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PROYECTO DE APYO A LA EXPORTACION DE PRODUCTOS AGRICOLAS NO-TRADICIONALES DE CENTRO AMERICA Y PANAMA

PROEXAG

NON-TRADITIONAL AGRICULTURAL EXPORT SUPPORT PROJECT

PROCEDURES IN HANDLING GRIEVANCES IN THE
FRUIT AND VEGETABLE INDUSTRY
FOLLOW-UP TO 1987

Assignment Numbers: TRNG/88-03

SUBMITTED TO:
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PREFACE

This report is based on a trip made by Thomas R. Walp to Guatemala, El Salvador, and Costa Rica between May 30 and June 6, 1988. The purpose of the trip was to advise Central American Export Federation staffs and their members how to protect their rights under the Perishable Agricultural Commodities Act (PACA) when exporting fruits and vegetables to buyers and agents in the United States. Pragmatic technical information was given to exporters and the PROEXAG team at PACA round tables.

This paper summarizes the recommendations made to the export federations in Guatemala (GREMIAL), El Salvador (ASPENT), and Costa Rica (CAAP), as well as PROEXAG. It covers the most common grievances of exporters in each country, the PACA grievance process for resolving marketing problems, and standard procedures for filing PACA grievances. The information was developed during the group sessions and one-on-one meetings.

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EXECUTIVE SUMMARY

Export federation staffs and members interviewed reported difficulty in resolving disputes in the marketing of their fruits and vegetables to United States importers. Continuing problems involved the inability to obtain accountings (liquidations) and payment of money due for agency transactions (growers' agents/sales agents), and for purchase and sales contracts when firm prices had been agreed upon.

Exporters had little or no knowledge of PACA's available legal machinery to assist federation members, free of charge, in settling contract disputes. Through personal interviews, it was clear that American importers in particular had recorded most oral negotiation in written contracts, showing the terms and conditions of the agreements between the parties. Federation members were not preserving their right to PACA trust protection by filing trust claims with USDA, in order to become secured creditors in the event of an importer's insolvency or bankruptcy.

There was a universal feeling of helplessness to pursue formal PACA reparation complaints against U.S. importers because of PACA's requirement that non-residents post a surety bond in double the amount of the claim. In most cases, the bonds were prohibitive and the exporters financially unable to meet the bonding requirement. Consequently, they were deprived of remedies under PACA, and there was a general feeling that US importers were hiding behind an unfair bonding requirement to escape their responsibility to pay promptly under PACA rules.

Among problems reported was the element of timing of shipments. Some exporters were shipping produce to U.S. importers which arrived just prior to the Christmas holiday. Unless the importers were able to dispose of the commodities before December 25, there wasn't any market in the U.S. until after January 1. In addition, shipments were not sold at prices sufficient to return a profit, or had to be dumped when their condition and quality deteriorated.

In addition, exporters were shipping their commodities to U.S. importers who lacked the expertise to handle particular fruits and vegetables, resulting in the commodity being sold at low prices and a poor return for the exporters.

It should be noted, however, that participants of previous seminars reported no new problems during the recently concluded shipping season. Apparently, then, these seminars have had a good effect.

Recommendations

A. Extensive Research on Prospective Buyers/Agents

Export federation members in Guatemala, El Salvador, and Costa Rica need to use available credit references to check the financial reliability of U.S. importers before entering into oral or written contracts for disposition of their fruits and vegetables. They should contact USDA to determine (1) whether the firm or individual has a current PACA license; and (2) PACA's experience regarding any previous or pending claims.

Federation members should evaluate current ratings furnished by Dun & Bradstreet and trade media (Blue Book and Red Book) for such factors as (1) how long business has been conducted; (2) credit worthiness; and (3) payment practices. Information on the importer's business integrity can also be found by researching major trade organizations in the U.S., such as the United Fruit & Vegetable Association and the Produce Marketing Association, as well as state departments of agriculture or local trade groups.

The credit check should also develop sufficient data to determine whether the importer is competent to handle the produce. An expert is more apt to have the ability to find buyers and obtain better prices for the exporter.

B. Use of PACA's Trust Protection Benefits

Exporters must exercise extreme care in specifying in their written contracts that the date payment is expected from U.S. buyers/agents is 30 days or less from the time the produce is received. Payment terms must be recorded and sent to the importer, with a copy kept in the exporter's file. PACA trust claims filed with USDA must be received by USDA within 30 days after the debtor has defaulted on payment. Otherwise, PACA trust benefits are lost and the exporter is not a secured creditor if there is insolvency or the importer files for bankruptcy.

C. Challenge to PACA Formal Reparation Complaint Bonding

For true equality, it is clear that exporters need to pool their financial resources for a class action Constitutional challenge of PACA's requirement that non-residents of the United States must furnish a bond in double the amount of the claim. This amount is conditioned upon payment of costs, including reasonable attorney's fees, if the U.S. importer prevails, and also includes any reparation against the foreign exporter on any counter claim.

The Secretary of Agriculture has the authority to waive the furnishing of a bond by a non-resident if that person resides in a country that permits a U.S. citizen to file a complaint without

a bond. At the present time, Canada is the only country whose residents have reciprocity and are not required to post a bond; and Canadians are provided access to PACA administrative relief because their country has a remedy similar to that of PACA.

PACA's bonding requirement is intended to discourage foreign claimants from making frivolous claims against domestic firms, and to insure recovery of successful counter claims in such a case. It is noteworthy that every PACA claim a federation member has filed with USDA during the last two years has been decreed by PACA as having merit. Consequently, no counter claims were made by the U.S. importers.

The export federations and their members in Guatemala, El Salvador, and Costa Rica, as well as in other Central American countries, should seriously consider making direct financial contributions to test the constitutionality of requiring non-resident bonding before a formal reparation complaint can be accepted, especially when the foreign claimant has a valid claim, and no counter claim has been made.

The exporters would share the initial \$5,000 attorney fee and additional legal fees, ranging from \$15,000 to \$25,000, to pursue a suit either in the U.S. District Court of Appeals or the U.S. District Court for the District of Columbia.

In the event of an unsuccessful Constitutional challenge to PACA's non-residency bond requirement, or until a judicial decision is reached by the federal judge, federation members could be assessed for each package shipped to the U.S. and thus build up a revolving fund to post surety bonds for formal reparation complaints. Upon a favorable decision by PACA, the USDA would release the funds and return them to the federations. This money, in turn, would be available to furnish bonds to other federation members.

D. PACA Assistance in Settlements

Exporters must exercise extreme care in making trading contracts (adequate credit searches are essential); preserve PACA trust protection by establishing an agreed upon time for payment that doesn't exceed 30 days; after payment default, file with the debtor (importer), and file a PACA claim within 30 days (the claim must be in the PACA office by the 30th day) to preserve trust benefits.

If they are not paid by the U.S. importer, exporters have two options. They may (1) file a PACA formal reparation complaint (with the double bond now required), or (2) file a U.S. District Court action to recover from trust assets. The latter is a more viable choice for federation members since no bond is required. Moreover, in the event the importer files for

protection under the U.S. bankruptcy law, PACA could not accept a formal complaint, even if a bond were furnished.

When an exporter transfers title, control or possession of a shipment of produce to a U.S. importer, that exporter automatically becomes a PACA trust participant, provided it has preserved the right to trust benefits. The trust consists of produce received, inventories of food (fruits or vegetables) or other processed products derived; and any receivables or proceeds from their sale. Only if a buyer/agent defaults on the payment agreement can an exporter demand payment from trust assets. The filing of a timely trust notice preserves trust benefits until payment is received in full.

For their part, buyers/agents are responsible for maintaining sufficient funds in a non-segregated "floating trust" to pay promptly for goods received. Money owed trust beneficiaries who have protected their rights cannot be paid to other creditors. Such trust assets are recoverable through a U.S. District Court action if the money has been paid to another secured creditor, such as a bank, lending institution, or even the U.S. Government. The PACA trust gives the exporter the ability to obtain payment at any early stage when financial difficulties are minimal and the likelihood of dollar recovery greatest.

SECTION I

GUATEMALA

A. Background

An overview of the Perishable Agricultural Commodities Act (PACA) and trust provisions was given by Ricardo Frohmader, PROEXAG Project Marketing Specialist, in June 1987. I presented an in-depth PACA seminar on September 21, 1987, at the request of the federation Gremial de Exportadores de Productos No Tradicionales (GREMIAL).

A follow-up program in round-table format was held in the penthouse, Camara de Industria, on May 31, 1988. About 20 federation staffers and members who had not attended any of the previous seminars were present. A few participants indicated they intended to go into the growing and shipping of fruits and vegetables and wanted information on marketing their produce to avoid potential problems.

The participants were given a detailed presentation on the PACA--a federal law to suppress and prohibit unfair practices in the marketing of fresh and frozen fruits and vegetables in interstate or foreign commerce. The "USDA/PACA/88 Executive Summary" of the September 1987 round table was explained.

Then Ricardo Frohmader read in Spanish two PACA cases filed with USDA by federation members, involving Guatemala exporters.

B. Case Studies

The illustrative cases were as follows:

1. Diresa vs. Antigua Trading Corp., Boise

a. The Claim

Carlos Ibarra, General Manager of Diresa (12 Calle 6-17, Zona I, Guatemala CA), filed a PACA complaint against Antigua Trading Corporation, Boise, Idaho (USDA-PACA, R.T./88 Case 1). The Guatemala exporter claimed he was owed \$28,000 for produce shipped to the American importer in consumer packs.

PACA advised the exporter that the importer was experiencing financial difficulty and was unable to pay the claim. It told Mr. Ibarra that it would be necessary to file a formal reparation complaint and post a bond in double the amount of the claim.

In a letter of April 18, 1988, Kenneth A. Gilles, Assistant Secretary of Agriculture, Marketing and Inspection Services of

the U.S. Department of Agriculture, pointed out the bonding requirements of Section 6(e) of PACA, which requires non-residents of the United States to furnish a bond "(1) to discourage frivolous claims against domestic firms by foreign claimants and (2) to provide access to the administrative relief afforded by PACA to foreign claimants located in countries with similar administrative remedies. Reciprocity of this sort exists between the United States and Canada."

Mr. Gilles also stated that Mr. Eduardo Mayora Alvarado, attorney, offered his legal opinion and said there is no administrative law in Guatemala equivalent to PACA; a U.S. claimant would have to file a civil suit, and Article 117 of Civil Court Procedure in Guatemala does allow a defendant to request that a bond be supplied by a foreign claimant.

Mr. Ibarra had suffered a loss in excess of \$100,000 and was financially unable to obtain a surety bond for double the amount of his claim. Consequently, USDA eventually closed the PACA reparation case.

The exporter had filed a PACA reparation case, but had failed to preserve trust benefits by filing a timely trust claim with USDA within 30 days of the importer defaulting on payment. Subsequently, the importer filed for bankruptcy, reporting debts of \$2.6 million and assets of \$1.6 million. Due to the exporter's failure to exercise trust protection in a timely fashion, he was considered an unsecured creditor and received nothing from the distribution of the debtor's assets.

Had Mr. Ibarra filed a trust claim, he would have recovered 100 percent from the debtor's assets under the PACA trust benefits. He simply needed to file proof of claim with the bankruptcy court and PACA would have verified that a proper claim had been filed with USDA. The trustee in bankruptcy then would have paid Mr. Ibarra.

b. Recommendations

(1) Exporters should not enter into contracts that exceed 30 days for payment for fruits and vegetables.

(2) Exporters should file timely trust claims with USDA, with a copy to the importer, within 30 days after default.

(3) Due to the eight-to-ten-day delay in mailing correspondence to the United States, exporters should send PACA trust claims to PACA's offices by FAX:

New Jersey: (201) 846-0427
Washington, D.C.: (202) 447-8868
Texas: (817) 334-8440

Arizona: (602) 629-6928
Illinois: (312) 350-0201

(4) Exporters should financially support a Constitutional challenge of PACA's non-resident bonding requirement to help themselves avoid bonds for filing formal reparation complaints against importers. In addition, federations could build up revolving funds by assessing their members for each package of produce shipped to the U.S. Successful pursuit of PACA formal complaints would then return the funds to the federations to help other members.

2. Guatemala Exporter vs. Miami Importer

a. The Claim

A Guatemala exporter claimed it was due \$36,261.50 for five container loads of fresh green onions, including 6,593 packages sold at \$5.50 per package (USDA-PACA, R.T./88 Case 2). They were shipped to a Miami, Florida, importer between April 11, 1987, and June 6, 1987.

In a letter of July 17, 1987, the exporter filed a PACA reparation claim with PACA's Washington, D.C., office. PACA acknowledged receipt of the exporter's complaint, and informed him in a letter dated November 20, 1987, that the importer had been contacted, but no informal settlement was possible. The exporter was given an opportunity to file a formal reparation complaint against the importer, who had not properly accounted (liquidated) for the consignments. PACA instructed the exporter to compute its damages (loss) based on the USDA Market News prices quoted for green onions during the period the importer received the shipments.

PACA also pointed out the double bonding requirements for non-residents before a formal reparation complaint could be accepted. The exporter requested a waiver of the bond in a letter sent on April 18, 1988, to Secretary of Agriculture, Richard Lyng. Attached to the letter was a formal legal opinion on Guatemalan reciprocity by a member of the Guatemalan Bar and Notary, certified by the U.S. Consul in Guatemala, Joyce A. Deshazo.

In his own letter of the same date, Kenneth A. Gilles, Assistant Secretary of Agriculture, Marketing and Inspection Services, advised that the bond could not be waived. Again, he stated it was the intention of the United States Congress "(1) to discourage frivolous claims against domestic firms by foreign claimants, and (2) to provide access to the administrative relief afforded by PACA to foreign claimants located in countries with similar administrative remedies." He noted that, "Reciprocity of this sort exists between the United States and Canada." Mr.

Gilles added that "No administrative law exists in Guatemala equivalent to the PACA, and a U.S. claimant would have to pursue a claim through civil courts" there. He further pointed out that Article 117 of the Civil Procedure Code of Guatemala does allow a defendant to request that a bond be supplied by a foreign claimant.

A week later, J.D. Flanagan, Chief of the PACA Branch, further advised the exporter that the importer apparently could not justify the amount of dumpage (product sent to dump, discarded, throwaway) reported in its accounting, and it would be necessary to file a formal complaint in order to pursue the claim. Mr. Flanagan's statement clearly indicated that the Guatemalan exporter had a valid cause of action against the U.S. importer; that the claim had merit and was not a frivolous one; and that the exporter would be the prevailing party in a formal decision rendered by the Judicial Officer of the Secretary of Agriculture.

On May 11, 1988, PROEXAG's Ricardo Frohmader phoned an attorney in the U.S., Stephen P. McCarron of the law firm Sures, Dondero and McCarron of Silver Spring, Maryland, concerning the possibility of a Constitutional challenge of the PACA non-residency bond requirement. The attorney confirmed the telephone conversation by FAX on May 12, 1988. He stated he would need a \$5,000 retainer fee against \$175 per hour to cover initial stages of the litigation in the U.S. Court of Appeals and U.S. District Court for the District of Columbia. The retainer would cover (1) legal and factual research, (2) the drafting and filing of the complaints, and (3) preliminary motions. He indicated the legal fees would range from \$15,000 to \$25,000, with court costs estimated between \$500 and \$1,500.

b. Recommendations

(1) Exporters should file PACA formal reparations to pursue PACA claims to a conclusion, in spite of the double bonding requirement for non-residents. And federation members must contribute funds for bonds.

(2) Federation members need to financially support a challenge to the constitutionality of PACA's non-resident bonding requirement.

c. Questions and Answers

The Seminar ended with a question-and-answer session, which included the following.

Q: When must payment be made by an agent under trust provisions? Does the agent have to wait until it receives payment from its customer?

A: PACA regulations require "prompt payment" of proceeds from the sale of the produce, which USDA interprets as payment within 30 days of receipt of the goods or within five days after the agent receives payment, whichever comes first. If the customer does not pay, the agent is obligated to file both timely trust claims to insure trust protection and PACA reparation claims to enforce collection.

Q: How can exporters be sure an agent/buyer is financially responsible in produce transactions?

A: The exporter should make extensive credit checks with PACA to see if the firm is licensed and if complaints have been filed against it. The exporter may check Dun & Bradstreet, trade media (Red Book and Blue Book), trade groups, such as United Fresh Fruit and Vegetable Association, Produce Marketing Association, etc.

Q: Can the Guatemalan growers/exporters get a PACA license?

A: Yes, even though they are exempt from PACA licensing, they can voluntarily apply for one. However, the license would not exempt them from posting a bond in the event of a formal complaint, nor would it guarantee they would receive payment for their shipments of produce.

Q: Can an exporter take produce away from one agent and give it to another if the agent is unable to sell the merchandise or if the prices are depressed in a particular market?

A: Yes, but agents need documentation to prove they offered the produce to wholesale dealers, brokers, jobbers, distributors, retailers, and commission merchants, and were unable to dispose of the shipments. The exporter would then have the right to revoke the agent's authority to distribute its produce and transfer the authority to someone else upon oral and written notice to the original agent.

Q: Is there a law similar to PACA in European countries?

A: No, only Canada has an administrative remedy similar to PACA. Recourse against Europeans is through a civil suit in a European court.

Q: Are legal fees/court costs recoverable if the PACA non-resident bond requirement is overruled in the Constitutional challenge?

A: No, the party filing the legal action must pay these costs.

Q: What is the difference between "Restricted" and "Unrestricted" USDA inspections in the U.S.?

A: Restricted inspections are not representative of the quality or condition of the entire lot. They cover only a small portion, such as a few packages or a certain part of the load (doorway, top layer, several stocks/layers). A restricted inspection may cover just weight, size, count, condition, or any factors requested by the importer.

To make an unrestricted, representative inspection to certify the quality and condition of the lot, the inspector proceeds after the entire shipment has been made, or sufficient samples have been removed from throughout the load.

USDA inspection reports have a statement at the bottom for restricted inspections to show what is actually covered by the inspection.

D. Consultations

1. Pierre Masse, Caresqua Productos Alimentos Caresqua

a. The Claim

On May 30, 1988, between 5 and 6:15 p.m., a private interview was held at Proexag's office with Pierre Masse, president of Caresqua Productos Alimentos Caresqua, S.A. (21 Avenida 2-35, Zona 14, Guatemala, C.A). The claim involved 11 lots of French beans sold to Rick Kaprelian, Fruit World Marketing Inc., of Reedley, California, for FOB prices totaling \$44,859.04. The first four shipments were accepted and paid for in full. The agreed upon price was variable based on the grade and size of haricot vert beans. However, the importer did not furnish accountings of the shipments to verify the sales prices charged by the importer to its customers in the United States.

Caresqua's records showed 17 loads of French beans shipped on consignment to Dancing Sun Farms, Inc., in Pompano Beach, Florida. The shipments were made during the same period as those to Fruit World. The first shipment on February 3, 1988, had an average selling price of \$2.32. The lowest net return to Caresqua was \$1.93.

Fruit World's agent in Guatemala, Guillermo Springmuhl, accepted the shipments. Prior to shipment to the U.S., the agent reportedly placed all the lots but a portion of one in cold storage, with temperatures too low for safe storage of the beans.

USDA recommends storage and shipment of beans at 45° F or above; temperatures of 42° F and lower cause physiological breakdown in beans, principally russeting. According to Mr. Masse, Fruit World's agent, Springmuhl admitted storage temperature was 38° F.

Subsequently, Caresgua filed a PACA reparation complaint, but restricted the claim to the number of packages shipped by Fruit World, rather than the actual amount documented and delivered to Fruit World's agent in Guatemala. Therefore Caresgua's claim would be more, since 631 packages were not shown to be shipped by Fruit World.

Mr. Masse claimed that Fruit World placed 203 boxes of one lot in cold storage on January 9, 1988, and that the beans were subsequently returned and dumped due to condition problems. Caresgua would not be responsible for Fruit World's negligent handling of the 203 boxes, and would be entitled to receive payment in full for their reasonable value based on the going market price at the time of acceptance by Fruit World.

In Caresgua's file was a USDA inspection report, obtained by Fruit World's customer, Sunshine Distributors, nine days after shipment. In it, USDA reported "some wilted (10-25 percent), range 8 to 86 percent, average 33 percent russeting, severe to moderate; less than one half of 1 percent decay." The inspection was not timely and would not be acceptable evidence of the arrival condition of the 740 packages covered by the inspection.

Caresgua's shipment #10 was received by Fruit World on January 26, 1988, but was not shipped until January 31, 1988, five days later. A USDA inspection reported temperatures ranging from 52 to 80° F, with the beans wilting and flabby. The condition was directly attributable to the abnormally high temperatures, and would not be the exporter's problem.

A subsequent USDA inspection on February 3, 1988 (Caresgua lot number unknown) revealed temperatures of 52-57° on 296 packages, with 43 percent russeting and no decay. That same day USDA inspected another 413 packages and reported temperatures of 58-59° F, with 31 percent russeting and no decay.

Caresgua's file included a copy of a letter of January 21, 1988, from Fruit World to its Guatemalan agent, Springmuhl, indicating the haricot vert Beans were "too large." Fruit World recommended that future shipment be handled on consignment.

Mr. Masse denied receiving any complaints from Fruit World or its agent, Springmuhl, until all the shipments had been made and delivered to Springmuhl. He said he never agreed to have Fruit World handle anything on consignment.

Fruit World, meanwhile, hired a Doctor Sances and sent him to Guatemala to check on Caresgua's cultural practices. In a February 1, 1988, letter he sent to Fruit World, which Mr. Masse received three days later, Dr. Sances expressed the opinion that Caresgua was inexperienced in harvesting and shipping. There was, however, no detailed explanation to support the claim, and such a statement by a Fruit World employee could be considered "self serving" and therefore not evidentiary.

A review of Caresgua's file turned up nothing to support Fruit World's claim regarding shipping problems. The importer had submitted no evidence of a breach of contract by the exporter. Records of USDA inspections obtained by Fruit World's customers show condition problems such as russetting, wilting and flabbiness. The burden is on Caresgua to produce evidence that the low temperature breakdown was due to Fruit World's agent placing the beans in abnormally cold storage, and not because of a breach of PACA's implied warranty of "suitable shipping condition" or "inherent or latent" defects resulting from physiological growth problems, as Dr. Sances contended.

PACA advised Caresgua that an informal settlement is not possible and it would be necessary to file a formal reparation complaint against Fruit World, and post a bond in double the amount of its claim. Mr. Masse said he would pursue the claim to a conclusion by posting the bond and filing a formal complaint. The PACA action is still pending.

Caresgua had sent a written contract to Fruit World, setting forth the terms of the oral agreement between the parties. Fruit World did not sign and return the contract to Caresgua, but it also expressed no objection to the written document. The PACA recognizes the written contract as evidence of the agreement between the parties. When there is no immediate objection and the written document is not returned with the exceptions noted, it becomes the contract. In other words, by remaining silent, one ratifies the contract and waives one's right to object later. In this instance, Fruit World received and accepted all 11 lots from Caresgua, paid for the first four lots, and raised no objection until after shipment was completed.

b. Recommendations

(1) Caresgua should obtain a bond and file a PACA formal complaint.

(2) Caresgua's claim should be amended to include the additional 631 packages delivered to Fruit World's agent and not be restricted to only the ones shipped by Fruit World. The importer became liable for at least the reasonable value of the beans at the time they were accepted in Guatemala. Fruit World would be entitled to an allowance only for proven damage due to

Caresgua's breach of contract. The burden rests on Fruit World to show Caresgua did not perform under the contract.

(3) Caresgua would need to obtain sworn depositions or affidavits from the cold storage company in Guatemala and from Fruit World's agent, Springmuhl, to support its claim that the beans were stored in Guatemala at low temperatures, which caused the quality and condition problems reported in the USDA inspections obtained by Fruit World's customers. The cold storage records will need to show not only temperatures, but how long the beans were on hand prior to shipment.

The depositions/affidavits should be attached to the formal complaint as exhibits to establish that chilling injury caused the quality and condition problems found in the USDA inspections (russetting, wilting and flabbiness).

2. Sergio and Julio Choy, Proexport, Guatemala City

a. The Claim

In a private consultation at the Guatemala Fiesta Hotel on June 4, 1988, between 1:15 and 2:30 p.m., Sergio Choy and his brother, Julio, told of difficulty in collecting for 12 container loads of snow peas shipped by their firm, Proexport (Via 3 1-51 Zona 4, Guatemala City, Guatemala) to Walter Jager of the Wayco Corporation, doing business as Ameritex Produce, Miami, Florida. The Choys claimed they were owed \$43,645.38 for shipments made between November 11, 1987, and December 8, 1987.

The Choys explained that a check they received for the first four loads cleared the bank, but subsequent checks issued in payment for the remaining eight containers were returned by their bank due to insufficient funds. Sergio Choy said he made a trip to Miami, on April 10, 1988, in an unsuccessful attempt to obtain payment.

The Choys also noted that the oral agreement was confirmed in a fax they received from Ameritex on October 20, 1987. That agreement amended the price and terms originally agreed to-- \$13.50 CIF--with payment to be made within 48 hours after receipt of the product. The new price was \$13.00 CIF, the payment being due within 72 hours.

On March 14, 1988, Ameritex's attorney, Lewis R. Cohen, of the law firm Cohen & Goldstein, PA, of Miami, Florida, informed the Choys in a letter that Ameritex was requesting a 90-day moratorium on action by its creditors. The importer wanted this time to arrange settlement of the outstanding debts, which totaled \$750,000. Sergio Choy said they agreed to withhold any

action for 90 days, and so signed the letter and sent the attorney a copy.

Several months later, however, the Choys received another letter from Ameritex's attorney, advising them that his client was unable to offer the creditors any plan to settle the debt.

From December, 1987, until that time, Sergio Choy explained, he had made 29 long distance phone calls to Ameritex and to its attorney regarding payment. He said it took 45 days for the first check to clear, and subsequent checks did not arrive and bounce until all shipments had been made to Ameritex.

The Choys reported that Jager's son had opened a new business, but the son was not a principal in Wayco Corporation. They were advised that PACA would place no restrictions on the son's firm, since he would not be liable for the corporation's debts. The principal of Wayco Corporation was Chilean, and did not have a PACA license. PACA further informed the Choys that since the firm was operating subject to license, PACA would have jurisdiction and could accept a formal complaint.

The Choys admitted they knew nothing about PACA trust protection, and so had not filed trust claims with USDA to make them secured creditors in the event Ameritex declared bankruptcy.

b. Recommendations

(1) Proexport should immediately file a PACA reparation complaint against Ameritex. They were advised of the information and documentation needed, and given a copy of a sample letter for filing, as well as PACA's Washington, D.C., address and phone numbers to inquire about status reports and to fax trust and reparation claims. They were also advised how PACA acknowledges receipt of complaints and gives status reports.

(2) Trust claims must be filed within 30 days of the importer defaulting on the payment agreement or of the check bouncing and being returned by the bank. In the event Ameritex declares bankruptcy, a PACA trust claim would make the exporter a secured creditor and preserve its right to any proceeds from the assets.

(3) Future contracts with U.S. importers should provide for payment by wired funds, bank to bank, or for irrevocable letters of credit to insure payment. Another alternative is payment by cashiers or certified check.

(4) Extensive credit checks of prospective U.S. buyers must be made, especially by contacting PACA to see if the firm holds a license and if there are pending claims against it.

(5) An exporter should be careful to select a reliable importer, who is financially capable of disposing of the shipment itself rather than forwarding it to questionable agents.

(6) Exporters should help finance the federation and its members so they can bring class action suit, challenging the constitutionality of PACA's non-resident double bond requirement. It was pointed out that PACA licensees are using the requirement to circumvent PACA's efforts to halt unfair and fraudulent practices in the marketing of fruits and vegetables in interstate and foreign commerce.

SECTION II

El Salvador

A. Background

The round table on Perishable Agricultural Commodities Act (PACA) in San Salvador, El Salvador, was held in ASPENT's meeting room on June 1, 1988. There were nine federation staffers and members attending. The presentation started at 9:30 a.m. and had better attendance than did the prior seminar of September 22, 1987. It was found that new people, generally young, were entering the export business and wanted information on how to protect their interests in produce contracts.

A brief overview was given by Jose Oromi, PROEXAG's training officer, concerning the purpose and goals of the seminar. My PACA presentation was a follow-up to the previous round table and Ricardo Frohmader's in June 1987.

Since the participants lacked any knowledge of PACA, we gave a detailed explanation of PACA, and how PACA handles reparation and trust claims. I also presented the report on the previous round table in September, 1987, entitled: "USDA - PACA 88 - Executive Summary." This was followed by Ricardo Frohmader's presentation in Spanish of the two Guatemala case studies. The first involved the exporter's failure to protect PACA trust benefits by filing a timely trust claim to become a secured creditor when the U.S. importer subsequently filed in bankruptcy. The second concerned PACA's double bond requirement for non-residents and a proposed constitutional challenge to the non-resident bonding. (See section A, I and II on Guatemala for details on these cases.)

B. Country Cases: Presentations by Individuals

1. Written Contract--Gutierrez and Lindemann Produce, Inc.

Juan Jose Gutierrez V., (Res. Las Mercado Pol B #17, Santa Ana, El Salvador; Tel. 503-40-3663), in a private interview at the El Presidente Hotel, June 1, 1988, requested a review of a proposed marketing contract with a U.S. importer. The written contract, dated May 12, 1988, was received from Lindemann Produce Inc., Los Banos, California. It covered 10,000 to 15,000 cartons of cantaloupes and 30,000 to 40,000 cartons of honeydew melons, to be shipped between December, 1988, and May 10, 1989. The agreement provided for payment within 45 days after the produce is received.

Recommendations

a. Amend the payment term to 30 days in order to retain PACA trust protection as a secured creditor in the event

of insolvency or bankruptcy.

b. Add a statement that PACA trust protection would be exercised in the event of default in the 30-day payment terms.

c. Add a provision requiring Lindemann, in the event of a malfunction to recover Ryan recorder tape or other temperature recording device from the shipment to file carrier claims for losses.

d. Send the revised contract back to Lindemann for signature, then have it returned to the exporter, to signify acceptance of the amendments to the original terms.

2. Salvatore's Melons, San Salvador

Salvatore Chiariatti, president, and Franklin S. Valle R., vice president, of Salvatore's Melons (35 Avenida Norte No. 10 Urbanizacion Santa Fe, San Salvador, El Salvador Tel. 503-26-5574), interviewed at the El Presidente Hotel on June 1, 1988. A previous consultation had been held with Mr. Chiariatti, on September 22, 1987. They gave us a status report on two pending PACA claims:

a. Claim Against Moreterra, Inc., Miami

PACA claim R-1059 was filed against Moreterra, Inc., Miami, for "failing to account truly and correctly," and to remit net proceeds for a container of honeydews shipped March 19, 1987.

PACA handled the claim, but was unable to obtain an itemized accounting (liquidation) showing what the melons were sold for or how they were handled. PACA advised that a formal PACA reparation complaint must be filed by the exporter, with damages (loss) based on the reasonable market value, using USDA market news prices quoted at the time of shipment. Furthermore, a bond would be required before a formal complaint could be filed.

b. Claim Against Texas International, Miami

PACA claim R-1060 filed against Texas International Resources Corporation, Miami, involved \$67,832.12 due the exporter for 23 containers of watermelons and honeydew melons shipped January, 1987 through April, 1987.

An investigation by one of PACA's auditors indicated only a balance of \$17,315.02 was due the exporter. Mr. Chiarrotti's attorney, Carlos M. Llorente Esq., of Siener & Shapiro PA, Attorneys at Law, 1790 W. (49th Street, Suite 312, Hialeah, Florida 33012), pointed out to PACA various errors made in the USDA audit and claimed a balance of \$61,996.56 was due his

client. Mr. Chiarrotti's attorney filed civil suits on both the claims in the Miami Court. He was given a \$6,000 retainer fee.

c. PACA's Response

PACA advised that a settlement was not possible and a PACA formal reparation complaint with bond would be needed in order for the exporter to pursue the claim to a conclusion. Mr. Chiariotti was told that he could not maintain both PACA actions and the court suits at the same time; this would be considered "double jeopardy," since only one could be maintained, the other would have to be closed.

Recommendations

In response to our advice, the exporter faxed the Washington, D.C. PACA office immediately to request a 45-day extension for sufficient time to obtain a bond and file a formal reparation claim. He indicated he would contact his bank concerning the pledging of property in El Salvador as collateral for the bond. He was also advised to see if his bank has a U.S. branch office to guarantee the bond.

3. Agroindustrial, San Salvador, El Salvador

Jose Manuel Eduardo Cuestas Graniello, doing business as Agroindustrial S.A. de C.V. (1A Calle Poniente No. 3714, San Salvador, El Salvador), was interviewed at the El Presidente Hotel, on June 1, 1988.

a. Claim Against U.S. Trade, New York

The exporter questioned the reported returns on accounts of sales (liquidations) received from U.S. Trade, New York, N.Y., for two trailer loads of cucumbers, including 720 cartons per shipment. The import firm is owned by Chileans.

The exporter's records indicated they were straight consignment transactions providing for payment within 30 days of receipt by U.S. Trade. The written agreement, in Spanish, required the importer to file a complaint within 48 hours after the cucumbers were received otherwise it would be assumed the commodity was graded US No. 1. U.S. Trade wanted 45 day pay terms, but finally agreed to 30 days.

The first trailer load was due December 16, 1987, and the second, December 18, 1987. Both, however, arrived on December 19, 1987. U.S. Trade complained about the size and shape of the cucumbers, but said nothing about the condition. The firm indicated it would send a fax on January 4, 1988, with final returns.

(1) The Sale

Mr. Graniello said he went to Florida to see the commodity and review the records. He reported the cucumbers were sold as follows:

- o One lot for an average price of \$8.57,
- o One lot at \$8 ASP,
- o 150 cartons at \$8 originally, with a \$2 adjustment

A USDA inspection reported five percent of these were sun-burned and pitted, seven percent shriveled, and four percent yellowing. The sixteen percent total condition defects indicated a breach of contract, provided it was a timely inspection (no date for inspection was reported).

o One lot at \$8, with a \$5 allowance and .50 cents trucking charge, for a net return of \$2.50. USDA inspection reported two to four percent grade defects (scars), 19 percent shriveled, nine percent yellowing, six percent pitted and sunken, for a total of 34 percent condition factors. Neither the inspection date nor the number of packages was reported.

o One lot at \$7, with an adjustment of \$3.11, plus \$3.60 trucking to Salt Lake City Produce, Syracuse, N.Y. Reportedly the lot had been rejected by D.M. Rothman, New York, N.Y. A USDA inspection reported 46° F, five percent yellowing, 12 percent shrivelling, and seven percent sunken/pitted, for a total of 24 percent condition factors.

o One lot at \$7, with a \$3 allowance and \$2.50 freight granted to Tom Ayooob Inc., Pittsburgh, Pennsylvania. A deficit was reported on the 1,440 cartons in the shipments.

The exporter advised that liquidations were not received until February 19, 1988. On February 26, 1988, the exporter wrote the U.S. Trade questioning its handling of the consignment transactions. U.S. Trade advised that documentation on each sale would be available for examination in its New York office during its regular business hours. No further response to the letter was received.

Recommendations

The exporter should file a PACA reparation complaint to have PACA verify U.S. Trade's handling of the shipments and the accounts of sales (liquidations) showing a deficit. It appears the importer may have been negligent since both trailers were received without problems, and U.S. Trade acknowledged that the cucumbers were alright. PACA will need an English translation of

the contract from Spanish into English from the exporter.

The two loads were broken up and sold to six different customers, with two sales showing no problem, and four with adjustments, rejection, and freight charges.

b. Claim Against Jay Nichols, Inc. Lakeland, Florida

The exporter, Jose Graniello, questioned the returns reported on four loads of cucumbers shipped to Jay Nichols, Inc. (P.O. Box 1704, 909 E. Oleander, St., Lakeland, Florida 33802.)

(1) Shipment Received

The importer reported the following.

o The first lot arrived with 23 percent damage, and the importer claimed the exporter had a representative in Florida who was on the way to inspect the shipment, but was told by the importer not to come as only 13 boxes were still on hand, and the balance had been sold.

A USDA inspection, December 18, 1988, reported a temperature of 46° F bottom/48° F top, with 12 to 14, average eight percent damage, including 3 percent serious damage, with small, underdeveloped cucumbers, 13 percent serious damage with soft and shriveled ends, and four to eight in some--average 4 percent--decay, cottony leak rot. The initial USDA inspection certificate did not show the number of cartons, but a corrected certificate issued showed 760 cartons were inspected. The importer reported that super select cucumbers were sold at \$12.71 in its liquidation (accounting), but the firm did not pay the proceeds.

o The second load reportedly was sold at prices of \$5.30, \$5.95, \$6 and \$8.75, but after the importer deducted allowances to customers and freight, a deficit resulted, which was taken off the proceeds for the first load.

o The third load's USDA inspection reported one percent sunburn, two to eight, one two percent yellowing (2-18 in some), two percent serious damage from yellowing, 3 percent cottony leak rot decay. The importer reported freight charges for 425 packages of \$1528.11.

o The fourth load, received on December 24, 1987, was shipped to A&P (Great Atlantic & Pacific Tea Co. Inc). National Produce Division, Detroit, Michigan. The retailer reported "white mold" on the cucumbers and packages were being handled for commission merchants' account. There was no USDA inspection or dumping certificate for the shipment received by A&P on January 4, 1988.

Recommendations

1. The exporter should not ship anything to the U.S. just prior to the Christmas-New Year's holidays since the market is very depressed and sales are difficult. There just is not any demand during that period.

There is a short supply after January 1, 1988. Shipment should be made to arrive just after that date when prices are very good.

2. The exporter should file a PACA reparation claim to have PACA verify the importer's handling of the consigned lots, and the reported returns.

c. Claim Against Double B Quality Produce, Inc.,
Fresno

The exporter questioned the returns reported on 12 loads of cucumbers sold by Double B Quality Produce Inc., (325 W. Shields, Suite 102, Fresno, California 93705; 209-227-0719). Sales of the consigned lots were handled by the importers Bruce Lofchie and Jim Malanca. The cucumbers were shipped into New Orleans, Louisiana, and then distributed by Double B.

(1) Damage Claimed

The cucumbers were received as follows:

o One load originally intended for Miami, Florida, was sent in error by Sealand Containers to New Orleans. The carrier assumed liability for the exporters' loss. Damages are to be based on the USDA market news prices, less the net proceeds realized from the resale. There would be no basis for a claim against Double B unless the firm was negligent in handling the resale in order to mitigate the loss.

o A second load was received in New Orleans. Part of the cucumbers were sent to Phoenix, Arizona, mixed with 2000 cartons of cantaloupes. Damage to the cucumbers would be caused by the incompatibility of the commodities. The melons would give off ethylene gas which increases the respiration of the cucumbers, resulting in condition problems.

o One lot was received by a customer in Rochester, New York, on December 21, 1987. A USDA inspection on December 22, 1987, reported 40/41° F temperatures, with three percent yellowing, three percent shriveling, and 5 percent cottony leak rot decay. The 80 cartons of cucumbers had been mixed with cantaloupes. The damage to the cucumbers was caused by the incompatibility of the commodities. Furthermore, the temperature was too low. USDA recommends transit and storage temperatures

for cucumbers of 45-50°. Cucumbers are subject to chilling injury at low temperatures. Cantaloupes should be shipped at temperatures of 32-34°, with a maximum of 40°. Because of the mixing of melons and cucumbers, the temperature was compromised to the detriment of the exporter's commodity.

o One lot was shipped to Syracuse, New York. A USDA inspection of 200 cartons on December 22, 1987, reported temperatures of 39-40° F, with four percent shriveled, nine percent yellowing, and seven percent cottony leak rot decay. The 20 percent total condition factors were excessive and indicated a breach of contract. However, the temperatures were too low for the cucumbers.

o One lot of Super Select cucumbers was reported to have seven percent shriveling, five percent yellowing, and five percent decay and cottony leak rot, with temperatures of 30-40° F.

The importer reported a deficit of \$12,191 on the five lots. The liquidations on the first lot mentioned above was liquidated on January 25, 1988, reporting gross sales of \$965 and a loss of \$3,694.69. A claim has been filed with Sealand.

o Another load arrived in New Orleans, Louisiana, on December 15, 1987, and was put in storage on December 17, 1987. Part was shipped to Boston, Massachusetts, on December 18, 1987, and around December 22, 1987. The exporter's records indicated the cucumbers were harvested and packed on December 7, 1987. Consequently, they were 15 days old when they arrived at destination. The cucumbers realized an average selling price of \$5.28.

o H. Schnell & Co. Inc., (238-243 New York Central Terminal Market, Bronx, New York) received a part of the December 7, 1987, packed cucumbers on January 2, 1988. The receiver claimed the lot was dumped, but there was no inspection or dumping certificate to support the claim. Average selling prices of \$6.93 and \$4.78 were reported for the Super Select and Selects.

o A USDA inspection made at Chelsea, Massachusetts, on January 7, 1988, covered 70 cartons of cucumbers. Temperatures of 41°-41° F were reported, with three percent grade defects (cuts), six percent yellowing, two percent shriveling, and three percent black rot decay.

o A USDA inspection in New Orleans, Louisiana, on January 2, 1988, covering 773 cartons of cucumbers, reported temperatures of 44-44° F, with four percent shriveled and one percent decay. The cucumbers were packed on December 21, 22, and 23, 1987. The load was sent to Boston, Massachusetts, where it was rejected on January 7, 1988. due to excessive condition problems. The 15-18 days from packing was too long a time for the cucumbers. They

were too old before being shipped from New Orleans. The exporter reported that the ship had been delayed in arriving in Guatemala, contributing to the problem.

o Jim Malanca of Double B furnished the exporter with a summary on one shipment, showing a deficit was incurred. The temperatures reported ranged from 39° F to 44° F, and it was indicated the cucumbers were mixed in with shipments of cantaloupes.

There obviously is a problem with the mixing of incompatible commodities, and shipping at lower temperatures than recommended for cucumbers.

Recommendations

1. The exporter should refrain from shipping produce to the U.S. which will be on hand during the Christmas-New Year's holidays when the market conditions are depressed, with low prices and no demand.

2. Fresh packed cucumbers should only be shipped due to their limited shelf life, even under the best of conditions.

3. A PACA claim should be filed to verify the agent's handling of the shipments, especially in view of the question of compatibility in mixing the commodity with cantaloupes, and compromising the temperature for a lower setting to accommodate the melons to the detriment of the cucumbers.

4. Greater care should be exercised in selecting a financially responsible importer to handle the production of cucumbers, and not shipping to numerous questionable, marginal operators on consignment.

5. The exporter should explore U.S. buyers who will accept produce at firm CIF prices, rather than using sales agents or commissions merchants to dispose of their production.

6. The exporter should financially support the federation and its members in challenging the PACA non-resident bond requirement, to test its constitutionality in a U.S. district court.

SECTION III

Costa Rica

The PACA round table, held at the Ambassador Hotel meeting room, sponsored by the federation, CAAP, was attended by 14 federation staffers and members. The participation was less than the previous round table on September 22, 1987, indicating that the previous attendees had gained sufficient information concerning the Perishable Agricultural Commodities Act (PACA) to assist them in avoiding or resolving their marketing problems. Only two of the participants acknowledged that they experienced difficulty in marketing their production in the U.S. during the recently concluded shipping season.

An in-depth study of the background and explanation of PACA procedures in handling reparation and trust claims was given to the attendees. This was followed by the summary covering the previous seminar, entitled "USDA-PACA/88, Executive Summary."

Ricardo Frohmahder discussed the two case studies involving Guatemala exporters filing PACA claims (see section A-1 on Guatemala for details on these cases).

A. Consultation

Following the USDA/PACA round table, a private interview was held with Aurora Aviles Vidarre of Cooperative Agricola de Productores de Fresa, San Jose, Costa Rica. Ricardo Frohmader and Jose Oromi were present. Aurora Aviles gave a status report on two PACA claims that were filed with USDA before the previous round table in September 1987.

No other federation members scheduled consultations.

1. Cooperative Agricola vs. Amador Import Export, Inc., Miami

In PACA R-1030, filed against Amador Import Export Inc., Miami, Florida, one container of strawberries was shipped by air on December 19, 1987. The exporter's letter of August 31, 1987 was recorded as a PACA complaint. PACA tried to locate the importer concerning a possible settlement but was unable to do so. The firm reportedly was out of business. PACA advised that in order to file a formal complaint, a bond in double the amount of the claim was needed. The importer was not licensed by PACA. The exporter was financially unable to furnish the bond, and the complaint was subsequently closed on PACA's records.

2. Cooperativa Agricola vs. Sky Tropical Properties, Miami

A second complaint, PACA R-1031, was filed jointly with

the initial claim against Mark Oleski of Sky Tropical Properties, Miami, Florida. The claim involved failure to pay \$28,980 for three loads of strawberries. The importer admitted the debt, but refused to agree to a settlement. PACA also requested a non-resident bond in double the amount of the claim before it would accept a formal reparation complaint. The exporter again said the bond was prohibitive, and the complaint was not pursued through PACA. The file was eventually closed by PACA.

The exporter expressed a willingness to give financial support to a constitutional challenge of PACA's non-resident bond requirement.

3. Interpretation of Cases

Here were two prime examples of U.S. importers being fully liable for the exporter's claims but the exporter was denied due process of law because of the financial inability to obtain a bond. There were no possibilities of successful counter-claims by the importers, which would have resulted in an award against the Costa Rican, firm paid out of a bond issued in favor of the U.S. Secretary of Agriculture.

Recommendations

1. The exporters must make use of PACA trust protection to become secured creditors in the event a U.S. importer becomes insolvent, or files in bankruptcy.

2. Exporters should not enter into marketing agreements with U.S. importers which provide for payment over 30 days after the produce is received, and must file timely PACA trust claims within 30 days after the U.S. importer defaults on payment. The original notice of intent to preserve PACA trust benefits is sent to USDA, with a copy to the importer (debtor). The claim must be in the USDA office by the 30th day after the importer defaults.

3. Exporters should obtain bonds to file PACA formal reparation complaints whenever they are financially able to do so, in order to protect their rights under PACA.

SECTION IV

Conclusions

A. USDA/PACA round tables are needed at least prior to the start of each shipping season in order to continue the educational process. New federation members need to learn about the Perishable Agriculture Commodities Act (PACA)--its administration by USDA, written contracts to protect their rights, PACA Trust Protection, and how to file PACA trust claims and reparation complaints.

B. Unless there is a spring followup to review the exporter's records for solutions to marketing problems, such reviews should be scheduled through the federations well in advance of the round table. This will enable efficient scheduling for the review, and assure that complete documentation will be available at the time of the consultation. Any document in Spanish should have an English translation.

C. Consultations should be scheduled at least an hour apart. As it was, most interviews ran an hour and a quarter to an hour and a half, when there were multiple transactions involved, and extensive records to review.

D. A letter should be sent to the federations to advise their members to enter into contracts with U.S. importers which provide for payment under irrevocable letters of credit by wired funds, bank to bank. Checks written in payment by U.S. importers take 45 days to clear. Thus payment terms are 30 days after the produce is received, a period of two and a half months can elapse before the funds are available for the exporter's use. In addition, the shipments can be completed before a check is returned by the bank for insufficient funds.

E. Following the USDA/PACA round table presentation in San Jose, Costa Rica, I was approached by Ivan Saballos P, director of export programs for the Instituto Centro Americano de Administracion de Empresas (Apartado 960-4040, A La Juera, Costa Rica), to give similar PACA seminars in Miami to off-shore countries. These would begin in July with the Dominican Republic. I expressed an interest in the seminars provided scheduling does not conflict with my four-week trip to England, planned for August through September.

I feel the offer to expand the PACA seminars to other countries by an organization associated with the Harvard School of Business reflects very favorably on PROEXAG's efforts in Central America.

F. Although the previous seminars have had a good effect, PACA's non-resident double bond requirement is still a severe

stumbling block to the exporters. The bonds permit U.S. importers to avoid their responsibilities under PACA rules requiring PACA licensees to account truly and correctly and to make "prompt payment in full" of funds due Central American exporters.

Federation members should contribute to revolving funds administered by the federations to furnish PACA reparation complaint bonds. And members should lend their financial support to a constitutional challenge of PACA non-resident bond.

APPENDICES

- A. Outline of "Background of Paca - Pages 1 to 3
- B. Spanish Presentation on PACA - Pages 1 to 5
- C. USDA -- PACA/88 Executive Summary - Pages 1 to 12
- D. PACA Trust Protection
 - 1. PACA Trust Provision - check list - 10/17/84 - 1 page
 - 2. PACA Trust Guidelines - 10/17/84 - 1 page
 - 3. PACA Notice of Intent to Preserve Trust
_____ or multiple transactions
One creditor - One debtor - 1 page
 - 4. The broker and PACA Trust Provisions - 109-84 - 1 page
- E. PACA's "Full Payment Promptly" Regulations - pages 1 and 2
- F. PACA'S "Acceptance-Rejection" Regulations - 1 page
- G. PROEXAG'S USDA-PACA, R.T./88 - Case no. 1, in Spanish -
pages 1 to 4
- H. PROEXAG'S USDA-PACA, R.T./88 - Case no. 2 in Spanish - pages
1 to 2, and _____ in _____ - pages 1 to 12
- I. Letter of April 27, 1988, from Pierre Masse, President of
Coresgue, Guatemala - 1 page