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LAND-BASED SOURCES PROTOCOL TO THE CARTAGENA CONVENTION

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

REPORT

[To accompany Treaty Doc. 110–1]

The Committee on Foreign Relations, to which was referred the Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annexes, done at Oranjestad, Aruba on October 6, 1999 and signed by the United States on that same date (Treaty Doc. 110–1), having considered the same, reports favorably thereon with two declarations, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

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I. PURPOSE

The purpose of the Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the "LBS Protocol" or "Protocol") is to prevent, reduce and control pollution in the wider Caribbean region caused by land-based sources and activities.

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II. BACKGROUND

The LBS Protocol is a protocol to the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the "Cartagena Convention"), which the United States joined in 1984. The Cartagena Convention is a regional framework agreement that was negotiated under the auspices of the Regional Seas Program of the United Nations Environment Program (UNEP) and sets out general legal obligations to protect 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 and south of 30 degrees north latitude)—collectively known as the wider Caribbean region. The U.S. marine environment covered by the Convention includes the waters off the coasts of 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. Almost all of the nations of the Caribbean and Central America have joined the Cartagena Convention, which now has 23 Parties.[1]

The Cartagena Convention serves as an umbrella agreement, which facilitates the negotiation of more detailed protocols that address specific marine environmental protection matters in the wider Caribbean region. The LBS Protocol is the third and most recent protocol concluded within the framework of the Convention and addresses one of the most serious sources of pollution in the region: land-based sources of marine pollution. The United States is already a party to the first two protocols to the Cartagena Convention, which respectively address oil spills and specially protected areas and wildlife.[2] In testimony before the committee, Ambassador David Balton noted that "overall the United States has been very satisfied with how the Cartagena Convention and its Protocols have been implemented."

The LBS Protocol implements Article 7 of the Cartagena Convention, which requires Parties to "take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by coastal disposal or by discharges emanating from rivers, estuaries, coastal establishments, outfall structures, or any other sources on their territories." Such pollution contributes to the degradation of coral reefs and commercial fisheries, negatively affects regional economies, and endangers public health, recreation, and tourism throughout the region. Among the principal land-based sources of marine pollution in the Caribbean are domestic wastewater and agricultural nonpoint source runoff, both of which are addressed by the LBS Protocol. The LBS Protocol lists priority

[1] As of July 2008, the following States had ratified or acceded to the Cartagena Convention: Antigua and Barbuda, Barbados, Belize, Colombia, Costa Rica, Cuba, Dominica, the Dominican Republic, France, Grenada, Guatemala, Jamaica, Mexico, Netherlands (ratified on behalf of the Netherlands Antilles Federation on 16 April 1984, and for Aruba as of January 1, 1986), Nicaragua, Panama, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, the United Kingdom (ratified on behalf of the Cayman Islands and Turks and Caicos Islands, and on behalf of the British Virgin Islands), the United States of America, and Venezuela.

[2] The Protocol Concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region (Treaty Doc. 98–13), was drafted and adopted concurrently with the Cartagena Convention; the United States joined the Protocol in October 1984. The second Protocol, the Protocol Concerning Specially Protected Areas and Wildlife (Treaty Doc. 103–5), was adopted in 1990 and entered into force for the United States on April 16, 2003.

source categories, activities, and associated pollutants that affect the wider Caribbean region and sets forth factors that Parties are required to evaluate and consider in developing prevention, reduction, and control strategies to manage land-based sources of pollution. In particular, the Parties are required to ensure that domestic wastewater discharges meet specific effluent limitations, and to develop plans for the prevention and reduction of agricultural nonpoint source pollution. U.S. influence in the development of the LBS Protocol has resulted in a regime largely patterned after and fully consistent with existing U.S. environmental law. The LBS Protocol will be implemented in the United States through existing statutes and will not require additional legislation. The Protocol is expected to raise standards for treating domestic wastewater throughout the region to levels close to those already in place in the United States.

III. Major Provisions

A detailed article-by-article analysis of the Convention may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 110–1. A summary of key provisions is set forth below.

Measures to Prevent, Reduce, and Control Pollution in the Wider Caribbean Region from Land-Based Sources and Activities

Paragraph 1 of Article III of the Protocol obligates each Party to "take appropriate measures" to prevent, reduce, and control pollution in the wider Caribbean region from land-based sources and activities. Paragraphs 2 and 3 of Article III require each Party to develop and implement appropriate national plans and jointly develop appropriate sub-regional and regional plans directed at preventing, reducing, and controlling such pollution. Article IV refers to the Annexes, which contain more specific obligations.

Annex I defines point sources and nonpoint sources,[3] sets out a list of priority source categories and activities that affect the Convention area, and lists associated pollutants of concern.

Annex II lists factors to be used in determining effluent[4] and emission source controls and management factors that the Parties are to apply, including the characteristics and composition of waste; characteristics of the activity or source category; and alternative production, waste treatment technologies, or management practices.

Annex III addresses domestic wastewater discharges. This Annex sets specific timetables and effluent limitations concerning such discharges into the Convention area. The Annex obligates Parties to ensure that such effluent discharged into the most sensitive (Class I) waters meets specific levels for total suspended solids; biochemical oxygen demand; pH; fats, oil and grease; faecal coliform; and floatables. Levels are also set forth for wastewater effluent discharged into less sensitive (Class II) waters. Annex III provides for the possibility of delaying full compliance for up to 10 years for Parties unable to achieve the effluent limitations within the pre-

[3] Pollution originating from a single, identifiable source, such as a discharge pipe from a factory or sewage plant, is called point-source pollution. Pollution that does not originate from a single source, or point, is called nonpoint-source pollution.

[4] Effluent is waste material discharged into the environment.

scribed timetables, provided that such Parties meet certain minimum criteria regarding implementation of effluent controls. Finally, Parts D-F of Annex III call for Parties to take economically and technically feasible steps to manage industrial pre-treatment, household systems, and management, operation and maintenance of wastewater systems. The EPA has determined that Annex III can be implemented by the United States under existing statutory and regulatory authorities, primarily in the Clean Water Act.[5]

Annex IV addresses agricultural nonpoint source pollution. This Annex requires Parties to develop plans for the prevention, reduction, and control of such pollutants that may adversely affect the Convention area. Such plans must identify programs to mitigate pollution in the Convention area from agricultural nonpoint sources. They must include: 1) an evaluation of agricultural nonpoint sources and their impact on the Convention area; 2) education, training, and awareness programs; 3) incentives to increase the use of best management practices; and 4) an assessment and evaluation of legislative and policy measures and plans to manage agricultural nonpoint sources. Each Party is required to report on its plans for prevention, reduction and control of agricultural nonpoint source pollution in accordance with Article XII of the Protocol. The United States would implement these requirements through the Clean Water Act and the Coastal Zone Management Act.[6]

Environmental Impact Assessments

Article VII requires each Party, "as far as practicable," to review the potential effects of planned activities that it has reasonable grounds to believe are likely to cause substantial pollution of, or significant and harmful changes to, the Convention area. The obligation is limited to activities that are subject, with respect to each Party, to "its regulatory control in accordance with its laws." According to the Secretary of State's Letter of Submittal, "[f]or the United States, this provision would [only] apply to activities that are conducted by the federal government or that are subject to regulatory control pursuant to a federal statute."[7] The National Environmental Policy Act and Executive Order 12114 would be used to implement the requirement as far as major federal actions are concerned. With respect to other activities, the Clean Water Act,[8] the Coastal Zone Management Act, and a host of other federal laws regulate, including through reviews and assessments, activities under U.S. jurisdiction or control that can reasonably be foreseen to cause substantial marine pollution.

Cooperation and Assistance

Article V requires Parties to cooperate on a bilateral, sub-regional, regional or global basis or through competent organizations in the prevention, reduction and control of pollution in the wider Caribbean region from land-based sources and activities. In addition, Parties are to "promote cooperation, directly or through com-

[5] *See* the Secretary of State's Letter of Submittal at p.8. The relevant provisions of the Clean Water Act are §§ 301, 302, 307, 402, and 403.

[6] *See* the Secretary of State's Letter of Submittal at p.9. The relevant provisions are as follows: § 319 of the Clean Water Act and § 1455b of the Coastal Zone Management Act.

[7] *See* the Secretary of State's Letter of Submittal at p.4.

[8] 33 U.S.C. § 1251 et seq.

petent sub-regional, regional and global organizations, with those Contracting Parties which request it in obtaining assistance for the implementation of [the Protocol]." Article VIII requires Parties to cooperate in the development of information-sharing systems to facilitate implementation of the Protocol. Article IX provides that, where pollution from land-based sources and activities from one Party is likely to adversely affect another Party, the Parties are to use their "best efforts to consult" with each other.

In response to questions from the committee regarding how the United States would implement these provisions regarding cooperation and assistance, the administration responded as follows:

> The United States already provides substantial assistance to nations in the Caribbean region for environmental programs, including for control of land-based sources of marine pollution. Much of our assistance to the region in this area is through in-kind services and the provision of technical expertise. The United States provides technical advice on marine environmental protection to the Caribbean through USAID, the Department of Agriculture, NOAA and EPA. In addition, the United States is a principal contributor to the United Nations Caribbean Environmental Program (CEP), which supports marine environmental protection activities in the region. In recent years we have provided approximately $400,000 in annual support to the CEP's Caribbean Trust Fund, and an additional $50,000 or so for the CEP's work on land-based sources of marine pollution. As a party to the Land-Based Sources Protocol, we would not incur any new funding obligations. Financing is done on a voluntary basis. We nevertheless hope that entry into force of the Protocol may spur international donors to provide greater assistance to nations of the Caribbean to address these issues.

Public Awareness and Education

Article X requires Parties to "promote public access to relevant information and documentation concerning pollution of the Convention area" and to promote the "opportunity for public participation in decision-making processes concerning the implementation of this Protocol." Article XI requires Parties to develop environmental education programs for the public and to promote training for individuals involved in pollution prevention, reduction and control. The United States already conducts a variety of public education and training programs that would fulfill this obligation, including through the Department of Agriculture's Natural Resource Conservation Service and numerous federally-funded state education and training programs.

Scientific, Technical, and Advisory Committee

Article XIV establishes a Scientific, Technical, and Advisory Committee. Each Party is to designate as its representative on the committee an expert in fields that are relevant to the implementation of the Protocol. Parties can designate additional experts and advisors that may attend meetings and the committee itself may request scientific and technical advice from other competent experts and organizations.

Article XII requires Parties to submit reports concerning their implementation of the Protocol and, "whenever possible, information on the state of the Convention area." The reports are to be used by the Scientific, Technical and Advisory Committee to prepare regional reports on the implementation of this Protocol, including the state of the Convention area.

The Scientific, Technical and Advisory Committee is intended to report to and advise the Parties to the Protocol on its implementa-

tion. The committee is charged with, *inter alia,* reviewing on a regular basis the annexes to the Protocol as well as the state of pollution of the Convention area from land-based sources and activities and, where necessary, recommending amendments to additional annexes for consideration by the Parties. The committee is also to examine, assess, analyze, and advise Parties on the effectiveness of the measures adopted to implement the Protocol.

Dispute Resolution

Although the LBS Protocol does not itself contain a dispute resolution provision, the Cartagena Convention does have a voluntary dispute resolution provision that is applicable to the Protocol. Specifically, Article II of the LBS Protocol notes that "[e]xcept as otherwise provided in this Protocol, the provisions of the [Cartagena Convention] relating to its protocols shall apply to this Protocol." Thus, Article 23 of the Cartagena Convention, which covers the settlement of disputes arising from "the interpretation or application of this Convention or its protocols" is applicable to the LBS Protocol. The procedure provided for under Article 23 of the Cartagena Convention, however, only obligates Parties to "seek to resolve" disputes regarding the interpretation or application of the Convention or its protocols and does not subject Parties to a mandatory dispute resolution procedure.

IV. Entry Into Force

In accordance with Article 28 of the Cartagena Convention, which is applicable pursuant to Article II of the Protocol, the LBS Protocol will enter into force on the "thirtieth day following the date of deposit of the ninth instrument of ratification, acceptance, or approval of the Protocol, or of accession thereto." To date, only four countries have ratified the LBS Protocol[9] and thus it has not yet entered into force. If the United States is among the first nine States to join the Protocol, it will enter into force for the United States on the thirtieth day following the date of deposit of the ninth instrument of ratification, acceptance, or approval of the Protocol, or of accession thereto. If the United States ratifies the Protocol after the ninth State has done so, the Protocol will enter into force for the United States on the thirtieth day following the date of deposit of its instrument of ratification.

V. Implementing Legislation

The LBS Protocol would be implemented in the United States through existing statutes; the Protocol does not require additional implementing legislation. U.S. laws that would implement the Protocol include the Clean Water Act,[10] the Coastal Zone Management Act,[11] the Outer Continental Shelf Lands Act,[12] the Clean Air Act,[13] the Solid Waste Disposal Act,[14] the Comprehensive Environ-

[9] Trinidad and Tobago, France, Saint Lucia, and Panama.
[10] 33 U.S.C. § 1251 *et seq.*
[11] 16 U.S.C. § 1451 *et seq.*
[12] 43 U.S.C. § 1331 *et seq.*
[13] 42 U.S.C. § 7401 *et seq.*
[14] 42 U.S.C. § 6901 *et seq.*

mental Response, Compensation, and Liability Act,[15] FIFRA,[16] and the National Environmental Policy Act.[17]

VI. Committee Action

The committee held a public hearing on the LBS Protocol on July 10, 2008. Testimony was received from Ambassador David A. Balton, Deputy Assistant Secretary of State for Oceans and Fisheries. A transcript of this hearing is annexed to Executive Report 110–19.

On July 29, 2008, the committee considered the LBS Protocol and ordered it favorably reported by voice vote, with a quorum present and without objection.

VII. Committee Recommendation and Comments

The Committee on Foreign Relations believes that the LBS Protocol would address some of the most serious sources of pollution in the region covered by the Protocol, which covers a substantial portion of the U.S. marine environment, including waters off the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida, as well as the United States Virgin Islands and Puerto Rico. Between 70 and 90 percent of pollution entering the marine environment emanates from land-based sources and activities.[18] Such pollution contributes to the degradation of coral reefs and commercial fisheries, negatively affects regional economies, and endangers public health, recreation, and tourism throughout the region. Although U.S. law is already fully consistent with the requirements set forth in the Protocol, U.S. ratification is likely to spur other countries in the region to join the Protocol and improve their domestic standards so as to mitigate pollution in the wider Caribbean region, which has a direct impact on the United States. Widespread adherence to the LBS Protocol would lead to an overall improvement of the U.S. marine environment and result in improved protection of human health and marine resources, as well as a stronger regional economy and tourism industry in the wider Caribbean region. Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of the LBS Protocol, as set forth in this report and the accompanying resolution of advice and consent.

A. AMENDMENTS TO THE ANNEXES

Article XVII of the Protocol, which incorporates by reference certain provisions of the Cartagena Convention, sets forth procedures for amending existing annexes and for adding new annexes to the Protocol. There are four existing annexes to the Convention: Annex 1—*Source Categories, Activities and Associated Pollutants of Concerns;* Annex 2—*Factors to Be Used in Determining Effluent and Emission Source Controls and Management Factors;* Annex 3—*Domestic Wastewater;* and Annex 4—*Agricultural Non-Point Sources of Pollution.* The default rule provided for in the Protocol, which incorporates by reference the amendment procedure provided for in

[15] 42 U.S.C. § 9601 *et seq.*
[16] 7 U.S.C. § 136 *et seq.*
[17] 42 U.S.C. § 4321 *et seq.*
[18] *See* the President's Letter of Transmittal at III.

the Cartagena Convention for annexes, is a tacit amendment procedure. Amendments to existing annexes of the Protocol are to be adopted by a three-fourths majority vote of the Parties present and voting at a meeting of the Parties and if adopted, will enter into force for all Parties except those that indicate that they object to the amendment within 90 days. The Protocol, however, also provides for the possibility of amending the annexes through a more traditional amendment procedure in a situation in which the Parties are of the view that the nature of the amendment is inappropriate for a tacit amendment procedure. Article XVII(2) of the Protocol provides that the Parties may decide at the time of the adoption of a particular amendment to an annex that it is of such importance that it will only bind those Parties that have affirmatively consented to be bound and will enter into force only when three-fourths of the Parties have so consented.

In accordance with Article XVII of the Protocol, which incorporates by reference certain provisions of the Cartagena Convention, new annexes would similarly be adopted by a three-fourths majority vote of the Parties present and voting and would enter into force for all Parties except those that indicate that they object to the amendment within 90 days. Article XVIII(2) of the Protocol, however, gives each State the option to declare when joining the Protocol that any new annex shall only enter into force for it upon its express consent. The declaration included in the proposed resolution of advice and consent would allow the United States to exercise this option with respect to amendments that include new annexes to the Protocol, so that the executive branch would have time to transmit such amendments to the Senate for advice and consent. In the committee's view, any amendment that required the inclusion of a new annex to the Protocol would require the advice and consent of the Senate.

The Committee on Foreign Relations recognizes that the tacit amendment procedure provided for amending existing annexes makes it possible for the implementation of the LBS Protocol to evolve without going through a standard amendment process, which can take years to complete. The four annexes currently attached to the Convention are largely technical and procedural in nature, and amendments to these annexes should not, in the normal course, rise to the level of those that require the advice and consent of the Senate. If there is any question, however, as to whether an amendment to these annexes requires the advice and consent of the Senate, the committee expects the executive branch to consult with the committee in a timely manner in order to determine whether advice and consent is necessary. Moreover, the committee expects that under such circumstances, the executive branch will make appropriate use of the objection procedure described above to prevent an amendment from entering into force for the United States before the conclusion of consultations on whether Senate advice and consent is necessary. Finally, should the Parties decide at the time of the adoption of a particular amendment to an annex that it is of such importance that it will only bind those Parties that have affirmatively consented to be bound, the committee believes it is likely that such an amendment would require the advice and consent of the Senate.

B. RESOLUTION

The committee has included in the resolution of advice and consent two proposed declarations; only one of them would be included in the instrument of ratification. Both are discussed briefly below.

First Declaration

This proposed declaration is provided for in Article XVIII(2) of the Protocol, which states that any State may declare when depositing its instrument of ratification, acceptance, approval, or accession that "any new annex shall enter into force for it only upon the deposit of its instrument of ratification, acceptance, approval or accession thereto." As a result of making this declaration, any new annexes adopted by the Parties to the Protocol would enter into force for the United States if and only if the United States deposits an "instrument of ratification, acceptance, approval or accession" to the relevant annex. This declaration was recommended by the executive branch and would be included in the U.S. instrument of ratification. As noted above in the discussion, this declaration would be made in order to be sure that the executive branch would have time to transmit such annexes to the Senate for advice and consent.

Second Declaration

This second proposed declaration states that the LBS Protocol is not self-executing. The Senate has rarely included statements regarding the self-executing nature of treaties in resolutions of advice and consent, but in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008), the committee has determined that a clear statement in the resolution is warranted. A further discussion of the committee's view on this matter can be found in Section VIII of Executive Report 110–12.

VIII. Resolution of Advice and Consent to Ratification

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

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO DECLARATIONS

The Senate advises and consents to the ratification of the Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annexes, done at Oranjestad, Aruba, on October 6, 1999 (Treaty Doc. 110–1), subject to the declaration of section 2 and the declaration of section 3.

SECTION 2. DECLARATION

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

> In accordance with Article XVIII, the United States of America declares that, with respect to the United States of America, any new annexes to the Protocol shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.

SECTION 3. DECLARATION

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

This Protocol is not self-executing.

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