

## International buy-back contracts

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Source: United Nations Economic Commission for Europe  
Palais des Nations, Genève, Switzerland 1211  
Telephone: (41-22) 917 4444  
Facsimile: (41-22) 917 0036  
Web: <http://www.unece.org/welcomef.htm>  
Email: [info.ece@unece.org](mailto:info.ece@unece.org)

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### Introduction

#### 1. Scope and purpose

International countertrade can take many forms. However, the present guide deals with only one of those forms - namely buy-back. Problems related with another form - counterpurchase - have been treated in a separate guide<sup>1</sup> issued by the United Nations Economic Commission for Europe. (For definitions of these two forms of countertrade, see Section 2.A below.)

The purpose of this guide is to provide to potential parties to buy-back transactions a basis for understanding the nature of the arrangement in which they are engaging, to help them identify the problem areas associated with the various components of the deal, and to give them guidance in drawing up the necessary contractual documents which define the rights and obligations of the parties.

#### 2. Terminology, parties, and contract structure

##### A. Terminology

###### Counterpurchase

In counterpurchase the seller and buyer of a primary transaction agree that the seller will subsequently buy (or will cause third parties to buy) products from the buyer (or from third parties in the buyer's country). In this form, the two flows of products - that is, the products sold under the primary transaction, on the one hand, and those sold in countertrade, on the other - are paid for in money. The value of products bought under the counterpurchase contract may be lower than, equal to or higher than the value of the products sold under the primary transaction. A typical feature of a counterpurchase transaction is that, contrary to buy-back (see below), there need not be any special relationship between the products sold under the primary transaction and those supplied in accordance with the counterpurchase contract.

###### Buy-back

In this form, the object of the primary transaction is machinery, equipment, patents, know-how, or technical assistance (hereinafter "equipment/technology") that will be used to set up production facilities for the buyer. The parties agree that the seller will subsequently buy from the buyer products produced in those production facilities. As in counterpurchase, both flows of products are paid for in money, and the value of the products bought back may be lower than, equal to or higher than that of the products of the primary transaction.

##### B. Parties

###### (a) Only two parties

Buy-back in its simplest form involves only two parties. One of the parties assumes the rights and obligations of a seller with regard to the primary transaction and those of a buyer in the buy-back transactions, while the other party takes the roles of seller and buyer in reversed order.

###### (b) Third parties as implementing sellers

However, it is possible that more than two parties are involved in a buy-back transaction. Thus, it may happen that the equipment/ technology which is the object of the primary transaction will not be used by the buyer itself (who might be a foreign trade organization or a trading-house), but is being

bought, licensed or otherwise acquired by it in the interest of a third party who will then set up the actual production facilities. In such a case, the buy-back products may be purchased from that third party, and not from the buyer of the primary transaction.

(c) Third parties as implementing buyers

In cases where the products sold in buy-back are not suitable for in-house use by the original seller, it is often agreed that he will have the right to assign his buy-back obligation to third parties, who will then discharge buy-back obligation of the original seller.

C. Contract structure

When the parties are negotiating the details of a buy-back transaction, one of the first questions they must agree on is this: will the various rights and obligations of the parties be evidenced in a single contract or will several contracts be drawn up for this purpose? The answer to this question will depend on the specific features of the individual transaction in question.

(a) One contract

It may be said that, if, at the time when buy-back is agreed on, it is possible for the parties to lay down the exact specifications of the buy-back products, and if there are no third parties involved, there is usually no reason why the whole of the parties' rights and obligations could not be included in the same contract.

(b) Separate contracts

In some cases, e.g., for financing reasons, separate contracts may be necessary.

Chapter I

Some preliminary issues

1. Scope of this guide

Parties to a buy-back deal may want to regulate their rights and obligations in a simple manner, and include the relevant provisions in the same contractual document that regulates the primary transaction. However, they often prefer to use several contracts. This guide deals with that manner of proceeding.

In principle, the rights and obligations of the parties under the primary transaction are similar to those usually agreed upon in international contracts for the sale of equipment/technology. The same can be said about the terms and conditions of the subsequent contracts implementing the sale and purchase of the specific buy-back products.

Yet, in buy-back there is a special relationship between these contracts. The equipment/technology that is involved in the setting up of the production facilities emanates from the party who commits himself to the subsequent purchase of products produced thereby.

For that reason this guide will discuss not only problems relating to the buy-back contract itself, but will also briefly address some of the main issues of the primary contract.

2. Definitions

In this guide, the terms below will have the following meanings:

- Equipment/ technology means the machinery and/or equipment and/or patents and/or know-how and/or technical assistance that will enable the manufacturing of the Products.
- Primary contract means the contract that regulates the rights and obligations of the respective parties with regard to the supply of the equipment/technology.
- Original seller means the party to the primary contract who supplies the equipment/ technology agreed upon therein.
- Original buyer means the party to the primary contract who purchases the equipment/ technology agreed upon therein
- Products means the products that are manufactured by using the equipment/technology and are sold and purchased by way of buy-back.
- Plant means the industrial or other works where the products are manufactured.
- Buy-back contract means the contract which the original seller and the original Buyer conclude simultaneously with the primary contract, and which regulates their rights and obligations, as parties to the buy-back contract, with regard to the sale and purchase of the products.
- Buy-back seller means the original buyer in his capacity as party to the buy-back contract.
- Buy-back purchaser means the original seller in his capacity as party to the buy-back

- Implementing contract means the contract that regulates the rights and obligations of the parties to that contract with regard to the sale and purchase of the specific buy-back Products arising out of the buy-back contract.
- Implementing seller means that party to the implementing contract who supplies the products agreed on therein. He usually is the party who is the original buyer and the buy-back seller, but he may also be a third party.
- Implementing buyer means the party to the implementing contract who purchases the products agreed on therein. He may, in fact, be the party who is the original seller and the buy-back purchaser, but he may also be a third party.
- Assignor means the buy-back purchaser, or, as the case may be, the buy-back Seller, who has assigned his rights and obligations under the buy-back contract to a third party.
- Assignee means the third party to whom the Assignor has assigned his rights and obligations under the buy-back contract.

## Chapter II

### The primary contract

The conformity of the products with the requirements agreed upon in the buy-back contract (see chapter three, section 3) depends, among other things, on the equipment/technology that is sold under the primary contract, on the manner in which the equipment/technology is transferred and used in the plant, and on the quality control policies and procedures that are instituted at the plant. The parties to the primary contract should therefore draft particularly carefully those parts of the contract that regulate these questions. A brief account of the issues involved is given below. For further details, parties should consult existing guides and model contracts dealing with these matters.

#### 1. Machinery and equipment

##### (a) Description

If the Original Seller is to supply machinery and/or equipment, the primary contract should contain a clear description thereof, and of the respective performance requirements.

As a rule, supply of machinery and equipment includes delivery of the technical documentation necessary for their proper use. If this is the case, the primary contract should specify the documents and stipulate how they will be handed over to the original buyer.

##### (b) Installation

If installation of the machinery and equipment is included in the primary contract, it should specify the respective obligations of the parties in this regard.

##### (c) Commissioning, test runs, and acceptance

When appropriate, the primary contract should specify the conditions for, and duration of, the commissioning of the machinery and equipment. Similarly, details on the test runs where the performance of the machinery and equipment are proven, should be agreed upon. Finally, the primary contract should set forth the terms and conditions under which the supply of the machinery and equipment will be accepted.

##### (d) Guarantees

The primary contract should set out the quality guarantee (material and workmanship guarantee) and performance guarantee (technological guarantee) of the machinery and equipment.

#### 2. Patents, know-how, and technical assistance

Often a buy-back transaction includes not only the sale by the original seller of production machinery and equipment, but also a grant of licence to use the original seller's patent rights and/or know-how relating to the manufacture of the products. As part of the transaction, the original seller may also render to the original buyer technical assistance relating to the manufacture of the products.

##### (a) Scope of licence

The primary contract should define the patents, technical information and other know-how that the original seller will license to the original buyer.

##### (b) Disclosure

The parties should agree on the manner (e.g., handing over of specifications, drawings, computer diskettes, etc.) in which the technical information will be disclosed by the original seller to the original buyer.

##### (c) Technical assistance

The parties may wish to agree that the original seller will arrange for his own technical personnel to visit the plant to assist the original buyer in undertaking the manufacture and sale of the products and/or train the original buyer's personnel in this respect. If this is the case, the primary contract should specify the number of the original seller's personnel that will be involved, and the time periods that will be used for this purpose.

Sometimes it will be necessary for the representatives of the original buyer to visit the plant of the original seller in order to become familiar with and/or be trained in the manufacturing of the products. In that case, the primary contract should contain provisions defining the scope and duration of such visit(s) or training, and the number of original buyer's personnel that will be involved therein.

### 3. Quality control and guarantees

#### (a) Quality control

To ensure that the products are of the agreed specification, performance and quality, the parties may wish to institute appropriate quality control policies and procedures. Quality control provisions might further stipulate procedures to be followed in the event that the products do not meet the agreed specifications, performance or quality.

#### (b) Guarantees

Matters related to the guarantee of the products can, of course, be agreed upon in the buy-back contract and, if necessary, even in the individual implementing contracts. However, the parties may wish to include appropriate provisions already in the primary contract. This might be the case, for example, when products will be sold to third parties under the trade mark of the original seller. He has then a direct interest in ensuring that appropriate guarantee standards are applied also with regard to such third parties.

## Chapter III

### Buy-back contract

#### 1. The buy-back commitment

##### (a) The requirement of buy back

If the sale of equipment/technology involves a buy-back commitment, the buy-back purchaser will often have to take specific measures to fulfil that undertaking. It is therefore very important that the original buyer informs the original seller of the buy-back requirement before negotiations on the substance of the primary contract begin. An early notice of the buy-back requirement will be of benefit to both parties since it allows the original seller to study, before the parties use time and expenses in negotiating the primary contract, whether or not he is willing, or able, to commit himself to the buy-back undertaking proposed by the original buyer.

Consequently, already at this stage the original buyer should, whenever possible, propose concrete details for the transaction, including the proposed total value, and the time period for fulfilment, of the buy-back obligation.

##### (b) Mutual commitments

If buy-back is accepted and agreed on by the parties, the buy-back contract should contain in one of its first paragraphs a clear commitment by the buy-back purchaser to purchase, on agreed terms, products, and an equally clear commitment by the buy-back seller to sell said products.

#### 2. The buy-back products

##### (a) Definition

Definition of the products is usually not a problem in buy-back. However, if the equipment/technology permits the production of a wide range of products, the parties may wish to agree on a mechanism according to which the assortment of the products to be sold and purchased under the buy-back contract will be agreed upon.

##### (b) Availability of Products

Once the parties have agreed that the buy-back purchaser will purchase products, it may be very important for him to be sure that he will in fact receive the products. The parties may therefore wish to include in the buy-back contract a commitment by the buy-back seller whereby he warrants that agreed amounts of products will be available at the time of performance. The buy-back contract should also stipulate the legal consequences if products are subsequently not available (see section 15 below).

#### 3. Conformity of the products

(a) Specification and quality

With regard to the conformity of the products the parties may simply refer to those provisions of the primary contract where the specifications and quality of the products are defined, and stipulate that the products to be delivered must correspond to such specifications and quality.

(b) Quantity and assortment

Regarding the quantity and, when applicable, assortment of the products, the parties may refer to the requirements set forth in the individual implementing contracts to be concluded within the framework of the buy-back contract.

4. Total value of buy-back commitment

(a) Value should be defined

The buy-back contract should contain a provision defining the value of the buy-back commitment - i.e., the value for which the buy-back purchaser will purchase products within the framework of the buy-back contract. This amount may be equal to, or lower or higher than, the price of the equipment/technology sold under the primary contract.

(b) Alternative ways of defining

The value of the buy-back commitment can be agreed in absolute money terms or as a percentage of the total price of the equipment/technology sold under the primary contract.

(c) Basis of calculation, etc. should be specified

The value of the buy-back commitment may be defined in terms of a percentage of the price of the equipment/technology, if such price (or the basis on which it will be calculated) is stated in unambiguous terms. That may not always be the case. Thus, for instance, the price of technical assistance might not be included in the price of the primary contract, but be invoiced separately on a time-basis. In such cases, the value of the buy-back commitment should be defined in a way which permits taking into account the final price of the technical assistance.

The buy-back contract must define clearly the value for which the individual implementing contracts will be applied against the buy-back purchaser's total undertaking (for instance, whether it is the FOB- or the CIF-value of the respective implementing contracts). Further, if the implementing contracts are to be invoiced in a currency other than the currency in which the aggregate value of the buy-back undertaking is set forth in the buy-back contract, the parties should agree in the said contract on the exchange rate at which the implementing contracts shall be applied against the aggregate buy-back undertaking; in doing so, they should take into account the applicable foreign exchange regulations (see also subsection 5 (d) below).

5. Price of the products

(a) Reasons for deferring the setting of prices

In buy-back the parties to the buy-back contract could in principle agree on the prices of the products, since the parties to that contract will also be parties to the subsequent implementing contracts.

Substantial time may pass after the signing of the primary contract and the buy-back contract before commercial manufacture of products is started at the plant. During that period prices of raw materials and components may change, and the same may happen to the costs of labour. The market situation for the products may also be different when commercial production begins.

For these and similar reasons the parties to the buy-back contract may wish to leave the final agreement on the prices to be made only at the time when the individual implementing contracts are concluded.

(b) Guidelines and standards

Nevertheless, the parties to the buy-back contract may wish to set, in that contract, certain guidelines or standards to be applied when prices are subsequently determined. There are various ways in which that can be done.

Thus, reference can be made, for example, to the prices charged generally for the types of products that are similar to the products. Or the parties could refer to the price of the said types of products in the territory in which the products will be consumed or re-sold. If it can be expected that no products of the same type will be offered for sale in that territory, reference may have to be made to the fair market value of the Products themselves in the said territory.

(c) Most-favoured purchaser terms

In order to ensure that the buy-back purchaser or his assignees will not be undersold in the agreed territory due to the fact that the buy-back seller grants more advantageous conditions to other purchasers, the parties may wish to agree in the buy-back contract that the buy-back purchaser and his assignees shall be granted most-favoured purchaser conditions with regard to the buy-back products. The parties should bear in mind any relevant anti-dumping, cartel or other similar legislation.

#### (d) Currency

The parties should agree in the buy-back contract on the currency in which the buy-back products shall be quoted and paid for. If the currency of payment is other than that of quotation, the parties should also agree on the method to be used when the currency of quotation is converted into the currency of payment (see also subsection 4 (c) above).

### 6. Assignment

#### (a) Reasons for Assignment

In buy-back, both the buy-back purchaser and the buy-back seller may find it necessary to assign their rights and obligations, either entirely or partly, to a third party in particular. If the products cannot be used in-house by the buy-back purchaser, there are various alternative ways in which he can dispose of them.

For example, he can purchase the products himself and then resell them, or he can assign the buy-back obligation directly to an assignee who will then conclude implementing contracts with the buy-back seller, take delivery of the products and either use them himself or resell them. There may, of course, be occasions when the buy-back purchaser can use a part of the products himself, and perhaps resell another part, but will still need to assign the rest of the commitment to a third party.

#### (b) Assignment by agreement, approvals and duty to inform

If it is the common intention of the parties that assignment in some form should be possible, they should provide for this possibility in the buy-back contract. When appropriate, an approval from relevant authorities and/or financial institutions should be obtained for the assignment.

The parties may also wish to agree in the buy-back contract that if a party assigns his rights and obligations under the contract to an assignee, he must give the other party notice thereof. If they so agree, they should also include in the contract provisions on the legal consequences of a failure to give such notice.

#### (c) Legal effect of assignment

The legal effect of assignment is that usually all rights and obligations of the assignor with regard to the assigned portion will terminate and be vested in the assignee. Therefore, if it is the intention of the parties that the assignor will remain responsible, together with the assignee, for the fulfilment of the assigned obligations, they should include a provision to that effect in the buy-back contract.

#### (d) The assignee and the other party to be bound to each other

In cases where it is agreed that a party to a buy-back contract will have the right to assign some part, or the whole, of his rights and obligations to a third party, the parties should provide in the buy-back contract that the assignor shall include in his agreement with any assignee a clause whereby the assignee commits himself to be bound by the provisions of the buy-back contract with regard to the assigned portion.

To counter balance this provision, the parties may wish to agree that, again with regard to the assigned portion, the other party shall in turn become bound vis-a-vis the respective assignee.

### 7. Re-sale of the products

#### (a) Re-sale territory to be defined

In the event that the buy-back products are to be re-sold, either by the buy-back purchaser or by an assignee, the parties to the buy-back contract may wish to consider whether they should define the territory where re-sale can take place.

#### (b) Rules of competition to be observed

It should be observed, however, that territorial restrictions may in certain circumstances violate national or international rules of competition, or otherwise be un-enforceable in practice. The situation should therefore be studied carefully in each individual case.

### 8. Reference

In the event that the buy-back purchaser's commitment will be discharged through implementing contracts, entered into within the framework of the buy-back contract, it is important that each

implementing contract that falls into this category is indeed recognized and recorded as such. For this purpose, the buy-back contract should contain a provision stipulating that each implementing contract must explicitly refer to the buy-back contract and state that it is made in fulfilment of the buy-back contract. Such a reference will facilitate the monitoring and recording of the individual implementing contracts.

#### 9. Terms of delivery

Usually the parties of the buy-back contract will also be the parties to the individual implementing contracts. If this is the case, they may wish to agree already in the buy-back contract on the terms of delivery to be used in the implementing contracts.

#### 10. Time schedules for performance

##### (a) Commencement of delivery

Since the products will be manufactured at the buy-back seller's plant, deliveries can begin only after some time has passed from the completion of the performance test and acceptance of the equipment/technology under the primary contract. The parties should therefore define in the buy-back contract the time period that will be required for the first delivery to take place.

##### (b) Estimated time schedule

If the fulfilment of the buy-back commitment will be extended over a period of several years, as is often the case, the parties may not wish to agree in advance on binding yearly quotas for deliveries, but rather to create, in a form of an estimated time schedule, only a broad framework within which to operate.

##### (c) Actual quantities and assortments

With regard to the actual quantities and, when applicable, actual assortments, of the products, the parties may wish to agree upon a mechanism according to which these will be defined. For example, the buy-back contract could stipulate that actual quantities and assortments will be negotiated and agreed upon in individual implementing contracts. These would be concluded between the parties an agreed number of days or months before the beginning of the next delivery period (year, quarter or month).

Even if agreement on binding quantities and assortments is left for subsequent implementing contracts, the parties may wish to set out in the buy-back contract some guidelines in that respect. They might stipulate, for instance, that when actual quantities and assortments are negotiated, the buy-back purchaser's own needs for products and/or prevailing market conditions in the agreed resale territory will be taken into account. On the other hand, the buy-back contract might also provide for certain minimum quantities that must always be purchased and/or maximum quantities that cannot be exceeded unless both parties agree thereto.

##### (d) Final date

While certain flexibility in the fulfilment of the buy-back commitment may suit both parties, they may wish to include in the buy-back contract a final date by which all implementing contracts must have been concluded.

#### 11. Lack of conformity

Since the parties to the buy-back contract will, as a rule, also be parties to the implementing contracts, and since the buy-back products are well known to them, they may wish to agree already in the buy-back contract on their respective rights and obligations in the event that the products are not in conformity with the agreed requirements. If the buy-back purchaser uses the equipment/technology to manufacture identical or similar products himself, the provisions he uses in contracts with his own customers might be used as a model when drafting the respective clauses of the buy-back contract.

#### 12. Payment

##### (a) Terms of payment

The buy-back contract should state how and against what documents payment of deliveries under implementing contracts will be effected, whether any securities of payment will have to be arranged by the buy-back purchaser or, as the case may be, by his assignee. The buy-back contract should also define what requirements such securities of payment, if agreed upon, should fulfil as well as which of the parties will be responsible for the costs involved in the agreed payment arrangements.

##### (b) Escrow arrangements

In appropriate circumstances the parties might also agree on an escrow arrangement. Thereby, the value of the products delivered under the primary contract - or the proceeds received from their re-sale - is placed by the original buyer on an escrow account with a bank or another third party, and is subsequently used to pay for some or all of the buy-back products.

### 13. Monitoring the performance

#### (a) Evidence accounts

The parties should agree in the buy-back contract on how the performance of the various obligations of the parties is monitored. A rather simple mechanism is that each party records those steps that are taken on his side in fulfilment of the respective obligations within the framework of the buy-back contract. Thus, in such a record (sometimes called an "evidence account") an entry could be made of each implementing contract concluded, each delivery completed, and each payment made within the framework of the buy-back contract.

#### (b) Assignee(s) to inform Assignor

In the event of assignment, the assignor normally has no particular interest in monitoring the fulfilment of the assigned portion; his rights and obligations with regard to that portion will have terminated (see subsection 6(d) above). However, if it is agreed that the assignor will remain, together with the assignee, responsible for the fulfilment of the buy-back obligation, the assignor should require that the assignee inform him about all implementing contracts that he concludes within the framework of the buy-back contract. If this is done, the assignor will be able to follow the development of the situation and, when called for, take appropriate measures to secure the timely fulfilment of the buy-back obligations.

#### (c) Evidence accounts to be compared and agreed

Since both parties to the buy-back contract should be informed of how the contract is being performed, the parties should agree in the contract that their evidence accounts will be compared and agreed upon on a regular basis. In the contract the parties could also agree that evidence accounts thus compared and agreed shall constitute final and conclusive evidence as to the performance of their obligations under the buy-back contract.

### 14. Liability

#### (a) Liquidated damages

Failure by either party to fulfil his obligations under the buy-back contract may imply liability to damages. If this question is not regulated in the buy-back contract or in the implementing contract(s), disputes will be settled in accordance with the rules of the applicable law.

It may be agreed in the buy-back contract that the non-compliance by a party or his assignee with the obligations thereunder gives birth to an obligation to pay liquidated damages - i.e., damages which are determined in advance by the parties themselves in the buy-back contract. The amount of the liquidated damages can be agreed as an absolute sum of money or, as is more usual, as a given percentage of the value of that part of the buy-back commitment which has remained unfulfilled.

#### (b) Bank guarantee

In appropriate circumstances the parties may wish to agree that the commitment by a party, and - as the case may be - his assignee, to pay liquidated damages should be backed by a bank guarantee obtained by the party (or his assignee). If this is the case, the parties should include in the buy-back contract provisions defining the amount of the bank guarantee, the bank in which it should be obtained, and the form and content it should have.

#### (c) Non-fulfilment caused by the other party

It is a general principle of contract law that a party may not claim damages for non-fulfilment of the agreed obligations by the other party if such non-fulfilment is a result of a failure by the first-mentioned party to meet his own commitments under the contract.

The parties may therefore wish to underline this principle in the buy-back contract by stating that no liquidated damages will be payable by a party insofar as the lack of performance of his obligations is due to an event which the other party has caused.

### 15. Relief from liability

#### (a) Circumstances to be defined

The parties to the buy-back contract may wish to provide in their contract for those circumstances which might bring relief from liability for consequences of failure to perform contractual obligations.

Where the parties fail to make such provision, the circumstances prompting relief from liability for consequences of failure to perform contractual obligations result from the law applicable to their contract.

The parties might stipulate that a party is not liable for failure to perform any of his obligations if he can prove that the failure was due to an impediment occurring after the signing of the buy-back contract, and which was beyond his control, and that he could not reasonably have been expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences. Examples of such situations are: war, civil strife, interference by public authorities, fire, natural disasters, etc.

#### (b) Procedure

In addition to the circumstances prompting relief from liability for failure to perform contractual obligations, the contract should also specify the procedure in the event of a party invoking relief. The following items constitute the most important provisions in this respect: the party which fails to perform and which is claiming relief should, without undue delay, give notice to the other party of the commencement of the impediment and of its inability to perform its obligations; the parties should specify the consequences for failure to give such notice (for example, payment of damages); and the right to terminate the contract in the event of a protracted impediment.

### 16. Termination of primary contract or implementing contract

#### (a) Primary Contract

Since the manufacture of products is possible only in the event that the equipment/technology is successfully transferred and accepted, it is clear that if this does not happen, and the primary contract is therefore terminated, there is no basis for the implementation of the buy-back contract either. The buy-back contract should therefore stipulate that if the primary contract is subsequently terminated without the equipment/technology having been transferred and accepted, the buy-back contract shall automatically become null and void.

#### (b) Implementing contracts

With respect to implementing contracts, the parties should agree whether, and under what conditions, the buy-back purchaser will be deemed to have fulfilled, in spite of the termination of an implementing contract, that part of his buy-back obligation which corresponds to the value of the implementing contract so terminated, and include corresponding provisions in the buy-back contract.

### 17. Prior commitments, effective date, amendments, and governing language

#### (a) Prior commitments

The parties to the buy-back contract may wish to include therein a provision, often found in commercial contracts, stating that the contract supersedes and invalidates all other commitments or representations which the parties may have made either orally or in writing prior to the date of signature of the contract.

#### (b) Effective date

The parties should agree on the date on which the buy-back contract enters into force. This date may be, for example, the date of the signing of the contract. On the other hand, if the effectiveness of the buy-back contract is subject to approval by competent authorities and/or financial institutions having an interest in the matter, the parties may wish to agree that each party must notify the other of approvals obtained in their respective countries, and that the date (of the latest) of such notification(s) will be the date when the buy-back contract enters into force. Finally, the parties should provide that if such approvals are not obtained within an agreed period, each party has the right to rescind the Buy-back Contract.

#### (c) Amendments

The buy-back contract should stipulate that any amendments to it will be effective only if made in writing and signed by legally authorized representatives of the parties, and if approved, when applicable, by the competent authorities and/or financial institutions.

#### (d) Language

It is to be recommended that the contracts used in the buy-back transaction be drawn up in one language only. As a consequence, disagreements based merely on differences in terminology or expression are avoided. If several languages are used, it is desirable that the parties designate one of the languages used as the governing language which shall be decisive in cases of dispute. In any

event, if the contract is drawn up in more than one language, the parties should endeavour to ensure that the texts are identical.

#### 18. Applicable law

The parties should agree on the law which governs the contracts used in the buy-back transaction, and in accordance with which the contracts are to be construed.

#### 19. Settlement of disputes

##### (a) Rules or institutions to be designated

With regard to any dispute or difference arising from or in connection with the interpretation or execution of the contracts used in the buy-back transaction, the parties should try to negotiate amicably before having recourse to arbitration. Should, however, the parties be unable to settle such dispute or difference, international business practice presents adequate conciliation and arbitration procedures to enable the parties to select the one appropriate to a particular case. The parties should state in the contract which arbitration rules will be applied, and/or which arbitration institution shall be competent, for the settlement of eventual disputes between them. If the parties wish to resort to ad hoc arbitration, they should specify how the arbitration court will be set up and function.

##### (b) Number of arbitrators to be agreed

Under many arbitration rules, the parties may agree on the number of arbitrators.

##### (c) Language of arbitration procedure

The parties may wish to agree on the language to be used in the arbitration procedure.

##### (d) Place of arbitration

The parties may wish to agree on the place where the arbitration will be held.

#### Annex

This Annex contains alternative clauses for a buy-back contract. Because of this, the document should be adapted to the specific circumstances of the transaction in question.

#### Buy-back contract

Between

Alpha \_\_\_\_\_<sup>1</sup>

of 1, Alpha Street, 00100 Alphatown, Alphaland (hereinafter "Alpha").

and

Beta \_\_\_\_\_<sup>1</sup>

of 1, Beta Street, 00100 Betatown, Betaland (hereinafter "Beta").

Whereas

Under a Primary Contract dated \_\_\_\_\_ 19\_\_\_\_ (hereinafter the "Primary Contract")<sup>2</sup> and the Technical Assistance Contract dated \_\_\_\_\_ 19\_\_\_\_ (hereinafter the "technical assistance contract")/ Alpha has sold to Beta, and Beta has purchased from Alpha, under the terms and conditions set forth in the primary contract/and the technical assistance contract/, the machinery/and/equipment/and/patents/and/know-how/and/technical assistance/specified therein (hereinafter "the equipment/technology"), to manufacture \_\_\_\_\_ (hereinafter "the products") in Betaland.

By way of buy-back, and under the terms and conditions set forth in this contract, Beta agrees to sell to Alpha, and Alpha agrees to purchase from Beta, products as specified herein.

Now, therefore, the parties to this contract agree as follows:

#### Article I

##### The buy-back commitment

1.1. Alpha hereby agrees to buy (or cause the purchase) from Beta, under the terms and conditions set forth in this contract, products manufactured by Beta using the equipment/technology sold by Alpha, and take delivery of the said products.

1.2. Beta hereby agrees to sell to Alpha (or to his assignee (as defined below in Article 6)), under the terms and conditions set forth in this Contract, such Products, and to accept the purchase by Alpha of such Products as buy-back within the framework of this Contract.

#### Article 2

##### The products

2.1. The assortment of products to be sold and purchased under this contract is agreed upon by the parties in accordance with the provision of article 10 below.

2.2. Beta hereby warrants that sufficient products of the agreed assortment will be available at the times specified in article 10 of this contract.

#### Article 3

##### Conformity of the products

3.1. The products to be delivered shall correspond to the specifications and quality agreed upon in the primary contract, and must be of the quantity and assortment required by the individual purchase contracts (hereinafter "implementing contract(s)") to be concluded within the framework of this contract between Beta /or his assignee (as defined below in article 6)/ in his capacity of seller of the products (hereinafter "the implementing seller"), and Alpha/or his assignee (as defined below in Article 6)/ in his capacity of buyer of the products (hereinafter "the implementing buyer").

3.2. The products must be contained or packaged in the manner required by the respective implementing contract.

#### Article 4

##### Total value of the buy-back commitment

4.1. During the term of this Contract Alpha shall purchase from Beta Products for the value of/

(A)<sup>3</sup> \_\_\_\_\_<sup>4</sup>

(B) not less than \_\_\_\_\_ per cent ( \_\_\_\_\_ %) of the total \_\_\_\_\_<sup>5</sup> price of the primary contract as specified in Article X of the contract/plus not less than \_\_\_\_\_ per cent ( \_\_\_\_\_ %) of the total price of the technical assistance invoiced in accordance with Article X of the technical assistance contract.

4.2. The value of each of the implementing contracts to be applied against Alpha's buy-back commitment under this contract shall be \_\_\_\_\_<sup>5</sup> value of the respective Implementing contract.

4.3. The value of each of the implementing contracts, if invoiced in a currency other than the currency in which Alpha's buy-back commitment is set forth hereabove, shall be applied against Alpha's commitment at the exchange rate quoted by the central bank of \_\_\_\_\_<sup>6</sup> at the date of the invoice issued in respect of such implementing contract.

#### Article 5

##### The price of the products

5.1(A). The prices of the Products offered under this Contract shall correspond to/

(A.1)<sup>7</sup>. The price generally charged at the time of the conclusion of the respective implementing contract for such products under comparable circumstances in the trade concerned.<sup>8</sup>

(A.2)<sup>7</sup>. The fair/average/market value of the products in the territory (as defined below in pare. 7.1) under competitive terms of delivery and payment.

(A.3)<sup>7</sup>. The prices of competing products, of essentially similar specifications and quality standards than those of the products, in the territory (as defined below in pare. 7.1) under competitive terms of delivery and payment.

(A.4)<sup>7</sup>. The quotation of the product at the \_\_\_\_\_ exchange<sup>9</sup> on the date when the respective implementing contract is concluded.

5.1(B). The prices of the products shall be agreed upon from case-to-case by respective implementing seller and impleting buyer of the products.

5.1(C). Alpha/and the assignee(s)/shall be granted most-favoured-customer conditions in the territory with regard to the products.

5.2. The prices of the products shall be quoted and paid for in \_\_\_\_\_<sup>10</sup>

#### Article 6

##### Assignment

6.1(A). Alpha shall not be entitled to assign its buy-back undertaking under this Contract, either as a whole, or any part of it, to any other entity/without the express written consent of Beta/.<sup>11</sup>

Such consent shall not be unreasonably withheld.

6.1(B). Alpha may assign the whole, or a part, of its buy-back undertaking under this contract, to any third party

6.2. In the event that Alpha (hereinafter "the assignor") shall assign any part of its buy-back commitment under this contract to a third party (hereinafter "the assignee")/

(A) all rights and obligations of the assignor under this contract with regard to the assigned part shall terminate at the time when the assignment contract between the assignor and the assignee becomes effective, and the respective rights and obligations shall be vested in the said assignee; provided that in the said agreement the assignee assumes all the obligations of the assignor agreed upon in this contract with regard to the part so assigned

(B) the assignor shall remain responsible, /jointly/ jointly and severally/ with the assignee, for the fulfilment of all of its obligations agreed upon in this contract.

6.3. Alpha agrees to include in its agreement with any assignee appropriate provisions whereby the assignee commits itself to be bound by this contract with regard to the assigned part of the buy-back commitment, as if this contract had originally been executed by the assignee. In consideration for the said commitment, Beta agrees to be bound by this contract against the respective assignee, with regard to the assigned part of the buy-back commitment, as if this contract had originally been executed with the assignee.

6.4. In the event that a party shall assign any part of its buy-back obligations under this contract to an assignee, it must give notice to the other party of the assignment. If the notice is not received by the other party within a reasonable time after the assignment, the party will be liable for the damages resulting from such non-receipt.

#### Article 7

##### Re-sale of the products

7.1. Alpha/or its assignee(s)/shall have the right to re-sell the products in the territory agreed upon below in paragraph 7.2 (hereinafter "the territory").

7.2(A). The territory shall include all countries in the world.

7.2(B). The territory shall include the countries set forth in appendix with respect to each of the products or product groups mentioned therein.

(C). Alphaland.

7.3. The products shall not be re-sold outside the territory without the written consent of Beta.<sup>12</sup>

7.4. It is agreed by the parties hereto that the restrictions set forth in paragraphs 7.2 and 7.3 above shall be construed as undertakings from the part of Alpha/or the Assignee/to refrain from actively putting the products in the market outside the territory.<sup>12 13</sup>

#### Article 8

##### Reference

Each implementing contract as may be entered into by a /party or its Assignee/in accordance with the terms of this contract, must explicitly refer to this contract and state that the said implementing contract is made in fulfilment hereof. The parties agree to include in their agreements with any assignee appropriate provisions to that effect.

#### Article 9

##### Terms of delivery

Unless otherwise agreed in the individual implementing contracts, the terms of delivery of the products will be \_\_\_\_\_.<sup>5</sup>

#### Article 10

##### Time schedules for performance

10.1. Deliveries of the products by Beta will commence \_\_\_\_\_ /days/months/ after the completion of the performance test and acceptance of the equipment/technology under the primary contract/and the technical assistance contract.

10.2. It is presently estimated that the buy-back commitment agreed upon in article 4 above will be fulfilled according to the following schedule:

Years	Value
19 _____	_____
19 _____	_____
19 _____	_____
etc.	Total _____

10.3. Actual quantities and assortments of products to be delivered will be negotiated and agreed upon in the individual implementing contracts to be concluded not later than \_\_\_\_\_

days/months/ before the beginning of each year/quarter/month with regard to the said /year/quarter/month.

10.4. When actual quantities and assortments are agreed upon, Alpha's remaining buy-back commitment /and/Alpha's own needs for products/and/prevailing market conditions in the territory for the various assortments of the products/ will be taken into consideration. It is agreed, however, that, until the total buy-back commitment has been fulfilled, the value of products to be sold by Beta and bought by Alpha each calendar year will be at least \_\_\_\_\_/ and not more than \_\_\_\_\_/.

10.5. Sufficient Implementing Contracts to cover the whole of Alpha's buy-back obligation as agreed under paragraph 4.1 above, must be concluded by \_\_\_\_\_ 19\_\_\_\_\_.

#### Article 11

##### Lack of conformity

11.1. Alpha must examine the products delivered to him within as short a period as is practicable in the circumstances.

11.2. Alpha loses the right to rely on a lack of conformity of the products if it does not give notice to Beta specifying the nature of the lack of conformity within \_\_\_\_\_<sup>14</sup> after it has discovered or ought to have discovered it.

11.3. Further rights and obligations of the parties with regard to the lack of conformity of the products will be governed.

(A) by the provision of the law applicable to this contract.

(B) by the provision of the guarantee conditions attached to this contract as appendix ( ), and by the provisions of the law applicable to this contract.

#### Article 12

##### Payment of the products

12.1. The Products shall be paid for in the currency agreed upon in paragraph 5.2 above, and in the manner set forth in paragraph 12.2 below.

12.2. Each delivery of the products shall be paid against the original documents set forth in paragraph 12.3 below/

(A) through direct bank transfer to the bank account in Betaland of the implementing seller of the respective products.

(B) through an irrevocable and transferable letter of credit, at/owing partial and trans-shipments, to be opened in the amount of the respective implementing contract at the latest \_\_\_\_\_ days after the signing of the said contract, in the respective implementing seller's favour, and to be confirmed by the bank in Betaland designated by the said implementing seller, such letter of credit to be valid for a period of \_\_\_\_\_ days/weeks/months after the agreed date of delivery of the respective products.

12.3. The/products/letter of credit/shall be payable against the following documents:

- \_\_\_\_\_.

- \_\_\_\_\_.

- \_\_\_\_\_.

12.4. The Implementing Buyer shall bear all exchange and bank charges as well as any other costs,/including the confirmation charges of Letters of Credit /but excluding the charges of the Bank of Betaland/ for transferring the funds to the Implementing Seller's account.

#### Article 13

##### Monitoring the performance

13.1. Both Alpha and Beta shall keep records on all implementing contracts concluded within the framework of this contract. Each such record (hereinafter "the evidence account") shall be in the form set forth in appendix ( ) to this contract.

13.2. The evidence accounts maintained by Alpha and Beta shall be compared and agreed by the parties through exchanges of letters on a quarterly basis during the term of this contract, the first occasion being no later than \_\_\_\_\_/\_\_\_\_\_/19\_\_\_\_\_.

13.3. Alpha and Beta hereby agree that the evidence accounts, compared and agreed in accordance with paragraph 13.2 above, shall constitute final and conclusive evidence as to the performance of their obligations under this contract.

## Article 14. Liability

14.1. In the event that Alpha's buy-back commitment, agreed upon in this contract, has not been fully performed by the date mentioned in paragraph 10.5 above, Alpha shall, upon written demand by Beta remit to Beta as agreed and liquidated damages \_\_\_\_\_ per cent ( \_\_\_\_\_ %) of the value of the products yet to be purchased under paragraph 4.1 hereof.

14.2. Notwithstanding the provisions of paragraph 14.1 above, Alpha shall not be obligated to make any payment mentioned therein insofar as the lack of performance of Alpha's buy-back commitment is due to the failure of the implementing seller to deliver products of the quality, price or cumulative value specified in Articles 3, 5 and 10, respectively, of this contract.

14.3. If the lack of performance of Alpha's buy-back commitment is due to the reasons set forth in paragraph 14.2, Beta shall, upon written demand by Alpha, remit to Alpha as agreed and liquidated damages \_\_\_\_\_ per cent ( \_\_\_\_\_ %) of the value of the products yet to be purchased under paragraph 4.1.

14.4. As guarantee for the due performance of its obligations under this article 14 Alpha shall issue to Beta a bank guarantee, acceptable to Beta, for the sum of \_\_\_\_\_<sup>4</sup>. The bank guarantee shall be essentially of the form and contents as set forth in appendix ( ) attached to this contract.

14.5. As a guarantee for the due performance of its obligation under this article 14 Beta shall issue to Alpha a bank guarantee, acceptable to Alpha, for the sum of \_\_\_\_\_<sup>4</sup>. The bank guarantee shall be essentially of the form and contents as set forth in appendix ( ) attached to this contract.

14.6. The payment by the respective party of the agreed and liquidated damages, set forth in paragraphs 14.1 and 14.3 above, shall be in full and final settlement of all claims that the other party may have against the first party arising out of or in connection with the breach by the first party of his obligations under this contract.

## Article 15

### Relief<sup>15</sup>

15.1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that it could not reasonably be expected to take the impediment into account at the time of the conclusion of the contract or to have avoided or overcome the impediment or its consequences.

15.2. Exemption under this article 15 shall be available to the affected party for the period during which the impediment prevents it from fulfilling his obligations under this contract. If the effect of the impediment lasts for more than \_\_\_\_\_<sup>14</sup> months, each party shall be entitled to terminate this contract upon written notice to the other, and neither party shall be liable to the other for any expenses or losses thereby incurred.

15.3. The party who fails to perform must give notice to the other party of the impediment and its effects on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

15.4. A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

## Article 16

The effect of the termination of the primary contract of the implementing contracts

16.1 In the event that the primary contract should subsequently be terminated without the equipment/technology having been transferred and accepted, this contract shall become automatically null and void and with no effect.

16.2 For the purposes of this contract, Alpha's buy-back commitment, agreed upon herein, or a respective part thereof, as the case may be,/

(A) shall be deemed fulfilled even if any implementing contract should later be terminated/through no fault on the part of Alpha/for whatever reason/.

(B) shall not be deemed fulfilled insofar as any implementing contract should later be terminated, irrespective of the grounds for which the implementing contract was terminated. In this case Alpha shall be obligated to conclude (a) fresh implementing contract(s) corresponding to the value of the

terminated implementing contract(s) such fresh implementing contracts to be then carried out in accordance with the provisions of this contract.

#### Article 17

##### Prior commitments, effective date, amendments, and governing language

17.1. Except as otherwise expressly provided in this contract, this contract supersedes and invalidates all other commitments or representations which may have been made by Alpha and Beta either orally or in writing prior to the date of signature of this contract.

17.2. This contract shall come into effect only /upon the entering into force of the primary contract/and/upon the signing of this contract by both parties/and/upon the approval of this contract by the competent authorities and/or /financial institutions/in/Betaland/ and/or /Alphaland. Beta shall immediately notify Alpha/and/Alpha shall immediately notify Beta/by cable or telex of such approval, and the date of/such notification/the latest of such notifications/shall be the date on which this contract comes into effect. Unless the approvals are obtained within \_\_\_\_\_ /days/months/from the signing of this contract, it shall be considered null and void and with no effect.

17.3. Amendments to this contract will be effective only if they are made in writing and signed by legally authorized representatives of the parties/, and if approved by the competent authorities /and/or/ financial institutions in/Betaland/and/Alphaland.

17.4. The \_\_\_\_\_<sup>16</sup> text of this Contract is the governing text.

#### Article 18

##### Applicable law

This contract shall for all purposes be governed by, and construed in accordance with, the law of \_\_\_\_\_.<sup>17</sup>

#### Article 19

##### Settlement of disputes

19.1. All disputes or differences which may arise between the parties out of or in connection with this Contract, and which cannot be settled amicably shall be subject to arbitration by \_\_\_\_\_<sup>18</sup> arbitrator(s) under the rules of \_\_\_\_\_.<sup>19</sup>

19.2. The award of the arbitrator(s) shall be final and binding on the parties.

19.3. The arbitration proceedings shall be conducted in the \_\_\_\_\_<sup>16</sup> language.

19.4. The place of arbitration shall be \_\_\_\_\_.<sup>20</sup>

_____.	_____ 19 _____
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Alpha	Beta
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By _____	By _____
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<sup>1</sup> International Counterpurchase Contracts (ECE/TRADE/169), UN.

<sup>1</sup> Indicate legal form of party.

<sup>2</sup> The words, or groups of words, separated by strokes are alternative formulations. Delete the one(s) not applicable.

<sup>3</sup> When alternative formulations comprise entire clauses, sentences, or half-sentences, the various alternatives are indicate with capital letters (A), (B), etc.

<sup>4</sup> Indicate amount and currency.

<sup>5</sup> Insert here the relevant term of delivery, e.g. FOB, CIF, etc.

<sup>6</sup> Indicate name of the contry.

<sup>7</sup> A-1 to A-4 are alternative formulations of 5.1(A).

<sup>8</sup> This alternative is based on Article 55 of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

<sup>9</sup> Indicate the name of agreed commodity exchange.

<sup>10</sup> Indicate currency.

<sup>11</sup> Replace "Beta" with the name of the appropriate Government body in Betatand, when applicable.

<sup>12</sup> Not applicable if alternative A is chosen.

- <sup>13</sup> Should be included if Alphaland or any of the countries listed in Appendix are member countries of the European Economic Community (EEC).
- <sup>14</sup> Indicate time period.
- <sup>15</sup> This Article 15 is based on Articles 79 and 80 of the United Nations Convention on Contracts for the International Sale of Goods 1980.
- <sup>16</sup> Indicate language.
- <sup>17</sup> Indicate country.
- <sup>18</sup> Indicate number of arbitrators.
- <sup>19</sup> Indicate applicable rules.
- <sup>20</sup> Indicate place and country.