Agricultural Law Update
VOLUME 6, NUMBER 6, WHOLE NUMBER 66 — MARCH 1989

UNIVERSITY OF ARKANSAS
MAY 1 4 1990
LIBRARY

Official publication of the American Agricultural Law Association

INSIDE

- In Depth: U.S. agricultural trade legislation: an overview – Part II
- *Federal Register* in brief
- Ag Law Conference Calendar
- State Roundup
- Appeals court dismisses Coleman litigation
- Bankruptcy empowering statute may alter rights in cooperative patronage certificates

IN FUTURE ISSUES

- An overview of the animal rights movement
- CRP contract terminates existing lease

Surveillance by helicopter and the Fourth Amendment

The U.S. Supreme Court has reversed the Florida Supreme Court's judgment concerning search requirements for surveillance of the interior of a partially covered greenhouse in a residential backyard from a helicopter in *Florida v. Riley*, 109 S.Ct. 693 (Jan. 23, 1989.)

Acting on an anonymous tip, a law enforcement officer used a helicopter to look for marijuana plants after being unsuccessful in observing anything from the ground. At an altitude of 400 feet, the officer, with his naked eye, was able to identify marijuana plants through missing panels in the roof. A warrant was obtained based upon these observations, and the ensuing search revealed marijuana growing in the greenhouse.

The defendant's motion to suppress the evidence because of the unreasonableness of the search was granted by trial court, and the Florida Supreme Court concluded that the search violated the Fourth Amendment and Florida Constitution.

A plurality of the U.S. Supreme Court disagreed, finding that although the property surveyed was within the curtilage of defendant's home, the openings in the roof of his greenhouse meant that he could not reasonably have expected the contents to be immune from examination by an officer seated in an aircraft.

The Court relied on *California v. Ciraolo*, 476 U.S. 207 (1986), a search case involving a fixed-wing aircraft flying at 1,000 feet. A plurality noted that the helicopter was operating legally and there was nothing to suggest that such flights by helicopters were sufficiently rare to lend substance to the claim that the flight violated a reasonable expectation not to be observed from that altitude. Nor was there any evidence to suggest that the flight had interfered with defendant's use of his greenhouse or curtilage. Thus, under the given circumstances, the search was not violative of the Fourth Amendment. – *Terence J. Centner*

FmHA's notice package–adequate responses

By now the 45 days are up for almost all farmers who received FmHA's "Notice Package" this winter. There was a great deal of confusion in the field about exactly how farmers were supposed to respond to the package. Rumors surfaced almost daily about the possibility of extensions and about certain forms being unnecessary. Much of the confusion came from FmHA: FmHA issued several policy statements during the response period, each of which stated a different position as to what constituted an adequate response.

FmHA has already begun responding to farmers' loan servicing applications. Some of the applications are being denied because, according to FmHA, the farmer did not submit an adequate response within the 45 days.

To date, FmHA has taken four different positions about what constitutes an adequate response.

Position #1 – the regulations

The regulations stated that to have an adequate response, the farmer must submit nine different completed forms and, in most cases, aerial photo(s) of the farm, all within 45 days. This is stated in one of the forms that was reprinted in the regulations. 53 Fed. Reg. 35741 (Sept. 14, 1988)(to be codified at 7 C.F.R. Part 1951, Subpart S, Exhibit A, Attachment 1). The nine forms are: (1) Form FmHA 410-1, Application for FmHA Services; (2) Form FmHA 410-8, Application Reference Letters; (3) Form FmHA 410-9, Statement Regarding Privacy Act; (4) Form FmHA 431-2, Farm and Home Plan; (5) Form FmHA 440-3, Request for Statement of Debts and Collateral; (6) Form FmHA 1910-5, Request for Verification of Employment; (7) Form FmHA 1924-1, Development Plan (if farmer is planning to make major changes in operation); (8) SCS-CPA-26, Highly Erodible Land and Wetland Conservation Certification; (9) Ad 1026, Highly Erodible Land and Wetland Conservation Certification. The aerial photo was required for farmers who

(Continued on next page)

want to have the option of applying for the homestead protection program and/or the conservation easement debt write-down program.

Position #2 – the December 9 "Rule of Reason" unnumbered letter

On December 9, 1988, the acting administrator of FmHA issued an unnumbered letter to all state directors, district directors, and county supervisors. It said that the "rule of reason" on receiving applications must be followed. That memo did not explain exactly what the "rule of reason" meant. Some highlights of the memo are:

1) "If the borrower has always been helped by the . . . FmHA . . . in filling out applications, we should help again."

2) "When the borrower has responded to the county office with a good faith effort within 45 days to supply all the information required for an application, accept the application even though incomplete and offer assistance deemed necessary."

3) "Farmers who have responded with a good faith effort even though the application is not complete, will be considered to be in compliance with the 45-day time period."

4) When the borrower submits an incomplete application, "the county supervisor will send the borrower a letter within 5 days of receiving the incomplete application, identifying and requesting the information needed to complete the application. . . ."

5) The two SCS forms (Form Ad 1026 and Form SCS CPA-26) and Form FmHA 410-8 (Application Reference Letter) will not be needed. The county supervisor will "immediately advise all borrowers who received the notice" of this decision.

It is important to note that "good faith effort" was never defined in this memo. The memo did not say that the submission of any certain combination of forms was necessary to show a "good faith effort."

Position #3 – the December 14 electronic letter and the December 15 follow-up memo

On December 14, 1988, the acting administrator issued an electronic letter to all state directors which stated that the third paragraph of the December 9 letter should be disregarded [the part of the letter which said that the two SCS forms and Form FmHA 410-8 were unnecessary]. Therefore, as a result of this letter, those three forms once again became necessary. The letter said that "District Directors should immediately call all County Offices and inform them of this information."

On December 15, 1988, the acting administrator issued a memo to all state directors, district directors, and county supervisors. This memo was exactly like the December 9 memo, except that the third paragraph of the December 9 memo was removed.

Position #4 – letters of December 22 and electronic memo of January 6

The Farmers' Legal Action Group received copies of two letters written by Roland Vautour, dated December 22, 1988. One letter was the National Save the Family Farm Coalition, and the other was to United States Senator Kent Conrad. The letters explained in concrete terms what the farmer has to do to meet the "good faith effort" test. The letters said that the borrower would be considered to have made a "good faith effort" if the following items were submitted within the 45 days:

1) Form FmHA 410-1, Applications for Services;

2) Form FmHA 431-2, Farm and Home Plan, including balance sheet; and

3) "Attachment 2" [the appropriate response form for borrowers who received the delinquency package] and "Attachment 4" [the appropriate response form for borrowers who received the nonmonetary default package].

One of the letters said that borrowers who are requesting a conservation easement write-down will have to submit a map of the farm. The letter implied that such map must be in within the 45 days.

The letters said that the rest of the necessary paperwork would have to be submitted within the next 60 days.

Then, on January 6, 1989, the acting administrator issued an electronic memo to all state directors and farm program chiefs which basically confirmed what Vatour said in the December 22 letters. It also said that:

1) The county supervisor should provide borrowers with a current copy of the unit price list for agricultural commodities for that state to assist the borrower in filling out the Farm and Home Plan; and

2) In addition to the forms listed above, within the 60-day period borrowers must submit a five-year production history.

Analysis

A few important points should be noted:

1) Between December 9 and January 6, FmHA's official position was that a "good faith effort" to respond to the package was sufficient, but there was no official statement as to what constituted a "good faith effort." Therefore farmers who turned in some response during that time can argue that they made a good faith effort, even if they did not turn in the three forms that were required by the January 9 memo.

2) The regulations said that a photo of the farm must be submitted within the 45 days to preserve the borrower's right to apply for the homestead protection program. In the January 9 electronic memo, no mention is made of this requirement. Therefore, borrowers who did not turn in the photo during the 45-day period may try to submit it during the following 60-day period and argue that, under the "rule of reason," FmHA should accept it. This is a reasonable position for borrowers to take because FmHA does not need the photo until it is time to process the borrower for preservation loan servicing, and that would not happen until all primary loan servicing processing is complete.

Randi Ilyse Roth

Editor's note: The above article is reprinted with the permission of the Farmers' Legal Action Report in which it first appeared.

Agricultural Law Update

VOL. 6, NO. 6, WHOLE NO. 66 MARCH 1989

AALA Editor Linda Grim McCormick
188 Morris Rd.
Toney, AL 35773

Contributing Editors: Donald B. Pedersen, University of Arkansas School of Law, Fayetteville, AR; Terence J. Centner, University of Georgia, Athens, GA; Randi Ilyse Roth, St. Paul, MN; James T. Massey, St. Paul, MN; Linda Grim McCormick, Toney, AL.

State Reporters: Sid Ansbacher, Jacksonville, FL; Julia R. Wilder, University of Arkansas, Fayetteville, AR.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 188 Morris Rd., Toney, AL 35773.

Copyright 1989 by American Agricultural Law Association. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without permission in writing from the publisher.

Bankruptcy empowering statute may alter rights in cooperative patronage certificates

In *In re FCS, Inc.*, 853 F.2d 1149 (4th Cir. 1988), the Fourth Circuit Court of Appeals has affirmed a modified Chapter 11 plan that authorized a debtor to release a portion of its patronage certificates to a cooperative in satisfaction of the cooperative's secured claim.

This case is noteworthy for cooperatives because it discloses that the contractual agreements between members and the cooperative embodied in articles of incorporation or bylaws may be superceded by section 1123(a)(5)(D) of federal bankruptcy law. For others, it shows that this bankruptcy provision may override nonbankruptcy law restrictions on the distribution of collateral to satisfy a claim secured by the same.

Universal Cooperatives, Inc., a cooperative organized under Minnesota law, had a secured claim for farm supplies sold to the debtor. The cooperative also had issued to the debtor patronage certificates. The debtor's rights in these patronage certificates were governed by the cooperative's Articles of Incorporation and state law.

The cooperative's Articles granted the cooperative a first lien on a member's patronage certificates as security for the member's indebtedness to the cooperative. In addition, the Articles allowed the cooperative's board of directors to set off a member's indebtedness against the member's patronage certificates. The court agreed with legal precedents characterizing the terms of the Articles as a contract between the cooperative and its members.

The bankruptcy court entered an order requiring the debtor to release a portion of its patronage certificates to the cooperative in satisfaction of the cooperative's secured claim. The cooperative challenged this order, claiming that the order essentially required the cooperative's board of directors to exercise its discretion to set off the debtor's indebtedness against its patronage certificates.

The Fourth Circuit found that the patronage certificates represented a contingent entitlement that vests when the board exercises its discretion and determines that the equity should be redeemed. However, as an entitlement created under state law, it may be supplanted by federal bankruptcy law.

Section 1123(a)(5)(D) provides that "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation, such as . . . the distribution of all or any part of the property of the estate among those having an interest in such property of the estate." 11 U.S.C. § 1123(a)(5)(D)(1982 & Supp. 1986).

The court interpreted this provision as an empowering statute that enlarges the scope of the debtor's prebankruptcy rights. Accordingly, it supersedes the discretionary power of the board over redemption of the patronage certificates.

– Terence J. Centner

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks:

1) FCA; Funding and fiscal affairs, loan policies, and operations and funding operations: minimum capital adequacy standards; notice of effective date of 2/1/89. 54 Fed. Reg. 5074.

2) FCA; Capitalization bylaws, equities issuance and retirement, etc.; effective date 2/9/89. 54 Fed. Reg. 6264; correction 54 Fed. Reg. 6118 and 7029.

3) FCA; Regulatory accounting practices; effective date 2/9/89. 54 Fed. Reg 6265.

4) FCA; Borrower rights; agricultural real estate loans, secondary markets; conservatorships and receiverships; notice of effective dates. 54 Fed. Reg. 7758, 7759.

5) CCC; 1989 common program provisions for wheat, feedgrains, rice, upland and ELS cotton programs and 1989 wheat program; effective date 2/2/89. 54 Fed. Reg. 5526.

6) CCC; Feed grains price support and production adjustment programs; effective date 2/2/89. 54 Fed. Reg. 5528.

7) FmHA; Revision of guaranteed farmer program regulations; final rule; correction; effective date 2/3/89. 54 Fed. Reg. 5409.

8) FDA; Human health risks associated with the subtherapeutic use of penicillin or tetracyclines in animal feed; availability of report from National Academy of Sciences/Institute of Medicine; comments due by 5/4/89. 54 Fed. Reg. 5549.

9) FGIS; Miscellaneous reference changes and corrections; final rule; effective date 2/7/89. 54 Fed. Reg. 5923, 5924.

10) USDA; Agricultural Marketing Service; Grading and inspection, general specifications for approved plants and standards for grades of dairy products; proposed increase in fees and other administrative changes; proposed rule. 54 Fed. Reg. 6682.

11) APHIS; Horse protection regulations; final rule; effective date 3/20/89. 54 Fed. Reg. 7174.

12) INS; Admission or adjustment of status of RAWs; proposed rule. 54 Fed. Reg. 9054.

– Linda Grim McCormick

Appeals court dismisses Coleman *litigation*

On December 28, 1988, a three-judge panel of the United States Court of Appeals in St. Louis denied both the government's and the farmers' appeals in the *Coleman v. Lyng* litigation (formerly *Coleman v. Block*). *Coleman v. Lyng*, 864 F.2d 604 (1988). This case, brought on behalf of 250,000 FmHA borrowers throughout the country, was filed in North Dakota in 1983.

The *Coleman* case resulted in several landmark decisions that effectively halted most FmHA foreclosures for over five years. In the most recent of these decisions, entered in the spring of 1987, the federal district court declared FmHA's foreclosure procedures to be unconstitutional and issued an injunction

(Continued on page 7)

AG LAW CONFERENCE CALENDAR

Symposium on Agricultural and Agribusiness Credit
April 27-28, 1989, Westin Hotel, Denver, CO.

Topics include: Implementing participation in the secondary agricultural financing markets, role of options in agricultural lending; special problems in agri-business lending; agricultural environmental issues; and effect of biotechnology upon agricultural credit.

Cosponsored by the American Agricultural Law Association, the American Bar Association, the American Bankers Association, the Institute of Life Insurance, and others

For more information, call David A. Lander at 314-342-1618

Fifteenth Annual Seminar on Bankruptcy Law and Rules
April 6-8, 1989. Marriott *Marquis* Hotel, Atlanta, GA.

Topics include: lender liability: creditor strategies; setoff and recoupment.

Sponsored by Southeastern Bankruptcy Law Institute

For more information, call 404-396-6677

Farm Bankruptcies under Chapter 12
Videolaw seminar.

Topics include cash flow; income tax aspects; conversion to Ch. 12; tax liens.

Sponsored by American Bar Association

For more information, call 1-800-621-8986 or 312-988-6200

Air and Water Pollution Control Law
May 25-27, 1989, Hyatt Regency Hotel, Washington, D.C.

Topics include implementing the Clean Water Quality Act of 1987 Amendments, wetlands protection; and Superfund/RCRA developments

Sponsored by ALI-ABA

For more information call 1-800-CLE-NEWS or 215-243-1630

U.S. agricultural trade legislation: an overview — Part II ©

by Donald B. Pedersen

TEXT IS 1/8 thru 53/3.48 USED 54/1 IN DEC 88

This article concludes the discussion of U.S. agricultural trade legislation begun in Part I, 6 Agricultural Law Update 4 (Feb. 1989). Topics covered in Part I were:

Exports out of the United States

–Promotion and facilitating

–Competitive pricing

–Financing

–Bilateral and multinational trade agreements

–Trade remedies – interference with U.S. export markets

–Export controls

Agricultural exports out of the United States are subject to various statutory and regulatory programs governing such matters as reporting, licensing, inspections, embargoes, shipping, and corrupt practices. Each is considered briefly.

Pursuant to the Agricultural Export Sales Reporting Regulations, exporters of wheat and wheat flour, feed grains, oilseeds, cotton and products thereof, and other designated commodities must make weekly reports of shipments to the FAS. *Int'l Trade Rep., Export Shipping Manual* (BNA) 190:201 - 190:293.

Except for most shipments to Canada, all items exported out of the U.S. are subject to an export license. 50 U.S.C. §§ 2401 - 2420. There is, in other words, no right to export. As to certain shipments, particularly chemicals and sophisticated electronics as examples, a validated export license must be obtained from the Office of Export Administration within the Department of Commerce. At the instigation of the President, items may be added to the validated export license list for reasons of national security, foreign policy, or short supply. Most shipments, including agricultural commodities and products, are usually covered by general licenses. Here no formal application is needed, but the proper general license symbol must be ascertained from published authorizations and inserted on the Shipper's Export Declaration. The Declaration must be filed with Commerce. Export licenses of either type may be unavailable for shipments to certain countries for foreign policy reasons – Cuba, Vietnam, North Korea, and Cambodia, as examples. A U.S. exporter who exports without a license is subject to severe criminal and civil penalties, as well as possible denial of future export and import privileges. 50 U.S.C. § 2410.

Most foreign governments require inspections as to imports from the U.S. of livestock, plants, and seeds. Animal and Plant Health Inspection Service (APHIS) inspections may satisfy the importing country as to preshipment phytosanitary restrictions. APHIS will certify that the product is free of injurious diseases and/or pests, if that is the case. The Federal Grain Inspection Service (FGIS) inspects and weighs all grain exported out of the U.S. Inspections are conducted at designated export locations in the U.S. In addition to grading grain under U.S. grain quality standards, FGIS will test for such things as aflatoxin levels in corn and protein content in wheat. All meat and most poultry being shipped out of the U.S. is inspected by the Food Safety and Inspection Service (FSIS) and an export certificate issued. APHIS, FGIS, and FSIS programs are operated in cooperation with the several U.S. states.

Some foreign governments require that U.S. products be certified as to set quality levels. Upon request and for a fee the USDA Agricultural Marketing Service will make the tests. Certificates verifying the lack of radiation or other contamination can be obtained from the USDA Technical Office.

Exports of U.S. food are not deemed adulterated or misbranded in violation of the U.S. Federal Food, Drug, and Cosmetic Act if they are in accord with the specifications of the foreign purchaser, not in conflict with laws of the importing country, are labeled for export on the shipping package, and are not sold or offered in U.S. commerce. 21 U.S.C. § 381(e). However, it is a violation to export animal feed containing a new animal drug which is deemed unsafe under 21 U.S.C. Section 360b. Id.

Over a period of about eight years, the President imposed several embargoes on U.S. shipments of agricultural commodities. The first three were economically motivated – concern about low U.S. stocks: the June 27, 1973 five-day general embargo on shipments of oilseeds and oilseed products followed by validated export licensing until October, 1973; the October, 1974 targeted moratorium on sales of corn and wheat to the U.S.S.R.; the July 24, 1975 targeted moratorium on such sales to the U.S.S.R. and Poland. The fourth was politically motivated, although the President cited both "national security and foreign policy" reasons – the January 4, 1980 - April 24, 1981 partial embargo on sales of wheat, feedgrains, soybeans, meat, dairy products, poultry, truffles, animal fats, and agrichemicals to the U.S.S.R.

In imposing such embargoes for foreign policy, as opposed to national security reasons, the President must consider various criteria and follow procedural steps added in the Export Administration Act of 1979. 50 U.S.C. §2403(c); § 2404(e)(3); §24405(b),(c),(e); §2413(h). As to embargoes on the export of agricultural commodities after December 22, 1981, 7 U.S.C. Section 1736j provides mandatory compensation to U.S. producers under certain circumstances. And, under a provision of the Future Trading Act of 1982 embargoes are not to affect existing contracts requiring delivery within 270 days of the embargo, except when the President has declared a national emergency or the Congress has declared war. 7 U.S.C. § 612(c)(3). The Export Administration Amendments Act of 1985 essentially extends the 1979 Act, but purports to limit somewhat more the President's power. For example, export controls on agricultural commodities for more than sixty days must now be authorized by a joint resolution of the Congress. 50 U.S.C. § 2406(g)(3)(A).

Export shipments of agricultural commodities sometimes fall under statutory provisions giving preference to U.S. flag vessels. The Food Security Act of 1985 (hereinafter farm bill), Pub. L. No. 99-198, 99th Cong., 1st Sess., 99 Stat. 1354, changed the requirement that fifty percent of U.S. government sponsored exports be so shipped. The cargo preference requirement does not now apply to specific commercial agricultural export programs such as export credit, export credit guarantee, and export enhancement programs. However, as of 1988 at least seventy-five percent of food aid exports must be shipped on U.S. flag vessels. Farm bill § 1142. The U.S. Department of Transportation, subject to the availability of funds, is to finance increased costs resulting from the 1985 changes in the cargo preference law. *Id.*

The Foreign Corrupt Practices Act of 1977 makes illegal the use of mails or other instrumentalities of interstate commerce in furtherance of payments, offers of payments, and gifts to foreign officials or political parties made for the purpose of obtaining, retaining, or directing business to any person. 15 U.S.C. § 78dd-2, as amended by §5003 of the

Copyright © Donald B. Pedersen 1989

Donald B. Pedersen is Professor of Law and Director of the Graduate Agricultural Law Program at the University of Arkansas School of Law.

Omnibus Trade and Competitiveness Act of 1988 (hereinafter trade bill), Pub. L. No. 100-418, 100th Cong., 2nd Sess., 102 Stat. 1107. The law is enforced by the U.S. Department of Justice and the Securities and Exchange Commission.

Imports into the United States

- Import controls

Various statutory and regulatory devices restrict importation of certain agricultural products into the United States. Quotas restrict entry of certain agricultural commodities, duties may be assessed under U.S. tariff schedules and may be elevated as the end result of countervailing duty and antidumping proceedings under U.S. law, and as to many agricultural imports, inspections or quarantines are routine.

Sugar quotas are regularly imposed by the U.S. Section 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624, has been used to put quotas not only on imports of sugar, but also peanuts, cotton, and other commodities. The statutory test is whether imports would cause "market disruption," principally imports at prices below the CCC price support loan level. The U.S. enjoys special GATT waivers for most of its quotas, including those on imported dairy products.

Australia agreed to be limited to 363,000 tons of beef exports to the U.S. for calendar year 1988, rather than face a quota of 315,000 tons that would have been automatically triggered under the U.S. Meat Import Act of 1979. This constitutes a reduction of 17,000 tons and has been criticized by the Cattle Council of Australia as hypocritical as the U.S. seeks to get Japan and Korea to open their markets to more U.S. meat exports. A similar quantitative restriction agreement was reached with New Zealand. Both 1988 limits were adjusted upward at 53 Fed. Reg. 48896 (1988). In essence, the U.S. currently uses a Presidentially managed system of negotiated restraints. A recent GAO study advocated the auction sale of such quotas as authorized at 19 U.S.C. Section 2581. Import licenses would be placed on the auction block under the scheme.

Section 4506 of the trade bill requires a study of USDA resources for sampling imported products pursuant to the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act. This has to do with residues of pesticides, drugs, and other products with enhanced enforcement as the apparent ultimate goal. Section 4703 calls for the Secretary of Health and Human Services to enter into cooperative agreements with governments of countries which are major sources of food imports into the U.S. to assure compliance with pesticide tolerance requirements of the Federal Food, Drug, and Cosmetic Act as to such imports.

USDA/APHIS administers detailed regulations governing the importation of live animals, animal products, and animal by-products. 9 C.F.R. pts. 92-96. Importation of animal embryos is now specifically regulated. 9 C.F.R. pt. 98. *See* Looney, *Regulations Affecting Importation of Animal Embryos*, 3 Agric. L. Update 4 (March 1986). A new final rule on importation of meat and animal products became effective on March 23, 1989, designed to assist efforts to prevent introduction of certain animal diseases into the U.S. 53 Fed. Reg. 7391 (1988) (to be codified at 9 C.F.R. pt. 94).

Private parties and the states can impose a variety of import standards so long as they advance health, safety, environmental and consumer interests and do not create unnecessary obstacles to U.S. foreign commerce. 19 U.S.C. § 2531.

As is the case in all countries, imports into the U.S. must "pass customs." Here classification and valuation occurs, tariff schedules are applied, and duties (taxes), if any, are assessed. Since origin can affect the level of duties, a country of origin determination also is made. Generally, when duties are assessed, payment by the importer of a deposit results in immediate release of the goods. As previously noted, the U.S., as of January 1, 1989, uses the Harmonized Commodity Description and Coding System, rather than the Tariff Schedules of the United States (TSUS). Disputes in this area go to the U.S. Court of International Trade. Under most favored nation (MFN) treatment, parties to the GATT are supposed to extend any privilege granted to another contracting state (e.g., a favorable tariff rate) to all contracting parties. The GATT provides safety valves as to imposition of countervailing duties and antidumping duties, discussed hereinafter. Suspension of MFN status is permitted in certain extraordinary circumstances.

Subject to certain exceptions, articles or containers imported into the United States must be conspicuously marked with its country of origin. Such markings are to remain clear to the ultimate purchaser, generally the final purchaser of the article in its original imported form. There is current controversy over whether the country of origin labeling requirement should be extended as to imported meats and other food products to reach consumers in supermarkets and eating establishments. Such an extension could involve the requirements of signs and notices on menus. Opponents point to added cost and to possible GATT violations. *See* Testimony of John W. Harmon, before Subcommittee on Trade, House Ways and Means Committee (Sept. 27, 1988) GAO/T- RCED-88-67.

- Trade remedies – Interference with U.S. domestic markets

Antidumping cases such as *Maine Potatoe Council v. U.S.*, 613 F. Supp. 1237 (CIT 1985), and *Dried Salted Codfish*, ITC Inv. TA-731-199, US ITC Pub. No. 1711 (1985), 50 Fed. Reg. 20819 (1985), involve attempts to get the U.S. to impose penalty duties on imports of the specific commodities (here from Canada) in response to perceived unfairly priced shipments of such products (here from Canada) into the U.S. Article VI of GATT permits a country to impose antidumping duties when dumping threatens material injury to an established industry in a contracting state, or materially retards the establishment of a domestic industry. The Department of Commerce does the complex economic analysis (Lower Than Fair Value) which, in general terms, means ascertaining whether sales in the U.S. market are at prices lower than those prevailing in another national market. The International Trade Commission (ITC) makes the following determinations in the usual case: what firms constitute the domestic industry; whether the industry has suffered material injury or there is a threat of material injury; whether dumping is a contributing cause. 19 U.S.C. § 1673 et seq. Under certain circumstances, the USTR may revoke the status of a country under the GATT for purposes of such proceedings, whereupon an injury determination does not have to be made. § 1314.

The 1988 trade bill seeks to clarify a variety of anti-dumping issues, some of which have been the subject of recent litigation: dumping by non-market economy countries (special rules), § 1316; third country dumping, § 1317; input dumping by related parties, § 1318; the use of fictitious markets to hold down

(Continued on next page)

 CONTINUED FROM PAGE 5

foreign market value, § 1319; circumvention of antidumping orders, § 1321; component part monitoring, § 1320; determining material injury, § 1328; and, considerations relevant to determination of threat of material injury, § 1326(b), §1329.

Also addressed is the question of under what circumstances U.S. producers of raw agricultural products may be considered part of the domestic industry when the problem is with dumping into the U.S. of the processed product. Section 1326 of the trade bill, subject to a ruling by the USTR that the provision is contrary to the GATT Antidumping Code and the GATT Subsidies Code, provides that producers of raw agricultural commodities will be considered part of the domestic industry if there is a single continuous line of production *and* if there is a substantial coincidence of economic interest between producers and processors based on relevant economic factors, including price, added market value, or other economic interrelationships regardless of whether based on legal relationships. As to processed agricultural products, rules on standing have been expanded to include trade associations or coalitions which include both processors and producers. § 1326(c).

House bill provisions to amend the 1916 Antidumping Act, 15 U.S.C. § 72, to expand private rights of action after affirmative antidumping findings did not survive Conference. House Conf. Rep. No. 100-576 at 530. The same is true of a proposed compensation fund for injured producers. *Id.*

Countervailing duty proceedings under U.S. law focus on unfair imports resulting from a foreign government aiding its industry with export subsidies or narrowly applied domestic subsidies. 19 U.S.C. § 1303 (1930 Act), § 1671 et seq. (1979 Act). Here there is the potential of the U.S. imposing penalty duties on the particular import into the U.S. to offset the effect of such subsidies. The 1979 Act tracks the GATT subsidies and Countervailing Duty Code, whereas the 1930 Act applies to nonsigners and does not require proof of injury to the domestic industry. A number of agricultural cases have emerged in recent years, including *Lamb Meat* involving New Zealand, 50 Fed. Reg. 37708 (1985), and *Live Swine* involving Canada, 50 Fed. Reg. 25097 (1985). *See also Alberta Pork Producers' Marketing Board v. U.S.*, 669 F. Supp. 445 (CIT 1987); *National Pork Producers Council v. U.S.*, 661 F. Supp. 633 (CIT 1987); *Canadian Meat Council v. U.S.*, 661 F. Supp. 622 (CIT 1987), 680 F. Supp. 390 (CIT 1988). These cases necessarily involve an in depth examination of the agricultural programs of the particular foreign country. They also involve an interplay between Commerce and the ITC, with some of the same issues involved as in antidumping cases.

The 1988 trade bill seeks to clarify selected issues pertinent to countervailing duty cases. Concerns with the definition of domestic industry and material injury are essentially the same as in antidumping cases. In addition, the trade bill seeks to articulate the difference between domestic subsidies and export subsidies. Certain foreign domestic subsidies of only nominal general availability are to be considered in the class of offending subsidies, if they are in fact provided to a specific enterprise or industry or group thereof. § 1312.

According to Section 1313 of the trade bill, subsidies to a raw agricultural product are deemed subsidies to the exported processed product if the demand for the raw product is substantially dependent on the demand for the processed product and processing adds only limited value.

In the case of exports from Canada, domestic judicial review in U.S. antidumping and countervailing duty cases is replaced under the U.S.-Canada Free Trade Agreement by bilateral panel review. Pertinent rules have been announced at 53 Fed. Reg. 53232 (1988) (interim ITA rule), 53 Fed. Reg. 52306 (1988)(final ITA rule), and 53 Fed. Reg. 53248 (1988)(interim ITC rule).

These trade remedies offer domestic industries ways to fight a variety of unfair practices by foreign exporters and foreign governments.

Section 201 cases allow U.S. industries seriously injured by an unforeseen excess of *fair* imports to pursue temporary relief in a nondiscriminatory manner in the form of quotas, duties, or orderly marketing agreements against all imports of a particular product from all countries. 19 U.S.C. §§ 2251-53. Such decisions are made by the President upon recommendation by the International Trade Commission. This relief from the MFN principle is authorized by GATT Article XIX and contemplates withdrawal or modification of trade concessions previously granted. Such escape clauses are also commonplace in bilateral trade agreements. A number of statutory requirements must be met and few – perhaps twenty percent – of section 201 petitions have been successful. The tuna industry lost such a case in 1984. *Certain Canned Tuna Fish*, USITC Pub. No. 1558, 49 Fed. Reg. 34310 (1984). The 1988 trade bill at section 1401(a) extensively amends the statutes governing section 201 petitions. Rapid provisional relief is authorized for a domestic industry that produces a perishable agricultural commodity which is like or is directly competitive with an imported perishable agricultural commodity. There must be a reasonable indication that such imports have increased sufficiently to be a substantial cause of, or to threaten serious injury to the domestic industry in the U.S. § 1401(a).

Conclusion

While this overview covers many topics, it is not totally comprehensive. It does suggest that U.S. international agricultural trade is carried on within a complex statutory framework designed on one hand to promote and facilitate, and on the other hand to protect. In the current GATT Round, the U.S. negotiating position calls for a harmonization of health and sanitary regulations and for a phasing out to zero of agricultural export subsidies, non-tariff barriers, and other trade distorting devices. The U.S. has dropped its insistence that this phasing out be accomplished by the year 2000. Should the agricultural trade aspects of the current GATT Round result in an adoption of the revised U.S. negotiating position (unlikely), the position advanced by the Cairns Group** (strong emphasis on short term measures), or some compromise measure (most likely, but far from assured), full U.S. implementation by federal statute would necessarily require the Congress, if it is willing, to alter certain of the statutory provisions discussed in this article. In written responses (Feb. 9, 1989) to questions put to him at his confirmation hearing, Secretary of Agriculture Clayton Yeutter stated that "[w]e cannot rationally construct farm legislation for the 1990's until we know the outcome of the Uruguay Round." The 1988 trade bill and certain preexisting legislation attempt to position the U.S. to deal with an uneven playing field for agricultural trade should meaningful progress not be forthcoming in the current round of GATT negotiations.

– *Donald B. Pedersen*

** Australia, Argentina, Brazil, Canada, Chile, Columbia, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand, Uruguay, and Fiji.

APPEALS COURT DISMISSES COLEMAN LITIGATION /

CONTINUED FROM PAGE 3

stopping 78,000 foreclosures already in progress at that time.

The 1987 court order served as the basis for legislation introduced in Congress later that year. This legislation, which became part of the Agricultural Credit Act of 1987, adopted the *Coleman* ruling as part of the new law and added additional, substantial protections for FmHA borrowers. The law was supported by a broad coalition of more than 50 farm groups and organizations who feared that the government might be successful in its appeal of *Coleman* and that the gains won in the case would be lost on appeal.

The appeals court in St. Louis declared in its December 28, 1988 opinion that the case had become moot. The court reached this decision, it said, because the Agricultural Credit Act of 1987 incorporated the *Coleman* decision, and replaced or modified the federal laws upon which it was based. The farmers' request for a rehearing was denied on February 1, 1989.

– James T. Massey

Editor's note: The above excerpted article is reprinted with the permission of the Farmers' Legal Action Report in which it first appeared.

STATE ROUNDUP

FLORIDA. *Coop's conversion to for-profit corporation: proper distribution of retained earnings*

In *Shinn v. Growers Fertilizer Cooperative*, 533 So.2d 1183 (Fla. Dist. Ct. App. 1988), certain shareholders of a not-for-profit agricultural cooperative sought declaratory judgment as to a proposed plan under which the association was to convert to a for-profit corporation. The trial court entered final summary judgment in favor of the association. The members appealed as to the cooperative's plan to distribute retained earnings from its permanent surplus fund based on members' past patronage as opposed to their current shareholdings in the cooperative. The Florida Second District Court of Appeal affirmed the lower court's decision.

The cooperative had an account called the "Net Profit Transferred to Retained Earnings" from which it paid patronage refunds to members.

In 1986, the association voted to convert to a for-profit corporation. The conversion plan called for a two-tiered distribution of stock to association members. The first tier involved a share-for-share exchange of new for old stock. The second tier required distribution of shares in the new corporation to members based on their patronage over a ten-year period.

The Shinns filed a declaratory judgment action, seeking a finding that the second tier scheme violated Florida law and the association's articles and bylaws. They asked the court to require distribution in proportion to the number of shares held in the cooperative.

The trial court entered summary judgment, holding that Fla. Stat. section 618.15(3) requires that any distribution of reserves and surpluses be made to members based on patronage.

The Shinns appealed on two grounds. First, they challenged the validity of the cooperative's distribution plan based on patronage. Second, and related to the first issue, the Shinns contended that the proposed plan would improperly dilute their proportionate shareholdings in the co-op from thirteen percent to less than one percent.

Subsequent to the filing of the appellate brief, the co-op amended the proposed second tier distribution plan whereby the association would distribute revolving fund certificates that would pay out retained earnings based on each member's patronage since the co-op's inception in 1934.

The appellate court temporarily relinquished jurisdiction to the trial court on the co-op's motion to dismiss the appeal as being moot. The trial court dismissed the second count as to dilution of holdings, but held that the first issue, as to validity of patronage-based distribution, was still viable.

On subsequent consideration of the amended plan, the appellate court focused on the philosophical and practical distinctions between conventional corporations and cooperatives.

The court noted that section 618.15(3), Florida Statues, authorizes cooperative associations to establish reserves or surpluses. The court held that Growers Fertilizer's "retained earnings account" was the equivalent of reserves or surpluses.

The court also stated that section 618.15(3) required that any distribution of reserves or surpluses to members be based on patronage. It held that Growers complied with this standard by distributing revolving fund certificates based on patronage prior to conversion.

The appellate court rejected the appellant's argument that the association's retained earnings fund differed from statutory reserves and surplus to be distributed based on patronage. The Shinns contended that permanent surplus fund was shareholder equity that must be distributed based on stock ownership. The court stated that the appellants misapplied a standard that applies only to conventional corporations.

The appellants further argued that because the retained earnings fund consists of net profit derived in part from nonmember business, the association could not distribute that fund's monies to members. They cited tax cases that held that earnings from sales to members were to be excluded from a co-op's gross income when those earnings were returned as patronage rebates.

The court held that section 618.15(3) did not so distinguish between member and nonmember business. It stated:

> Contrary to the Shinn's suggestion, distributions of earnings derived from nonmember business to members cannot result in a windfall profits to members, because section 618.01(3) [,Florida Statutes,] limits the amount of business the cooperative can do with nonmembers. [Earnings from nonmembers cannot exceed 50% of a cooperative's total revenue.]

533 So.2d at 1187. The Court further stated that windfalls would not accrue to non-patron members, who, "unlike their counterparts in for-profit corporations, ordinarily derive no benefit from nonmember business." *Id.* Finally, the court held that the cited tax cases helped distinguish economic benefit under internal revenue laws, "but it does not determine entitlement to the funds for state law purposes." *Id.*

– Sid Ansbacher

ADDRESS
CORRECTION REQUESTED

219 New York Avenue
Des Moines, Iowa 50313

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Positions noted

The National Center for Agricultural Law Research and Information, University of Arkansas School of Law, Fayetteville, Arkansas has openings for two full time staff attorneys. J.D. required. LL.M., M.A. (Agricultural or Environmental Sciences), or M.B.A. (Agribusiness) desirable. Must be qualified to teach 1 law school course (Ag Law curriculum). June 1989 availability. Contact Director, NCALRI, Waterman Hall, University of Arkansas, Fayetteville, Arkansas 72701. 501-575-7642.

University of Arkansas is an equal opportunity affirmative action institution.