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Bartering with the Bolsheviks: A Guide to Countertrading with the Soviet Union

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Bartering with the Bolsheviks: A Guide to Countertrading with the Soviet Union

I. Introduction

Countertrade has been an integral part of modern international trade since its inception after World War I when the Germans used it to help their economy recover and prosper. It flourished after World War II when the Soviet Union and the Eastern Bloc countries used countertrade to avoid political and economic restrictions on East-West trade. Today, as many as eighty-eight countries, including the Soviet Union, request or require countertrade before buying from exporters. This expanded use of countertrade by foreign nations increases the likelihood that United States companies looking to expand their product market to nonmarket economies, including the Soviet Union, will experience countertrade demands in some form.

The United States became actively involved in countertrade in 1950 when the Department of Agriculture began a barter program to export surplus agricultural goods to other countries. The United States Government still trades surplus agricultural goods through countertrade. In recent years, however, American multinational corporations such as PepsiCo Incorporated, Coca-Cola Company, McDonald's, General Electric, and Goodyear Corporation have also be-

1. There are many different types of countertrade. The types most commonly used are:
   A. Barter—the exchange of goods or services of equal value under a single contract.
   B. Counterpurchase— the linkage of a sales transaction for the export of goods, technology, or services with reciprocal purchases of products from the purchaser's country. This type of countertrade is the most prevalent, especially in East-West trade.
   C. Compensation or buy-back arrangement— the sale of technical equipment or a plant with a contractual commitment on the part of the seller to purchase a certain quantity of products that are produced by or derived from the original sale.


3. Lochner, supra note 2, at 734.


5. Lochner, supra note 2, at 732.

6. Id. at 745.
come involved in countertrade. Though countertrade transactions are on the rise, it is difficult to determine the effect it has had on United States trade because the exact dollar value of all countertrade transactions is unknown. This difficulty occurs for two primary reasons. First, United States companies are not required to report information on countertrade agreements to the United States Government since these contracts are viewed as propriety information. Second, many United States companies sell their reciprocal purchases to other countries before those goods enter the United States; therefore, the goods are not subject to United States import laws.

The Soviet Union engages in more countertrade agreements than all other Eastern European countries combined. Countertrade has many advantages for the Soviet Union. First, it establishes channels through which the Soviet Union can sell products that it is unable to sell through normal channels of foreign trade because of the limited marketability in the world economy for Soviet products. Second, countertrade guarantees that Soviet expenditures of hard currency for imported products are offset by hard currency earnings for its exports. This allows the Soviet Union to minimize the outlay of its scarce reserves of hard currency for its necessary imports. Third, countertrade presents the Soviet Union with the opportunity to upgrade the manufacturing capabilities of its factories.

It is conceivable that in the near future small and medium sized businesses in the United States will enter into countertrade agreements with the Soviet Union in their search for increased sales and market share. This Comment will examine the decisions these busi-
nesses must make in determining whether to enter into countertrade agreements with the Soviet Union. It will discuss typical countertrade contracts and what provisions a United States business should negotiate for. It will then discuss the relevant laws on countertrade in the United States and in the Soviet Union.

II. Advantages of Countertrade for United States Companies

There are a variety of incentives for an American company to enter into countertrade agreements with the Soviet Union. First, countertrade allows a company to take advantage of sales opportunities in the Soviet Union. A company can sell its products to a large and demanding market without the competition that it would normally have in the United States. If a company can establish itself as a reliable trading partner, it can gain an edge with the Soviet people as well as the Soviet government, who will be reluctant to enter into trade agreements with competitors of the American corporations. Also, by being the first company in a field to countertrade with the Soviet Union, the company can negotiate exclusive marketing rights in specific geographic areas for the goods that it exports.

Second, an American company will gain a long-term, reliable means of conducting international trade because that may be the only way to open up new markets and gain competitive entry into certain countries. Kendall, Toward the Elements of a New Trade Policy, Forum on US-Soviet Trade Relations, March 20, 1986, at 2. Some small entrepreneurs have already started countertrading with the Soviet Union. They have been exporting and importing items such as woolens, fashions, watches, and cars. A small recording studio has also exported its recording technologies and has built a recording studio in the Soviet Union in return for selling those recordings in the United States. The small entrepreneurs believe that to countertrade with the Soviet Union, a small business has to have a long-term trade outlook and not a short-term trade outlook. Adam Smith's Money World (PBS television broadcast, November 19, 1989) (transcript on file at Dickinson School of Law Library).

14. L. WELT, COUNTERTRADE: BUSINESS PRACTICES FOR TODAY'S WORLD MARKET 28 (1982) [hereinafter L. WELT]. Goodyear Corporation uses countertrade as a sales tool to obtain foreign trade contracts. "We trade our tires for minerals, textiles, agricultural products, almost anything. If we don't, they'll get [tires] from somebody else." Martin & Ricks, supra note 7, at 1, col. 6.

15. The Soviet Union is known to be loyal to international companies that do business in the Soviet Union over a period of time. Adam Smith's Money World, supra note 13. Therefore, many companies use countertrade to enhance their reliability so they will have an advantage in later bargaining transaction against their competitors. Coca Cola Corporation helped construct a whey-protein plant in the Soviet Union for good will in order to enhance their corporate reliability and to gain an edge with the Soviet Government for future trade endeavors. General Electric also uses countertrade as a way to enhance its reputation for reliability in foreign markets. Martin & Ricks, supra note 7, at 1, col. 6.

16. P. VERZARIU, supra note 11, at 17-18. One company that has been successful at countertrade with the Soviet Union has been the PepsiCo Corporation. PepsiCo began countertrading with the Soviet Union in 1972. It was the first foreign consumer product to be sold in the Soviet Union. Since 1972, sales of Pepsi-Cola have reached over one billion servings a year in the Soviet Union. In the United States, sales of Stolichnaya vodka have grown over 800% since 1972 and are approaching one million cases annually. It is the largest selling imported vodka in America. In 1986, a new contract was signed between the two parties that represents more than two billion dollars in retail sales of Pepsi-Cola and Stolichnaya Russian vodka. Press Releases, PepsiCo, Incorporated.
source of materials at a low price.\textsuperscript{17} Raw materials, component parts, and finished products may be cheaper to purchase from the Soviet Union than from companies in the United States because of lower labor and transportation costs in the Soviet Union.\textsuperscript{18} By trading with the Soviet Union for these materials, a company can lower the production costs for its goods, pass the savings along to consumers by decreasing the cost of its products, and gain an advantage against its competitors.

Third, by entering into countertrade agreements, a company may take advantage of United States tax and tariff laws. Since a company does not have to report details of its countertrade agreement to the United States government, a company can understate the nominal worth of the transaction, thus enabling it to pay less in tariff fees and taxes.\textsuperscript{19} Also, countertrade imports are exempt from import quotas and import prohibitions.\textsuperscript{20} This exemption allows a company to import products through countertrade that it might not have been able to do through regular trade.

The fourth advantage of countertrade is that it can be used to retrieve funds from a country that has blocked the exit of dollars or other hard currency from its borders. Nations whose monetary systems are not exchangeable on the open market try to use scarce dollars and other hard currencies only to pay interest on foreign debt or to buy specific imports. There is not enough hard currency in those countries to allow foreign companies to exchange profits made in their currency for dollars and then take them out of their borders. Therefore, countries such as the Soviet Union will prevent a company from purchasing hard currency or investing its capital by enacting exchange controls to regulate purchases and holdings of foreign currency within their borders.\textsuperscript{21} Because these controls do not allow a company to invest its money where it can earn the highest return, the investments are not as valuable as they could be. Countertrade allows a company to reinvest the country’s own currency into a product made in that country and to resell it in another country where hard currency can be obtained. By entering a countertrade agreement, a company can thus alleviate the devaluing of its

\begin{enumerate}
\item \textsuperscript{17} L. Welt, supra note 14, at 28.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Kostecki, Should One Countertrade, 21 J. World Trade L. 7, 20 (1987).
\item \textsuperscript{21} Sesit, Funds Blocked Abroad by Exchange Controls Plague Big Companies, Wall St. J., Dec. 3, 1984, at 1, col. 6. To get around these controls, PepsiCo, Inc. reinvests its profits from the sales of Pepsi-Cola in the Soviet Union to building new bottling plants in the Soviet Union. It has already built twenty-two bottling plants in the Soviet Union and twenty-eight more are in the process of being built. PepsiCo has also contracted to build two Pizza Huts in the Soviet Union. It also purchases Soviet battleships with their profits and sells them to the West. Adam Smith’s Money World, supra note 13.
\end{enumerate}
investment.

III. Disadvantages of Countertrade

A company should be aware that there are disadvantages involving countertrade transactions with the Soviet Union as well as advantages. These disadvantages may be alleviated through appropriate provisions in the countertrade contract; however, they should be evaluated by a company before deciding to enter into a countertrade agreement. The major disadvantage of countertrade is that a company will have an insufficient number of desirable products to choose from to purchase for their reciprocal obligation.\textsuperscript{22} During countertrade negotiations, a company will receive a list of goods that can be purchased through countertrade arrangements. On that list will be products that the Soviet Union cannot sell through normal trade channels because of their low quality or because of the lack of demand for those goods.\textsuperscript{23}

The product range offered for export through countertrade obligations changes regularly. It includes those products that the Ministry of Foreign Trade allocated for countertrade arrangements and those products that did not meet their export quota for the year. The Ministry of Foreign Trade determines the quota for each product by taking into consideration the products distributed through previous commitments, the marketability of the products on export markets, and the trade balance for the year.\textsuperscript{24} It gives these quotas to the foreign trade association with a list of those goods that are to be sold through normal trade channels and a list of those products which will be sold through countertrade transactions.\textsuperscript{25} If in the latter part of the year, the foreign trade association does not expect to meet the quotas on certain products originally sold through regular export trade, it may make those products available for purchase under countertrade agreements.\textsuperscript{26}

Since there is little demand for the Soviet products used in countertrade negotiations, a company may find the products unmarketable in the United States, forcing a company to either sell to another market or lose money. An example of a countertrade transaction which resulted in a disaster for a company was the agreement

\begin{itemize}
\item \textsuperscript{22} P. Verzariu, supra note 11, at 68.
\item \textsuperscript{23} Since these goods cannot be used to generate hard currency through direct sales, they are offered in countertrade agreements as a means of disposing them at prices they would not sell for in the world market. Countertrade allows the Soviet Union to gain access to new markets for their products by using an American company's expertise in marketing and advertising to sell its goods for them. L. Welt, supra note 14, at 28.
\item \textsuperscript{24} P. Verzariu, supra note 11, at 35.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\end{itemize}
between Control Data Corporation and the Soviet Union. Control Data sold computers to the Soviet Union in exchange for Soviet Christmas cards; however, Control Data found it difficult to sell religious Christmas cards marked "Made in the U.S.S.R." to consumers in the United States. The transaction resulted in a loss for Control Data.

Another problem with countertrade is the issue of products liability. At this time, there is no applicable law to determine who will be liable for injuries occurring from the defects in products defectively made by the Soviet Union but sold by a United States company. Nor is there case law or legislation that establishes that if a company is found liable under product liability it would be compensated by the government of the Soviet Union.

Other problems involved in countertrading with the Soviet Union are after-sales service and timely deliveries by the Soviet Union. A company will have to be prepared to conduct any after-sales service that may be needed on the products. It also has to be prepared for untimely deliveries since the Soviet Union has been known to be unpunctual with export deliveries.

IV. The United States Government's Interpretation of Countertrade

Though countertrade is legal in the United States, the United States Government opposes countertrade because it believes that countertrade is economically inefficient, both to companies and to the United States economy. It is the United States Government's view that countertrade is advantageous to a company in the short run because it increases a company's market share and profits. It believes it to be detrimental to a company in the long run, however, because countertrade decreases a company's profits and hinders its ability to compete in the future because of the substandard products the company receives through countertrade and the costs that it incurs to market and sell these products.

The United States Government maintains that countertrade is detrimental to the United States economy because it impedes the free flow of trade and investment. The Office of the United States Trade Representative has described the government's view on

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27. Martin & Ricks, supra note 7, at 1, col. 6.
28. P. Verzariu, supra note 11, at 69.
29. Senator Bill Bradley of New Jersey agrees with the Government's interpretation of countertrade. He believes that countertrade is not a viable trading tool; however, if a company wishes to enter into countertrade, it should enter slowly and carefully. Adam Smith's Money World, supra note 13.
30. U.S. Countertrade Policy, supra note 1, at 125.
31. Id.
countertrade as being contrary to an open, free-trading system and inconsistent with non-discrimination principles. The government is also concerned about the potential for tax evasion during countertrade transactions. Since there is more than one currency used and there is mutual buying and selling of products in countertrade agreements, a company can underestimate the nominal worth of the transaction without the United States Government ever learning the true value of the agreement.

Although the United States Government does not endorse countertrade, it will not oppose the participation of American companies in countertrade agreements. The American economic system is based on a laissez-faire theory which asserts that government should intervene as little as possible in private company contracts including foreign trade contracts. Government officials believe that countertrade will play a significant role in world trade in the future; therefore, they do not want to stand in the way of a company that wishes to use countertrade as a bargaining tool in a contract with another country. The Government will only interfere when it believes that the transaction will have a negative impact on national security.

V. Determining if a Company is Prepared to Engage in Countertrade

Companies that are successful at executing profitable countertrade transactions are generally those companies that have broad international trade experience and those with the commitment and the resources to execute a long-term countertrade agreement. A company with these assets is able to anticipate potential problems and safeguard against them. Before a company decides to engage in countertrade then, it should evaluate its resources and determine those which are beneficial to a countertrade agreement. A company should assess its capacity to handle the countertrade products, its capital availabilities, and its personnel. A company should also weigh the benefits of increased sales in a virgin market against the costs—both in time and money—associated with marketing a new

32. Lochner, supra note 2, at 743.
33. Id.
34. Id. at 749.
35. Id. at 742.
36. Id. at 737.
37. Martin & Ricks, supra note 7, at 1 col. 6.
38. Lochner, supra note 2, at 749.
39. Id. at 751.
40. Id.
41. P. Verzariu, supra note 11, at 50.
product, one in which they may not be familiar with selling.\textsuperscript{42}

A company should consider the added cost of marketing and advertising these goods before entering into a countertrade agreement, especially if these goods have a reputation of not being profitable exports. A company should also consider the additional costs of hiring marketing consultants or of starting a separate entity to distribute the product if the company has to sell an unfamiliar item. If, after the evaluation, a company still desires to engage in countertrade, it must decide if it wants to transfer its countertrade obligations to a third party, usually a trading house, and let that party sell the exported product, or if it would like to market the product itself.\textsuperscript{43} Transferring the obligations to a trading house allows a company to engage in countertrade without having to delegate a substantial amount of company time and money towards marketing a product with which it may not be familiar.

VI. Countertrade Laws of the Soviet Union

A company will increase its chances of being successful at countertrade with the Soviet Union by learning as much as possible about Soviet countertrade rules and requirements before entering into negotiations with the Soviet Government.\textsuperscript{44} At this time, the Soviet Union has no laws or regulations on record that discuss countertrade. However, that does not mean that none exist. These regulations may be confidential. The Soviet Government may not want other countries to know their countertrade policy and, therefore, have not had it printed for public record. Moreover, there may be laws and regulations on countertrade of which only the Ministry of Foreign Trade\textsuperscript{45} is aware. Since such laws in the Soviet Union change regularly, it would be difficult for a United States company to determine which regulations are in effect at the particular time it is negotiating a countertrade transaction with the Soviet Union unless that company researches the laws of the Soviet Union just prior to and during negotiations.

On the outside, therefore, the theory of countertrade in the Soviet Union resembles the theory of countertrade in the United States: countertrade is a private contract between two private parties and not subject to the interference of the Government. It seems improbable, however, that the Soviet Government is not involved at all in countertrade transactions since all trade in the Soviet Union is

\textsuperscript{42}Id. at 49.
\textsuperscript{43}Id. at 55.
\textsuperscript{44}Lochner, supra note 2, at 751.
\textsuperscript{45}The Ministry of Foreign Trade is the Soviet foreign trade organization. See infra notes 50-52, and accompanying text.
presently nationalized. All purchases and sales of any type of product with foreign states and individual foreign trade enterprises are made in the name of the Russian Republic. All other import and export trade transactions are prohibited. This monopoly on foreign trade has been maintained in each series of Soviet Constitutions.

Foreign trade for the Soviet Union is conducted through the Ministry of Foreign Trade. This Ministry is responsible for assisting in the preparation of export and import plans and drafting and negotiating inter-governmental trade agreements. The Ministry is separated into more than fifty different divisions, or foreign trade associations. Each foreign trade association specializes in a particular good, type of activity, or geographic area.

A principal task of the foreign trade associations is to undertake import and export operations in accordance with the Soviet Union's economic and social development plans. The Soviet Government allocates products which it wants to export and the associations enter into contracts to export those items. The associations have the power to create new forms of foreign economic ties to export these goods and to enter into any type of legal transaction. Although foreign trade associations are granted these powers and allotted those products by the Soviet Government, only the foreign trade associations are liable to foreign entities for the trade obligations they enter into. The Soviet Government is not itself liable for the obligations of the foreign trade associations. Nor are the foreign trade associations liable for the obligations of the Soviet Government.

A. Countertrade Practices of the Soviet Union and Negotiating Tactics to Frustrate These Practices

Though the Soviet Union does not have any public-law requiring countertrade, it does have practices which an American company

46. Decree on the Nationalization of Foreign Trade, SU RSFSR I (1918). Nationalization of foreign trade may come to an end, however, under perestroika as a result of Soviet Premier Mikhail Gorbachev's efforts to reform Soviet trading regulations to make them more favorable toward privatization. Adam Smith's *Money World*, supra note 13.
47. Id.
48. Id.
50. Id. at 334.
51. Id.
52. Id. at 336.
54. Id.
55. Id.
56. Id. at Section 10.
57. Id. at Section 11.
58. Id.
59. Id.
should be aware of prior to negotiations— even in instances where an American company is negotiating for trade under what appear to be normal trade arrangements. Sometimes in the early stages of negotiations, the Soviet Union will not mention that there will be a countertrade obligation in return for the sale of the American products. Often, the foreign trade association will wait until a price for the American goods is agreed upon to discuss countertrade requirements. To prepare itself for this obligation, an American company should determine what percentage of its original sale it is willing to accept as a countertrade commitment before entering into negotiations with the Soviet Union. Additionally, a company should not quote a final price for its products until after the terms, conditions, and the product range offered for countertrade is identified.

When selecting a Soviet product to purchase through a countertrade arrangement, an American company should try to select a Soviet product that it can distribute. It should try to negotiate with the foreign trade association to have the product manufactured to the specifications of the market where the company is planning on selling the product to ensure the success of the transaction. Once the product is selected, the company must quote a final price for the original sale to the Soviet Union. The final price should include all costs which the company expects to incur from the countertrade transaction such as the cost to market, transport, and dispose of the Soviet products. Rarely will the foreign trade associations agree to a countertrade offer from the American company without long periods of negotiations. Negotiations are lengthy in countertrade agreements because foreign trade associations work under very strict guidelines. They are bound under secret governmental directives from the Ministry of Foreign Trade to extract the highest possible level of countertrade obligations from an American company. A company can offer the foreign trade association some alternatives to negotiate lower countertrade terms. It can offer an extension of the repayment on the export contract, or an extension of the performance guarantees. It can offer an expansion of training programs for Soviet personnel or an increase in support services. It can also guarantee fixed prices over the contract term; however, this alter-

60. L. Welt, supra note 14, at 26.
61. Id. at 25.
62. P. Verzariu, supra note 11, at 23.
63. L. Welt, supra note 14, at 26.
64. P. Verzariu, supra note 11, at 23.
65. Id.
66. Id.
67. Id. at 24.
68. Id.
69. Id.
native should only be used if the other alternatives fail, since fixing prices for a lengthy contract period may gravely harm a company if prices for that product sharply increase.

B. Countertrade Contracts and the Provisions that an American Company Should Demand

A countertrade contract is actually a series of three contracts. The first contract is a standard sales contract for the sale of American products to the Soviet Union. The second agreement is a contract for the purchase of Soviet goods by the American company at a later date or over a period of time. The third contract is the protocol. The protocol is the instrument in which the Soviet Union and the American company agree to enter into respective contracts to purchase the other party’s goods with hard currency.\footnote{\textit{Id.} at 27.} The protocol is usually drafted first. The Soviet Union will usually present the American company with standard form contracts\footnote{A sample counterpurchase agreement with the Soviet Union is as follows:} that it will want the American company to agree to. The American company should not accept these standardized forms as they are written, but should negotiate for added provisions and for alterations to the existing provisions.

There are many provisions that American companies should demand be included in the countertrade contract to alleviate future problems. First, there should be a provision in the contract stating the agreed value of the reciprocal purchase. The value of the reciprocal purchase is usually expressed as a percentage of the value of the American export contract\footnote{\textit{Id.} at 27.}. This provision should also include the trade organizations from which the goods must be purchased and the

\footnote{\textit{L. Welt, supra} note 14, at 32.}
time period during which the reciprocal purchase must be made.\textsuperscript{73} A company should negotiate for a lengthy time limit to purchase the Soviet products so that it can locate customers before purchasing the goods. By having the time to locate customers, a company will reduce its storage costs.\textsuperscript{74}

Second, a provision listing the products an American company can choose to purchase should be included in the contract. Those goods should be described in specific detail with a standard of quality defined and insisted upon.\textsuperscript{75} There should also be a related provision stating that goods not conforming to the specifications in the contract will not be accepted, and the American company should have the option of being released from its countertrade obligations should this problem occur.\textsuperscript{76}

Third, a provision should be included allowing the company to appoint an independent surveyor to inspect the quality of the goods either at the manufacturing plant or before shipment.\textsuperscript{77} By being able to inspect the goods before they are shipped, a company can check the quality of the goods before they enter the United States. It also allows a company to check for defects in the goods to alleviate the chance of being sued in the United States for products liability.\textsuperscript{78}

Fourth, important provisions in a countertrade contract are the stipulations that discuss the penalties to be dispersed for non-compliance or non-fulfillment of the contract. The Soviet Union usually insists on a provision that imposes a penalty on the company for non-fulfillment of its purchase obligation. This penalty is usually a percentage, approximately ten to fifteen percent, of the unfulfilled portion of the obligation.\textsuperscript{79} The American company should have a clause added to that provision stating that payment of the penalty would release the company from any further obligations under the contract.\textsuperscript{80} The Soviet Union, then, could not demand specific performance after the company pays the penalty. An American company should also include a penalty\textsuperscript{81} provision for late delivery of the goods. Since it is common for delays to occur in delivering Soviet products, a company should stipulate that a late delivery is a material breach of contract allowing the company the option of terminat-
Fifth, an important provision that should be included is the formula used to determine the price of the goods. One commonly used formula is the "acceptable international price at the time of purchase." The acceptable international price is the price paid by another American customer for the same product. Another widely used formula is the "fair market value of goods in first party's country." This formula compares Soviet products to similar products of equal quality that are available to the American company under comparable terms of delivery and payment from other foreign suppliers. The fair market value of the similar products will be the fair market value of the Soviet products. A periodic renegotiation of the price should be stipulated in the contract to anticipate increases in world market prices.

Other provisions can be included in the contract to protect the American company from future discrepancies. One is a provision allowing the company to assign its countertrade obligations to a third party. Another allows the company to market the goods without interference from the foreign trade association or allows the company to have exclusive distribution of those goods in certain markets. A company should also have a provision added into the contract that would apportion the delivery of the goods to the supply and demand of those goods in the United States. That provision would alleviate great economic loss to the company because it would not have to incur storage costs for products when there is no demand for them. There should also be an arbitration clause included in the contract stating the appropriate arbitration court and the governing law in case of a legal conflict. Finally, the contract should contain an agreement by the Soviet Union to cooperate in an investigation by the American Government on issues of antidumping or of countervailing subsidies.

82. Kennedy, supra note 77, at 55.
83. L. Welt, supra note 14, at 37.
84. Id.
85. Id.
86. Id.
88. L. Welt, supra note 14, at 38. This clause is important even when a company plans to sell the product itself since a company might want to assign the obligation to a third party in the future. For example, PepsiCo started selling Stolichnaya vodka under a subdivision of the company, PepsiCo Wines and Spirits International. In 1977, it assigned its exclusive rights to import Stolichnaya in the United States to Monsieur Henri Wines Limited. Press Release, PepsiCo, Inc.
89. L. Welt, supra note 14, at 38.
91. P. Verzariu, supra note 11, at 27.
VII. United States Laws Pertaining to Countertrade

The United States does not have any laws that specifically regulate countertrade. Nor do they distinguish between imports resulting from countertrade agreements and imports resulting from normal trade contracts. The laws which regulate normal trade and which grant relief to United States industries that have been injured from imports can be used against imports resulting from countertrade, though few cases have been brought against companies engaging in countertrade. Those laws which can be used are the Antidumping Law, the Countervailing Duty Law, the Escape Clause provision, and Section 406 of the Trade Act of 1974. While all of these laws regulate normal international trade between market economy countries such as the United States, only section 406 of the Trade Act of 1974 expressly addresses trade with nonmarket economies such as the Soviet Union.

A. Countervailing Duty Law

The Countervailing Duty Law of the Tariff Act of 1930 provides a penalty for the foreign subsidization of exports. It states that if a “country under the Agreement” or an

93. PepsiCo's president during the first countertrade agreement with the Soviet Union, Donald M. Kendall, commented on the lack of United States policy on countertrade while making his closing remarks at the Forum on US-Soviet Trade Relations. He stated, "when I think back over American trade policy toward the Soviet Union during the time I've been building PepsiCo's business over there, it's a wonder we got anything done at all." Kendall, Forum on United States-Soviet Trade Relations, supra note 13, at 2.
94. Analysis, supra note 4, at 8.
95. Id.
100. A "country under the Agreement" is defined as a country:
(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title,
(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President, or
(3) with respect to which the President determines that—
(A) there is an agreement in effect between the United States and that country which—
(i) was in force on June 19, 1979, and
(ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States,
(B) the General Agreement of Tariffs and Trade does not apply between the United States and that country, and
(C) the agreement described in subparagraph (A) does not expressly permit—
(i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by Congress, or
(ii) nondiscriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair trade practices.
organization of that country provides a subsidy with respect to the
manufacture, production, or exportation of a class or kind of mer-
chandise imported or sold for importation into the United States,
and the Commissioner determines that an industry in the United
States is or may be threatened by material injury, or an industry is
materially retarded by reason of that import or by reason of sale,
then there should be a countervailing duty equal to the amount of
the net subsidy imposed upon such merchandise.\textsuperscript{101}

The Countervailing Duty Law, section 1671, does not apply to
countertrade transactions with the Soviet Union. The Soviet Union
cannot be considered a "country under the Agreement" because it is
not a member nation of the General Agreement of Tariffs and
Trade; therefore, it is not a member of the Agreement on Subsidies
and Countervailing Measures. The Soviet Union also does not have
unconditional most-favored-nation status in the United States, and it
is unlikely that it will receive that status anytime in the near future.

Though the Soviet Union is not subject to the Countervailing
Duty Law under section 1671(b), it is subject to countervailing du-
ties under the special provision section of the Tariff Act of 1930,
section 1303(a)(1).\textsuperscript{102} Under this section, if a country or an organi-
zation in that country pays or bestows a bounty or grant upon the
manufacturer, producer, or exporter of any product manufactured or
produced in that country, a duty will be imposed upon the importa-
tion of the product into the United States equal to the net amount of
the bounty or grant. A finding of material injury to a domestic in-
dustry is not required under section 1303.

Although countertrade agreements with the Soviet Union tech-
nically fall under section 1303 of the Countervailing Duty Law, the
United States has had difficulty imposing a countervailing duty on
countertrade transactions. In order to impose a countervailing duty
on imported products from the Soviet Union, the United States has
to prove that the Soviet Union awarded a subsidy, bounty, or grant
to the United States business during their countertrade negotiations.
Determining whether that has occurred has been considered "admin-
istratively infeasible."\textsuperscript{103} The difference in economies makes it diffi-
cult for authorities in the United States to accurately determine the
actual price and cost of products traded through countertrade. There
is the difficulty of determining the exchange rate given for a ruble
since the ruble is unexchangeable in world markets. Also, there is
the difficulty of determining the cost of production for Soviet prod-

\textsuperscript{19} U.S.C.A. 1671(b).
\textsuperscript{101} 19 U.S.C.A. 1671(a).
\textsuperscript{102} 19 U.S.C.A. 1303(a)(1).
\textsuperscript{103} Zarin, supra note 92, at 261.
ucts in relation to the cost of production for American products since the economic factors that determine cost and price in a market economy are not the same factors used to determine cost in a nonmarket economy.104

B. Antidumping Law

The Antidumping Law was enacted to prevent discriminatory export pricing106—the practice of a country selling a product at a lower price in the United States than it is selling the product in its own country. The Antidumping Law states that if foreign merchandise is being or is likely to be sold in the United States at less than its foreign market value and an industry in the United States is materially injured, threatened with material injury, or materially retarded from the importation or sale of these products, an antidumping duty shall be imposed.106 The duty will be equal to the amount by which the foreign market value exceeds the price charged in the United States. The foreign market value of a product produced in a nonmarket economy is determined by the domestic price charged in a free market economy country that is comparable to the nonmarket economy country.107 If there is no information that would determine the foreign market value of the product, the foreign market value is determined by the total value of the factors of production, general expenses, profits, costs of containers, coverings, and other expenses.108

Often in countertrade agreements, the business party to the agreement will have to undersell its reciprocal products or sell the goods in the United States at a lower price than it had expected as a result of the poor quality of the products or the difficulty of selling them in the world market.109 If another American company in the industry is threatened with injury by this underselling, the company can ask the United States Government for relief by imposing an antidumping duty on those products.

The Antidumping Law, however, like most United States trade laws, is inadequate in dealing effectively with countertrade products sold in the United States at a marginal cost—a price below the average cost charged by market economy producers.110 Usually, the marginal price charged for countertrade products will not violate the

104. Potter, supra note 87, at 426.
105. U.S. Countertrade Policy, supra note 1, at 136.
107. U.S. Countertrade Policy, supra note 1, at 137.
110. Potter, supra note 87, at 422.
standards set forth in the Antidumping Law;\textsuperscript{111} therefore, no duty will be added to the cost of the product. Since the product will enter the United States economy at a cheaper price than its American competitors’ products, consumers will demand the imported products instead of the American products. To compete with these products, domestic industries have to reduce production of their products to balance their supply with the consumer’s demand for their products or reduce the prices for their products to the level charged by the imported products. Either one of these actions reduces the overall profit to domestic industries. With reduced profits, companies will not be able to keep all of their workers employed, resulting in increased unemployment in the United States.

Another inadequacy of the Antidumping Law as related to countertrade is that the underselling has to transpire for a minimum of 160 days for the law to take effect.\textsuperscript{112} This law would then be ineffective in situations where countertrade products were being sold in the United States for a lower price than its American competitors for only a short period of time. Another deficiency of this law is that it lacks a method of calculating the value of a countertrade agreement.\textsuperscript{113} Without a formula for determining the value of the contract, it is difficult to determine if dumping is occurring.

C. \textit{The Escape Clause}

The Escape Clause is used to give temporary relief to industries that are injured as a result of increased competition from imports. If a company or industry seeks relief under the Escape Clause, the company must request an investigation from the International Trade Commission. If the International Trade Commission determines that a product is being imported into the United States in such increased quantities as to be a substantial cause of serious injury\textsuperscript{114} to a United

\begin{footnotesize}
\begin{enumerate}
\item U.S. Countertrade Policy, supra note 1, at 138.
\item Zarin, supra note 92, at 256.
\item U.S. Countertrade Policy, supra note 1, at 138.
\item Under the statute, the factors applied:
\begin{enumerate}
\item (A) with respect to serious injury—
\begin{enumerate}
\item the significant idling of productive facilities in the domestic industry
\item the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit, and
\item significant unemployment or underemployment within the domestic industry.
\end{enumerate}
\item (B) with respect to the threat of serious injury—
\begin{enumerate}
\item a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment) in
\end{enumerate}
\end{enumerate}
\end{footnotesize}
States industry producing a like or directly competitive product, it will write a report of its findings and suggest possible remedies. This report will be sent to the President of the United States. If the President agrees with the findings of the International Trade Commission, he must take all appropriate and feasible action within his power to assist the domestic industry make necessary adjustments to better compete with the foreign products. The President, however, can change or nullify the decision of the International Trade Commission if he feels that imposing restrictions under the Escape Clause may bring retaliatory action by the exporting country or if it is not in the national economical interest of the United States. The President's action, in turn, is reviewed by Congress, which has the power to overturn the President's decision not to act.

Under the Escape Clause, the International Trade Commission can recommend and the President can impose actions such as a duty, a tariff, or an import restriction on particular goods from a particular country. The actions can only be invoked for a maximum period of eight years. If the restriction granted was for a shorter period of time, an extension may be allowed, but the total duration for the action cannot exceed eight years.

D. Section 406 of the Trade Act of 1974

It has been said that section 406 of the Trade Act of 1974 “indirectly addresses countertrade by addressing imports from Communist countries,” since a significant percentage of countertrade agreements involve Communist countries. Section 406 is also known as the Market Disruption Clause. Though it is similar to the Escape Clause, Section 406 only applies to imports from Communist coun-

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116. U.S. Countertrade Policy, supra note 1, at 141.
117. Id.
118. Id.
122. Analysis, supra note 4, at 35.
tries. If there are reasonable grounds to believe that imports from a Communist country are causing market disruption in a domestic industry and emergency actions are necessary to prevent domestic injury, the President of the United States can invoke a duty, a tariff, or a quota on that particular country's product.\textsuperscript{123}

It is easier for a company seeking relief from imports to prove market disruption under section 406 than it is to prove serious injury under the Escape Clause. Market disruption can be proven by showing that an import of an article has increased very rapidly so as to be a significant cause of material injury to a domestic industry producing a comparable product.\textsuperscript{124} There is no need to show serious injury to the industry to seek relief under section 406. Another difference between the Escape Clause and section 406 is that the objective of section 406 is not to promote industry adjustment but to prevent or remedy a market disruption.\textsuperscript{125}

The Congressional intent behind obtaining relief under section 406 was that the market disruption "must have occurred during a recent period of time."\textsuperscript{126} Though the requirement of showing market disruption by the rapidly increasing importation of a product—the flooding of a market—under section 406 may be easier to prove than the serious injury requirement of the Escape Clause, it is still difficult to show under most countertrade agreements since the products are imported gradually over a number of years. It is unlikely, therefore, that any long-term countertrade agreement will violate section 406. Congress also enacted section 406 because it was concerned that the United States may become overdependent on a Communist country for products that are vital to the national defense and to the domestic economy.\textsuperscript{127} Factors determining overdependence are the degree of market penetration that the product has on the United States economy, the possibility that the Communist country will cut off the supply of that good to the United States, and the availability of alternate sources in the event that the Communist country does cut off importation of that product to the United States.\textsuperscript{128}

Overdependence can occur from countertrade because of the marginal price that the products are sold for in the United States. The lower retail price for the countertrade goods increases the demand for them which, in turn, suppresses domestic production and

\begin{itemize}
  \item \textsuperscript{123} 19 U.S.C.A. 2436(c).
  \item \textsuperscript{124} 19 U.S.C.A. 2436(e)(2)(A).
  \item \textsuperscript{125} Potter, \textit{supra} note 87, at 453.
  \item \textsuperscript{126} Id. at 436.
  \item \textsuperscript{127} Id. at 432.
  \item \textsuperscript{128} Id. at 455.
\end{itemize}
halts growth in those domestic industries.\textsuperscript{129} The result of stifled domestic growth is a dependence on those Communist countries still producing those goods. This overdependence on a Communist country, especially the Soviet Union, may be hazardous to the United States national defense. During war time, the United States might not be able to rely on the Soviet Union for materials to defend the country. Overdependence is also detrimental to our domestic economy for the same reasons stated under the Antidumping Law. An overdependence by consumers on Soviet imports because of their low prices would make United States industries lower their prices to compete with the imported products. The industries' profits would decrease; therefore, they would suppress the production of products. Companies, would have to dismiss employees, causing unemployment to increase. A recession and a depression might well follow.

Although an overdependence on the Soviet Union or any Communist country may lead to hazardous results in the United States, the government is usually hesitant about bringing a section 406 action against a Communist nation. The hesitancy stems from the fear that a market disruption investigation may be misunderstood politically, or that it may be diplomatically difficult or impossible when relations between the United States and that country are strained.\textsuperscript{130} The Government fears that a market disruption action will result in retaliatory action. Usually, the only time the United States Government will intervene is when the economic losses from the trade overwhelm other political and foreign policy considerations.\textsuperscript{131} Prior to 1981, for example, there were only six investigations conducted by the International Trade Commission under section 406. In four of those cases, the Commission found that no market disruption existed. In the other two cases, the Commission found that market disruption occurred; however, at the time, President Carter rejected invoking any actions to remedy the situation because he believed that it was not in the interest of the United States economy.\textsuperscript{132}

VIII. Conclusion

The Soviet Union is one of the largest overseas markets.\textsuperscript{133} Its people have large amounts of disposable income to spend on consumer goods since there are not many consumer goods available in the Soviet Union.\textsuperscript{134} For United States businesses wishing to expand their market share into foreign markets, the Soviet Union has proved

\textsuperscript{129} Id. at 417.
\textsuperscript{130} Id. at 437.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 439.
\textsuperscript{133} Adam Smith's Money World, supra note 13.
\textsuperscript{134} Id.
to be a profitable alternative to the highly competitive markets of Europe. Companies wishing to do business in the Soviet Union should expect that some form of countertrade will be required. In the future, countertrade will be increasingly used by the Soviet Union, given the stifling Soviet economy and the inconvertibility of the ruble in the world market. The United States Government, therefore, should be prepared for an escalating amount of countertrade contracts between United States companies and the Soviet Government. It should try to protect those companies, as well as domestic industries, from injury by enacting laws specifically regulating countertrade transactions.

Until the United States establishes regulations on countertrade, however, companies entering into countertrade transactions must be aware that they enter the agreement at their own risk; if they are injured, they will have no remedy under trade laws, trade regulations, or the common law. Their only remedy will be from a breach of the countertrade contract. That is why it is "of crucial importance that the countertrade contract be drafted clearly and unambiguously in all of its provisions, and that nothing be left to common sense or to later interpretation." 135

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135. L. WELT, supra note 14, at 32.