U.S. SENATE COMMITTEE ON
Finance
SENATOR CHUCK GRASSLEY, OF IOWA - CHAIRMAN
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For Immediate Release
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Grassley Requests Customs Ruling on Caribbean "Pass-Through" Ethanol Facility

WASHINGTON – Sen. Chuck Grassley, chairman of the Committee on Finance, today sent a letter to the Bureau of Customs and Border Protection requesting a ruling on the eligibility of dehydrated ethanol produced by Angostura Holdings Limited (Angostura) – a Trinidad and Tobago company – to enter the U.S. market duty-free.

Angostura is constructing an ethanol dehydration facility in Trinidad and Tobago, and the facility could be completed in the second quarter of 2005. The plant will remove water from Brazilian ethanol feedstock, and Angostura plans to ship 100 percent of the ethanol it will dehydrate to the United States. Given that European Union wine alcohol is dehydrated in nearby Jamaica, and given the current wine glut in the European Union, the possibility exists that Angostura might also dehydrate European wine alcohol feedstock for export to the U.S. market.

In order for a product to qualify for duty-free treatment under the Caribbean Basin Economic Recovery Act (CBERA), at least 35 percent of the value of the product must be added in CBERA beneficiary countries, such as Trinidad and Tobago. But a report recently released by the Export-Import Bank – which in 2004 approved credit guarantees for Angostura's facility – stated that Angostura's plant will add only about 10 percent in value to the Brazilian ethanol that Angostura will dehydrate. Accordingly, the value contributed by Angostura will fall well below CBERA's 35 percent value-content requirement for duty-free entry. Moreover, as noted in Grassley's letter, the 10 percent value added by Angostura can in no way "normally be presumed" to meet the 35 percent test.

"I'm asking Customs to determine whether duty-free entry should be provided to ethanol that will be merely dehydrated in a 'pass-through' operation located in a CBERA country," Grassley said. "As a 'pass-through' operation, Angostura's facility will provide little economic benefit to the Caribbean region, and thus not fulfill Congress' objective in passing the CBERA. At the same time, Angostura's plant will enable Brazilian and possibly EU ethanol feedstock producers to avoid the payment of duties to the United States."

Grassley first became concerned about Angostura's plant in 2004 when he learned that taxpayer-guaranteed credit insurance issued by the Export-Import Bank is being used to finance the facility's construction. "I have well-founded and continuing concerns that the issuance of credit guarantees by Exim Bank to Angostura violated the Exim Bank's authorizing statute," Grassley said. "For that reason, I added language to the conference report accompanying the 2005 consolidated appropriations bill directing Exim Bank to issue a report concerning its financing for Angostura. The

report did little to alleviate my concerns. The Exim Bank's report did, however, make it clear that Angostura's facility will be a mere pass-through operation that will add little value to the non-CBERA ethanol it will dehydrate. Accordingly, I'm asking Customs to examine whether ethanol dehydrated by Angostura should receive duty-free treatment."

The text of today's letter to the Bureau of Customs and Border Protection follows.

March 29, 2005

Mr. Michael T. Schmitz
Assistant Commissioner
Office of Regulations and Rulings
U.S. Customs & Border Protection
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20229

Re: Ruling Request on Duty-Free Eligibility Under the Caribbean Basin Economic Recovery Act and the Tax Reform Act of 1986, as Amended, of Dehydrated Alcohol for Fuel Use Produced by Angostura Holdings Limited in Trinidad and Tobago

Dear Mr. Schmitz:

I am writing to request that the Bureau of Customs and Border Protection (CBP) issue a ruling on the eligibility of dehydrated ethyl alcohol (ethanol) for fuel use produced by Angostura Holdings Limited (Angostura) in Trinidad and Tobago to enter the U.S. market duty-free under the Caribbean Basin Economic Recovery Act (CBERA) (Pub. L. 98-67) and the Tax Reform Act of 1986 (Pub. L. 99-514) as amended by the Steel Trade Liberalization Act of 1989 (Pub. L. 101-221). In particular, I request that CBP determine whether such dehydrated alcohol meets the 35 percent value-content requirement of section 213(a)(1)(B) of the CBERA (19 U.S.C. § 2703(a)(1)(B)) for duty-free access to the U.S. market.

As a United States Senator from Iowa – the state that leads the country in the production of both ethanol and corn, the major U.S. feedstock for ethanol – I have a direct and demonstrable interest in the issues presented in this ruling request.

I. Facts

A. Angostura Constructing Ethanol Dehydration Plant

Angostura Holdings Limited (Angostura) of Laventille, Trinidad and Tobago, is in the process of constructing an ethanol dehydration plant in Port Fortin, Trinidad and Tobago,[1] and completion of this facility is projected for the second quarter of 2005.[2] This plant will dehydrate hydrous ethyl alcohol through the use of two molecular sieve dehydration systems.[3] Angostura's facility will concentrate ethanol from 95 percent alcohol-volume to 99.9 percent alcohol-volume.[4] This plant will produce up to 100 million gallons of dehydrated ethanol annually.[5]

The ethanol feedstock dehydrated by Angostura will originate in Brazil,[6] and the possibility exists that Angostura will dehydrate European Union wine feedstock as well.[7] Accordingly, the hydrous ethanol feedstock dehydrated by Angostura will originate in countries that are not beneficiary

countries under the CBERA. Angostura expects to export 100 percent of the dehydrated ethanol it will produce to the United States.[8]

B. Angostura Plant Will Add 10 Percent to Value of Brazilian Feedstock Ethanol

In a report released on January 24, 2005, written pursuant to Division D of the Consolidated Appropriations Act of 2005, the Export-Import Bank of the United States elaborated on its March 2004 approval for the issuance of an insurance policy to finance the export of equipment to Trinidad and Tobago for use in Angostura's dehydration facility. The Export-Import Bank wrote:

The equipment supported by Ex-Im Bank will be utilized to process "anhydrous" ethanol by removing water from "hydrous" fuel-grade ethanol produced in Brazil (the world's dominant ethanol producer), thereby *adding about 10% value* to the product. (Emphasis added).

Thus, an agency of the U.S. government that is familiar with Angostura's plant is on record as stating that Angostura – through its dehydration of Brazilian feedstock – will add approximately 10 percent to the value of the ethanol it processes.

As such, a dehydration facility located in a CBERA beneficiary country (Trinidad and Tobago) will add value of about 10 percent to feedstock wholly produced in a non-beneficiary country (Brazil and possibly the European Union).

II. Relevant Statutes and Regulations

A. 35 Percent Value-Content Requirement for Duty-Free Treatment

CBERA and CBP's regulations impose a 35 percent value-content requirement for eligible articles from beneficiary countries to qualify for duty-free treatment.[9] The CBERA at 19 U.S.C. § 2703(a) provides that:

(1) Unless otherwise excluded from eligibility by this chapter, and subject to section 423 of the Tax Reform Act of 1986, the duty-free treatment provided under this chapter shall apply to any article which is the growth, product, or manufacture of a beneficiary country if –

. . . . .

(B) the sum of (i) the cost or value of the materials produced in a beneficiary country or two or more beneficiary countries, plus (ii) the direct costs of processing operations performed in a beneficiary country or countries is not less than 35 per centum of the appraised value of such article at the time it is entered.

Under CBP's regulations at 19 § CFR 10.195(a):

"[A]ny article which is either wholly the growth, product, or manufacture of a beneficiary country or a new or different article of commerce which has been grown, produced, or manufactured in a beneficiary country, may qualify for duty-free entry under the CBI. . . . . Duty-free entry under the CBI may be accorded to an article only if the sum of the cost or value of the material produced in a beneficiary country or countries, plus the direct costs of processing operations performed in a beneficiary country or countries, is not less than 35 percent of the appraised value of the article at the time it is entered.

Thus, it is clear that in order for an eligible product from a CBERA beneficiary country to enter the United States duty-free, the product must meet the 35 percent value-added requirement of the CBERA.

B. 35 Percent Value-Content Requirement Imposed to Prevent "Pass-Through" Operations

The legislative history of the CBERA makes clear that the purpose of the 35 percent value content

requirement is to prevent "pass-through" operations. The House Report accompanying the CBERA states that the provision providing the 35 percent test (19 U.S.C. § 2703(a)(1)(B)) "specifically prohibits strictly 'pass-through' operations from qualifying for duty-free entry."[10] The House Report also provides the reasoning of the Congress in seeking to thwart the development of pass-through operations through the 35 percent value content requirement and other rule-of-origin requirements and states:

The object of these provisions is to prevent pass-through operations in which the work performed is of little economic benefit to the Caribbean and constitutes avoidance of U.S. duties.[11]

Thus, Congress recognized that "pass-through" operations would be in the interests of neither the United States nor beneficiary countries. Instead, "pass-through" operations would enable entities in non-beneficiary countries to avoid the payment of duties to the United States. Moreover, by providing little economic benefit to beneficiary countries, such operations would be incompatible with the express purpose of the CBERA, to address issues of "long-range economic development" in the CBERA region.[12]

C. Articles Wholly Produced in Beneficiary Countries *Normally Presumed* to Meet 35 Percent Value-Content Requirement

CBP's regulations provide at 19 CFR 10.195(e) that:

Any article which is wholly the growth, product, or manufacture of a beneficiary country . . . shall *normally be presumed* to meet the requirements set forth in paragraph (a) of this section. (Emphasis added).

In other words, if an article is wholly the growth, product, or manufacture of a beneficiary country, it will "normally be presumed" to meet the 35 percent value-content requirement of 19 CFR 10.195(a) and thus qualify for duty-free treatment under the CBI.

D. Ethanol Provisions of the Tax Reform Act of 1986 as Amended by the Steel Trade Liberalization Act of 1989

The Tax Reform Act of 1986 establishes specific rules for the tariff treatment of ethyl alcohol under the CBERA. Specifically, section 423(a) of the Tax Reform Act of 1986 provides that:

[N]o ethyl alcohol or a mixture thereof may be considered –

. . . . .

(2) for purposes of section 213 of the [CBERA], to be –

(A) an article that is wholly the growth, product, or manufacture of a beneficiary country,

. . . . .

unless the ethyl alcohol or mixture thereof is an indigenous product of that . . . beneficiary country.

The Steel Trade Liberalization Act of 1989 amended section 423(c) of the Tax Reform Act of 1986 and defines the term "indigenous product." Section 423(c) as amended (19 U.S.C. § 2703 note) reads:

(2) Ethyl alcohol or a mixture thereof that is produced by a process of full fermentation in an insular possession or beneficiary country shall be treated as being an indigenous product of that possession or country.

(3)(A) Ethyl alcohol and mixtures thereof that are only dehydrated within an insular possession or beneficiary country . . . shall be treated as being indigenous products of that possession or country only if the alcohol or mixture, when entered, meets the applicable local feedstock requirement.

(B) The local feedstock requirement with respect to any calendar year is –

(i) 0 percent with respect to the base quantity of dehydrated alcohol and mixtures that is entered;

(ii) 30 percent with respect to the 35,000,000 gallons of dehydrated alcohol and mixtures next entered after the base quantity; and

(iii) 50 percent with respect to all dehydrated alcohol and mixtures entered after the amount specified in clause (ii) is entered.

(C) For purposes of this paragraph:

(i) The term 'base quantity' means, with respect to dehydrated alcohol and mixtures entered during any calendar year, the greater of –

(I) 60,000,000 gallons; or

(II) an amount (expressed in gallons) equal to 7 percent of the United States domestic market for ethyl alcohol . . .

(ii) The term 'local feedstock' means hydrous ethyl alcohol which is wholly produced or manufactured in any insular possession or beneficiary country.

(iii) The term 'local feedstock requirement' means the minimum percent, by volume, of local feedstock that must be included in dehydrated alcohol and mixtures.

In summary, section 423 of the Tax Act of 1986 provides that no ethyl alcohol may be considered an article that is wholly the growth, product, or manufacture of a beneficiary country unless it is an indigenous product of a beneficiary country. The Steel Trade Act of 1989 amends Section 423(c) of the Tax Act of 1986 and provides two means by which ethyl alcohol will receive treatment as an indigenous product: first, the ethyl alcohol shall be considered indigenous product if it is produced through the process of full fermentation in a beneficiary country; second, ethyl alcohol shall be considered indigenous if it is dehydrated and meets the applicable local feedstock requirement as noted above.

But even if dehydrated ethanol produced by Angostura using Brazilian or other non-beneficiary country feedstock, *e.g.*, European Union feedstock, were to qualify as an "indigenous product" of Trinidad and Tobago under the provisions of the Tax Reform Act of 1986 as amended by the Steel Trade Liberalization Act of 1989, and even if this dehydrated ethanol were thus to qualify as an article wholly the product of Trinidad and Tobago under the provisions of the Tax Reform Act of 1986, such dehydrated ethanol would not necessarily meet the 35 percent value-content requirement of 19 U.S.C. § 2703(a)(1)(B) and 19 CFR § 10.195(a) needed to qualify for duty-free treatment under CBERA. In fact, providing duty-free treatment to such ethanol produced by Angostura would rely on a faulty presumption, *i.e.*, a presumption that the 10 percent value added by Angostura would meet the 35 percent value-added requirement of CBERA.

III. Angostura's 10 Percent Value-Added Cannot "Normally Be Presumed" to Meet 35 Percent Value-Added Test

The determination of whether dehydrated ethanol produced by Angostura using feedstock from Brazil or other non-beneficiary countries would qualify for duty-free treatment rests upon a reading of 19 CFR § 10.195(e). Once again, 19 CFR § 10.195(e) states that:

Any article which is wholly the growth, product, or manufacture of a beneficiary country . . . shall *normally be presumed* to meet the requirements set forth in paragraph (a) of this section. (Emphasis added).

Significantly, 19 CFR § 10.195(e) does not provide that articles that are wholly the growth, product, or manufacture of a beneficiary country "shall" by their very nature meet the requirements of 19 CFR § 10.195(a), *i.e.*, "shall" meet the 35 percent value-content test. Rather, it states that such articles shall "normally be presumed" to meet the requirements of 19 CFR § 10.195(a).

Accordingly, the regulation puts the onus on CBP at least to consider whether an article indeed shall "normally be presumed" to meet the requirements of 19 CFR § 10.195(a). By doing otherwise, CBP would ignore the words "normally be presumed" and instead find – contrary to the regulation – that *all* articles "shall" meet the requirements of 19 CFR § 10.195(a). The regulation anticipates that it is conceivable that at least *some* articles cannot "normally be presumed" to meet the 35 percent value-added requirement.

Dehydrated ethanol produced by Angostura using Brazilian or other non-beneficiary country feedstock, *e.g.*, European Union feedstock, clearly cannot "normally be presumed" under 19 CFR § 10.195(e) to meet the 35 percent value-content requirement needed to qualify for duty-free treatment under CBERA.[13] After all, according to the Export-Import Bank, Angostura will add only about 10 percent in value to the ethanol it processes, which falls well short of the 35 percent value-content requirement of CBERA found at 19 U.S.C. § 2703(a)(1)(B) and 19 CFR § 10.195(a). Accordingly, dehydrated alcohol produced by Angostura using Brazilian or other non-beneficiary country feedstock is ineligible for duty-free treatment.

IV. Angostura's Facility Will Be a Mere "Pass-Through" Operation

Moreover, as Angostura will add significantly less than 35 percent in value to the Brazilian or European Union feedstock it processes, Angostura's ethanol dehydration facility will be a mere "pass-through" operation. As such, it will contribute little economically to Trinidad and Tobago, a CBERA beneficiary country, and accordingly not comport with the express purpose of the CBERA, which is to address issues of "long-range economic development" in the CBERA region.[14] In addition, this "pass-through" operation will enable producers of ethanol feedstock in non-beneficiary countries, *e.g.*, Brazil and the European Union, to avoid paying U.S. duties. The legislative history of the CBERA makes clear that Congress – by imposing a 35 percent value content requirement – expressly sought to prevent the establishment of the type of "pass-through" operation that Angostura will be operating.

V. Conclusion

For these reasons, CBP should find that dehydrated alcohol for fuel use produced by Angostura in Trinidad and Tobago using feedstock produced in a non-beneficiary country, *e.g.*, Brazil or the European Union, does not qualify to enter the U.S. market duty-free under the CBERA and the Tax Reform Act of 1986 as amended by the Steel Trade Liberalization Act of 1989.

Sincerely,

Charles E. Grassley

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[1] Juhel Browne, *Angostura launches US $11m ethanol plant*, Trinidad Guardian, August 6, 2004, available at http://www.guardian.co.tt/archives/2004-08-06/business1.html.

[2] *CBI Ethanol*, JJ&A Fuels-Blendstock Report, March 11, 2005, Issue 098, at 5.

[3] *Export-Import Bank of the United States Summary of Minutes of Meeting of Credit Committee*, Export-Import Bank, March 26, 2004, available at http://www.exim.gov/article.cfm/A72E76A9-9B9A-05FA-0970ED20CE4EDE16/.

[4] Letter written on behalf of Angostura Limited by Anton E. Edmunds, Deputy Executive Director of Caribbean-Central American Action, to Senator Charles Grassley, August 13, 2004.

[5] *Id*.

[6] Stephen Haley and Christine Bolling, *Sugar and Sweeteners Outlook*, SSS-242, Economic Research Service, U.S. Department of Agriculture, January 28, 2005, at 27.

[7] *Angostura investing US $11m in fuel-grade ethanol plant*, Jamaica Observer, August 11, 2004, available at http://jamaicaobserver.com/magazines/Business/html/20040810T220000-0500_64338_OBS_ANGOSTURA_INVESTING_US___M_IN_FUEL_GRADE_ETHANOL_PLANT_.asp. *See also*, Sarah Nassauer and Christopher Lawton, *French Whine*, New York Times, March 2, 2005, at B1, B3.

[8] *Angostura enters major fuel ethanol project*, Mirror Online, August 13, 2004, available at http://www.tntmirror.com/friday/2004/aug13/business01.htm.

[9] I understand that 19 U.S.C. § 2703(a)(1) imposes another requirement for eligible articles of beneficiary countries to enter the U.S. market duty-free. Such articles must be "imported directly from a beneficiary country into the customs territory of the United States". 19 U.S.C. § 2703(a)(1)(A). As I assume that dehydrated alcohol produced by Angostura will be shipped directly to the United States, I do not discuss this requirement in this ruling request.

[10] H.R.Cong.Rep. No. 266, 98th Cong., 12 (1983).

[11] *Id.* at 13.

[12] *Id.* at 3.

[13] The definition of "presume", of which "presumed" is the past participle, also demonstrates that CBP should at least consider whether the presumption that dehydrated ethanol produced by Angostura meets the 35 percent value-content requirement of 10 § CFR 10.195(a) is true. The American Heritage Dictionary defines "presume" as "assume to be true in the absence of proof to the contrary". CBP cannot "assume to be true" that dehydrated ethanol produced by Angostura meets the 35 percent value-added test as "proof to the contrary" indeed exists. Again, the Export-Import Bank has stated that Angostura will add only about 10 percent value to the Brazilian feedstock it will use in producing dehydrated ethanol.

[14] H.R.Cong.Rep. No. 266, 98th Cong., 3 (1983).