Beyond the Countertrade Taboo: Why the WTO Should Take another Look at Barter and Countertrade

By Robert Howse, NYU Law School

howserob@gmail.com

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Introduction

Associated during the cold war with currency controls, artificial exchange rates, administratively managed trade, and other pathologies of command economies, barter and countertrade have more than survived the end of Communism. They are unofficially estimated to account for 20-30% of world trade, and anecdotal evidence suggests that these practices grow in the wake of each economic and financial crisis. In the most recent financial and economic crisis, anecdotal evidence in the form or reporting in the general and specialized news media (such as *Barter News*), suggests that barter and countertrade are being resorted to in response to increasing costs of trade finance, and of using the financial system more generally to deal with the various risks of international commercial transactions. The scale and significance that such transactions can attain is reflected in a 2008 deal between China and the Congo, where China is supplying $9 billion in technology and equipment for the building of a copper mine in the Congo, to be paid for with exports of copper and cobalt from the Congo to China.[1]

In official trade policy circles, however, there is a marked distaste for barter and countertrade, stemming from its strong association with the dysfunctions of command economies during Communism. There is little reflection on of the fact that after Communism, the use of barter and countertrade, by all accounts, only increased, both in transitional, former Communist economies and in developing countries. Similarly, there is little awareness of the extent to which these techniques are used by private parties in developed market economies in a transparent manner, in full compliance with taxation and other regulatory requirements.

The prejudice against barter and countertrade found a recent expression in an editorial in the Financial Times, lamenting the use of this practice to trade agricultural commodities: "the great advantage of a well-functioning market is that it is open to all on the same terms. Barter systems, in contrast, are deeply arbitrary…Government barter also opens the floodgates to domestic corruption and abuse. When goods are not exchanged at market prices-or worse, when the terms of deals are not even made public-officials can too easily strike bad deals….Market

[1] *Trade Finance Magazine*, May 1, 2008.

trading would ensure transparency….The problem today is that the markets are not functioning well. Commodities markets are volatile in the best of times, and were already stressed during last year's unprecedented price rises. But now trade financing has become much harder to obtain: banks are frequently charging more for letters of credit than typical trading margins can cover. This is blocking trade flows. Countries make a mistake if they try to escape these market imperfections by leaving markets altogether. As more trade shifts to barter deals, commodities markets become even thinner, less liquid and more volatile for those who still trade commercially. And the gross inefficiency of barter will increase the cost and reduce the availability of food further-precisely what food-importing nations must avoid."[2]

Not only is barter supposed to be inefficient but it is even more widely assumed in trade policy circles to be illegal under WTO rules. This is an assumption that is rarely challenged either in policy discourse or in academic trade law and policy literature. A typical articulation is as follows: "Counter-trade is not an available way of the trade because the WTO does not allow this type of trade in the global market". [3] According to another expert, "The General Agreement on Tariffs and Trade was aimed at promoting multilateralism in trade. Countertrade is inherently bilateral in nature. Therefore in promoting countertrade, developing countries may be both breaching the GATT rules, and depriving "themselves of one of the benefits that the GATT.. . [was] meant to confer upon their signatories."(quoting Roessler 1985)"[4] Indeed so strong is the notion that countertrade is in violation of WTO rules that it has been suggested that the lack of

[2] "Barter Beware" Financial Times, February 1 2009.
[3] Jang, et al. "The Defense Offset Valuation Model", DISAM Journal, December 2007.
[4] "Legal Implications of Countertrade in Economic Context", SOAS Occasional Paper #2, March 1996.

statistics can be attributed in part to the unwillingness of governments to acknowledge officially these transactions. [5]

Yet a search of the WTO document database, and standard databases for legal literature, discloses that, since the creation of the WTO in 1995, there has not been a single sustained treatment of the legality of barter and/or countertrade, not in the context of any WTO dispute ruling, not in discussions in any WTO committee, and not in any document of the WTO Secretariat. Barter and countertrade are not explicitly mentioned in any of the WTO treaties, despite the fact that discussion and debate about these practices was in full swing during the time in which the WTO Uruguay Round Agreements were being negotiated. Perhaps even more surprising, given the strength of the conviction that barter and/or countertrade are illegal or inconsistent with the WTO legal system, there is not a single discoverable article in the burgeoning and now enormous secondary literature since the inception of the WTO that provides a sustained analysis of the grounds for this judgment.

This essay is intended to begin to fill this gap. I seek to explore the emergence of the prejudice against barter and countertrade at the GATT era during the 1980s. I then draw on a body of economic literature that applies transaction costs analysis to international barter and countertrade transactions, to suggest why these transactions may have "legitimate" economic rationales, rather than being attributable to coercion or pressure by importing governments or rather than being attributable to pathologies such as corruption, cronyism, wasteful subsidization, currency manipulation, and so on.

[5] D. Marin and M. Schnitzler, "Tying Trade Flows: A Theory of Countertrade with Evidence," American Economic Review, December 1985, text of footnote 2.

The GATT Critique

In 1984, The GATT Secretariat produced what is the only study on countertrade and the law and policy of the international trading system. The Study, entitled simply "Countertrade"[6], and a subsequent article, largely condemned countertrade as commercial policy and practice, while coming to much more nuanced and ambiguous conclusions about its legal status under the GATT. Nevertheless, subsequent to this study and a perhaps related article by Frieder Roessler, then the head of the GATT legal service,[7] it became rapidly assumed that the attitude of the GATT as a institution was countertrade was not only negative as a matter of policy, but also that countertrade was per se illegal under GATT rules.

The study begins by closely identifying countertrade either with the failure of governments to deal in a timely manner to external shocks, resulting in the need for foreign exchange rationing, or with the wish to disguise real prices in a transaction (anti-transparency).

The study claims:

"21. In a number of countries, liquidity problems have been triggered by a delayed policy response to external events (the oil price hike, decline in export demand, increased interest rates on foreign debt). During this period, some have felt obliged to impose strict exchange controls rather than reduce domestic expenditure directly or devalue their currencies. There are two clear motives for countertrade in these circumstances. First, it can permit local firms to continue trading when allocations of foreign exchange are no longer forthcoming. Second, it can facilitate

[6] GATT, Consultative Group of Eighteen, Twenty-third meeting 4-6 April 1984, CG>18/W/80.
[7] "*Counter trade* and the GATT legal system," Journal of World Trade Law, 19, 604-614 (1985). .

an appropriate de facto devaluation of the currency on a transaction-by-transaction basis. In essence, the country with an overvalued currency ends up paying an abnormally high price for its imports to offset the existing abnormally high price for its exports at the official exchange rate.

22. A second situation in which countertrade may be preferred to conventional trade is where there is a wish to disguise the real prices in a transaction. This may explain the importance of 'surplus' commodities in countertrade. A surplus arises when the price is too high to clear the market. While this would only be a temporary phenomenon in competitive markets, many primary commodities are not sold in competitive markets, domestically or internationally. For a whole range of commodities, international competition is restricted by cartel-type agreements. Countertrade offers member countries in financial difficulty the prospect of disposing of their surplus export goods either at undisclosed prices, or at nominal prices which conform to international agreements, but which nevertheless involve an effective discount in terms of the goods received in exchange. Countertrade could be similarly used to achieve a result equivalent to dumping and export subsidization. (This is not to say that the effective selling price cannot be determined, only that it is considerably less transparent than in normal trade.)"

The study occasionally addresses arguments that countertrade may have more above-board rationales, such as export promotion, but it is largely dismissive of these:

"23. It is also argued that countertrade can benefit individual countries in circumstances other than those just described. For example, countertrade is often justified as a marketing device, which is especially appropriate for goods that are difficult for a particular country to sell abroad or those for which export markets have yet to be established. Producers in some countries may suffer from a lack of information about export opportunities, or perhaps find marketing activities too difficult or costly. Countertrade could be of assistance by placing the onus on foreign suppliers to market local goods. This is more likely to be advantageous where foreign firms are large and diversified, or have marketing expertise in the relevant area. It frequently happens, however, that foreign suppliers are unable to market countertrade items themselves, and are obliged to sell them (at a discount) to specialist trading firms. The services of these firms could presumably be made directly available to the country concerned at a lower cost. If the country's goods are such that they cannot profitably be marketed in conventional transactions (because of poor quality or high domestic costs) then the same is likely to be true within a countertrade deal."

The GATT study is similarly dismissive of suggestions that countertrade may be an efficient means of managing default risk in transactions: "25. It has been suggested that in lending to countries with a poor credit rating, repayment in goods can be less risky than that in hard currency. This is relevant, for example, to buy-back transactions involving private firms, where a supplier of capital equipment may propose this form of repayment itself. Nevertheless, default in goods can be as feasible as default in cash, as the experience of some longer-term countertrade deals has shown. Indeed, countertrade transactions have some special risks of their own, apart from the availability of goods; these include problems of quality control, delays in delivery and disruptions stemming from changes in trade policy, all of which can create additional uncertainty about the eventual value of the "repayment". For such reasons, trade credit insurance institutions do not provide cover for contracts stipulating countertrade commitments."

Occasionally, the study makes some acknowledgement that where countertrade is not directly imposed by government but is on the basis of a voluntary transaction between private parties it may have a useful purpose (rather than simply being a means of disguising prices and circumventing customs, tax and other regulatory disciplines), but this is only the case where sub-optimal distortive government policies have made it difficult for private parties to transact on a cash basis:

"28. Bilateral trading practices give rise to two sorts of cost. First, there is the cost derived from restriction of choice. By tying import and export transactions, it becomes impossible to choose the cheapest source of supply and the most profitable outlet, except in the unlikely event that they happened to coincide. Second, there are the increased transaction costs associated with searching for, negotiating and coordinating, viable pairs of transactions. All else being equal, these two costs will rise with the degree of rigidity in the bilateral trade requirements. They will result in a reduced volume of world trade and distortions in its pattern, such that income losses will be experienced by all trading countries. These losses will generally fall most heavily, however, on those countries whose choice is most restricted. *Nevertheless, it should be recognized that where access to the multilateral trade and payments system is inhibited by rigid exchange controls and overvalued exchange rates, certain countertrade practices may naturally emerge as a second-best solution, allowing some additional trade to take place and improving economic welfare.* This proposition has most force when it applies to transactions entered into by private firms as a means of dealing with the exchange market distortions. In these cases, only trade that is beneficial to both parties could be expected to take place, at relative prices that will approximate those in the world market. When governments mandate countertrade, however, additional costs will generally be incurred, introducing the possibility that the country will suffer net losses in trade and welfare."(Emphasis added)

Yet after all these warnings about the evils of countertrade the GATT study concludes (in what must be the least-read paragraph!): "64. The case studies have shown that countertrade as such 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 react to countertrade, can be inconsistent with obligations under the General Agreement or the codes."

Rethinking the Economics of International Barter and Countertrade

The fact that barter and countertrade appeared to be expanding (including to more and more countries outside the Soviet Bloc) not contracting, as communism met its demise led in the to the first systematic efforts by economists to understand what might be the underlying rationales for countertrade, outside the context of a planned economy without a convertible currency. A number of the studies attempt to test empirically the hypotheses for the economic rationale for these transactions, analyzing representative samples of transactions, using regression techniques. In this section of the paper, In this section of the paper I draw extensively on these studies, in arguing that the GATT-era critique of countertrade needs to be largely reconsidered.

Barter and Countertrade in an Economic and Financial Crisis Where Credit is Tight and Future Demand is Uncertain

The effects of the recent financial and economic crisis on conventional trade financing have been described by Chauffour and Farole: "Although trade finance has neither been a proximate nor ultimate cause of the financial crisis, it quickly became a collateral damage. As the financial crisis unfodler, the availability of trade finance tightened and its cost rose because of growing liquidity pressure in mature markets and a perception of heightened country and counterparty risks. The contraction in trade finance was also fuelled by the loss of critical market participants, such as Lehman Brothers, a drying up of the secondary market for short-term exposure (as banks and other financial institutions deleveraged), and the volatility of commodity prices (footnote omitted). The implementation of the Basel II accord on banking laws and regulations, with its increased risk sensitivity of capital requirements, in an environment of global recession is also generally considered to have put additional pressure on banks to hold back on trade finance. Regardless of Basle II, as companies have been downgraded, higher risk premiums have increased capital requirements, further reducing access to trade credit, especially for SMEs and banks in emerging markets."[8] More profoundly, Chauffour and Farole observe: "When banks are under pressure, the capital needed for trade finance may be allocated elsewhere on balance

[8] Jean-Pierre Chauffour and Thomas Farole, "Trade Finance in Crisis: Market Adjustment or Market Failures?", Policy Research Working Paper 5003, World Bank, July 2009.

sheets. With no secondary market to offload loans, balance sheets have been constrained. In addition, global currency volatility and more rigorous counterparty risk assessment contribute to higher cost of trade finance for importers, exporters and financial intermediaries." Perhaps most importantly, they speculate: "Part of the problem may lie in the temporary inability of the market to properly calculate the risks-in the words, it is not a problem of risk per se but *uncertainty*.[Footnote omitted]…there is evidence to suggest that the current economic crisis has resulted in a systemic recalibration of international risk relative to domestic risk. This stems both from real perceptions of higher macro-level risks as well as a herd-like "flight to safety" that works against international transactions."(p. 13)

It is not immediately obvious how barter or cashless countertrade can solve this problem. It is clear that the combination of constrained/higher cost access to trade finance and uncertain future demand would increase the incentive of the buyer to seek barter or cashless countertrade. Not only does the buyer face a *higher* cost of financing; it faces a *lower* (opportunity) cost of barter/countertrade, since there is, with the recession, greater uncertainty about the opportunities to sell its product for cash on the open market. But what about the seller: in a crisis where liquidity is a challenge for many firms, one would imagine that the disincentive to accept goods rather than cash is only more acute. The seller is faced with the very likely burden of having to try and sell the goods for cash in a recession.   What we have to remember here however is that in a recession the seller *also* faces the problem of weak demand for her own goods, and moreover one can apply the problem of uncertainty to not only the question of supply of financing but also of demand for the underlying goods and services. While the buyer faces the trade finance/liquidity constraint, in a recession both buyer and seller face uncertainty concerning how fast and to what extent demand for their goods and services will recover.   Now let us introduce some assumptions, based upon real world observations, albeit anecdotal (since there is no rigorous comprehensive data) about international barter and countertrade transactions. The first is that the seller is more likely to be a developed country exporter, which produces technologically fairly complex goods, and the buyer a developing country producer of goods that are more like commodities, where quality can vary significantly but where buying decisions do not require considerable investment in the transfer of knowledge and the evaluation of the suitability of the goods for specific purposes. The second assumption is that a barter/countertrade transaction is much more likely to occur among parties that engage in repeat transactions. Based upon analysis of the financial and economic crisis by the World Bank and WTO, the crisis has had a more severe effect on liquidity among developing country firms, relative to developed country, firms. At the same time, there is some evidence of "decoupling"- that demand has recovered more quickly or declined less in the developing world (admittedly a huge generalization). If the developed country firm is less worried about short-term liquidity/credit (and thus the loss of an immediate cash payment for the goods) and more worried about the uncertainty of future demand in a recession while the developing country firm is more worried about liquidity/credit than the uncertainty of demand, or even if worried about both in varying degrees, barter/countertrade may be a Pareto-optimal solution, where economic conditions combine trade financing constraints with demand uncertainty. Moreover, if uncertainty about the market for the developing country's goods in a recessionary environment is greater than with respect to future demand for the developed country seller's products, then managing the latter uncertainty for the former by taken on the latter (i.e. through accepting to resell the buyer's own products)

Now consider the possibility that the buyer is already a customer of the seller. Finding a new customer for technologically sophisticated goods involves a new investment in marketing, whereas this is largely a sunk cost in the case of the existing customer. But finding a new supplier of such goods also imposes search on information costs on the buyer. Both parties may have this additional incentive to continue transacting into the future. *If* there were *no* liquidity/credit constraint on the seller, then of course, the solution might simply be for the seller to provide its own credit financing to the buyer, in the absence of the availability of bank financing to the buyer. However, in the recent crisis *some* liquidity/credit constraint may be faced by the seller as well as the buyer. Increasing unsecured receivables, or offering financing on terms for its buyers, may itself cause problems for the creditworthiness of the selling firm. If the buyer is a known customer, and particularly if the seller knows something about the products and production practices and processes of the seller, as well as their payment habits (which information it is likely to have if it has repeatedly been selling production technology to the buyer) then it is in a relatively good position to manage some of the risks noted by the GATT and other critics of barter/countertrade in their claim that such transactions are almost always likely to be inefficient. In sum, in a barter/countertrade transaction the parties can exploit some of the information costs already sunk in their existing business relationship. As we shall see this can make financing through barter/countertrade efficient (i.e. less costly than third party, e.g. bank financing) even under non-crisis conditions. What should be evident from the above analysis is that, in an economic and financial would be plainly wrong, as do the critics of barter/countertrade that such transactions only occur in the face of coercion (direct or indirect, such as imposition of currency controls) by government, or by private market actors with a monopoly or monopsony: the systemic features of the crisis may give both parties incentives to engage in such transactions, quite apart from any overall imbalance in power, either due to governmental or private behavior, that makes one of the parties the unwilling "victim" of the transaction. Let us now to turn to a range of situations where barter/countertrade may be efficient, given the transaction costs of international trade in a non-crisis situation.

Buyback

One of the most observed or studied forms of international countertrade transaction is "buyback." A firm from country A contracts to build a plant in country B and is paid in whole or in part from the production coming from that plant. It is easy to see how from the buyer's perspective of the buyer this manages a particular moral hazard, e.g. that the buyer will supply substandard or low-quality technology or workmanship. If the seller behaves in this manner they will bear at least some of the costs themselves, in the form of lower quality products and/or services, and perhaps even insecurity of supply. In the case of developing countries information asymmetries may be particularly great concerning the quality and suitability of products or services for particular uses that can be made from the seller's technology. As Hennart suggests: "Buy-backs provide some guarantee that sellers will provide state-of-the-art equipment and after-sales service. If plant sellers intended to sell outdated equipment , they would be unwilling to contract for the plant output except at very low prices, and this would provide a signal to the buyer. If they failed to provide-after-sales service, they would be unable to take delivery of the contracted output."[9]

Conversely, in taking on burden of reselling the countertraded goods, the seller of the plant/technology is not assuming the same kind of risks as would a counterparty who has no specific pre-existing knowledge of the quality and serviceability for particular purposes of the goods in question. This is especially true where the seller, as will often be the case, supplies on-going servicing, parts, etc. at the buyer's production facility; the seller may be deeply engaged with the buyer in brainstorming a wide range of problems in the production process.

As Hennart and Anderson note, the efficient solution to the information asymmetries to which barter is here the response is, according to the theory of firm (Williamson) internal contracting, i.e. integrated ownership. In the international context, this means Foreign Direct Investment. Hennart and Anderson show that the incidence of countertrade is positively correlated to barriers to Foreign Direct Investment, including political risk. Critics of FDI along the lines of the GATT report might well argue that countertrade can and should be avoided through governments removing barriers to FDI. This may be true with respect to explicit restrictions on the legal rights of foreign nationals to own enterprises, or formal conditions such as performance requirements, but the costs can be high in insuring investors against political risk, for example through bilateral investment treaties with broad rights to compensation for actual and regulatory takings, as the awards in the recent cases concerning the Argentine financial crisis

[9] Jean-Fancois Hennart and Eric Anderson, "Countertrade and the Mnimization of Transaction Costs: An Empirical Examination,' 9 Journal of Law, Economics, and Organization 1993 , p. 295.

illustrate.[10] Even where the regulatory climate in the host country is relatively favorable nevertheless the costs of the foreign firm are different and the risks it assumes are likely to be quite different in the case of offshore ownership. Ownership means that the firms' costs and revenues are *directly* influenced by a wide range of factors not present in external contracting through countertrade: taxation, labor and employment laws. It may not be efficient for the foreign provider of the technology/equipment to invest in detailed information about these laws and regulations, or assume in the first instance the risk entailed. Also, ownership entails foreign exchange risks. Managing foreign exchange risks may require the purchasing of financial instruments such as currency futures and swaps. These have costs. Indeed, as I shall suggest later, there may be respects in which some forms of countertrade transactions provide a lower-transaction cost method of managing foreign exchange risks than financial instruments, even in the absence of "buyback."

Barter or Countertrade as Collaterialization

It is well-known that that one means of managing payment risk in purchase and sale transactions is through taking security on property. Yet in conventional trade financing, lending is not typically secured through a chattel mortgage or other security interest on the buyer's own inventory. The theory is obvious: in the case of default on the contractually required cash payment, the creditor (which may be the seller) can seize the inventory in partial or full payment for the debt. Barter or countertrade, depending on how the transaction is structured legally and financially, can serve the function of collaterialization. The buyer acquires not a security

[10] I have explored this problem in another paper, on investment treaties as devices to insure investors against regulatory change. "Compensation for Regulatory Change and Investor Protection in Bilateral Investment Treaties and Regional Trade Agreements: A Policy Analysis", paper presented at faculty workshop, Harvard Law School, Spring 2009.

interest or mortgage on the seller's inventory but an actual property right in the inventory as the payment in the transaction. There may be a number of reasons why collaterialization of the buyer's inventory is not a usual option in the case of third party trade financing. One is the transaction costs to the third party (typically a bank) of verifying the existence of the goods, establishing the risks of damage or deterioration over the relevant period, and ascertaining their market value/quality. If the seller is not simply an unaffiliated party but a regular vendor of technology, equipment etc. it may have already had to invest in information concerning the buyer's product, may have been physically present at its facilities etc. This may be so even where, unlike the case with buyback, the particular products in question have not been produced with the seller's own technology/equipment.

A deeper account would require a comparison of the nature of default risk in the three following situations: 1) the buyer defaults on a cash payment and there is no collaterialization; 2) the buyer defaults on a cash payment and there is collateralization; 3) the buyer "defaults" in a countertrade transaction by selling the goods to another party. In situation 1, the situation of the seller or the financial intermediary is that of an ordinary creditor. The ability to collect will depend on the legal system in the relevant jurisdiction(s), the formal and actual practical possibilities for enforcement in the courts, and especially for seizure or attachment of assets. Bankruptcy law will also be relevant. In the second case, what will be relevant is the legal framework for secured transactions involving chattels. It has been pointed out that in many jurisdictions, especially developing country and transitional economy ones, that formally and/or in practical terms, the law of secured transactions is either non-existent, poorly developed, hard to understand, or unfavorable to foreign creditors, whether the seller or a financial intermediary. It may be in significant part for these reasons that trade financing for development does not make (apparently) much use of collaterialization of the developing country buyer's inventory.[11] In the third case, that of a barter or countertrade transaction default would normally mean that the buyer would instead of yielding its inventory as payment to the seller, sell the inventory in question to some other party. Thus, one can see immediately one "cost" of default on a barter transaction: the buyer in the barter transaction must find an alternative use for its inventory. In the case of the barter transaction, assuming that the seller has already acquired a property right to the buyer's inventory, then it need not depend on the law of secured transactions in the jurisdiction of the buyer (or wherever the inventory is located). Instead, the seller in the barter transaction is directly enforcing a fully vested property right. According to Marin and Schnitzer, "how easy or how difficult it is to track down and seize the goods specified as collateral for the import credit depends on the location of these goods. As long as they are still in B's [the developing country/transitional economy buyer in the transaction] country, A [the developed country seller in the transaction] nees the support by courts in *B*'s country which in the countries we consider in this paper is not very reliable, as we argued above. This exactly why it is not helpful to secure the import credit with the goods originally imported (known as "retention of title"). The advantage of securing import credit with export goods rather than the original import goods is that B intends to sell these exports goods abroad, which means that A has a better chance to seize them. If the export goods are shipped to A's country, A can seek recourse from the courts in her own country. If the export goods are shipped to some other country, A's chances of recovering her collateral depend on the legal environment in that particular country. Most developed jurisdictions are prepared to recognize and enforce such rights, either by allowing the creditor to

[11] See Fleisig, Safavian and de la Pena, Reforming Collateral Laws to Expand Access to Finance, World Bank, 2006.

sue locally or on the basis of a reciprocal enforcement convention [reference omitted]. This means that B is severely restricted in where he can sell his export goods without fear of legal intervention."[12]

I would note that even if the legal system of the developing country buyer in the countertrade transaction is not radically flawed, there is still a reduction of risk that comes from the fact that where the seller in the countertrade transaction hold the title to the goods, there is a clearly an additional claimant against whom they can attempt recovery, any other party to whom the buyer in the countertrade transaction has sold the goods. Marin and Schnitzler claim that, empirically, it is very rare that "default" is observed in countertrade transactions; disputes are much more likely to center on the quality of the goods rendered. And this may in turn explain why such transactions are more common where because of a pre-existing business relationship with the buyer in the countertrade transaction the seller in the transaction has superior or less costly information about the quality of the goods than an unaffiliated party.

Countertrade as a Means of Managing Exchange Rate Risk and Price Volatility

Countertrade may be used as a means by governments of managing foreign exchange risk. As Hennart explains: "The government of an importing country contemplating using its foreign exchange to buy additional imports may worry that it will not be able to generate sufficient exports to earn the needed foreign exchange. One way to shift the risk to others is to

[12] Daria Marin and Monika Schnitzer, "The Economic Institution of International Barter," The Economic Journal 112, 295-316 9(2002)

make imports contingent on offsetting exports." Jean-Francois Hennart, "Beyond Barter", Chief Executive, March 1990, p. 74. Hedging currency risks through countertrade rather than financial instruments may be desirable because purchasing financial instruments requires an up-front financial payment and thus drains liquidity. Auboin and Meier-Ewert suggest (writing in 2003), "currency hedging is only available in international markets for transactions of fairly large amounts, and at relatively high costs for the traders;…"[13] Moreover, as Choi and Tschoegl note, "Financial instruments cannot hedge real exposures effectively because financial value changes with nominal exchange rates, not real exchange rates, and is based on interesting earnings not inflation. A countertrade deal can help solve the real price problem. Because counter-trade involves the exchange of real goods, not financial instruments for real goods, it can solve the inflation risk involved in foreign currency procurements. Thus, it can sometimes provide a superior hedge to financial instruments."[14]

This leads to the possibility that countertrade can simply function as a futures contract where financial futures instruments are not available or too costly.[15]

Countertrade as an Export Promotion Strategy

[13] M. Auboin and M. Meier-Ewert, "Improving the Availability of Trade Finance during Financial Crises," WTO Secretariat, Geneva, 2003, p. 14.
[14] S-R. Choi and A. E. Tschoegl, "Currency risks, government procurement and countertrade: a note", Applied Financial Economics 2003, 13, 885-889, 888-889.
[15] J.E. Parsons, "A Theory of Countertrade Financing of International Business", MIT Working Paper no. 1632-1985; E. Amann and D. Marin, "Risk-Sharing in International Trade: An Analysis of Countertrade, Journal of Industrial Economics (1994).

Producers often face considerable costs in identifying export markets for their goods and services and in distributing and marketing the goods and services abroad. This may particularly be the case for developing country producers. Governments typically have export promotion agencies, trade commissioner services, etc. that assist producers in breaking into export markets. Countertrade may be regarded as one means of addressing the costs of penetrating export markets. In effect, the seller in the countertrade transaction agrees to introduce the buyer's products to export markets. It is entirely conceivable that the seller will face lower costs in doing so than the buyer who is the producer of the goods in question. Moreover, if, as may well be the case, the seller has a future interest in vending more goods and services to the buyer, the seller gains as well when the buyer in the countertrade transaction is able to win consumers in new markets, expand its output and demand more goods and services from the seller in the countertrade transaction. As Hennart notes, "[T]here are many cases where the purchase of distribution services is subject to high transaction costs. Effective distribution often requires the distributor to make transaction-specific investments. The successful introduction of a new differentiated product or that of an existing differentiated product to a new market requires substantial, up-front investment to find customers and learn how to price, demonstrate, and service the product. Often these investments are specific to a particular producer. The trader may find, after making significant up-front investments in the expectation of a long-lived relationship, that he is bypassed by the exporter once sales start to pick up. As a result traders are usually reluctant to make supplier-specific investments to market products from sources they do not control through equity stakes."[16] Again, where internal contracting (FDI) is not a desirable solution, countertrade may provide an attractive alternative.

[16] Hennart, supra n. ? p. 143.

A specific scenario where countertrade can support export development, and one that is not uncommon in the case of developing country producers, is where penetrating export markets requires improvements in quality or other adaptations in the products or the way in which they are packaged. The producer, where risk-averse, will be unlikely to want to invest significant resources in these changes without some assurance that, if they are made, in fact consumers in the export market will buy the product. On the other hand, a distributor or potential consumer may be unwilling to commit to purchase until it sees the actual results from the changes. In a countertrade transaction, the party who is buying the goods that require improvement or adaptation has a special incentive to make a pre-commitment to the purchase of those goods- namely that the producer is making a commitment to buy its own goods.

A variant of this scenario is that countertrade may itself be used to finance the improvements in question. An actual, albeit not recent, example of this is the case of Independent Seafoods of Western Australia. The company was searching for new sources of supply and found that "suitable product was available off the Vietnamese coast but this was not acceptable to the Australian market because of hygienic, quality, grading and packaging considerations. The Australian firm decided that the answer to its problem of supply was to upgrade the production of several seafood producers in Vietnam to Aulstralian standards in return for a priority claim on their output."[17] The Vietnamese producers paid Independent Seafoods with seafood and seafood products for the equipment, know-how etc. it supplied. It will be observed that the structure of this relationship addresses an additional transaction costs problem that a producer faces when it seeks to break into export markets through improving or

[17] Richard Fletcher, "Network Theory and Countertrade Transactions", International Business Review 5, 167-189 (1996), p. 178.

adapting its product. In contracting with an unaffiliated party to make the improvements, the producer must manage the risk that the unaffiliated party will provide substandard goods and services and the result will be that the products are still not in condition for export marketing. In the Independent Seafoods transaction, because the supplier of the goods and services that allow for the upgrades is the same party that must dispose of the upgraded products, this risk is largely shifted away from the developing country producer. Here the "hostage effect" is similar to the case of buyback, discussed above.

A Legal Analysis of Countertrade under the WTO Agreements

General Considerations

As a general matter, WTO law does not discipline directly the behavior of private actors. A major exception is the TRIPs Agreement, which requires that WTO Members provide for intellectual property rights and their enforcement against private actors. Otherwise, WTO disciplines have essentially nothing to say concerning voluntary countertrade transactions between private actors. As will be discussed below, the one area where the WTO rules may be relevant to purely private market behavior is the case of dumping: WTO law does not prohibit dumping, but does have a set of disciplines, substantive and procedural rules that determine under what circumstances WTO Members may impose antidumping duties on imports (dumping is the sale of a like product in the country of importation at a lower price than it is being sold in the country of production). But, in general, WTO disciplines will only be relevant where governments are regulating countertrade (for example making it mandatory or a condition of foreign investment, or in other ways creating incentives for private parties to undertake it) or where governments are themselves participating in countertrade as market actors. In the latter case, WTO rules are relevant, whether the transaction is government-to-government or government to foreign private firm.

Transparency

The negative view of barter and countertrade reflected in the GATT report frequently attributed to the WTO and other international economic institutions is often attributed in part to the notion that barter and countertrade are inconsistent with the principle of transparency that is central to the multilateral trading system. Such a perspective is, arguably, mistaken in two ways. First of all, it is a mistaken view of what the principle of transparency in the GATT/WTO system actually is. And secondly, it is mistaken in the assumption that "conventional" transactions-where goods or services are sold for a monetary payment and unlinked to purchases or undertakings to purchase of other goods and services—are more transparent.

The principle of transparency finds its most authoritative expression in Article X of the GATT. It is clear from Article X that the principle has essentially nothing to do with transactional transparency: it revolved around transparency in laws and regulations that affect commerce. In several respects the WTO system is permissive of the right of governments to request certain information from traders, namely where they are subject to anti-dumping and countervailing duty proceedings. At the same time, these agreements (which will be considered more generally in a later section of this paper) also require in some respects governments to protect the confidentiality of certain information, i.e. to ensure it is not disclosed publicly. In no case does a WTO agreement require a Member government to mandate transparency in transactions between private traders.

When we turn to cases where governments themselves act as traders, here the relevant norms are contained in Article 17 of the GATT, on State Trading Enterprises. Here, there are some transparency requirements imposed on WTO Members. These are as follows: "(*c*) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (*a*), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(*d*) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises." It is evident that these requirements, and their limits, apply equally to barter or countertrade as well as other transactions of state trading enterprises. There is no reason to believe that barter or countertrade would prevent a WTO Member from fulfilling the requirements in question, or circumvent them.

In some informal domestic settings, barter is associated with under the radar transactions that, by avoiding money changing hands, are assumed to be aimed at concealing the transaction from tax or other regulatory authorities. There are legendary stories about organized crime exchanging stolen art for weapons, to name one example. Only barter in the strict sense avoids entirely monetary transactions, and only where the parties are using themselves the bartered goods or services, not reselling them to a third party. In the case of international transactions in *goods*, bartered or countertraded goods will have to be declared to customs just as goods in single cash transactions have to be declared. The concern then shifts to one of concealment of the actual value of the goods, to the extent that assessment of taxes and duties usually relies on a genuine transparent market price. However GATT/WTO rules on customs valuation allow precisely the possibility of customs authorities using a constructed price in situations where they cannot rely on invoice price information. In such situations, traders assume the risk that the authorities will construct a *higher* price than the one that would have been stated in the invoice in a single cash transaction. There is no reason for traders to assume that by avoiding an explicit cash price, they will end up paying less in duties and taxes than would otherwise being the case. Indeed, the more typical concern would be that given the discretion to construct the price of a transaction customs authorities will tend to self-interestedly err on the high, not the low side (assuming an absence of corruption).

Apart from the supposed risks of regulatory circumvention from barter or countertrade, there is an apparent concern that these practices impede or make more expensive information required to make markets function efficiently, i.e. they obscure price signals. In the case of fungible commodities, there is little concrete evidence that barter or countertrade transactions distort spot market prices. Information from individual transactions with a monetary price attached must still be filtered through consideration of multiple factors in order for a clear signal to be discerned-including credit terms, security of delivery, and risks of contamination, adulteration etc. When one is dealing with non-fungible commodities-goods where the quality and suitability for a given function can differ substantially from transaction to transaction-raw transaction-to-transaction price data themselves do not send by any means clear market signals.

In sum, as a policy matter even aside from strict legality barter and countertrade are not un-transparent in the sense of withholding or making more expensive information that markets require in order to function efficiently.

Most-Favoured Nation

The Most-Favoured-Nation (MFN) obligation in Article I of the GATT requires that WTO Members afford, unconditionally, to every WTO Member the most favourable treatment provided to the "like products" of any country. It could be argued that when the government is requiring by law that firms engage in countertrade it is violating MFN because it is imposing a condition on imports (the purchase of goods from the country's own producers) that is likely to be met only by suppliers from certain countries. However, in the *Canada-Autos* case, the WTO panel took a narrow view of the meaning of unconditionality in Article I of the GATT, which was that conditions unrelated to the national origin of the imported products need not violate Article I. Thus, a law that made countertrade mandatory but in no way limited the choice of foreign parties for countertrade transactions based on their national origin or the national origin of their goods would not likely violate the GATT.

Article III National Treatment

WTO Members are required to provide treatment "no less favourable" to "like" imported products than that provided to domestic products with respect to all "laws, regulations and requirements." This obligation does not apply to government procurement.   Where the government mandates countertrade as a condition of import transactions, but not in purely domestic transactions, it is fairly obvious that there is a less favourable treatment of imports. A buyer of domestic products does not face the need to impose on the seller, regardless of the transaction logic, a requirement that payment will be in the form of the buyer's own products, and this clearly provides an advantage to domestic over imported "like" products. Article III is however only relevant where there are "like" domestic products. Likeness for purposes of Article III:4 is defined by considerations such as the physical characteristics of the product, end uses, and consumer tastes and preferences. Historically, in most contexts where governments have imposed countertrade requirements of this kind, the imported products being sought could be observed to have significant differences with domestic products in terms of quality, level of technology etc. if indeed any domestic products existed for the end uses in question.

GATT Article XI: Quantitative Restrictions

Article XI of the GATT enjoins WTO Members from imposing prohibitions or restrictions on imports or exports. The GATT report is correct that a law requiring countertrade in import transactions is restriction on imports, and the WTO jurisprudence o the meaning of quantitative restrictions, both in the goods and the services context, supports the notion that virtually any measure that has some restrictive *effect* on imports or exports could violate Article XI.   Compulsory countertrade limits imports to those that can be paid for with domestic goods; this is obviously restrictive. It is also arguable that countertrade has a restrictive effect on exports, in that in order to import, domestic producers must offer their products for export to the seller of the imports, thereby removing them from the general export market. The obligations in

Article XI are subject to an exception in Article XII for import restrictions to safeguard the balance of payments. In such a case, however, the import restrictions must be administered on a non-discriminatory basis, preserving as far as possible the historical market shares of the WTO Members currently supplying the Market. While the GATT Study seems to suggest that a countertrade requirement is inherently at odds with the condition of non-discrimination in Article XII (paragraph 37) this need not be the case. For example, the countertrade requirement may apply primarily to goods that have never previously been imported into the country imposing the requirement. In such a case, obviously, there is no need to ensure that historical market shares are preserved. It is further significant that the requirement of maintaining historical market shares is not an absolute one, qualified by the expression "as closely as possible." Where countertrade is the chosen means of addressing balance of payments concerns, any deviation from historical market shares that *cannot be avoided* given this choice arguably does not violate the conditions of Article XII.

Under Article XII, it is perfectly legal to impose purely protectionist measures, such as import quotas, to protect the balance of payments. Measures such as import quotas are easy to implement in such as away as to preserve historical market share of importers. However, such measures do nothing to address the underlying imbalances that lead to instability in the balance of payments. Instead, they create protectionist constituencies and are difficult politically to remove even when the balance of payments crisis has passed (see the India-US dispute over the India's balance of payments restrictions). Drawing on the transaction costs analysis in the previous section of the paper, it is easy to see that a countertrade requirement may, by contrast, have the effect of addressing some of the underlying problems. Countertrade may lead to developed country sellers investing in the identification and cultivation of new export markets for the goods of the country imposing the countertrade requirement, and even in investing in improvements and modifications of such goods that enable their sale for export. Countertrade may enable technology transfer that would otherwise occur only under conditions of Foreign Direct Investment. Thus, countertrade may offer new ways of earning foreign exchange that may help to solve the underlying payments imbalances, unlike the other restrictions contemplated in the Article XII exception. It thus seems perverse, from a policy perspective, and a purposive interpretation of Article XII, that the GATT study would suggest the greater difficulty of conforming to Article XII in the case of countertrade than purely protective measures such as quotas.

State Trading Enterprises

Article XVII of the GATT provides, in part:

"Where governments are themselves engaged in commercial transactions, Article XVII of the GATT requires that they make purchase and sale decisions strictly in accordance with commercial considerations. The provisions of sub-paragraph (*a*) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales. "

This provision would appear to place an important legal constraint on the use of barter or countertrade by states. They can only make purchase and sale decisions based upon the willingness of a counterparty to engage in barter or countertrade on the basis of the considerations that would motivate a private party in choosing such a transaction. Here the literature that attempts to understand barter and countertrade as solutions to transaction costs problems can be helpful; solving these problems is a matter "commercial considerations" where we would predict that private parties in analogous circumstances would structure a transaction this way. The second obligation, to allow the enterprises of other contracting parties to compete for participation in such purchases and sales, would appear on its face to pose a problem for countertrade, where future purchases are tied to prior sales or vice versa. However, it should be noted that this obligation is not unqualified: it is nuanced by the expression "in accordance with customary business practice." Again, the concern seems to be cases where participation in purchases and sales is being restricted on grounds that have nothing to do with business practices, such as the national origin of the would-be purchaser or seller. Consider two examples of possible purchasing practices of STEs. An STE could conclude an Agreement with another country (let's say Germany with Russia) to purchase a particular commodity, let's say wheat exclusively from that country. Such an agreement would on its face be arguably discriminatory and contrary to the obligation to afford contracting parties, i.e. WTO Members other than Russia the opportunity to compete for participation. It appears to favor one country, perhaps for geopolitical reasons, which is impermissible under the non-discrimination principles of GATT to which Article XVII is arguably a lex specialis. But let us say that the Agreement between Germany and Russia includes a reciprocal obligation on Russia to sell a certain quantity or grain, and at a given price in a specific currency. The exclusivity afforded to Russia is not a matter of discrimination against other countries but a reasonable business decision, given the benefits to Germany in managing the risks of fluctuations in commodity prices and exchange rates. Private actors might well decide to manage risks in this way, and so the exclusivity is arguably “in accordance with customary business practice.”

The WTO TRIMS Agreement

The WTO TRIMS Agreement does not create any new substantive obligations beyond those in GATT Articles III and XI; it merely clarifies that certain kinds of investment measures are contrary to these provisions, and introduces certain transparency (reporting an monitoring requirements. According to the Illustrative List in the Agreement: “TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production… 2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports; (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production." In this Illustrative List, 2 (a) would seem to describe the situation where a government makes countertrade a condition for importing, even though the expression "countertrade" is not used. However, the effect here is solely that the disciplines of Article XI of the GATT apply, and these remain subject to the balance-of-payments exception discussed above.

Subsidies and Countervailing Duties

It has been suggested that barter or countertrade may constitute an export subsidy. [18] Export subsidies fall into the prohibited category under the WTO Subsidies and Countervailing Measures Agreement. As with the other WTO Uruguay Round Agreements, there is no WTO practice or even secondary literature that addresses the consistency of barter and countertrade with the SCM Agreement. One theory of an export subsidy is as follows: Country A makes its import of widgets from a producer in country B conditional on the producer in country B importing gadgets from country A. The producer in country B would rather not have an obligation to purchase the gadgets, and indeed will face costs of disposing of them. Thus in order to induce the export of the gadgets, Country A pays greater than the market price for the widgets. Does this fall within the meaning of an export subsidy under WTO law? In the SCM

[18] Marin, Tying in International Trade: Evidence on Countertrade, p. 470. Lecraw, The Management of Countertade: Factors influencing Success, Journal of International Business Studies (1985).

Agreement an export subsidy is defined to include “subsidies contingent, in law or in fact4, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I.”   The illustrative list in Annex A almost exclusively contains payments or rebates, including tax breaks, to exporting industries; the only measure that is listed that involves an inducement to the *purchaser* of the exported products is export credit and insurance schemes. But the inclusion of this example indicates that conceptually there is no reason why an export subsidy cannot consist of a payment to the purchaser rather than the producer of the exported products. In order to meet the definition of “subsidy” in the SCM Agreement a measure must entail a “financial contribution” within one of the various meanings in Article I of the SCM Agreement. According to Article I, a financial contribution may occur where government purchases goods. Thus on the hypothetical scenario we are examining a purchase of widgets conditional on the seller buying gadgets could have the requisite element of “financial contribution.” The question then becomes, whether the purchase confers a “benefit” on the producers of the gadgets. According to Article 14(d) of the SCM Agreement: “(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).” In sum, purchase of goods can be a financial contribution and can confer a benefit if made for more than adequate remuneration. It should be noted that strictly speaking the recipient of the financial contribution in the case of the hypothetical countertrade transaction is the importer of the gadgets whereas the beneficiary is the exporter.

However, it is clear from WTO Appellate Body jurisprudence under the SCM Agreement that the recipient of the financial contribution and the beneficiary need not be the same entity.

It is clear that, in determining whether the price at which the widgets are purchased represents more than adequate remuneration, transaction cost analysis may be of considerable use. Even if the purchase price for the widgets represents a premium over the world market price it need not constitute more than "adequate remuneration" if the transaction is an efficient means of managing the various kinds of risks analyzed in the transaction costs theories of countertrade. In effect, one would ask whether country A is paying to manage exchange rate, inflation, default or moral hazard risks through countertrade rather than through other mechanisms such as Foreign Direct Investment, currency and commodity futures contracts, financial swaps etc. Empirically one would expect more instances of the management of these risks by countertrade in a period or in a country or region where the latter alternatives have become more expensive and or less available.

The Government Procurement Agreement (GPA)

The GPA is a plurilateral agreement, which has only attracted the adhesion of a minority of WTO Members, mostly developed countries. The GPA is the only WTO Agreement besides the TRIMs Agreement that explicitly disciplines a countertrade practice, in this case offsets.

Article XVI of the GPA provides: 1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.

2. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation."

Offsets are defined in footnote 7 of the GPA as "measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements."

It must first of all be noted that the offer broad exception for developing countries in the GPA represents some acceptance by the WTO of the legitimacy of countertrade as a development tool.   Secondly, we must also consider the general exceptions in the GPA, Article XIII:

"1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour. "

Article XXIII: 1 certainly allows the use of offsets in defence procurement, a major area of countertrade. The question whether in some circumstances the XXIII:2 exception might also apply to offsets. For example, where governments lack the necessary foreign exchange to insure adequate imports of essential medicines or foodstuffs, could they justify an offset requirement as "necessary" for the protection of human life or health?

Anti-Dumping

Dumping is defined as the selling of a product in an export market for a lower price than in the home market. While dumping is not prohibited under WTO law, the WTO Anti-Dumping Agreement provides WTO Members with a self-help remedy against dumping in the form of anti-dumping duties, where dumping is determined to cause "material injury" to the domestic industry. Barter and countertrade are often claimed to be means of undermining or circumventing anti-dumping law, because bartered and countertraded goods lack a transparent, arms-length export price. In the case of barter, there may be no purchase price whatever-the contract is simply for a certain quantity of the importer's own goods. With respect to countertrade, there may be an export price (for instance, in counterpurchase agreements, the commitments of each party to purchase the other party's goods are likely to be expressed in monetary terms, not in volume) but the export price may not be so easily comparable to the domestic sale price; the reason is that the export price reflects in part the value to the importing party of the reciprocal commitment to purchase. No such commitment may exist in the case of domestic transactions and thus the home country price may, all things being equal, be higher in consequence. According to Vermulst,[19] in the case of barter, the export price will be constructed as with transactions where the parties are related, i.e. not arms-length. The normal benchmark, set out in Article 2.3 of the WTO Anti-Dumping Agreement, will be the price at which to products are first resold in the country of importation to an unrelated party. However, Article 2.4 of the Agreement requires a "fair" comparison of prices, and specifies certain allowances may be required to insure this "fair" comparison: "Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Taking into consideration the countertrade dimension of the sale may not be more difficult than in adjusting for other practices that tie buyers and sellers and affect price comparability, such as after sale-service, long-term commitments to purchase, and obligations with respect to marketing the goods in a certain way in the country of importation.

Conclusion

[19] Edwin Vermulst, The WTO Anti-Dumping Agreement: A Commentary, Oxford University Press, 2005.

The relationship of barter and countertrade to international trade policy and law merits more serious examination. The extremely negative attitude towards these practices that developed in the GATT in the mid-1980s, mostly in response to situations in command economies, has yet to be revisited in the WTO era. Although it is usually recited in the literature that barter and countertrade account for something between 15 and 30% of world trade, these are obviously guesses, since no statistics are kept by domestic or international institutions. "GATTthink" assumed that barter and countertrade was inefficient and will only exist, even between private parties, in the presence of some serious dysfunction in the marketplace caused by inefficient government policies, or alternatively, if one or other of those parties (or both) has an interest, presumed nefarious, in disguising or concealing the price of the transaction. Drawing on literature in transaction costs economics, this paper suggests that this view is wrong: governments as well as private parties may well engage in barter and countertrade transactions for reasons that are consistent with the spirit and letter of the multilateral trading system. Even in the situation where there is the strongest case that countertrade is in tension with GATT norms— namely where government measures compel countertrade as a response to balance of payments pressures-countertrade may be more compatible with the underlying principles of the GATT than other measures that can be justified under the balance-of-payments exception: unlike import quotas, for instance, mandating countertrade does not provide protection for specific domestic products that may be difficult to lift when the balance of payments crisis is over, while at the same time countertrade may expand export markets thereby contributing to longer-term improvements in the balance of payments and reducing the need to have again recourse to restriction of imports to manage the balance of payments.

Barter and countertrade have the potential to provide an alternative to Foreign Direct Investment as a means of managing certain transaction costs of contracting. Moreover, barter and countertrade can particularly be attractive in situations where the two parties have already invested in information about each others' products and have an ongoing business relationship; and especially where, as in buyback, the buyers' and sellers' interests in the quality and performance of each others' products can be linked. Institutions concerned with trade and development, whether UNCTAD, the WTO or the World Bank, have largely ignored (or simply maligned, in the case of the WTO's predecessor the GATT) barter and countertrade in their public advice to developing countries on trade policy options for developments. A more informed discussion of barter and countertrade requires the bracketing of prejudices and as a start an attempt to monitor and study the incidence and structure of such transactions in the contemporary world of international commerce.