelines

50. The parties may wish to provide standards or guidelines to be used in determining particular contract terms. The use of a standard would allow the parties to determine a contract term by computation or by some other objective method not dependent upon the discretion of the parties. Examples of such standards include a formula, tariff, quotation, rate, index, statistic, or some other criterion not influenced by the will of either party. For example, the price of the countertrade goods may be determined by reference to the price at which goods of the same type are sold in a particular market or exchange, or the quality of the countertrade goods may be defined by reference to a particular national or international quality standard. Many legal systems recognize as valid a provision that the price or other contract term should be determined by reference to a standard.

51. Guidelines, on the other hand, set parameters within which a contract term is to be determined and involve a degree of latitude in arriving at a contract term. For example, the countertrade agreement may set a range within which the parties are to negotiate the price or it may be agreed that the price must be "reasonable". If the type of goods has not been determined, the parties may agree on a list of goods on which the negotiations should focus or to which it should be limited (such lists are discussed in chapter V, "Type, quality and quantity of goods"). As to other terms of the future contract, such as delivery, the parties may agree that the supply contract should be negotiated on the basis of prevailing market conditions. Where reference is made to market conditions, it is advisable that the parties refer to a specific market.

52. Because of the discretion left to the parties, the inclusion of a guideline in the countertrade agreement for a particular term in the future contract does not ensure the finalization of that term. Nevertheless, a narrow range within which agreement should have been achieved, or clear guidelines limiting the latitude available to the negotiators, will not only

make it more likely that a contract will be concluded but will also make it easier to show that a party refusing a given contract offer is in breach of the countertrade commitment.

(ii) Determination of contract term by third person

53. Sometimes the parties agree that a particular contract term will be determined by a third person. While such an approach provides a high degree of certainty that the term will be made definite, its infrequent use may be attributable to a reluctance by parties to relinquish their control over a contract term. When such a method is used, it is usually to determine the price of goods (see chapter VI, paragraphs ___ to ___). The parties might be willing to agree on such a method of determining a contract term if clear guidelines are established within which the third person is to decide or if the third-person intervention is the last resort after other agreed mechanisms (e.g., negotiation, application of an agreed standard) have failed. If the parties do not wish to entrust the decision on a contract term to a third person, but still want the benefit of the opinion of a third person, it may be agreed that the determination by the third person will only be a recommendation.

54. A number of legal systems recognize the right of the parties to entrust a third person with determining a contract term. In particular, reference by the parties to a third person for the determination of the price is a question frequently addressed in legal systems. There are, however, variations among the systems. For example, while some legal systems recognize that an arbitral tribunal or even a court may be entrusted with the determination of a contract term, others permit such a determination only if it is not performed as part of arbitral or judicial proceedings. Legal systems also differ as to the consequences of a failure by the parties to agree on the third person or of a failure by the third person to act. Under some legal systems, the parties would have no recourse to a procedure for designating or replacing the person, and would have to accept the consequences of the contract term being left undetermined. In other systems, if the third person was to determine the price, the case may be treated as if the parties had agreed on a reasonable price. There are also differing approaches to the availability and extent of judicial review of a decision by a third person.

55. The issues that the parties may wish to address in a stipulation empowering a third person to determine a contract term are enumerated below.

56. Person to request determination of term. The parties may wish to address the question whether, at the time when the parties fail to agree on the term, either party would be entitled to request the third person to determine the term or whether the third person may act only upon the request of both parties.

57. The identity of the third person or the appointment procedure. The parties may wish to name in the countertrade agreement the person who is to determine the contract term. In this case, the parties may also wish to provide an appointment procedure to be used in the event that the named person fails to act or is unable to act. If the parties do not wish to name the person who is to determine the contract term, it may be advisable for the parties to agree that they will appoint the third person at such time as they are unable themselves to reach agreement on the contract term. In such a case

the parties may wish to agree on an appointment procedure, which is to become operative if the parties cannot reach agreement on the appointment of the third person.

58. Guidelines or standards to be observed by third person. The parties are advised to delimit the mandate of the third person by providing guidelines or standards to be observed in determining the contract term. Such guidelines and standards are discussed generally above, paragraphs 50 to 52, and, as to price, in chapter VI, "Pricing of goods", paragraphs ___ to ___.

59. Nature of decision of third person. The parties may agree that the decision by the third person would be binding as a contractual stipulation of the parties. Another approach may be to provide that the determination of the third person would be treated as a recommendation to be considered by the parties in good faith.

60. Procedure for challenging decision by the third person. In some situations, for example, where the binding determination by the third person involves a question of particular economic significance, the parties might wish to provide an opportunity for the decision to be challenged by resort to another person, a panel of persons, or an institution. As to the nature of the decision on the challenge, it may be provided that the decision would bind the parties or only be a recommendation. The parties may wish to stipulate the mandate that would be given to the person deciding on the challenge (i.e., to uphold or reject the challenge, or to modify the challenged decision). The parties may wish to indicate how, in the event the challenged decision is set aside, the decision on the contract term is to be made (e.g., by the parties themselves or by the same or a different third person).

(iii) Determination of contract term by contract party

61. Sometimes the countertrade agreement leaves the determination of a contract term to one of the parties to the countertrade agreement. If such an approach is contemplated, the parties should take into account the restrictions legal systems provide concerning the validity of clauses empowering a party to the contract to determine a term of the contract. Generally, an arbitrary right given to one of the parties to determine a contract term is unenforceable. If the subject of the determination is the price, a number of systems would recognize such a right given to a party if its exercise is limited by such standards as reasonableness, good faith or fairness. Some of these systems would construe ambiguous agreements as implying a reference to such a standard. Other legal systems require the freedom to determine the price to be limited by a more definite standard.