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Prohibition on Alternative Fuel Credit and Alternative Fuel Mixture Credit for Black Liquor – Senate Committee on Finance Draft Proposal

Comments by the Embassy of Brazil

The Government of Brazil would like to thank Senators Grassley and Baucus and the Committee on Finance for providing the opportunity to comment on the legislative staff draft proposal to clarify the types of fuels that should qualify for alternative fuels tax credits and eliminate from eligibility fuel derived from the processing of paper or pulp.

Brazil has been closely following this issue and, in a letter sent to the Senate Committee on Finance and House Committee on Ways and Means in May, already asked legislators to close this loophole in the federal law that allows paper and pulp companies to benefit from tax credits intended to encourage the use of biofuels by the transportation sector. Brazil agrees with the objective and description of the proposed draft to modify the definition of alternative fuels, more specifically, to exclude any fuel arising from the production of paper and pulp from being eligible to receive these tax credits: the alternative fuel credit, the alternative fuel mixture credit and related payment provisions.

Notwithstanding, the Government of Brazil would like to suggest that the proposed effective date of the measure be changed. The present draft proposes that the tax credits for paper and pulp industries shall be eliminated for fuel sold or used after the date of enactment of new legislation yet to be passed by Congress. Being a highly distortive measure, with longlasting economic adverse consequences, Brazil believes that the elimination of the tax credits should have retroactive legal effect, if not to the date it was first established, in December 2007, at least to the beginning of the tax year in 2008. The right of the US Congress to approve retroactive application of tax provisions has been repeatedly upheld by the US Supreme Court, such as in *United States v. Carlton* (1994). The Court declared that "Congress had acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." The Court further stated that "Congress acted promptly and established only a modest period of retroactivity" and pointed out that "tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."

The Brazilian paper and pulp sector is already being hurt by this provision and other developed trade partners are already implementing other trade distorting measures in order to level the playing field. Private-sector estimates are that the US paper and pulp companies could receive up to $8.0 billion in 2009 alone. To illustrate the magnitude of the distortions caused by this measure, this is higher than the amount of total US agricultural support notified to the WTO in 2006 and in 2007 (US$ 7.7 and US 6.2 billions respectively).

In contact with Senate Committee on Finance staff, Brazil was advised that any new legislative measure dealing with tax issues, such as the one proposed by this draft, should be initiated in the House, according to US legal provisions. In this context, Brazil would like to highlight the initiative taken by Representative Ann Kirkpatrick (D-AZ), and sponsored by Jeff Flake (R-AZ), to introduce a bill (H.R. 2967) to deny the alternative fuel and alternative fuel mixture credits for black liquor by amending the Internal Revenue Code of 1986. Brazil understands that this would be an appropriate legislative vehicle to fulfill the intent of Senators Baucus and Grassley to "close this unintended loophole and save billions in American taxpayers dollars".

Finally, the Government of Brazil would welcome any other legislative action deemed appropriate by the US Congress to terminate these tax credits available to the US paper and pulp industry without delay.