

September 1987

Recent Developments in U.S. Law Affecting the International Trade of Agricultural Products and Pesticides

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Recommended Citation

Juergensmeyer, Julian Conrad (1987) "Recent Developments in U.S. Law Affecting the International Trade of Agricultural Products and Pesticides," *Florida Journal of International Law*. Vol. 3: Iss. 1, Article 2. Available at: <https://scholarship.law.ufl.edu/fjil/vol3/iss1/2>

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Juergensmeyer, Recent Developments in U.S. Law Affecting the International Trade
**RECENT DEVELOPMENTS IN U.S. LAW
AFFECTING THE INTERNATIONAL TRADE
OF AGRICULTURAL PRODUCTS AND PESTICIDES**

*Julian Conrad Juergensmeyer**

I. INTRODUCTION	27
II. RECENT DEVELOPMENTS AFFECTING THE EXPORT OF AGRICULTURAL COMMODITIES	27
III. RECENT DEVELOPMENTS IN U.S. LAW AFFECTING EXPORT AND IMPORT OF PESTICIDES	32
IV. CONCLUSION	37

I. INTRODUCTION

International trade practices of the United States are determined to a great extent by congressional trade law and by presidential national foreign policy. Current developments in U.S. import/export law for agricultural commodities and pesticides will affect U.S. activities in the international market. However, policies pursued by the President may have a greater effect. In recent years, the limits on what a President can do regarding U.S. international trade practices have been largely determined by public opinion. This paper focuses on current development in U.S. import/export law for agricultural commodities and pesticides, and indicates how U.S. foreign trade policy may affect the implementation of these laws.

II. RECENT DEVELOPMENTS AFFECTING THE EXPORT
OF AGRICULTURAL COMMODITIES

The value of agricultural commodities exported by the United States in the early years of this decade fluctuated considerably, reflecting the use of food exports as a weapon of international trade and diplomacy. In 1980, the dollar value of U.S. agricultural exports to the Soviet Union was approximately \$1.5 billion.¹ This figure rose to \$1.7 billion in 1981, and to nearly \$3.3 billion in 1982.² The value of

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1. Report of the National Corn Growers Association, Mar. 16, 1982, at 4 [hereinafter Corn Growers Report].

2. *Id.* at 13.

exports of agricultural commodities to Eastern Europe in 1980 were nearly \$2.5 billion but dropped to \$2 billion in 1981 and plummeted to \$900 million in 1982.³ The total value of U.S. exports to foreign nations dropped from \$43.78 billion in 1981 to \$39.09 billion in 1982 and \$37.5 billion in 1983.⁴ These declines are seen by many as a direct result of trade embargoes imposed during the Administration of President Carter, the effects of which have carried over into the Administration of President Reagan.

In order to understand recent trade practices of the U.S. certain trade laws must be understood. American agricultural products reach foreign markets through two quite different procedures: (1) the Agricultural Trade Development and Assistance Act,⁵ and (2) "regular" channels of commerce.

Trade pursuant to the Agricultural Trade Development and Assistance Act (the Act) is entirely within the control of the U.S. Government. In fact, the exporter usually is the U.S. Government. Depending upon the government's goals, the "export" of agricultural commodities may be a gift (foreign aid) to a friendly nation, a barter arrangement whereby a foreign nation receives food in exchange for some commodity the U.S. needs, or a purchase in the domestic market by a foreign government with credit provided by the Commodity Credit Corporation (CCC). Congress stated three goals in enacting the Act: (1) to promote foreign policy; (2) to share America's plentiful agricultural produce; and (3) to develop America's agricultural exports. But whatever the transaction, the government, not private parties, is completely in control of such "export".⁶

The private side of the export picture is the export of American agricultural commodities through the regular channels of commerce. But here, too, the U.S. Government plays a potentially key role. These private transactions should be divided into two groups: (1) agricultural products exported to countries covered by the Export Administration Act and (2) agricultural products exported to countries not covered by the Export Administration Act. It is the first of these categories that creates the possibility of so-called embargoes on the export of agricultural commodities.

3. *Id.* at 10.

4. *Id.* See also *Embargoes, Surplus Disposal, and U.S. Agriculture: A Summary*, Economic Research Service, U.S. Department of Agriculture, Agriculture Information Bulletin No. 503 (November 1986).

5. The Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736 (1987).

6. 7 U.S.C.A. § 1691 (1987).

The Export Administration Act, enacted in its present form in 1979, requires export licenses for the export of specified commodities to specified countries.⁷ The so-called Soviet grain embargo of 1980 illustrates the workings of the Act. President Carter, prompted by the controversy over the Soviet presence in Afghanistan, instructed the Secretary of Commerce to place grain and other agricultural products on the commodity control list for exports to the Soviet Union, thus triggering the Act's export license provision. The "embargo" proclamations were in fact statements that no such licenses would be issued. Despite recent anti-embargo legislation enacted by Congress, which will be discussed below, the basic machinery for "embargoes" created by the Export Administration Act remains in place today.

The Export Administration Act thus gives a U.S. President broad embargo powers over private international transactions in U.S. agricultural commodities. Congress demonstrated its uneasiness with these powers refusing to grant long extensions of its date of termination. By law, the Act was scheduled to terminate on September 30, 1983. However, Congress granted three very short extensions: the first for two weeks; the second until February 29, 1984; and the third for additional month. The third extension was allowed to pass without further action by Congress. Thereafter, President Reagan extended the Act by executive order.

At this point, the important effects of U.S. public opinion on the exercise of presidential power in international trade should be emphasized. The Soviet grain embargo imposed by President Carter was extremely unpopular in the United States. The embargo was in effect from January 4, 1980, until it was lifted by President Reagan on April 24, 1981.⁸ According to the Associated Press, U.S. farmers will always believe that the embargo brought them close to ruin. Farmers blame Carter's partial ban on sales to the Soviets for the decline in U.S. farm exports that began with the embargo and has continued during the Reagan administration.

The National Corn Growers Association, for example relies on a 1982 study by former U.S.D.A. official John Schnittker, which attributes losses to the Carter embargo of \$11.4 billion in national output, plus related losses of 310,000 jobs and \$3.1 billion in personal income.⁹

7. 50 App. U.S.C.A. § 2404 (1987).

8. Juergensmeyer, *International Trade Developments*, 5 J. AGRIC. TAX'N & L. 70, 71 (Spring 1983).

9. Corn Growers Report, *supra* note 1, at i.

Critics argue that the Soviet grain embargo and three embargoes imposed in the 1970's have seriously damaged the image of the United States as a reliable supplier of farm commodities. As a result of these embargoes, U.S. trading partners have diversified their buying procedures and entered into trade agreements with a variety of exporting nations. Critics argue that not only are major international trading partners less dependent on the U.S. for farm products, but the image of the U.S. as an unreliable trading partner will not be easily overcome.

Reagan made the Soviet embargo a centerpiece of his 1980 Presidential campaign, particularly in the Farm Belt. His disclosed opposition to the use of embargoes as an instrument of foreign policy was considered a major factor in the defeat of Jimmy Carter. One of Reagan's first acts as President to the lift the embargo.

In a speech in 1983 to the American Farm Bureau Federation in Dallas, President Reagan officially adopted the position that recent embargoes have made the U.S. appear to be an unreliable source for farm products in the world market. He vowed to work to undo the damage done in prior administrations, so that "the world [would] know that it can count on America and her farmers for two things — generous food aid for those who are hungry and the reliability of our farm supplies".

This statement set the stage for the President's announcement that he had signed into law, on the same day, the Futures Trading Act of 1982 which contains an anti-embargo or "sanctity of export contract" provision.¹⁰ Under this act, the President may not, except in periods of declared war or national emergency, prohibit or curtail the export of agricultural commodities or products covered by an export sales contract, if the contract was made prior to the embargo announcement and if contract requires delivery within 270 days after the embargo announcement. Therefore, the so-called anti-embargo act, suggests that foreign traders would consider American exporters reliable at most for nine-month periods, but would not want to count on them as long-term trading partners the mechanism for imposing an embargo through executive order still exists under the Export Administration Act.

Arguably, President Reagan's actions have been inconsistent. For example, as one of his first official acts as President, Reagan officially condemned agricultural trade restrictions and ended the Soviet grain embargo. But at the same time, by Executive Order, he extended the Export Administration Act, which grants broad executive powers, to

10. Futures Trading Act of 1982, 7 U.S.C.A. §§ 1-26 (1987).

impose embargos. One needs to remember also that the new Futures Trading Act of 1982 really only prohibits restrictions on imposing embargos on sales; thus some observers believe that the threat of an embargo on exports of agricultural commodities under the Reagan administration still exists.

A recent Department of Agriculture study contradicts the presidential position that the effects of the Soviet grain embargo have been disastrous. Conducted in 1986 (ERS) at the request of Congress, the study concludes that the embargo had no lasting effect on the financial shape of American farmers, since larger sales to other foreign buyers offset the loss of the Soviet market. In fact, the report states, the U.S. actually increased its sales to Mexico and other countries as a result of the embargo. The report also argues that the embargo did little to change world prices and trade volume, since the U.S. quickly found other markets and Moscow covered for canceled grain sales by switching to other countries such as Argentina, Australia, Canada and the European Community.

The ERS study rejects prior studies that reported losses to American farmers as a result of the embargo. Instead, it claims American farmers did not suffer since U.S. domestic programs implemented during the embargo prevented U.S. farmers from bearing the cost of the embargo. The report further observes that the U.S. lost market shares throughout the 1980's more as a result of world economic conditions and foreign responses than as a result of the embargo. The ERS report concludes that the U.S. share of the Soviet market would probably have contracted even without the embargo as the period of detente faded and production capacity of competing exporters expanded.

This new report has infuriated U.S. farm interests and is being disavowed by Reagan's Secretary of the Department of Agriculture. Its conclusions threaten the assumptions upon which Reagan administration farm programs are based, including recent efforts to drive down the price of grain on the world market. Although President Reagan has not yet commented on the report, it is clear that its release is an embarrassment to the Administration.

The facts that administration officials are disavowing the ERS report and that U.S. agricultural interests are strongly opposed to its findings suggest that public opinion in the U.S. will not tolerate a return to the use of an embargo on exports of agricultural commodities. President Reagan is keenly aware of the importance of this issue to the American public. His opposition to the Soviet grain embargo helped defeat President Carter in 1980. It is therefore highly unlikely that Reagan would risk the political consequences which would result from the imposition of future embargoes.

For the immediate and foreseeable future, it is likely that U.S. foreign trade policy will focus on rebuilding trust in the American farmer as a reliable exporter of agricultural commodities.

III. RECENT DEVELOPMENTS IN U. S. LAW AFFECTING EXPORT AND IMPORT OF PESTICIDES

If pesticides, active ingredients, or devices are manufactured solely for export to foreign countries, the U.S. Environmental Protection Administration (EPA) does not require registration. Although EPA has one of the most efficient regulatory systems of any federal agency, there remains a double standard when it comes to exportation. There is only limited monitoring of pesticides manufactured for export, while those manufactured for home are quite heavily regulated. The standard with regard to exports seems to be caveat emptor. Neither the identities of pesticides exported by the U.S., their amounts, or their destinations were available from EPA. The agency claims that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) does not require the destination of exported pesticides.¹¹ EPA claimed also that the amounts exported was confidential business information and as such were protected from disclosure.¹² EPA did provide a computer printout listing registered establishments which exported all, or part, of their annual production.

A pesticide may be manufactured in the U.S. for export as long as FIFRA provisions regulating labeling, misbranding, registration of establishments, and record-keeping are adhered to, in addition to the requirements specifically addressing for exports and imports. These requirements refer to preparing and packing the pesticide according to the specifications or directions of the foreign purchaser.

In addition, prior to export, the foreign purchaser, not the government, must sign a statement acknowledging he understands that the pesticide is not registered for use in the U.S. and cannot be sold in the U.S. A copy of this statement must be given to an "appropriate official" of the government of the importing country.¹³ The major complaint about this procedure is that these statements go astray. Because the official should receive them is not identified.

11. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. §§ 1-26 (1987).

12. 7 U.S.C.A. §§ 136e and 136h (1987). *See also* 40 C.F.R. § 32.100 (1987).

13. 7 U.S.C.A. § 1360(a) (1987). *See also* 29 C.F.R. § 1440.1 (1987) (regarding arbitration of pesticide data disputes), 40 C.F.R. 32.100 (1987) (regarding department and suspension under EPA assistance programs).

FIFRA also requires that any change in any registration when one becomes effective is cancelled or is suspended must be sent through the State Department to the governments of other countries and to appropriate international agencies. If requested, this notification shall include all information related to the cancellation or suspension, as well as information concerning other pesticides registered under FIFRA that could substitute for the cancelled pesticide.¹⁴

FIFRA also provides, albeit in vague terms, that EPA shall, in cooperation with the State Department and any other appropriate federal agency, participate and cooperate in any international efforts to develop improved pesticide research and regulations.¹⁵

Although the monitoring of pesticides manufactured solely for export is limited, FIFRA does require compliance with the following four provisions of the Act: registration of establishments, labeling, misbranding, and record-keeping.¹⁶ The same requirements apply for all establishments, whether manufacturing federally or state registered pesticides, or pesticides intended solely for export. They also apply to any foreign sites producing pesticides or devices for import into the U.S.¹⁷

Labeling requirements are quite extensive and cover everything from listing of amounts of components by percentages to point size of type required. In general, all labels must clearly and prominently show the following: (1) the name, brand, or trademark under which the product is sold must appear on the front label; (2) the name and address of the producer, registrant, or person for whom produced; (3) the net contents; (4) the product registration number; (5) the producing establishment number; (6) an ingredient statement; (7) warning; (8) directions for use; and (9) the use classification.¹⁸ All information required by FIFRA must be clearly legible to a person with normal vision, and must be placed with such conspicuousness and expressed in such terms to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. All text is to be in English. However, EPA may propose additional text in other languages.¹⁹

14. 7 U.S.C.A. § 1360(b) (1987).

15. 7 U.S.C.A. § 1360(d) (1987).

16. 7 U.S.C.A. § 1360(a) (1987).

17. 7 U.S.C.A. § 136e(a) and 40 C.F.R. 167.2(a) (1987).

18. 40 C.F.R. § 162.10 (1987).

19. *Id.*

The final provision of FIFRA which extends to pesticides intended solely for export is record-keeping. The records required to be kept may be inspected by any official of EPA at any reasonable time. The required records do not extend to financial data, sales data other than shipment data, pricing, personnel, or research data (other than data relating to registered pesticides).²⁰ All producers must maintain the following records: (1) product name, EPA registration number, and amounts per batch; for pesticides intended solely for export, the records must also show the complete formula. These records must be retained for 2 years; (2) the brand names and quantities of devices produced; (3) records pertaining to receipt of all pesticides, active ingredients, and devices used in producing pesticides; (4) shipping information; (5) inventory records of amounts of pesticides in stock which producer has produced; (6) copies of all domestic advertising of the restricted uses of any pesticide registered for restricted use; (7) copies of all guarantees given; (8) records on the method of disposal sites, and types and amounts of pesticides disposed of; these records shall be retained for twenty years; (9) records of any tests conducted on human beings; (10) records containing research data relating to registered pesticides; (11) in the case of all pesticides, active ingredients, or devices intended solely for export to any foreign country: (a) copies of the specifications of the foreign purchaser; (b) copies of labels required to comply with FIFRA; and (c) copies of the statement signed by the foreign purchaser, acknowledging that he understands that the pesticide is not registered in the U.S. These statements must be obtained annually. These records are to be retained for a period of two years after expiration of the contract.²¹

FIFRA also sets out the following guidelines for the importation of pesticides and devices. All imported pesticides are required to be registered under this Act and to follow all labeling requirements as set out in 40 C.F.R. § 162.10. Devices are not required to be registered, but they may not bear any statement, design, or graphics that are false or misleading.²²

All importers must submit a notice of Arrival of Pesticides and Devices to EPA prior to the arrival of a shipment in the U.S. This notice will be completed by EPA indicating the disposition of the shipment, and returned to the importer. Chemicals which can be used

20. 7 U.S.C.A. § 136f (1987).

21. 40 C.F.R. § 169.2 (1987).

22. 19 C.F.R. § 12.111 (1987).

as pesticides but which are not imported for such use and are not on the Abbreviated List of pesticides, do not require submission of a Notice of Arrival.²³

Upon arrival of a shipment, the importer must present the Notice to the district director of Customs at the port of entry. The Notice will indicate the Customs action to be taken. When a shipment arrives in the U.S. without a Notice, it will be detained at the importer's risk and expense until a completed Notice is presented or until other disposition is ordered by the Administrator. This detention period may not exceed 30 days unless an additional 30 days is sought by petition. If not exported by the consignee within 90 days after the expiration of the detention period, the shipment will be destroyed.²⁴

The Notice may indicate that a shipment is to be detained to allow EPA to examine it. The consignee may receive, but not use the shipment prior to determination if a bond is furnished.²⁵ Either on the completed Notice or upon arrival of a shipment, EPA may request samples of the pesticide and all labeling.²⁶ Notice must be given to the owner who has the right to testify, in writing or orally, to the reasons the pesticide should be allowed entry. If it appears from examination, however, that the pesticide is adulterated, misbranded, or otherwise violates FIFRA, the import may be refused entry. If it is not exported within 90 days it will be destroyed. The cost of any storage, cartage, or labor on pesticides refused entry is to be borne by the owner or consignee. Any default on such payment will constitute a lien against any further importation by this owner or consignee.²⁷

The following provisions of FIFRA relating to pesticides solely for export were to be amended in The Pesticide Reform Act of 1986 is enacted into law. The act was never passed, but the provisions serve as a useful guide to possible future legislation.

The actions which constitute misbranding would be amended to include this final provision: "in the case of a pesticide intended for export that is substantially similar in composition and use pattern to a pesticide registered under section 3, the label does not contain the same health, safety, and hazard precautions as a pesticide registered under section 3, unless such precautions on the label are in conflict with the law of the importing country."

23. 19 C.F.R. § 12.112 (1987).

24. 19 C.F.R. § 12.113 (1987).

25. 19 C.F.R. § 12.115 (1987).

26. 19 C.F.R. § 12.116 (1987).

27. 7 U.S.C.A. § 1360(c) (1987).

Record-keeping would also be required of exporters, in addition to producers. The appropriate government regulatory office in the importing country would need to be notified 30 days prior to the first shipment of pesticides each year. The exporter would need to have received written evidence that the notification was delivered to the appropriate government regulatory office, and have submitted a copy of the notification, in English, to EPA before exporting any pesticide, device, or active ingredient. This notification would be required in an appropriate language and would contain the following information: (1) the name of the pesticide and the common and chemical names of the active ingredients; (2) the name and address of the person exporting the pesticide; (3) the name and address of the person importing the pesticide; (4) the name and address of the appropriate government regulatory office in the importing country; (5) a statement of the reasons why the pesticide was canceled, suspended, voluntarily withdrawn, is not registered in the U.S., or has been classified for restricted use, and the list of restrictions; and (6) the name and address of the EPA office that, on request by the importer or official of the importing country, can provide additional information on the pesticide.

The label of pesticides intended solely for export from the U.S. would be required to be written in an appropriate language. Other than the statement, "Not Registered for Use in the U.S. of A.," the label would not be allowed to refer to compliance with the laws of the U.S. unless the label also contained or was accompanied by a description of the relevant requirements of such laws.

The cancellation notices to foreign governments provision would be amended to include notice of any pesticide classified for restricted use. In addition, such notices would be required to include, whether requested or not: (1) the reasons for the regulatory action taken; (2) for canceled or suspended registrations, information concerning other pesticides that are registered and that could be used in lieu of such pesticide; and (3) the name and address of the EPA office that, on request, could provide additional information on the pesticide. The section dealing with EPA cooperation in international efforts would be expanded to include non-governmental and international organizations. The proposed amendment states: "the Administrator [EPA] shall . . . *actively* participate in international efforts to develop improved pesticide research and regulatory programs."

The following would all be new. "[EPA shall] provide foreign countries with technical assistance to develop comprehensive pesticide regulatory programs; within 1 year of the effective date of these amendments, and every 3 years thereafter, [EPA shall] conduct and publish a survey of all countries that import pesticides from U.S. exporters

or from which the U.S. imports agricultural commodities, (A) to ascertain what procedures are in place in each country regarding registration, labeling, and training to ensure safe handling, transportation, application, and disposal of pesticides; and (B) to control residues on foods in order to meet tolerances established under U.S. law; and (C) to report to Congress annually on the activities conducted to comply with this subsection and the results thereof.”

IV. CONCLUSION

Since the early 1980's, the U.S. trade-deficit has worsened causing business and government to seriously consider the promotion of exports from the U.S. As stated, trade embargoes have not proved effective to meet their political goals, and the result has been a decline in U.S. economic activity. Though the Reagan administration has attempted to restore confidence in the U.S. as a stable exporter of agricultural and manufacturing goods, the administrations efforts have been inconsistent and ineffective. Developments in regulation of agricultural products and pesticides have improved the ability to export these products. However, it is still early, and with the 1988 Presidential election and a new President, the possibility of a change in administrative policies may continue the perception of foreign trading partners that the U.S. is not a reliable trader in international trade of agricultural products and pesticides.

