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PROTOCOL CONCERNING SPECIALLY PROTECTED AREAS AND WILDLIFE TO THE CONVENTION FOR THE PROTECTION AND DEVELOPMENT OF THE MARINE ENVIRONMENT OF THE WIDER CARIBBEAN REGION

SEPTEMBER 3, 2002.—Ordered to be printed

Mr. BIDEN, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 103–5]

The Committee on Foreign Relations, to which was referred the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Kingston on January 18, 1990, including Annexes, having considered the same, reports favorably thereon, with the reservations, an understanding, and a declaration set forth in the resolution of advice and consent, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of advice and consent to ratification.

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I. PURPOSE

The Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (hereafter "SPAW Protocol" or "Protocol") is designed to protect threatened or endangered species of plants and animals in the Caribbean region.

II. BACKGROUND

A. IN GENERAL

In the early 1980s, the United States became a party to Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, also known as the Cartagena Convention. The United States signed it in March 1983, the Senate gave its advice and consent in September 1984, and the United States became a party in 1986. The Cartagena Convention is a regional environmental agreement ratified by 21 nations in the Caribbean Region (most of the nations of the Caribbean and Central America have become party, though a handful have not). Its area of application comprises the marine environment of the Gulf of Mexico, the Caribbean Sea and the adjacent areas of the Atlantic Ocean, within 200 nautical miles off the Atlantic Coasts of the participating States, south of 30 degrees north latitude. U.S. territory covered by the Convention includes the marine environment in the waters off Texas, Louisiana, Mississippi, Alabama, and Florida, as well as the United States Virgin Islands and Puerto Rico; the Convention does not apply to internal waters.

The Cartagena Convention envisaged that more detailed protocols would be developed by the parties to address specific matters. The SPAW Protocol is such an agreement. In effect, it implements Article 10 of the Cartagena Convention, which requires parties to "take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species," in the geographic area covered by the Convention.

The Protocol was signed by the United States at the negotiating conference in 1990. It was submitted to the Senate by President Clinton in April 1993. The Bush Administration has indicated, by letter to the Committee and in testimony, that it supports the Protocol. The Protocol entered into force on June 18, 2000, following the deposit of the ninth instrument of ratification. As of July 1, 2002, ten nations were party to the Protocol.

The United States Government and U.S.-based environmental groups were instrumental in negotiating the SPAW Protocol and in supporting the region-wide Caribbean Environment Program. U.S. influence in the development of the Protocol has resulted in a regime largely patterned after and consistent with United States environmental law already in effect. Indeed, the Protocol will be implemented in the United States through existing statutes and will not require additional legislation. Existing legislation which fulfills the obligations of the Protocol include the Marine Protection, Research, and Sanctuaries Act, the Coastal Zone Management Act, the Wilderness Act, the Endangered Species Act, the Marine Mammal Protection Act and the Migratory Bird Treaty Act.

B. SUMMARY OF KEY PROVISIONS

The Letter of Submittal from the Secretary of State to the President, set forth in Treaty Doc. 103–5, provides a detailed analysis of the Protocol. This section briefly addresses the major provisions of the Protocol.

The basic obligations of the Protocol are set forth in Article 3, which requires Parties to take the "necessary measures" to "protect, preserve, and manage" areas that "require protection to safeguard their special value" and "threatened or endangered species of flora and fauna." Each party is required to regulate, and where necessary, prohibit, activities having adverse effects on these areas and species.

The Protocol applies to the area covered by the underlying Cartagena Convention, but expands on the definition in the Convention. It also covers (1) waters on the landward side of the baseline from which the breadth of the territorial sea is measured and extending, in the case of watercourses, up to the fresh water limit; and (2) such related terrestrial areas (including watersheds) as may be designated by a party. The United States does not intend to designate a terrestrial area under the Protocol unless requested to do so by an interested state or territory (to date, none of the parties to the Protocol has done so).

The other key provisions of the Protocol are Articles 4, 10 and 11.

Under Article 4, a Party is required, "when necessary" to establish protected areas within its jurisdiction in order to "conserve, maintain and restore" important habitats and ecosystem. The United States does not anticipate designating any protected areas under Article 4 at this time.

Under Article 10, Parties are required to adopt national measures for actions within the Protocol areas to protect endangered or threatened wild flora and fauna. Under Article 11, Parties are required to adopt co-operative measures to ensure protection and recovery of specific species listed in three Annexes, which are an integral part of the Protocol. Annexes I and II comprise plant and animal species, respectively, requiring the most protection. Annex III comprises both plant and animal species requiring some protection, but not the extensive protection required by the first two Annexes.

III. Entry into Force and Termination

Pursuant to Article 27, the Protocol entered into force on June 18, 2000, thirty days after the deposit of the ninth instrument of ratification. If the United States ratifies the Protocol, it will enter into force for the United States on the thirtieth day after the deposit of the U.S. instrument of ratification.

Under Article 29 of the Cartagena Convention, a Party may denounce the Protocol at any time after two years from the date of entry into force of the Protocol for that Party. The denunciation takes effect on the ninetieth day after it is received by the depositary (the Government of Colombia).

IV. Committee Action

The Committee held hearings to review the Protocol on October 26, 1993 (S. Hrg. 103–379), and on May 7, 2002 (S. Hrg. 107–594). On July 30, 2002, the Committee considered the Treaty, and ordered it favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the

Protocol, subject to the reservations, an understanding, and a declaration set forth in the resolution of advice and consent to ratification.

V. Committee Comments; Discussion of Resolution of Advice and Consent to Ratification

The Committee recommends that the Senate advise and consent to ratification of the SPAW Protocol. The Protocol will advance an important U.S. objective of promoting marine conservation in the waters of the Caribbean area by fostering cooperation among the nations of the region in protecting critical habitats and species. In addition to the endorsement from the Bush Administration, the Protocol is supported by several non- governmental organizations, including the International Association of Fish and Wildlife Agencies (representing the fish and wildlife agencies of the 50 states and Puerto Rico) and several environmental organizations.

The Committee notes that, in submitting the Protocol to the Senate in 1993, the President did not submit the Annexes to the Protocol for the advice and consent of the Senate. This decision was made, the Executive Branch submission indicates, because the State Department "after consultations with the staff of the Foreign Relations Committee, believes that they are best treated as an Executive Agreement." (Treaty Doc. 103–5, at v)

The Committee recommends, instead, that the Annexes also be given advice and consent, for this simple reason: the Protocol itself treats them as "an integral part" of the Protocol (Article 26). The Committee agrees, however, with the Executive Branch view that amendments to the Annexes may be made without the advice and consent of the Senate, provided there is adequate consultation with the Senate prior to adoption of the amendments by the Parties, and provided there is adequate time for public comment on proposed amendments. In its initial submission and in its testimony, the Executive Branch has committed to soliciting public comment, through notice in the Federal Register, on proposed amendments. In a written exchange following the May 7, 2002 hearing, the Executive Branch agreed to the suggestion made by Chairman Biden that the Annexes be given the advice and consent of the Senate.

In submitting the Protocol to the Senate, the Clinton Administration proposed two reservations and one understanding to the Protocol. Following the hearing held in 1993, the Administration submitted an amended version of the first proposed reservation. The Bush Administration reviewed these proposals anew, and has indicated to the Committee that it supports the reservations and understandings proposed by the Clinton Administration, as amended. The Committee has made minor modifications to the first two reservations proposed by the Executive Branch.

The first reservation clarifies that the United States does not consider itself bound by Article 11(1) to the extent that current U.S. law, such as the Marine Mammal Protection Act (*see, e.g.*, 16 U.S.C. 1371) or the Endangered Species Act, allows the limited taking of fauna and flora for the purpose of public display, scientific research, photography for educational or commercial purposes, rescue and rehabilitation or as incidental catch.

The second reservation relates to the requirement, set forth in Article 13, for environmental impact assessments. Such assessments are required under the National Environmental Policy Act for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. But such assessments are not required in all cases. The reservation states, therefore, that the United States will not be bound by Article 13 to the extent that the obligations therein differ from the obligations of Article 12 of the Cartagena Convention.

The third reservation clarifies that the United States does not consider six species listed on the Annexes to require protection in the United States, because they are not currently listed under the Endangered Species Act.

The proposed understanding reflects a common understanding expressed at the Diplomatic Conference that adopted the Annexes to the Protocol, and which is set forth in the Final Act of that Conference. It states the understanding of the United States that the provisions of the Protocol do not apply to non-native species (defined as species found outside of their natural geographic distribution) as a result of deliberate or incidental human intervention. It should be noted that Article 12 of the Protocol requires parties to take all appropriate measures to "regulate or prohibit" intentional or accidental introduction of non-native species that may cause harm to the natural flora and fauna of the region. The understanding indicates that the parties are not required, however, to take measures under the Protocol to protect such non-native species. In sum, a party must take appropriate steps to keep out non-native species, but if such species are introduced into the area covered by the Protocol, there is no obligation to protect such species.

Finally, the proposed declaration states that existing Federal legislation provides sufficient legal authority to implement United States obligations under the Protocol, and that no new legislation is necessary in order for the United States to implement the Protocol. A similar declaration was included in the resolution of advice and consent to the Inter-American Convention for the Protection and Conservation of Sea Turtles (Treaty Doc. 105–48), approved by the Senate in 2000.

VI. Resolution of Advice and Consent

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. ADVICE AND CONSENT TO RATIFICATION OF THE PROTOCOL CONCERNING SPECIALLY PROTECTED AREAS AND WILDLIFE TO THE CONVENTION FOR THE PROTECTION AND DEVELOPMENT OF THE MARINE ENVIRONMENT OF THE WIDER CARIBBEAN REGION, SUBJECT TO RESERVATIONS, AN UNDERSTANDING, AND A DECLARATION.

The Senate advises and consents to the ratification of the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, including Annexes, done at Kingston on January 18, 1990 (Treaty Doc. 103–5), subject to the reservations in section 2, the understanding in section 3, and the declaration in section 4.

SECTION 2. RESERVATIONS.

The advice and consent of the Senate under section 1 is subject to the following reservations, which shall be included in the instrument of ratification.

(1) The United States does not consider itself bound by Article 11(1) of the Protocol to the extent that United States law permits the limited taking of flora and fauna listed in Annexes I and II—

(A) which is incidental, or

(B) for the purpose of public display, scientific research, photography for educational or commercial purposes, or rescue and rehabilitation.

(2) The United States has long supported environmental impact assessment procedures, and has actively sought to promote the adoption of such procedures throughout the world. U.S. law and policy require environmental impact assessments for major Federal actions significantly affecting the quality of the human environment. Accordingly, although the United States expects that it will, for the most part, be in compliance with Article 13, the United States does not accept an obligation under Article 13 of the Protocol to the extent that the obligations contained therein differ from the obligations of Article 12 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.

(3) The United States does not consider the Protocol to apply to six species of fauna and flora that do not require the protection provided by the Protocol in U.S. territory. These species are the Alabama, Florida and Georgia populations of least tern (Sterna antilllarum), the Audubon's shearwater (Puffinus lherminieri), the Mississippi, Louisiana and Texas population of the wood stork (Mycteria americana) and the Florida and Alabama populations of the brown pelican (Pelicanus occidentalis), which are listed on Annex II, as well as the fulvous whistling duck (Dendrocygna bicolor), and the populations of widgeon or ditch grass (Rupia maritima) located in the continental United States, which are listed on Annex III.

SECTION 3. UNDERSTANDING.

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

The United States understands that the Protocol does not apply to non-native species, defined as species found outside of their natural geographic distribution, as a result of deliberate or incidental human intervention. Therefore, in the United States, certain exotic species, such as the muscovy duck (Carina moschata) and the common iguana (Iguana iguana), are not covered by the obligations of the Protocol.

SECTION 4. DECLARATION.

The advice and consent of the Senate under section 1 is subject to the following declaration:

Existing federal legislation provides sufficient legal authority to implement United States obligations under the Protocol. Accord-

ingly, no new legislation is necessary in order for the United States to implement the Protocol.

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