LEGAL ASPECTS OF COUNTERTRADE
UNDER
THE GENERAL AGREEMENT ON TARIFFS AND TRADE
AND
THE NATIONAL LAWS OF CANADA AND THAILAND

By

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Countertrade is no longer a new term in international trade. Countertrade will continue to grow in the next decade despite opposition from various developed countries. Nevertheless, little attention has been given to develop a generally acceptable definition of countertrade and a classification of its forms. More importantly, the study of the legal implications of countertrade under GATT and national laws of countries involved in countertrade is still limited. This thesis is a first step to explore the definition and forms of countertrade, as well as its national and international legal implications.

The first part of this thesis, respecting the overview and framework of countertrade, contains three chapters. The first chapter describes the purposes and methodology employed in the research of this thesis. Chapter two discusses the development of countertrade in world trade and the definitions and major forms of countertrade transactions. A definition of "countertrade" is proposed. The discussion of elements contained in each form of countertrade will assist classification of the forms of countertrade. The advantages and disadvantages of countertrade from the perspective of both developed and developing countries is also discussed. In Chapter three, the development of countertrade policy in Canada and Thailand is examined. The writer concludes that countertrade should be
encouraged but with care taken to adopt the form most suitable to the specific problems each country is facing. Generally, Thailand and Canada should study the impacts of countertrade on their economies prior to implementing countertrade policies. In respect of their mutual relations, Thailand and Canada should put an emphasis on the development of countertrade practice in the forms of Offsets and Compensation.

The second part respecting the legal implications of countertrade, consists of Chapters four, five and six. Chapter four examines the legal implications of countertrade under the major provisions of the GATT and its Codes. The writer concludes that there are a number of unresolved problems with which GATT and the Codes cannot deal efficiently because they were drafted while countertrade was still unimportant in international trade. A study of the impact of countertrade and a detailed study of the legal implications under GATT is still required. In Chapters five and six, the writer examines countertrade transactions under the private and regulatory laws of Canada and Thailand. The discussion, within the limited scope of the thesis, is aimed only at providing some precautions respecting possible effects of such laws on countertrade transactions. The private law aspect deals only with basic problems of choice of law principles, the State Immunity principle, and the enforcement of foreign or international arbitral awards that arise from disputes concerning countertrade agreements. The discussion of regulatory law is
divided into three parts based on the purposes and nature of the legislation: Fiscal and other regulatory control laws; Remedial regulatory laws; and the Promotion and Administrative regulatory law. Specific provisions of the legislation are examined. Certain suggestions are made for reform of the law.

The last part of this thesis, Chapters seven relates to practical consideration of negotiating and drafting countertrade agreements. The purpose of this part is to guide practitioners in preparing and structuring countertrade agreements efficiently. The writer also suggests the preparation of model countertrade agreements to overcome problems of time and cost in drafting agreements, and to strengthen the developing countries' bargaining power. Chapter eight, the conclusion, summarizes the major points which are discussed in previous chapters.

The diversity of countertrade transactions probably precludes the development of uniform domestic or international rule to regulate this type of international commerce. This thesis has shown that lawyers in developed and developing countries need, however, to be aware of the special nature of countertrade transactions when considering the application of laws of a general character so as to preserve the value of this form of trade.
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Part I
OVERVIEW AND FRAMEWORK OF COUNTERTRADE

Chapter One
Introduction

"While political factors will continue to dominate the countertrade scene present political and economic developments seem likely to gravitate toward even greater increases in the volume of world counter-trade than in the past ..."

Countertrade then will not just go away if it is ignored, on the contrary, those in the international business community who disregard the vigorous growth in this sector do so at their peril, for in the situation the gods are unlikely to temper the wind for the shorn lamb".

Brian D. Townsend
The Financing of Countertrade, 1986

1.1 Overview

Countertrade transactions have increased greatly during the past several years. They are playing an important role in the overcoming of the economic difficulties that have beset international world trade and in particular have assisted many countries to develop their markets and economies. Countertrade is no longer just between Eastern bloc countries and developing countries or within their own group. It now extends to trade between these groups and developed countries.

A recent OECD report suggests that there will be considerable
development in the commercial law focusing on the drafting and litigation of countertrade agreements.¹

1.2 Purpose of Study

In writing this thesis, the writer hopes to accomplish the following objectives:

1. To understand the legal framework and the structure of countertrade transactions in the world trade today.

2. To propose an acceptable definition of "countertrade" by examining the definitions and the forms of countertrade practices used by various international organizations, government bodies and experts.

3. To examine the practical considerations of negotiating and drafting specific types of countertrade agreements from a developing countries' perspective.

4. To examine the legal implications of countertrade agreements under the GATT.

5. To study the countertrade policy and practice of the Canadian and Thai governments and the potential for countertrade transactions between Canada and Thailand.
6. To examine the legal implications and practical considerations of countertrade practices which may arise under Canadian and Thai substantive laws.

In order to achieve the above broad objectives it is impossible for the writer to analyze or focus on specific legal questions or issues in detail. In addition, the lack of information on countertrade, especially the legal aspects of countertrade, have forced the writer to limit the discussion to general and practical considerations.

1.3 Methodology of Study

The methodology employed in this thesis consists of description, explanation\(^2\) and legal analytical discussion. The writer will first depict the characteristics, development and forms of countertrade and present an overview of the legislation that may be applicable to countertrade transactions. The writer will then discuss the advantages and disadvantages of countertrade and examine the specific legal implications that arise under the GATT, Canadian and Thai laws. In some circumstances, the writer will give hypothetical facts and raise specific legal questions about these facts in order to narrow the discussion only to countertrade practice.
1.4 Outline

The thesis is divided into three major parts. Each part is divided into several chapters. The first part is designed to outline the framework of countertrade and consist of three chapters. The second part is also divided into three chapters covering the legal implications of countertrade under GATT, Canadian and Thai law. The third part discusses the practical considerations involved in negotiating and drafting countertrade agreements.

Part I, Chapter one will provide the outline of this thesis, the purpose and method employed in studying this topic.

The framework of countertrade will be discussed in Chapters two and three respectively. In Chapter two, a historical overview of countertrade will be provided and the current share of world trade that is accomplished through countertrade noted. Then the definitions and the forms of countertrade and the characteristics of each form, including the advantages and disadvantages of countertrade and the reasons why countertrade should be encouraged will be examined. In Chapter three, the development of countertrade policy in Canada and Thailand will be explored, as well as the prospects for countertrade between the two countries.
Part II, which is the most important part of this thesis, is divided into three chapters. In Chapter four, the legal implications of countertrade under GATT, which is the most important international agreement regulating trade among nations, will be discussed. In Chapters five and six, the examination will focus on the legal implications of countertrade transactions from the national private and regulatory perspective. Chapter V will examine the Canadian law. Before discussing the private and regulatory law aspects, the legal problems of constitutional law and trade law will be briefly noted. The private law aspects will emphasize Conflict of Law Rules with respect to choice of law, the state immunity principle under the State Immunity Act and the Crown Proceeding Act, and dispute resolution with regard to the enforcement of foreign or international arbitral awards. The regulatory laws are sub-divided into three parts, the first part is the fiscal and regulatory control laws which includes custom laws, the Income Tax Act, the Export and Import Permits Act. The second part is the remedial regulatory laws which includes the Special Import Measures Act ("SIMA"), and the Competition Act. The last part is the promotion and administrative regulatory laws which includes the Export Development Act and the government procurement regulations under the Department of Supply and Services Act.

In Chapter six, the substantive laws of Thailand will be examined in the same structural manner as was the Canadian law.
The private law aspects will include the Conflict of Law Act, the principle of state immunities under Thai law, and dispute resolution as to the enforcement of foreign arbitral awards. The fiscal and regulatory control laws include custom laws, tax and duties rebate law, Revenue Code, the Exchange Control Act, the Export and Import of Goods Act, and the Alien Business Control Law. The remedial regulatory law is Anti-dumping Act. The promotion and administrative regulatory laws include the Investment Promotion Act, Government Procurement Regulations and Regulation on the Creation of the National Debt.

Chapter seven, the final part of the thesis, will discuss from a developing country's perspective the practical considerations involved in negotiating and drafting specific types of countertrade agreements, namely: Framework or Protocol Agreements, Barter Agreements, Counterpurchase Agreements and Compensation Agreements.

Finally, in the concluding chapter, the writer will summarize the major points made in the previous chapters and offer some conclusions. Overall, this thesis should:

1. propose a definition of "countertrade".

2. propose the elements necessary to determine the various forms of countertrade.
3. emphasize the fact that countertrade is a new form of trade between parties which is different from the traditional trade in goods and services and because of this the legal instruments that regulate international trade, such as GATT and its Multilateral Code, are of little assistance in resolving disputes that arise from countertrade transactions.

4. show that the national laws of Canada and Thailand have an impact on countertrade transactions. Canadian regulatory laws seem to be more developed than Thai law in coping with the growth of countertrade. The current national laws, in some circumstances, should be developed and modified to encourage countertrade in a direction that will not distort trade patterns. The examination of the legal implications of Canadian and Thai laws on countertrade from a practical standpoint, hopefully, will create an awareness among legal practitioners in the two countries that the current knowledge of traditional international sale of goods and services is not sufficient. Legal practitioners have to have greater knowledge of the complexities of the transaction, as well as the relevant laws, so that they can structure the transaction effectively, both in terms of costs and time.

The fundamental tension respecting countertrade is between developed countries which strongly oppose mandatory government
countertrade requirements and while developing countries which believe that countertrade may be one of the most important tools they have to achieve economic recovery and future development. While these contradictory views will undoubtedly remain unresolved for at least for the next decade, hopefully, this thesis will be a first step to the finding of a solution to the problem.

For the purpose of discussion in this thesis, unless it is otherwise expressly provided for,

1. "Countertrade transactions" will include Barter transactions, Counterpurchase transactions, Compensation transactions, Offset transactions, Advance Purchase transactions, Bilateral Agreement or Switch Trading transactions, and Evidence Account Transactions.

2. "Exporters", "Suppliers" or "Exporting Countries" shall mean both government and state trading enterprises or private firms in developed countries who are foreign sellers or contractors.

3. "Importer" or "Importing countries" shall mean both the government or state trading enterprises or private firms in Eastern bloc countries, and developing countries.
4. A "Primary Agreement" shall mean the Primary Sales or Services Agreement where an exporter or supplier in a developed country provides its products or services to an importer in the Eastern bloc or developing country, as the case may be.

5. The "Countertrade Agreement" shall mean the Barter Agreement, the Counterpurchase Agreement, the Compensation and the Offsets Agreement or the Secondary Sales or Services Agreement where the exporter is obliged to comply with the commitments to purchase or take a delivery of goods and services provided by the importer.
Footnotes – Chapter One


3. According to Banks, he quoted that under GATT, eastern trading areas comprise of Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the USSR, The People's Republic of China, Mongolia, North Korea, Vietnam. (G. Banks, "Economic and Politics of Countertrade" (1983), 6 The World Economy, No. 2 at 179, footnote 11).

4. Based on Art. XVIII of GATT, a developing country is one which can support only low standard of living and is in the early stage of development (this is not meant to apply only to countries which have just started their economic development, but also to whom those economy are undergoing a process of industrialization to correct an excessive dependence on primary production (E. McGovern, International Trade Regulation, 2nd ed. (U.K.: Exeter Globefield Press, 1986) at 273.)
Chapter Two  

Definition and Forms of Countertrade Transactions  

and Their Development  

2.1 Overview  

This part of the thesis will review the definitions and the forms of countertrade transactions given by various international trade organizations, namely: OECD, GATT and UNCTAD, some government departments in the United States, England and Canada, and also the definition and forms used by experts. The proposed definition of countertrade to be used in this thesis will be given and the controversial issue of advantages and disadvantages of countertrade from both a developed and developing countries' perspective will also be examined. First, however, it is useful to give an overview of the history of countertrade and the current state of countertrade in world trade.  

2.2 Historical Overview of Countertrade  

Historically countertrade was developed from the barter arrangement, the world's oldest form of trading. Countertrade operated as a form of international barter in most western countries during 1930-1933 when there was a breakdown of the international trade and payment system during the world economic depression.¹ Germany had established an extensive barter and barter-like program with eastern European countries through
inter-governmental agreements using bilateral clearing accounts in 1934 and again during the Second World War. In the 1950's, while the trading partners in western and eastern European countries attempted to avoid barter arrangements by shifting from bilateral trade to multilateral trade, the states of southern Latin America were engaging in international barter among themselves. The major reasons for international barter in this region were monetary problems and the need to market surplus commodities.

The commodities exchanged in such arrangements were petroleum products, minerals and agricultural commodities. The growth of this barter-like program in southern Latin America was reduced at the end of the 1950's when international payments were improved and the LAFTA multilateral clearing system was established. However, some countries, like Mexico, Brazil, and Argentina, have continued international barter-like arrangements with developed countries in eastern Europe and with Asia's developing countries up until the present.

During the mid 1950's the group of Eastern bloc countries engaged in the bilateral balancing practices among themselves and developed international barter between themselves and groups of developing countries in Asia, Latin America and Africa that has continued until the present. Apart from political reasons, the major economic reasons for Eastern bloc countries engaging in
the bilateral barter trade was the lack of convertible currencies, the lack of access to international markets, the lack of Western marketing methods, and the low quality of products.⁵

From the 1960's to 1970's various forms of countertrade transactions developed between Eastern bloc countries and Western countries and with developing countries, commencing with barter or barter-like programs and evolving to the more recent industrial countertrade arrangements involving commercial and industrial compensations.⁶ Developing countries have engaged in countertrade transaction with Eastern European countries since the 1960's,⁷ and more recently with developed countries. The major motive for engaging in countertrade is the economic necessity of developing the manufacturing sector in their countries.⁸

2.3 Share of Countertrade in World Trade

Due to the complexity of the definition and form of countertrade transactions given by various international organizations and experts and the confidential nature of transactions, the official share of countertrade of world trade is not available. However, estimates of the share of countertrade have been made by various international organizations such as UNCTAD, OECD and IMF, by national organizations in developed countries, and by some experts. In
1986, an UNCTAD report estimated that countertrade transactions, using a broad definition, may account for at least 15 (fifteen) percent of the total world trade. IMF and GATT estimates for the countertrade share range from 1 (one) percent and to approximately 8 (eight) percent of total world trade. A recent OECD study published in 1985 sub-divided the countertrade share of world trade based on the types of countertrade and the countries involved as will be discussed below. The OECD study estimated countertrade in industrial areas at approximately 60 (sixty) percent of world trade. Fifteen (15) percent was trade between industrialized countries and Eastern European countries. The countertrade between industrial countries and the oil produced countries accounts for 2 (two) percent of world trade and the countertrade between OECD and other developing countries (non-oil countries) is approximately 5 (five) percent. The countertrade between industrialized countries is approximately 2 (two) percent. Finally, the trade among the developing countries (oil producing countries) or between them and the Eastern European countries was approximately 10 (ten) percent of intra-developing countries trade and 30 (thirty) percent of developing country trade with Eastern European countries. In this report it was estimated that the value of world trade in 1983 was amount of 80 (eighty) billion U.S. dollars with approximately 4.8 (four point eight) percent of this conducted in the form of countertrade (excluding trade among the Eastern European countries and trade under Clearing Agreements).
A 1987 survey by economist in the GATT Secretariat showed that in the 1983-86 period countertrade had accounted for not less than 3 (three) to 4 (four) percent of world trade. Various press reports cited the amount of countertrade during the 1980's as being anywhere from 1 (one) to 40 (forty) percent. However, a conservative estimate of 10 (ten) percent of total world trade being conducted in the form of countertrade was suggested by the Canada Department of External Affairs and this is reasonable.

In the early 1970's there were fifteen countries, mainly in Eastern Europe, engaged in countertrade deals in one form or another. By 1979 the figure was about twenty-seven countries, including countries from Central and South America, and by 1983 it had risen to sixty-seven, from all over the world, and as many as eighty-eight if those OECD countries whose countertrade requirements relate solely to contracts for military supplies were added. A recent special survey noted by the press reported that about one hundred countries now have formal or informal countertrade policies.

Apart from the Eastern European countries (such as the German Democratic Republic, the USSR, Poland, Romania, Czechoslovakia, Bulgaria, and Hungary) who use countertrade as a tool for their trade, the developing countries, both non-oil and oil producing countries in Africa (such as Egypt, Kenya, Ghana, etc.), Asia
(such as Indonesia, Iran, Malaysia, the Philippines, South Korea, China and Thailand), Europe (such as Malta and Yugoslavia) have also developed countertrade policies with their foreign trading partners. In addition, some developed countries, like Australia, New Zealand, Denmark, Belgium, Luxembourg, and the Netherlands have also introduced some countertrade policies with respect to government procurement and/or defense equipment. Some other developed countries, especially in the private sectors, play a vital role in countertrade transactions, namely: the U.S.A., France, Belgium, Canada, and Japan.

The above estimation are sufficient to show that countertrade has played and continues to play an important role in world trade.

2.4 Definitions

Since there is still no uniform typology or precise legal terminology which has been accepted in international commercial practice or in legal writing, the definition and classification of countertrade transactions depends on the nature of the arrangements and contracts, the number of parties involved and the legal system of the countries involved. Sometimes it even depends on the experts involved. Each countertrade transaction presents unique features. In some cases the same type of arrangements may be defined or classified differently. For
example, it may be referred to as "compensatory"\textsuperscript{25} or "compensation".\textsuperscript{26}

Various definitions have been given to the word "countertrade" by different international organizations, national institutions and experts.

The Organization for Economic Cooperation and Development ("OECD") defines "countertrade" as:\textsuperscript{27}

"an international commercial operation in the framework of which the seller has to accept in partial or total settlement of his deliveries the supply of products (or more rarely services) coming from the purchasing country".

The United Nations Conference on Trade and Development ("UNCTAD") defines "countertrade" as:\textsuperscript{28}

"... a certain type of business arrangement under which an exporter undertakes to be generated by others, benefits such as revenues for an importer. The arrangements typically entail linked trading obligations of enterprises into countries involving exchange of products, technology and other services".

The Canadian Department of External Affairs defines "countertrade" as:\textsuperscript{29}

"... a generic term encompassing all transactions where a sale to an importer (public or private sector) is conditional upon a reciprocal purchase or undertaking by the exporter".
The Department of Trade and Industry, United Kingdom defines "countertrade" as: \(^{30}\)

"... an umbrella term for a whole range of commercial mechanisms for reciprocal trade... The common characteristic of countertrade arrangements is that export sales to a particular market are made conditional upon undertakings to accept imports from that market".

The United States International Trade Commission (USITC) takes the view that "countertrade": \(^{31}\)

"... refers to all forms of reciprocal or "tied" international contractual or "best effort" commitments".

Professor Schmitthoff in his recent book defines "countertrade" as: \(^{32}\)

"... a collective term which denotes various methods of linking two export transactions, one emanating from the exporter's country and the other from that of the importer".

McVey defines "countertrade" as: \(^{33}\)

"... a practice in international trade in which two parties link an import transaction and an export transaction in a reciprocal fashion".

Verzariu defines "countertrade" as: \(^{34}\)

"reciprocal and contingent exchange of goods and services are specified by contract and each flow of deliveries is valued and settled in monetary units".
Kostecki, an economist in the GATT Secretariat, defines "countertrade" as:

"... a special case of a linked transaction providing for reciprocal buying and selling. This type of reciprocity arrangement is frequent not only in home markets but also in international trade".

Townsend, in his recent book, defines "countertrade" in general terms as:

"... those foreign trade deals in which the export of goods to a foreign country are coupled to imports from that country, at identical values or agreed upon volume ratios".

It may be noted that some of the definitions are very broad and loose and some are very narrow. This writer is of the opinion that the common elements in the countertrade transactions consist of:

1. their being ad hoc (monetized) forms of barter or a transaction-by-transaction form of barter;

2. being an international business arrangement between at least two parties (public or private sectors);

3. the arrangement being on a reciprocal basis;
4. the commitment of both parties being legally binding on the basis of a contract; and

5. the transaction includes the sale or exchanges of goods and the services or transfer of technology.

If the above elements exist, the transaction should then be classified as a "countertrade" transaction. Arrangements which are based on a "best effort" basis should not be regarded as "countertrade" transactions because such arrangements would not be enforceable and they have no meaning on either the national or international law level. In addition, it is the GATT Secretariat's view that transactions that involve direct investment such as "co-production arrangements", "industrial cooperation agreements", or transactions between two countries which originates from the inconvertability of currency such as comprehensive bilateral trade and payments arrangements (except switch trading), should not be categorized as "countertrade".

This writer is of the view that the most important element in a "countertrade" transaction is the reciprocal contractual commitment between at least two parties. Without the binding contractual commitment of trading parties, the transaction will have no legal effect and thus cannot have any legal implications at the international or national level.
Based on the elements summarized above and for the purpose of the discussion in this thesis, the following is proposed as the definition of the word "countertrade":

"A general practice of an international transaction between at least two parties (from either the public or private sector) who agree to link or reciprocate their import and export transaction on a contractual and ad hoc basis. The transaction may deal not only with the sale or exchange of goods but also with services or the transfer of technology between two parties. There are a number of forms of trade that can be classified as countertrade depending on various, elements, namely the nature and the duration of the agreement, the parties and the products involved."

2.5 Major Forms of Countertrade Transactions

2.5.1 Introduction

Similar to the problem of defining the word "countertrade", there are different forms of countertrade classified by different organizations and experts. The following elements may be taken into account in classifying the forms of countertrade:

1. The nature of goods traded;
2. The extent to which the trade flows offset one another;
3. The length of time needed to complete both transactions;
4. The type of agreement or agreements (the number of agreements, and the restrictions of the agreements);
5. The number of the parties involved except for the importer and the exporter;
6. The relationship between imported products and exported products; and

7. The financing procedures.

The following forms of countertrade transactions have been utilized by the various organizations and legal commentators and may be of assistance. OECD classifies countertrade transactions into two major forms. First, Commercial Compensation, which consists of Barter Transactions and Compensation Deals or Counterpurchase. The compensation deals are sub-divided into (a) precompensation; (b) parallel transactions and counter transaction; and (c) counterpurchase as part of an overall arrangement. Second, Industrial Compensation which consists of Buy Back Arrangements and other forms such as Framework Agreements or a long term Protocol-type Agreements.

UNCTAD classifies the form of countertrade to include: (1) Barter; (2) Counterpurchase; (3) Compensation or Buy Back; (4) Industrial Co-operation (including Offset Arrangements); and (5) Switching.

The GATT Secretariat classifications of countertrade include: (1) Classical Barter; (2) Counterpurchase which includes Offset Arrangements; (3) Buy-Back; and (4) Switch Trading.
The Department of External Affairs, Canada, classifies the forms of countertrade as: (1) Barter; (2) Counterpurchase; (3) Advance Purchase; (4) Offsets; (5) Buy Back; and (6) Bilateral Agreements.

The Department of Trade and Industry, United Kingdom classifies the forms of countertrade to include: (1) Counterpurchase; (2) Barter or Compensation Trading; (3) Buy-Back; (4) Offset; (5) Switch Trading (Switch or Swap); and (6) Evidence Account.

USITC classifies the forms of countertrade to include: (1) Counterpurchase; (2) Compensation; (3) Barter; (4) Switch; and (5) Offset.

Professor Schmitthoff classifies countertrade into four types namely: (1) Reciprocal Sales Agreements; (2) Barter; (3) Buy Back; and (4) Disposal and Switch Transactions.

McVey takes a very broad view and classifies the forms of countertrade into fourteen forms: (1) Counterpurchase; (2) Compensation or Buy Back; (3) Barter or Swap; (4) Import Entitlement Programs; (5) Offsets; (6) Clearing; (7) Switch Trading; (8) Progressive or Proactive Countertrade; (9) Franchise Agreements; (10) Positive and Reverse Countertrade; (11) Develop for Import Transactions; (12) Performance Requirements; (13)
Collection Through Export Transactions; and (14) Miscellaneous Countertrade Variations.

Verzariu classifies countertrade into three forms:  

(1) Direct Compensation (Buy Back); (2) Indirect Compensation (or Counterpurchase); and (3) Reverse Countertrade (Junktim).

Welt, a U.S. countertrade expert, classifies countertrade to include: (1) Barter; (2) Counterpurchase; (3) Compensation (or Buy Back); (4) Evidence Account; and (5) Bilateral Clearing Agreements or Switch Trading.

Kostecki's classification of countertrade includes: (1) Counterpurchase; (2) Offsets; (3) Buy Back; (4) Advance Purchase; and (5) Barter.

Townsend classifies countertrade into five forms: (1) Barter; (2) Compensation; (3) Countertrade (or Counterpurchase or Parallel Trade); (4) Co-operation Trade, which includes Industrial co-operation and Joint ventures; (5) Offset; and (6) Countertrade Collections.

It is interesting to note that civilian lawyers classify countertrade into four forms. For example, Guyot classifies countertrade into: (1) Barter; (2) Counterpurchase; (3) Offsets; and (4) Buy Back. Loeber classifies them as (1) Barter; (2)
Compensation; (3) Counterpurchase; and (4) Industrial Co-operation or Buy Back.\textsuperscript{58} Rajski classifies countertrade into four forms but refers to them in different names: (1) Barter; (2) Barter-like Contract; (3) Counterpurchase; and (4) Buy Back.\textsuperscript{59}

In Canada, the Department of External Affairs, has classified the forms of countertrade differing from the classification used by the Canadian legal commentators, Castel, de Mestral, and Graham, who utilized: (1) Counterpruchase; (2) Compensation; (3) Barter; (4) Bilateral Clearing or Switch Trading; and (5) Other forms of countertrade, e.g. progressive positive countertrade.\textsuperscript{60}

The Institute of Soviet and East European Studies, Carleton University, classifies countertrade to include:\textsuperscript{61} (1) Barter; (2) (2) Switch Trading; (3) Counterpurchase; and (4) Co-operation Agreements which includes (a) Product Pay Back (Buy Back), (b) Commercial Co-operation, and (c) Industrial Co-operation.

In Thailand, however, there have been no authorities or institutions which have been working on either definitions or classifications of countertrade forms.

Clearly countertrade is classified differently by various organizations and experts. Sometimes, the nature of the transactions is the same but it is called different things. The classification of countertrade forms by some legal commentators,
like Townsend and McVey, are too detailed. In fact, such countertrade forms may fall under major forms of countertrade. In addition, the broader terms used for some forms of countertrade practices, especially in trade between Eastern bloc countries and the West, such as industrial cooperation, commercial and industrial compensation, make the traders confused about what the actual form of countertrade is or how to refer to the arrangement.

This thesis, however, does not intend to examine and work out acceptable categories of forms and terminology for countertrade practice in world trade. Therefore, only the major forms of countertrade practices which are most significant and widely adopted in international trade will be examined. These are: Barter; Counterpurchase; Compensation or Buy Back; Offsets; and Miscellaneous forms of countertrade arrangements which originate from a lack of hard currency of one or both the importing or exporting countries, which includes Advance Purchase, Bilateral Agreement or Switch Trading, and Evidence Account. The structure and agreements involved in each arrangement will be demonstrated in the form of a flow chart.

2.5.2 Barter

Barter is often referred to as "swap" or "Compensation Trading". It is defined by OECD as a "Bilateral contractual
exchange of goods and/or services avoiding the use of international currency". It should be noted that OECD categorizes international barter into 3 categories: (1) pure Barter with no payment other than in goods between trading partners; (2) bilateral trade agreements associated with clearing arrangements in order to avoid payment in convertible currencies; and (3) bilateral trade agreements with arrangements only on the commercial side for partial or total compensation through more or less firm commitments of imports and exports.64

The major purposes for imposing Barter Arrangements65 are: (1) to dispose of surplus products that cannot be otherwise sold in the world market; (2) to solve a debt crisis facing a country; and (3) to allow for the importation of products when a country has no hard currency.

The main characteristics of "Barter" are:66

1. It is a single agreement containing provisions covering deliveries mainly between government sectors or between state enterprise or government with the private sector.

2. Except for "barter like" arrangements, there is no transfer of funds, no financing or third party involvement.

3. The exchange of goods or services generally takes place
simultaneously or within a very short time.

4. A parallel bank guarantee in the form of a stand-by letter of credit may be needed if it involves a substantial amount of merchandise or the product has a high commercial value such as oil.

This type of transaction has been undertaken frequently between East European countries and developing countries, among developing countries, and between oil producing countries and developing or developed countries. Most of the products involved in Barter are agricultural commodities, oil and raw materials.67

A traditional barter transaction is now uncommon in international trade practice. However, a contemporary barter agreement68 or barter-like arrangement or "quasi barter"69 arrangement is still used. These contemporary barters will not contain certain of the characteristics or elements of the traditional barter agreement. The delivery period of products may be longer; it may not be necessary to deliver the products simultaneously; and the agreement may be partially involved with a monetary payment for the balance of the account.

In this thesis the word "Barter" will include conventional Barter and contemporary Barter.
The Barter Arrangements which Canada and Thailand have been engaged in with other countries are:

(1) A 1982 Barter Arrangement between the Canada Potash Corporation of Saskatchewan (PCS) and the Indonesia government, where bulk potassium chloride was exchanged for rubber, coffee, and cocoa.  

(2) Thailand had entered into Barter Arrangements with South Korea, Romania, and the USSR, exchanging agricultural commodities (primarily tapioca and corn) for fertilizer. In addition, rice has been exchanged for jute from Bangladesh; for palm oil from Malaysia; and for crude oil from Nigeria and The People's Republic of China.  

(3) The Port Authority of Thailand purchased six tower cranes from Yugoslavia with a value of 226.4 million Baht (approximately 11.3 million Canadian dollars) where 25% will be paid in cash and 75% will be bartered for rice, tobacco leaves, tapioca, rubber, textile products, and canned foods from Thailand.
Figure 1

Structure and Agreements Involved in Barter Arrangement

1. Barter Agreement

Canada (The Supplier)

Raw Materials (Potassium)

2. Commodities such as rice

Thailand (The Importer)

Services

3. Partial Payment for products or services

Parallel Bank Guarantee (Stand-by Letter of Credit)

Notes

1. For provisions that should be included in a Barter Agreement see discussion in Chapter seven, 7.3.2., infra.

2. If it is a Barter Arrangement between developing countries, normally it will have no partial payment being only an exchange of products.

3. If it is a Barter Arrangement between a developing
country and developed country, it may involve not only the exchange of products but also partial payment.

4. A parallel bank guarantee in the form of a stand-by letter of credit may be required if the parties involved are state trading enterprises or from the private sector.
2.5.3 Counterpurchase

Counterpurchase is sometimes referred to as "indirect compensation"\(^73\), "parallel trade" or "countertrade".\(^74\) It is defined as a transaction in which the exporter delivers the goods and/or services to the importer and the exporter contractually agrees to purchase the goods from the importer in an amount equal to an agreed percentage of the original sales or services contract value.\(^75\) Sometimes the counterpurchase requirements will be equal to the full amount of the imports or even ten percent over. Very often, the importer has to agree to a discount on the products exported as a fee or commission to an international trading company to dispose of the products.\(^76\)

The main characteristics or elements of counterpurchase arrangements can be summarized as follows:\(^77\)

1. Supply and counter-delivery are covered by two separate agreements which operate independently and each of which refers to the other by way of an independent protocol within the framework agreement.

2. The time for the exporter to fulfill the obligation is short, usually from 1 to 5 years.
3. The payment in cash or hard currency for the goods or services will be made separately by the importer and the exporter.

4. The goods of the two agreements are not related.

5. The transfer of the counterpurchase obligation to a third party is normally possible.

6. This transaction is composed of three separate agreements, namely:

   a. The Primary Sales or Services Agreement which is a standard sales or services agreement with a cash payment;

   b. The Counterpurchase Agreement or Secondary Sales Agreement containing terms and conditions for the exporting country to buy the products from the importing country; and

   c. A Protocol or a Framework Agreement that serves to link the sales or services contract and the Counterpurchase Agreements. However, the Protocol or the Framework Agreement is sometimes provided in the Counterpurchase Agreement.

   There are different subdivisions of Counterpurchase Arrangements. Townsend, for example, subdivides Counterpurchase
into 4 categories: (1) parallel deals; (2) linked deals; (3) psychological countertrade; and (4) positive or reverse countertrade. There is another type of Counterpurchase called an "Advance Purchase," but the Canadian Department of External Affairs regards "Advance Purchase" as one form of countertrade. The writer will use the term Counterpurchase for all transactions that meet the characteristics or have the elements discussed above.

The reasons importing countries engage in Counterpurchase arrangements are similar to those for Barter Arrangements. For example, where a product is in over-supply or where it is not marketable. The major differences in the elements of Counterpurchase as distinct from Barter are: the number of agreements involved; a separate financing and the monetary settlement made by each party; and the time to fulfill the obligations by the exporter is longer than the Barter Arrangement. The product offered by the importing countries to the exporting countries in a counterpurchase arrangement are similar to the products offered in Barter. They normally involve agricultural commodities, and raw materials including oil and minerals. Therefore, subject to mandatory Counterpurchase, the exporter is unlikely to accept a Counterpurchase deal unless a sizable discount is given.

USITC takes the view that an Evidence Account should also be
considered as part of a Counterpurchase scheme since the exporter may resort to an Evidence Account in order to overcome problems associated with a Counterpurchase Arrangement. The writer, however, does not regard this Evidence Account as part of a Counterpurchase Arrangement as it only constitutes one form of countertrade.

The Counterpurchase Arrangement is the most common form of countertrade arrangement. It is usually the arrangement made between a government or state trading enterprise and a foreign private firm. So far, only Romania and Indonesia have mandatory legislation that requires foreign exporters to enter into Counterpurchase Arrangements. Under Romanian Official Decree No. 276 (of July 25, 1979), full countertrade coverage is requested for almost all imports, including items that fall in the category of priority imports. In Indonesia, a trade development program introduced in 1982 includes the government countertrade policy which is to apply to all government funded projects valued in excess of 500 million rupiah ($450,000) and the foreign supplier must agree to a 100 percent Counterpurchase of non-oil and gas products against the value of the imports into Indonesia.

Counterpurchase Arrangements which had been entered into by Canada and Thailand are noted below.
a. Canada

1. The sale of Canadian nuclear reactors and transfer of technology to Romania, financed by the Export Development Corporation where the Canadian sub suppliers of such nuclear reactor are required to counterpurchase 100% (one hundred percent) of product from Romania.\(^{86}\)

2. The supply of steel by Sydney Steel Co., Canada, to the Indonesian government valued US$9.758 million involved the counterpurchase by the Sydney Steel Co., Ltd. of tea, rubber, and satex tin from Indonesia.\(^{87}\)

b. Thailand

1. The Counterpurchase Arrangement between the Thai government and the Senegal government involved the purchase of 60,000 tons fertilizers from Senegal with the Senegal government in turn purchasing 60,000 tons of Thai rice.\(^{88}\)

2. In the Counterpurchase Arrangements between the Thai government and both Hungary and Yugoslavia the Thai government is to purchase medical equipment from Hungary and dentistry equipment from Yugoslavia and, in turn, Hungary is to buy fabric, coffee, rice, canned foods and rubber from Thailand, and Yugoslavia is to buy rice from Thailand. The total value of this arrangement is 1 million U.S. dollars per annum.\(^{89}\)
Figure 2

Structure and Agreements Involved in Counterpurchase Arrangement

1. The Protocol or Framework Agreement may or may not link the Primary or Services Agreement with the Counterpurchase.
Agreement depending on the agreement of both parties. The supplier, however, usually prefers not to link the agreements together.

2. The time that the suppliers have to fulfill their Counterpurchase obligations will range from 1-5 years following the execution of the Primary Sales or Services Agreement.

3. Normally the Counterpurchase Agreement will provide for the transferability or assignment of the countertrade product to a third party or trading house in order to dispose of the product.
2.5.4 Compensation

Compensation is sometimes referred to as "Buy Back", "Industrial Compensation" or "Industrial Co-operation Trade". The writer will use the term "Compensation" or "Buy Back" in the context of the discussion of this thesis. In a Compensation or Buy Back transaction the exporting country, mainly through private firms, will sell equipment, technology and/or an entire turnkey plant to the importing country, either a private firm or government, and the exporter agrees to buy back from the importing country the products derived from the output of the plant and/or the use of the technology or the equipment.

Compensation or Buy Back Arrangement have been widely used in the USSR, China and certain developing countries in order to obtain foreign technology without spending hard currency. Some commentators, like Townsend, subdivided Compensation into two forms which are Total Compensation and Part Compensation. At present, this practice is being widely used among developed countries where they have subsidiaries or associated companies in foreign countries.

In fact, Compensation has similar characteristics to Counterpurchase except that the countertrade product to be supplied by the importer is the product of the equipment or technology provided by the suppliers and therefore, in most
cases, the time for the suppliers to fulfill their obligations is quite long.

The main characteristics or elements of Compensation or Buy Back can be summarized as follows:94

1. The value of the transaction is quite high, often in the hundreds of millions of dollars because the products supplied involve industrial equipment or plants with sophisticated technology.

2. The goods and the products are related to the equipment or technology imported.

3. The payment of hard currency, in whole or in part, will be made and the value of the Compensation or Buy Back commitment is usually greater than the value of the primary sales or services transactions.

4. The period of the arrangements is usually quite long ranging from five to twenty years.

5. The value of the products produced during the agreement usually equals the value of the plant/technology or equipment, plus an amount to cover the interest expenses during the period of the Buy Back.
6. The Agreements involved in the Compensation transaction are similar to those in Counterpurchase Agreement. They consist of three agreements:

6.1 A Primary Agreement which covers not only the conventional international sales agreements which cover the equipment, but also covers the services (technology transfer), construction and/or turnkey agreements;

6.2 A Secondary Sales or Services Agreement or Compensation Agreement which is similar to the agreement required in a Counterpurchase or Barter transaction; and

6.3 A Protocol or Framework Agreement to separate or to link the Primary Agreement and the Secondary Agreement (Compensation Agreement).

There are no examples of a Canadian firm and a Thai firm being engaged in a Compensation Arrangement with other countries. However, one example is the Buy Back Arrangement between Austria and the USSR which involves the sale of Austrian pipelines, equipment, and materials to enable the USSR to develop certain gas fields. The payment will be paid by the production being piped to Austria.95
Figure 3

Structure and Agreements Involved in Compensation Agreement

Machinery/Technology Plant → Primary Sales or Services Agreement or Turnkey Agreement → Payment

1. Canada (The Supplier) → The Protocol or Framework Agreement → Thailand (The Importer)

2. Payment → Secondary or Compensation Agreement → Product from Factory or Plant

3. Trading House ← Other Countries

Notes

1. The Protocol or Framework Agreement need not be in the Compensation Arrangement, it may be included in the Primary Sales or Services Agreement.

2. The time for Canadian suppliers to purchase the output from the plant ranged from 5–20 years and the value of the
compensation is normally higher than the Primary Sales or Services Agreement.

3. In some circumstances the supplier may assign the product to a trading house for disposition to third countries as is done in the Counterpurchase Arrangement.
2.5.5 Offsets

Offsets are sometimes referred to as being part of industrial co-operation. They are sub-divided into three categories: (1) direct offsets, including business that relates directly to products being sold; (2) indirect offsets, including all business unrelated to the products being sold; (3) a combination of direct and indirect offsets. Direct forms of offsets includes the following business: (1) co-production; (2) licensed production; (3) sub-contract product; (4) overseas investment; and (5) technology transfer. Offsets usually involves exports of high technology, military equipment or aircraft from an industrialized exporting country. The exporting country may be required to hire a sub-contracter in the importing country or to use raw materials originating from the importing country, to fulfill local content requirements, or to assist the importing country in selling its products to a third party. Traditionally, offsets apply only to the sale of military equipment or aircraft, but it is becoming common where the importing country is seeking to develop its own industrial capability and to finance the purchase of investment goods where other sources of financing are not available.

The main characteristics of offsets can be summarized as follows:
1. Offsets involve investment products such as communications equipment of high value, high technology or military equipment, such as commercial aircraft and spareparts.

2. Normally, the importing country is a government or state enterprise.

3. There may be various forms of indirect offsets such as co-production, sub-contract production, etc.

The number of agreements will depend on what type of offset arrangement the trading parties entered into. Normally there will be two agreements: (1) the primary sale and/or services agreement, and (2) the secondary sub-contract or co-production agreement. These two agreements may be separated or tied together. Offset arrangements may be entered into on a permanent basis as is the case when there is investment in an importing country.

A number of developed countries, such as Australia and New Zealand, have set out guidelines for offset policy for government procurement.102

Thailand has never been engaged in offset arrangements with any countries. Canada has entered into offset arrangements when purchasing CF-18 aircraft worth US$2.37 billion from the U.S.
companies McDonald Douglas and General Dynamics. These U.S. firms agreed to hire Canadian sub-contractors, transfer proprietary aerospace and electronical technology to Canadian firms, establish Canadian plants, promote the Canadian tourists industry, and develop the export market program of Canadian good.103
Notes

1. The payment for such equipment will normally be on an installment basis and the purchaser shall get financing from
domestic or international financial institutions.

2. The sub-division of direct offset will depend on the result of the negotiation between the parties.

Please note that some forms of offset arrangements (namely, Investment Agreements or Co-Production Agreements) may be on a permanent basis rather than ad hoc as is the case of a Subcontract Agreement or Licensed Production Agreement.
2.5.6 Miscellaneous Forms of Countertrade Transactions

The following forms of countertrade were introduced by importing countries because of a lack of hard currency to pay for imports as a result of the current debt crisis.

2.5.6.1. Advance Purchase

Advance Purchase is a transaction where an exporting country buys product from an importing country in advance and effects payment through an escrow account which will serve to finance imports by the importing country. This arrangement is being used by severely indebted countries. The major purpose of Advance Purchase is to secure payment in advance for exporter's goods and thereby eliminate non-payment. This arrangement can be used to generate hard currency for the importer and to avoid time-consuming, cumbersome foreign exchange regulations and central bank's foreign exchange procedures. In this arrangement commercial banks play a major role in handling the "escrow account" and in some cases act as a principal in the arrangement.

As discussed earlier, (in 2.5.2, supra note 79), UNCTAD categorized Advance Purchase as one form of Counterpurchase, but External Affairs, Canada, categorized it as a separate form of
countertrade. Based on the elements identified with Counterpurchase the writer agrees with the External Affairs Canada classification.

An example of Advance Purchase Arrangement is not readily available. It is the writer's opinion that the banks which handle this type of arrangement are not willing to disclose details because of the confidential nature of the transaction and because they do not want to have their technique for acquiring confidential market knowledge or expertise made available to possible competitors.
1. A Canadian supplier will purchase the product from Thailand and the payment will be made into an escrow account in Bank Z in Canada or another country except Thailand. For this type of export arrangement some countries, like Thailand, are required to obtain approval to open a foreign escrow account under the exchange control law.

2. An Escrow Account Agreement between the Canadian

Notes
supplier, the Thai importer and Bank Z must be entered. The payment from the Canadian exporter to the escrow account for the products will be made.

3. Subsequently, the Canadian supplier will deliver to the Thai importer the products under the Sale Agreement arranged in 1 or the Secondary Sale Agreement.

4. The payment to the Canadian exporter will be made upon the presentation of documents as required in the Escrow Account Agreement.
2.5.6.2 Bilateral Agreement or Switch Trading

Bilateral Agreements or Switch Trading are sometimes referred to as a Bilateral Clearing Agreement.\textsuperscript{108} The reason for the existence of this arrangement is the lack of hard currency for one or both of the countries involved or political or other economic reasons. It is an arrangement in which the two governments agree to exchange a number of products over a specified period, usually 1 year, on an agreed exchange rate between their two national currencies. These arrangements commonly make use of clearing accounts, which permit trade to take place without the need for foreign exchange. After the specified period, if the deficit exceeds the clearing account the debtor country must pay the excess in hard currency or a specified currency. The trading country will be allowed to switch the excess balance of product to a third party in order to generate hard currency for the payment to the creditor country under the clearing account.\textsuperscript{109} The price of the goods transferred are usually substantially discounted from the nominal value sometimes up to 40%. This practice is used mostly by Eastern bloc countries and developing countries in their bilateral trade.\textsuperscript{110} For example, U.S. medicines and European-made components for Rank-Xerox copier machines manufactured in India, have been shipped to the Soviet Union through the Indo-Soviet Clearing Agreement and U.S. fertilizers have been exported to Pakistan through the Romanian-Pakistan Agreement.\textsuperscript{111}
Figure 6

Structure and the Agreements Involved with Switch Trading or Bilateral Agreement

1. **Bilateral Clearing Agreement**

   **Government of Country A**
   - Central Bank

   **Central Bank of Country A, B**
   - Will credit and debit foreign account and pay domestic exporter in local currency or hard currency
   - Government of Country B, Central Bank

   **Exporter**

   Payment in hard currency or convertible currency

   **Goods 1 from B**
   - Importer

   **Exporter**

   **Goods 2 from B**
   - Importer

   **Exporter**

   **Goods 3 from A**
   - Importer

   **Switch Trader**

   **Goods 4 from B**
   - Importer in Country C
Notes

1. The Bilateral Clearing Agreement between central banks of countries A and B will specify the list of goods for exchange, the value of the goods in each currency, and the time limit for the settling of the balance.

2. The central banks will pay their local suppliers in domestic currency or hard currency when they receive it from the other country or a third party after the completion of Clearing Arrangement.

3. After Goods 1 and Goods 2 have been exchanged, the importer and exporter in Countries A and B will receive payment in domestic currency.

4. After completion of clearing account, Country A will credit Country B for the Goods 3 that Country A has supplied to the importer in Country B. Generally Country B will have to pay a convertible or hard currency to Country A.

5. If Country B does not want to take the goods of Country B, Country A will ask the switch trader to sell Goods to a third country (Country C) in a discounted manner, and Country A will have to pay the switch trader for the services. Country C will normally be required to pay in convertible or hard currency to the central bank in Country A.
2.5.6.3 Evidence Account

An Evidence Account is an agreement where a group of suppliers or exporting countries, mainly developed countries, undertake to buy and sell goods from importing countries in one or more Foreign Trade Organizations (FTO) over a given period of up to three years. Such sales and purchases are recorded in an evidence account maintained by banks in both countries. If the importing country sells more to the exporting country than it purchases from it, it will receive credit at the exporting country's bank in hard currency. In a reverse case, the exporting country will receive credit at the importing country's bank in the local currency. This arrangement is widely used in Eastern bloc countries where the trades are under the responsibility of the FTOs and the products involved are usually raw materials, chemical or other basic commodities.112

The Evidence Account Arrangement may be used to overcome problems arising from Counterpurchase.113 The Evidence Account provides a great deal of flexibility for the importer in buying export products with guaranteed, offsetting, hard currency exports. The exporter can take the benefit of having a broader range of goods to choose from compared to the counterpurchase transaction and it is less time consuming for both the negotiation of the agreement and the approval procedures.114 Generally, an exporting country is restricted under the Evidence
Account from transferring its obligations or products from the importing country to a third party.\textsuperscript{115} An example of an Evidence Account Agreement is where a U.S. firm signed several Evidence Account Agreements with the Chinese Industrial Ministry and the Agreement between Bowater, a British Trading House, and Gwangdon Province.\textsuperscript{116}
Figure 7

Structure and the Agreements Involved With Evidence Account

1. Evidence Account Agreement

2. Exporter in Country A
   Monitoring bank which credits and debits payments

   Exporter of Goods 1

   Importer of Goods 3
   payment

   Exporter of Goods 2

   Importer of Goods 2 payment

   Importer of Goods 3 payment

2. government sector or FTOs
   Monitoring bank which credits and debits payments

   Exporter of Goods 1 Goods 1
   payment

   Exporter of Goods 2 Goods 2

   Exporter of Goods 3 Goods 3

Notes

1. Evidence Accounts can also be established with one or more Foreign Trade Organizations (FTOs). The Accounts will state the value of the sale and how the balance is to be determined at the end of the agreement. If the stipulated volume or value is not fulfilled, the unfulfilled portion will be added to the
following years purchase obligation.

2. Numerous companies will be involved in Country A and in the FTOs in Country B so that the list of goods will be flexible.

3. When Exporter 1 in Country A sells Goods 1 to the Importer in Country B, the payment for Goods 1 will be credited to Exporter 1's bank account in Country B in the local currency.

4. When the exporter of Goods 3 in Country B sells Goods 3 to the importer in Country A, the payment will be credited to the bank account in Country A in the local currency which is mainly a convertible currency.
2.6 Advantages and Disadvantages of Countertrade

2.6.1 Overview

The discussion on advantages and disadvantages of countertrade is a controversial one. Most of the developed countries (mainly the OECD members) oppose mandatory government countertrade requirements and do not encourage their private sectors to enter into countertrade agreements since they are perceived to be contrary to the multilateral rules of trade. For example, Carey and McLean wrote about the U.S. government's policy on countertrade that:¹¹⁷

"The U.S. government has no means of encouraging non-military countertrade, nor does it consider countertrade an appropriate mechanism to enhance its policies of economic assistance to developing countries... The U.S. government's view ... is that countertrade is inefficient, increases the cost of each trade transaction, encourages bilateralism and hence threatens "free" multilateral trade arrangements and probably conceals unfair trade practices, particularly subsides... (U.S. government) it has made clear its opposition to foreign government-mandated countertrade and seeks to limit the proliferation of countertrade both through bilateral and multilateral channels".

The United Kingdom, Canadian and French governments share the view of the U.S. government respecting countertrade practices. However, these three governments still offer advice, information, and general guidances to exporters and will allow private
exporters to engage in countertrade.\textsuperscript{118} Most of the developing countries, on the other hand, tend to engage in countertrade in one form or another because of their wish to increase their exports, obtain hard currency and improve their competitive position.\textsuperscript{119}

An OECD report has concluded that countertrade does not provide a basis for a long term trade strategy.\textsuperscript{120} In addition, Kostecki concluded that countertrade was not an efficient form of trade as it has all the familiar shortcomings of bilateralism. Kostecki suggested various alternatives to remove the distortions which are the root of countertrade\textsuperscript{121} and which will be discussed later in the following part of this Chapter.

The writer will first discuss the most common advantage of countertrade for both developed and developing countries. Second, the advantages from different perspectives will be discussed along with the disadvantages of countertrade from both a developed and developing countries' perspective. Finally, the writer will discuss the reasons why countertrade should be encouraged.

One major advantage that both developing and developed countries share is that countertrade can be used as a means to increase market shares in foreign markets.\textsuperscript{122} For example, developing countries can use countertrade as an export promotion
tool for non-traditional goods or to penetrate new markets relying on the marketing network of experienced partners. Private firms in developed countries can also use countertrade as a tool to expand their foreign markets, especially with the Eastern European and developing countries. Pepsi-Cola entered the USSR market by building soft drink plants in Moscow, Leningrad, and Tallinn. Pepsico's costs and returns will be met by the sale of Russian Vodka in the U.S. for which Pepsico is the sole agent.
2.6.2 Advantages of Countertrade: Developing Countries

Perspective

1. Economic difficulties faced by developing countries resulted in trade deficits and a lack of convertible currency to pay for imported products and external debts. Countertrade in the form of Barter and Counterpurchase can be used to pay for the importation of goods and services and some times the payment of external debts. For example, when Indonesia and Malaysia's current account imbalances became more marked in 1981, Indonesia took the first step to impose a counterpurchase policy for government procurement between the end of 1982 and mid 1983. Malaysia has followed Indonesia's policy. Another example is where several oil producing countries (namely, Kuwait, Libya, and Qatar) have recently offered to pay creditors in oil.¹²⁵

2. Developing countries may use countertrade as a tool for development policy, especially in the form of Compensation or Buy Back and Offsets. For example, countertrade in the form of Compensation has frequently been used by Eastern European countries to facilitate the transfer of technology in order to produce competitive goods. In developing countries which do not face serious economic difficulties, like Maylasia prior to 1981, countertrade can be used as a means of saving resources which may then be assigned to major public industrial projects.¹²⁶
3. Developing countries may use countertrade especially Compensation or Offsets as a financing tool in industrial projects. For example, the USSR entered into Compensation Arrangements with various western firms to construction chemical industrial projects and paid for the construction and equipment through export of the output from the project. The People's Republic of China has also been engaging in countertrade to finance its industrial base. In 1984 Saudi Arabia used Barter to finance the purchase of ten Boeing 747 aircraft at a value of 1 billion U.S. dollars with an exchange of their oil products.127

4. Developing countries may use countertrade especially Barter and Counterpurchase as a marketing tool for surplus commodites or products in order to sustain the prices of primary products when there is a declining market demand and/or to sell unwanted low quality or excessive products and products which are difficult to sell for cyclical or structural reasons. For example, oil producing countries like Iran, Libya, and Nigeria have attempted to export oil beyond the quota set by OPEC to other developed and developing countries and have wanted to avoid unloading oil on the spot market. The additional advantages of engaging in countertrade is that some suppliers of products, who are subject to international commodity agreements or producer cartel, may lower their prices in a clandestine manner without officially contravening those agreements or setting off a
reaction on international commodity exchanges.\textsuperscript{128}

5. Developing countries may use countertrade, especially Switch Trading, to increase integration of trade among themselves.\textsuperscript{129} For example, the establishment of the Latin American Integration Association (ALADI) authorizes bilateral trade and economic complimentary agreements between its members and between member and non-member countries within the region.\textsuperscript{130}

6. Developing countries may also use countertrade to overcome trade barriers among trading partners. However, this is not important insofar as countertrade goods are subject to import controls and barriers.\textsuperscript{131}

7. Finally, developing countries can use countertrade as a means to induce foreign investment,\textsuperscript{132} for example, by requiring foreign investors to invest in the country through Compensation and Offset Arrangements.

2.6.3 Advantages of Countertrade: Developed Countries Perspective

1. Developed countries can utilize countertrade to develop new supply sources and ensure the supply of critical materials from developing countries, especially mineral products.\textsuperscript{133}
2. Developed countries can obtain new and lower cost materials and products supplied or produced by developing countries.\textsuperscript{134}

3. Developed countries may gain goodwill from importing countries if they offer to enter into countertrade arrangements and this may lead to a privileged position for future projects and the maintenance of their work force.\textsuperscript{135}

4. In the present debt crisis where developing countries cannot pay back their loans, countertrade may be used to pay the loans. The financial institutions in developed countries can arrange to market the products produced by the developed countries or firms in the developed countries can take products in lieu of money.\textsuperscript{136}

5. Multinational firms and banks of developed countries which have expertise in countertrade, especially those with their own trading houses or trading companies, may become the main actor in a countertrade transaction being responsible for financing a deal, buying and selling a product, acting as an intermediary or a broker in which case they will receive fees for their services.\textsuperscript{137}

6. Developed countries may use countertrade to support production and development among themselves or in developing
countries.\textsuperscript{138} An example of this are the offset programs for the military or aerospace equipment in place between the USA and NATO countries\textsuperscript{139}

2.6.4 **Disadvantages of Countertrade**

As previously mentioned, most international organizations like OECD and GATT, as well as developed countries are opposed to mandated government countertrade practices and do not encourage their private firms to engage in countertrade. There are a number of reasons developed by these organizations and countries on why they do not support countertrade.

1. Countertrade threatens to undermine the multilateral trading and international monetary system. It encourages bilateralism which distorts multilateral trade.\textsuperscript{140}

2. A countertrade deal is complicated, cumbersome and time-consuming. It also increases the cost of the transaction. Developing countries may have to buy products at a higher price since the suppliers may increase their prices to cover anticipated costs such as commissions paid to trading houses. Some developing countries may not be able to achieve a full advantage from countertrade transactions since they may have to pay higher prices for import products due to a weaker negotiating position. In addition, the risk of trade increases as long as
the countertrade commitment by foreign suppliers is not fulfilled.\textsuperscript{141} A recent World Bank survey of Counterpurchase in Indonesia showed that most trading house firms or brokers got a commission in the amount of 85-120 million U.S. dollars while only an eighth to a third of the commissions went to Indonesian exporters.\textsuperscript{142}

3. Developing countries may lose control over their private sectors that engage in countertrade, both in terms of the monitoring of foreign currency earned by such companies and the covering up of commercial fraud such as underdeclared import products that allows for the paying of less duties or overdeclared export products that allows for illicit capital transfers.\textsuperscript{143}

4. A countertrade transaction, especially where there is government intervention, may conceal the unfair trade practices in the form of subsidies. In addition, it can also lead to the dumping of countertrade products.\textsuperscript{144}

5. Countertrade can limit the choice of suppliers for the importing countries since the products offered by suppliers may be more expensive or non competitive in terms of quality.\textsuperscript{145}

6. The prices of countertrade products may not be determined by market forces but may be dictated by the bargaining power of
one of the partners. Developing countries have less advantages compared with their foreign suppliers, especially where the product is in surplus or no reference prices exist. Sometimes countertrade may disrupt the market of the country which sells the goods. For example, Ghana and Guinea unintentionally disrupted their own cocoa export markets in a series of poorly structured barter deals.¹⁴⁶

7. From a short term perspective countertrade may be a means of overcoming certain economic distortions. However, from a long term perspective such countertrade may result in unfavourable impacts upon developing countries. These impacts will include: disruption in commodities markets, both on prices and on quota production; the loss of control over the marketing and distribution aspect of the products; and a failure to develop expertise. Also, because most of the countertrade products are raw materials or semi-processed goods with an inelastic demand the hope of countertrade expanding the market is doubtful.¹⁴⁷

8. Finally, in the long run, countertrade practices run up against trade barriers that exist in certain markets, for example quota restrictions.¹⁴⁸

2.6.5 Conclusions

After examining the various arguments about countertrade the
writer is in favour of countertrade provided that the form of countertrade utilized fits the specific needs of developing countries and that, except in special circumstances, countertrade not be made mandatory. The following are reasons why countertrade should continue to play an important role in world trade.

First, it must be accepted that not all countertrade arrangements create an unfavourable impact. It will depend on whether developing countries choose an appropriate form. For example, if a country facing a debt crisis and has no convertible currency, it may be useful to establish a mandatory Barter or Counterpurchase Agreement. On the other hand, if developing countries want to change from being the suppliers of primary commodities to the suppliers of manufactured or industrial products, the Compensation or Offsets Arrangements may be the most suitable way to accomplish this.149

Second, countertrade may not be the same as traditional bilateral trade since most countertrade will normally be open for all trading parties to participate in on a non-discriminatory basis. There currently exist several proposals on the multilateralization of countertrade.150 In addition, the idea of reciprocity or conditional Most Favoured Nation (MFN) has become associated with the concept of equivalent market access across trade sectors and may become a popular approach in the 1980's and
Third, the problem with respect to the cost and complexity of the transaction can be overcome if all international organizations, developed countries and developing countries agree to work out acceptable guidelines, definitions, forms, and Model Agreements. In addition, training of developing countries' officers to negotiate and draft countertrade agreements will help the situation.

Fourth, the problem on subsidies, dumping and control over the private sectors's role in countertrade should be resolved by the national law in each country.

Fifth, the U.S. government's current policy of initiating a review and assessment of the negative effects of countertrade by various international organizations such as OECD, GATT, and IMF may cause a prejudiced outcome of the studies. The writer is doubtful of how reliable these studies can be. As Townsend stated in the preface to his book:

"Unfortunately, much of the material published on the subject (countertrade) has not been calculated to inspire businessmen to embark upon an initial venture in this market. On the contrary a great deal of the material is politically biased, self protective, cautionary, contradictory or even negative".

It is the writer's opinion that an independent group is
needed to study and assess the impact of countertrade, its definitions, forms and even the drafting of Model Agreements to reduce the cost and time involved in negotiation.

Finally, Kostecki in his 1987 article seeks to encourage an international initiative of various actions aimed at improving debtor countries credit such as the coordination of domestic and trade policies for determining the supplies of a number of surplus primary commodities and restraining developed countries application of protective measures against developing countries. These policies have never been achieved though there have been various efforts to overcome the problems noted. Kostecki went on to suggest that governments should initiate various actions including the encouraging of a more active and entrepreneurial marketing strategy rather than relying on countertrade, and the evaluating of the impact of surplus commodities and modified trade payments which encourage countertrade. The writer, however, is of the opinion that these suggestions are impractical and cannot solve the problems encountered by the developing countries and their perceived need to encourage countertrade.

As discussed above, countertrade will continue to grow no matter how developed countries try to oppose it. The reasons for the growth of countertrade can be seen from the advantages it offers to all trading partners. More particularly, the major
reasons for the growth of countertrade depend on the functions of countertrade which are: as a marketing tool, as a purchasing mechanism, and as a co-operation arrangement. Kostecki's Survey Report of 51 countries involved in countertrade indicated that 70 (seventy) percent of countertrade functions as a marketing tool, with the objective being export promotion of manufactures or the marketing of surplus commodities. Only 18% of the countries used countertrade as purchasing mechanism and another 12% of countertrade was functioning as co-operation arrangements.¹⁵⁷

In light of the current state of disruption in world trade and finance, the writer believes that countertrade should be encouraged, with some caution, both in the government and private sectors. Countertrade must be carefully selected to suit the specific purposes or problems of each developing country. Moreover, it must be emphasized that countertrade should be used as a means to encourage the economic development of developing countries and to expand trade.¹⁵⁸ The writer further believes that at present there is a lot of competition among firms from developed countries seeking to sell their products or win big industrial projects in developing countries. The developing countries, therefore, should take the opportunity in this "Buyer's market" to strengthen their bargaining power by insisting that their trading partner engage in a "reciprocal" trade arrangement such as countertrade.
Footnotes - Chapter Two


4. The reasons for the bilateral balancing practice in the forms of barter or barter-like among Eastern bloc countries are mainly because of the distinguishing features of communist communities. It includes: (1) The domestic price structure is politically and administratively determined; (2) The decision about what and how much to produce are made by central planners; (3) Foreign trade policy is made by central planners under the five years plan; (4) There are no direct linkage between the domestic and international countries (see Banks, supra, note 2 at 13-14).

5. Outters-Jaeger, supra, note 1 at 13-14.


8. Ibid. See detailed discussion at 14-19.


10. OECD, supra, note 7 at 11.

11. Ibid. at 11, 12.

12. Ibid. at 12.

14. Ibid. See also Carey & McLean cited Walsh's paper that "countertrade accounted for an estimated 25-30 percent of world trade in 1984, compared with an estimated 2 percent in 1964" (Carey & McLean, supra, note 3 at 443).

15. External Affairs, Canada, Countertrade Primer For Canadian Exporters (Ottawa: Department of Supply and Services, October, 1985) at 2.

16. OECD, supra, note 6 at 9.


18. See detailed discussion in OECD, supra, note 6 at 13-14.

19. See detailed discussion in OECD, supra, note 7 at 11.


23. OECD, supra, note 6 at 9.

24. OECD, supra, note 7 at 9.


26. Rajski, supra, note 22 at 128.

27. OECD, supra note 6 at 9.

28. UNCTAD, supra note 9 at 76.


31. USITC, supra, note 21 at VII, footnote 1.


34. Verzariu, supra, note 25 at 27. Verzariu took a broader view and used the word "compensatory arrangements (CAs) to include Barter, Countertrade, Evidence Account, Bilateral Clearing and Switch, Bilateral Trade Agreements or Protocols, Domestic Content Contract, Coproduction Licence, Investment Performance, Subcontracting (See details in Verzariu, supra, note 25 at 25-41).


37. GATT Secretariat Paper on Countertrade, CG 18/W/80 (No. 84-0599), (unpublished paper) at 4 and see G. Banks, supra, note 2 at 160.

38. External Affairs Canada, supra, note 15 at 1.

39. Ibid., U.K. Department of Trade and Industry, supra note 20; USITC, supra note 31 at VII, footnote 1.

40. See definition of Compensatory Arrangement; see Verzariu, supra, note 25 at 23-24 and supra note 34.

41. UNCTAD, supra, note 9 at 76.

42. See USITC, supra, note 21 at VII, footnote 1.

43. GATT Secretariat Paper, supra, note 37 at 4-5.

44. OECD, supra, note 6 at 9-10.

45. Ibid. at 17-25.

46. UNCTAD, supra, note 9 at 76-77.

47. GATT Secretariat Paper, supra note 37 at 2-5; and see Banks, supra, note 2 at 160-162.


50. USITC, supra, note 21 at 1-8.
51. Schmitthoff, supra, note 32 at 140-143.
52. McVey, supra, note 33 at 15-22.
53. Verzariu, supra, note 25 at 27.
56. Townsend, supra, note 36 at 8-19.
57. C. Guyot, "Countertrade Contracts in International Business" (1986) 20 The Int'! Lawyer 921 at 925.
59. Rajski, supra note 22 at 130.
61. The Institute of Soviet and Eastern European Studies, Options for Canadian Firms in East-West Trade (Report) (Ottawa: Carleton University, 1978) at 61-65.
62. McVey, supra, note 33 at 16.
64. Outters-Jaeger, supra, note 1 at 17.
65. Ibid. at 34; Townsend, supra, note 36 at 9.
67. See detailed discussion in Outters-Jaeger, supra, note 1 at 11-16.
68. Guyot, supra, note 57 at 925.
69. Rajski, supra, note 22 at 130.

71. Ibid, at 137, 146, 151; and External Affairs, Canada, supra, note 15 at 30-31.


73. Verzariu, supra, note 25 at 27.

74. Townsend, supra, note 36 at 11.

75. Guyot, supra, note 57 at 929-930.


78. Townsend, supra, note 36 at 12-14. The psychological countertrade is not considered as a form of countertrade under this thesis since it lacks contractual obligation by the suppliers.

79. UNCTAD, supra, note 76 at 7.

80. External Affairs, Canada, supra, note 15 at 1.

81. USITC, supra, note 21 at 2.

82. Ibid.

83. GATT Secretariat Paper, supra, note 37 at 3.

84. External Affairs, Canada, supra, note 15 at 28.

85. Ibid. at 21.

86. Ibid. at 27.

87. Verzariu, supra, note 25 at 62.


90. OECD, supra, note 6 at 11; UNCTAD, supra, note 9 footnote 43.

91. McVey, supra, note 33, at 16.

92. USITC, supra, note 21 at 3.

93. Townsend, supra, note 36 at 9-10.

94. Ibid, at 10; OECD, supra, note 6 at 23; Guyot, supra, note 57 at 948-949; USITC, supra, note 21 at 30.

95. Banks, supra, note 2 at 162.

96. UNCTAD, supra, note 9 at 76.

97. USITC, supra, note 21 at 7.

98. Ibid, at 6; External Affairs, Canada, supra, note 15 at 1-2; and see Verzariu, supra, note 25 at 44-45.

99. McVey, supra, note 33 at 17.

100. See U.K. Department of Trade and Industry, supra, note 20; and UNCTAD, supra, note 9 at 79.

101. Guyot, supra, note 57 at 945-947; USITC, supra, note 21 at 5; Townsend, supra, note 36 at 17-18.

102. See External Affairs, Canada, supra, note 15 at 13, 25.

103. McVey, supra, note 33 at 11.

104. UNCTAD, supra, note 76 at 7.

105. External Affairs, Canada, supra, note 15 at 1.

106. Townsend, supra, note 36 at 55-57.

107. Ibid, at 55.

108. Verzariu, supra, note 25 at 33; see discussion in Outters-Jaeger, supra, note 1 at 38-47.

109. Verzariu, supra, note 25 at 33; UNCTAD, supra, note 76 at 7, 10; External Affairs, Canada, supra note 19 at 2.

110. External Affairs, Canada, supra, note 15 at 2.

111. Verzariu, supra note 25 at 33-35.

112. Ibid, at 31-32; USITC, supra, note 21 at 2.
113. USITC, supra, note 21 at 2.
114. Welt, supra, note 54 at 22.
115. USITC, supra, note 31 at 2.
118. See U.K. Department of Trade and Industry, supra, note 20; External Affairs, Canada, supra, note 15 at 3.
119. OECD, supra, note 7 at 26.
120. Ibid, at 27.
121. Kostecki, supra, note 13 at 20.
123. UNCTAD, supra, note 76 at 10.
124. Terpstra, supra, note 122 at 484.
125. OECD, supra, note 7 at 14-15.
126. Ibid, at 18-19.
127. Ibid, at 31, and see Verzariu, supra, note 25 at 69, 178-182.
128. OECD, supra, note 22 at 17.
130. See Carey and McLean, supra, note 3 at 454.
131. UNCTAD, supra, note 76 at 10.
133. Carey & McLean, supra, note 3 at 449, and Terpstra, supra, note 123 at 515.

135. Ibid.

136. See OECD, *supra*, note 22 at 15.

137. See Korth, *supra*, note 122 at 46-48; and Townsend, *supra*, note 36 at 55-57. See also The Introducing of Florida State Legislation which authorizes the exchange plan to deal with financial products as well a hard to sell commodities and physical goods. The law will persuade more institutions and multinational companies to consider countertrade. Singapore also set up the center for countertrade (The Economist-Post Services, Too Much Barter is Bad For You, The Bangkok Post, May 13, 1987) at 19.


139. See Carey and McLean, *supra*, note 3 at 446.

140. OECD, *supra*, note 7 at 24.


142. Fitzgerald, *supra*, note 141 at 47.

143. OECD, *supra*, note 7 at 10.

144. Ibid. see Carey and McLean, *supra*, note 3 at 445, and see also Townsend, at 20, 21.


146. Ibid.; Korth, *supra*, note 122 at 46.

147. OECD, *supra*, note 7 at 23-25.

148. Ibid. at 25.

149. See Fitzgerald, *supra*, note 141 at 49.

150. UNCTAD, *supra*, note 76 at 11.


152. See generally Carey and McLean, *supra*, note 3 at 456. See also Fitzgerald, *supra*, note 141 at 49.
153. Carey & McLean, supra, note 3 at 446. See also IMF and World Bank policy in Fitzgerald, supra, note 141 at 46-49.

154. Townsend, supra, note 36 preface.


156. Ibid. at 18.

157. Ibid. at 9.

158. Fitzgerald, supra, note 141 at 49.
Chapter Three
The Development of Countertrade Policy in Canada and Thailand

3.1 Introduction

In this Chapter the writer will outline the development of countertrade in Canada and Thailand, as well as the government policy on Countertrade in these two countries. Then, the prospect of countertrade transactions between Canada and Thailand will be examined.

3.2 Development of Countertrade in Canada and Its Position

Even though Canadian firms had been engaging in countertrade transactions with developing countries and Eastern bloc countries over an extensive period, it is only recently that countertrade transactions have drawn much attention from the Canadian government. In 1984, there was a report prepared by the Trading House Task Force and submitted to the Minister of International Trade which provided a Canadian perspective on countertrade. This report recommended that the association of trading houses should play a role in disseminating information that could assist Canadian exporters faced with countertrade and that the government should provide basic advice and referral services to
exporters and co-operate with the trading house association to enable them to play a more effective role in countertrade.  

This report estimated that in 1983 one billion dollars, approximately 1.1 percent of Canadian exports, would be affected by countertrade and if Canadian exports to the U.S. were excluded from consideration, countertrade would affect 5 (five) percent of Canadian exports. The report suggested that countertrade should be encouraged to affect a much wider scope of Canadian exporters of commodities and semi fabricated goods.

In 1985, the Department of External Affairs published a text entitled "Countertrade Primer For Canadian Exporters". This paper is designed to provide a Canadian exporter with a basic knowledge and understanding of countertrade and to give some directions on additional sources of assistance prior to having to deal with a countertrade demand. This text indicates that in 1984, approximately 600 million dollars worth of Canadian exports, point five percent (0.5%) of total Canadian exports, was tied to some form of countertrade.

The reasons why Canadian exports have been minimally affected by countertrade are that most Canadian goods are exported to the U.S. and OECD countries. Also, the major export products are food and raw material, while countertrade has involved mostly manufactured products and capital projects. And, finally,
Canadian export sales are most frequently sales between Canadian based foreign subsidiaries and their parent companies.  

The Canadian government's policy on countertrade is similar to that of other developed countries (OECD members): countertrade is inconsistent with a multilateral policy and the government will not introduce or encourage countertrade or will not become directly involved in countertrade deals. The major reasons are that: (1) countertrade is a regressive trade practice which distorts the multilateral flow of goods and services; (2) countertrade prejudices the export opportunities of small and medium-sized firms; (3) countertrade deals inefficiently with the economic and financial constraints it attempts to resolve; (4) countertrade manifests a regrettable trend to bilateralism; and (5) countertrade tends to remove trade from the purview of normal GATT disciplines through its lack of transparency. However, the Canadian government recognizes that private exporters particularly in the areas of transportation equipment, telecommunications, defence and other high technology products, resources and energy extraction projects, agricultural and forestry equipment, and engineering and consulting services, will face the demand for and engage in countertrade in one form or another.

To ensure that the private sector remains competitive, the government should assist the private sector to deal with
countertrade requirements, although all the responsibilities for entering into countertrade remain with the exporter. To facilitate Canadian exporters dealing with countertrade, the Department of External Affairs established in 1984 a Trading House and Countertrade Division (TEH). This Division's function is to strengthen the understanding and capability of Canadian exporters and ensure that they have access to appropriate countertrade intelligence, as well as knowledge of new developments in this field.

3.3 Development of Countertrade in Thailand and Its Position

In November 1981 Thailand introduced an official countertrade policy favouring the Barter Arrangement. The government department responsible was the Ministry of Agriculture and Cooperatives ("MAC"). MAC set up a sub-committee to supervise and approve Barter Arrangements involving Thai agricultural products. However, the value of Barter Arrangements during that time was low, thus the sub-committee was dissolved in mid-1982.

In 1985 a new National Countertrade Sub-Committee ("NCTT") was established by the government in order to promote Thai products in foreign markets. The NCTT, which works under the supervision of the Economic Ministers, is empowered to supervise and approve proposed countertrade transactions involving the government or state trading enterprises. NCTT consists of the
Minister of the Ministry of Commerce ("MOC"), who acts as the Chairman, the Permanent Secretary of the Ministry of Commerce, the Director General of the Department of Business Economics, and other representatives from the Ministry of Agriculture and Cooperatives, the Ministry of Finance, the Ministry of Communications, and the Bank of Thailand.

Proposals for countertrade with the government or state trading enterprises are to be considered on a case-by-case basis by the NCTT. The NCTT is also empowered to appoint working groups to study specific countertrade projects. There was no explicit policy direction given by the NCTT until March, 1987, when the NCTT, with the approval from the Economic Ministers, proposed a policy with respect to government countertrade transactions which can be summarized as follows:

1. It is the government's policy that countertrade transactions be regarded as a supplementary trading pattern. The purpose of the government's countertrade transactions are to:

   a. dispose of surplus domestic goods which cannot otherwise be marketing or whose price is declining;

   b. penetrate new markets and expand the existing markets of Thai products; and
c. reduce current trade deficits.

2. Countertrade requirements should be based primarily on the regular trade requirements of the Thai government with favourable trade terms for Thailand.

3. Any plan to purchase foreign products by government departments or state trading enterprises for a minimum value of 50 million baht (2.5 million Canadian dollars) must be submitted to the NCTT for study by October of each fiscal year. The plan should include any proposed countertrade from foreign suppliers.

4. The type of countertrade products are to be changed from time to time in accordance with their suitability. Primary countertrade products should be those products facing export problems. Countertrade involving agricultural products or manufactured products should have as its goal the seeking of new markets.

5. The price of countertrade products is to be subject to negotiation and should be the current world market price. Foreign products should be of good quality and competitive price.

6. Private sectors are to be allowed to freely engage in countertrade.
The above guidelines also include the procedures that are to be complied with respecting the conclusion of agreements and terms of payment.

Since the NCTT has set up its policy, there have been a number of countertrade proposals submitted for approval. For example, a Barter proposal involving a tower crane for textiles and fishery products between Yugoslavia and the Port Authority of Thailand; a Counterpurchase Arrangement for medical equipment involving the purchase of Thai Agricultural products, textiles, minerals, rubber, and coffee, between the Ministry of Public Health and Hungary; a Compensation Arrangement offered by a Belgian company to set up an ammunition factory for 1,600 million baht (80 million Canadian dollars), the production of which would be bought by the Belgian company and exported to a third country; and a Counterpurchase Arrangement offered by the Cargill Company to sell over a year 8,000 barrels a day of high speed diesel oil to the Petroleum Authority of Thailand ("PTT") with Cargill purchasing agricultural and mineral products.13

Presently, the Thai government's policy explicitly encourages countertrade as a tool to expand foreign markets. Most of the countertrade arrangements are in the form of Barter or Counterpurchases of agricultural products and minerals. The annual expenditure by government in the acquisition of goods and services is one of the most attractive areas for foreign
suppliers to propose countertrade deals.

As noted above Thai private firms are allowed to engage freely in countertrade. However, at this point there is no service center for countertrade information.

Recently, the Director General of the Business Economic Department, the Secretary of NCTT, expressed a need for a qualified person to examine and negotiate government countertrade arrangements. He suggested a permanent NCTT be established consisting of representatives from the Department of Public Prosecution and the Juridical Council Office and representatives from concerned government agencies who would negotiate each deal with foreign countries.14

It is interesting to note that in June, 1987, the Export Development Committee ("EDC") was restructured. The Thai EDC consists of the Prime Minister or his Deputy as the Chairman of the Committee, the Minister of the Ministry of Commerce as Vice Chairman, the Ministers from the Ministry of Foreign Affairs, Finance, Communications and Agriculture and Co-operatives. Other members of the Committee are the Permanent Secretary of the Ministry of Commerce, the Secretary General of the Board of Investment, the Secretary General of the Office of National Economic and Social Development Board, the Governor of the Bank of Thailand, the Director General of the Bureau of the Budget,
and the Director General of the Export Promotion Department who acts as the secretary to the Committee. The members also include representatives from the private sector including the Board of Thai Trade, the Thai Industrial Association, and the Thai Bank Association. The function of the EDC, among other things, is to develop export development policy and encourage cooperation respecting export development policy between the public and private sectors.\textsuperscript{15}

Proposal of New Countertrade Policy in Thailand

A detailed discussion of the countertrade policy of Thailand is beyond the scope of this thesis. However, a few comments seem appropriate.

Countertrade may be used as a tool to supplement the objectives of the Thai Sixth National Economic and Social Development Plan, which is the main framework and policy for the development of the Thai economy. The Sixth Plan emphasizes increased efficiency and the attaining of higher quality outputs in order to ensure Thailand's international competitiveness. The Sixth Plan hopes to lessen the trade deficit and the current account deficit by increasing the income earned from exports, as well as using export growth to create jobs. Exports are to be encouraged by improving services, streamlining the government
bureaucracy to reduce investment costs, and by building up the capability of exporters. Countertrade will, undoubtedly, play an important role in achieving the objectives established in the Sixth Plan.

Concerning the Thai countertrade policy a number of comments can be made.

First, the government should take into account the various forms of countertrade, particularly the Compensation or Offset forms which can be utilized to achieve economic development by inducing transfer of technology, foreign investment or by penetrating new markets for manufactured products or high technology products. The Compensation Arrangement should be the major form of countertrade arrangement in which the government should be engaged. Barter and Counterpurchase agreements should only be used if the trade terms in favour of the Thai government respecting prices and domestic supplies and the government must be assured that there will be no disrupt of current export markets. Countertrade may be used by both government and private sectors to bargain with trading partners which have a considerable trade surplus with Thailand.

Second, it is the writer's opinion that the Thai government has too many committees and working groups responsible for international trade and finance. There is the Export Development
Committee ("EDC"), the Government Procurement Board ("GPB"), the Foreign Trade Board ("FTB"), the National Countertrade Sub-Committee ("NCTT"), and the Committee in charge of regulation of purchasing, contracting for work and engagement of consultant projects financed by External Loans ("CPC"). Duplication of roles reflects an inconsistent policy. All relevant government and private sectors should jointly work out guidelines and a uniform policy on countertrade. The EDC seems to be the most appropriate organization to draw up the guidelines and study the impact of countertrade on the Thai economy. The NCTT should exist as a sub-committee of the EDC. Other concerned committees, especially the Government Procurement Committees, the GPB and CPC, must work closely with the NCTT in order to ensure policy consistency. The legal advisors from the Public Prosecutor and the Office of the Juridical Council should also be included in the NCTT in order to assist it in negotiating terms and conditions with trading parties. In addition, the NCTT should include representatives from the private sector.

Third, private sector countertrade transaction should be encouraged and assisted by the government. The multinational trading firms owned and operated by Thai nationals could play an important role in countertrade. These trading firms could act as importers, exporters or intermediaries for countertrade products. Since Thai private trading firms may lack countertrade expertise, joint ventures between Thai trading firms and foreign
trading firms could be undertaken. Government or private trade associations such as the Board of Trade could form a study group or a committee to provide services and information to small and medium size Thai importers and exporters respecting countertrade opportunities with foreign firms. 19

Fourth, the government should supervise and monitor private countertrade transactions to ensure that there are no illegal transactions such as those that overvalue goods for illicit transfer or undervalue goods in order to pay less duty. The NCTT should be notified about private sector countertrade arrangements, but approval procedures for private sector countertrade should be avoided.

Fifth, the government should provide clear guidelines for countertrade transactions for both the public and private sectors, and prepare a model countertrade and framework agreement for major barter and counterpurchase arrangements which will avoid time-consuming negotiating and drafting. The list of products for countertrade should be flexible and it should be revised and updated from time to time.

Finally, a joint working group composed of representatives from the private and government sectors with a mandate to study countertrade policy and its legal implications is needed. Regionally, Thailand should work with the other members of ASEAN
in order to evaluate possible countertrade arrangements among ASEAN members and to learn from the previous experiences of the member countries, in particular Indonesia.

3.4 Prospect of Countertrade Between Canada and Thailand

Canada is the most export dependent country in the developed world with almost thirty percent (30%) of its current production of goods and services exported with most destined for the United States. In 1985 trade with the United States accounted for seventy-eight percent (78%) of Canadian exports, while the Asia Pacific region received only nine point two percent (9.2%). The major export products from Canada are fully-manufactured products, such as machinery, motor vehicles and electronics equipment. Processed or manufactured goods accounts forty-one point nine percent (41.9%) of foreign trade, while crude materials and fish products accounted for fifty-eight point one percent (58.1%) of the exports.20

Thailand's major exported products are commodity products such as rice, rubber, maize, tapioca products, sugar, fishery products, tin, precious stones,21 integrated circuits and textile products. Between January-October, 1986, Thai exports to Canada were valued at 128.2 million Canadian dollars, and imported products from Canada were valued at 85.5 million. Previously, Canada always had a trade surplus with Thailand.22 The products
exported to Canada are natural rubber, canned tuna, baby clams, beans, and textile products. Canada's direct investment in Thailand increased from 48.6 million baht (2.43 million Canadian dollars), during 1971-1975, to 225.7 million baht (11.28 million Canadian dollars) in 1981-1985. Canada's share for investment in Thailand is only 0.69% of total foreign investment, compared to thirty-two point twenty percent (32.20%) for U.S. investors, and twenty-seven point twenty-eight percent (27.28%) for Japanese investors.

A recent paper prepared by Canadian and Thai officers suggested that with reference to the Sixth National Economic and Social Development Plan, Canada should build long term economic linkages consistent with Thailand's Development Plan and Canada's capability and interests. Such a strategy would include the establishment and maintenance of information on investment requirements, the establishment of institutional mechanisms and cooperative linkages in both Thailand and Canada that support project development in specific industrial sectors, and the improving of the Canadian private sectors' capability with respect to the identification, preparation and implementation of viable projects in Thailand. These strategies may assist Canada to play an effective role in Thailand's industrial development.

There are various trade and service sectors where Canadian exporters could expand their market shares in Thailand, both in
term of investment and trading. These sectors would include finance, petroleum and gas, mining, public utilities services, the agricultural and chemical industry, pharmaceuticals, metal and machinery industries, electronics and transportation equipment.26

With the growth of countertrade policy in Thailand, Canadian exporters cannot ignore this manner of trading. The trade of goods and services from Canada should be proposed or pursued by Canadian exporters with both the Thai government and private sectors utilizing Compensation and Offsets arrangements.

3.5 Conclusion

Canada, as a developed country whose major exports are both manufactured and agricultural products, should encourage and support its private sectors to study the possible markets in Thailand, particularly in high technology sectors such as aeronautics, communication equipment and within the petroleum industry. However, since the cost and benefit of countertrade is controversial, it will depend on particular needs of each country in implementing the countertrade policy. Thailand, for example, may implement the countertrade policy in order to achieve its economic development. Canada, on the other hand, may implement its countertrade policy in order to expand the export market particularly for capital goods and natural resource products.
Basically, the writer is of the opinion that during the course of the economic development in Thailand where the acquisition of capital goods and foreign technology are required, countertrade policy in the form of Compensation and Offsets should be implemented. In the meantime, Canada requires to expand their export market of capital goods and technology. Both objectives may be achieved by countertrade.

Where countertrade transactions are implemented, the problems or pitfalls that may arise should be carefully examined and immediate action taken to remedy such problems. For example, the following problems may arise in countertrade transactions:

1. poor quality countertrade products.
2. missed delivery schedules.
3. inflexibility of choice of countertrade products.
4. unrealistic prices attached to imported products, machinery, services.
5. lack of a clear policy from the government.
6. time wasted in negotiating and drafting a countertrade agreement.
Footnotes - Chapter Three

1. External Affairs, Canada, Promoting Canadian Exports: The Trading House Option (Canada: Department of Supply and Services, November, 1984) at 33.

2. Ibid, at 32.

3. Ibid.

4. External Affairs, Canada, Countertrade Primer for Canadian Exporters (Canada: Department of Supply and Services, October, 1985) at 1.

5. Ibid, at 3.

6. Ibid, at 2. See also External Affairs, Canada, supra, note 1 at 32.

7. External Affairs, Canada, supra, note 4 at 3.

8. Ibid.

9. Ibid. at 6.


17. See generally in ibid, at 14.


19. See generally in Unakul, supra, note 16 at 14.


23. Ibid.


4.1 Introduction

Despite of the growth of countertrade in world trade, little attention has been paid to the legal implications of it under the General Agreement on Tariffs and Trade (GATT), the most important international agreement regulating trade among nations. There are a few scholars writing on the subject. Most of these articles deal with the question of whether or not a mandatory countertrade requirement imposed by a government will violate GATT. There is no extensive research or study by GATT of this subject, except for a paper prepared by the GATT Secretariat as a background note which cannot be taken as an official interpretation of GATT. In this thesis, I shall attempt to deal with some of the general legal implications of countertrade under the major provisions of GATT as well as the GATT non-tariff barrier codes. In order to do this, I shall address the following questions:

1. How GATT's provisions apply to the private or government sectors involved in countertrade transactions.
2. Whether trade in services as part of countertrade transactions is subject to the GATT provisions.

3. Whether a mandatory countertrade requirement imposed by the government of a GATT contracting party violates the objectives of the GATT.

4. Whether advantages or benefits typically associated with countertrade requirements and provided by a GATT contracting party violate or are inconsistent with any major provisions of the GATT or the non-tariff barrier codes. If so, what remedies are available.

5. What, if any, are the exceptions to GATT rules which allow a GATT contracting party to introduce or impose countertrade transactions without violating GATT provisions?

6. Whether existing GATT rules, as well as the non-tariff barrier codes, govern all the legal implications arising from countertrade practice.

To accomplish this goal, the writer will summarize the major GATT provisions which relate to countertrade practice, and subsequently examine the effect of the major provisions on countertrade transactions. However, due to lack of precedents or
rulings by GATT Panels, the discussion in this thesis is more "abstract" than "concrete", although in some circumstances hypothetical cases will be used for the purpose of discussion.

In this chapter the discussion of legal implications under GATT will be divided into four parts. The first part will provide an overview of GATT's objective and its principal obligations and a discussion of some specific problems that may rise in the application of GATT to countertrade transactions. The second part will examine the legal implications of the major principles of GATT. In addition miscellaneous provisions under GATT and its multilateral agreement will be briefly reviewed. The third part will discuss the exception principles where countertrade transactions may be implemented without incompatible to GATT. Finally, the concluding part will try to find the solution to some unresolved problems.

4.2 Overview of GATT and Its Applications

This part will be sub-divided into six topics in order to address some specific legal issues under GATT that may arise when GATT is called into application. To begin with the writer will provide the general GATT objective and its principal obligations and subsequently examine specific legal problems with respect to application of GATT and its Codes.
4.2.1 GATT Objectives and Principal Obligations

The General Agreement on Tariffs and Trade (GATT) is the most important international agreement regulating trade among nations. GATT's basic objective is to liberalize world trade and place it on a secure basis, thereby contributing to economic growth and development and the welfare of the world's people. The principal obligations which GATT imposes upon each contracting party are: (1) to accord most favoured nation (MFN) treatment to other parties with respect to most aspects of trade regulation; (2) to observe the maximum level of tariffs set out in GATT's schedule of concessions; (3) to limit or abstain from the use of a number of non-tariff barriers; (4) to make use of special procedures for resolving disputes; and (5) to trade on a multilateral rather than a bilateral basis.

4.2.2 Application of the GATT Rules to the Private Sector Involved in Countertrade Transactions

Basically, the GATT rules apply only to actions or measures taken by contracting parties. It only obligates governments and only through the intermediary of the government does it apply to citizens. If a countertrade transaction is imposed upon or introduced by the private sector, or if the transactions are voluntarily entered into by the private sector, such transactions will not fall under the GATT rules. It may be noted that as a
proposition of international law this opinion may not be correct. Technically a state is responsible for all actions taken by individuals or companies registered within its borders.

A private party who is injured by an action of a government where that action is inconsistent with the GATT rules, may only seek relief under the GATT by making a petition to its own national government requesting it to pursue the matter in accordance with the GATT framework.5

Countertrade practice among private sectors/actors where there is assistance from their government (e.g. in the form of credit facilities or advantages or benefits with respect to tax or quota), may violate or be incompatible with GATT obligations and will allow the other contracting parties to seek a relief under GATT rules. In summary, GATT rules do not directly apply to the countertrade transaction between private sectors unless the governments are involved or opt to intervene to protect their own interest.

4.2.3 Application of the GATT Rules to Government Sector Involvement in Countertrade Transactions

There are a number of importing countries which explicitly or implicitly impose mandatory countertrade requirements against exporting countries. So far, only Romania and Indonesia have
legislation that imposes countertrade requirements for almost all imports, including items that fall into the categories of priority imports and for government projects. In some circumstances the government may offer advantages or benefits to a private sector or state trading enterprise which engages in countertrade transactions and this may constitute a violation of GATT rules. The majority of legal opinion holds that mandatory countertrade requirement imposed by a government is inconsistent with the GATT objectives, as well as various major principles of the GATT.

4.2.4 Trade in Services Which Relate to Countertrade and the GATT Rules

Some countertrade transactions involve trade in services such as the construction of a plant and the transfer technology in compensation or offset arrangements. Currently, these service requirements are not subject to GATT provisions since the GATT has no application to trade in services. However, there are a number of agreements developed during the Tokyo Round of Multilateral Trade Negotiations (MTN) dealing with non-tariff and other aspects of services which present some scope for expansion. Those agreements are: The Agreement on Government Procurement, which includes in its scope services incidental to the supply of products if the value of these incidental services do not exceed that of the product themselves, but not the
services per se; the Subsidies Code, which contains an outright prohibition on export subsidies and incorporates an illustrative list containing a number of practices that could relate to service export; the Agreement on Technical Barrier to Trade; The Agreement on Import Licensing Procedures; The Customs Valuation Code; and The Agreement on Trade in Civil Aircraft.

4.2.5 Government-Mandated Countertrade Requirement and the GATT Objectives

A government mandated countertrade requirement includes specific laws, regulations and policies on countertrade transactions which aim to: (1) restrict the products eligible for counter exports, (2) limit the market in which countertrade export products may be resold, (3) restrain imports of products not countertraded, and (4) specify the acceptable form of countertrade. Walsh has said that government mandated countertrade tends to distort world trade and create tensions between those parties participating in a mandated countertrade arrangement and those not participating in such an arrangement.

As stated above, the major GATT principles and objective are: to liberalize world trade with the aim of eliminating discriminatory national policies, to encourage multilateral arrangements, to encourage tariff concessions, to limit non-tariff barriers, and to make use of special procedures to resolve
disputes. The preamble to the GATT states that the various economic objectives (including the expansion of production and exchange of goods) are to be achieved by the contracting parties entering into reciprocal and mutually advantageous arrangements consistent with the GATT objective and principles. Roessler classified the major legal principles under GATT as non-discrimination, open markets (i.e. free trade) and fair trade.

As government mandated countertrade requirements may encourage the trading parties to enter into bilateral arrangements and this tends to limit the trade flow and to distort world trade, it may be concluded that even though such government mandated countertrade is not necessarily in violation of the letter of GATT, it may be inconsistent with the GATT objectives.

One may argue that the government mandated countertrade requirement is in fact aimed at expanding the production of goods and that countertrade practices are not what the drafters of GATT anticipated at the time of drafting. However, the GATT Secretariat working paper has concluded that:

"... Countertrade ... is not contrary to GATT or to any of the codes supplementary to it. However, depending on the circumstances of the particular case, governmental measures that require, stimulate or take the form of countertrade, or that to react countertrade, can be inconsistent with obligations under General Agreement or the codes."
It is the writer's opinion that the criteria to consider in deciding whether a countertrade transaction violates GATT's objectives is found in the provisions of the GATT read in conjunction with the preamble rather than from the preamble alone. As Professor Jackson has commented, the objectives of GATT are sometimes inconsistent with each other and there is no established hierarchy of objectives. He also suggests that certain clauses of GATT do not reflect the currently accepted practice and therefore, the interpretation and application of GATT obligations must be approached with considerable caution. Thus, an examination of the major GATT principles by using the GATT rules and interpretative notes, preparatory work, practice and precedent, other interpretative principles and policy will be required prior to concluding whether a government mandated countertrade violates the GATT.

4.2.6 The Application of the Codes Resulting From Multilateral Trade Negotiations to Non Signatory Members of GATT

In examining the legal implications of countertrade under the GATT, it is necessary to discuss the multilateral codes on non-tariff barriers which operates within the GATT framework. These codes arose from the need for GATT to reach beyond tariff regulations in order to continue to encourage trade liberalization. The codes they may be relevant to countertrade
transactions are: (1) the Subsidies and Countervailing Duties Code; (2) the Custom Valuation Codes; (3) the Code on Government Procurement; (4) the Agreement on Technical Barriers to Trade; (5) the Agreement on Import Licensing Procedures; and (6) the Agreement on Trade in Civil Aircraft. Whether these codes apply to a GATT contracting party that is a non-signatory to the codes is controversial. The real issue of whether all the codes (resulting from the MTN in Tokyo) and their obligations should be extended on an unconditional MFN basis to all existing GATT members is not within the scope of this thesis. The writer, however, will present the differing views on the issue since it provides some insight into the operation of the GATT and how the GATT system may deal with a difficult, new problem.

Professor Jackson comments on the application of the codes in his 1969 text that:

"... specific applicability of any one of them to any GATT party could depend on acceptance, or lack of objection, by that party. Some rules might be so significant that acceptance would remain a condition entry into GATT. Offers might have lesser importance and acceptance would be subject to specific negotiations, with mention in a party's Schedule of those rules (by number) that were accepted or rejected."

He further suggests that the caveat as to the code's (Anti Dumping Code, 1967) applicability in any case involving GATT parties who are not members of the codes must be remembered. In the text, he does not give any definite answer to the question of
the code's applicability to non-signatories.

There is opinion which supports the view that the codes should bind only a country which signs the codes because the codes establish the principle of a "conditional MFN" where the codes' benefits are available only to codes' signatories and the codes are not an integral part of GATT, nor do they amend the GATT. Samet has noted that the following six codes contain "conditional MFN" elements: Customs Valuation, Government Procurement, Import Licensing, Technical Barriers, Subsidies, and Countervailing Measures and Anti-dumping. Hufbauer & Schoff suggest that the strongest argument against the "conditional MFN" approach is that such an approach might lead to the fragmentation of the world trading system and to the regionalization of political alliances.

However, one may argue that it is questionable whether the codes represent a "conditional MFN". There is a decision of contracting parties of GATT in November, 1979, which states that the "existing rights" and benefits of GATT members, under Article I of the GATT, which had not become parties to the non-tariff barrier agreement (the code) were not affected by those agreements. Based on the GATT parties decision in 1979, Professor Jackson in his 1983 article, and McGovern, concurred that the codes' benefits must be extended to non-signatories.
It should be noted that there was a case filed by the Indian Government against the U.S. government on October 29, 1980 claiming the U.S. government's application of the denial of injury criterion to non-signatories of the Subsidies Code was a contravention of Article I of GATT. The dispute panel was terminated, however, when both countries reached an agreement. This issue arose again in 1982 and was referred to the Subsidies Committee.30

This writer agrees with the opinion of Professor Jackson and McGovern that the MTN Codes should apply their benefits or the most favourable terms to non-signatory members because the unconditional MFN should prevail since the provisions of the Codes are operating under the GATT framework. It should also be noted that the objective of the Codes, such as the Subsidy Code, the Anti-dumping Code, the Custom Valuation Code, are to interpret the provisions of the GATT in order to provide greater uniformity and certainty in the implementation of the GATT. In addition, the non-reciprocity rule is one of the major objectives of GATT that grant benefits to developing countries.31
4.3 Legal Implications of Countertrade Under the Major Principles of GATT

4.3.1 Introduction

In this part, the writer will discuss the general rules of the GATT, namely the Most-Favoured Nation ("MFN") principle, the National Treatment Obligation, and the Non-Tariff Barrier Principles, as well as the legal implications of the countertrade transaction under these rules.

4.3.2 Most-Favoured Nation (MFN) Principle

A. Overview

The MFN or the non-discrimination principle between contracting parties is to be found in several provisions in the GATT and the Codes concluded during the MTN Round. The most important MFN principle is provided in Article I of GATT. This Article obliges a member country to extend the "unconditional MFN principle" in tariff and other trading policy areas to all contracting parties. Under the principle, if more favourable treatment is granted to any one country, it must also be extended at once to all members of the GATT. This MFN principle covers four areas of activity: (1) Custom duties and charges of any kind imposed on or in connection with the importation or
exportation of goods or imposed on an international transfer of payment for imports or exports; (2) the method of levying such duties and charges; (3) all rules on the formalities in connection with the importation and exportation of goods; and (4) internal taxes and regulations. The MFN principle should apply to measures taken against unfair trade practices (such as countervailing or anti-dumping duties) if such unfair trade practices are carried out by other countries and they met the requirement provided for in these provisions. There are, however, exceptions to the MFN principle: (1) the Historical Preference Exceptions (Arts. I:2, 3); (2) the Customs Unions or Free Trade Areas (Art. XXIV); (3) the Balance of Payment Exception (Art. XIV); (4) the General Waiver Granting GSP to developing countries; (5) the Individual Countries Waiver to enable them to give preferential tariff treatment to particular countries; (6) Special arrangements (MFA); and (7) Certain provision in the Codes such as in the Subsidies and Countervailing Code which contain elements of conditional MFN treatment.

B. Legal Implications

With respect to countertrade transactions, there are two questions to be considered under the MFN principle. Firstly, whether government mandated countertrade is inconsistent with this principle. Secondly, whether the benefits or advantages
associated with countertrade respecting custom duties and various relaxation of import and export licensing procedures granted by the government contracting party is inconsistent with the MFN principle.

As to government mandated countertrade, Romania and Indonesia are, so far, the only two GATT members that have explicit legislation for the mandatory countertrade requirement, but contracting parties have not yet made any complaint to the GATT respecting this legislation being a violation of the MFN. If any GATT member were to make a complaint, Romania and Indonesia might argue the developing country exception, the balance of payment exception, or the government procurement exception\(^3\) in order to sustain their legislated government mandated countertrade practices.

One may argue that a mandated countertrade requirement should be considered as "rules and formalities in the importation and exportation" under Article I of GATT. Therefore, it will apply to all foreign exporting countries on a non-discriminatory basis, with the result that such government mandated countertrade requirements would not violate the MFN principle.\(^3\) This argument, however, may be challenged on the ground that the government mandated countertrade condition on the import of foreign products constitutes a bilateral arrangement and is inconsistent with the GATT objective as implicitly provided in
Article I of preserving the multilateral character of the GATT system. It is the writer's opinion that Article I does not explicitly prohibit the imposition of a government mandated countertrade requirement which is imposed on a non-discriminatory basis. Consistent with the GATT preamble the countertrade requirement may be used as a tool to expand the market of both contracting parties and to open up markets for surplus products. In addition, voluntary consensual agreements in the form of free trade deals share similar characteristics of "reciprocity" under countertrade. Thus, there is no reason to say that a government mandated countertrade requirement implemented on a non-discriminatory basis is inconsistent with the MFN principle.

With respect to advantages or benefits granted by the importing country to foreign suppliers in a countertrade transaction, the granting of such benefits or advantages associated with countertrade may violate the MFN principle. These advantages or benefits may be granted in various forms such as custom duties, licensing requirements, quota relaxation, and foreign exchange allocations only to the countertrade import. Argentina, Brazil, India, and Korea give special status to countertraders respecting import license applications thus having their approval accelerated. Brazil gives a special status to countertrade products by lifting import quotas and embargoes that may exist on such products. Argentina will allocate foreign
exchange for countertrade imports.\textsuperscript{40} There is a GATT decision in a case where Hungary granted tariff reduction to Poland, Romania, and Czechoslovakia because those countries had entered into cooperation contracts. In the case, the GATT Secretariat ruled that the tariff reduction granted by Hungary appeared to imply conditional MFN treatment and, therefore, was compatible with the GATT.\textsuperscript{41} It can be concluded that benefits or advantages granted to specific contracting parties engage in countertrade transactions is inconsistent with the MFN principle because such benefits apply "conditionally" only to the specific contracting parties.\textsuperscript{42} However, if one of the exceptions to be discussed later in this thesis is met, then it may be permissible to provide such benefits or advantages to specific parties without violation of the MFN principle.

In summary, a government mandated countertrade requirement is consistent with the MFN principle provided that such a requirement does not discriminate against other contracting parties. However, with certain exceptions, the benefits or advantages granted to a country which engages in countertrade in the form of tariff reduction, licensing requirement or transfer of fund will be in violation of the MFN principle.
4.3.3 National Treatment Obligation

A. Introduction

The national treatment obligation under GATT means that imported goods are to be accorded the same treatment as goods of local origin with respect to domestic matters such as taxation and regulation. This obligation is different from the MFN principle in the sense that the MFN principle only requires a government to treat all foreign goods equally, although domestic products might be favoured. The major principle of national treatment obligation is provided in Article III of the GATT. Article III:1:5 prohibits the GATT contracting parties from using internal taxes or other forms of regulation (not tariff or other border measures) to discriminate against imported goods. This principle is also found in other Articles such as Article IV in relation to cinema films and Article XVI regarding subsidies.

Most of Article III is an elaboration of the national treatment obligation, with three paragraphs dealing specifically with mixing regulations (Article III:5-7), one on price control (Article III:9), and a final paragraph leaving cinematograph films to be governed by Article IV (Article III:10). There are explicit exceptions to this obligation for production subsidies (Article III:8(b)), government purchases (Article III(a)), and certain mixing requirements enforced on specified dates in 1934,
and 1948 (Article III:6).\textsuperscript{44}

B. Legal Implications

There are two questions to be examined with respect to countertrade transactions and the national treatment obligation:

(1) Whether the countertrade requirement, particularly offset arrangements which require an exporting country to buy domestic products or ensure domestic content in preference to the export products, violates the national treatment principle; and

(2) Whether the credit facilities provided to an importer to buy domestic products in order to comply with a countertrade agreement violates the national treatment obligation.

In examining the domestic purchasing requirement, the following GATT panel decisions are relevant.

In one case the European Economic Community required domestic importers and producers of animal feeds in member states to purchase specified quantities of dry milk for use in such feeds. The GATT panel ruled that this requirement was in violation of Article III:4 since it was an internal quantitative regulation.\textsuperscript{45} Another case was where the Canadian Government required United States' investors to sign an undertaking under the Foreign
Investment Review Act (FIRA) to purchase goods of Canadian origin in preference to imported goods in specific amounts and proportions, or to purchase goods from Canadian sources (hereinafter referred to as the FIRA case). In this case the GATT Panel held that "the imported products are clearly treated less favourable than domestic products and such requirements are therefore not consistent with Article III:4". The Panel further ruled that the said purchase undertaking was not in violation of Article III:5 where the issue dealt with is the existence of internal quantitative regulations relating to the mixture, processing or use of product (irrespective of whether these are purchased or obtained by other means). The undertaking was not categorized as an internal quantitative regulation.\textsuperscript{46}

Looking at the GATT decision in the FIRA case it can be concluded that, with certain exceptions, a countertrade requirement which requires exporting countries to buy or use domestic products in preference to exported products violates the national treatment obligation of Article III:4 since such a requirement treats the products of the exporting country in a different manner from the like products of the importing country. In addition, if the importing country establishes a countertrade requirement that producers use, mix or process domestic products in a specified amount or proportion, this will be in violation of the national treatment principle under Article III:5 since it will constitute a quantitative regulation.\textsuperscript{47}
With respect to the second situation where some importing countries stimulate countertrade transactions by granting special credit facilities to the private sector to purchase domestic products in order to fulfill the countertrade obligation, such a practice also violates the national treatment obligation under Article III:4. However, if such a practice involves government procurement, it may be permissible under the exception as provided in Article III:8.

4.3.4 Non-Tariff Barrier Principles

4.3.4.1 Introduction

The non-tariff barrier principles in the GATT are found in the provisions on quantitative restrictions (Article XI-XIV), Subsidies and Countervailing Duties (Article XVI), Anti-Dumping Duties (Article VI), State Trading (Article XVII), and within the Government Procurement Code. The multilateral codes concluded during the Tokyo Round are also extremely important. The application of the Codes is one of the most controversial issues within the GATT framework. The writer is of the opinion that some of the Codes are to be considered as interpretative instruments of the GATT Articles, and that under the unconditional MFN principle the benefits and advantages derived from the application of the Codes should be applied to non-signatory members.
4.3.4.2 Quantitative Restriction Obligation

A. Introduction

The following four Articles of GATT contain the central obligations regarding quantitative restrictions:

(1) Article XI: prohibits the use of quotas, (with certain exceptions);

(2) Article XII: an exception to Article XI for balance of payment reasons;

(3) Article XIII: in case exceptions are utilized and quota applied, they must be applied "non-discriminatorily"; and

(4) Article XIV: exceptions to Article XIII in certain balance of payment cases.

Article XI contains specific exceptions to the quantitative restriction obligation: (1) export restrictions that relieve food shortages (Article XI:2(a)); (2) restrictions necessary for the application of standards for grading or classification (Article XI:2(b)); and (3) import restrictions on any agricultural or fishery products under certain specific circumstances.49
B. Legal Implications

The following questions will be examined in this part:

(1) Whether a government mandated countertrade requirement violates Article XI.

(2) Whether the countertrade restrictions established through a quota or import licensing framework is consistent with Article XI.

(3) Whether, under circumstances where the countertrade requirement is allowed to be imposed, it must be applied on a non-discriminatory basis.

There are conflicting views on whether the government mandated countertrade requirement violates Article XI. One view is that the government mandated countertrade requirement is one form of trade restriction and is included as an "other measure" apart from quota restrictions in Article XI and therefore is prohibited. The other view is that the government mandated countertrade requirement is not a trade restriction but is a tool to expand the importing market. A government mandated countertrade restriction that has no consequence on the importing or exporting of goods will not come under the purview of Article
XI. However, if a government mandated countertrade transaction has an effect on the import or export of goods through the use of a quota or import license then the transaction may violate Article XI:I.

It is interesting to note that in the FIRA case, the United States claimed that Canada was in violation of Article XI because purchase undertaking which required U.S. investors to buy domestic products in preference to export products also operated as a restriction on the importation of products into Canada. But the GATT Panel took the view that such a purchase undertaking did not prevent the importation of goods and therefore was not inconsistent with Article XI.52

With respect to the question of whether countertrade restrictions established through a quota or import licensing framework is inconsistent with Article XI, the concern is that some contracting parties may establish the requirement that: (1) the import license for certain products will only be issued if it is exchanged for an export sale of a certain value from the importing countries;53 (2) import quotas and embargoes are lifted for countertrade imports;54 or (3) the contracting parties adopt the policy of withholding or slowing down the approval of import licenses for the products from the exporting countries.55 All legal scholars who have written about the GATT and countertrade and the GATT Secretariat Paper share the view that such
countertrade practices constitute a trade restriction and, therefore, violate Article XI:1. The writer agrees with the above opinion but takes the view that mandatory countertrade alone will not violate Article XI unless there is a form of trade restriction established as part of the countertrade practice.

If a contracting party is permitted to establish a quota, import license or other trade restrictive measure in a countertrade transaction by relying on one of the exceptions provided in the GATT, namely the balance of payments or developing countries exception, the exception should apply to all contracting parties on a non-discriminatory basis as provided for in Article XIII. For example, importing countries cannot choose to apply quota or import or export license rules in countertrade practices with only some exporting countries.

Generally, under Article XIII, importing countries may impose countertrade requirements as restrictions on the importation of products provided that such restrictions are non-discriminatory. This comment may be supported by analogy with the GATT Panel's 1979 decision in the France v. Hong Kong case. In this case, the GATT Panel ruled that non-quota restrictions withholding or slowing down the approval of imports only of Hong Kong products violated Article XI and Article XIII.

It must be noted that if the restrictions will unfairly
redistribute trade among contracting parties because some of the contracting parties are better equipped to deal with countertrade, then the restriction may be discriminatory unless the importing country takes some measures to offset the redistributive effect of the countertrade requirement.  

Under Article XIV, the importing country is allowed to impose a quota or import license through countertrade requirements on a discriminatory basis on the grounds of balance of payment exception or developing country exception. However, such countertrade requirements must have an "equivalent effect" to certain payment restrictions which are permitted under the Article of Agreement of the International Monetary Fund ("IMF Agreement"). This right of an importing country to apply countertrade restrictions on a discriminatory basis will depend on the right to introduce bilateral payment arrangements under the IMF Agreement. IMF set out its policy with respect to bilateral arrangements and the use of the countertrade arrangements thus:

"The Fund's policy of not approving the maintenance of bilateral payments agreements and of encouraging their termination in the context of Article IV consultations has contributed to a decline in the use of bilateral payments arrangements. The approach set out in Executive Board Decision No. 955 (59/45), adopted on October 23, 1959, remains appropriate; that is, that (a) there is no justification on balance of payments grounds for discrimination by members whose current receipts are largely in externally convertible currencies, (b) where such discriminatory restrictions have long been maintained, a reasonable amount of time may be needed to
eliminate them, but this time should be short, (c) in the case of payments relations with countries having centrally planned economies in which limitations exist on convertibility, the Fund would be prepared to consider whether balance of payments considerations would justify the maintenance of some degree of discrimination. The number of members continuing to maintain bilateral payments arrangements at present suggests that the policy in (b) should continue to be implemented".

4.3.4.3 Subsidies and Countervailing Restrictions

A. Introduction

There are two provisions, Article XVI and Article VI, in the GATT that relate to the restriction on subsidization of goods and to the application of countervailing duties. Export subsidies for non-primary products are prohibited, (Article XVI:4) but export subsidies for products are permissible subject to certain conditions (Article XIV, 2:3). The imposition of a countervailing duty may be taken by the importing country against subsidized products where they are causing or threatening material injury to the domestic industry (Articles VI:3 and 6). However, the criterion for imposing a countervailing duty under Article VI are not relevant to Article XVI.

Due to the ineffectiveness of the GATT in regulating the use of subsidies or in controlling the countervailing duty laws of the contracting parties, a new code called the Code on Subsidies and Countervailing Duties or the Agreement on Interpretation and
Application of Articles VI, XVI, XXIII of the General Agreement on Tariffs and Trade (The Subsidies Code) was completed during the 1979 Tokyo Round. The Subsidies Code restates the prohibition on export subsidies for manufactured and similar products found in Article XVI of the GATT and adds minerals to the list of products not to receive export subsidies. Developing countries, however, are permitted under this Code to grant export subsidies to all industries, although they may face countervailing duties in many of their export markets if they engage in such subsidization. The Subsidies Code has an illustrative list of the export subsidy measures which are prohibited under the GATT, which includes: (1) Direct Subsidies; (2) Currency Incentives; (3) Transport Subsidies; (4) Preferential Supply of Goods or Services; (5) Reduction of Direct Tax Liability; (6) Exemption or Remission of Indirect Taxes; (7) Remission or Drawback of Import Charges Subsidies; (8) Export Credit Guarantees and Insurances; and (9) Export Credits. The Subsidies Code requires a finding of material injury from the subsidization before countervailing duties may be imposed (Article 16 of the Subsidies Code). This Code as earlier discussed should apply to non-signatory members.

B. Legal Implications

A countertrade transaction may give rise to questions under Article VI, XVI and the Subsidies Code:
(1) Will a government mandated countertrade requirement constitute a subsidy or export subsidy under the GATT and its Code?

(2) What type of advantages or benefits provided by a government to an importer in a countertrade arrangement will constitute an export subsidy and will violate Article XVI and the Subsidies Code?

(3) What is the basic principle for imposing countervailing duties on countertrade products?

With respect to the first question, there are two different opinions whether a government mandated countertrade requirement constitutes a subsidy or an export subsidy. The first opinion is that a mandated countertrade requirement is a measurable economic advantage given by the government to a domestic importer and is discriminatory against other domestic importers. Based on the view that Article XVI governs only subsidies that operate to increase exports or reduce imports, the government mandated countertrade requirement will constitute a "subsidy" and will be subject to notification to the other contracting parties as provided in Article XVI:1, part A, and Article II of the Subsidies Code.

The other opinion is that a mandated countertrade requirement
imposed by an importing country is not a measurable economic advantage and will not discriminate against other groups of domestic enterprises. It is important to remember that it is difficult to quantify the consequences or advantages of government mandated countertrade.

It is the writer's opinion that the purposes of Article XVI and the Subsidies Code are to regulate subsidies and to prohibit export subsidies. The subsidies must have the consequence that an importer will be able to sell their products at a lower than normal market value in order to compete with other contracting parties. If there are benefits associated with a countertrade requirement, then it should be measurable in terms of monetary value or benefit in kind. Therefore, a mandated countertrade requirement alone does not constitute a subsidy or an export subsidy.

As to the second question, whether a countertrade practice which constitutes an export subsidy for non-primary products will be inconsistent with Article XVI:3 of the GATT and Article 9 of the Subsidies Code, the illustrative list of export subsidies is provided in the Annex to the Code. Export subsidies for primary products are permissible subject to certain conditions (Article XVI:3 and Article 10 of the Subsidies Code). Primary products are defined as:
"any product of farm, forest or fishery, in its natural form or which has undergone such processing as its customarily required to prepare it for marketing in substantial volume of international trade".

To determine what type of export subsidies under countertrade practice are prohibited a hypothetical case study will be discussed:

**Case Study No. 1: Type of export subsidy**

The Canadian Government passes legislation to the effect that a private importer will be able to negotiate a countertrade deal with an exporting country to buy a Canadian product (non-primary product) of a value equal to the import product or more and will be able to sell this product to governments at a price higher than that charged to other domestic customers. Moreover, the Canadian Government may provide the following advantages or benefits to these private importers: currency retention schemes or any similar practices which involve a bonus on export; preferential supplies of services or goods; export guarantees or an insurance program; and export credits. It is assumed that Canadian subsidization is causing a material injury to the domestic industry of the importing country.

The questions to the examined is whether the types of advantages or benefits provided by the Canadian Government constitutes an "export subsidy".
Discussion

There is no doubt that the benefits or advantages provided by the Canadian Government to their importers who engage in a countertrade practice as mentioned above will be considered as export subsidies. The benefit that the Canadian Government will buy the non-primary products from the importer at a higher price as a condition for their export performance falls under the illustrative list of export subsidies in the Annex to the Subsidies Code. Thus, the provision by a government of direct subsidies to a firm contingent upon export performance is inconsistent with Article 9 of the Subsidies Code. If the Canadian Government grants a more favourable exchange rate for exports this also constitutes an export subsidy as noted in the Annex illustrative list of export subsidies which provides that "Currency retention schemes or any similar practice which involve a bonus for export" is a subsidy.

Apart from the two illustrative lists demonstrated in the case study above, the following provisions in the Illustration of Export Subsidies under the Subsidies Code should be taken into consideration:

"(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly
competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(j) The provisions by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products and of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, insofar as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of January 1, 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(1) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement".

It is a controversial issue whether the illustrative list under the Subsidies Code will be the only criteria used to determine an export subsidy question. The EEC views that the illustrative list must be conclusive and the rules of the Annex
should not be left to the discretion of signatory governments.\textsuperscript{68} The GATT takes the view that a practice that does not meet the illustrative list criteria might still be considered as a subsidy.\textsuperscript{69} The latter view is supported by the GATT working party.\textsuperscript{70} It is not within the scope of this paper to discuss this issue in detail.

The imposition of countervailing duties is to take place only if a subsidy causes or threatens material injury to a domestic industry. If the material injury test is met, the countervailing duty levied must not be in excess of an estimated amount of the subsidy granted by the foreign government (Article VI:3, and Article 4 of the Subsidies Code). Article VI:6(a) restricts the imposition of an anti-dumping duty or countervailing duty unless there has been a determination that the effect of the export subsidization is to cause or threaten material injury to an established domestic industry or to materially retard the establishment of a domestic industry (see also Article 6 of the Subsidies Code). The criteria used to determine the "material injury" and the method of determining the countervailing duty is beyond the scope of this thesis. However, it should be noted that the injury decision is based on factual information only. The factors which can cause injury to a domestic industry are the volumes and prices of the countertrade products. The material injury determination is complex and requires an assessment on a case by case basis of all the factors affecting the domestic
It is interesting to note Leibman's opinion that:

"... to the extent countertrade is not expressly mentioned in the illustrative lists, it will be difficult to obtain any consensus as to its impermissibility, nor will it be easy to prove its prejudicial effects in order to impose countervailing duties."

The writer disagrees with Liebman's opinion. It is the writer's opinion that though countertrade is not expressly included in the illustrative list, if a grant of benefits or advantages has been explicitly or implicitly made to an importer, this should be sufficient to fulfill the criteria found in the illustrative list. However, the writer agrees with Liebman's opinion that it may be difficult to prove its prejudicial effects or material injury and thus impose countervailing duties unless the practice engaged in is a "permanent trade practice".

In conclusion, a government mandated countertrade requirement alone will not constitute a subsidy or an export subsidy. However, the benefits or advantages associated with countertrade requirements that fall under the illustrative list of export subsidies, an Annex to the Subsidies Code, will constitute an "export subsidy". If material injury takes place, a countervailing duty may be imposed. There may be some difficulties in determining "material injury" and imposing a
countervailing duty in countertrade practice since the countertrade will generally be on an ad hoc or temporary basis rather than on a permanent basis.

4.3.4.4 Anti-Dumping

A. Introduction

Dumping is defined as the case where products are sold in a foreign market at a lower price than in the domestic market. But dumping itself does not give rise to a problem under GATT, it must combine with an "injury" to a contracting party. It has been suggested that the reasons for dumping are the maintenance of domestic prices in the country of origin through the disposing or exporting of stock surplus and the elimination of competition in the importing country, thereby establishing or maintaining a market share.

Article VI of the GATT governs the use of anti-dumping duties and is designed to discipline the use of anti-dumping duties by importing countries. It permits an importing country to impose an anti-dumping duty if the import product is sold at less than its "normal value" as defined in the Article. The anti-dumping duty may be imposed only if the dumped import is causing or threatening "material injury" in the importing country or retarding the establishment of an industry (Article VI:1). The
amount of the extra duty that may be imposed cannot be greater than the margin of dumping (Article VI:2). It must be noted that no product is to be subjected to both anti-dumping and countervailing duties simultaneously (Article VI:5). Due to the vagueness and imprecision regarding the criteria to be used to define injurious dumping and the procedures to be followed in levying anti-dumping duties, an Anti-Dumping Code was adopted in the mid 1960's by a group of GATT members. This Code was revised in 1979. It is also called the Agreement on Implementation of the General Agreement on Tariffs and Trade (the "ADC Code"). This Code is broadly consistent with its predecessor and with Article VI\textsuperscript{77} and will be discussed simultaneously with Article VI of the GATT.

B. Legal Implications

The GATT does not prohibit dumping nor does it oblige the government to prevent dumping, but Article VI and the ADC Code give contracting parties the right to levy anti-dumping duties if dumping causes or threatens material injury. The crucial question in an alleged dumping situation is what constitutes the normal value of the product since dumping occurs only if the goods is priced below this value. Hence, the writer will briefly discuss the method of determining the export price or normal value of products involved in a countertrade and the relationship this has with dumping.
If the export price of countertrade products being sold to an importer is not lower than the price sold by the exporter in his country, no anti-dumping issue will arise. In this situation, the exporter will incorporate the anticipated cost that the importer may have to pay into the price of the countertrade product. The costs are: the cost of disposing of the countertrade product and the discount to be given to the trading house or international broker. However, the export prices of some countertrade products, particularly where the products are commodities or primary products involved in a Barter, Counterpurchase or Switch Trading arrangement, may be lower than the domestic price since these products are often agricultural surpluses or low quality products. In this circumstance, the exporter of countertrade products will normally give a large discount or sell the products at a loss in order to dispose of them or to maintain or expand their market shares. If the private sector or government in the importing country can establish "material injury" resulting from such dumping, anti-dumping duties can be imposed. The anti-dumping duties are the difference between the export price and the normal value. The national laws of GATT member countries respecting the establishment of anti-dumping duties must be consistent with Article VI and the ADC Code.

As this thesis will briefly examine the method of determining
the export price and the normal value of a countertrade product, the examination based on the following case studies seems appropriate.

Case Study No. 2: Dumping in Counterpurchase Arrangements

A Canadian company entered into a counterpurchase agreement with a Thai company. Under the counterpurchase agreement, the Canadian company agreed to buy rice from the Thai company at the price of 80C$ per ton. The price of rice on the international market at that time was 100C$ per ton. Part of the rice was imported into Canada and other part was to be resold to a trading house at the price of 60C$ per ton and that trading house was to sell the rice to purchasers in the U.S. at the price of 60C$ per ton. It was assumed that the importation of Thai rice, both into Canada and the USA caused or threatened material injury to Canadian and US domestic products.

Discussion

In the above facts, the normal value of the rice will be 100C$ per ton (Article VI:1a of the GATT, Article 2(1) of the ADC Code). If there is no such price, a comparison price of the product or a like product when exported to the third country will be used (Article VI(b) of the GATT, Article 2(8) of the ADC Code). Since the export price to USA would be 60C$ per ton, the
Canadian and US governments would be able to impose anti-dumping duties at the rate of 20C$ per ton for the rice imported to Canada, and 40C$ per ton for the rice imported to the U.S. market.

Case Study No. 3: Dumping Computation Arrangements

A Canadian company entered into a compensation arrangement with a Thai company to produce toys. Under the compensation arrangement the Canadian company was to transfer its technology and sell its equipment to the Thai company and agreed to buy the toys produced by the Thai company using the technology and equipment. The price of the toy products to be sold to the Canadian company was to be lower than the normal value since the Thai company was an associated company of the Canadian company. These toys were not to be sold domestically or to any other countries. Again it was assumed that the lower price of the toys cause or threaten material injury to the Canadian toy industry.

Discussion

In this case it is assumed that the normal price of the toy products was not available because there was no sale of like products in Thailand and that there is no comparable product exported to a third country. The anti-dumping duties, however, may be determined from the cost of production in Thailand, plus a
reasonable amount for administrative, selling, and other costs, plus a profit (Article 2:4 of the ADC). On the other hand, Article 2:5 of the ADC provides that:

"In case where there is no export price or whether it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported or on such reasonable basis as the authorities may determine."

The normal value and the export price must be a fair comparison based on the same level of trade, differences in the conditional terms of sale, and differences affecting price comparability (Article 2:6 of the ADC).

It is clear from the facts described above that the Canadian government which is a signatory to the ADC, would determine the normal value of the product on a "reasonable basis" under their own national law which is to be in accordance with the guideline set out in Article 2:5 and 2:6 of the ADC.

From the above two cases, it is questionable whether a Canadian importer would argue that the lower price of the countertrade product is due to the anticipated cost or allowance that may arise in disposal of the countertrade product, this cost would include transportation and the commission given to the
trading house or the sale conditions associated with countertrade requirements. It is the writer's opinion that the government should take this criteria into consideration in determining the normal value or export price as provided in Article 2(6) of the ADC and Article VI:1 of the GATT. What should be categorized as a cost for an adjustment of the export price and normal value in a countertrade transaction requires further study.

To sum up, the imposition of an anti-dumping duty on countertrade products is possible if two requirements are met: (1) the export price of a countertrade product is lower than the normal value (domestic price); and (2) the dumping causes or threatens material injury to the industry in the importing country. However, the method of determining the normal value or export price of the goods must take the nature of countertrade transactions into consideration so that the determination will be fair and reasonable. In case of a temporary or an ad hoc countertrade transaction, it may be difficult to establish the fact necessary to meet the material injury test.
4.3.4.5 State Trading Enterprise

A. Introduction

State trading enterprises can be used as a non-tariff barrier to restrict the import of goods. The State Trading Enterprises provision under Article XVII is aimed at controlling such practices by contracting parties. This provision applies not only to "State Trading Enterprises" but to any firm which has been granted an exclusive right or privilege by its government.

According to Article XVII:1(a), state trading enterprises shall, in their purchasing or selling involving either imports or exports, act in a manner consistent with the MFN principle which GATT prescribes for government measures affecting imports and exports by private traders. This obligation is understood to require state trading enterprises to make their purchase and sales solely in accordance with commercial considerations. It has been suggested that state trading enterprises are only obliged to comply with the MFN principle but not the National Treatment obligation, therefore a state trading enterprise is entitled to treat imported goods different from domestic products. Note that the MFN principle under Article XVII:1 is not applicable to imports for government consumption (Article XVII:2).
The following questions will be examined in this part:

(1) Whether a government mandated countertrade requirement established through a state trading enterprise or a private enterprise which has been granted a privilege or monopoly right violates Article XVIII:1.

(2) Whether the above countertrade requirement for all exporting countries constitutes an "import restriction" under Article XI.

(3) Whether the above countertrade requirement violates Article II:4 with respect to limits on tariff concessions.

(4) Whether the export performance requirement for state trading enterprises or private companies imposed by a government violates Article XVII:1(c) regarding the limitation on government intervention.

With regard to a government mandated countertrade established through a state trading enterprise involving some specific exporting countries, such a practice will be inconsistent with Article XVI:1 since it applies to specific exporting countries on a discriminatory basis. However, if the imported product is for government consumption, no problem arises (Article XVIII:2).
With respect to the second question, the interpretative note associated with Article XI, XII, XIII, XIV and XVIII of GATT states that the term "import restrictions" and "export restrictions" include restrictions made effective through state trading operations. A government mandated countertrade requirement on an import monopoly has the same restrictive effect as the issuing of import licenses conditional upon countertrade. Therefore, subject to certain exceptions in Article XI:2, such a requirement in a countertrade arrangement is inconsistent with Article XI:1.81

With respect to tariff concessions, Article II:4 of the GATT provides that a monopoly for the importation of a product by a state trading enterprise or a private enterprise shall not operate so as to afford a protection in excess of the amount of protection provided in the tariff schedule. Gadbaw views that this provision could be used against countertrade requirements imposed via an import monopoly that has been established either formally or informally.82

The imposition of an export performance requirement for a state trading enterprise or a private enterprise in a countertrade transactions is not incompatible with Article XVII(c). The GATT Panel in the FIRA case found that Article XVII is not applicable to export performance requirements because there is no provision in the GATT which forbids requirements to
sell goods in foreign markets in preference to selling in the domestic market.\textsuperscript{83}

Finally, decision of a state trading enterprise to grant permission to import as part of a countertrade arrangement is consistent with Article XVII:1:2 if the decision is made in accordance with "commercial considerations". Commercial considerations, according to the interpretative note to Article XVII:1(b), includes a "tied loan". One writer takes the view that a countertrade requirement shares similar characteristics to a "tied loan", so that the importation of goods which depends on a countertrade requirement should also be regarded as a "commercial consideration" and therefore, will not be inconsistent with Article XVII.\textsuperscript{84} This view, however, may be attacked on the ground that a "commercial consideration" may not be intended to include the countertrade requirement and countertrade is not a customary business practice as provided in Article XVII:1(b). Even though there is no precedent, the writer agrees with Liebman's view that a state trading enterprise or the private sector should take into account the countertrade requirement as a "commercial consideration" in granting the importation right to export products provided that such a countertrade restriction applies to all exporting countries on a non-discriminatory basis.\textsuperscript{85}

In summary, with the exception of government procurement, a
countertrade requirement which establishes a privilege for a state trading enterprise or a private firm may be inconsistent with the following three provisions of the GATT: Article XVI:1, if it is applicable on a discriminatory basis; Article XI, if it involves a quantitative restriction; and Article VI:2, if the countertrade requirement involves offering tariff protection in excess of the tariff schedule. However, if a state trading enterprise merely takes the countertrade requirement into consideration when importing the product, the countertrade requirement may not be in violation of Article XVI. It is suggested that in the future, the interpretative list to the Article should include the countertrade practice as a "commercial consideration".

4.3.4.6 Government Procurement Code

The government procurement rules in the GATT are an exemption from the national treatment obligation (Article III:8(a)) and from the state trading enterprise non-discriminatory rules (Article XVII:2). There was an Agreement on Government Procurement (the "AGP") concluded at the MTN in 1980. The AGP has been accepted by the USA, Canada, the EEC and about ten other countries. The aim of the AGP is to ensure increased international competition and to encourage more effective use of public resources. The AGP lays down the principle of non-discrimination and of national treatment for products from other
countries that are parties to the AGP respecting legislation procedures and practices regarding government procurement. The AGP covers only government procurement contracts of a value not less than 150,000 Special Drawing Right units ("SDR"). The AGP applies to all products purchased by the entities covered, as well as the services that are ancillary to the supply of products when their value is less than that of product concerned. It also includes tendering procedures. Unlike the Subsidies Code and the Anti-Dumping Code, the AGP obligation only applies to the signatory members to the Agreement. However, if a signatory country were to pass legislation inconsistent with the AGP and the law was applied discriminatorily against a non-signatory member, the non-signatory could claim that such treatment was inconsistent with Article I, the MFN Principle. There are provisions under the AGP which give more favourable treatment to developing countries. Moreover, the AGP allows exemptions from certain obligations under the Agreement and for a temporary exemption from the national treatment rule.

B. Legal Implication

If a country which is a member of the AGP, like Canada, imposes a countertrade requirement (in various forms) for the purchase of products for government use, such a requirement may be incompatible with the AGP but not incompatible with the national treatment obligation under Article III of the GATT. To
examine the legal implications of this, a hypothetical case study is presented.

Case Study No. 4

The Canadian Government imposes an offset arrangement involving a government contract to build a plant valued at one million Canadian dollars. The requirement stipulates that the award will be given to the firm which offers the best offset procurement (i.e. use of Canadian materials or local employment).

Discussion

This particular offset arrangement that requires an exporter to ensure a certain Canadian content is not in violation of the national treatment obligation in Article XII of the GATT because it involves government procurement (Article III:8(A)).\textsuperscript{88} However, such a requirement may be in violation of Article III:1 respecting national treatment and non-discrimination unless it applies on a non-discriminatory basis. Moreover, the policy that the award will be given to a firm which offers the best offset requirement may be in violation to Article V:14(h) of the AGP. According to Article V:14(h), the contracting party is normally to refrain from awarding contracts "on the condition that the supplier provides offset procurement opportunities or similar conditions". It further states that in the limited number of
cases where such requisites are part of a contract, the parties concerned "shall limit the offset to a reasonable proportion within the contract value".\textsuperscript{89}

A developing country may be able to require a certain domestic content, offset procurement, or transfer of technology as a criteria for an award of a contract.\textsuperscript{90} Liebman comments that the AGP will not be applicable to developing country procurements made in furtherance of a countertrade requirement which is similar to "tied aid".\textsuperscript{91}

It is interesting to note that Article V:14(h) of the AGP only deals expressly with the offset arrangement. However, the other forms of countertrade, such as counterpurchase or Barter, may also be covered by the AGP.

The writer thinks that the AGP will rarely apply to a countertrade requirement unless countertrade becomes widely practiced by developed countries which have signed the AGP.

4.3.4.7 Customs Valuation

One major problem in countertrade transactions is the customs valuation of countertrade products. Previously, customs valuation under GATT was based on the "actual value method". "Actual value" was defined under Article VII(b) of GATT as:
"Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions ...".

Article VII and its interpretative note provide useful guidelines for the permissible applications of a broad definition of "actual value", but it permits the importing country to determine the time and place of valuation. This discretion given to GATT contracting parties creates two major problems for the importers. First, there is little uniformity among the methods used by different contracting parties and as a consequence, the same nominal tariff rate may result in entirely different effects in various countries. Second, some contracting parties employ a method which inflate the value of certain products above their actual value. Thus, Article VII proved ineffective in dealing with the methods.\(^9\)\(^2\) The Customs Valuation Agreement ("the CVA") or the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade\(^9\)\(^3\) was drafted to achieve the GATT objectives that goods should be assessed at its actual value and in a reasonably manner. Part I of the CVA accomplishes the GATT objective by, in effect, eliminating the discretion granted the GATT contracting parties under Article VII to select the valuation method. Instead, contracting parties ratifying the CVA are bound to adopt the customs valuation method contained in Part I. The CVA contains six alternative valuation methods incorporating broad methods of the customs valuation: the
transaction valuation (Articles 1, 2, 3 of the CVA), the
deductive valuation (Article 5 of the CVA), the computed
valuation (Article A), and the derived valuation (or reasonable
means value method) (Article 7 of the CVA). These alternatives
will apply in sequential order.

The transaction value is defined in Article 1 of the CVA as "the price actually paid or payable for the goods when sold for export to the country of importation". The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported products. There are four exceptions when the transaction value will be applicable to imported goods: (1) where restrictions substantially affecting the value of the goods exist on the disposition or used of the goods; (2) where the sale or price is subject to some conditions or considerations for which a value cannot be determined; (3) where some "part of the proceeds of any subsequent resale, disposal or use of goods by the buyer will accrue directly or indirectly to the seller; and (4) where the buyer and the seller are related.

An importing country cannot apply the transaction value method as provided in Article I of the CVA to a countertrade transaction because the sale or price is subject to some conditions or consideration. If countertrade is transacted in a pure barter form without specifications of monetary term, it is
not considered as a "sale" and the transaction value method will not be applicable.\textsuperscript{102}

If customs valuation cannot be made under Article 1 of the CVA, the customs value shall be the transaction value of identical goods sold for export to the same country at or about the same time (Article 2 of the CVA). And if the customs valuation cannot be made under Articles 1 or 2, Article 3 of the CVA will apply. Article 3 of the CVA is identical to Article 2 except that Article 3 computes "the transaction value" of similar goods to the goods being valued. It must be noted that the customs valuation method under Articles 2 and 3 of the CVA will be used only if a transaction value of appropriately similar or identical goods can be discovered. To use Article 2 or 3, the imports to be compared must be similar in several important aspects. They must be produced in and imported to the same country at about the same time. Goods may be compared if sold in different quantities and at different "commercial levels" as long as an appropriate adjustment can be made on the basis of demonstrated evidence which clearly establishes a reasonable and accurate adjustment.\textsuperscript{103} If a suitable comparable import transactions cannot be found, then Article 2 or 3 of the CVA will not apply.

It is questionable whether Article 2 or 3 of the CVA would apply to countertrade transactions. The writer is of the opinion
that the transaction value method as provided in Articles 2 or 3 of the CVA will not apply to countertrade transactions. Support for the writer's opinion is as follows: (1) the transaction value of identical or similar goods under Articles 2 and 3 cannot be used if the transaction is subject to some conditions; and (2) the comparable import of identical or similar goods to countertrade products is not possible in several important respects namely, the commercial level and quantities. There are two opinions of the Technical Committee on Custom Valuation with respect to Barter and Compensation which support the proposition that the "transaction value" is not applicable in a countertrade transaction. Therefore, the determining method for the value of product in a countertrade transaction will be based on one of three methods: the deductive value method, the computed value method, or the derived value method. The writer will briefly discuss these three methods.

Under the deductive method, the value of the goods will be based on the price at which the imported goods or similar products are sold in the country of importation: (a) at the time of importation or (b) at the earliest date after importation of the products in question and in any event within ninety days, or (c) after further processing. In each case, the comparison is to be based on the unit price of the greatest aggregated quantity sold.
It should be noted that a discount given to a trading house or a third party in disposing or selling of countertrade products should be included in the value adjustment based on the cost of production.

The computed value of products is the sum of: (a) the cost or value of materials, the fabrication, or processing employed in their production; (b) a reasonable profit and general expenses equal to those usually reflected in the sale of goods of the same class or kind; and (c) the cost or value of all other expenses appropriate to the valuation bases, either c.i.f. or f.o.b., which the importing country adopts. This computed value method will generally be limited to those cases where the buyer and seller are related and the manufacturer is prepared to provide the necessary information and to allow for verification.\(^{107}\)

If neither of these two methods are applicable, the value may be determined by any derived method or reasonable means consistent with provisions of the Code and the GATT using available data especially previous valuations (Article 7 of the CVA).\(^{108}\)

It is the writer's opinion that the deductive value may be the most appropriate for the Barter and Counterpurchase arrangement since it offers more alternatives and is more
flexible. The computed value may be appropriate for a compensation or buy back arrangement because in such an arrangement, the importer and the exporter normally are related or associated with each other. It is also easy to obtain the necessary information and verification.

4.3.5 Miscellaneous Provisions Under the GATT and the Multilateral Codes

4.3.5.1 Introduction

There are a number of other provisions in the GATT and Codes that may give rise to legal implications for a countertrade transaction. This part will be a general overview of how countertrade transaction may be effected by these miscellaneous provisions.

4.3.5.2 Tariff Concession (Article II of the GATT)

Tariff concessions as provided in Article II are a commitment by a GATT contracting party to levy no more than a stated tariff on a particular item and the contracting party must apply those agreed tariff concessions equally to like products of all contracting parties under the MFN principle (Article II:1(a) of the GATT). Gadbaw has suggested that since a countertrade requirement gives a tariff concession to a party which agrees
with the countertrade terms, this will be in violation of this Article unless the contracting parties include the countertrade requirement as a condition in its GATT schedule. Gadbow is also of the view that the countertrade requirement imposed by a contracting party through an import monopoly that has been established either formally or informally through the granting of a tariff preference violates Article II:4.

4.3.5.3 Nullification and Impairment (Article XXIII)

Where a contracting party imposes a mandatory countertrade practice that may violate or be inconsistent with GATT principles, any other contracting party of the GATT may challenge the practice by utilizing Article XXIII. Under this Article, when a contracting party feels that its benefit is being nullified or impaired or the objectives of the GATT are being impeded, the party may request a consultation among the contracting parties to investigate and make appropriate recommendations respecting the situation. If the circumstances are serious enough, the contracting parties may authorize a specific form of retaliation such as suspending the application of concessions or other obligations under the GATT to any other contracting party. Any government measure violating a GATT provision constitutes a prima facie nullification or impairment of a GATT benefit. Once an infringement is shown, the burden of proof shifts to the offending government to prove that
nullification or impairment of a GATT benefit has not occurred. 111

Another implication of Article XXIII of the GATT is that when a benefit accruing from a tariff concession is nullified or impaired as a result of the application of any measure (e.g. a countertrade requirement), whether or not there is a conflict with a provision of the GATT (Article XXIII:1(b) of the GATT), a contracting party may bring a complaint against a contracting party for corrective or compensatory action. The tariff concession of a contracting party is considered nullified or impaired if the following two conditions are met: 112

1. a measure was introduced after the tariff negotiations which upsets the competitive relationship between the products concerned; and

2. the measure could not have been reasonably anticipated at the time the tariff concession was negotiated.

4.3.5.4 Exchange Arrangement

It is questionable whether countertrade transactions, particularly the Advance Purchase, Switch Trading and Evidence Accounts, which are aimed at limiting the availability or use of foreign exchange violate the GATT. Government exchange measures may include a restriction on the method of payment for goods and the need for a licensing requirement for exchange control purposes. For example, in some bilateral agreements, payment for goods will only be made through the clearing account between the
two countries.

In general, countertrade transactions which prohibit import or export through "other measures other than duties/taxes or other charges" (Article XV:4 of the GATT) are in violation of Article XI. Where exchange measures are in compliance with the Agreement of International Monetary Fund (IMF), the measures are permissible (Article XV:9 of the GATT). There is no answer to the question whether an exchange action permitted under the IMF may be contrary to the purposes of the GATT. The relationship between IMF and GATT needs more detailed study.

4.3.5.5 Protocol of Accession

In some specific cases the GATT protocol of accession requires a signatory to increase its imports from market economies in proportion to the increase in its total imports as set forth in its national plan. Where countertrade has been used to increase imports from market economies, this will be in violation of the protocol of accession. Thus far, only Romania is subject to this condition.
4.3.5.6 Other Multilateral Trade Agreements

Apart from the multilateral codes discussed above, (the Anti-dumping Code, Subsidies and Countervailing Code, Custom Valuation Code and Government Procurement Code) there are a number of multilateral agreements which are not an integral part of, nor do they amend, the GATT. Some of the agreements do, however, operate within the GATT framework, but are binding only upon their signatories. These agreements are:

(1) The Agreement on Technical Barriers to Trade (also known as the Standards Code). This Agreement aims to ensure that laws passed by contracting parties in regard to health, safety and a technical requirements of products do not act to restrict imports unnecessarily. The code is also aimed at the development of common standards on an international plane and the adoption of these standard by national governments.\textsuperscript{116}

(2) The Agreement on Import Licensing Procedures. This Agreement lays down a number of rules to be followed in the administration of an import licensing system. These rules are designated to reduce any unnecessary restrictions arising from the operation of these systems.\textsuperscript{117}

(3) The Commodity Agreements concluded with respect to trade in certain primary products and resources. The purpose of
commodity arrangements is to provide a reasonable and regular income for those countries (usually developing countries) whose economics are heavily dependent on exports of the primary product. Examples of these Agreements are: the Wheat Trade Convention of 1970, the International Sugar Agreement of 1977, the International Cocoa Agreement of 1980, the International Coffee Agreement of 1983, the International Dairy Arrangement of 1979, the Arrangement regarding Bovine Meat of 1979, the International Natural Rubber Agreement of 1979, the International Tin Agreement of 1981, and the International Tropical Timber Agreement of 1983. These agreements are not operating within the GATT context, as they fall mainly within the scope of UNCTAD.  

(4) The International regulations on the trade in Industrial Sectors. The following trade sectors are subject to restraint arrangements (mainly on a quota basis) through multilateral or bilateral arrangements and thus may impact upon countertrade practice: steel products, aircraft, textiles, footwear, and electronics. These agreements and arrangements may be effected by a countertrade transaction, but a discussion of the legal implications will not be undertaken.
4.3.6 Exception Principles

4.3.6.1 Introduction

There are a number of provisions in the GATT that permit contracting parties to engage in countertrade transactions, either by the imposition of government mandated countertrade or by granting benefits or advantages to a concerned party, without violating the GATT principles.

4.3.6.2 Waiver Clause (Article XXV:5)

The waiver clause (Article XXV:5) is the broadest exception to the principles of the GATT. One writer suggests that the waiver clause is one of the most important practical considerations in challenging countertrade under the GATT.\textsuperscript{120} Article XXV:5 provides that:

"In exceptional circumstance not elsewhere provided for in this Agreement, the contracting party may waive an obligation imposed upon a contracting party, by the Agreement, provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority must compromise more than half of the contracting parties. The contracting parties may also by such a vote:

(1) define certain categories applied for waiver of obligation, and

(2) prescribed such criteria as may be necessary for the application of the paragraph."
4.3.6.3 The Escape Clause (Article XIX)

The Escape Clause as provided in Article XIX allows a country to impose temporary import restrictions, including tariffs, despite the obligations of the GATT and the binding GATT schedules. The criteria for its invocation can be summarized as follows: 121

(a) There must be an increased quantity of imports;

(b) The increased imports must be a result of (caused by both) (1) unforeseen developments and (2) the effect of a GATT obligation; and

(c) The increased imports must cause serious injury or threaten serious injury to a domestic industry.

Both developed and developing countries may invoke this Article in order to utilize countertrade practices for specific products provided they can establish the fact that the increased imports cause serious injury or threaten serious injury to a domestic industry. However, a countertrade measure adopted by the invoking country must not discriminate against other contracting parties. 122
4.3.6.4 Balance of Payments Provision (Articles XII-XIV)

As discussed above, the imposition of a mandatory countertrade requirement may be regarded as a quantitative restriction under Article XI of the GATT. However, if such a countertrade measure is imposed for balance of payment purposes as provided for in Articles XII and XIV, the countertrade measure is permissible. The use of this exception does not require GATT's approval, thus this Article is the most practical one to be use. Using Article XII a contracting party may restrict the quantity or value of imports (e.g. by means of mandatory countertrade) in order to safeguard its external financial position, or to protect its balance of payments under Article XIII:1, or to ensure a level of reserves adequate for the implementation of its programme of economic development (Article XVIII:9). Restrictions must not exceed those necessary to forestall the imminent threat of or actual serious decline of monetary reserves or, where reserves are very low, restrictions may be used to achieve a reasonable rate of increase in the reserves. Due regard must be paid to special factors which may be affecting reserves or the need for reserves and as conditions improve the restrictions must be progressively relaxed.

In applying a quantitative restriction (countertrade requirement measure), a contracting party: (a) must avoid
unnecessary damage to the commercial or economic interests of other parties; (b) must not prevent unreasonably the import of goods in minimum commercial quantities if their exclusion would impair regular channels of trade; and (c) must not prevent the importation of commercial samples or (d) must comply with patent, trademark, copyright or similar procedures (Article XI:3(c), Article XVIII:10 of the GATT). Restrictions may be imposed in such a way as to give priority to the importation of those products which are essential (Article XII:3(b), Article XVIII:10 of the GATT).

### 4.3.6.5 Exceptions for Developing Countries

Most countertrade requirements are imposed by developing countries. Developing countries are given special rights in regard to balance of payment measures and safeguard actions in Article XVIII. Section A, C, and D of Article XVIII provides developing countries with opportunities for taking safeguard action appropriate to their particular needs. In practice, these provisions are rarely invoked reliance being placed instead on other provisions of the GATT such as Articles XII, XVIII:B, XIX, XXVIII. Though this principle is rarely used it is specifically designed for developing countries. This Article provides a wide degree of flexibility for the use of protection devices (including the countertrade requirement) to assist developing industries. The contracting parties must meet one of
two criterion in order to impose the protective measures without being in violation of the GATT. These criterion are:

(1) The contracting party has a low standard of living, or

(2) The contracting party is in an early stage of development.

The contracting party which meets the first criterion has the right to utilize Sections A, B, and C of Article XVII. The contracting party which meets the second criterion has recourse only to Section D of Article XVIII. The contracting party which meets both criterion has the option to choose.

Section A of Article XVIII is related to the tariff negotiations in that after all the prerequisites have been met, a country can raise tariffs even when the tariff is bound in the schedules. Section B of Article XVII relates to balance of payment restricitons. It is recognized that in practice, developing countries use quantitative restrictions extensively, relying on the balance of payment exception. Section C of Article XVIII authorizes quantitative restrictions to alleviate balance of payment problems through the promotion or the establishment of a particular industry. Section D of Article XVIII authorizes the GATT contracting parties to extend the benefits of Section C to developing countries which no longer
automatically qualify for the benefits of the article.\textsuperscript{126}

Since most countertrade practices are initiated by developing countries, this is one of the reasons why no petition has been made through the GATT to consider its non-compliance. However, if one of the contracting parties were to challenge that a countertrade transaction imposed by a contracting country was inconsistent with the GATT, the developing countries exception might be invoked. Liebman comments that:

"... an LDC (developing country) can usually obtain more easily than otherwise a waiver for a quota or surcharge based on balance of payment difficulties...".\textsuperscript{127}

\subsection*{4.3.6.6 Custom Unions and Free Trade Area (Article XXIV)}

Article XXIV of the GATT provides for an exception to the MFN principle, not only for members of full-fledged custom unions and free trade areas, but also for countries that conclude "interim agreements" designed to lead to the formation of custom unions or free trade areas. Thus far, there are no pure custom unions or free trade areas, as most regional trade arrangements have been in the form of an interim agreement.\textsuperscript{128}

Any contracting party deciding to enter a customs union, free trade area or an interim agreement, is obligated under Article XXIV:7 to notify the GATT contracting parties and furnish
information about the arrangement.\textsuperscript{129} In practice, with exception to the European Economic Community (EEC), other regional groupings have not really met the definition of a customs union or a free trade area, thus it could be argued they should not be eligible for an exception. Nevertheless, these regional groupings have been taking advantage of the Article XXIV exception, without formal action or retaliation from GATT members.\textsuperscript{130} How this GATT exception operates is complex and is beyond the scope of this thesis.\textsuperscript{131} However, if the contracting countries are eligible for exceptions under this Article, the countertrade transaction among their members will be permitted and will not be in violation of the GATT.

4.3.6.7 General Welfare and National Security Exceptions (Articles XX, XXI)

Article XX is deceptively simple in providing a general exemption from GATT obligations in an enumerated series of situations that generally have to do with government regulation to protect public morals, human, animal or plant life, or health and so forth.\textsuperscript{132} Article XXI establishes an exception to all GATT obligations in the case of national security needs.\textsuperscript{133}

Liebman comments that these two exceptions should not apply to a countertrade requirement. The writer, however, takes the view that the national security exceptions may be invoked in
cases involving an offset arrangement for defence equipment. This exception is similar to the exception provision in the Agreement on Government Procurement ("the AGP"). The writer agrees with Liebman that the general welfare exceptions are not likely to be invoked in a countertrade transaction.

In summary, the waiver clause, the escape clause, the balance of payment exception, and the developing countries exception are more relevant to the countertrade transaction than the other exceptions. However, the balance of payment exception and the developing countries exception are the most practical ones in dealing with countertrade since they may be invoked without seeking the approval of the other contracting parties.

4.4 Conclusion

From the above examination the writer conclude that countertrade requirements, as well as the benefits or advantages granted by the contracting parties of GATT either to private or to state trading enterprises, may be in violation of the provisions of the GATT or its Codes. The mandated countertrade requirement may be inconsistent with the major GATT provisions, notably the MFN principle; the National Treatment obligation; and the quantitative restriction obligation. The benefits or advantages granted by a government, either to the private sector or to state trading enterprises, may also violate the GATT, the
Subsidies and Countervailing Codes and the Government Procurement Code. In addition, when countertrade transactions are involved, legal implications may arise under the Custom Valuation Code, the Tariff Concessions, and the Nullification and Impairment provisions. A GATT Secretariat Paper concluded that:

"... the rules of the General Agreement and of the Codes relating to the use of restrictive import measures and export subsidies appear to be sufficiently broad to cover also those cases in which protection or export subsidization results from a requirement or inducement to engage in countertrade."

The writer, however, disagrees with the above statement. The current GATT rules and its Codes do not facilitate a uniform interpretation of those principles. For example, the basic question on whether countertrade measures are consistent with GATT objectives remains uncertain. One may regard countertrade as a "trade restriction" and therefore countertrade practices will be in violation of the GATT objectives and of the GATT provisions. This view may be argued on the ground that the trade restriction provision under GATT must be strictly construed. However, if the countertrade requirement is not covered by the GATT explicitly as a trade restriction, it may not be in violation of the GATT. So this can be added that countertrade should be acceptable since it can be used to overcome trade barriers and to maintain and increase market shares.
disadvantages of countertrade as discussed in Chapter two, when the legal implications under GATT arises, it is impossible to provide a uniformed legal interpretation of the GATT. The GATT and its Codes were prepared at a time when countertrade did not play an important role in world trade. But the situation has changed. The writer suggests that the GATT should appoint a Panel to study the economic impact of countertrade, as well as its legal implications under the GATT and its Codes. The studies done by the OECD and UNCTAD on the countertrade issue do not deal with the possible legal implications under the GATT. The structure of the study by previous GATT Secretariat may be followed, but a detailed explanation and analysis of the legal issues should be undertaken. It may also be advisable to have a joint study with the IMF since most of the countertrade practices deal with balance of payment problems and international payment.

The new round of Multilateral Trade Negotiations (the Uruguay Round) which commenced in 1986 seems to ignore the subject of countertrade. The writer suggests that the Uruguay Round should include countertrade as a subject of negotiation as part of its dicussions on tariffs, non-tariff measures, GATT provisions, Safeguards, MTN Agreements and Arrangements, subsidies and countervailing duties, etc. The negotiations on trade in services should also deal with the countertrade transaction since it involves services in compensation and offset arrangements.
Footnotes - Chapter Four


3. See Jackson, supra, note 2 at 187.


11. Ibid. at 308.

13. Ibid.


15. See McGovern, supra, note 2 at 12.

16. Ibid. at 13, footnote 27.


18. GATT Secretariat paper on Countertrade and the General Agreement on Tariffs and Trade Doc CG 18/W/80 No. 84-0599, at 29 (unpublished paper).


20. See ibid. at 19-20.


23. Jackson, supra, note 2 at 198.

24. Ibid. at 413.


27. Hufbauer; Schoff, supra, note 22 at 21.

28. See McGovern, supra, note 2 at 257, footnote 47, which refers to GATT's decision B.I.S.D. 26th Supplement 201 (1980) at 201; McRae, Thomas, supra, note 25 at 264, footnote 77.

30. See McRae, Thomas, supra, note 25 at 244, footnotes 80-81.

31. See the preamble provided in the Subsidies Code, Anti-dumping Law and Custom Valuation Code, and see Jackson, supra, note 2 at 26 and 786.


34. McGovern, supra, note 2 at 256-257.


38. Gadbaw, supra, note 4, at 259; Jackson, supra, note 2 at 56.

39. See McGovern, supra, note 2 at 12, and GATT preamble.

40. Walsh, supra, note 12 at 599.


42. See also GATT Secretariat Paper, supra, note 18 at 16.

43. See Jackson, supra, note 2 at 273.

44. Ibid. at 287.

45. B.I.S.D. 25th Supplement (1979) at 49 para 4.6; see also McGovern, supra note 2 at 251.

47. See Gadbaw, *supra*, note 4 at 260; see also McGovern, *supra*, note 2 at 249-252.


49. See Jackson, *supra*, note 2 at 308-316.


55. See generally GATT Panel Discussion on French Restriction on Hong Kong Products (hereinafter called France v. Hong Kong case); B.I.S.D. 30, supplement 129 (1984) at 129-140. See also Verdun, *supra*, note 46 at 208.


61. Paterson, *supra*, note 7 at 14. Please note that a few developing countries such as Brazil, Uruguay, Korea, Egypt, and Pakistan have accepted the Codes.


63. This view should be based on the definition of subsidy given by two authors and the purpose of Article XVI. Jackson defines subsidy as "It is broadest definition a subsidy could
embrace numerous domestic social program as well as direct payment for export promotion" (J.H. Jackson, "The General Agreement on Tariffs and Trade", in W.S. Surrey; D. Wallace, (eds.) A Lawyer's Guide to International Business Transactions, 2nd ed. Part 1 (U.S.A.: The American Law Institute, 1977) 37 at 55. McGovern, based on GATT practice, defines it as "... A subsidy is a measurable economic advantage afforded to an enterprise by or at the direction of government, without adequate recompense, and in a way which discriminates against other enterprises or economic activities in the same country". (McGovern, supra, note 2 at 312).

64. Jackson, supra, note 2 at 383.

65. Interpretative note to Article XVI, Section B and note of Article 9 of the Subsidies Code.

66. GATT Secretariat Paper, supra, note 8 at 23; and Roessler, supra, note 55 at 610.


68. Ibid. at 129.

69. Ibid.

70. Jackson, supra, note 2 at 384.

71. See generally in Beseler, William, supra, note 32 at 143-168.

72. Liebman, supra, note 37 at 256.

73. Paterson, supra, note 7 at 15.

74. Jackson, supra, note 2 at 414.

75. Beseler and William, supra, note 62 at 44.

76. Stone, supra, note 25 at 36.

77. Paterson, supra, note 7 at 15-16.

78. The major consideration is the difference in conditions and terms of sale. It shall include transport, insurance handling and ancillary cost, packing, guarantee warranties, technical assistance and servicing, commission and salesmen's salaries, credit terms, overhead and research development costs, advertising cost and level of trade. See detailed discussion in Beseler, Williams, supra, note 62 at 100-107.
79. See Jackson, supra, note 2 at 346-347; GATT, Report on Panel, supra, note 52 at 18; Roessler, supra, note 4 at 606.

80. See also Roessler, supra, note 4 at 606; Liebman, supra, note 37 at 257, and GATT Report on Panel, supra, note 52 at 10-11, 18.

81. Liebman, supra, note 37 at 257.

82. Gadbaw, supra, note 4 at 259.

83. GATT, Report on Panel, supra, note 52 at 19. See also Roessler, supra, note 4 at 609.

84. Liebman, supra, note 37 at 259.

85. See also Jackson, supra, note 2 at 53; McGovern, supra, note 2 at 205.

86. Castel; de Mestral; Graham, supra, note 1 at 113-114.

87. Ibid.

88. GATT Secretariat Paper, supra, note 18 at 21.

89. Ibid. at 22.

90. Ibid. and Interpretative note of Article V:14(h) of the AGP.

91. Liebman, supra, note 37 at 257-258; Interpretative note of Article 1:1(a) of GATT.


94. Behrendt, supra, note 92, see detailed discussion at 164.

95. Ibid. at 164.

96. The CVA, Interpretative notes of Article 1 of the CVA, supra, note 93 at 135.

97. Ibid. Article 1:1(a).

98. Ibid. Article 1:1(b).

99. Ibid. Article 1:1(c).

100. Ibid. Article 1:1(d).
101. *Ibid.* Article 1:1(b) and see example in the Interpretative note of Article 1:1(b) at 135-136.


103. The CVA, Article 2:1(b); 3:1(b).


106. See McGovern, *supra,* note 2 at 159. See also the CVA, *supra,* note 93, Article 5, and Interpretative note at 120-121, 139-141.

107. See McGovern, *supra,* note 2 at 160, and see generally the CVA, *supra,* note 93, Article 6 (1) and the interpretative notes at 121, 141-142.

108. See McGovern, *supra,* note 2 at 160, the CVA, Article 7 and the interpretative notes at 122, 142-143.


118. See detailed discussion in McGovern, *supra,* note 2 on Commodity Arrangements, Chapter 15, at 461-493.


120. Liebman, *supra,* note 39 at 261.
121. Jackson, supra, note 2 at 557.
122. See also McGovern, supra, note 2 at 292.
123. Jackson, supra, note 2 at 639.
125. Ibid. at 273, 295.
127. Liebman, supra, note 39 at 259.
129. Jackson, supra, note 2 at 585.
130. Jackson, supra, note 63 at 68.
131. See detailed discussion in Jackson, supra, note 2, Chapter 24.
132. See detailed discussion in ibid. Chapter 28, and Jackson, supra, note 63 at 71.
133. Liebman, supra, note 39 at 260.
134. GATT Secretariat Paper, supra, note 18 at 29.
135. See Liebman, supra, note 37 at 260.
137. Ibid. at 19–20.
Chapter Five
Legal Implications Under National Laws: Canadian Law

5.1 Introduction

Similar to traditional international trade transactions, a countertrade transaction gives rise to legal implications at the international and national level. National law that may have an impact on countertrade transactions can be divided into two parts. The first part is the legal implications that arise under private law. The second part is the Regulatory law aspect.

Legal implications under private law includes the contract law governing international sale and service transactions. It is necessary to be aware of international conventions providing for the unification of international contract terms and the establishment of Model laws and procedures, but a discussion of this is beyond this thesis. The writer intends to discuss conflict of laws regarding the choice of law clause, the state immunity rule, and the problem of enforcement of foreign arbitral awards.

As to Regulatory law, the writer will emphasize how these laws effect the countertrade transaction by looking at Customs Laws, the Income Tax Act, and the Export and Import Permits Act. Then, the thesis will turn to the remedial regulatory laws that
might allow the private or government sector to remedy an unfair trade practice situation. The most important remedial laws are the Special Import Measures Act which deals with dumping and subsidization, and the Competition Act which deals with trade restrictions. Laws that might be used as a tool to promote countertrade and administer countertrade transactions, such as the Investment Canada Act, the Export Development Act, and the Department of Supply and Services Act, will also be discussed.

Canada is a federal state with legislative power distributed between the federal government and the ten provincial governments. As a federal state, the extent of the federal legislative power and the provincial legislative power is a debatable and controversial issue. Therefore, the writer will briefly examine the impact of the constitutional law of Canada on countertrade transactions.

5.2 Canadian Constitution and Trade Laws

A. Overview

The Federal authority to enact legislation dealing with international trade is supported by two provisions within section 91 of the Constitution Act of 1867, (the section which indicates the areas of federal jurisdiction) and also Canadian common law. These bases of federal authority are:
1. the trade and commerce power, Section 91(2);
2. the taxation power, Section 91(3); and
3. the treaty-marking power arising from common law principles.

The provinces, however, are not devoid of authority regarding international trade issues particularly given the scope of section 92(13) of the Constitution Act which gives a province jurisdiction over "property and civil rights" in the province. Therefore, private law aspects of trade, and the international conventions which deal with private law aspects of trade, fall within the provincial jurisdiction. The province, with certain restrictions, is also empowered to regulate trade law with respect to the following matters:

1. Direct taxation within the province (Section 92(2));
2. Natural resources, including taxation of the export of natural resource products (S. 92A); and
3. Government procurement, which might provide export opportunities for the private sector.

Provincial legislation that directly affects international trade has been ruled by Canadian courts to be invalid. Only where the impact on international trade is incidental has the
court upheld provincial legislation that may deal with international trade. Similarly, federal legislation which attempts to regulate intra-provincial trade has been declared to be invalid. However, with the exception of natural resource products, if the purpose of federal legislation is to market products outside the province or to regulate the interprovincial and export trade of products, federal legislation has been upheld by the Supreme Court of Canada.

The major problem is determining which jurisdiction (federal or provincial) can deal with the various legal aspects of a countertrade agreement such as the promotion, enforcement, and regulation of the agreement. The short answer is that both the federal authority and the provincial authority have jurisdiction over different aspects of a countertrade arrangement.

B. Legal Implications

The discussion of the legal implications of Canadian Constitution law will be based on the assumption that the federal government or the provincial governments would wish to implement regulatory legislation respecting the promotion and control of countertrade transactions between Canada and foreign trading parties. If the legislation is regarded as effecting only intra-provincial or local matters, the provincial government is empowered to enact the regulatory law. Conversely, if
legislation is regarded as an inter-provincial or international matter, the federal government is empowered to enact such regulatory law. The Supreme Court of Canada's decisions respecting what is an intra-provincial or local matter and what is to be considered as inter-provincial or international matter is of assistance.

Fairley suggests\(^{14}\) the following criterion given by Chief Justice Laskin and Justice Dickson in *McDonald v. Vapour Canada*\(^{15}\) will assist in deciding whether a piece of legislation deals with local or national matters. Legislation may be considered to be nationally or internationally oriented if:

1. there is a national regulatory scheme;

2. there is ongoing supervision of such a scheme by a federal regulatory agency;

3. the legislation is concerned with trade in general, rather than with an aspect of a particular business;

4. the province jointly or severally would be constitutionally incapable of passing such an enactment; and

5. the failure to include one or more provinces or localities would jeopardize the successful operation of the legislation in
other parts of the country.

Whether legislation falls under the federal legislation power or the provincial legislation power is to be determined from the primary objective of the legislation and the provisions contained therein. In general, if regulatory laws purport to control and facilitate countertrade transaction between Canadian firms and foreign parties and have provisions requiring import and export permits notification of the deal to be submitted to an agency set up under the legislations, and provisions for the granting of special services or incentives to Canadian exporters in countertrade transactions, then it is the writer's opinion that the federal government is empowered to enact such legislation pursuant to section 91(2), because the purpose of the legislation is to deal with international trade.16

However, a province may be able to enact a law promoting or controlling the export of natural resources in a countertrade transaction utilizing Section 92A. Section 92A gives the provinces control over the inter-provincial export of their natural resources provided that they do not discriminate with regard to price or supply within the country. The federal powers in this area are preserved by Section 92A(3), thus what exists is a subject that comes under concurrent jurisdiction. Also related to natural resources is Section 92A(4) which allows the province to tax natural resources by any mode or system including direct
taxes. This newly acquired power over non-renewable natural resources may result in a significant change in the position of the provinces in this area of international trade. It is the writer's opinion that if a province enacts a law designed to promote or limit the export of natural products in a countertrade transaction, this law would come under Section 92A.

Professor Paterson has suggested that the provinces have a limited but independent economic power to conclude international contracts and provide infrastructure for the private sector's action on the international plane. Thus it might be implied that the province should be able to provide administrative guidelines to facilitate countertrade transactions between Canadian exporters in the province and foreign parties.

C. Conclusion

The distribution of federal and provincial governments legislative power under the Canadian constitution is a controversial issue and all the discussion above is open to challenge by all concerned parties in a countertrade transaction. The writer thinks that neither the federal government nor the provincial government will attempt in the short run to regulate aspects of countertrade. However, with the growth of countertrade the question of legislation power to regulate the countertrade transaction will become increasingly important.
5.3 Private Law Aspects

5.3.1 Introduction

As private law comes under the jurisdiction of each province, it is the writer's intention to take a broad perspective of the common law on conflict of laws with respect to choice of law clauses and the question of the enforcement of foreign arbitral awards in Canada. Separate treatment will be given the Sovereign Immunity Act and Crown Proceeding Act.

5.3.2 Conflict of Laws: Choice of Law

A. Overview

In Canada, for conflict of laws purpose, there are thirteen law districts, ten provinces, two territories and the federal system with respect to matters within federal legislative competence. Conflict of law principles in the common law provinces are similar though not identical. However, there are significant differences between the common law rules and the civil code rules of Quebec. This part, however, will discuss only the common law rules.

Some Canadian statutes provide a general choice of law rule
which must be applied when determining the proper law. Other
statutes have a limited application and provide only choice of law
rules for contractual issues specifically covered by them, but
leave unaffected the determination of the proper law in relation
to issues outside the purview of the statue. 20

Generally, the proper law of contract may be determined in
one of three ways: 21

1. by being expressly selected by the parties;

2. by being inferred from the circumstances; or

3. by judicial determination of which jurisdiction has the
closest and most real connection to the transaction.

Professor Castel has summarized conflict of law rules as
follows: 22

"... Canadian courts adopted the proper law
doctrine... as the system of law by which the parties
intended the contract to be governed, or, where the
intention is neither expressed nor to be inferred from
the circumstance, the system of law with which the
transaction has its closest and most real connection".

It must be noted that the proper law of contract will apply
only to a dispute between private parties and does not involve
the enforcement of regulatory laws. The proper law of contract
rules, however, are subject to the limitation of the *lex fori* regarding matters of procedure and public policy.23

B. Legal Implications

Countertrade transactions involving Canadian trading parties raise the following questions about the enforceability of countertrade agreements under Canadian Conflict of Law Rules:

1. What is the conflict of law rules for choosing the proper law of a countertrade agreement?

2. What is the Canadian court's approach to a choice of law clause where the law chosen has no connection to the transaction?

3. What criteria will a Canadian court use in applying foreign law?

First, under Canadian conflict of law rules the parties can expressly agree on the governing law in the Framework Agreement, Primary Sale or Services Agreement, and the Countertrade Agreement.

In case the parties fail to agree on the governing law, the court must determine the proper law by ascertaining the jurisdiction with which the transaction has its closest and most
real connection. Jurisdictions that would be considered are: the place of contracting, the place of performance, the residence of the parties, the nature and subject matter of contract, and the location of the subject matter.\textsuperscript{24}

Generally, in a countertrade transaction the choice of law is agreed upon. The selection must be bona fide and there must be no reason for avoiding the chosen system on the grounds of public policy.\textsuperscript{25}

The second question is what will be the Canadian courts reaction if the parties purport to expressly select a proper law of contract with which the transaction has no connection. For example, in a countertrade transaction between a Thai firm and a Canadian firm where the parties agree to English law as the proper law of contract what will the Canadian courts do? Professor Castel is of the opinion that\textsuperscript{26} the law of a particular province in Canada may be selected to govern a contract even when that province is unconnected to the transaction. This is the rule that came from the leading English case, \textit{Vita Food Product Inc. v. Unus Shipping}.\textsuperscript{27} However, Canadian courts are free to strike down a choice of law clause which is unconnected with a transaction.

It is uncertain whether the parties can agree that different contractual issues may be governed by different laws. For
example, could the parties in a countertrade transaction agree that the formation and the validity of the countertrade contract be governed by the law of the importing country (Thailand) and the performance of the countertrade agreement be governed by one of the provinces, e.g. British Columbia. Professor Castel takes the view that the parties to a countertrade agreement can choose a different proper law of contract for different contractual issues. If this is correct the parties to a countertrade agreement would be entitled to select a different proper law to govern the different countertrade agreements, namely the Framework Agreement, the Primary Sale or Services Agreement, and the Countertrade Agreement. However, the parties normally will not choose a different proper law for the various agreements since to do so would create more complexity.

As to the third question on the application of foreign law as a proper law of contract, a Canadian court will not enforce foreign penalty or revenue laws, a foreign law that is contrary to the forum's stringent public policy respecting public or moral interest such as Canada's conception of essential justice and morality, and a foreign law that involves the enforcement of regulatory law. Professor Castel takes the view that public policy must connote more than local policy respecting internal affairs. He further states that:

"If foreign law is to be refused any effect on public policy grounds it must at least violate some
fundamental principles of justice, some prevalent conception of good morals or some deep-rooted tradition of the forum. ... In the common law practice of Canada very seldom has public policy been invoked in the court with the success".

The Canadian court's use of public policy issue in dealing with foreign law is more liberal than that of the Thai court which tends to extensively use the domestic public policy test.33

In Canada, foreign law is a question of fact which must be specifically pleaded by the party relying upon it, and it must be proved to the court by properly qualified witness.34 If a foreign law is not proved, the law is assumed to be the same as the lex fori.35

C. Conclusion

Canadian conflict of law rules in the common law provinces with respect to the proper law of contract and the application of foreign law to an agreement are very similar to the Thai Conflict of Law Act.36 The proper law rules apply only to the dispute under the agreement, and not to the enforcement of regulatory legislation. There are, however, two unsettled problems:

(1) the question of the choice of law where the chosen law has no connection to the transaction, and

(2) the public policy test to be used by Thai and Canadian
courts when such a ground is invoked.

The parties involved in a countertrade transaction should examine the enforceability of the countertrade agreement prior to agreeing to a choice of law clause. A Thai party must also note that since Canada is a federal state and many of the legal aspects of private agreements are governed by provincial laws, the choice of law clause must be to a Canadian province.

5.3.3 State Immunity Act and Crown Proceeding Act

A. Overview

The State Immunity Act of Canada which entered into force on July 15, 1982\textsuperscript{37} introduced and confirmed far reaching exceptions to the principle that a foreign state is immune from jurisdiction in a Canadian court. The Act applies to a foreign state which is defined as a sovereign state or any political sub-division of the foreign state acting in a public capacity. This Act affirms the rule that immunity is to apply notwithstanding the failure of the state to take any step in the proceedings. The Act sets out instances where immunity is to be denied. The exceptions from immunity include: commercial activity,\textsuperscript{38} death and property damages,\textsuperscript{39} maritime law,\textsuperscript{40} and concerning property in Canada.\textsuperscript{41} A foreign state may waive its immunity\textsuperscript{42} from execution and attachment.
B. Legal Implications

Since most countertrade transactions will be entered into between government and government, government and private enterprises or state trading enterprises, the questions to be examined under this Act are:

1. Whether the government or state enterprise of the importing country are sueable in a Canadian court.

2. And if so, can the property of the foreign government or state enterprise located in Canada be subject to execution?

As to the first question, the foreign state, which includes a department or agency, is immune from Canadian court jurisdiction except where explicit criteria have been met or the foreign state has waived its immunity. The Act does not attempt to precisely define the major exception to immunity which is where the state is involved in a "commercial activity". The emphasis in the definition of this term is on the nature of the activity rather than the purpose. 43

The "commercial activity" exception constitutes the restrictive theory of sovereign immunity as opposed to the absolute theory of sovereign immunity where a state is immune
from being sued regardless of the activity. The need for the restrictive theory arose from the increasing willingness of states to enter into commercial or other private law transactions with individuals. Canadian courts have adopted the restrictive view of sovereign immunity. For example, in the Lorach Transport case, the Federal Court of Appeal held that the State of Iran was the owner of the bill of lading and of the cargo. Its agreement with D. Inc. and the contract of affreightment were ordinary, commercial, private law transaction hence, Iran could not claim a sovereign immunity. In Zodiak Int'l Product Inc. v. Polish People's Republic, the contract in question, which the plaintiff alleged had been breached by the defendant (the Polish People's Republic), granted to the plaintiff exclusively distribution rights in Canada for all motion pictures produced by or leased to the defendant. The Quebec Court of Appeal held that the contract was a purely commercial transaction and was not an act of state and the defendant could not claim sovereign immunity.

It is the writer's opinion that if a countertrade transaction is entered into between a Canadian firm and a department of a foreign state or state trading enterprise, the transaction will constitute a "commercial activity" and the foreign entity would be sueable in a Canadian court.

In addition, if the foreign entity waives its immunity by
written agreement or otherwise as provided in the Act, the foreign entity is suable in a Canadian court.

Regarding the execution against the property of foreign state, the Act grants general immunity from execution and attachment of the property of a foreign state, subject to certain exceptions. These exceptions include the case whereby the department has either explicitly or by implication waived its immunity or where the property is used or is intended to be used for a commercial activity.

Where a countertrade agreement is between a foreign party and either a federal or provincial government department ("the Crown"), and the foreign party wants to sue the Crown for breach of contract, the foreign party is required to proceed if the party is the federal department in accordance with the Proceedings Against Crown Act. If the party is a provincial government department, the foreign party has to proceed in accordance with the Crown Proceeding Acts of each province, such as the Crown Proceeding Act of British Columbia. The effect of these acts, subject to the exclusion of specific performance and injunctions as possible remedies, is to place the Crown in almost the same position as any other corporation or individual when it comes to the making and enforcing of contracts.
C. Conclusion

In practice, countertrade agreements between foreign states or their departments will provide for a waiver of immunity. Therefore, the foreign state or its department which enters into a countertrade transaction with a Canadian firm will be sueable and its property located in Canada subject to execution. When a foreign party wants to sue the Crown of the federal government, the proceedings against the Proceedings Against Crown Act will apply. For the provincial government, the Crown Proceeding Act of each province will apply.

5.3.4 Dispute Resolution: International Arbitration

A. Overview

In international agreements dispute resolution through international arbitration is recommended in order to eliminate uncertainty respecting conflicting jurisdiction.\(^53\)

The most important multilateral conventions on foreign or international arbitration are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention")\(^54\) and the Model Arbitration Law drafted by United Nations Commission on International Trade Law ("UNCITRAL") ("the Model Law").\(^55\) Canada, both at the federal and provincial
level, has acceded to and adopted the New York Convention and the
Model Law. In May, 1986, the federal government enacted the
United Nations Foreign Arbitral Awards Convention Act, and the
Commercial Arbitration Act. The Commercial Arbitration Act
applies to a limited range of both commercial and civil matters
that come within the federal jurisdiction. Canada's accession
to the New York Convention has the effect of making an award
rendered in Canada (i.e. British Columbia) readily recognized and
enforceable in the courts of contracting parties to the New York
Convention and their foreign arbitral awards will be recognized
and enforced in Canada.

Each province has to adopt the conventions as provincial law.
For example, British Columbia has adopted the New York Convention
as the Foreign Arbitral Award Act ("the FAA Act") which
restricts the application of the New York Convention to
"commercial agreements". British Columbia adopted the Model Law,
with some amendments, as the International Commercial Arbitration
Act (the "ICA Act") primarily to give legislative support to
their newly created Center of International Commercial
Arbitration.
B. Legal Implications

As discussed earlier, the examination of the legal implications of enforcement of foreign or international arbitral awards will be based on British Columbia law. The party who wishes to enforce a foreign arbitral award in other provinces is required to examine the law of that province. However, in the common law provinces the major principles are similar.

In British Columbia, which has adopted both the New York Convention and the Model Law, if a dispute arises from a countertrade agreement the parties will have the alternative in most cases of being able to choose to proceed to enforce an award through the FAA Act or the ICA Act. Generally, the ICA Act supplements and assists in interpreting the FAA Act. For example, the definition of "international" in Section 1(3) of the ICA Act will assist the British Columbia Supreme Court in interpreting what a "foreign arbitral award" is and what constitutes a "non-domestic award" under Schedule 1 of the FAA Act or the definition of commercial arbitration. Section 3(6) of the ICA Act will assist in the interpretation of commercial reservations under Section 3 of the FAA Act. If there is a conflict between the FAA Act and the ICA Act, or other acts, the FAA Act is to prevail. However, it is unlikely that there will be any conflict between the ICA Act and the FAA Act because the ICA Act is simpler and a more flexible mechanism for the
enforcement of an arbitral award and the two are designed to work together.

There is no doubt that disputes arising from a countertrade transaction between a Thai party and a Canadian partner will come under the purview of the ICA Act.\textsuperscript{62} In addition, an arbitral award made in connection with a countertrade transaction rendered outside Canada, or inside Canada but regard as a non-domestic award, will be come under the purview of the FAA Act.\textsuperscript{63}

It should be noted that where a foreign arbitral award cannot be enforced under either the FAA Act or the ICA Act, the award may still be enforced in Canada in accordance with rules that existed prior to the implementation of the new legislation. The prior rules provided that awards could be enforced as a contract under common law rule\textsuperscript{64} or under Part 2 of the Court Order Enforcement Act by taking an action to enforce the foreign judgment under Section 30(1) of this Act.\textsuperscript{65} The latter alternative applies only to awards made in the Federal Republic of Germany, Austria and two Australia States.

The enforcement of foreign or international arbitral awards in Canada, such as in British Columbia, offers more alternatives and certainty for the parties in a countertrade transaction. The adoption of the Model Law as dometic law which facilitated the establishment of the International Arbitral Center in Canada
might also make the Center an attractive choice for arbitration.

C. Conclusion

The enactment of legislation to recognize and facilitate the enforcement of foreign or international arbitral awards in Canada, both at governmental and provincial levels, assures the parties in countertrade agreements that the enforcement of foreign or international awards which meet all conditions will be more certain and predictable.

5.4 Regulatory Law Aspects

5.4.1 Introduction

The discussion of the enforcement and the application of regulatory law that effects countertrade transactions is necessary because the courts will ignore the proper law of the contract chosen by the parties when dealing with the regulatory law. The purposes of regulatory laws are to control private business transactions and implement government policy. A foreign firm that engages in a countertrade transaction with a Canadian firm in Canada is subject to this regulatory law.

In examining the regulatory law that may effect a
countertrade transaction, the writer will focus on specific issues arising from the application of such legislation both to the private and government sectors, as well as the impact of such legislation on the countertrade policy of Canada. The writer will sub-divide the law into 3 categories on the basis of the purpose of the law: the Income Tax Act, and the Export and Import Permits Act; remedial regulatory laws, which include the Special Import and Export Measures Act and the Competition Act; and Promotion and Administrative Regulatory Laws, such as the Investment Canada Act, the Export Development Act, and the Department of Supply and Services Act.

5.4.2 Fiscal and Regulatory Control Laws

5.4.2.1 Introduction

For the purposes of discussion, the writer will classify Fiscal laws mean Customs laws, which includes the Customs Act, 1986, the Customs Tariff Act, and the Income Tax Act. Regulatory Control law will include the Export and Import Permit Act. As to the Fiscal laws, the writer will limit the discussion to the following:

1. Questions concerning customs valuation and the surtax; and
2. Questions on tax liability of non-residents carrying on business with a Canadian company and the method of valuing the income from goods or services in countertrade transactions under the Income Tax Act.

With respect to the Export and Import Permit Act, the writer will highlight the relevant provisions that parties involved in a countertrade transaction should review and comply with.

5.4.2.2 Customs Laws

A. Overview

The major principles of Canadian Customs laws are found in two pieces of legislation. First, the Customs Act, 1986 which provides a detailed framework for the administration and the determination of value for duty, as well as providing for various exemptions from duty. Second, the Customs Tariff Act, which provides for the levy and collection of import duty on goods and for the imposition, by Cabinet, of surtaxes. These laws are administered by the Department of National Revenue. In discussing the legal implications, the precedents or rulings on the GATT Customs Valuation Code and the United States Custom law may be of assistance since Canada, as a signatory member of the GATT Customs Valuation Code, has adopted the Customs Valuation method from that code and amended its Custom Act concerning
valuation for duty purposes to bring it into line with that of
the United States Custom law. There is a Duties Relief Act that
provides for drawbacks, reductions, refunds and remission of
duties, other than the export drawbacks provided in the Customs
Act, which the parties should take into account. It is beyond
the scope of this thesis to discuss this topic.

B. Legal Implications

I. Customs Valuation Method

Following the amendment of the Customs Act in 1986, the
customs valuation of the goods imported to Canada are divided
into six methods. They are: (1) the transaction value method;
(2) the transaction value of identical goods; (3) the
transaction value of similar goods; (4) the deductive value of
the goods; (5) the computed value of goods; and (6) the
residual method.

As there is no ruling or precedent under the new Canadian
Customs Act, 1986, on the determination of value of goods
involved in countertrade transactions, the writer will briefly
examine these six methods and subsequently discuss their possible
applicability to countertrade transactions.

Transaction value is the first and most important method that
the Department of National Revenue may use in determining the
value of goods or products for custom duty purposes.\textsuperscript{78} The
transaction value is based on the sale price of the goods or
products that are exported to Canada provided the following
conditions are met.\textsuperscript{79}

1. There are no restrictions respecting the disposition or
use of the goods by the purchaser (other than specified
restrictions, such as those imposed by law).

2. The sale or the price paid is not subject to conditions
in respect of which a value cannot be determined.

3. The price of the goods includes the proceeds of any
subsequent resale which will accrue to the vendor.

4. The purchaser and vendor are unrelated, or if related,
the relationship does not influence the price paid.

Section 48 also specifies elements which can be added or deducted
from the price paid.\textsuperscript{80}

Where the transaction value method cannot be used, the first
alternative is the transaction value of identical goods. A major
change here is that such sales are export sales and not sales in
the domestic market of the country of export. The next
alternative is the transaction value of similar goods. In respect of both identical and similar goods, comparison is made with goods from the same producer and then with goods from other producers.\footnote{81}

The deductive value method is based on the sale price after importation into Canada and has the advantage of relying on information available in Canada.\footnote{82} The computed value method, on the other hand, is based on the cost of producing the goods and on the amount of profit and general expenses. This method requires foreign manufacturers to provide information as to the cost of production of goods.\footnote{83} The difference between these last two methods is that the deductive value starts with a resale price in Canada and works backward to an export price. The computed value works forward from the costs of production.\footnote{84} In practice, the importer has the right to have the computed value method applied ahead of the deductive value method. The computed value method is likely to be utilized by the importer when the importer and the supplier are related companies.\footnote{85}

When goods cannot be valued under any of the first five methods, they shall be appraised by the residual value method which means that any of the first five methods may be flexibly applied on the basis of information available in Canada.\footnote{86} The application of the residual value method will almost always require consultation between the importer and the Department.
What method is to be used in determining the customs valuation of goods in countertrade transactions? First, the transaction value method as specified in Section 48 of the *Custom Act*, 1986 should be applied. The importer will want to use the transaction value method since it is based on the invoiced price and the value of countertrade products is usually lower than other products. However, it appears that in countertrade transactions, particularly in the Barter Arrangements, where there is no price or monetary term for the countertrade product, the transaction value method may not be applicable because there is no sale. Even where there is a monetary term in a Barter or other type of countertrade arrangement, such an arrangement may be regarded as sale or price that is subject to conditions for which a value cannot be determined as provided in Section 48(1)(b) of *Customs Act*, 1986. Therefore, the transaction value method may not be useable for countertrade transactions.

It should be noted that Memorandum D13-4-4 of Revenue Canada respecting limitation on the use of the transaction value method does not include that portion of the GATT Customs Valuation Code Interpretative Note which gives examples of sales that are not acceptable under the Code. The following are examples of "unacceptable sales" in the Code that may relate to countertrade.
"(a) The seller establishes the price of imported goods on condition that the buyer will also buy other goods in specified quantities;

(b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;

(c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi finished goods which have been provided by the seller on the condition that he will receive a specified quantity of the finish goods."

Professor Irish has commented that the omission of these three examples from the Memoranda may mean that the Canadian Custom Authorities wish to adopt a different policy or it may mean that the inclusion of examples was felt to be unnecessary as they will have limited significance in any negotiation between Canadian Custom Authorities and importers.90

All the examples provided in the interpretative notes on the GATT Customs Valuation Code are aimed at overcoming problems of interpretation.91 It is the writer's opinion that the Canadian Customs Authorities should take a view similar to that of the GATT Technical Committee and interpret the Customs Valuation Code so that the first transaction value under Section 48 of the Customs Act, 1986 will not apply in a countertrade transaction.

One U.S. Customs Service Ruling in 1984 dealt with a customs valuation problem respecting a Barter transaction. The
transaction involved U.S. and U.S.S.R. firms with large industrial machinery going from U.S.A in exchange for machine tools and bakery and doughnut machinery from the U.S.S.R. There was no monetary value attached to the machinery from the U.S.S.R. The U.S. Customs Service ruled that unless the barter transaction specified the monetary value of the machinery, the transaction value method was not applicable. It may be implied that if the monetary value of the machinery was specified, the transaction value method would have been applied. If this view is adopted, it would contradict the GATT Technical Committee opinion and the provisions of the Customs Valuation Code.

Even though the GATT Technical Committee's view is not clear, the writer is of the opinion that in a countertrade transaction, the other two alternate transactions value of the like goods or the similar goods method also should not apply. The reasons are: (1) the comparable import of identical or similar goods to countertrade products is not possible unless the like or similar goods to be compared are sold based on the same countertrade requirements which is unlikely to occur, and (2) when the condition respecting countertrade requirement applies to the identical or similar goods, the first transaction value method is also not applicable.

It is uncertain how Canadian Custom Authorities would take the position in determining the value of countertrade
products. Most likely the Canadian Customs Authorities would interpret the conditions under Section 48(1)(b) of Customs Act, 1986, to include the countertrade transaction as a sale subject to conditions, regardless of the non-specification of monetary value for the countertrade products.

In certain countertrade transactions, like Counterpurchase or Buy Back arrangements where the importer agrees to do something relating to the production or the marketing of imported goods, this condition will not result in rejection of the transaction value method.94

Basically, if the first transaction value method is not applicable in countertrade transactions, then other methods will be employed:

1. the transaction value of identical goods;
2. the transaction value of similar goods;
3. the deductive value;
4. the computed value; and
5. the residual value.

Professor Irish summarizes the order of application of the alternate modes of determining transaction value:95

"transaction value of identical goods from the same producer, transaction value of identical goods from other producers, transaction value of similar goods from
the same producer, transaction value of similar goods from other producer...".

In practice, if a review of goods from the same producer reveals that there are no sales of identical goods but there are sales of similar goods, then the search for sales of identical goods from other producers might not be examined.\textsuperscript{96}

The application of the above customs valuation methods to countertrade transactions will depend on the products involved and will be applicable on a case by case basis.

Generally, the transaction value of identical goods will be based on the transaction value of identical goods produced by the same vendor or producer in the exporting country for export to Canada at about the same time, at the same quality and quantity.\textsuperscript{97} This method depends on the knowledge of the importer of sale of identical goods. However, customs valuation determined by this method may not be appropriate if the transaction value of the product sold to other importers is subject to a condition as provided in Section 48(1)(b) of \textit{Customs Act, 1986}. In this case the transaction value of identical goods will not be used. The transaction value of similar goods also has this problem.\textsuperscript{98} If the transaction value of identical or similar goods sold by other producers is applicable (where it is determined that no conditions exist), the importer of countertrade products may have to pay a higher duty since the
transaction value of other products or similar products sold by other producers may be higher than those involved in a countertrade transaction.\(^99\) It should be noted that if, in applying these two methods, more than one transaction value of identical goods or similar goods is formed, the lowest value should be used to determine the customs value of imported products. Though these methods are less satisfactory than the transaction value under Section 48 of the \textit{Customs Act, 1986}, they are more convenient and predictable than the deductive value and computed value methods.\(^100\)

U.S. Customs Service takes the view that the deductive value is most appropriate in cases of Barter Arrangements and that the other methods are not applicable.\(^101\) The deductive value method is based on the price at which the imported goods, identical or similar products are resold in the domestic market. Sales used for determining the deductive value must be between parties who are unrelated.\(^102\) This method is not as predictable as transaction value since it will apply only after the goods are imported, but it will use information available in Canada as opposed to foreign information necessary to compute value based on the cost of the product.\(^103\)

If the parties have the choice of using the deductive value method or the computed value method (which is based on the cost of the material and production),\(^104\) the importer should use the
deductive value method since the computed value method is more complex and requires information from overseas. The residual value method should be avoided since it allows the Custom Authorities to determine duty on an arbitrary basis.

The method of valuation to be applied to a countertrade transaction will depend on the nature of the transaction and the products involved. It is a complex area of law which requires detailed examination on each particular case.

The importation of countertrade products may face a surtax or surcharge imposed by the Custom Authorities under the Customs Tariff Act. The Canadian Customs Tariff Act provides for the imposition by cabinet of surtaxes or surcharges of varying duration and amounts in three separate situations.

1. To enforce Canada's rights under a trade agreement to respond to discriminatory conduct having an adverse effect on Canada's trade.

2. Where Canada's external financial position and its balance of payments are such as to require special measures.

3. Where imported products are causing or threatening "serious injury" to a Canadian producer of a like or a directly
The two government departments which are responsible for the initiation of the imposition of the surtax are the Department of Finance and the Department of External Affairs. The Department of Finance plays the major role, while the Department of External Affairs will recommend the imposition of the surtax when it arises from a trade agreement.

Countertrade transactions may raise concerns about the imposition of the surtax in several situations.

(1) If a developing country imposed a mandatory countertrade requirement on a discriminatory basis against Canadian firms, the Canadian cabinet might impose the surtax against products imported from that country using Section 7(2)(b)(d). The order to impose the surtax would have effect for the period specified, unless the order is revoked at an earlier date. The order must be published in the Canada Gazette.

(2) If an importer of countertrade products causes or threatens serious injury to a Canadian producer of a like or competitive product as determined by the Canadian Import Tribunal under the Special Import Measures Act, or the Textile and Clothing Board under Textile and Clothing Board Act, then the Cabinet may impose a surtax on the imported goods under Section
8(1) at a rate specified in the order. The maximum rate is not exceed what in the opinion of the governor-in-council is sufficient to prevent further injury or threat of injury.\textsuperscript{114} The order will remain in effect for a specified period or until revoked, but shall not exceed three years. The order must be published in the Canada Gazette.\textsuperscript{115}

It may be advisable for Canadian importers to seek a ruling or consult with the Department of Finance and the Department of External Affairs prior to importing countertrade products. Even though this will not protect against action being taken by other producers in Canada, it may limit the exposure to the surtax.

C. Conclusion

The Customs Valuation methods and the possible imposition of a surtax are major legislatively-based actions that may effect countertrade products imported into Canada. The current Canadian Customs Act and Customs Tariff Act are broad enough to deal with countertrade transactions. The importer is advised to plan and structure the countertrade transaction cautiously in order to avoid costs. Other producers who may suffer from the importation of countertrade products may seek relief through the imposition of a surtax under the Customs Tariff Act in conjunction with the Special Import Measures Act.
A. **Introduction**

Canadian income taxes are levied pursuant to the *Income Tax Act* ("ITA")\(^{116}\) on all persons, including corporations, estates and trust, which come within the federal taxing jurisdiction. Due to the complexity of the application of the *ITA*, this thesis will examine briefly on only two specific questions that may be relevant to countertrade transactions. First, the tax implications for a non-resident company engaging in a countertrade transaction with Canadian companies. Second, the method of determining the value of goods or services under countertrade transactions for tax purposes. This thesis, however, does not deal with Part XIII of the *ITA* respecting income tax of non-residents in Canada which imposes a withholding tax on payments made to or income made by a non-resident of Canada, including interests, dividends, rents and royalties. Part XIII of the *ITA* is referred to as a "non-resident withholding tax" and is pegged a statutory rate of 25 (twenty-five) percent. The discussion will be limited only to the tax liability of non-residents under Part I and Part XIV of the *ITA*. 
B. Legal Implications

As to the first point, non-resident corporations, individuals or other entities are taxed in Canada under the ITA only in respect of certain types of income:

(1) Income from a business carried on in Canada;
(2) Employment income earned in Canada;
(3) Income or capital gains from the disposition of taxable Canadian property; and
(4) Unearned or investment type of income from sources in Canada.

There are three criteria used to ascertain when a non-resident engages in a countertrade transactions in such a way as to become subject to Canadian tax:

(1) Whether there is a business;
(2) Whether it is being carried on in Canada; and
(3) If a Double Tax Agreement exists between Canada and the country in which the non-resident resides, whether the profits are attributable to a permanent establishment in Canada.

A business is defined under Section 248(1) of the ITA as:

"business" includes a professional; calling trade manufacture or undertaking of any kind whatever and except for the purposes of paragraph 18(2)(c), an adventure or concern in the nature of trade but does not
include an office of employment".

Undoubtedly, countertrade transactions between a foreign company and a Canadian firm are regarded as a business. The second element — whether a business is being carried out in Canada — is the most complex one to determine. There are a number of conditions that, if satisfied, directs that a non-resident will be considered to be carrying on business in Canada. These conditions are: (1) if the non-resident or an agent on his behalf, continuously concludes contracts in Canada, and (2) if the non-resident concludes contracts, delivers goods and receives payment within Canada, even though no physical establishment is maintained in Canada and the non-resident is not present in Canada. Section 253 of the ITA provides that a non-resident is to be considered carrying on business in Canada if the non-resident produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves, or constructs any thing, either in whole or in part, in Canada or if the non-resident solicits, orders, or offers anything for sale in Canada through an agent or servant irrespective of whether the contract or transaction is to be carried out in Canada or outside Canada. Therefore, if a foreign firm concludes a countertrade agreement and delivers goods and receives payment within Canada, the foreign firm will be deemed a non-resident carrying on business in Canada. However, a single countertrade transaction may not be sufficient to meet the conditions that generally apply for carrying on business in Canada because it does not meet the
"continuity in carrying on business" test. 119

Subject to the Double Tax Agreements, a non-resident company deemed to be carrying on business in Canada will be subject to Canadian income tax. Once the non-resident's taxable income has been determined, the amount of Canadian tax payable is computed by applying the federal and provincial tax rates for corporations. 120 The branch tax at the rate of 25% may be applicable to a non-Canadian corporation which carries on business in Canada. This tax is normally levied on the post-tax profits earned by a non-Canadian corporation through its business activities in Canada, less a special allowance which is designed to permit the corporation to increase the amount of the capital invested by it in its Canadian operations. 121

Tax exemptions or deduction are available to national corporations of countries that have entered Double Tax Agreements with Canada. So far Canada has entered into over 40 double tax treaties (which are officially called Conventions or Agreements for the Avoidance of Double Taxation and the Prevention of Tax Evasion). 122 Thailand is among those countries which has concluded a Double Tax Agreement with Canada, having completed the treaty in 1984. This Double Tax Agreement is called the Convention Between Canada and the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 123 (hereinafter called "Canada-
Thailand DTA). Therefore, if a Thai company enters into a countertrade agreement with a Canadian firm and the Thai company does not constitute a permanent establishment under Article 5 of the Canada-Thailand DTA, it will not subject to Canadian income tax. Detailed discussion of this issue is beyond the scope of this thesis.

Finally, countertrade transactions may give rise to problems respecting the valuation of goods and services problem for purposes of computation of income and expenses. The issue is complex and is beyond the scope of this thesis, however the writer will provide an overview of some of the tax implications that may arise in countertrade transactions.

In a Barter transaction where the parties may or may not specify the value of the goods or services, the method of determining the value is complex. There is no provision in the ITA that deals directly with international barter. However, Interpretation Bulletin IT-490 issued by Revenue Canada respeecting domestic barter may be of assistance. In domestic barter, Revenue Canada takes the position that:

"... barter transactions are within the purview of the Income Tax Act. Such transactions can therefore result in income or expense as contemplated by sections 3 and 9 thereof or can result in the acquisition or disposition of capital property, eligible capital property, personal-use property or inventory, depending upon the circumstances of the persons who are bartering and the nature of that which is bartered, on the same
Revenue Canada has the following guidelines for the valuation of goods and services:

1. In effect, the tax consequences of a particular barter transaction will be determined as if cash were the consideration.

2. Where an amount must be brought into income or treated as the proceeds of a disposition of capital property, that amount is the price that the taxpayer would normally have charged a stranger for the goods or services, adjusted for any cash paid or received as part of the transaction.

3. In the event that only one-half of the barter transaction can be valued, Revenue Canada will accept that value for purposes of the total transaction, provided that the parties were dealing at arm's length.

There is only one Tax Court of Canada decision, the 1985 Linnett case, respecting domestic barter which may have implications for international barter. The tax-payers were partners in a law firm. The firm had an account with a barter exchange known as Tradex. Under the Tradex scheme member businesses accepted barter credits from other members in exchange for goods and services. The taxpayers accepted Tradex credits in exchange for legal services and for tax purposes valued each
dollar credit at fifty-five cents rather than at the face value of one dollar. The Minister based its tax assessment on the face value of one dollar. In the case the taxpayers successfully proved to the court that the credits could be exchanged only for goods or services offered by other Tradex members, and this limitation of the use of the credits clearly indicated that their value had to be less than their face value. The court, however, did not ascertain the true value of the credits, instead ordering a reassessment.  

In the case of international barter, if the price or value of goods or services is lower than the market value, which is normally the case, Revenue Canada may assess the income or expenses of the taxpayer (an importer of countertrade products or a non-resident who carries on business in Canada) based on the market value or actual value of the goods and services. The writer is of the opinion that if the taxpayer can establish the fact that: (a) the goods in a barter transaction have some restriction specified in the barter agreement (such as market restriction for countertrade products); (b) the cost of countertrade product is lower than the market price due to excessive surplus of supplies; or (c) the importers of countertrade products have to pay a fee to trading houses in disposing of the countertrade product which in turn get a big discount from the exporters, then Revenue Canada should accept the agreed prices and the difference of the transaction from the
ordinary sales and services agreement. If Revenue Canada views that the price or value of goods has to be reassessed, then the assessment of prices must be reasonably done taking the countertrade obligation and its characteristics into consideration. The Tax Court decision in the Linett case may form the basis for further developments in international barter transactions.¹³⁰

Some forms of countertrade transactions may constitute a non-arm's length transaction because of the commitment or reciprocal nature of the countertrade agreement and the parties to it. If a countertrade transaction is regarded as a non-arm's length transaction, then the value of the goods or services must be determined based on a "fair market value" or a reasonable "arm's length price".¹³¹

The ITA does not provide an all-inclusive definition of an arm's length transaction. However, Revenue Canada, in 1987, issued an Information Circular¹³² defining the "arm's length principle" to mean that:¹³³

"each such transaction should be carried out under terms and at a price that one could reasonably have expected in similar circumstances (similar product or service, market credit terms, reliability of supply and other pertinent circumstances) had the parties been dealing at arm's length".

If the countertrade transaction takes place at a fair market
value, the question of whether the parties do or do not deal at arm's length will not be an issue.\textsuperscript{134}

The criterion which have been examined by the courts in determining whether or not a transaction is at arm's length are as follows:\textsuperscript{135}

(a) the existence of a common mind which directs the bargaining for both parties to a transaction;

(b) parties to a transaction acting in concert without separate interests; and

(c) de facto control.

In addition to the above criterion, "related persons" are deemed not to deal with each other at arm's length for Canadian tax purposes.\textsuperscript{136} "Related persons" are defined as:\textsuperscript{137}

"a. individuals connected by blood relationships, marriage or adoption;

b. a corporation and a person who controls the corporation, or a person who is a member of a related groups which controls the corporation;

c. any two corporations,

i. if they are controlled by the same person or group of persons

ii. if each of the corporations is controlled by one person and the person who controls one of the
corporations is related to the person who controls the other

iii. if one of the corporations is controlled by one person and that person is related to any member of a related group which controls the other corporation

iv. if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation

v. if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other

vi. if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation."

The meaning of "control" for Canadian tax purposes means the ownership of enough shares which carry voting rights to elect the majority of the board of directors. In general terms, this means owning more than fifty percent (50%) of the voting rights of a corporation.138

Revenue Canada's criteria in determining the "arm's length" transaction of unrelated persons is based on a theory of separate economic interests which reflect "ordinary commercial dealing between parties acting in their separate interest".139 Thus, the mere fact that a countertrade agreement has been concluded by a Canadian and a non-Canadian firm may not be sufficient to have it regarded as an arm's length transaction. It requires detailed examination of the transaction. Some forms of countertrade such
as compensation or offset arrangements may be deemed to be a non-arm's length transaction because the Canadian firm and non-Canadian firm may have a share in a joint venture company or control over each other.\textsuperscript{140}

In general, the "fair market value" of goods and services is the most significant one since if the value of the goods or services does not reflect the fair market value, Revenue Canada may consider that the transaction was not conducted at arm's length. There are several provisions in the ITA that contain the term "fair market value" but there is no definiton of the term in the ITA. The decision of the Supreme Court of Canada in the Untermyer case and Mann Estate may be useful.

In \textit{Untermyer Estate v. A.G.B.C.}\textsuperscript{141} the Supreme Court of Canada defined "fair market value" as:

"The highest price, expressed in terms of obtainable in an open and unrestricted market between prudent parties, dealing at arm's length, both having a reasonable knowledge of all relevant facts and neither party being under any complulsion to transact."

In \textit{Minister of Finance v. Mann Estate}\textsuperscript{142} the Supreme Court of Canada defined "fair market value" as:

"The highest price available estimated in term of money which a willing seller may obtain for the property in an open and unrestricted market from a willing, knowledgeable purchaser acting at arm's length."
There is a lot of jurisprudence respecting fair market value but various issues remain unresolved. The valuation of goods or services in a countertrade transactions is one of these unresolved issues. Generally, in countertrade transactions, the value of goods or services reflects the actual value or the fair market value because the parties to the countertrade agreement, if at arm's length, will have knowledge of all the facts and are not under any compulsion to complete the transaction.

Revenue Canada's current position on "fair market value" or "reasonable arm's length price" is to look at the price or value in the market where the transfer is being made, as opposed to looking at the home market of the supplier. Revenue Canada's position provides little guidance for determining the value of goods and services in a countertrade transaction. In fact, a key question is whether Revenue Canada should recognize and accept that countertrade transactions are a unique and complex transaction which differ from traditional sale arrangements. The reciprocal contractual commitment in all countertrade transactions (such as the Framework Agreement, the Primary Sale or Services Agreement, the Countertrade Agreement) should be taken into consideration. If countertrade is entered into at arm's length, the value or prices determined by the parties will most often reflect the actual value of goods or services.

It should be noted that Revenue Canada takes the buy and sell
agreement into consideration in determining the value of shares in an arm's length domestic shares transfer. Therefore, so long as there is no clear policy or interpretative note given by Revenue Canada, this guideline may be used by analogy for a countertrade transaction. One may argue, however, that this Interpretation Bulletin should not be used as a basis in determining the value of goods or services in a countertrade transaction because it applies only to a domestic shares transfer.

C. Conclusion

The question respecting the valuation of goods and services in a countertrade transaction for tax purposes remains unresolved until Revenue Canada issues guidelines which deal specifically with countertrade transactions. The writer is of the view that Revenue Canada should recognize and accept the fact that a countertrade transaction is a unique transaction and that all the conditions contained in agreements should be taken into consideration so that the method of determining the value of goods or services will be fair and reasonable to the taxpayers. The question of the tax liability of the importer and exporter in countertrade transactions is an important factor in structuring countertrade agreements because the parties may end up paying more taxes than in a traditional sale or services transaction. The provisions under the ITA are sufficiently flexible to deal
with the countertrade situations but guidelines would be very helpful.

5.4.2.4 Export and Import Permits Act

A. Overview

There are a number of different acts which restrict the import of particular products into Canada. The Export and Import Permit Act, (hereinafter called the "EIP Act") is the major import and export control law in Canada. This law's two aspects, the import control and the export control, will both be discussed.

Concerning import control, the EIP Act confers power on the Cabinet to establish an import products control list restricting the import of products for the following purposes in accordance with the needs of Canada: (1) to ensure the best possible supply and distribution of products that are scarce in the world market or are subject to governmental control in countries of origin or to allocation by inter-governmental arrangement; (2) to restrict the importation of farm products, meat products, agricultural products, fishery products under relevant legislation in order to support any action or to support the price of the product under the relevant legislations; and (3) to implement an inter-governmental arrangement or commitment.
In addition, Section 5(2) of the EIP Act allows the Cabinet to include certain products on the import control list if the importation of these products would cause or threaten serious injury to Canadian production as determined by an inquiry made by the Board established under the Textile and Clothing Board Act or Special Import Measures Act.\textsuperscript{151} Permits are issued by the Export and Import Permits Division of the Department of External Affairs but are administered by the custom officers at ports of entry.\textsuperscript{152}

As to the export control, the EIP Act authorizes the Cabinet to establish an export control list for the purposes provided in Section 3:

"(a) to ensure that arms, ammunition, implements or munitions of wars, naval, army or air stores or any articles deemed capable of being converted thereinto or made useful in the production thereof or otherwise having a strategic nature or value will not be made available to any destination wherein their use might be detrimental to the security of Canada;

(a.1) to ensure that any action taken to promote the further processing in Canada of a natural resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource;

(a.2) to limit or keep under surveillance the export of any raw or processed material that is produced in Canada in circumstances of surplus supply and depressed prices and that is not a product of agriculture;

(b) to implement an intergovernmental arrangement or commitment; or

(c) to ensure that there is an adequate supply and
distribution of such article in Canada for defence or other needs."

It must be noted that there are a number of acts that control the export of products from Canada with which the exporter must comply in order to export such a product. For example, the export of oil, gas and power is subject to a licensing requirement under the National Energy Board Act. The exportation of certain radioactive products and nuclear technology requires a licence granted from the Atomic Energy Control Board under the Atomic Control Act. Exporters of agricultural products must first comply with the regulations of the relevant provincial marketing agency as delegated to them by the federal Agricultural Products Marketing Act. Certain agricultural products are subject to export control under the Canada Agricultural Products Standard Act.

The procedure for export permit issuance is governed by the Export and Import Permit regulations. Export permits are administered by the Export Control Division of the Department of External Affairs. Products that require export permits are divided into two types. First, those products on the export control list, which sets out specific categories of goods by type or origin. Second, the area control list which lists countries which export is prohibited without a permit.

The importer, exporter, applicant or any person who fails to
comply with the provisions of the EIP Act or the conditions provided in the import or export permit, will be subject to a fine and/or imprisonment.  

It must be noted that the Import Permits Division or the Export Control Division is not required to provide a reason for the acceptance or denial of a request for a permit. A permit is not transferable. The EIP Act applies to acts done in Canada with a view to violating the Act abroad. However, acts committed by Canadians, Canadian corporations or their subsidiaries abroad do not in themselves offend this Act.

B. Legal Implications

The legal implications of this Act are of a procedural or administrative nature. An importer of countertrade products or the supplier of goods and services from Canada must obtain the appropriate permit for all goods listed in the Import Control List, the Export Control List or Area Control List.

The Import Control List is composed of sixty-seven different items with clothing, footwear, textile fabric, yarn and animal agricultural products accounting for most of the items. The List is amended from time to time.

With regard to the Export Control List, there are a number of
goods or products which may be divided into ten categories: 167
(1) animals and agricultural products; (2) wood and wood
products; (3) general purpose industrial machinery and electronic
devices; (4) Transportation equipment; (5) Metals, minerals and
their manufactured products; (6) Chemicals, metalloids and
petroleum products; (7) Arms, munitions, military, naval or air
stores; (8) Atomic energy materials and equipment; (9) Goods
originating outside Canada; and (10) Miscellaneous goods and
materials.

Countries included in the Area Control List are: Albania,
Bulgaria, Czechoslovakia, German Democratic Republic and East
Berlin, Hungary, Mongolia, Socialist Republic of Vietnam, Poland,
Romania, and the Union of Soviet Socialist Republics. 168

When importing textile or clothing products in a countertrade
transaction, the importer must be aware of quota restrictions
under Bilateral Voluntary Restraint Agreements which Canada has
concluded with 21 textile exporting countries, including
Thailand. 169 Under this Agreement, textile products are included
on the Canadian Import Control List. This means that Canada is
not required to find actual or threats of "serious injury" to the
production of textile or clothing products in Canada. 170 Other
non-textile products may be subject to quota restrictions if the
Canadian Import Tribunal is satisfied that the inquiry made under
the Special Import Measures Act shows that importation will cause
or threat serious injury to Canadian products.\textsuperscript{171}

If the Department of External Affairs refuses to issue an Export or Import Permit to the importer, what are the legal implications for the importer or the applicant? The Supreme Court of Canada in \textit{Maple Lodge Farms Ltd. v. Government of Canada}\textsuperscript{172} ruled that under Section 5 of the EIP Act, it is Cabinet's responsibility to establish the Import Control List. The Act confers on the Minister a separate discretionary authority to issue permits for goods included in the list. This discretion is not subject to judicial review unless it has been exercised unreasonably or in bad faith. Canada is a signatory to the GATT Agreement on Import Licensing Procedures of which Article 3(f) provides that:

"If the licence is not approved, the applicant shall, on request, be given the reasons therefor and shall have a right of appeal or review in accordance with the domestic legislation or procedure of the importing country".

It is Professor Paterson's considered opinion that the limitation on judicial review permitted in the \textit{Maple Lodge Farms} case is incompatible with the spirit of Article 3(f) of the GATT Agreement.\textsuperscript{173}

As to export permits or licences, based on the scope of Section 3 of the \textit{EIP Act}, the exporter will also have little chance of challenging the refusal of an export licence.\textsuperscript{174} Again...
Professor Paterson has suggested that if a Canadian exporter could show that the refusal of an export permit was based on considerations or factors not encompassed with the statutory statement of purposes of the Act, the refusal would be *ultra vires* the Minister.\(^{175}\)

C. Conclusion

The *Export and Import Permits Act* is a regulatory control law with which the trading parties must comply in order to get appropriate licences. The concerned parties are advised to seek a preliminary survey and consult with the Departments concerned prior to structuring a countertrade transaction. The ability to issue both import and export permits is in the discretion of the relevant Departments with certain exceptions. Neither the importer nor the exporter has recourse to judicial review if a permit is not granted.

5.4.3 Remedial Regulatory Laws

5.4.3.1 Introduction

The *Special Import Measures Act* and *Competition Act* are remedial in nature. Both acts have recently been enacted to replace older acts. There are likely to have a greater impact on countertrade transactions than any other Canadian legislations.
The reason is that countertrade transactions are often regarded by developed countries as unfair trade practices which lead to subsidization, dumping and a lessening of competition. The writer intends to discuss only the specific aspects of these Acts that directly impinges on countertrade transactions without going through the detailed provisions.

5.4.3.2 Special Import Measures Act

A. Overview

The Special Import Measures Act ("SIMA") was proclaimed in force on December 1, 1984. Its purpose is to more effectively protect Canadian producers from dumped or subsidized imports. It also ensures that Canada has the necessary legislative authority to take full advantage of GATT, the Subsidies Code and the Anti-Dumping Code. There are two main forms of action that can be taken against the import of countertrade products under the SIMA - dumping and countervail.

If a countertrade transaction is regarded as constituting dumping or subsidization, then anti-dumping or countervailing duties may be imposed. Investigation of dumping and subsidization situations is complicated. Two separate bodies investigate an issue of dumping or subsidization of goods. First, the Deputy Minister of National Revenue (hereinafter
called "the Deputy Minister") investigates whether dumping or subsidization has occurred. Then the Canadian Import Tribunal (hereinafter called "the Tribunal") will determine whether such dumping or subsidization causes injury to Canadian industry.\textsuperscript{179} The initial investigation may be initiated by the Deputy Minister\textsuperscript{180} pursuant to a recommendation of the Tribunal\textsuperscript{181} or by a Canadian producer who suspects injury by dumping or subsidizing.\textsuperscript{182}

It should be noted that where both an anti-dumping duty and countervailing duty is payable on goods, the portion which is attributable to the export subsidy is not collectable as an anti-dumping duty.\textsuperscript{183}

This thesis will only examine whether a countertrade transaction constitutes dumping or subsidization under the SIMA. The discussion in Chapter four on the legal implications of countertrade under Articles VI, XVI of the GATT and the Subsidies and Anti Dumping Codes may be of assistance in examining this question.\textsuperscript{184} In addressing this question the writer will separate the discussion on subsidizing and dumping so that a comparison under the GATT and its codes can be made.

As to subsidization, it is necessary to examine the definition of a subsidy in the SIMA. Unlike Article VI of the GATT and the Subsidies Code, the SIMA tries to provide a
comprehensive definition in Section 2(1):

"any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to person engaged in production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, as a result of any scheme, program, practice; or thing done, provided or implemented by the government of a country other than Canada ... ".

It should be noted that Section 2(5) of SIMA requires the Deputy Minister to "take fully into account" Article 9, respecting the export subsidy list, and Article 11, respecting domestic subsidies, in any question relating to the definition of a subsidy. Section 38(1)(b)(iii) and 41(1)(a)(iv) require the Deputy Minister to consider whether, in his opinion, the export subsidy in question is not "inconsistent with" the exporting country's obligation under the GATT. The discussion of the legal implications of countertrade under GATT Articles VI, XVI and the Subsidies Code concluded that a government mandated countertrade requirement by a foreign government will not be regarded as a subsidy. However, if the benefits or advantages associated with countertrade transactions fall under the illustrative list of export subsidies then such a countertrade transaction may constitute an export subsidy.186

Based on the definition of subsidy provided in SIMA and the examination of Article 9 of the Subsidies Code, the writer thinks that the major tests to qualify as a "subsidy" under SIMA are:
that it must be in the form of a financial or other commercial benefit; and the financial or commercial benefit must be provided or implemented by a foreign government. Thus, countertrade transactions, either mandatorily or voluntarily engaged in by foreign suppliers, will not be a "subsidy" under SIMA unless these two tests - financial or other commercial benefits and government involvement - are met. If a countertrade transaction is regarded as an "export subsidy" then the Deputy Minister has to take into account the exporting country's obligations under the GATT prior to determining whether or not the subsidized goods will be subject to preliminary or final determination.\textsuperscript{187} Basically under the GATT, export subsidies for products other than certain primary products are prohibited.\textsuperscript{188} Export subsidies to primary products are permissible provided the export subsidy is in conformity with the requirements of GATT under Article XVI:3 and Article 10 of the Subsidies Code. The determination of compliance is for the Deputy Minister. Professor Paterson comments that the Deputy Minister's decision to take the GATT obligations of an exporting country into consideration may be immune from judicial review since it may be considered as decision of a purely administrative nature.\textsuperscript{189}

It should be noted that subsidizing actions can be brought under the \textit{Customs Tariff Act} but to succeed both a decision by the Tribunal and the Cabinet is needed to impose countervailing duties.
Only two cases have resulted in the imposition of countervailing duties by Canada. Professor Paterson comments that the reason why Canada makes little use of countervailing duties is the fact that subsidizing activity can be dealt with through anti-dumping legislation, and that Canadian federal and provincial governments are involved in some kinds of subsidies and would not want to draw attention to their activities.

With respect to dumping, this thesis will briefly examine the definition of dumping and the method of determining normal value and export prices. Section 2(1) of SIMA defines "dumped", in relation to any goods, to mean that the normal value of goods exceeds the export price. The difference in these two prices is the margin of dumping and measures the amount of any anti-dumping duty payable. The major problem is the method used to determine the normal value and export prices of countertrade products.

As concluded respecting the legal implications of countertrade transactions under Article VI of GATT and the Anti-Dumping Code ("ADC"), the method of determining the normal value and export price of countertrade products should take into account the differences in conditions and terms of sales, taxation, and other differences (such as costs) which affect price comparability.
Under SIMA the rules for determining normal value and export prices are set out in Sections 15-30 and in the SIMA Regulations.\textsuperscript{194} For normal value, there are three basic formulae. First, under Section 15, the normal value is based on the price of like goods sold by the exporter to non-associated purchasers at the same trade level, in the same quantity and under ordinary commercial and competitive conditions. Allowance is then made for differences in terms and conditions of the sale, taxation and price comparability between the goods sold to the importer and the like goods. Second, under Section 16, normal value can be based on various adjustments where there are variations in comparable sale volumes. Third, under Section 20, normal value can be based on the exporting country where its export trade and domestic prices are substantially determined by the government. After the establishment of normal value, it can be adjusted to take into consideration quantity discount, quality, and freight allowances. Where the normal value of goods cannot be determined from the exporter's domestic sales, the Deputy Minister may determine the normal value using either (1) the exporter's sales to an arm's length customer in another export market (Section 19(a)), or (2) the domestic selling price of like or similar products (Section 19(b)). The normal value will be the cost of production plus "an amount for administrative selling and all other costs, and an amount for profit".\textsuperscript{195} It is questionable whether the anticipated cost in a countertrade
transaction which the exporter has to pay will be categorized as "an amount for administrative selling".

As to the determination of export price, the SIMA sets out the method in Sections 24-28 but it is less detailed than that of the normal value method. Under the SIMA, the export price is the lesser of (a) the sales price for the goods adjusted by deducting all costs, charges and expenses of shipment above to those generally incurred in domestic sales, but including Canadian duties or taxes imposed, and (b) the importer's purchase price adjusted in the same market.\textsuperscript{196}

Where there is a sale between associated persons or a compensatory arrangement which relates to the price of goods or the profits/costs of the parties,\textsuperscript{197} the SIMA requires the export prices be determined by the price of the import to non-associated persons, rather than the sales price with appropriate adjustments.\textsuperscript{198} If the importer does not resell the goods in the same condition but assembles, packages, or further manufactures the goods, the export price will again be the price of the sale of the finish products to a non-associated purchaser, less additional manufacturing or processing expenses.\textsuperscript{199}

If the Deputy Minister cannot determine normal value or export prices, the Minister can prescribe as he deems appropriate a method for finding normal or export prices.\textsuperscript{200} The current
practice is to have a stand-by prescription ready in any given case to cover new models of goods or new exports which are not part of the original investigation. This method is discretionary and an administrative order which is not subject to judicial review.

The method of determining a normal value and export price for countertrade products will depend on the nature of the countertrade transaction. The major problem in determining the normal value and export price is how to take into account the cost incurred in the countertrade transaction. The SIMA Regulations do not indicate what costs will be taken into account in an adjustment. However, the SIMA Regulations contain provisions for the adjustment of normal value in various circumstances such as quantity, quality, discount, delivery cost, substitution of trade level, cost of production, and other costs.

In the adjustment of export subsidies, the Deputy Minister is to take profits, the discount rate for export price, and goods in transit into account. This thesis, however, cannot examine this question in detail.

The writer agrees with Buchanan's statement that:

"... The determination of normal value and export price involves elaborate factual analyses of sales in the home and Canadian markets, with allowances to be made respecting differences in terms and conditions of
sale and other differences between the sale of the like goods abroad and in Canada."

The last question to be looked at is the method of determining material injury to a Canadian industry that may result in the levying of an anti-dumping duty or a countervailing duty. Section 2(1) of SIMA defines "material injury" and "retardation" as:

"material injury" means, in respect of the dumping or subsidizing of any goods, material injury to the production in Canada of like goods, and includes, in respect only of the subsidizing of an agricultural product an increase in the financial burden on a federal or provincial government agricultural support program in Canada."

"retardation", in respect of dumping or subsidizing of any goods, means material retardation of the establishment of the production in Canada of like goods."

The above definition does not provide any concept of material injury. Some commentators suggest that the Anti-Dumping Code ("ADC") injury test may be of assistance. Such factors in this test include: loss of domestic production and sales, loss of market share, loss of profit, decreased incapacity utilization, lowering of return on investment, loss of employment and other related factors. 204

Section 42(3) of SIMA requires that the Tribunal in examining injury to domestic (Canadian) production, take full account of Article 4(1) of the ADC where domestic industry is defined as
"domestic producers as a whole of like products to these imported or domestic producer whose collective output constitutes a major proportion of total domestic production." The meaning of "major proportion" refers to a producer whose output is significant and is not a reference to the more precise mathematical computation of more than one half.

In countertrade transactions which are on an ad hoc or temporary basis it may be difficult to establish the "material injury test" or "material retardation". For some forms of countertrade such as counterpurchase, compensation or offset it may be easier to establish these tests.

If it is established that dumping or subsidization has occurred and it has caused material injury to Canadian domestic production, the Tribunal may then impose an anti-dumping duty or a countervailing duty on the products imported into Canada equal to the margin of dumping or the amount of subsidization.

Some types of countertrade arrangements that involve capital, such as offset or compensation arrangements where foreign suppliers may conclude a turnkey agreement or sell aircraft at a dumped price, are regarded as "one free bite" because one particular instance of dumping may cause significant injury but is unlikely to recur soon enough for a finding injury to adversely affect the exporter.
Professor Paterson comments that SIMA provides some solutions respecting the importation of capital goods because the Deputy Minister can commence an inquiry into the dumping of capital goods and name the sources he wishes to scrutinize and simply ensure the issuance of a preliminary determination prior to the conclusion of binding contracts for the sale of capital goods. Section 2(1) of SIMA defines sale to include "an irrevocable tender" so the Deputy Minister is free to find that goods are dumped by reference to the tender price. In addition, Section 26 of SIMA also deals with the situation where the exporter undertakes to indemnify the importer for dumping duties paid.

C. Conclusion

The SIMA should be able to deal effectively with the importation of countertrade products. The issue is how the Deputy Minister or the Tribunal will use their discretions in determining normal value or export price.
5.4.3.3 Competition Act

A. Overview

Canada, like most industrialized countries, has laws prohibiting various forms of anti-competitive business practice, the most important of which is the new Competition Act, 1986, a predecessor of the Combine Investigation Act. The purpose of the Competition Act is set out in Section 1.1:

"... to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competitor in Canada, in order to ensure that small and medium size enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

A Competition Tribunal has been established under the Competition Tribunal Act. This Tribunal has jurisdiction to hear and determine all applications made under Part VII of the Competition Act on matters reviewable by the Tribunal. The Competition Act has both criminal and civil provisions. It is beyond the scope of this thesis to discuss the Competition Act in detail. There are constitutional and extraterritorial application problems with the legislation. This thesis will focus only on the countertrade transaction and the consequences that arise under the Competition Act.
B. Legal Implications

In examining the legal implications of the Competition Act, the following questions will be looked at:

1. Whether a countertrade agreement is exempt from the application of the criminal provisions relating to competition in the Act.

2. What type of countertrade transaction may be subject to review by the Tribunal?

As to the application of criminal offence provisions in the Act, Section 32(1) of the Competition Act provides that:

"Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture of production of a product, or to enhance unreasonably the price thereof,

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or

(d) to otherwise restrain or injure competition unduly,
is guilty of an indictable offence and is liable to imprisonment for five years or to a fine of ten million dollars or to both."

However, Section 32(4) of the Act states that if "the conspiracy combination, agreement or arrangement relates only to the export of products from Canada" the Act will not be applicable. This exemption is itself subject to qualification under Section 32(5), which sets out three situations in which export agreements will be subject to the Act's provision:

"... if the conspiracy, combination, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada."

As there are no reported cases using Sections 32(4) or 32(5) of the Competition Act, it is difficult to assess the scope of the exemption they provide. Professor Paterson has suggested that export agreements are valid only insofar as they do not have an impact on the domestic Canadian market. It should also be noted that an export agreement resulting in a decrease in the physical volume of exports, but which results in an increased dollar value, will be exempted from the Act under Section
Thus, primary sale or services agreements between Canadian exporters and foreign importers will qualify as an export agreement under Section 32(4) and will not be subject to the prosecution provisions of the Act, provided that the export agreements do not fall within the qualifications of Section 32(5).

Under Section 32.1(1), a countertrade agreement, concluded by foreign suppliers which give effect to an agreement in Canada, may violate the general conspiracy provision under Section 32. Therefore, countertrade agreements which result in the importation of countertrade products into Canada will be subject to the provisions of the Competition Act. For example, a countertrade transaction entered into with the intention of unduly preventing or lessening competition in the production, manufacture, purchase, or sale of Canadian products, may violate Section 32(1)(c) and give rise to a fine and/or imprisonment.

The onus of proof, as in all criminal matters, is on the Crown to prove the accused is guilty beyond a reasonable doubt. The only intention the Crown must prove is the intent to enter into a conspiracy, combination, agreement or arrangement, and not the intent to prevent or lessen competition unduly. However, the Crown must prove that if a conspiracy is carried into effect, it would lessen competition unduly. A party may also be liable for private damages to a person who
suffers loss or damages as a result of a breach of the Competition Act.\textsuperscript{223}

In addition, a countertrade agreement contrary to Section 32(1) may be void and unenforceable between the parties.\textsuperscript{224} Professor Fridman's comments should be noted that agreements contrary to the Combines Investigation Act could give rise to a defence of illegality in the event of an action being brought to enforce the agreement between the parties.\textsuperscript{225} There is a comment by two English legal commentators that a contractual provision made illegal or criminal by statute may be severed and the rest of the agreement may be specifically enforced if the purpose of the statute was to protect persons in the position of the party seeking to enforce the agreement and if the party was acting in good faith not realizing that the provision was illegal.\textsuperscript{226} If this view were adopted by a Canadian court, a countertrade agreement which violates certain provisions of the Competition Act would still be enforceable.

In practice, the Crown has a burden to prove that that the foreign supplier of countertrade product had conspired, combined, agreed or arranged with a Canadian importer to prevent or lessen competition in Canada or the parties intend to agree and such agreement would lessen competition in Canada unduly.

The question of the general application of Section 32 to
countertrade situations remains uncertain since there is no decisions respecting its application to countertrade transactions. In the United States, there is also no precedent with respect to the application of its Anti-Trust Law to countertrade agreements. Thus, the writer agrees with Professor Nozick's suggestion that a formal process of pre-notification and advance clearance, such as exists with mergers, would better protect the public interest against cartels disguised as export agreements and more readily facilitate legitimate export agreements.\(^{227}\)

There are a number of situations when a countertrade transaction may be reviewable under the *Competition Act* as a restrictive or unfair trade practice. The matters reviewable by the Competition Tribunal include: refusal to deal,\(^{228}\) consignment selling,\(^{229}\) exclusive dealing, market restriction and tied selling,\(^{230}\) and refusal of supply by foreign suppliers.\(^{231}\) In addition, the Tribunal could review situations where foreign judgments, laws and directives are applied in Canada with adverse consequences.\(^{232}\) The only person authorized to make an application to the Tribunal is the Director of Investigation and Research ("Director").\(^{233}\) A minimum of six Canadian residents may apply to the Director requesting an inquiry provided there are grounds for making an order under Part VII or an offence under Part V or VI has been or is about to be committed.\(^{234}\)
As discussed above, a countertrade transaction on a temporary or ad hoc basis will not provoke the Director to file an application with the Tribunal or entitle Canadian competitors to submit applications to the Director for an inquiry into the transaction. However, if the countertrade transaction causes or leads to a situation provided for in the Competition Act, the transaction will be reviewable.

The following are provisions in the Act that may apply to countertrade transactions.

1. Although unlikely, a countertrade transaction may constitute a refusal to deal as provided in Section 47

"(1) Where, on application by the Director, the Tribunal finds

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed,
reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements."

The above four criterion must be met if the Tribunal is to issue an order under this section.

2. In a countertrade transaction, a refusal to supply by foreign suppliers under Section 56 of the Competition Act, may arise.

"Where, on application by the Director, the Tribunal finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the "first" person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Tribunal may order any person in Canada (the "second" person) by whom or on whose behalf or for whose benefit the buying power was exerted

(a) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or
(b) not to deal or to cease to deal, in Canada, in such product of the supplier."

This provision is designed to prevent the exertion of buying power outside Canada to the detriment of a purchaser within Canada.235

3. A countertrade transaction may constitute an exclusive dealing, tied selling or market restriction, if the transaction meets the requirement provided in Section 49(1)(a)(b). In this case the Tribunal may order a cease to such practices or it may impose requirements on such practice as it deems fit to overcome the effect of the practice or to stimulate competition in relevant markets. Section 49(2) on the exclusive dealing and tied selling provides:

"Where, on application by the Director, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the
market or to restore or stimulate competition in the market."

Exclusive dealing can take one of the two forms. First, it can involve a situation in which a supplier requires a buyer to purchase exclusively or primarily from him or his nominees. Second, it may involve a situation where a supplier induces a buyer to deal only in his or his nominee's products by offering to supply the product on more favourable terms and conditions.  

Tied selling may take three forms. First, it may involve a requirement by a supplier that the buyer acquire a second product from the supplier as a condition for being supplied the first and usually highly desirable product (the tying product). A second form involves the requirement that a customer refrain from distributing, in conjunction with the tying product, another product not manufactured by the supplier. The third form of tied selling is to offer the tying product on more favourable terms or conditions if the buyer agrees to either of the first two forms of tied selling.  

Section 49(3) on market restriction provides that:

"Where, on application by the Director, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market
restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product."

A market restriction means any practice where a supplier of a product, as a condition of supplying the product to a customer, requires the customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside the defined market.\textsuperscript{238}

There are two exclusive dealing or market restriction practices that are not reviewable by the Tribunal:\textsuperscript{239}

First, if the exclusive dealing or market restriction is or will be engaged in only for a reasonable period designed to facilitate the entry of a new supplier into a market or of a new product into a market, and

Second, if it is between or among companies, partnerships or sole proprietorships that are affiliated.

The three tied selling exceptions that are not reviewable by the Tribunal are:\textsuperscript{240}

(a) If tied selling is engaged in reasonably with regard to the technological relationship between or among the products to which it applies;
(b) If tied selling is engaged in by a person in the business of lending money for the purpose of better securing loans made by him and it is reasonably necessary for that purpose; or

(c) If tied selling is engaged in between or among companies, partnerships or sole proprietors that are affiliated.

4. The mandated countertrade requirement imposed by foreign countries, like the counterpurchase requirement in Indonesia, may give rise to the questions under Section 54 of the *Competition Act* which states that:

"(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada, would

(i) adversely affect competition in Canada, (ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency, (iii) adversely affect the foreign trade of Canada without compensating advantages, or (iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Tribunal may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs (b)(i) to (iv)."

This provision, however, raises questions of the extraterritorial reach which, although interesting, is beyond the
scope of this thesis.\textsuperscript{241}

5. The countertrade agreements, particularly in Compensation or Counterpurchase arrangements, may constitute exclusive dealing or tied selling situations because foreign parties may insist that a Canadian firm buy products exclusively from the output of the plants. In some countertrade transactions, including Barter, foreign suppliers normally insist on having a "market restriction" provision that permits the importers to sell the countertrade products exclusively in the importing countries. This may also give rise to the application of the \textit{Competition Act}.

Since there are no precedents on the application of the \textit{Competition Act} to countertrade transactions, it remains to be seen how the Tribunal or a court would approach the issues when they arise. It will require examination on a case by case basis since each countertrade transaction has a unique form and, of course, has different consequences.

\textbf{C. Conclusion}

The \textit{Competition Act} is likely to have an impact on countertrade transactions. It may cause a countertrade agreement to be declared void by the court. Canadian importers and foreign suppliers may, in some circumstances, be liable for criminal
offences if the countertrade transaction lessens competition in Canada. Some types of countertrade will subject to review by the Tribunal. A lawyer who structures the countertrade transaction must be aware of the application of this Act.

A Procedure for the giving of advance rulings, with statutory force like those in merger cases, should be established in both criminal and reviewable matters. For now, it is recommended that an informal ruling from the Director of Investigation and Research of the Competition Tribunal be obtained.

5.4.4 Promotion and Administrative Regulatory Law

5.4.4.1 Introduction

The promotion and administration laws that might effect countertrade transaction are:

1. The Investment Canada Act, which establishes a screening process for foreign investments and the encouragement of foreign investments in Canada.

2. The Export Development Act, which allows the Export Development Corporation, a federal crown corporation, to provide financial assistance to Canadian exporters in countertrade transactions.
3. The **Department of Supply and Services Act** which establishes the Department of Supply and Services to perform as a purchasing agent for the federal government of Canada. Discussion of this Act and Department will be confined to the implementation of the GATT Agreements to which Canada is a signatory member.

5.4.4.2 Investment Canada Act, 1985

A. Overview

The **Investment Canada Act**, 1985,\(^{242}\) (hereinafter called the "IC Act"), establishes an advance screening system on investment coming into Canada. This Act replaces the **Foreign Investment Review Act**, 1974, which had been much debated and criticized both externally and domestically during its eleven year lifetime. The purpose of the new Act is to encourage investment in Canada by Canadians and non-Canadians and to provide for a review of significant investments in Canada by non-Canadians in order to ensure a benefit to Canada.\(^{243}\)

The administration of the **IC Act** is the responsibility of the Minister of Regional Industrial Expansion ("Minister"), who is advised by an agency established under the Act called Investment Canada.\(^{244}\) In addition, the duties of the Minister under the Act
include: carrying out research and analysis relating to investment; providing investment information services; and assisting in the development of industrial and economic policies that effect investments in Canada. In performing these duties, the Minister is entitled to consult with industrial and labour representatives, provincial and local authorities and other interested persons, and to enter into agreements with provincial governments and agencies. It seems that the responsibilities of the agency both to encourage investment and to review foreign investment are potentially contradictory. To remove some of the concern, the Minister publicly announced that seventy-five percent of the staff of the agency would devote its time to the positive development of the investment opportunities, while only twenty-five percent would deal with review.

The IC Act is limited in its ability to review and obtain notification of the investment activities of "non-Canadians". For the purpose of the Act, non-Canadian means an individual, government or agency thereof, or an entity that is not a Canadian. A Canadian is defined as including: (a) a Canadian citizen; (b) a permanent resident within the meaning of the Immigration Act, 1976, who has been ordinarily resident in Canada for not more than one year after the time at which he first became eligible to apply for Canadian citizenship; (c) a Canadian government, whether federal, provincial or local, or an agency thereof; and (d) an entity that is Canadian-controlled, as
The work of the Agency is to screen the acquisition of Canadian business by non-Canadians, to acknowledge the establishment of new Canadian businesses and to monitor the acquisition of Canadian businesses by non-Canadians which are not subject to review.

B. Legal Implications

This act may give rise to the following questions respecting a countertrade transaction:

1. What type of countertrade transactions may be subject to review or notification under the IC Act?

2. What are the exemptions, if any, to the above requirements?

As to the reviewability of a transaction and the notification requirement, the IC Act will rarely apply to a countertrade transaction unless a non-Canadian enters into Canada to fulfill its countertrade commitment under an Offset or Compensation Arrangement.

Generally, foreign investments will be reviewable if:
1. it is an acquisition of a Canadian business within the meaning of Section 28(1) of the IC Act and the acquisition meets the value threshold specified in Section 14 of the IC Act, or

2. the acquisition or establishment of new investment is related to Canada's cultural heritage or national identity as described in Section 15 of the IC Act.

A non-Canadian is required to formally notify Investment Canada of his intention to establish a new Canadian business or to acquire control over a Canadian business whether or not the acquisition is reviewable under the Act. Notification must be given prior to or within 30 days of the investment. The notification process is not intended to involve a review of any kind, but is to allow the government to monitor foreign investment for policy and statistical purposes and to obtain notice of investment which may be reviewable on cultural grounds.

It is beyond the scope of this thesis to examine each type of countertrade transaction and the possible application of this Act. Generally, if a non-Canadian establishes a new business, he is subject to the notification requirement. For example, if a non-Canadian is going to establish a foreign trading house to handle a countertrade transaction, it will be subject to the
notification requirement under Section 11. The provisions of the
IC Act do not apply to 11 types of business as specified in
Section 10. They are: (1) acquisitions by traders or dealers in
securities in the ordinary course of their businesses; (2)
acquisitions by venture capitalists subject to certain conditions
to be fixed by the Minister; (3) acquisitions of control of
Canadian businesses resulting from realizing on security granted
for bona fide loans or other financial assistance; (4) temporary
acquisitions of control of Canadian businesses for the bona fide
purposes of facilitating the Canadian businesses' financing; (5)
certain corporate reorganizations that do not result in an
ultimate change of control of the Canadian business involved in
the reorganization; (6) acquisition of control of a Canadian
business carried on by an agent of the federal or a provincial
government of Canada, or by a Crown corporation; (7) acquisitions
of certain tax-exempt corporations; (8) acquisitions of or the
establishing of Canadian-chartered banks; (9) involuntary
acquisitions of control of Canadian businesses as a result of
death or by operation of law; (10) certain acquisitions by
insurance companies for the benefit of their policy holders; and
(11) the acquisition of control of a Canadian business, the
revenue of which is generated from farming carried out on the
real property acquired in the same transaction.

It may be necessary if the Canadian government wants to
promote the establishment of foreign trading houses which have
experience and expertise in handling countertrade transactions to include the international trading house business as an excluded business under Section 10 of the IC Act.

The function of Investment Canada is not only to review or to acknowledge the application from non-Canadians to invest in Canada but also to promote and assist Canadian business in developing opportunities to invest in Canada. Therefore, it is possible that in the investment promotion aspect, Investment Canada may play an active role in developing countertrade transaction policy with foreign parties in the form of offset and compensation arrangements.

C. Conclusion

The IC Act will not have a significant impact on countertrade transactions since most countertrade transactions engaged in by Canadian firms involve investment in foreign countries. The establishment of trading houses by non-Canadians to handle countertrade transactions will be subject to the notification requirement. The IC Act investment promotional function should be used as a tool to develop and encourage countertrade transactions in Canada.
5.4.4.3 The Export Development Act

A. Overview

The Export Development Corporation (hereinafter called "EDC"), established under the Export Development Act (hereinafter called "EDC Act"), has as its mandate the purposes of "facilitating and developing trade between Canada and other countries by means of the financial and other powers provided in this Act ...".

EDC offers a broad program to facilitate and develop Canadian export trade and supplement the facilities available from private financial institutions. It does this so that purchases of Canadian exports may be financed on credit terms competitive with those offered in international markets, including the government supported export financing programs of other countries. Financial assistance will not normally be made available if it is available in the private market or if the proposed transaction does not meet the EDC's criteria or guidelines.

The EDC provides insurance, guarantees and financing facilities which, combined with advice and the organization of financial service packages, fosters the ability of firms selling Canadian goods and services to compete effectively abroad. Basically, there are four major types of financing facilities
available to the EDC to perform its functions: (1) export credit insurance and guarantees as provided in Section 24; (2) export loans and guarantees as provided in Section 29; (3) a note purchase program as provided in Section 33; and (4) foreign investment insurance as provided in Section 34.

B. **Legal Implications**

This part of thesis is intended only to provide a brief outline of the export financing facilities which include export credit insurance and guarantees, export loans and guarantees, and foreign investment insurance to countertrade transactions. In doing so, it will be necessary to examine whether countertrade transactions will be regarded as an "export transaction" or an "investment in a foreign country" under the definition provided in the EDC Act.

(a) **Export Financing Facilities**

The phrase "export transaction" is defined in Section 23 as:

"... a transaction involving

(a) the export of goods out of Canada, (b) the manufacture, treatment or servicing of goods for, or the sale or leasing of goods to, a foreign customer, (c) the sale or licencing of any right in a patent, trademark or copyright to a foreign customer, (d) the rendering to a foreign customer of any managerial, construction, technological, marketing and other services or (e) the purchase in Canada by a person carrying on business or
other activities in Canada of goods that that person will use out of Canada or will lease to another person; including foreign government for use out of Canada".

Professor Paterson comments that, based on this definition, EDC services are available to foreign corporations or individual so long as they carry on business in Canada.261

Based on the above definition, it is the writer's opinion that a countertrade transaction which supplies goods or services under a primary Supply or Service Agreement to foreign importers should be regarded as an export transaction262 under the EDC Act. However, it is questionable whether the EDC would agree to provide the financial facilities for countertrade transactions since the payment may be made in the form of product (like in Barter or Compensation) or the payment may depend on the commitment of Canadian exporters to fulfill their obligations under the countertrade agreement.

Even though the power to determine the terms and conditions upon which the EDC Board will provide financing facilities to Canadian exporters is discretionary, the statutory criteria in Section 24(1) and 29 of the Act must be met. Section 24 (1) on Export Credit Insurance and Guarantees and Section 29 on Export Loans and Guarantees, state that the EDC Board, in authorizing those transactions, must do so for the purpose of facilitating and developing trade between Canada and foreign countries. At present, the EDC Board takes the position that the transaction
should be based on commercial practice and should provide long lasting benefits to Canada.  

There is no policy or precedent for the provision of financial facilities (either export insurance and guarantees or export loans and guarantees) to Canadian exporters involved in countertrade transactions, except for the sale of Canadian nuclear reactors in 1981 where the EDC provided 1 billion Canadian dollars to Canadian exporters while Romania demanded that all Canadian suppliers counterpurchase products from Romania.

The EDC and other government supported insurance agencies will not provide insurance cover for exports which depend on countertrade for payment. This may implicitly mean all the financing facilities provided by EDC will not be available for countertrade transactions. Moreover, it is uncertain whether Canadian exporters would be eligible for financial facilities from the EDC under the EDC guidelines.

If the EDC Board recognizes or accepts that countertrade transactions promote exports and they are sound commercial practices providing long lasting benefits to Canada, then Canadian exporters should be able to apply for financing facilities from the EDC.
(b) **Foreign Investment Insurance**

The EDC provides insurance for Canadian investors and non-Canadian investors who carry on business in Canada for investments made in foreign countries covering three frequent political risks: (1) blockage of transfer of funds; (2) expropriation; and (3) war, revolution or insurrection.²⁺⁶⁷ This insurance service helps Canadian companies to invest abroad and to compete on an equal footing with companies that receive similar support from other governments.

Some forms of countertrade arrangements, such as Compensation or Offsets where Canadian exporters are to invest or lend money to their foreign suppliers should be regarded as "investment in a foreign country". Section 23(1) of the EDC Act defines "investment in a foreign country" as:

"(a) the acquisition of shares, stock, or any other interest in a corporation incorporated and carrying on, or proposing to carry on business, in a foreign country,

(b) the acquisition of a right to share in the assets of a business carried on, or proposed to be carried on, in a foreign country, whether as a corporation or otherwise,

(c) the lending of money or extension of credit, by any means, to a person in a foreign country for use by him in or in connection with a business carried on, or proposed to be carried on, by him in that country,

(d) the transferring of any money, or the shipping of goods or equipment, to a foreign country for use for use in or in connection with a business carried on, or proposed to be carried on, in that country,"
(e) the acquisition, by way of written agreement, of a right in respect of a business carried, or proposed to be carried on, in a foreign country

(i) to manage such business

(ii) to furnish administrative, financial, technical or general advisory services to such business,

(iii) to participate in the profits of such business, or

(iv) to receive a payment from such business, where the amount of the payment by such business is related to or determined by

(A) its use of property of the recipient of the payment,

(B) the volume of its production or sales, or

(C) the value of its production or sales,

(f) the giving by a person of a guarantee of payment of an amount payable as result of an investment set out in paragraphs (a) to (e) where such investment is made by another person in a business carried on, or proposed to be carried, in a foreign country and the guarantee is given to that other person, or

(g) where there is a series of two or more guarantees each of which, except the first, is given in respect of a preceding guarantee in the series, the giving of any guarantee in the series if the first such guarantee is an investment in a foreign country by reason of paragraph (f)."

The following criteria must be met in order for a Canadian exporter to be eligible for foreign investment insurance: 268 (1) economic advantages must accrue to Canada; (2) advantages must exist for the host country, and (3) the host government must give its approval. It must be noted that despite the above statutory and policy criteria, the EDC has an overall discretion to refuse
coverage. Where a Canadian investor enters into Compensation or Offset Arrangements with foreign parties, they should seek foreign investment insurance coverage because the project involves a long term agreement. However, the EDC policy is not to provide insurance for export products in countertrade transactions.

Apart from the EDC, there are a number of organizations in Canada that may participate or facilitate countertrade transactions both at a government to government level, between the private sector and foreign government, or between private sectors. For example, the Canadian Commercial Corporation ("CCC") whose main activity involves brokering the requirements of foreign governments and international agencies with the supply capabilities of Canadian producers, also provides exporters with a "government to government contract" when requested by a foreign customer or if a Canadian exporter believes it will help conclude a contract. The CCC may play an important role in government mandated countertrade requirements imposed by foreign governments. Another agency is the Canadian International Development Agency ("CIDA") which has primary responsibility for the administration of Canadian development programs which provide assistance to 80 developing countries. CIDA may assist Canadian exporters and foreign suppliers in exchanging and learning expertise in developing countertrade transactions.
C. Conclusion

Even though the provisions in the EDC Act would permit the EDC to provide financial facilities in the forms of export credit insurance, export loans, guarantees or foreign investment insurance to Canadian exporters who engage in countertrade transactions, it seems that Canadian government policy is against the provision of such services. The reasons may be as follows.

1. The Canadian government, as a member of the OECD, is opposed to countertrade transactions because they are regarded as an unfair trade practice and prejudicial to export opportunities of small or medium size firms.\(^{273}\)

2. Canada is a signatory to the OECD Arrangements on guidelines for officially supported export credit which provides a framework within which export credits are to be used.\(^{274}\) It appears that countertrade transactions are not listed in the arrangements.

The writer, however, is of the opinion that the EDC should reconsider its position of not providing financial services to Canadian exporters in countertrade transactions. Private financial assistance alone may not enable Canadian exporters to compete with other countries. It requires further study on how the EDC could provide assistance to Canadian exporters without
violating the GATT and Canada's commitment to OECD members.

5.4.4.3 The Department of Supply and Services Act:
Agreement on Government Procurement

A. Overview

The Department of Supply and Services Act\(^{275}\) confers various duties and power to the Minister of the Department of Supply and Services ("DSS") in relation to:\(^{276}\)

"(a) the acquisition and provision of articles, supplies, machinery, equipment and other material for departments;

(b) the acquisition and provision of services for departments;

(c) the planning and organizing of the provision of material and service required by departments; and

(d) the acquisition and provision of printing and publishing services for departments."

Prior to the implementation of the multilateral Agreement on Government Procurement ("AGP"), DSS had been able to impose a countertrade policy on the acquisition of all goods and services for the federal government then described as a policy of sourcing goods in Canada wherever possible and only resorting to foreign suppliers where the cost of domestic goods was higher than foreign goods.\(^{277}\) However, after signing and implementing the AGP, Canada has had to comply with the conditions and
requirements of the AGP. The purposes of the AGP, as discussed in Chapter four, are to ensure increased international competition and to permit more effective use of public resources. It lays down the principle of non-discrimination and of national treatment for procurement from foreign countries which are signatories of the AGP. It is interesting to note that Canada did not enact any legislation to implement the AGP because the Act already conferred a wide power to the Minister. The Minister has just modified the internal administrative policies of the Department to conform with the provisions of the AGP. Canadian policy guidelines for implementation of the AGP have been published as "Procedures for Implementing the GATT Agreement on Government Procurement" (hereinafter called "the Procedure").

B. Legal Implications

The contents of the Procedure for implementing the AGP are essentially a simplified version of the Agreement and appear to be an accurate and concise review of the operative provisions of the AGP which bear upon the administrative formalities necessary to comply with the AGP.

Basically, the Canadian federal government cannot impose or introduce a mandated countertrade policy in the acquisition of foreign goods and services if the government procurement meets the coverage requirement as stated in the Procedure, that:
"(1) it is a goods contract or includes a service component which is incidental to the value of the goods; (i.e. the value of the service component is less than half the value of the contract); and

(2) the value of the contract is 150,000 SDR units or more; (Note: 150,000 SDR units is equivalent to $202,000 Cdn. for calendar year 1986); and

(3) the contract is issued on behalf of an entity listed in Annex I to the Code. In addition, the product coverage for DND and the RCMP is limited to those commodities listed in Annex I to the Code.

The Procedure does not state who is to decide whether a particular procurement contract will be subject to its provisions. In practice, DSS screens orders to determine whether the criteria of the Procedure are met. Most of the orders from its customers are potentially subject to the AGP except those from the Department of National Defence and R.C.M.P.\textsuperscript{283} Currently DSS uses the selective tender method exclusively. The selective tender method requires bids from a group of suppliers who are usually pre-established.\textsuperscript{284}

It is possible that some forms of countertrade transactions such as Offset and Licensing of Technology may apply to government procurement. The Procedure provides for offsets and Licensing of Technology stating that:\textsuperscript{285}

"The use of offset procurement opportunities or licensing of contract award may occur in a limited number of cases. Such requisites should not be used in a discriminatory manner (v. (14)h)."
This provision seems to be the only provision that deals specifically with countertrade transactions.

With the division of legislative power between federal and provincial governments, the AGP is not binding on the provinces despite the important role they play in government procurement in Canada. The agencies and departments of provincial governments are free to discriminate against foreign suppliers in breach of the AGP unless they voluntarily observe the guidelines.286 A provincial government may, therefore, impose or introduce countertrade transaction policy in its government contracts. However, this may, in turn, give rise to constitutional problems.

C. Conclusion

With the exception of Offset and Licensing of Technology agreements and for security reasons, the Canadian federal government, or a signatory member of the AGP, cannot impose or introduce countertrade transaction requirements for government procurement. On the other hand, a provincial government may be able to use or to impose countertrade requirements in the acquisition of goods or services provided the relevant legislation is within the legislative power of the provincial government.
It is difficult to evaluate the effectiveness of the AGP and it remains to be seen whether the new market (government procurement) made available will be taken advantage by foreign suppliers. If not, the administrative cost and burden associated with the AGP may exceed any tangible benefit. In this case the Canadian government may have to re-evaluate its position toward the AGP\textsuperscript{287} and at that time a further study of countertrade requirements on government procurement may be useful.

5.5 Conclusion

The private law aspect in Canada seems to deal effectively with countertrade agreements. Even though there is no precedent or rulings from both the judicial and administrative levels which deal directly with the countertrade problems, the writer is of the opinion that the current regulatory laws in Canada can cope and deal with the potential growth of countertrade in Canada. The most important issue is that all judicial, government and administrative tribunals should be educated on the elements of each countertrade transaction and should recognize that countertrade transactions have unique characteristics which make them different from traditional sales and services contracts.
Footnotes - Chapter Five


2. See generally ibid. at 6.


5. R.K. Paterson, Canadian Regulation of International Trade and Investment (Canada: Carswell, 1986) at 37. Unless it provided otherwise, Sections referred to in this part shall mean Sections in the Constitutional Act, 1867.

6. Ibid. at 37-38; Hogg, supra, note 3 at 440; see also in Citizens' Insurance Co. v. Parsons, (1881), 7 App. Cas 96 at 113, 1 Cart 265.

7. See Paterson, supra, note 4, at 21.

8. See detailed discussion in Hogg, supra, note 3 Chapter 21 at 601-625.

9. See detailed discussion in Chapter 26 at 561-599.

10. See Paterson, supra, note 5 at 41.

11. Ibid. at 38, and see footnote 20.

12. See generally in Hogg, supra, note 3 at 441-442. See also the case in King v. Eastern Terminal Elevator Co. (1925) S.C.R. 434.

S.C.R. 844.

14. Fairley, supra, note 4 at 155-156.


17. Paterson, supra, note 5 at 40. The natural resources or primary product is defined in Section 92(5) and the sixth schedule. It includes crude oil, gas, liquid, forestry products.

18. Ibid, at 41. The provinces have also engaged in trade and services promotion activities such as the appointment of overseas trade mission. (See also Paterson, supra, note 4 at 12).


21. Ibid. at 531.

22. Ibid. at 526.


25. Castel, supra, note 20 at 531.

26. Ibid. and footnote 41, 42.

27. (1939) A.C. 277.
28. Castel, supra, note 20 at 545.

29. Ibid. at 151-153.

30. Paterson, supra, note 23 at 125.


32. Ibid. at 153-154.

33. See discussion in Chapter six, infra, and Supreme Court decisions in notes 14-25.

34. Castel, supra, note 20 at 139, 143.

35. Ibid. at 145.

36. See discussion in Chapter six, Infra 6.2.2.


38. Ibid. S. 5.


40. Ibid. S. 7.

41. Ibid. S. 8.

42. Ibid. S. 4(2).


45. See Lorach Transport case, supra, note 43.


47. The State Immunity Act, S. 2, 5.

48. Ibid.
49. Ibid. S. 11. See also Lorach Transport Ltd. case, supra, note 43.


58. Castel; de Mestral; Graham, supra, note 1 at 825.


61. See Article VII of the New York Convention, the more favorable right provision. See also Van den Berg, supra, note 54 at 354; Redfern & Hunter, supra, note 55 at 279.


66. See Paterson, *supra*, note 23 at 125, and the discussion of the decision of the Supreme Court of Canada in *R.V. Thomas Equipment Ltd.* (1979), 96 D.L.R. (3d) 1, at 114-128. In this case, it involved the application of Alberta legislation, The Farm Implement Act, R.S.A. c. 136, against Thomas Equipment Ltd., a New Brunswick firm, in the Franchise Agreement between Alberta firm and New Brunswick firm which the proper law of contract is New Brunswick. This issue includes the question of the extraterritorial reach effect of the regulatory law which is beyond the scope of this thesis.

67. S.C. 1986 c. 1 (hereinafter called "*Customs Act, 1986*").

68. R.S.C. 1970 c. c-41 as am (hereinafter called "*Customs Tariff Act*").

69. See Paterson, *supra*, note 5 at 60-61.


78. See generally the Principles for Administration of the Transaction Value System, prepared by the Department of National Revenue, Custom or Exise (Castel; de Mestral; Graham, *supra*, note 1 at 217-221).


81. Paterson, *supra*, note 5 at 63-64.

82. *Ibid*, at 64. See *Customs Act, 1986*, S. 51.

83. *Customs Act*, S. 52.

84. Paterson, *supra*, note 5 at 64.
85. Castel; de Mestral; Graham, supra, note 1 at 219.


87. See M. Irish, Customs Valuation in Canada, (Canada: CCH, 1985) at 169. See also Advisory Opinion on Technical committee on Customs Valuation Code (GATT Technical Committee) on the Treatment of Barter or Compensation Deals, Paper on Countertrade and the General Agreement on Tariffs and Trade, DOC GG 18/W/80 No. 84-0599 (unpublished paper) at 25.


90. Irish, supra, note 87 at 170-171.


93. See discussion in Chapter four, supra, 4.3.4.7, note 104.

94. See generally in Irish, supra, note 87 at 169-170.

95. Ibid. at 210.

96. Ibid.


98. Ibid. S. 50.

99. See supra, note 93.

100. Irish, supra, note 87 at 210.

101. Abbey, supra, note 91 at 67.


103. Irish, supra, note 87 at 222.

105. Irish, *supra*, note 87 at 228.


107. See discussion the difference of Canadian *Customs Act*, S. 52 from Article 7 on the list of prohibited method of valuation (Irish, *supra*, note 87 at 229-230).


117. See the *ITA Act* Part XIII, S. 212-218.


121. *ITA*, S. 219(1)(h).


125. Ibid. Clause 4 at 2500-669.


129. ITA, S. 3, 9.


131. ITA, S. 69(1), (2), (3). The purpose of this section is to prevent a taxpayer under certain circumstances from claiming excessive cost as consideration paid to persons with whom he is not dealing with at arm's length and from failing to account for the full value of anything disposed of in the same circumstance.


135. Ibid. at 1-110-1-111.

136. ITA, S. 251.

137. Ibid. S. 251(2).


140. See details Ibid. at 1-112-1-124.

141. (1929) S.C.R. 84.


144. Revenue Canada, supra, note 132 at 3.

145. See Revenue Canada, Interpretation Bulletin IT-140R2 December 29, 1980.

146. See Paterson, supra, note 5 at 80, and footnote 22.

147. The EIP Act, 1953-54 ("EIP Act") R.S.O. Chapter E-17, S. 1.

148. Ibid. S. 5(a).

149. Ibid. S. 5(a.1), (a.2), (b).

150. Ibid. S. 5(c).

151. Ibid. S. 5(2).

152. The EIP Act S. 24, 25.


159. The EIP Act, S. 3.

160. Ibid.

161. Ibid. S. 13-23.

162. Castel, de Mestral, William, supra, note 1 at 158.

163. See the EIP Act, S. 17.
164. Ibid. S. 15, and see Castel, de Mestral, William, supra, note 1 at 159.

165. The EIP Act, S. 7.8.

166. Sor/70-379, August 14, 1970, as amended.


169. See generally Paterson, supra, note 5 at 90, footnote 78, and Appendix I, at 370-372.

170. Ibid. at 90.

171. The EIP Act, S. 5(2)(b).


173. Paterson, supra, note 5 at 84-85.


175. Ibid. at 98.


180. SIMA, S. 31(1).

181. Ibid. S. 31(2)(3).

182. Ibid. S. 31(1).

183. Ibid. S. 10.

184. See discussion in Chapter four, 4.3.4.3 and 4.3.4.4 supra.
185. See generally Paterson, supra, note 5 at 145.

186. See discussion in Chapter four, 4.3.4.3 supra.

187. SIMA, S. 38(1)(b)(iii), and 41(1)(a)(iv)(c).

188. Subsidies Code, Art. 9. Certain primary products are defined as any product of farm, forest or fishery, in its natural form or which has undergone such processing as its customarily required to prepare it for marketing in substantive volume of international trade.

189. Paterson, supra, note 5 at 144-145.

190. Giese, supra, note 179 at 16.

191. Paterson, supra, note 5 at 142.

192. This definition is similar to Article VI of GATT, and Article 211 of the Anti-Dumping Code.

193. See definition of dumping in SIMA, Ss. 2(1), (3), (4).

194. Sor/84-927 November 22, 1984, Ss. 3-25.

195. See detailed discussion in Paterson, supra, note 5 at 111-113, and Buchanan, supra, note 178 at 16-20.

196. SIMA, S. 24, Buchanan, supra, note 178 at 20.

197. SIMA, S. 25(b), Paterson, supra, note 5 at 113-114.

198. SIMA, S. 25(c), Buchanan, supra, note 178 at 21.

199. SIMA, S. 25(a); SIMA Regulation, S. 21.

200. SIMA S. 29.

201. Paterson, supra, note 5 at 115.

202. Ibid.

203. Buchanan, supra, note 178 at 15.

204. Ibid. at 21. See general discussion in Paterson, supra, note 5 at 116-118.

205. Paterson, supra, note 5 at 118.


208. See discussion in Paterson, supra, note 5 at 133-136.

209. Ibid. at 134.

210. Ibid. at 135.


214. Ibid. S. 8(1).

215. Competition Act, Parts V, VI.

216. Ibid. Parts VII, VIII.

217. See Paterson, supra, note 5 at 99.


221. See generally the decision under the previous Combines Investigation Act in R.V. Aluminum Co. (1976), 29 C.P.R. (2d.) 183 (Que. S.C.).


224. See Dom. Supply Co. v. T.L. Robertson MFG Co. (1917), 39

225. See discussion in Fridman, supra, note 52 at 348-350.


227. Nozick; Neff, supra, note 218 at 58.

228. Competition Act, S. 47.

229. Ibid. S. 48.

230. Ibid. S. 49.

231. Ibid. S. 59.

232. Ibid S. 54, 55.

233. Ibid. S. 3, 8(1).

234. Ibid. S. 7.


236. Competition Act, S. 49(1)(a)(b).

237. Ibid. S. 49(1)(a)(i)(ii).

238. Ibid. S. 49(1).

239. Ibid. S. 49(4)(a).

240. Ibid. S. 49(4)(b)(c).


243. Ibid. S. 2.

244. Ibid. S. 6-9.

245. Ibid. S. 5(1).

246. Ibid. S. 5(2).

247. Paterson, supra, note 5 at 318, and footnote 32.
248. IC Act, S. 3.

249. See discussion on the Acquisition Control and Value Threshold in Paterson, supra, note 5 at 321-324.


251. See definition of new Canadian business in IC Act, S. 3.


254. Paterson, supra, note 5 at 329.

255. IC Act, S. 5.

256. The EDC Act, R.S.C. 1970, C-E 18, as amended.

257. The EDC Act, S. 10(1).


259. Paterson, supra, note 5 at 158.

260. EDC Information Circular, No. 80-1 (Revised, November, 1986) at 1.

261. Paterson, supra, note 5 footnote 26 at 160.

262. See Ibid. at 161. Professor Paterson suggests that when combined with the definition of export transaction, full turnkey projects with attendant licencing and technology may qualify for consideration.

263. See generally Paterson, supra, note 5 at 159.

264. External Affairs, Canada, Countertrade Primer for Canadian Exporters (Canada: Department of Supply and Services, 1985) at 28.

265. Ibid. at 6.

266. The EDC generally offers seven financing facilities which include both buyer and supplier credit arrangement, namely:
(1) a loan; (2) a multiple disbursement agreement loan; (3) a line of credit; (4) the note purchase program; (5) a protocol; (6) a specialized credit line; (7) the EDC's medium-term financing facilities-forfaiting. See EDC Information Circular, supra, note 260 at 2.

267. EDC Act, S. 34.
268. See generally EDC Information Circular No. 80-2 (Revised April 1986) at 1-2. See also Paterson, supra, note 5 at 355-356.
269. Paterson, supra, note 5 at 356, and see also general discussion on insurable risk, coverage premium and co-insurance at 357-367.
270. External Affairs, Canada, supra, note 264 at 6.
271. Castel, de Mestral, Graham, supra, note 1 at 377-378.
272. Ibid, see at 374, 377, An Establishment of A New Trade and Development Facility within CIDA. This facility would link the EDC export financing to CIDA development assistance in developing countries and its aim to link aid money to increase Canadian exports (see generally Paterson, supra, note 5 at 163).
273. See External Affairs, Canada, supra, note 264 at 3.
274. See detailed discussion in Paterson, supra, note 5 at 167-168.
276. Department of Supply and Services Act, S. 5(1).
277. See Paterson, supra, note 5 at 149.
278. Castel, de Mestral, Graham, supra, note 114.
279. Paterson, supra, note 5 at 149.
281. Paterson, supra, note 5 at 149.
282. Paterson, supra, note 5 at 393.
283. Ibid, at 149.
284. Ibid. at 148-149.
285. Ibid. at 395.
286. Ibid. at 150.
287. Ibid. at 150.
Chapter Six

Legal Implications Under National Laws: Thai Law

6.1 Introduction

Unlike Canada, Thailand is a unitary state with a constitutional monarchy and a legal system based on the civil law of continental Europe and Japan.¹ The main source of Thai law is legislation. Legislation is categorized by different names and ranked in a hierarchial order. The major legislation is called an Act, Code, an Emergency proclamation (if it involves a fiscal matter) or an Announcement of the National Executive Council. Usually, the legislation provides for the issuance of detailed implementing regulations. There are approximately 50,000 pieces of subordinate legislation currently in force. This subordinate legislation includes the Royal Decrees, Ministerial Regulations, Ministerial Notifications, and By-laws. Court Decisions are not in themselves sources of law, but the decisions of the Supreme Court of Thailand are of higher persuasive authority respecting the interpretation of legislation.

In this Chapter, the readers should take the following remarks into account:

1. It is difficult for the private sector to obtain information on official government policy because of the
bureaucratic system. Some government departments issue internal rulings or guidelines which are not available to public. There are a few departments such as the Custom Department, Revenue Department and Commercial Registration Department which publish their rulings on a discretionary basis.

2. There are a few texts, court decisions or articles in the area of international trade law.\(^2\)

3. All legislation, decisions and regulations are in Thai. The English translations referred to in this Chapter are not official and the Thai texts prevail where a conflict occurs.

The discussion will be divided into two sections. The first part deals with private law aspects. The second part is the regulatory law aspects. These sections will be sub-divided into various sections in the same manner as the discussion of Canadian laws.

6.2 Private Law Aspects

6.2.1 Introduction

The discussion of the private law will focus on three major problem areas of international trade law. They are: first, the validity under the Act on Conflict of Laws of choice of law or
proper law of contract clauses found in countertrade agreements; second, the application of the state immunity rule principle when a party enters into a countertrade agreement with a Thai government department or a state trading enterprise; and third, dispute resolution under international arbitration with respect to the enforcement of foreign or international arbitral awards.

6.2.2 Conflict of Laws: Choice of Law

A. Overview

It is important for the trading parties to know by which laws the agreement is governed. Normally, the parties to a Countertrade Agreement will be advised to provide expressly which legal system they desire to apply to their Agreement. The governing law in Countertrade Agreements will be either the law of the exporting or importing country or, sometimes, the law of a third country. Which law is chosen usually depends on the bargaining power of the parties.

The Act on Conflict of Laws, B.E. 2481 ("Thai Conflict of Laws") recognizes the choice of law by the parties. Choice of foreign law is not contrary to Thai public policy. Thai courts regard foreign law as a question of fact which has to be proved to their satisfaction by expert witnesses or other admissible evidence. If a party fails to adduce such evidence, Thai law
will be applied.\(^6\)

B. **Legal Implications**

The following questions are to be examined under the choice of law principles of the *Thai Conflict of Laws*:

1. Are Countertrade Agreements made in foreign countries valid under the *Thai Conflict of Laws*?

2. May the parties select a foreign law as the governing law for the Countertrade Agreements under the *Thai Conflict of Laws*?

3. What are the restrictions under the *Thai Conflict of Laws* regarding the application of foreign law and what is the Thai court's approach to applying foreign law as the governing law?

With respect to the first question, Sections 9 and 13(3) of the *Thai Conflict of Laws* recognizes the validity of a Countertrade Agreement provided the Agreement is made in accordance with the laws of the country where the Agreement was made. Therefore, if a countertrade agreement is made and valid under the law of province in Canada (such as British Columbia), it is also valid in Thailand.\(^7\)

With respect to the second question, Section 13 recognizes
that the parties may agree on the governing law but if the parties fail to agree, this Section provides the criteria to be used to determine the governing law. Section 13 provides that:

"The question as to what law is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties thereto. If such intention, expressed or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

When the contract is made between persons at a distance, the place where the contract is deemed to have been made is the place where the notice of acceptance reaches the offerer. If such place cannot be ascertained the law of the place where the contract is to be performed shall govern.

A contract shall not be void when made in accordance with the form prescribed by the law which governs the effects of such contract."

From the above provision, the following comments can be made.

1. The governing law chosen by the parties only applies to the essential elements or effects of the contract, the formation and performance of the Agreement, but not regulatory or public law.

Where Thai law is chosen as the governing law, the writer suggests that the choice of law clause as suggested by Professor Schmitthoff should be adopted and adapted as follows:
"Thai law will be construed and govern all respects of this (Countertrade) Agreement including the validity, the conclusion and the performance of the Agreements".

This clause avoids any possibility of one party arguing that the governing law clause intends only to cover the formation of the contract but not to the performance of the contract.\(^9\)

2. It is questionable whether a Thai court would accept the application of several governing laws to various aspects of the same Agreement. For example, in a Countertrade Agreement between a Thai importer and a Canadian exporter, parties may agree that the formation and the validity of the Agreement should be governed by the law of Thailand, because the Agreement is to be executed in Thailand, while the performance of the Countertrade Agreement should be governed by British Columbia law, since the products originate in British Columbia. There is no Thai precedent on this issue. It is the writer's opinion that since there is no restriction on the parties agreeing to different laws applying to different aspects of a contract, the Thai court, based on Sections 5 and 13 of *Thai Conflict of Laws*, should accept this expressed intention of the parties provided the intention is not contrary to public policy.\(^{10}\) The various component agreements of a countertrade transaction, e.g. the Primary Sales Agreement, the Countertrade Agreement, and the Framework Agreement, could all be governed by different substantive laws. It is the writer's opinion that if these Agreements are linked to each other, using difficult governing
laws creates more difficulties for the parties if there is a dispute.

3. Where the parties select a foreign law which has no connection with the transaction, the validity of such a choice of law clause is debatable under Thai law. The Thai Conflict of Laws does not have any provision dealing directly with this and there is no Thai legal decision on this matter. Section 3 of the Thai Conflict of Laws provides that general principles of private international law are to apply in situations where there are no provisions in the Act or other Thai law respecting an issue. Hence, one can argue that the parties are entitled to choose any law they desire so long as the parties exercise their right in good faith and for a legal purpose. This argument is based on the leading English case Vita Food Product Inc. v. Unus Shipping Co.\textsuperscript{11}

One might also approach the issue by arguing that since the Thai Conflict of Laws is based on civil law, especially German law, and under German Conflict of Laws the law chosen must be connected with or related to the Agreements, such as through the nationalities of the parties or the place of performance,\textsuperscript{12} that therefore, the parties cannot choose a legal system which has no connection to the parties or the Agreement.

The writer agrees with the latter view because under Section
13 of the Thai Conflict of Laws, where there is no express choice of law clause, it is assumed that the law common to the parties where the parties have the same nationality or the law of the place where the Agreement has been made will apply. The writer is of the opinion that connecting factors may be an important element in application of foreign law under the Thai Conflict of Laws rules.

As to the third question respecting the restriction on the application of foreign law under the Thai Conflict of Law, there are three situations in which a Thai court will not apply foreign law to a contract irrespective of the express intention of the parties. First, if the foreign law is contrary to the Thai Conflict of Law or the public policy of Thailand, as provided in Section 5 of Thai Conflict of Law. Second, if the foreign law to be applied is a revenue law and, third, if the foreign law to be applied is a penal law.

The question of what is contrary to Thai public policy and how a Thai court decides this issue are controversial ones. Dr. Yod Saeng Uthai, the late well-known Thai legal scholar on Conflicts of Law, suggests that in deciding whether a foreign law is contrary to the public policy of Thailand, the Thai court must proceed on a case by case basis.

There is only one reported Thai Supreme Court decision on the
issue decided in 1968. In Siam Commercial Bank v. Laemthong Bank (No. 1583/2511), the Supreme Court held respecting Section 5 of the Thai Conflict of Law that:

"... the agreement for the application of foreign law to the dispute will be enforceable so long as such foreign law is not contrary to the public order or good morals of Thailand therefore the Agreement to apply a foreign Statue of Limitation is not enforceable in Thailand".

The Thai Supreme Court did not elaborate what criteria were used to determine the meaning of "public order or good morals of Thailand" or why the Supreme Court regarded a foreign limitation law as contrary to public policy. Under Thai law limitation periods are contained in the Thai Civil and Commercial Code ("the CCC"). In principle, the Thai court will apply a choice of foreign substantive law, not foreign procedural law. Since most foreign legal systems classify a Statutory Limitation as a procedural law, the Thai Supreme Court might implicitly classify a limitation period provision as a procedural law as well and, therefore, hold that the foreign Statute of Limitation is not enforceable in Thailand.15

There are reported cases where the Thai Supreme Court nullified contracts because they were either contrary to public policy or to the law related to public policy.

(a) An interest rate provision in a contract was held to be
void where the interest rate was contrary to the rate specified in the Thai usury law\textsuperscript{16} (the maximum interest rate for a loan under the usury law is 15% per annum).

(b) An Agreement to extend or to reduce the limitation (or prescription) as provided in CCC was found to be void.\textsuperscript{17}

(c) The assignment of licences to export rice, a controlled commodity at the time, was held to be void.\textsuperscript{18}

(d) A Cartel Agreement between private parties entered into in order to bid for government or public enterprise projects was declared void.\textsuperscript{19}

One Supreme Court case, \textit{Hismoco American Co., Ltd. v. Srisuwan Ltd.}, deals with the issue of enforcement of a foreign arbitral award given in New York. In this case, the Supreme Court held that:\textsuperscript{20}

"Since the Agreement for arbitration was voluntary on the part of both parties and not contrary to any law or public order, the process for acquiring the award in the State of New York was properly carried out and the award itself, not being contrary to the law of that State, is hence enforceable in Thailand".
C Conclusion

The choice of law or proper law of contract under the Thai Conflict of Laws governs the formation, conclusion, and performance of the contract. Regulatory law or public law will apply to a countertrade agreement regardless of the choice of law clause. In drafting a countertrade agreement, it is the writer's opinion that the governing law for the Framework Agreement, the Primary Sale or Services Agreement, and the Countertrade Agreement, should be carefully chosen and should be the same if the Agreements are to be linked. The parties are free to choose the governing law provided that such law will not be contrary to the "public order or good morals" of Thailand. If the parties choose a foreign law to apply to Countertrade Agreements involving Thai clients, a legal opinion from a Thai legal counsel with respect to the Thai Conflict of Laws and the formalities required under regulatory law should be obtained.

6.2.3 State Immunity Rule

A. Overview

Unlike Canada, Thailand does not have specific legislation respecting State Immunity and Crown Liability thus one must refer to the Thai Civil and Commercial Code ("CCC") and the Civil Procedure Code ("CPC").
Under Thai law, the capacity to sue or be sued is attributed only to two types of persons, natural persons and recognized categories of juristic persons.\textsuperscript{22} Under Section 68 of the CCC, a juristic person can only come into existence by virtue of provisions of the CCC or of an Act. Section 72 of the CCC recognizes the following categories of juristic persons: (1) public bodies; (2) monasteries and temples; (3) registered partnerships; (4) limited companies; (5) associations; and (6) authorized foundations. Section 73 includes in the term Public Bodies, Departments of Government, Local Administrations and Municipalities. The Supreme Court further clarified the meaning of Public Bodies in the 1957 case of Phya Preeda Narubate v. H.M. Thai Government where the Court held that:\textsuperscript{23}

"Although the word government may refer to central organ of the State or a group of persons, it is not a juristic person under the Civil and Commercial Code or any other law, and is not therefore a proper party before the Court".

The Thai government cannot sue or be sued because of the absence of legal personality under the CCC, not because of a constitutional theory of sovereign immunity.\textsuperscript{24} A party can seek a remedy against any of the competent government Ministries or responsible Departments under the Act of the Administration of the Kingdom\textsuperscript{25} and this is in keeping with Sections 72 and 93 of the CCC.
With respect to execution against the government or public property, there are two provisions under the CCC and the CPC to consider. Section 1307 of the CCC provides that:

"No seizure of State property can be effected, whether such property form part of its domaine public or not".

Section 285(4) of the CPC provides that:

"The following properties of the debtor under the judgment are not subject to the execution.

(4) Any property which cannot transfer according to the law or property which is not subject to the execution according to the law".

B. Legal Implications

As most countertrade agreements are likely to be concluded between foreign suppliers and Departments of the Thai government state trading enterprises, the following two questions should be examined:

1. Whether the parties to a countertrade agreement are suable in a Thai court, and

2. If so, whether the property of the government or state trading enterprise is subject to execution.
As mentioned above, the government of Thailand is not a juristic person, therefore, it will not be able to enter into a countertrade agreement with foreign suppliers. Countertrade agreements can be entered into between foreign suppliers and government departments or state trading enterprises which are incorporated or established under specific laws and hence are juristic persons. A foreign supplier must be certain whether he has entered into an agreement with an appropriate or lawful juristic person and that the department or state enterprise has the power to enter such an agreement in order to avoid possible later arguments on the legality of statues and ultra vires. If a foreign supplier has concluded a countertrade agreement with a competent government department or state enterprise, in case of breach of agreement, the government department or state enterprise will be suable in a Thai court.

Under Section 1307 of the CCC and Section 285(4) of the CPC a foreign supplier cannot seize or execute against government property. Provisions in legislation which incorporates or establishes state enterprises may provide that the property of the state enterprise is not subject to execution or seizure. There are no rulings directly on this issue by the Supreme Court. In practice, when a government department or state trading enterprise enters into an international agreement with a foreign party, particularly an International Loan Agreement, the government department or state enterprise agrees to waive the
immunity clause. However, the writer believes that such a waiver may have no binding effect and a Thai court may likely interpret the law in a strict sense and not permit the seizing of the property of the government or public enterprise.

C. Conclusion

There are no established rules on state immunity with respect to commercial activities. Despite the growth of the role of government departments and state enterprises in international trade and financing, the rule of sovereign immunity in Thailand is still uncertain. The necessity of drafting state immunity legislation requires further study.

6.2.4 Dispute Resolution: International Arbitration

A. Overview

At present, Thailand does not have specific legislation on either domestic or international commercial arbitration. There are provisions on arbitration in Sections 210-222 of the Thai CPC. Under these provisions, there are two types of arbitration, an arbitration in court and arbitration out of court. Foreign or international arbitration is categorized as an arbitration out of court. The only provision dealing with arbitration out of court in the CPC is Section 221. There are no provisions governing
either the appointment of an arbitrator or the procedure for arbitration out of court. The parties, therefore, are at liberty to agree on these procedures.  

Once an award is given, it becomes a contractual obligation of the parties. If the losing party refuses to comply with the award, the other party can request a court to enforce it. The procedure for enforcement of an award arising from arbitration in court and arbitration out of court are different. The provision relating to the enforcement of arbitration out of court is provided in Section 221 of the CPC:

"Where a dispute has been submitted to arbitration out of court, if any party refuses to abide by the award, such award may not be enforced unless the Court having territorial jurisdiction and competency over the case has, upon the request of the opposing party, given judgment in accordance with the award.

In such case, the Court having territorial jurisdiction and competency shall be the Court designated by the parties in the agreement or, in the absence of such designation, the Court which would have territorial jurisdiction and competency to try and adjudicate the dispute.

If the Court is of the opinion that the award is "contrary to law" in any respect, the provisions of the last paragraph of Section 218 shall apply".

B. Legal Implications

The enforcement of foreign arbitral awards can be undertaken using national laws or international conventions. Thailand has ratified both the Geneva Protocol 1923 and the Geneva Convention
1927, and acceded to the New York Convention (N.Y. Convention) of 1959 without reservations. The legal status of these three international treaties, especially that of the N.Y. Convention, is a debatable issue among Thai legal scholars, since the Conventions do not have implementing legislation. There are a number of Thai Supreme Court's decisions which enforced a foreign arbitral award but without explicit or implicit refer to the N.Y. Convention. Most of the court's decisions regarding foreign arbitral awards are similar to those made respecting domestic arbitral awards under Section 221 of the CPC.

The issue of "public order or goods morals" (public policy) was raised by the defendants in these cases but this argument was rejected by the court. There are two Supreme Court decisions in which the Court refused to enforce a foreign arbitral award. In the first case, the Court refused to enforce an award rendered in London, though the Court expressly recognized that both Thailand and the U.K. were parties to the N.Y. Convention, taking the view on the peculiar facts before it that the defendant was not a party to the disputed sales contract containing the arbitration clause and so could not have agreed to the submission of the dispute to arbitration. In the second case, the Court refused to enforce an arbitral award rendered in Romania, also a member of the N.Y. Convention, by distinguishing the word "dispute" and "default". The Court ruled that since the debtor defaulted on the contract, the petitioner could not refer the default to
arbitration, since only disputes could be referred to arbitration, thus the award was unenforceable.\textsuperscript{33}

C. Conclusion

The party who wants to enforce a foreign arbitral award in Thailand may utilize Section 221 of the CPC provided that the arbitration proceedings were conducted in accordance with the applicable arbitration rules, the governing law of the contract, and the award is not in violation of the law of the country where the award was made.

A party which seeks to enforce a foreign arbitral award in Thailand cannot rely merely on the N.Y. Convention because the lack of implementing legislation may lead the Court to refuse to use the Convention to enforce the award. A similar position was taken by the Indonesian Supreme Court in \textit{Navigation Maritime Bulgaria v. R.T. Nizwar Indonesia}.\textsuperscript{34}
6.3 Regulatory Law Aspects

6.3.1 Introduction

In examining regulatory laws, the writer will sub-divide the regulatory laws to three major parts that might effect a countertrade transaction. First, the Fiscal and Regulatory Control Laws which includes Customs Act respecting valuation methods, Customs Tariff, the Revenue Code, the Exchange Control Act, the Export and Import of Goods Act, and the Thai Alien Business Control Law. Second, Remedial Regulatory laws which includes the Anti-Dumping Act, and the Price Control and Anti-Monopoly Act. Third, Promotion and Regulatory law which includes the Investment Promotion Act, the Government Procurement Regulations, and the Regulation on Creation of the National Debt.

6.3.2 Fiscal and Regulatory Control Laws

6.3.2.1 Introduction

The examination of fiscal law will focus on customs law respecting the valuation method of products for customs duty purposes, special duties for dumping situations and advantages and benefits under the tax and duty rebate law. In addition, the tax implications of non residents or foreign firms engaging in countertrade transactions with Thai parties and on potential tax
assessment provisions under the Revenue Code will be discussed. The "real" control regulatory law, notably the Exchange Control Act, the Export and Import of Goods Act, and the Thai Alien Business Control Law will also be examined.

6.3.2.2 Customs Law

A. Overview

The basic laws governing customs are the Customs Law, B.E. 2469 (1926 A.D.) as amended and the Customs Tariff Decree, B.E. 2503 (1960 A.D.) as amended. Duty is collected on both import and export. The classification of goods for duty purposes is based upon the Brussel Tariff Nomenclature and includes approximately 100 items. Duties are levied on an ad volorem or a specific rate basis whichever is higher.\textsuperscript{35} Imported products are subject both to custom duty and a business tax which is administered by the Customs Department for the Revenue Department.\textsuperscript{36} Export duties are imposed on only a few items such as rice, scrap iron, hides, rubber, wood, raw silk, and powdered fish.\textsuperscript{37}
B. Legal Implications

The major problem that arises in a countertrade transaction under customs law is the question of how to determine the value of the imported products in the countertrade transaction, especially where the arrangement is one of Barter or Counterpurchase. Counterpurchase Arrangements seem to create less problems since the price of the product is usually specified and reflects the market value. Barter Arrangements, on the other hand, face more problems since the price of the products may not be related to the actual market value. The customs duty will be collected in accordance with Customs Act and Customs Tariff Decree. The value of the products for purposes of calculating the duty must be the actual market value of the products. The "actual market value" is defined as:

"the wholesale cash price exclusive of duty, for which goods of a like kind and quality are capable of being sold without loss at the time and place of importation or exportation, as the case may be, without any deduction or abatement."

The Customs Department has issued Order No. 17/2515 and No. 12/2527 (1984 A.D.) respecting the definition and method of determining the "actual market value". These two orders set out the method and procedures for determining the value of goods for customs duty purposes. Basically, Order No. 17/2518 is the explanation of the criteria for determining "actual market value" as provided in Section 2(12) of the Customs Act, B.E. 2469.
brief, value for customs duty purposes must contain the following four important elements: (a) it must be the wholesale price; (b) it must be in cash; (c) it must exclude duty; and (d) it must be the price of goods of a like kind and quality that is capable of being sold without loss or without any deduction or abatement.\(^1\)

Question will arise in Barter transactions where the parties do not agree on a monetary term or if the parties have agreed on the value of goods which is lower than the value of the like kind of goods in the traditional transactions. The customs officers may apply the value of like goods in a traditional transaction which may be higher than the actual value without taking the elements of the countertrade transaction into consideration.

It is necessary to educate all customs officers about the problems in valuation of goods in countertrade transactions and to revise the law and policy respecting valuation of goods, if the government wants to promote or encourage countertrade.

It must be noted that if the government is concerned that private firms will use countertrade to cover up fraudulent practices such as under-declaring imports so as to pay less duty or over-declaring exports so as to be able to make illicit capital transfers, training of custom officers and appropriate guidelines should be implemented.
As to dumping situations, the **Customs Tariff Decree**, authorizes the Customs Department to impose a special duty in addition to the normal import duty if it appears that "any imported goods have been subsidized by any country or person by any means other than the drawback or compensation of the duties and/or taxes, and that the subsidy causes or may cause damage to national agriculture or industries". This special duty, however, is not to be more than the amount of the subsidy deemed by the Ministry of Finance have to be granted by the exporting country.\(^4\) This provision is similar to the **Anti-Dumping Act**, but the power of the Customs Department under the **Customs Tariff Decree** is more efficient in dealing with a dumping situation than the **Anti-Dumping Act**. The major reason is that the action under the **Anti-Dumping Act** will require more time to inspect the case prior to imposition of a duty.\(^4\) However, in practice, the special duties provision under the **Customs Tariff Decree** has never been exercised by the Customs Department because, in the past, dumping by foreign exporters was unlikely to happen. With the growth of countertrade between private sector and other developing countries or foreign trade organizations in the Eastern bloc countries, the import of the products under countertrade transactions may cause damages to domestic industry and the imposition of special duty under this law may be necessary or desirable.

It should be noted that there is the **Tax and Duty Rebate for**
The Exported Products Manufacturing in the Kingdom Act, B.E. 2524 (1981 A.D.) ("Tax and Duty Rebate Act") which supports manufacturers in exporting products to foreign markets and thus providing an opportunity for Thai products to compete in the world market. The Act is a regulatory law which provides the procedural mechanism for how an exporter may obtain a tax rebate. An importer (as referred to in a countertrade transaction) may apply for a tax and duty rebate under this law. The importer (or the manufacturer) who imports products from a foreign supplier and then exports countertrade products, will be able to obtain tax and duty rebates under the Tax and Duty Rebate Act if all the conditions under the Act are met.

C. Conclusion

The definition and method of determining "actual market value" of products set out in the current Customs Department Order is not adequate to cover the complexity of countertrade arrangements. The criteria adopted by the Technical Committee in GATT may be more useful. If the government wants to encourage countertrade practice among private parties and control the potential fraudulent practices of private firms, the guidelines respecting the determination of actual market value should expressly include countertrade transactions. Private importers should be aware of the special duty which may be imposed in cases of subsidies being granted by a foreign country. In addition,
the importers or exporters in countertrade transactions should take the full advantages and benefits offered under the Tax and Duty Rebate Act

6.3.2.3 Revenue Code

A. Overview

The principal taxation law of Thailand that would be involved in a countertrade transaction is the Revenue Code, B.E. 2481 (1948 A.D.). The main forms of taxation imposed under the Code are corporate income tax, personal income tax, and business tax. A stamp duty also comes under the Code. There are a number of other specific revenue collecting statutes that impose taxes, such as Custom, Excise, and Property or Land Tax. There are also withholding taxes imposed in a number of situations under the Revenue Code. The following discussion assumes that a countertrade transaction between Canadian exporters or contractors and Thai importers or employers is being contemplated or has been agreed upon. Because of this the Agreement for the Avoidance of Double Taxation and Fiscal Evasion between Thailand and Canada ("Thailand-Canada Tax Treaty") will also be discussed since this tax treaty may reduce the tax liability of the parties concerned. This tax treaty only applies to corporate income tax and petroleum income tax and not to business tax or the stamp duty.45
The major questions to be answered in this part are:

1. What is the tax liability of foreign companies (here a Canadian company) engaged in a countertrade transaction with a private or public sector in Thailand?

2. What tax assessment provisions under the Revenue Code may have an impact on a countertrade transaction?

B. Legal Implications

As tax is quite a broad area, this thesis will emphasize only several specific practical issues that may arise in a countertrade transaction. In discussing the possible tax liability of a foreign company engaging in a countertrade transaction, a hypothetical fact situation is the best way to proceed as it will illustrate some of the issues. This section is aimed at providing any introduction to the difficult tax issues that parties involved in this type of transaction may face.
I. Case Studies on Tax Liability of Canadian Firms Engaging in Countertrade Transactions

Case No. 1: Barter and Counterpurchase: Corporate Income Tax and Business Tax

A Canadian company ("Company A") enters into a Barter or Counterpurchase Agreement with a Thai private company ("Company B"), and the Agreement is executed in Thailand by a representative or employee of Company A.

Questions

1. What will be the Thai corporate income tax liability of Company A?

2. What will be the business tax liability of Company A?

All companies, whether foreign or domestic, are treated equally for tax purposes. A foreign company which carries on business in Thailand is subject to corporate income tax on the income arising from or in consequence of carrying on business in Thailand at the rate of 35% of the net profit.46

Whether a foreign company is carrying on business in Thailand is a complex issue. Carrying on business includes business
activities of employees, a representative or a go-between. These employees, representatives or go-betweens, will be deemed as an agent of the foreign company and are under a duty to file a tax return on the foreign company's behalf. In one Supreme Court decision, a local company which signed a Sales Agreement in Thailand on behalf of a foreign seller was deemed to be an agent for the foreign company. If the foreign company receives money from the activities of its agent, the agent has a duty to file a tax return and is liable to pay tax on behalf of the foreign company under Section 76 bis of the Revenue Code. There are, however, two circumstances in which Section 76 bis may not be applicable.

1. Foreign companies that are residents or nationals of a country which has entered into a Bilateral Agreement with Thailand for the Avoidance of Double Taxation are not subject to Section 76 bis, if (i) they do not have a permanent establishment in Thailand to which income is attributable, or (ii) their business is carried on in Thailand through an independent agent.

2. Foreign companies whose purchase orders are solicited by an independent agent in Thailand in accordance with the criteria set out in the Board of Taxation Ruling No. 2/2526, dated August 19, 1983 are exempt from the application of Section 76 bis.

Since Thailand and Canada have a Tax Treaty, in the above
fact pattern if the execution of the Agreement by the representative of Company A does not constitute a permanent establishment of Company A in Thailand, the profit derived by Company A will not be subject to Thai corporate income tax.\(^{49}\)

A trader, seller, importer, manufacturer or contractor, who carry on a business specified in the Business Tax Schedule of the Revenue Code, will be liable for business tax.\(^{50}\) The Business Tax Schedule includes sale of goods and hire of work (services). The rates of business tax for sale of goods depends on the type of products. The importer and exporter have to check the business tax rate for each particular product. Many export products are not subject to business tax, although raw sugar, fishery products, and rubber products are subject to business tax.

Where Company A does not engage in activities that qualify the company as a manufacturer or importer there is no business tax liability. Where there is a sale of goods (Barter or Counterpurchase Arrangement) between Company A and a state enterprise in Thailand that is exempt from business tax and Company A has conducted its business through an agent, the agent will be deemed as the importer. Under these circumstances, the Revenue Code requires the state enterprise to withhold business tax at source at a specified rate ranging from 7%–60% depending on the products and the agent must file a withholding tax return on Company A's behalf.\(^{51}\)
Case No. 2: Compensation: Corporate Income Tax and Business Tax

A Canadian manufacturing company ("Company A") enters into a Compensation Agreement with the Petroleum Authority of Thailand ("PTT"), a Thai state trading enterprise, in the form of a turnkey project to build a factory and transfer technology in manufacturing drilling equipment to PTT. Company A agrees to buy the drilling equipment manufactured. The project is to last 24 months.

Questions

What would be the corporate income tax and business tax liability of Company A?

(a) Corporate Income Tax

Under the Thailand-Canada Tax Treaty, Company A will constitute a permanent establishment ("PE") in Thailand through the provision of services to build the plant and, therefore, the income paid by PTT to Company A for the equipment and technology transferred is a business profit attributable to Company A in Thailand and, subject to corporate income tax at the rate of 35%. The Revenue Code requires that all types of payments, including sales and service fees, made by the government and
government organizations (including state enterprises) are subject to a withholding tax of 1%. The tax deducted will be treated as a credit in the computation of corporate income tax payable by Company A in the accounting period in which the tax is deducted.\textsuperscript{53}

(b) **Business Tax**

On the turnkey project, Company A is considered the contractor engaging in hire of work business in Thailand, as provided in category 4 of the Business Tax Schedule. Therefore, Company A will be subject to business tax, as well as municipal tax, at the rate of 3.3% of gross receipts. Since in this case the payment of service fees is being made by a government organization, PTT will be required to withhold the business tax which will be treated as a credit in the computation of business tax.\textsuperscript{54} It is possible to minimize the business tax liability and stamp duty through good tax planning. For example, in a turnkey project where payment for the materials and the fee for technology transfer can be put in separate Agreements, Company A may pay business tax only on the service fees but not on the cost of materials.
Case No. 3: Barter, Counterpurchase: Independent Agent

Company C, a Canadian trading firm, is to act as an independent agent between a Canadian manufacturer and a Thai importer. In acting as the independent agent, Company C is to sell a Canadian product to the Thai importer and, at the same time, buy Thai products on behalf of a Canadian manufacturer for export to Canada and other countries. Company C will receive fees for the services rendered to the Canadian manufacturer.

Question

What is the tax liability of Company C in acting as an independent agent or trading firm?

It is assumed that Company C has obtained the appropriate licence under the Thai Alien Business Law. Company C is an independent agent and will not be deemed as an agent or a go-between for the Canadian manufacturer under Section 76 bis and, therefore, will not be liable to corporate income tax on behalf of the Canadian manufacturer. Company C will, however, be responsible for their own corporate income tax at the rate of 35% of the net profit and will be liable to business tax under category 10, Brokerage and Agency, at the rate of 6.05% of gross receipts.
II. Assessment of Tax Under The Revenue Code That May Affect Countertrade Transactions

In dealing with countertrade transactions, the importer or exporter may be faced with the problem of how to determine the value of products or services. In some cases, the services or products traded between parties will be valued lower than market value because the parties are not dealing at arm's length or because of considerations in the countertrade arrangements. The following assessment provisions must be taken into consideration.

(a) Corporate Income Tax

In the computation of the net profit or net loss of the importer or the exporter who engages in countertrade transactions, the assessment officer is allowed to assess the value of the products or fees where he considers, that without justifiable ground, the value is lower than the market value.

"Section 65 bis(4): In the case where, without justifiable ground, a property is transferred, service is rendered, or money is lent without any compensation, service charge or interest in an amount lower than the market value, the assessment officer has the power to assess the compensation, service charge or interest at the market value on the date of transfer, rendering service or lending.

This provision applies not only to Barter and Counterpurchase Arrangements but also to Compensation Arrangements where there is
a transfer pricing situation between a parent company and its subsidiary or related company in Thailand.

Another provision relating to assessment is the comparison method sections.

"Section 65 bis (7): The assessment officer shall have the power to assess cost prices of imported goods by comparison with the cost price of the goods at the same category and type which are delivered to another country".

This provision may apply to both Barter and Counterpurchase transactions where the imported product is valued lower than the market price. It provides a comparable method with the like product. There is no ruling or judicial precedent on how the Revenue Department determines the market value. It will depend on the officer's discretion.

Another situation that can arise is where a company in Thailand exports products under the instruction of the head office, branch, or affiliated company overseas. Section 70 of the Revenue Code deems this export as a sale made in Thailand and the market price of the goods on the date of export will be deemed revenue in the accounting period in which the transaction takes place.
(b) Business Tax

Business tax liability arises on the gross receipts derived from the product.

1. Section 78 septem provides the method to ascertain the "market price".

"In the case where several market prices prevail or where a definite market is not apparent, the Director General with the approval of the Minister may by notification prescribe computation rules for ascertaining the market prices to be adopted as value of goods".

2. Section 87 bis permits the assessment officers to exercise the tax assessment power if the value of the product is lower than the "market value" in the following manner:

(Comparison Method)

"(3) (to) determine the selling price of goods by comparison with prices of the same category or type of goods on the same or proximate date in comparable markets or by comparison with world market prices...

(Controlled or Relationship Method)

(5) (to) determine the gross receipts which a trader should have received in case the trader sold goods at a price lower than that at which goods could have been sold, and such sale at the lower price was made because there existed control or relationship in the capital of management between the trader and the purchase of goods.

(Market Price Method)

(6) Determine the price of properties or value of
services on the basis of the market price prevailing on the date of transfer or performance if such transfer or performance was made for no consideration or for a consideration less than the market price without justifiable grounds".

Again there is no ruling on how the Revenue Department will determine the "market value". As mentioned above, business tax is not applicable to the exporter of products from Thailand, except those who export certain products, thus business tax is mainly applicable to the importer, manufacturer, or contractor. A Thai importer will have to examine this provision carefully if the value of the imported product is lower than the normal value or if the importer and the exporter have a contractual relationship.

(c) **Stamp Duty**

Under the Thai *Revenue Code*, a number of instruments, documents and transactions are subject to the stamp duty as listed in the stamp duty schedule. Rates depend upon the class of instrument. Basically, the Framework Agreement, the Primary Sale Agreement, and the Countertrade Agreement are not subject to any stamp duty since these instruments are not provided for in the stamp duty schedule. However, in the compensation or offset arrangement where there is a Transfer of Technology Agreement or Hire of Work or Services Agreement, the stamp duty at the rate of .1% of the remuneration stipulated is applicable. Agreements executed outside Thailand and carried out outside of Thailand are
exempt from stamp duty.

C. Conclusion

Tax liability arising from a countertrade transaction will vary case by case. Even though it is the writer's opinion that the Thai Revenue Code has sufficient provisions to deal with countertrade transactions, especially respecting the determination of the value of products or services, a problem still exists. Tax officers should recognize that countertrade transactions are unique arrangements different from traditional commercial arrangements, and thus call for flexible application of the tax assessment rules on a reasonable basis. Guidelines should be established so that the parties can foresee the costs of entering into countertrade transactions and avoid unexpected tax assessments. Moreover, in structuring countertrade arrangements, particularly Compensation or Offset Arrangements, tax planning can minimize corporate income tax, business tax and stamp duty liabilities.
A. Overview

Exchange control in Thailand is provided for in the Exchange Control Act, B.E. 2485 (1942 A.D.) as amended ("EC Act"). The purpose of the law is to control the movement of currency, property or services in order to protect the exchange resources of the country. The EC Act sets out the principles of control and ministerial regulations, notifications and notices prescribe the detailed procedures. The EC Act is administered by the Bank of Thailand ("BOT") on behalf of the Ministry of Finance. Ministerial Regulation No. 13, B.E. 2497 (1954 A.D.) (M.R. No. 13), as amended, and its subordinated legislation such as notifications of the Ministry of Finance, Notices from the competent official, and directions to authorized agents, are the most important regulations which prescribe the procedural details. Under Ministerial Regulation No. 13, the BOT has the power to delegate to authorized agents the authority to transact business relating to foreign means of payment. No person can transfer funds or receive payments in foreign currency without permission from the BOT.
B. Legal Implications

There are two major questions to be examined: first, what are the procedural or administrative requirements under the EC Act that have to be complied with in order to import or export goods under a countertrade transaction; second, whether Countertrade Agreements which are contrary to the EC Act will be enforceable.

With respect to the first question, the importer must comply with the following procedures for the clearance of goods through customs:

1. A person importing goods into Thailand must file Form EC 21 and furnish full details concerning the transaction. An approved EC 21 gives authority to the Custom Department to clear the goods, unless the C.I.F. value of the goods is less than Baht 20,000 in which case no EC 21 is necessary.64

2. The importer who does not require foreign currency to pay for the imported goods, such as in a Barter Arrangement, still has to submit Form EC 21 for authorization from BOT in order to comply with customs procedures.65

3. The payment for an import, unless an exemption has been granted, may be made by means of a letter of credit and the authorized agent may approve Form EC 21 and EC 22 on behalf of
the BOT.\textsuperscript{66}

Payment for imports by means other than a letter of credit requires the permission of the BOT. The importer in this case is required to submit Forms EC 21 and EC 23.\textsuperscript{67}

Where the payment is for services under a compensation arrangement or a commission to be paid to a trading firm for disposing of countertrade products, the following procedures must be complied with prior to the authorization of payment by BOT:

1. The relevant person must submit Form EC 31.\textsuperscript{68}

2. If the payment is for purposes listed in Clause 35 of the Directions, the necessary evidence must also be submitted. Among other things, the list includes commissions on exports or imports payable as per contract, sums paid in compensation for deterioration in quality, royalties or patent fees, and licence fees.\textsuperscript{69}

Where an importer is going to export countertrade products to a foreign country, the following procedures must be complied with:

1. Form EC 61 must be submitted to an authorized agent together with the sales contract, correspondence relating to
purchase and sale of the goods, or a copy of the letter of credit covering the goods to be exported (if any). Form EC 61 and certificate must be submitted together with the Export Entry Form to a customs officer. 70

2. The importer who sells the countertrade products must acquire payment for their export in foreign currency within 180 days of the date of exportation and the foreign currency must be sold to an authorized agent (namely commercial banks) within 7 days of the date of acquisition, unless an extension has been granted by BOT. 71

With respect to the enforceability of countertrade agreements, the questions are whether a countertrade agreement constitutes an exchange contract and whether it violates the EC Act. Generally, any exchange contract which violates Article VIII, sub-section (2)b of the Bretton Wood's Agreement, will be unenforceable in the member countries.

"Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulation of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any other member ...".

Opinions vary as to whether a countertrade agreement constitutes an exchange contract that is inconsistent with the above provision of the Bretton Wood's Agreement. On view is that an exchange contract is only a contract to exchange the currency
of one country into the currency of another. Another view is that an exchange contract is one which affects a country's exchange resources in any way. The English and the U.S. courts seem to adopt the narrow construction, but the West Germany, Luxemburg, and French courts, have adopted a wider interpretation. 72

Concerning English law, Professor Schmitthoff has commented that: 73

"... an exchange control within the meaning of this provision is in principle only a monetary deal in currencies. It does not comprise a genuine commercial contract for the sale and purchase of merchandise or commodities, although the price is expressed in foreign currency. Thus, a contract whereby Italian buyers purchased metal from English dealers but which had not been authorized by the Italian authorities did not qualify as an "exchange contract" and was enforceable against the buyer".

The New York Court of Appeals also has implicitly adopted the narrow construction. 74 However, an exchange contract made in the disguise of a sale of goods or services agreement would be unenforceable as was decided by the House of Lord in United City Merchants Investment Ltd. v. Royal Bank of Canada (1982). 75

The wide interpretation has been adopted by the West Germany Court of Appeal in Lessinger v. Mirau, I.L.R. (1955) 725; the Luxembourg court in Societe Filature et Tissagex Jourdain v. Epoux. Haynen-Bintner I.L.R. (1955) 727, and the Paris Court of
Appeal in *de Boer, Widow Moojen v. von Reichert* (89 J. Droit Int'l 718, Cour d'appel, Paris 1962).\(^7^6\)

Thailand is a member of the Bretton Wood's Agreement. No case has been decided in Thailand directly adopting the wide or narrow approach. Under Thai law, if the objective of the agreement is contrary to "public order or good morals", the agreement will be void. Sections 113, 114 of the CCC read:

Section 113:
"An Act is void if its object is prohibited by law or is impossible or is contrary to public order or good morals".

Section 114:
"An Act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals".

Therefore, it is questionable whether a countertrade agreement would be enforceable if the parties failed to obtain the authorization of the BOT under the EC Act.

Thai courts are quite likely to follow the *Terruzi* case from England since the parties' objective is not to circumvent the EC Act, but is rather a failure to comply with the procedural requirements. However, if the Thai importer induces the exporter to invoice or value the goods at a higher price than the true price so that the importer can transfer the excess to the importer's account outside Thailand, such an agreement would be
unenforceable since the parties intent was to breach the **EC Act**.\textsuperscript{77}

It is the writer's opinion that the Thai court would adopt the view that the **EC Act** is a law related to "public order or good morals" and if both the importer and exporter intentionally failed to obtain the necessary permission from the BOT, the countertrade agreement would be null and void under Section 113 of the **CCC**. Where a payment is divided into two portions, whether the whole agreement will be unenforceable or only that part involving the over-pricing is answered by Section 135 of the **CCC** that:

"If any part of an act is void the whole act is void, unless it may be assumed under the circumstance of the case that the parties intended the valid part of the act to be severable from the invalid part".

However, there is no ruling by a Thai court on this matter. The English **Royal Bank of Canada** case may be followed by the Thai court. In this case, the House of Lord ruled that contractual provisions respecting the excess over the true price was unenforceable since it breached the Exchange Control law of the importing country (in this case Peru), but that that part of the agreement which represented the genuine merchandise transaction was enforceable.\textsuperscript{78} In the **Royal Bank of Canada** case, the exporter did not know that the importer was trying to avoid the Peruvian exchange control law.
The writer is of the opinion that if the exporter does not know that the importer is attempting to avoid the EC Act, the Thai court should follow the English case and on the basis of Section 135 of the CCC hold that the genuine portion of the agreement be enforceable. But if both the exporter and importer know about the intended avoidance the Thai court should rule that the agreement is void and unenforceable under Section 113 of the CCC.

C. Conclusion

The EC Act deals primarily with administrative and procedural detail, but the importer or exporter should pay attention to it. If Thailand wishes to encourage countertrade transactions, the EC Act must be revised to facilitate and control countertrade agreements, particularly in terms of import and export procedures, the approval process and the payment method, so that a countertrade transaction may operate without interference. The question of the enforceability of countertrade agreements and violation of the EC Act by the importer or exporter is very important. If the objective of the parties is to avoid the EC Act, such agreements should be unenforceable. However, if the exporter has no knowledge about the EC Act formalities, the agreement should be enforceable under Thai law. It is advisable for the exporter to incorporate in the countertrade agreement
that all exchange control procedures must be fulfilled by the importer.\textsuperscript{79}

6.3.2.5 The Export and Import of Goods Act, B.E. 2522 (1979 A.D.)

A. Overview

The purposes of the Export and Import of Goods Act, B.E. 2522 (1979 A.D.)\textsuperscript{80} ("EI Act") are to control the importation and exportation of enumerated goods, to authorize the government to collect special fees for the import and export of these special goods, and to manage trade with foreign countries.\textsuperscript{81} The EI Act authorizes the Ministry of Commerce ("MOC") to designate classes of goods which are to be subject to export and import controls by banning or licencing.\textsuperscript{82} Currently, there are 50 classes of goods subject to export control and 75 classes of goods requiring licences under the EI Act. In addition, there may be other controlled goods under other laws, such as the Cosmetic Act, the Drug Act, and the Export Standard Act No. 2, B.E. 2522 (1979 A.D.). The importation and exportation of such goods must be in compliance with the relevant laws.\textsuperscript{83} The EI Act is administered under the supervision of the Foreign Trade Board (FTB) consisting of representatives from various government departments.\textsuperscript{84} The power of the FTB includes studying, analyzing and researching international trade issues and proposing programs, plans or
measures to the Minister of the MOC and the Minister of the Ministry of Finance to remedy international trade problems. 85

B. Legal Implications

The EI Act is an administrative regulatory law with which the importer and the exporter must comply in all respects. In entering a countertrade transaction, the importer and the exporter must examine whether the products involved are subject to any banning or licencing requirement under the EI Act. In addition, the importer and exporter should examine whether such imported or exported products will be subject to any "special fee". A special fee may be imposed against the exporter of goods like rice and sugar in order to maintain or guarantee a minimum domestic price. 86

With respect to imported products, certain products require permission prior to importation. 87 These products include gold, sugar, lumber, and rice. This list of controlled imported products varies and is published in the MOC's Notifications.

With respect to the control of export of goods, normally the goods are listed in the Notifications announced by the MOC. 88 Most of them are commodities such as rice, rubber, tapioca, and tin. The decision of the officers in granting or refusing to issue an import or export permit under the EI Act is an
administrative order and is not subject to judicial review.

**C. Conclusion**

The EI Act is an administrative and regulatory control law. The concerned parties are advised to seek a preliminary survey and consult with the officers concerned. If the Thai government wants to promote or encourage countertrade, a detailed policy and guidelines respecting import and export licencing requirements on countertrade transactions must be prepared.

6.3.2.6 **Thai Alien Business Control Law (NEC 281)**

A. **Overview**

The Thai Alien Business Control Law, the official title of which is "The Announcement No. 281 of the National Executive Council", ("NEC 281") came into force on November 26, 1972. Its objective is

"... to prescribe business regulation for aliens in order to maintain the balance of trade and economy of the country and in order that business of aliens should benefit the country as a whole".

The law specifies the type of business activities which are prohibited to aliens unless permission is given by the government. Under the law, an "alien" is defined as a natural or
juristic person without Thai nationality and includes a juristic person with half or more of its capital belonging to aliens (bearers of certificate of shares of a limited company are considered to be shares owned by aliens), with half or more of its shareholders, partners or members being aliens, or a limited partnership or a registered ordinary partnership having an alien as the managing partner or manager. The law does not apply to aliens who engage in business with the permission of the Thai Government or under an agreement between the Thai Government and a foreign government which excludes the acts operation. The only agreement of this latter type is the Treaty of Amity, Commerce and Economic Relations between the United States and Thailand ("The U.S.-Thai Treaty"). Thus, an American national is exempt from the Alien Business Control Law. There are, however, business activities which the U.S.-Thai Treaty does not cover (known as reserved enterprises), such as communications, transportation, fiduciary functions, the exploitation of land or other natural resources, and domestic trade in indigenous agricultural products.

The types of business activities which are prohibited or are under control are specified in the list annexed to the legislation. The list prescribes sixty-three categories of prohibited and controlled businesses and is divided into chapters relating to agriculture, commerce, services, industry, handicrafts and other businesses.
An alien is prohibited from engaging in businesses listed in Annexes A and B. However, there are two Royal Decrees that permit an alien to engage in businesses specified in those annexes. The first exception is the Royal Decree of 1983 permitting aliens who have been granted investment promotion to carry out businesses prescribed in Annex B. The second exception is the Royal Decree permitting aliens to carry out meetings, seminars, and exhibitions in relation to businesses specified in Annexes A, B, and C. It is to be noted that the law does not apply to businesses falling outside the three annexes. Normally, in granting permission to aliens to engage in businesses in Annex C, the Director General will impose conditions respecting loan capital and duration of business.

The businesses in Annex A include, for example, rice, farming, trade in real property, professional services including brokerage and agency, and building contractors. The businesses in Annex B are, businesses in agriculture including farming, forestry, fishery, business in industry and handicrafts including printing, wood processing, and drug manufacturing. The businesses in Annex C include, for example, export activities of all types of products, retail of machine engines and tools, wholesale activities of all types within the country except those specified in Annex A, mining, and businesses in services.
B. Legal Implications

In addressing the legal implications of the NEC 281, the writer will provide three hypothetical facts and discuss the legal issues that arise.

Case No. 1: Counterpurchase; Wholesale; Export; Retail Business

If a Canadian supplier company ("Company A") engages in a countertrade transaction with Company B in Thailand by selling a product to Thailand and, at the same time, agreeing to buy a product from Company B or another company in Thailand, either in the form of Barter or Counterpurchase, the Canadian company may be required to establish a company or branch office in Thailand.

Case No. 2: Turnkey Project: Compensation and Offsets

Under two turnkey projects, Company A, a Canadian company, is going to engage in a Compensation or Offset Arrangement with the Thai Ministry of Defence, to build a plant to manufacture defence equipment for the Thai government or to assemble commercial aircraft for Thai Airways International Ltd., a government-owned company. The Canadian company will have to transfer technology to the Thai party. In return, Company A agrees to buy defence equipment or aircraft manufactured from the plants.
Case No. 3: Trading Company

A Canadian company establishes a trading company to carry out countertrade transactions. The activities to be undertaken may include services rendered in supervision of the sale, inspection of the quality of the goods, and searching for a purchaser for the countertrade products. This trading company may derive its income from commissions or discounts given either by the seller or the buyer of products. Sometimes, the trading company will buy the countertrade products and resell them to a third party.

For each of the above cases, it is first necessary to determine whether the business activities in the countertrade transaction are subject to NEC 281.

Discussion

Case No. 1: In this case, whether NEC 281 applies depends on what type of products Company A is going to sell in Thailand and how Company A wants to sell those products. If Company A is going to enter into the wholesale business (except respecting agricultural products, mining products, antiques and works of art and where the products are for export to Canada or other countries) Company A will be required to obtain permission to engage in this business from the Director General of the Commercial Registration Department, Ministry of Commerce, since
the wholesale businesses is found in Annex C, Chapter 1(1), and
the export business of all types of products fall under
businesses in Annex C, Chapter 1(2) of NEC 281.99

The law permits foreign companies to export all types of
products, including local agricultural products and mineral
products to other countries. However, if a Canadian company is
only a buying agent for its head office and receives no income,
it may fall under "services business" in Annex C, Chapter 3(1)
(see discussion in Case 2, infra).

A Canadian company may only engage in a retail business for
machinery, engines and tools provided permission from the
Director General of the Department of Commercial Registration,
Ministry of Commerce, is obtained since this business falls
within Annex C, Chapter 1(3) of NEC 281.100 The retail of other
products falls in Annex B, Chapter 3(1) and a Canadian company
may engage in the retail business only with the permission of the
Board of Investment.101 Machinery, engines and tools have been
interpreted as tools or equipment that require special expertise
to operate such as generators, computers, accounting machines,
and equipment for oil and mineral drillings.102
Discussion

Case No. 2: The building of a plant for the Ministry of Defence under a turnkey project will fall under businesses specified in Annex C, Chapter 4(1): for other construction except the construction of buildings. In this case, a Canadian is required to obtain a licence under NEC 281. In practice, where a government or state enterprise contract is involved, the approval under NEC 281 will be easily obtained. The assembling of airplanes for Thai Airways International Ltd. would not be subject to NEC 281 since the assembling of aircraft is not listed in the Annexes of NEC 281.

Discussion

Case No. 3: In this case a Canadian company is going to establish an in-house trading company to provide the following services solely to its parent company or head office:

1. purchasing of Thai products;

2. inspection and control of both quality and quantity of the products purchased from Thailand; and

3. providing market information.
This in-house trading office is not to derive any income for its head office. This practice would be categorized as a business in services under Annex C, Chapter 3(1) and requires permission from the Director General of the Department of Commercial Registration. However, this type of business may get special treatment from the Ministry if it is qualified as a representative office engaging in international commercial transactions under the Regulation of the Office of the Prime Minister authorizing the establishment of a non-trading commercial representative office, dated April 30, 1986. This special treatment includes exemption from conditions normally imposed upon an alien who requests permission under NEC 281 and a minimized tax exposure.105

If the Canadian company is going to provide the full range of services of a trading house including acting as an intermediary between buyers and sellers and providing detailed information services in return for a fee, the activity may be regarded as brokerage or agency under Annex A, Chapter 3(5) of NEC 281 which is a prohibited business.106 But if the trading company engages in the wholesale and retail businesses or the export business, it is necessary to obtain permission under NEC 281 as discussed in Case No. 2 above. American companies may engage in this type of business under the U.S.-Thai Treaty since it is not a reserved business.107
C. Conclusion

The NEC 281 is a regulatory law under which all parties are to proceed to apply for the appropriate licence. If Thailand decides to use countertrade transactions as marketing tools to expand their export market, especially in private sectors, strong national trading companies must be built up. Presently, local trading firms are not well-established. Therefore, assistance from experienced trading companies in countertrade practice may be required. It is interesting to note that the Singapore government decided to encourage private companies to develop their own countertrade expertise and to develop itself into a major countertrade centre by persuading six countertrade companies to establish in Singapore with a 5 year tax free incentive.

To promote and encourage foreign international trading firms to establish a presence in Thailand, a modification of NEC 281 is required. Although this modification requires in depth study, the writer suggests that the following issues need to be looked at:

1. NEC 281 should exclude the activities of international trading companies which act as intermediaries from Annex A, Chapter 3(5) and include this activity as a new type of business in Annex C.
2. The criteria or conditions for the granting of permission should not create a burden to trading firms. The minimum export target and value of Thai export products must be specified.

3. With respect to wholesale or retail businesses, under Annexes B and C of NEC 281, a relaxation of the rules should be given to the trading firm which engages in countertrade.

6.3.3 Remedial Regulatory Laws

6.3.3.1 Introduction

The purpose of discussing the Anti-Dumping Act and the Price Control and Anti Monopoly Act is to provide an overview on how these Acts will effect the countertrade transactions and how government and private sectors can seek a remedy for dumping or unfair trade practices that may occur in countertrade transactions.
6.3.3.2 Anti-Dumping Act, B.E. 2507 (1965 A.D.)

A. Overview

Thailand enacted the Anti-Dumping Act in 1965\textsuperscript{110} prior to accession to the GATT in 1982. However, Thailand is not a signatory to the Non-Tariff Barrier Code. This Act permits the imposition of anti-dumping duties if the goods have been imported for the purpose of dumping.\textsuperscript{111} Section 4 of the Anti-Dumping Act defines "dumping" as:

"dumping under this Act means the importation of goods into the Kingdom for disposal at a price less than the normal value of the goods and causes or shall cause injury to domestic industry".

The Act provides the definition and criteria to be used to determine the normal value of goods in Section 4, paragraph 2:

"The normal value of goods shall refer to

1. The prices of the same kind or the like or the similar goods sold in the ordinary course of trade in the exporting country.

2. The highest price of the same kind or the like or the similar goods export to any other country in the ordinary course of trade, and

3. The prices including the production cost of the same or similar kind of products in the manufacturing country, the distribution cost and a reasonable amount of profit.

In consideration the above due allowance shall be
made for the differences in condition and term of sales for difference in taxation and for other differences affecting price comparability into account.

If the above values cannot be satisfactorily determined, they shall be in accordance with those appraised by the Ministry".

There is an Anti-Dumping Board to administer the Act.\textsuperscript{112} This Board has the power and duty to investigate the facts and determine whether or not dumping exists.\textsuperscript{113} The anti-dumping duty will be imposed by the Customs Department. The rate of the duty is not to exceed one hundred percent 100\% of the normal value of the goods.\textsuperscript{114}

Similar to the Customs Tariff Decree special duty, the Anti-Dumping Act has never been applied. The reasons may be the existence of Section 11 bis of the Customs Tariff Decree which authorizes the Customs Department to impose a special duty where subsidization exists which is more efficient and effectively.\textsuperscript{115}

B. Legal Implications

The Anti-Dumping Act is designed to provide the private sector a remedy where there is a subsidization or anti-dumping situation. Countertrade transactions between exporting countries and Thailand may give rise to problems under the Anti-Dumping Act if the value of the goods imported is lower than the normal value and the importation of the goods "causes or shall cause" injury to a domestic industry. The importing of products by a
government or state enterprise is beyond the scope of the Act. A member of the private sector who is not a "promoted entity" under the Investment Promotion Act and who cannot convince the Customs Department to exercise its power under the Customs Tariff Decree to impose a special duty, may seek a remedy under the Anti-Dumping Act by initiating their own action.

One major problem in utilizing the Anti-Dumping Act is the method of determining the "normal value" of the goods. The Anti-Dumping Act does not contain the "material injury" test as found in Article VI:6(a) of the GATT. Normally, the importation by developed countries of products from foreign suppliers in exchange for countertrade products will not raise an issue of a "lower than normal value" of the imported goods since the exporters normally add in the costs which they anticipate to incur in disposing of the products. Therefore, the price of the imported products will be higher than or at least equal to the normal value of the goods. However, if the countertrade practice is one of barter of commodities or products which can be produced in Thailand, it may create an anti-dumping situation. This is likely to happen in a case where there is a countertrade transaction between Thailand and other developing countries or Eastern bloc countries.

C. Conclusion
Even though the Anti-Dumping Act has not been used, it may, like the Customs Tariff Decree, play an active role in the near future. The following comments should be taken into consideration.

1. The private importer should ascertain that the anti-dumping procedures will not be initiated either by the Customs Department or by the private sector. Nevertheless, if an anti-dumping action has been initiated by the government or the private sector, the importer should stress that the conditions of sale in the countertrade transaction must be taken into account prior to the determination of the "normal value of goods".

2. Under the Act, if any person is of the opinion that an anti-dumping situation exists, he may submit a petition to the Anti-Dumping Board to investigate and examine this matter. If the Board thinks fit, the Board may pursue the investigation by advertising the petition, and allowing any interested person to explain the facts, and advance supporting or opposing opinions. It is interesting to note that the Act allows "any person" to make a petition but it only allows an "interested person" to give a supporting or opposing opinion.

3. The government may intervene in a private countertrade practice using the custom tariff law to levy a special duty on imported goods where the products are granted assistance by other
countries and the importation "causes or shall cause" injury to agricultural or industrial sectors in Thailand.

6.3.3.3 **Price Control and Anti-Monopoly Act, B.E. 2522 (1979 A.D.)**

A. **Overview**

The purposes of the **Price Control and Anti-Monopoly Act**\(^{118}\) ("PCAM Act") are to protect consumers through the establishment of price fixing control measures and to prevent monopolies that would hinder competition. The **PCAM Act** is administered under the supervision of the Price Control and Anti-Monopoly Board (or the Central Board).\(^{119}\) The **PCAM Act** provides that in order to prevent price fixing or unfair trade practices, the Central Board has the authority to declare certain goods as being "controlled". Once a product is a "controlled" product, the Central Board is empowered to impose various requirements respecting manufacturing of the importation and exportation of the controlled product.\(^{120}\)

Similarly, the Central Board is also empowered to announce what is a "controlled business". A "controlled business" may include any activity in agriculture, industry, commercial services or other activities of a similar nature.\(^{121}\) When a controlled business is announced, the person engaging in the controlled business must inform the Central Board of the selling
price.\textsuperscript{122}

B. \textbf{Legal Implications}

The following provisions under the \textit{PCAM Act} may have implications for countertrade transactions.

1. Whether the goods to be imported or exported are categorized as a "controlled product" under Section 23 of the \textit{PCAM Act}. If it is regarded as a controlled product, then the importer or exporter has to comply with all requirements as provided in Sections 24, 25 and 30 of the \textit{PCAM Act}. Most of the controlled goods are goods used for domestic consumption such as soap, detergent and edible oil.

2. In some circumstances, the importation of goods from foreign suppliers under countertrade transactions may run afoul of Section 29 of the \textit{PCAM Act}, which reads as follows:

"No business enterprises shall, on its own or otherwise to conspire or perform in any way, willfully force the price of the goods to go down or go up without reasonable ground or cause the fluctuation of the price of the goods".

The most important element for the offence under this Section is the intention of the importer to force the price of goods to go down without reason.
3. The importer or exporter must also determine whether the business engaged in is a controlled business. There are only a few businesses that are listed as controlled businesses under the PCAM Act, again most of them involve domestic services. The importer will not be allowed to engage in these activities, as provided in Sections 35-38 of the PCAM Act.

C. Conclusion

The PCAM Act will have little impact on countertrade transactions in Thailand. The parties would have to examine whether the import or export products are categorized as "controlled products" or whether the business is categorized as a "controlled business". It is difficult to assess the impact of the PCAM Act on countertrade transactions since there is no ruling or precedent to guide the way.

6.3.4 Promotion and Administrative Regulatory Law

6.3.4.1 Introduction

The Investment Promotion Act is the only legislation that promotes countertrade transactions. It also contains provisions that protect the interest of the promoted person's business that might be effected by countertrade transactions. The Government Procurement Regulations and the Regulation on Creation of the
National Debt are not considered as "legislation" or "subordinate legislation" and thus have no legally binding effect. They are merely government administrative orders respecting government procurement and finance. The purpose of the discussion is to examine the current government procedures that may require to be revised if the Thai government decides to implement a countertrade policy respecting the government procurement.

6.3.4.2 Investment Promotion Act

A. Overview

The Investment Promotion Act, B.E. 2520 (1977 A.D.) ("IP Act")\textsuperscript{123} provides the framework for investment promotion and investment incentives and establishes the Board of Investment ("the BOI") to administer both domestic and foreign investment promotion. The objective of the IP Act is to promote those investments that will be most beneficial to the country. The only investments which are eligible for investment promotion are those which are important and beneficial to the economic, social development and security of the country.\textsuperscript{124} The BOI has currently provided a list of about a hundred activities which may be promoted. These activities are divided into six major activities, namely: agricultural products and commodities, minerals, metal and ceramics, chemical and chemical products, mechanical and electrical equipment; services, and other
products. However, the BOI is prepared to consider any proposed activity. The investment incentives granted to a promoted business by the BOI are tax incentives, non-tax incentives, protection, guarantees, special incentives, and other assistance.

B. Legal Implications

A countertrade transaction may give rise to legal implications under the IP Act as follows:

1. Does a government mandated countertrade requirement violate the guarantee granted by the government to the promoted person under Sections 44-48 of the IP Act?

2. How do promoted enterprises seek protection or assistance from the BOI under Sections 49-52 of the IP Act against the import of foreign products by private sectors in a countertrade transaction?

3. What are the incentives that a foreign company may obtain from the BOI if the foreign enterprise enters into a Compensation or an Offset Arrangement?

4. May the activity of trading firms engaged in countertrade transactions be classified as a promoted business under the IP Act?
First, the IP Act provides for a guarantee by the government: against nationalization, against competition from new state enterprises, against state monopolization of products similar to those produced by a promoted person, against price control, and against imports by government agencies or state enterprises with a tax exempted. Also, the government guarantees not to withdraw from the promoted person permission to export.

A government mandated countertrade requirement which requires the importing of products which are manufactured within Thailand by a promoted person may constitute a violation of Sections 44 and 45 of the IP Act respectively. Section 44 of the IP Act provides that:

"The State shall not undertake a new activity in competition with the promoted person".

In practice, Thailand has not breached its guarantees regarding foreign investment. Theoretically, the importation of foreign products by the government under a countertrade agreement should not constitute an "undertaking of new activity" unless the foreign company enters into a joint venture with the Thai government to manufacture similar products to that produced by the promoted businesses. Therefore, the writer is of the opinion
that unless this joint venture requirement is met importation of products, covered by a promotion guarantee, pursuant to a countertrade agreement, will not violate Section 44 of the IP Act. If the Thai government monopolizes the sale of products through a countertrade deal and those products and commodities are similar to those manufactured by a promoted business, this will violate the guarantee against state monopolization of the sale of products similar to those produced by a promoted person as provided in Section 45 of the IP Act.

In addition, the importation of foreign products by government agencies or state enterprises with tax exemptions arising from a countertrade transaction, may be in violation of Section 48 of the IP Act which provides that:

"The State shall not allow any government agency, government organization or state enterprise to import into the Kingdom, with import duties and business taxes exempted any kind of its products or commodities which the Board is of the opinion that they are of the same kind as those being produced or assembled by the promoted person, which are comparable in quality therewith and are available in sufficient quantity to be acquired for its use.

The provision of paragraph one shall not apply to munitions under the law on control of military munitions for use in services of the Ministry of Defence".

In summary, the government should not enter into countertrade transactions that violate the provisions under the IP Act respecting guarantees given by the government to a promoted person.
Second, countertrade transactions between the Thai private sector and their foreign suppliers may cause damage to the business of a promoted person if the foreign products are similar to or substitutable with those produced by the promoted person. In this circumstance, the promoted person may seek protection and relief measures from the BOI under Sections 49 and 50 of the IP Act. These provisions allow for the imposition of a surcharge on a foreign product at a rate not to exceed fifty percent (50%) of the C.I.F. value for a period of not more than 1 year, and for an import ban on competitive products.

In addition, a promoted person may seek other assistance measures as provided in Sections 51 and 53 and tax relief measures under Section 52 and 53 of the IP Act. A foreign investor who engages in Compensation or Offset Arrangements and is qualified as a promoted person under the IP Act, may also seek assistance under this Act.

Third, some forms of countertrade arrangements, such as Compensation or Offset Arrangements, may require foreign companies to establish operations in Thailand or enter into joint venture agreements with Thai partners. These foreign companies should try to obtain acceptance from the BOI in order to get the various incentives under the IP Act.
The procedure, policy, guidelines and criteria for the granting of investment promotion are provided in the IP Act, and the Announcement of the BOI No. 1/1983, dated June 10, 1983. The major consideration is the demonstration that the investment is important and beneficial to the economic, social development and security of Thailand. The incentives available include both tax incentives and non-tax incentives. The tax incentives are: the exemption from or reduction of import duties and business taxes; exemption of corporate income taxes for up to 8 years with permission to carry forward losses and deduct them as expenses for up to 5 years; exemption for up to 5 years of withholding tax on goodwill, royalties or fees remitted abroad, and exclusion from taxable income of dividends derived from promoted enterprises during the tax holiday. There are two additional tax incentives. The first incentive is for promoted businesses in the investment promotion zones, and the second incentive is for export businesses. The latter incentive includes exemption from import duties and business taxes on imported raw materials and components, exemption from import duties and business taxes on re-exported items, exemption from export duties and business tax on items which the promoted person produces, assembles or purchases for export, and the ability to deduct from taxable corporate income an amount equivalent to five percent (5%) of the increase in income derived from export over the previous year, excluding cost of insurance and transportation. There are important non-tax incentives granted
to a promoted person such as: permission to bring non-nationals to undertake investment feasibility studies and work as technicians and experts;\textsuperscript{149} permission to own land;\textsuperscript{150} and permission to take or remit foreign currency abroad.\textsuperscript{151}

Fourth, previously the \textit{IP Act} listed international trading companies as one of the businesses that was eligible for promotion. However, this has been suspended since March 11, 1981. For international trading companies to be eligible for promotion under the \textit{IP Act} there had to be paid up registered capital of not less than 30 million Baht which was to increase to not less than 50 million Baht within 3 years after the date of commencement of operation.\textsuperscript{152} The other conditions that had to be fulfilled were: (1) the company had to be wholly owned and managed by Thai citizens, and (2) the company had to export qualified goods at a value of not less than 300 million Baht in the first year increasing to not less than 500 million Baht by the third year.\textsuperscript{153} At present, there are 8 or 10 international trading firms which are promoted by the BOI. Most of them are owned by Thai nationals but only a few of them meet the conditions set up by the BOI in order to be qualified for tax incentives and financial assistance. It is the writer's opinion that the government should reintroduce the "international trading firm" into the promoted business list. This will allow foreign international trading firms to participate in countertrade transactions. Criteria must be carefully established to cover
the ownership, minimum requirements to expand the countertrade target, list of countertrade goods, function of the trading company, and previous countertrade experience. The policy should be the promotion of Thai products in the export markets through countertrade, as well as the transference of countertrade techniques to Thai nationals. The international trading house should not be permitted to do business only with their subsidiaries or associates. Instead, they must undertake broad activities to deal with small and medium sized manufacturers and exporters in Thailand.

C. Conclusion

The IP Act should be used effectively in encouraging the private sector in countertrade transactions. The "promoted entity" may seek a remedial measure under the IP Act if the countertrade transaction threatens its interest. The government, in the meantime, should be careful in implementing government countertrade policies that may lead to breaches of the government guarantees made pursuant to the IP Act.

6.3.4.3 Government Procurement Regulations

A. Overview

Annual government expenditures on projects include a wide
range of activities and can include hire of work, sale of goods, provisions of services, construction and engineering projects. Foreign suppliers eye these government contracts greedily. Irrespective of the nature of the activities involved, it is important when dealing with government organizations in Thailand to be aware that there are extensive mechanisms which must be complied with before activities can commence. The most important regulations concerning the execution of government contracts are: The Regulation of the Office of the Prime Minister on Procurement, B.E. 2521 (1978 A.D.) as amended ("the GP Regulation"),\textsuperscript{154} and The Regulation of the Ministry of Finance on Purchasing Contracting for Work and the Engagement of Consultants Under Project Financed by External Loans, B.E. 2524 (1981 A.D.)\textsuperscript{155} ("the PCC Regulation").

The GP Regulation applies to those government agencies that finance procurement through annual expenditures, supplementary budgets, and subsidiary financing announced by the Minister of Finance without release through the Treasury.\textsuperscript{156} The term "government agency" is defined to include a Ministry, Bureau, Department, Office or other state work under central or provincial administration. It does not include state enterprises, work units under local administrative services law or having by law the status of a local administrative body.\textsuperscript{157} The Government Procurement Board, ("the GPB") chaired by a member of the Office of the Prime Minister designated by the Prime
Minister, is composed of various representatives from government. The GPB has power to interpret and rule on questions arising from the GP Regulation.  

There are 6 methods of purchasing and contracting government work. They are: (1) the price agreeing method; (2) the price specification method; (3) the price inquiry method; (4) the competitive bidding method; (5) the special method; and (6) the special care method.

Local suppliers, domestic materials and local enterprises should be encouraged as specified in Clauses 9-10 of the GP Regulation. Which method the government will employ to award a contract will depend on the value of contract and its urgency. Normally, government purchases or contracts valued at more than 400,000 Baht (approximately C$20,000) must be done by competitive bidding. The detailed procedures for competitive bidding are provided in Clauses 36-44 of the GP Regulation. Procedures for the execution of the Model Agreement are provided in Clauses 61-65 of the GP Regulation. The exchange method and the Model of exchange control are also prescribed in Clauses 68-73 of the GP Regulation.

The PCC Regulation will apply only to the projects of government agencies, state enterprises, or financed by external loans. Government agencies include a Ministry, Bureau,
Department office or other government unit in the central administration, provincial administration or abroad and the state enterprises under the Budget Procedural Act. The administration of the PCC Regulation is under the supervision of the Committee in charge of Regulation for purchasing, contracting for works and engagement of consultants under projects financed by external loans ("CPC"). The CPC consists of various representatives from government agencies chaired by the Permanent Secretary of the Ministry of Finance. Purchasing or contracting may be conducted in 5 methods. They are: (1) the price agreeing method; (2) the price enquiry method; (3) the competitive bidding method; (4) the special method; or (5) the special case method. Generally, domestic products or Thai enterprises are encouraged, except where other guidelines and conditions are set by foreign loan agreements. The method of awarding a contract will depend on the value of the contract. Similar to the GP Regulation, purchases or contracts of a value greater than 400,000 (approximately C$20,000) must be conducted by the competitive bidding method. The procedures are provided in Clauses 33-42. Sample contracts and guides for negotiation and execution of a contract are provided in Clauses 79-84. There is no sample of Exchange Contract similar to the GP Regulation.

In general, the concept and the contract value criteria of the GP Regulation and PCC Regulation are the same. There are differences in the details and samples of contracts.
B. Legal Implications

The above two Regulations do not have binding authority under Thai law. Rather, they establish administrative rules which government agencies and state trading enterprises are to follow. Both the GP Regulation and the PCC Regulation have no provisions dealing with countertrade. If the government decides to introduce countertrade by using government procurement as an inducement, a clear countertrade policy and a sample agreement would be the most important elements in order to speed up negotiations and increase the willingness of foreign exporters to enter into the deals with Thailand.

The following factors should be taken into consideration if the government decides to use government procurement avenues as an inducement to arrange countertrade.

1. The contract value available for countertrade arrangements should not be too low. Any contract valued at 10,000,000 (ten million baht) (approximately C$50,000) might be open for countertrade proposals. The value specified by the National Countertrade Sub-Committee ("the NCTT") of 50 million baht (approximately 2.5 million Canadian dollars) is too high. Empirical research is needed to determine a reasonable and appropriate value.
2. A list of government projects where countertrade transactions may be appropriate should be prepared. The list should not include projects that domestic suppliers or contractors are able to undertake. The list should focus on international projects that require financing from overseas sources.

3. The list of countertrade products in Counterpurchase Arrangements must be wide and flexible. Attention should be paid to domestic shortages and the demands of the world market. The list should be updated frequently.

4. Sample countertrade agreements should be drafted although they must allow for revision since sample or standard agreements will not fit all circumstances.

5. A permanent countertrade unit like the NCTT should be established. Government countertrade should proceed under the supervision of this unit.
C. Conclusion

Government procurement regulations do not consider countertrade practice. So far, government bodies in Thailand are free to undertake countertrade arrangements under the supervision of the NCTT. It is important that the government should emphasize various types of countertrade arrangements such as Counterpurchase, Compensation, and Offsets, rather than just Barter.

6.3.4.4 Regulation on Creation of the National Debt, B.E. 2528 (1985 A.D.)

A. Overview

The Regulation on Creation of the National Debt, B.E. 2528 (1985 A.D.) ("CND Regulation")\(^{167}\) is designed to recommend policy and plans concerning the creation of international debts by the government sector. This Regulation is administered by the National Debts Policies Committee ("the NDP Committee"). The NDP Committee is composed of various representatives from government agencies and is chaired by the Minister of the Ministry of Finance.\(^{168}\) The CND Regulation defines "creation of debts"\(^{169}\) as:

"the borrowing of money by government agencies and state enterprises from domestic and foreign loan sources. This also includes borrowings whether given or not given guarantees by the government and hire purchase
and credit facilities with installment. However, it does not include the domestic debts of state enterprises used as revolving fund for operation".

The NDP has various powers given to it by the CND Regulation. Among other things assigned to the NDP is the power to prepare an annual creation of foreign debts plan which is to consider domestic and foreign borrowing by government agencies and state enterprises, and also other projects such as joint venture deals.

The CND Regulation limits foreign loan debt so as not to exceed 9 percent of the ratio of the foreign currency revenue expected from the sale of goods and services in a subsequent year. Government agencies or state trading enterprises which desire to do anything that would result in creating international debts must submit a project proposal to the Office of the National Economic and Social Development Board ("NESDB") for consideration. Consequently, the NESDB will submit the proposal for the Cabinet's approval.

B. Legal Implications

Similar to the GP Regulation and PCC Regulation, the CND Regulation has no juridical status, rather it is a policy and administration requirement for government and state trading enterprises. The CND Regulation also has no provisions relating to countertrade agreements. However, it is questionable whether
if government agencies or state enterprises wanted to engage in countertrade arrangements, the countertrade arrangement would be considered as a "creation of debt". If it is regarded as a "creation of debt", then approval from the NDP Committee will be required. There are some practical problems when the application of the CND Regulation is required. Hypothetical facts and discussion below may be appropriate.

**Case No. 1**: If Thai Airways International Ltd. ("Thai Airways"), a state enterprise, wants to acquire a new aircraft from MacDonald Douglas, a U.S. firm, by entering into a Barter Arrangement, Thai Airways will not have to borrow money from foreign sources but will use revolving operating funds to pay for the new aircraft on an installment basis. MacDonald Douglas, in turn, would purchase products supplied by Thai Airways through its trading house to pay for the aircraft over a period of 3-5 years.

**Discussion**

The acquisition of a new aircraft by Thai Airways as a state enterprise would not be subject to the GP Regulation since Thai Airways is a limited company owned by the government. The acquisition would not be subject to the PCC Regulation because it is not financed by external loans.
It is questionable whether the "Barter like" arrangement with MacDonald Douglas to pay part of the aircraft price in commodities would be classified as a "creation of debt" under the CND Regulation. One may view that the acquisition of an aircraft does not require Thai Airways to borrow any money from domestic or foreign sources. So long as Thai Airways uses part of its revolving funds to pay for the aircraft on an installment basis, the transaction should not fall within the definition of "creation of debt" under the CND Regulation. Others may argue that the payment by Thai Airways to MacDonald Douglas through the Barter Arrangement should be regarded as a use of credit facilities with installment payments and, therefore, does constitute a creation of debts. The writer agrees with the former view and thinks that when drafting the CND Regulation, the draftsman did not foresee that countertrade would become part of international trade. There is no precedent or any ruling on the above question. However, in practice, where there is any doubt, state enterprises or government agencies seek clarification from the NDP Committee.

C. Conclusion

In light of the growth of countertrade, the government should establish guidelines on countertrade practices consistent with the two government procurement regulations, the CND Regulation and the NCTT guideline on countertrade. There are too many
committees supervising international finance and trade which results in discrepancies and inconsistent policy. In addition, unless appropriate training is undertaken a shortage of qualified personnel able to carry out policy and negotiate countertrade agreements will be the result. This situation is exacerbated by the frequent rotation of government officers. An independent, permanent unit comprised of experts from the responsible government agencies is needed to deal with the growth of government procurement and countertrade transactions.

6.4 Conclusion

The discussion of the legal implications of both private regulatory law should assist the parties developing a countertrade transactions to prepare and structure an effective and enforceable countertrade agreement. The legal implications of Thai private law still leaves unresolved many problems that may have to be answered by the Thai court, in particular public policy notions, the state immunity principle, and the enforcement of foreign arbitral awards.

The examination of regulatory law indicates that some legislation may deal inefficiently with countertrade transactions, for example, customs law respecting valuation method, the Customs Tariff Decree and the Anti-Dumping Act. If the government decides to supervise and encourages countertrade
transactions, both at the government and private sector level, the amendments of all regulatory laws and administrative regulations as discussed is required.
Footnotes - Chapter Six


2. See generally Kraivixien, supra, note 1 at 97. Though this article was written in 1962, it is still true that the practitioner's textbooks on other branches of law are scarce.


5. Ibid. S. 5. In the Act, the phrase "public order and good morals" is used. It has the same notion as that of "public policy".

6. Ibid. S. 8.

7. See Kim, supra, note 3 at 501.


11. (1939) A.C. 277.

12. Wuthichamnong, supra, note 10 at 780.

13. Ibid. at 786-787.

14. Saeng Uthai, supra, note 8 at 75.
15. It is interesting to note that under current English law, the Foreign Limitation Period Act 1984, foreign rules of limitation shall apply in English court unless they conflict with English public policy. See discussion in Schmitthoff, supra, note 9 at 184-185.

16. Supreme Court's decision, No. 1364/2514 (no case name given).
17. Supreme Court's decision, No. 30/2516 (no case name given).
18. Supreme Court's decision, No. 1288/2501 (no case name given).
19. Supreme Court's decision, No. 2022/2519, 986/2521 (no case name given).
20. Supreme Court's decision, No. 698/2521 (no case name was given).

21. S. Sucharitkul, Immunities From Attachment and Execution In Respect of Property of Foreign States-Thailand (1980) 22 Mal. L.R. 185 at 185. The discussion of this part will emphasize the capacity of government departments, state enterprises to be sued in Thai court which will have similar notions to the Proceeding Against Crown Act (R.S. 1980 C. 393) or the Crown Proceeding Act (S.B.C. 1979 C. 86).

22. CCC, S. 68, 73.
23. Supreme Court's decision, No. 724/2490.
24. Sucharitkul, supra, note 21 at 185-186.

25. Ibid. at 186. Currently the Act of the Administration of the Kingdom is the Announcement of the National Executive Council No. 216.


27. Ibid. at 22-23.

28. Ibid. at 24.

Status: Problem Suggestion to Amend the Recognition and Enforcement of Arbitral Award Rendered Out of Court (1983) 40 BOT-BUN-DIT at 218-219.

30. See generally in Suwan, supra, note 29 at 102-105. Supreme Court's decision No. 698/2521 in Hismoco American Co., Ltd. v. Srisuwan Ltd., and Supreme Court's decision 1083/2522.

31. Suwan, supra, note 29 at 105.

32. Supreme Court's decision No. 520/2520 in K.C. Thia (1949) v. Taweephol Ltd. Part.

33. Supreme Court's decision No. 918/2521 (1978 A.D.) in Liquidator of Thai Werapol Ltd. v. State Enterprise Thimmilort of Romania.


36. Revenue Code, S. 78, duo decim.


42. Customs Tariff Decree, supra, note 35 S. 11 bis.

43. Pangsook, supra, note 41 at 464.


45. See Revenue Code, S. 3, and Royal Decree issued under the Revenue Code governing exemption from Revenue Taxes (No. 18). Thailand has to date entered into the Tax Treaty Agreements with 22 countries, namely Sweden, Norway, Denmark, Japan, the Federal Republic of Germany, the Netherlands, France, Singapore, Republic of Korea, Italy, Belgium, the United Kingdom, Indonesia, the Philippines, Canada, Malaysia,
Pakistan, Poland, India, Austria, Finland, and the People's Republic of China.


47. Revenue Code, S. 76 bis.

48. Supreme Court's decision 1231/2509 (1966 A.D.).


50. Revenue Code, S. 77, 78.

51. Ibid. S. 77, 78 bis and 78 quattuordecim.

52. Thailand-Canada Tax Treaty, Art. 5, paragraph 3(6), Art. 7, paragraphs 1, 2.

53. Revenue Code, S. 69 bis.

54. Ibid. S. 78, 78 quindecim. Please note that if the payment for service fee to a foreign contractor is made by a private company, such private company is also required to withhold tax at source under S. 78, septendecim.

55. Thailand-Canada Tax Treaty, Art. 5, para 6, Art. 7.

56. Revenue Code, S. 78.

57. Revenue Code, S. 104.

58. Ibid. Stamp Duty Schedule 4.


60. EC Act, S. 7 bis.


62. M.R. No. 13, Art. 34.

63. Ibid. Arts. 7, 7 bis, 12, 14.

64. Direction to Authorized Agent, May 25, B.E. 2502 (1959 A.D.), Ministry of Finance, Cl. 14.

65. Ibid. Cl. 28.
66. Ibid. Cls. 16-17.
67. Ibid. S. 27.
68. Ibid. Cl. 34.
69. Ibid. Cl. 35(d) (e) (f) (g).
70. Ibid. Cls. 45, 48.
71. Ibid. Cls. 46, 56.
73. Schmitthoff, supra, note 9 at 96-97, footnote 15-16. See also English decisions in Wilson, Smithe & Cope Ltd. v. Terruzi (1976), 1 All E.R. (C.A.).
75. 1 All ER. 720 and see Schmitthoff, supra, note 9 at 97.
76. Wood, supra, note 72 at 5-12-5-12.1.
78. Schmitthoff, supra, note 9 at 97.
81. See EI Act, S. 5 and Remark.
82. Ibid. S. 5(1)(2).
84. EI Act, S. 8.
85. Ibid. S. 9, 25.
86. Ibid. S. 6, 13.
87. Ibid. S. 5(1)(2).
88. Ibid.
90. NEC 281, preamble.
91. Ibid. Cl. 3.
92. Ibid. Cl. 2.
93. The U.S.-Thai Treaty, Article IV, para 1 and 4.
94. Ibid. Art. IV, para 2.
95. NEC 281, Cl. 4.
96. Ibid. Cl. 4, and Royal Decree permitting aliens who have been granted investment promotion to carry out businesses prescribed in Annex B (B.E. 2516) (28 November, B.E. 2516 (1973 A.D.) (Thai Government Gazette, Vol. 90, Part 159 (Special Issue), dated December 7, B.E. 2516 (1976 A.D.).
98. See Ministerial Regulation No. 2 (B.E. 2516) issued under NEC 281, dated November 24, 1972, which was dated May 29, 1973, and Notification of Commercial Registration Department Re: Permission for an Alien to Operate Business, dated 20th February, 1981 (Commercial Registration Department; Chulalongkorn Law Alumni, Compilation of Laws Related to Alien Business (Announcement of National Executive Council No. 281) (Bangkok: Kor Printing, 1982). (Thai version).
99. NEC 281, Cl. 4, Annex C, Chapter 1(1).
100. Ibid. Cl. 4, Annex C, Chapter 1(3).
101. Ibid. Annex B, Chapter 3(1).
102. Commercial Registration Department, Chulalongkorn Law Alumni, supra, note 98 at 78.
103. **NEC 281**, Cl. 4, Annex C, Chapter 4(1).


106. **NEC 281**, Cl. 4.

107. **NEC 281**, Cl. 2.


112. Ibid. S. 5.

113. Ibid. S. 8.

114. Ibid. S. 11.

115. See discussion in *supra*, note 43.

116. Ibid. S. 4, para. 3.

117. Ibid. S. 9.


120. Ibid. S. 23.

121. Ibid. S. 4, 31.

122. Ibid. S. 32.


125. Ibid. at 100.

126. IP Act, S. 28-36.


128. Ibid. S. 49-50.


130. Regulation of the Office of the Prime Minister Concerning the Formation of Investment Services Centre (Thai Government Gazette, Vol. 99, Part 125, Special Issue, September 3, 1982). See also K. Chantikul, supra, note 124 at 105-106.


132. Ibid., S. 43.

133. Ibid. S. 44.

134. Ibid. S. 45.

135. Ibid. S. 46.

136. Ibid. S. 48.

137. Ibid. S. 48.

138. Ibid. S. 16-23.


140. The IP Act, S. 28, 29, 30.

141. Ibid. S. 31-32.

142. Ibid. S. 33.

143. Ibid. S. 34.

144. Ibid. S. 35(1)-(4).

145. Ibid. S. 36(1).
146. Ibid. S. 36(2).
147. Ibid. S. 36(3).
148. Ibid. S. 36(4).
149. Ibid. S. 24-26.
150. Ibid. S. 27.
151. Ibid. S. 37.

152. BOI, supra, note 140 at 68.


154. Government Gazette, Volume 95, Part 135, Special Issue, dated December 4, B.E. 2521 (1978 A.D.). This Regulation has been amended up to Regulation No. 7, B.E. 2529.

155. The PCC Regulation was announced by the Ministry of Finance on November 14, 1984, with the approval of the Economic Ministers.

156. The GP Regulation, B.E. 2521 (1978 A.D.), Cl. 4.
157. Ibid. Cl. 3.
158. Ibid. Cl. 8 bis, 8 ter.
159. Ibid. Cls. 11, 12.
160. Ibid. Cl. 16.

161. The PCC Regulation, Cl. 6.
162. Ibid. Cl. 5.
163. Ibid. Cl. 11.
164. Ibid. Cl. 14.
165. Ibid., Cl. 7.
166. Ibid. Cl. 17.

167. This CND Regulation was issued by the Cabinet and signed by the Prime Minister on March 24, B.E. 2528 (1985 A.D.).
168. *CND Regulation*, Cl. 5.


171. *Ibid.* Cl. 5(3).


176. *GP Regulation*, *supra*, note 156, Cl. 4.
Part III
Practical Consideration and Conclusion

Chapter Seven
Negotiating and Drafting of Countertrade Agreements

7.1 Introduction

The negotiating and drafting of countertrade agreements is the most important part of concluding a countertrade transaction. The negotiation of countertrade deals is time-consuming and costly. It requires preparation, research, planning and patience to successfully negotiate a profitable countertrade agreement. In addition, the parties should recognize and avoid pitfalls of countertrade so that both parties can protect their interests and achieve their goals.¹ This chapter will discuss the negotiating and drafting of barter, counterpurchase and compensation agreements since these types of transactions are the most common in international trade. It will emphasize the developing countries perspective. To do so, the developed countries' attitude towards countertrade agreements will also be discussed.
7.2 Negotiating Strategies

Negotiating strategies must be based on each party's definition of their own interest. In general, the party which has more bargaining power will be in a position to demand more favourable terms. The party which has less bargaining power can increase its bargaining power by designing and carrying out an active policy which can include publishing a prospectus or the details of a project (in case of compensation) and preparing a Model Agreement.²

The negotiating strategies employed in a countertrade agreement are similar to those used in other commercial agreements but the parties are required to have a broader knowledge of the transaction including knowledge about: the countertrade products, the disposal of the countertrade products, and the ratio for the countertrade. The parties must identify the targets of the countertrade, the fall back position, and the counter offer. The parties must know the nature of countertrade arrangements, as well as the requirements, the precedents and practices used by the trading partner in order to aware of the expectations and to form a view of what will be perceived as reasonable.³ Negotiating strategies can be divided into two steps that of pre-negotiation and negotiation.
7.2.1 Pre-negotiation Steps

A. The Importer's Perspective

Importers, most of whom are developing countries, should draw up the requirements that they want to include in a countertrade transaction. These would include: the value (both in terms of percentage and ratio) of the countertrade products or services; the types of products and price formulas required; the method of disposing or reselling the goods; the method of payment; and a Model Agreement which should protect the interest of the importer and ensure that the exporter or the foreign supplier will comply with the countertrade commitment. In addition, the importer should develop its own market information with respect to the countertrade transaction so that it can offer an alternative proposal to the exporter in distributing the importer's products through the exporter's marketing mechanism.

B. The Exporter's Perspective

Most of the exporters are developed countries who are eager to sell their goods or services to importers. With the intense competition among the developed countries, particularly for any compensation deal which involves the transfer of technology or a high value project such as a turnkey plant, the exporters who willingly agree to engage in countertrade transactions will have
a better chance to be a successful seller or bidder. The exporter should first find an initial contact or customer\textsuperscript{4} and determine whether the transaction will involve countertrade and how much it will cost.\textsuperscript{5} The exporter should collect and analyse all the information with respect to the requirements, the rules and policies, the need of the importer with respect to countertrade, and the types of products offered by the importer. The exporter should also take the following into consideration\textsuperscript{6}: 

(1) Outside assistance if they do not have sufficient expertise. 

(2) The marketing tools necessary to promote the sales or services in the importing countries, and 

(3) The practices and precedents that the importer has used in business with other exporters. 

The exporter may try to minimize the countertrade value as much as it can. The final price should be quoted by the exporter only after the terms and conditions offered for countertrade are identified.\textsuperscript{7}
7.2.2 Negotiating Step

The following are a number of major issues on which the parties should negotiate prior to drafting the final agreements.

7.2.2.1 Simultaneous Negotiation of the Countertrade Deal

The parties should negotiate the primary sale and/or services agreement simultaneously with the countertrade agreement so that they can determine the costs and benefits incurred prior to agreeing on the final prices of both agreements.\(^8\)

7.2.2.2 A Separate Agreement

With the exception of the barter agreement, an exporter is advised to enter into a separate agreement so that the importer cannot withhold payment under the primary agreement when there is a dispute under the countertrade agreement.\(^9\) In addition, the exporter wants to be ensured that he will not be obliged to fulfill his countertrade commitment if there is force majeure or the importer is in breach of the countertrade agreement. This separate agreement will be of assistance in the arranging of finance for both the exporter and for the importer and for transferring obligations under the countertrade agreement to a third party.\(^10\) For example, if a separate agreement has been
entered into, the exporter may be able to finance its export by means of non-resource finance, factoring, and forfeiting from banks and other financial institutions.\textsuperscript{11} On the other hand, the importer must be assured by the exporter that its commitment under the countertrade agreement will be fulfilled, especially if it involves a long term commitment like a counterpurchase or a compensation arrangement. Therefore, it is the writer's view that, except for the purpose of finance, the importer should insist that the two separate agreements be linked to each other by an expressed provision contained in either a Protocol or a framework agreement or in the countertrade agreement, as the case may be.\textsuperscript{12} Professor Schmitthoff suggests that a letter of intent in the form of a protocol or framework agreement, which does not create a legal obligation on the exporter, should be avoided.\textsuperscript{13}

The relationship of the primary agreement and the countertrade agreement is a controversial issue in international trade. There are two theories. The first theory is that if the parties expressly agree to separate both agreements, it should be recognized according to the concept of contractual freedom and each party has to comply with their obligations regardless of whether the other party is in breach or terminates the other agreement. The second theory is based on the common scheme and the real intention of the parties where any attempt to separate the agreements will violate the intention of the parties. There is an international case on the linkage of counterpurchase
agreements in Germany where the Court of Appeal ruled that a turnkey agreement and counterpurchase agreement are normally independent unless the agreements stipulate to the contrary or the circumstance of the transaction or interest of the parties show the contrary.\textsuperscript{14}

7.2.2.3 Choice of Products for Countertrade

The list of products available for countertrade must be agreed upon in advance. The exporter normally prefers to have a flexible and wide range of marketable countertrade products from which to choose. The exporter is also advised to ask for the right to select or buy the products\textsuperscript{15} from a third party in the importing country and the right of refusal if the countertrade products do not meet the specifications.\textsuperscript{16} In case of barter and counterpurchase, the countertrade products do not need to relate to the products imported by the exporter under the primary sales agreement. This is unlike the compensation transaction where the exporter is committed to buy the products resulting from the output of the equipment, technology or the turnkey plant itself.

The exporter should be cautious since: (1) the products listed may not always be available; (2) the list of products may change without warning due to a shortage of supply; (3) the product descriptions may not be specific, both in quality and quantity; and (4) the importer (mainly foreign trade
organizations) may decline to include a cancellation clause in
the countertrade agreement in the event that the importer is
unable to make satisfactory products available.\textsuperscript{17} The importer
can overcome these concerns by preparing an up-to-date list of
countertrade products with detailed specifications and updating
the list from time to time. The demand and supply of those
products and the price fluctuations in the world market must be
closely followed by the importer so that it will be in a position
to determine the price and offer an alternative proposal to the
exporter. The importer should allow for a flexible choice of
products provided that it will not cause a supply shortage in its
domestic market. If the importer is unable to supply the
products listed in the countertrade, the importer should have
substitute products ready for the exporter or the exporter should
be entitled to buy from a third party if the products are
available. In case of a failure to supply the choice of products
by the importer, a liquidated damage or penalty clause should be
imposed rather than terminating the countertrade agreement.

7.2.2.4 The Countertrade Ratio

The countertrade ratio is the amount or value of the goods
that the exporter of a primary agreement has to buy from the
importer in return. The exporter will try to avoid or minimize
the countertrade ratio as much as possible by offering:\textsuperscript{18} (1) a
price discount; (2) an extension of the repayment term; (3) a
performance guarantee; (4) other financial incentives; (5) acceptance of partial payment in local currency as long as the law and the government allow it to be reinvested; (6) transfer to a third party; and/or (7) acceptance of payment in services available in the importing country.

The importer, at the same time, has to weigh the cost and benefit of waiving or reducing the countertrade ratio. It is a matter of bargaining power. If more products offered by the importer are marketable in the world market, less objections will be made by the exporter. Where most of the countertrade products are not marketable in the world market because of an excessive supply and/or the low quality of the products, the importer may require the exporter to import countertrade products at a countertrade ratio ranging from a percentage of the value of the primary sales or service agreement equal to the value of the products or even higher depending on the type of countertrade. Some importers, mostly Eastern European countries and developing countries, have set the percentage of countertrade values from 10% to 100% or higher. The exporter may be able to negotiate and settle the countertrade at a lower rate of between 5% - 30%. The percentage will depend on the nature of the products to be imported and the need of the importer. The exporter has to prepare and learn about the figures so that it can determine the cost and set up its own position when the negotiation takes place.
7.2.2.5 Penalty Provision

To ensure the performance of the agreements a penalty provision is advisable. The amount of penalty is usually ten percent of the countertrade value. An exporter is sometimes willing to pay a twenty percent penalty in order to avoid the countertrade commitment.\(^{22}\) It is suggested that the exporter should accept a penalty clause only if the payment of the penalty will release the exporter from countertrade obligations and from all claims made by the importer arising from the countertrade. The provision should provide that the payment of the penalty will not affect the obligations under the primary agreement.\(^{23}\)

From the importer's perspective, the amount of penalty should be high enough\(^{24}\) so that the exporter has no incentive to voluntarily pay the penalty. If a low penalty provision is agreeable, payment of the penalty should not release the exporter from the countertrade obligations. The primary sales or service agreement should contain a similar penalty provision. In practice, the importer may ask for a bank guarantee against the penalty clause. It is suggested that such a guarantee should not be payable upon demand, but should be payable within 30 days of demand.\(^{25}\)
7.2.2.6 Duration of Countertrade Commitment

The duration of the countertrade commitment will depend on the nature and type of countertrade. For barter, the duration may be comparatively short or it may be simultaneously fulfilled by the exporter. Counterpurchase will require from one to five years. A compensation arrangement will usually allow five to twenty-five years for the exporter to fulfill its commitment. In counterpurchase arrangements the exporter may want to have a longer time period to fulfill the counterpurchase commitment so that the exporter can have time to contact the end-user or the third party and possibly avoid extensive storage of the counterpurchase goods. On the other hand, the importer frequently attempts to obtain a much shorter period\(^{26}\) of six to twelve months. All of this will be reversed in a compensation deal where the exporter will want to shorten the duration because of the need to use the output from the equipment, plant or technology to set off and pay for the equipment/turnkey plant imported by the importer.

7.2.2.7 Transferability Provision

For maximum flexibility the exporter should insist on having a provision allowing for the transfer of obligations respecting countertrade products to a third party such as a trading firm and/or the end-user of the product.\(^{27}\) The importer may allow a
transferability provision provided that prior consent from the importer is obtained so that the importer can be assured that the products will not be resold to existing customers or be dumped into the importer's existing market. The exporter may request the importer to accept a clause whereby a consent of transferability will not be unreasonably withheld.  

7.2.2.8 Marketing Restrictions

The exporter is advised not to accept a marketing restrictions clause because it will limit resale or disposition of the products in other markets especially where the exporter cannot use such products itself or sell them through subsidiaries or other business connections. Where the product is marketable, the exporter should also try to obtain an exclusive, limited term distribution right for the countertrade product. If it is impossible to obtain an exclusive distribution right, then a non-exclusive distribution right over an agreed territory may be sufficient. The importer, however, should insist on having a marketing restriction clause in order to protect and maintain its market shares and to sustain the prices offered to existing customers and to prohibit the re-entry of goods. The exporter may impose marketing restrictions on the importer if they are engaged in a compensation deal where the output of a turnkey plant or technology are intended to be sold domestically or exclusively to the exporter.
7.3 Drafting of Countertrade Agreements

7.3.1 The Protocol or Framework Agreement

The objective of the protocol or framework agreement is to link the primary agreement with the countertrade agreement. Sometimes the provisions of the protocol may be found in the countertrade agreement, but it is recommended that the protocol agreement should be entered into separately in order to avoid the merger of the two agreements.\textsuperscript{32}

To what extent linkage should exist between the primary agreement and the countertrade agreements will depend on the bargaining power of the parties and their intention. The exporter may prefer to have less linkage between the two agreements and insulate the agreements from each other since the exporter does not want to have a problem with the importer, especially concerning payment, if problems occur the countertrade agreement. Alternatively, the exporter may want to have a link between the primary agreement and the countertrade agreement in the event the primary agreement is cancelled because of \textit{force majeure} or the importer breaches the primary agreement. One commentator has suggested that the protocol should contain a provision stating that the cancellation of the primary agreement will cause the countertrade agreement to be cancelled or that the
amount of the exporter's countertrade obligation will depend on a percentage of the value of the primary agreement. On the other hand, the importer, who wants to ensure the fulfillment of the countertrade obligations by the exporter, will want the two agreements to be linked so that the importer can withhold payment under the primary agreement, as well as claim for a penalty or a set-off against the outstanding balance which the importer may still owe to the exporter.

In a long-term major construction agreement such as compensation, a separate framework agreement is not normally required. Instead, it is usual to build a countertrade provision in a compensation or offset agreement. The reason is that in compensation arrangements the duration of agreements is quite long and the sale or technology transfer are related to the output of the products. These provisions constitute a framework agreement. Professor Schmitthoff has suggested that the framework agreement or protocol should contain all the provisions which are related to the countertrade obligations, such as specifications and choice of goods, methods of payment, transferability, market restrictions, penalty provisions, as well as, the terms and conditions which are normally contained in an international trade contract. These general terms may include general clauses, a reservation of a title clause, a price escalation clause, an interest and a force majeure clauses, a choice of law and an arbitration clause.
The writer's view is that the Framework Agreement or the Protocol should contain only those necessary provisions which link the primary and the countertrade agreements. The specific provisions which are required in a countertrade transaction, as well as the standard terms and conditions of an international trade agreement should be contained in the countertrade agreement. The reason is simply that the more there are detailed provisions contained in a separate agreement, the greater the chance of conflicting between these agreements.

7.3.2 Barter Agreement

Generally, a Barter transaction will involve a single agreement which covers both the delivery of primary goods and the counter delivery of countertrade goods. Specific provisions to be considered in drafting a barter agreement are detailed below.

(1) Introductory and Acknowledgement Provisions

The agreement should provide that both parties agree to exchange the goods and be obliged to fulfill their commitments under the agreement and that the two deliveries are in consideration of each other.
(2) Quality Control and Delivery Provisions

Most barter agreements deal with commodity products or equipment. The quality control and inspection provision, as well as the delivery provision of both products, must be carefully drafted. To cover the surplus, storage or shipping problems of a large exchange of mineral, oil or agricultural products, a provision should be included that provides that upon the request of one of the parties, and in case of an imperative reason, the quantity delivered can be modulated.39

(3) Contingency Clause

Since there is a possibility that one party may fully or partially default, an ordinary contingency clause\(^40\), as well as a specific provision allowing the non-breaching party the option of receiving a specified payment in currency in lieu of receiving later delivery of conforming goods, should be drafted.\(^41\) The ordinary contingency clause will be discussed in the subsequent section in conjunction with the common provisions of other countertrade agreements.
(4) **Bank Guarantee**

A parallel bank guarantee provision in the form of a standby letter of credit should be inserted in the barter agreement where the non-breaching party may obtain payment in hard currency from the breaching party in the event of a full or partial breach of the barter obligations.  

(5) **Prices**

The price formula or the value of the goods should be specified in the barter agreement. The prices should also refer to the amount or quality of the goods as a unit price. A fixed price may be used if the exchange of goods is carried out subsequently or relatively soon after the signing of the agreement by both parties. The prices may be expressly provided in accordance with the INCOTERMS of the International Chamber of Commerce (ICC).

**7.3.3 Counterpurchase Agreement**

Generally in a counterpurchase arrangement there are parallel international sales agreements between the exporter and the importer. The principle agreement normally consists of a standard international sales agreement in which the exporter must provide the products or commodities to the importer. A
counterpurchase agreement, on the other hand, will contain a standard international sales agreement provision, as well as a specific provision that will link the principle agreement and the counterpurchase agreement. The linkage provision will either be contained in the counterpurchase agreement or in a separate agreement referred to as the Framework Agreement or the Protocol. The necessity for a separate agreement has been discussed above. The following specific provisions must be taken into consideration in drafting a counterpurchase agreement.

(1) **Preamble**

Where there is no separate agreement framework agreement or protocol to link the primary agreement and the counterpurchase agreement, additional provisions in the preamble of the counterpurchase agreement should be sufficient to link the agreements. The importer, however, may insist on having a provision inserted in both the primary agreement and the counterpurchase agreement linking the agreements in order to ensure that the exporter will fulfill the obligations under the counterpurchase agreement.
(2) **Counterpurchase Clause**

This clause should contain an acknowledgement provision for the exporter to purchase a specific amount of goods from the importer or at a percentage referred to in the principal agreement.47

(3) **Description of Goods/Quantity/Quality Control/Inspection**

Normally, the list of counterpurchase goods may vary considerably. An updated list of goods must be incorporated into the counterpurchase agreement at regular intervals. The mechanism for the change of the list of counterpurchase goods must be incorporated into the Agreement.48 Where the exporter is allowed to purchase goods from other sources in the importing country, provisions to this effect must be drafted.49 An additional requirement concerning each individual purchase from the list of available goods may be incorporated into the agreement.50

The quantity of goods should be exactly noted in barrels, tons, bales, etc. or as a percentage of goods in the principal agreement.51 A provision to allow for an increment may be inserted if the importer wants to give an incentive to the exporter and if the exporter manages to find more markets for the imported products.
The quality control and the inspection procedures, as well as the provision concerning the appointment of a neutral surveyor, should also be incorporated in the counterpurchase agreement. The reasons are that the exporter must receive goods which meet the standard market requirements and avoid disputes over the quality of goods. The inspection of goods should be carried out in the importing country. In case there is non-conformity, the provision should allow for a price reduction or an adjustment of the counterpurchase obligations, a penalty clause and at least the return of the goods to be repaired or replaced, as the case may be.

(4) Prices

Since a counterpurchase transaction does not occur immediately, there is a possibility of price fluctuation, in particular for commodities. The exporter may prefer to have a fixed price if the counterpurchase will be carried out in a short period of time. However, a pricing formula must be agreed upon by both parties. A common pricing formula is the international price at the time of purchase or at a specified percentage below or above that price. Where the counterpurchase goods are raw material and commodities, the pricing formula can be indexed to the price quoted by a recognized international exchange market. Prices under both the principal and counterpurchase agreements
should be fixed in a common currency to avoid the impact of exchange rate fluctuation. Where such a provision is not negotiable, a multiple currency clause may be advisable in order to avoid exchange rate risks. With respect to the prices provision, both principal and counterpurchase agreements should contain the "most-favoured-customer" clause guaranteeing that the same or similar products will not be sold by the parties to other customers at a lower price. The adaptation or negotiation clause with respect to prices must be incorporated into the agreement if it involves a long term supply of goods. The escalation clause which allows for inflation or movements in foreign currency may also be of assistance.

(5) Delivery Schedule

As discussed earlier, the time for the exporter to complete the counterpurchase agreement will range from 1-5 years and usually the exporter prefers to have a longer period to fulfill the delivery of counterpurchase goods and the importer prefers a shorter time period. The provision containing the delivery schedule for a specific date or periodic delivery must be clearly drafted. The exporter may prefer to have a provision which provides that if the importer fails to deliver the goods within a specified period, this will constitute a material breach of the entire counterpurchase agreement and the exporter will be discharged from the counterpurchase obligations. The importer
will try to avoid this type of clause. However, if this provision cannot be obtained the agreement should provide that in the event of delay or unavailability of the goods, the counterpurchase obligations of the exporter will be reduced correspondingly or that a penalty will be assessed against the importer.  

(6) **Marketing Restrictions**

One provision should reflect the agreement of both parties on the extent that marketing restrictions will be applicable. The drafter must ensure that this provision will not be contrary to the regulatory law of the exporting country such as the Anti-trust or Competitive laws.

(7) **Transferability Provision**

In addition to the discussion of the transferability clause above, the drafting of the transferablity provision should contain provisions that allow the exporter discharge from liability and that a written permission from the importer must be obtained if the exporter wants to transfer his obligations or countertrade goods to a third party.
(8) **Penalty Clause**

The parties must first agree on the amount of penalty which may vary from 10% to 50% of the value of the unfulfilled counterpurchase obligation. The importer must ensure that the penalty clause does not constitute an "escape clause" for the exporter. On the other hand, the exporter will try to get agreement from the importer that payment of the penalty will not effect the importer's obligations under the principal agreement or that the exporter is able to terminate his obligation under the counterpurchase agreement once the penalty is paid. In drafting such clauses, the governing law must be taken into consideration where national law distinguishes between a penalty and liquidated damages.

(9) **Bank Guarantee**

Both the importer and the exporter are often required to have a parallel bank guarantee from each other either in the form of a standby letter of credit or a performance guarantee. The name of the issuing bank, the amount of the guarantee, the duration of the guarantee and the time that each party has to issue the bank guarantee must be expressly provided for in the counterpurchase agreement.
7.3.4 Compensation Agreement

A compensation arrangement will not only involve a principal sales and services agreement (sometimes referred to as a turnkey agreement)\textsuperscript{66} to be performed by the exporter, but will also involve a compensation agreement in which the exporter agrees to buy the output from the equipment or technology transferred to the importer. A framework agreement or protocol to link the primary agreement and the compensation agreement may not be required if linkage provisions are incorporated in the compensation agreement. The major provisions as discussed in the counterpurchase agreement will be applicable to the compensation arrangement. However, the drafter of the agreement should pay attention to the issues noted below.\textsuperscript{67}

(1) Prices

In a construction agreement or a turnkey arrangement, the prices can be: (1) a lump sum amount; (2) a unit price; or (3) a cost reimbursement. To minimize the cost the importer will normally prefer to have a fixed price or a lump sum agreement for the primary sale and services agreement or a turnkey agreement. Conversely, the exporter does not want to take the risk of an increase in cost, especially in a turnkey project. A fixed price or a lump sum may be acceptable in a controllable project or a small project. In case the importer insists on a fixed or lump
sum price, the exporter should mitigate its risk by splitting the arrangement into a fixed price agreement and an agreement where the price is subject to adjustment. Wallace, however, suggests that a lump sum type of pricing method is most favourable in a turnkey project compared to unit price or cost reimbursement. The following provisions should be taken into consideration in a lump sum contract:

1) A change or variation clause, empowering changes to be ordered in the permanent work, usually by the owner or the contractor and leading to an adjustment of the original contract price.

2) A fluctuation, variation of prices or rise and fall clause. The adjustment of a contract price should be made based on cost of labour, material, currency, custom duties, and taxation changes.

3) A change of conditions and unfavourable conditions clauses, intended to compensate the contractor for an unforeseen problem with the site problems or difficulties rendering the work more expensive.

These criteria apply to both the primary agreement and the compensation agreement since the cost of production of the compensation goods will be increased.
(2) **Compensation Ratio**

The compensation ratio which the exporter has to buy from the output will range from 10% to 100% of the output. The calculation of the ratio is based on the cost of the plant, equipment, interests, and other expenses. Normally, the exporter will use the price recovered for the output to pay for the plant, equipment or technology. The lower the ratio, the longer the exporter will have to wait to be fully paid. 71

(3) **Transferring of Title**

Since the exporter will not be fully paid for the equipment and technology by the importer for an extended period, it is important to provide who will retain the ownership and who will be responsible for the maintenance, services and damages incurred to the equipment. 72

(4) **Method of Payment**

The method of payment in a compensation arrangement is different from a barter or counterpurchase agreement. The payment for the products, the equipment and technology under the agreement may be partially made in hard currency or made by sales of the resultant product produced from the equipment/technology.
The mechanism will depend on the arrangements between the parties. For example, the exporter may purchase the products from the importer at a discount rate and re-sell to the end-user in order to pay for the cost of the equipment/technology or the exporter may take the products in exchange for the equipment or the technology. In some circumstances, the importer may obtain importer (buyer) credit from a financial institution and use it to pay the exporter in full amount. Where the exporter sells the equipment or technology to the importer, the exporter will agree to pay the importer in cash to buy from the importer a predetermined amount of the resultant product. This type of arrangement requires a separate compensation agreement. This is like a counterpurchase arrangement except that the equipment delivered and the counterpurchase agreements are closely related.  

(5) Training and Transfer of Technology

The training and transfer of technology agreement is not specific to a compensation agreement, rather it is found with a turnkey agreement. Wallace suggests that if there is additional and continuing obligations, e.g. training after completion, the drafter should provide for a special sanction other than simple damages for breach of contract by using a separate contract for these post-completion services.
7.3.5 General Provisions

The following provisions are general provisions that the drafter should incorporate into the primary agreement and the countertrade agreements.

(1) The Adaptation Clause

The adaptation clause should be incorporated into a long term agreement, especially a counterpurchase agreement, a turnkey agreement, a long term construction agreement or a compensation agreement. The adaptation clause is sometimes referred to as: a clause for the filling of gaps; a clause of variations; a clause for price escalation; a currency stabilization clause; or a most favoured clause. The adaptation clause may help bridge the usual problems and questions arising during the performance of a long term agreement.\(^{75}\) The drafter should be careful to ensure that the adaptation clause meets the requirement of certainty under the proper law of contract.

(2) The Renegotiation Clause

Renegotiation clauses are specific contractual provision which differ from the adaptation clause because they authorize changes in agreements without following an automatic or predetermined pattern. In drafting a renegotiation clause, the
drafter must give special consideration to the following aspects: 76 (1) events triggering renegotiation (determining event); (2) procedures for adaptation; (3) nature of the third person entrusted with adaptation if the parties fail to reach agreement; and (4) the mission of the third person.

The renegotiation clause should be used in lieu of the stabilization clauses which are highly speculative in terms of contract stability and conflict avoidance. 77

(3) Force Majeure and Hardship Clauses

Both of these provisions allow one party to suspend or terminate the agreement without any right of recourse. The application of force majeure and the hardship clauses are very similar. The difference is that the force majeure clause does not usually describe in detail both the procedures and types of adjustment. Conversely, the hardship clause is aimed at adapting the contract to the situation utilizing more detailed procedures and it usually indicates the sanction if the parties cannot reach an agreement. In drafting a countertrade agreement with a state trading organization or a government body, the force majeure clause should cover the situation where the government promulgates legislation to restrict the performance of the contract 78
(4) **Arbitration Clause**

The arbitration clause should cover a broad description of subject matter in order to avoid successful challenges to the jurisdiction of the arbitral tribunal. The subject matter that can be submitted to arbitration must be in accordance with the law of the place of arbitration and the law applicable to the merits of the dispute. The appointment of the arbitrator, the place of arbitration, the language and cost should be incorporated into the agreement.

(5) **Choice of Law Clause or Governing Law Clause**

The governing law of the contract should be specified in the agreement. The governing law will depend on the parties for example, if it is an agreement between a state and a foreign private party the choice may be a domestic law of one of the contracting parties, a third country's law, or the general principles of law. If it is an agreement between two private parties, the choice of law may be domestic law and/or trade usage. The drafter has to assure that the form of the agreements are valid and enforceable under the governing law. As the choice of law clause will affect only the rules governing a contractual matter, other domestic law in the country is still applicable in a non-contractual matter. Therefore, the exchange control law, tax law, custom law, anti-trust law, anti-dumping
law, and import and export control law will still be applicable to the countertrade arrangements. The drafter is also advised to take the relevant acts into account. However, if the trading party is a government, it may agree to waive the application of those laws by issuing a new law or covenant.

7.3.6 The Model Countertrade Agreement and Standard Clauses

In 1979, a member of the United Nations Commission on International Trade Law (UNCITRAL) suggested that a model contract and a standard clause on barter-like (countertrade) agreements should be looked at by the UNCITRAL working group. The working group concluded, after their study, that it does not appear useful to attempt to construct a single unified legal structure for a barter-like (countertrade) agreement because of the mixture of legal elements in such an agreement. However, the standard clauses dealing with payment or with the right of one party to refuse performance because of non-performance should be prepared by the Commission. However, due to the complexity and various types of countertrade the writer believes that an effort to draft a model countertrade agreement or standard clauses, as well as a study of their legal implications, should be carried out by the UNCITRAL or by the developing countries group which engages in countertrade arrangements. The draft model agreement and standard agreement may be limited to: (1) the Framework Agreement or the Protocol; (2) the Barter Agreement; (3) the
Counterpurchase Agreement; and (4) the Compensation Agreement.

The model agreements and standard clauses with respect to international sales of goods, international construction agreements, and transfer technology agreements as prepared by UNCITRAL and other international organizations, such as United Nations Economic Commission for Europe or the Federation Internationale Des Ingenieur Conseils (FIDIC)\textsuperscript{84} can be used as the standard agreement and be incorporated into a Model countertrade agreement. The draft of model agreements and standard provisions will not only strengthen the bargaining power of the developing countries, but it will also reduce the time and cost of the negotiation and drafting process. In addition, it may solve the unpredictability of these types of agreements. The Model Agreement and standard clauses should be flexible and allow the parties to select the best forms to fit a specific type of transaction.

7.4 Conclusion

The negotiating and drafting of countertrade agreements requires a lot of preparation, planning, and patience from both parties. Generally, the importers, most of whom are developing countries, lack the expertise and the resources necessary to negotiate on the same footing with the developed countries' exporters. A model agreement and standard provisions would be of
assistance to redress this imbalance if they are jointly drafted by a group of experienced representatives from developing and developed countries. The Model Agreement or provisions should reflect a fairness to both parties and aim to resolve the complexity of countertrade transactions.
Footnotes - Chapter Seven


6. Ibid. at 82-83; see also Grabow, supra, note 14 at 260-261; see also Lochner, supra, note 1 at 751.

7. Lochner, supra, note 1 at 752.

8. See Verzariu, supra, note 5 at 87, 88; Grabow, supra, note 4 at 263-264; OECD, East West Trade Recent Development in Countertrade (Paris: OECD, 1981) at 37.


10. See reasons why a separate agreement is necessary in C. Guyot, "Countertrade Contracts in International Business" (1986) 20 The International Lawyer 921 at 936.


12. See OECD, supra, note 8 at 26.

13. See Schmitthoff, supra, note 11 at 144-145.
14. See discussion in Guyot, supra, note 10 at 939-941. See footnote 75 Obereandesgericht, 17 U151/81 December 1, 1982 (Dusseldorf).


16. The word used in the trading between the importer of the economic plan state (like Foreign Trade Organization (FTO)) with respect to the right to buy from the third party which may relate to the FTO is "linkage" (See Grabow, supra, note 4 at 263, and see D.N. Koschik, "Structuring Barter and Countertrade Transaction", in B.S. Fisher, K.M. Harte, (eds.), Barter in the World Economy (New York: Praeger, 1985) 37 at 70.

17. OECD, supra, note 8 at 44.

18. See Verzariu, supra, note 5 at 90-91.

19. For example, in the compensation or buy back, the countertrade obligations will range from 10%-100% of the production. The ration will be calculated based on the price of plant, equipment or technology transfer and cost (interest plus operation expenses).

20. Guyot, supra, note 10 at 952.

21. See Loeber, supra, note 15 at 310. See also the countertrade ratio of the socialist countries. It ranges from 5 to over 100 percent at OECD, supra, note 8 at 41.

22. Grabow, supra, note 4 at 263. Guyot, supra, note 10 at 935. See discussion in OECD, supra, note 8 at 54-56.

23. Grabow, supra, note 4 at 263; Guyot, supra, note 10 at 935.

24. See Letter of Tender of Department of Trade of Indonesia provide for liquidated damage of 50%. The difference between the total of products actually purchased and the balance of the unfulfilled products. (See also U.K. Department of Trade and Industry, Countertrade: Some Guidance for Exporters (London, October, 1985) (no page listed).

25. Loeber, supra, note 15 at 312.

26. Ibid. at 309.

27. OECD, supra, note 8 at 31.
28. Ibid.
29. Ibid. at 52. See Schmitthoff, supra, note 11 at 144.
31. See Grabow, supra, note 4 at 268; see Koschik, supra, note 16 at 71.
32. Koschik, supra, note 16 at 52, 67.
33. Ibid., Grabow, supra, note 4 at 264.
34. Ibid. Professor Schmitthoff suggested that if the framework agreement should contain a link between primary agreement and countertrade agreement, the provision should state that the exporter's obligation shall only become effective when the primary agreement is concluded or the importer has provided a performance guarantee (Schmitthoff, supra, note 11 at 144). See also samples of A Frame Contract and Frame Agreement in respect of a Joint Venture Between Eastern European and Western European Company in a Third Country (B.D. Townsend, The Financing of Countertrade (London: Butterworths, 1986) at 31-34.).
35. Schmitthoff, supra, note 11 at 140.
36. Ibid. at 66-67, 147.
37. See Example of the Framework Agreement Used in Indonesia (Department of Trade and Industry, Annex 2B, supra, note 24); The Frame Contracts Used in Romania and Used in USSR (Verzariu, supra, note 8 at 184-188).
38. Koschik, supra, note 16 at 47; Grabow, supra, note 4 at 270; Guyot, supra, note 10 at 926.
40. The ordinary contingency clause must be included to guarantee the quality and the delivery of both sets of goods. The following should be included: (1) a detailed specification and description of goods; (2) a guarantee of quality and quality control; (3) a right of inspection; (4) a right to neutral surveyor, determination and settlement of claim, penalties in case of late delivery, delivery of non conforming goods and failure of delivery, force majeure (Guyot, supra, note 10 at 927 and footnote 32).
41. Grabow, supra, note 4 at 270.

42. Ibid. at 270-271. A standby letter of credit is an undertaking by a bank to make payment to a third party (the beneficiary) or to accept bills of exchange drawn by him, provided that the timely tenders the correct documents specified in the credit (see detailed discussion on Letter of Credit, Bank Guarantee in Schmitthoff, supra, note 11 at 363-364, Chapter 25, at 379-384).

43. See Guyot, supra, note 10 at 926-927.

44. Koschik, supra, note 16 at 48.

45. The principal terms of international sales agreement should include description and quality of goods; delivery place, date and mode; price and mode of payment; transfer of risk; transfer of ownership; reservation of title; restricalton on re-sale; exemption and limitation clause; insurance and escape clause (see D.E. Perrot, "International Sale Agreements", in J.D.M. Lew; C. Stanbrook, (eds.) International Trade: Law and Practice, (U.K.: Euromoney Publication, 1983) 3 at 11-16). Schmitthoff suggested the following important clauses should be contained in the international sale agreement: general clause, reservation of title clause, price escalation clause, interest, force majeure, choice of law and arbitration (Schmitthoff, supra, note 11 at 66-67).

46. See Koschik, supra, note 16 at 67.

47. Guyot, supra, note 10 at 931.

48. See discussion in 7.2.2.3, supra.

49. This linkage involve with the counterpurchase agreement with country such as a Foreign Trade Organization of State Planned Countries. See Grabow, supra, note 4 at 266, and Koschik, supra, note 16 at 70.

50. Ibid. at 74.

51. Koschik, supra, note 16 at 69.

52. Ibid. at 71-72. See also sample provisions at 62-63; see Guyot, supra, note 10 at 932.

53. Grabow, supra, note 4 at 267.

54. Ibid. 266. Caldwell suggested that the rules in drafting this type of clause are: (1) simplicity; (2) appropriate
index (consumer price index ("CPI")) or wholesale price index; (3) index should carefully be described; (4) methods of making adjustments should be specified. (See M.S. Caldwell, "Selected Clauses in Transactional Contract", in V.P. Nanda, ed. at 4-14-4-15).

55. Guyot, supra, note 10 at 932.

56. Caldwell, supra, note 54 at 4-13-4-14.

57. Grabow, supra, note 14 at 266. See Perrot, supra, note 92 at 17. The precaution on the period for which such term will be effective and the criteria on most favoured-customer clause in drafting this clause must be taken into consideration.


60. See discussion at 7.2.2.8, supra.

61. See discussion at 7.2.2.7, supra.

62. See Guyot, supra, note 10 at 934.

63. See discussion at 7.2.2.5, supra.

64. See Schmitthoff, supra, note 11 at 111-113.

65. Ibid. at 382-384.


76. *Ibid.* at 166. See also sample of Renegotiation Clauses at 154-169.
78. *Ibid.* at 151-152.
81. See G.V. Hecke, "Contract Subject to International or Transnational Law", in H. Smits, etc. (eds.) *International Contracts*, (New York: Matthew Bender, 1981) at 26-33. Peter summarized in his book on the choice of law clauses in investment agreement to two major types: (1) choice of law clauses including a reference to the host country's law (importing country's law) which include exclusive application of the host country's law. Exclusive application of the host country's municipal law as existed at a determined moment, simultaneous application of the laws of the host country and the investor... etc.; (2) choice of law clauses not referring to the host country's municipal law which include application of the legal system of a third party. The sample of choice of law clauses are also given in his book (Peter, *supra*, note 75, pp. 167-172).
82. See Hecke, *supra*, note 81 at 47.
84. See detailed discussion in Schmitthoff, *supra*, note 11,
Chapter Eight
Conclusion

Countertrade transactions have unique characteristics and complex elements. The historical overview of their development and the examination of the advantages and disadvantages of countertrade transactions in world trade shows that countertrade will continue to grow despite the opposition of developed countries. Developing countries, however, should carefully select a form of countertrade that suits their specific purposes and situation. A countertrade transaction implemented by developing countries in order to overcome economic difficulty and expand export markets should not distort world trade patterns. Developing countries should emphasis countertrade as a means of encouraging economic development. Generally, countertrade is better than other forms of trade in the sense that it can perform different functions in order to overcome some specific problems. First, it can be used as a marketing tool to expand trade and services. Second, it can be used as a purchasing mechanism to overcome economic difficulties, and third, it can be used as a co-operative arrangement to develop the economy of trading parties.

Thailand, as a developing country, should develop its countertrade policy along the lines suggested above. Countertrade should be used for the purpose of economic
development and that of expanding export markets. Thailand should focus on implementing compensation or offset arrangements. Clear policy guidelines should be developed. International trading houses which are capable of handling countertrade transactions should be encouraged.

Canada, as a developed country, should provide assistance to all Canadian exporters to compete with other foreign countries in countertrade transactions. Specifically, there exist potential countertrade transactions in the form of compensation or offsets in the area of high technology and capital goods between Thailand and Canada.

The legal implications of countertrade under GATT gives rise to various questions. Some questions can be answered, but a number cannot because GATT and its Codes were prepared at the time when countertrade did not play an active role in world trade. The legal implication of countertrade under GATT requires further study by GATT members and other international organizations such as the IMF, UNCTAD. One particular item that needs to be studied is the determination of an accepted definition of countertrade. The writer has proposed the following definition of countertrade:

"A general practice of an international transaction between at least two parties (from either the public or private sector) who agree to link or reciprocate their import or export transaction on a contractual and ad hoc
basis. The transaction may deal not only with the sale or exchange of goods but also with services or the transfer of technology between two parties. There are a number of forms of trade that can be classified on various elements, namely: the nature and the duration of the agreement, the parties and the products involved."

With different legal systems, Canada has more legal problems with their consitutional and trade laws than Thailand. The examination of the laws of Canada and Thailand shows that Canadian laws, both private and regulatory, are more developed than those of Thailand. The private law of Thailand still leaves uncertain important questions about international transaction agreements, in particular public policy notions and enforcement of foreign arbitral awards. Conversely, Canadian private law aspects seem to be clear and efficient in dealing with those issues.

As to regulatory law, Canada has developed its international trade law by adopting or implementing various international trade agreements into domestic laws, for example, the Anti-Dumping Code, the Subsidies Code, and the Government Procurement Agreement. In addition, Canadian administrative and judicial procedures recognize Canada's obligations under international trade agreements. Conversely, Thailand has not developed her trade law in that direction.

In examining Canadian and Thai fiscal and regulatory control laws, it seems that a wide discretion is conferred on government
officers. However, the enforcement of those laws by the authorities in the two countries is different due to the attitude of government officers and the provisions in the legislation. Canada's legislation normally contains detailed provisions and regulations that specify criterion with which the exporters or the importers are to comply. This makes it more difficult for officers to abuse their power or to use arbitrary judgment. By adopting and implementing international trade agreements into Canadian domestic laws, such as the Customs Valuation Code and the Agreement on Import Licencing procedure, government authorities will normally exercise their power in accordance with those agreements and take a lenient attitude towards import and export transactions. In Thailand, most of the fiscal and regulatory control laws do not normally provide any detailed criteria for the enforcement of those laws. These decisions sometimes rest on the discretion of the government officers alone. With the exception of the tax and customs assessment, the decision of government authorities respecting the approval for the remittance of funds, or granting of export or import licences, is categorized as an "administrative order" and is immune from judicial review.

The attitude of some government officers who have to administer those laws is aim at controlling and reviewing the import and export transactions rather than facilitating the transaction, particularly when it involves with import and export
licencing requirements. This attitude may sometimes lead to an arbitrary tax and duty assessment or to a delay in import and export permits approval. However, the Thai government has put a lot of effort into changing the attitude of government officers and the situation has improved during the last few years.

Regarding remedial regulatory law, Canada, with its new SIMA and Competition Act, appears to provide more protection to Canadian industry and producers. These acts may have a great affect on countertrade transactions. Thailand has two similar acts, the Anti-Dumping Act and the Customs Tariff Act that deal with dumping situations but they have not yet been used because dumping situations have not arisen and the lack of awareness among government authorities and domestic producers respecting the consequences of dumping. The writer believes that with the growth of countertrade in Thailand, these acts will play a key role in countertrade transactions.

As to promotion and administrative regulatory law, the Investment Canada Act may be used to promote countertrade if the government desires to do so. The Export Development Corporation, under its statutory criteria, may assist Canadian exporters in countertrade transactions. However, the EDC's current policy is not to provide any financial assistance to Canadian exporters in countertrade transactions. With the implementation of GATT Government Procurement Agreement in Canada, the Canadian federal
government's power to use countertrade requirements in government contracts is limited. However, this restriction does not apply to provincial governments.

In Thailand, though the Thai Alien Business Control Law is a regulatory control law in nature, but it seems that the Thai Alien Business Control Law and the Investment Promotion Act can be used as effective tools to promote and encourage countertrade in Thailand, especially in establishing international trading houses, and inducing more foreign investment in the form of Compensation or Offsets. In addition, Thailand should unify and revise the current government procurement regulations, as well as the Regulation on Creation of National Debts, to ensure consistency and to promote countertrade requirements in the government projects.

Developing countries should improve and develop their strategies in negotiating and drafting specific types of countertrade agreements with developed countries. The development and preparation of Model Agreements is recommended.

Finally, it may be difficult to develop a uniform domestic or international rules in order to regulate the countertrade transactions because of the diversity of countertrade transactions. It is the writer's opinion that lawyers in developed countries need to be aware of the special nature of
each countertrade transaction when the application of private and regulatory laws are made.
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