

# Report for Congress

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## **Drug Certification Requirements and Congressional Modifications in 2001-2002**

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# Drug Certification Requirements and Congressional Modifications in 2001-2002

## Summary

From the mid-1980s to 2001, Congress required the President to certify that specified drug producing and drug-transit countries were cooperating fully with the United States in counter-narcotics efforts in order to avoid a series of sanctions, including suspension of U.S. foreign assistance and financing, and opposition to loans in the multilateral development banks. The sanctions would also apply if Congress, within 30 calendar days, passed a joint resolution of disapproval to overturn the presidential certification.

Over the years, representatives from many countries complained about the unilateral and non-cooperative nature of the drug certification requirements and urged the United States to end the process and to rely upon various multilateral methods of evaluation that have been developed. Mexico, often the focus of congressional debate, particularly expressed dissatisfaction with the process, even though it was regularly certified as being a fully cooperative country. Following the July 2000 election of opposition candidate Vicente Fox as President of Mexico, legislative measures were introduced to modify the drug certification requirements, and these initiatives were mentioned when President Bush met with President Fox in Mexico in mid-February 2001, and in the United States in early September 2001.

In major legislative activity in 2001, the Senate Foreign Relations Committee reported out two measures (S. 219 and S. 1401) that would have modified the drug certification procedures for three years, required the President to designate only the worst offending countries subject to sanctions, and encouraged the convening of a high-level conference to develop an effective multilateral strategy. By the end of the year, the only measure that passed was the Foreign Operations Appropriations for FY2002 (H.R. 2506/P.L. 107-115) that waived the drug certification requirements for FY2002 only, but required the President to designate and withhold assistance from the worst offending countries which had failed demonstrably to adhere to international counter-narcotics agreements, although the withholding could be waived if the provision of assistance was determined to be in the national interest.

In major legislative activity in 2002, Congress passed the Foreign Relations Authorization for FY2003 (H.R. 1646/P.L. 107-228), with Section 706 of the Act establishing new certification and designation procedures. Drawing from S. 1401, the new procedures require the President to make a report, not later than September 15 of each year, identifying the major drug transit or major illicit drug producing countries. At the same time he is required to designate any of the named countries that has “failed demonstrably,” during the previous 12 months, to make substantial counter-narcotics efforts. U.S. assistance would be withheld from any designated countries unless the President determines that the provision of assistance to that country is vital to the national interest of the United States or that the designated country subsequently made substantial counter-narcotics efforts. Notwithstanding the general suspension of the previous drug certification and sanctions procedures, subsection 706(5)(B) provides that the President may apply those procedures at his discretion.

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# Drug Certification Requirements and Congressional Modifications in 2001-2002

This report provides (1) a brief summary of the existing drug certification requirements for drug producing and drug-transit countries; (2) background on the experience, criticisms, and reform efforts under these provisions; (3) a summary of early congressional options and proposals advanced in 2001, with possible advantages and disadvantages; (4) a summary of later initiatives with legislative activity in 2001 and 2002; and (5) a tracking of legislative action on the major initiatives in those years.<sup>1</sup> Similar material is presented in a different way under the main headings.

## Drug Certification Requirements, 1986-2001

From 1986 to 2001, with some modifications in procedure, Congress required the President to certify that certain countries were cooperating fully with the United States in counter-narcotics efforts in order to avoid the suspension of U.S. foreign assistance. Sections 489-490 of the Foreign Assistance Act of 1961, as amended, required the President to designate the major illicit drug producing and drug-transit countries by November 1 of each year. These sections further required the President to withhold 50% of U.S. assistance for the designated countries for that fiscal year until he certified by March 1 of each year that the countries had cooperated fully with the United States in drug control efforts, or had taken adequate steps on their own to achieve the goals and objectives of the 1988 United Nations Drug Convention.<sup>2</sup>

In the event the President was unable to certify that a country was fully cooperative, or to determine that a less than fully cooperative country should be given a certification in the national interest, certain sanctions applied to the countries denied certification. Among the sanctions applied to decertified countries were the following: (1) most foreign assistance and financing of sales for the decertified country are suspended, with the exception of counter-narcotics and humanitarian aid; (2) U.S. representatives were required to vote against loans for the country in the multilateral development banks; and (3) certain trade sanctions, including increased tariffs and denial of preferential trade benefits, could be applied at the President's

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<sup>1</sup> The initial version of this report drew from a CRS memorandum prepared for the Senate Foreign Relations Committee and was used with the permission of the Committee.

<sup>2</sup> For more detail, see U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Fact Sheet: Majors List and the Certification Process, March 1, 2001, available on internet at [<http://www.state.gov/g/inl/rls/fs/index.cfm?docid=1130>]; and CRS Report 98-159, Narcotics Certification of Drug Producing and Trafficking Nations: Questions and Answers, by Raphael F. Perl.

discretion. The imposed sanctions were to remain in force until the country was subsequently certified.

The sanctions would also apply if Congress, within 30 calendar days, passed a joint resolution of disapproval to overturn the presidential certification, thereby decertifying a country. However, any such congressional resolution would be subject to a presidential veto, and would require a two-thirds vote of both houses to override.

On March 1, 2001, in the most recent presidential certifications under those provisions, President Bush certified 20 of the 24 designated drug producing or transit countries as fully cooperative in counter-narcotics efforts, and he granted vital national interest certifications to Cambodia and Haiti. Only two countries – Afghanistan and Burma – were decertified and subject to the sanctions. President Bush's determinations were very similar to the determinations of President Clinton in the previous year, except that Nigeria and Paraguay were elevated from national interest waiver status to fully cooperative status. By the end of the 30-day period for congressional review of presidential drug certifications, no resolutions of disapproval had been introduced to disapprove President Bush's certification of Mexico or any other country.

## Past Experience and Reform Efforts

Over the years, as U.S. presidential certification decisions were prepared and announced, spokesmen from many countries (particularly Mexico, which has often been the focus of congressional debate) have complained about the unilateral and non-cooperative nature of the drug certification requirements, and have urged the United States to end the process and to adopt more multilateral methods of evaluation. Particularly in the context of Latin America and the Caribbean, the most commonly mentioned multilateral forum for counter-narcotics evaluation is the Multilateral Evaluation Mechanism (MEM) developed by the Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States (OAS).<sup>3</sup>

Although Mexico has been fully certified each year by a series of U.S. presidents, congressional resolutions to disapprove Mexico's certification were

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<sup>3</sup> Following up on the Hemispheric Anti-Drug Strategy of 1996 and the Plan of Action of Summit of the Americas II (1998) in Santiago, Chile, the CICAD agreed upon the Multilateral Evaluation Mechanism (MEM) in 1999, and a CICAD working group developed a questionnaire with 61 indicators to which governments responded for the first time in 2000. A Governmental Experts Group, made up of one representative from each country, assessed achievements in 1999-2000 for all countries except their own country. The resulting overview Hemispheric Report and the individual National Reports make assessments and recommendations for future action. Critics argue that the reports are preliminary, bland, and without any sanctions. Proponents argue that the reports make important recommendations, that the MEM process will advance beyond this first effort, and that countries care about their performance under the agreed upon criteria. For more detail on the CICAD and the MEM process, see the CICAD's internet site at [<http://www.cicad.oas.org/en/mem/Main.htm>].

introduced in 1987, 1988, 1997, 1998, and 1999, and congressional criticisms of Mexico's certifications were voiced in many years.<sup>4</sup> Resolutions of disapproval failed to reach floor action in most years, but both houses passed separate versions of weakened resolutions of disapproval in 1997, and a Senate resolution of disapproval reached the floor but was defeated in 1998.<sup>5</sup>

Responding to domestic and international criticisms, measures to modify the drug certification requirements were introduced but not enacted in 1997. In the lower house, the House International Relations Committee reported out H.R. 1486, the Foreign Policy Reform Act, with Section 403, proposed by Representative Hamilton, which would have eliminated the presidential certification, congressional review, and sanctions against countries under the certification process. Instead, it would have required the President to continue to report yearly, and to consult regularly with Congress on drug control issues. It would have given the President the authority to withhold bilateral assistance and to oppose multilateral bank financing for countries that are not fully cooperative if he found those measures to be helpful. In the upper house, an amendment by Senators Dodd and McCain to the Foreign Operations Appropriations Bill (S. 955) was defeated, which would have suspended the drug certification requirements for two years, and called upon relevant country leaders to develop a multilateral framework for improving international cooperation in counter-narcotics efforts.

Following the July 2000 election of opposition candidate Vicente Fox as President of Mexico, bills were introduced but not enacted to exempt Mexico from the drug certification requirement in FY2001. However, the Senate did pass S. Res. 366 in October 2000, expressing the sense of the Senate that a one-year waiver was warranted for Mexico so that the new presidents in Mexico and the United States could develop more effective and cooperative counter-narcotics programs.

In late January 2001, Senator Dodd introduced S. 219 to suspend the existing drug certification process for two years and encourage a high-level conference to develop an effective multilateral strategy. In mid-February 2001, Senator Kay Bailey Hutchison introduced S. 353 to exempt Mexico from the drug certification requirement in FY2001 but require enhanced bilateral counter-narcotics cooperation. About the same time, Senator Grassley and Senator DeWine introduced S. 376 to modify the certification process for FY2002-FY2004 to require the President to identify only those countries that are failing to cooperate fully with the United States in drug control efforts.

In mid-February 2001, on the eve of President Bush's visit with President Fox in Mexico, the Senate passed S.Con.Res. 13 expressing the sense of Congress that the President should work with the President of Mexico to advance bilateral cooperation. The measure urged the President to seek, among other things, "to

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<sup>4</sup> For details on the certification process and an illustration of the possible consequences of decertification of Mexico, see CRS Report RL30080, *Mexico and Drug Certification in 1999: Consequences of Decertification*, March 4, 1999, by K. Larry Storrs.

<sup>5</sup> For more detail, see CRS Report 98-174, *Mexican Drug Certification Issues: U.S. Congressional Action, 1986-2001*, by K. Larry Storrs.

review the current illicit drug certification process, and should seek to be open to consideration of other evaluation mechanisms that would promote increased cooperation and effectiveness in combating the illicit drug trade.” During the joint press conference following the meeting in Mexico, President Bush indicated that there was a movement in Congress to review the drug certification requirements, and he expressed confidence in President Fox’s efforts to combat drug trafficking.

In late February and early March, additional measures were introduced to modify the existing drug certification procedures. On February 27, 2001, Representative Kolbe introduced H.R. 753 to exempt Mexico from the drug certification requirements in FY2001. On March 1, 2001, Senators Boxer and Gramm introduced S. 435 to provide that the drug certification procedures would not apply to countries with which the United States has bilateral counter-narcotics agreements; and Representative Reyes introduced H.R. 841 to suspend the certification procedures for two years and encourage development of an effective multilateral strategy.

On March 1, 2001, the same day that the President certified that Mexico was cooperating fully with the United States in counter-narcotics areas, the Senate Foreign Relations Committee held a hearing in which several of the proposed modifications to the drug certification requirements were discussed. Assistant Secretary of State for International Law Enforcement Affairs Rand Beers testified that the certification process had been “an effective, if blunt, policy instrument” but he recognized a growing sense in Congress that there may be more effective approaches. He added: “Any regime that might modify or replace certification should have an enforcement mechanism to ensure continued international counternarcotics cooperation. If there were efforts to suspend the certification procedure, we believe the President must retain in the interim the power to decertify or sanction individual countries using the standards of the current process. We do not believe that there should be exemptions for individual countries or regions at this time. Future carve-outs may be appropriate, however, for regions where there is a mutually acceptable and credible multilateral evaluative mechanism in place.”

On April 3, 2001, the Senate Foreign Relations Committee reported out S. 219 with an amendment in the nature of a substitute, with elements from the various proposals, that would suspend the existing drug certification procedures for three years, require the President to designate only the worst offenders subject to sanctions, and encourage a high-level conference to develop effective multilateral drug reduction and prevention strategies. On August 1, 2001, the Senate Foreign Relations Committee approved S. 1401, the Foreign Relations Authorizations Act for FY2002-FY2003, with the provisions of the previously reported S. 219 incorporated as Sections 741-745 in Title VII, Subtitle D, Reform of Certification Procedures Applicable to Certain Drug Producing or Trafficking Countries. The Committee reported out S. 1401(S.Rept. 107-60) on September 4, 2001, and the measure was placed on the Senate Legislative Calendar.

During President Fox’s official state visit to the United States on September 5-7, 2001, the Mexican President, in addressing a joint session of Congress, called upon Congress to pass legislation to suspend the drug certification requirements as a gesture of trust and faith in the new government, arguing that “trust requires that one

partner not be judged unilaterally by the other.” Following the Bush-Fox talks, the joint communique praised the growing law enforcement cooperation between the countries, expressed support for the OAS’ multilateral evaluation of counter-narcotics efforts, and noted President Bush’s commitment “to work with the U.S. Congress, on a priority basis, to replace the annual counter-narcotics certification regime with new measures designed to enhance international cooperation in this area.”

In December 2001, Congress passed the Foreign Operations Appropriations Act for FY2002 (H.R. 2506) that contained a temporary, one-year waiver of the drug certification procedures on a global basis for all major drug-transit and drug producing countries. It required the President, with some waiver authority, to designate and withhold assistance from the countries that have failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to obligations under international counter-narcotics agreements. The conference report was approved by the House on December 19, 2001, and by the Senate on December 20, 2001. It was signed into law (P.L. 107-115) on January 10, 2002.

In September 2002, Congress passed and the President signed the Foreign Relations Authorization for FY2003 (H.R. 1646/P.L. 107-228), with Section 706 of the Act dealing with International Drug Control Certification Procedures. Drawing from S. 1401, the new procedures require the President to make a report, not later than September 15 of each year, identifying the major drug transit or major illicit drug producing countries. At the same time, he is required to designate any of the named countries that has “failed demonstrably,” during the previous 12 months, to make substantial efforts to adhere to international counter-narcotics agreements (defined in the legislation) and to take other counter-narcotics measures. U.S. assistance would be withheld from any designated countries unless the President determines that the provision of assistance to that country is vital to the national interest of the United States or that the designated country subsequently made substantial counter-narcotics efforts. Notwithstanding the general suspension of the previous drug certification and sanctions procedures, subsection 706(5)(B) provides that the President may apply those procedures at his discretion. A transition rule provides that for FY2003 the required report must be submitted at least 15 days before foreign assistance funds are obligated or expended. The conference report on H.R. 1646 was approved by the House by voice vote on September 25, 2002, and was approved by the Senate by unanimous consent on September 26, 2002. It was signed into law (P.L. 107-228) on September 30, 2002.

## Early Legislative Options, with Possible Advantages and Disadvantages

### Retain the Current Drug Certification Process

Congress could leave the present drug certification process in place, and make no changes to existing legislation.

**Possible Advantages.** It is argued that leaving the system intact would provide continuity with a process that has been in place for many years, and, which, arguably, has produced results. According to this view, the certification process has encouraged the executive branch to place a high priority on foreign drug trafficking activities, and it has forced the countries to take appropriate actions throughout the year.<sup>6</sup> It is viewed by many as a legitimate exercise in accountability that requires recipients of U.S. foreign assistance to cooperate with the United States in important matters. Although countries may express opposition to the certification process, nearly all drug producing or transit countries have been given full certification, or a national interest certification, and have had little fear of sanctions.

Among Latin American and Caribbean countries, only Colombia and Panama have ever been decertified. Despite Mexico's argument that the certification process is harmful to bilateral cooperation, the United States and Mexico have cooperated extensively in recent years through the yearly cabinet-level Binational Commission, the twice yearly High-Level Contact Group on Narcotics Abuse, and the quarterly Plenary Group on Law Enforcement. Acting through these groups, the countries agreed upon an Anti-Drug Alliance in 1997, a joint anti-drug strategy in 1998, law enforcement coordination in 1999, and anti-money laundering initiatives in 2000. The United States has also been heavily involved in training Mexican military and law enforcement officials in recent years. Proponents of the existing process would argue that the procedure has encouraged bilateral discussion and agreement on counter-drug policies for all countries.

**Possible Disadvantages.** It is argued that the existing system is unilateral, punitive, arbitrary, and counter-productive. It places blame upon the drug producing and transit countries while neglecting the large responsibility posed by the demand for drugs in the United States. It is viewed as harmful to the absolutely essential cooperation needed with neighbors and allies, not only in counter-narcotics efforts, but in other areas as well.<sup>7</sup> In the context of U.S.-Mexico relations, it is argued that

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<sup>6</sup> See the statements of Representative Benjamin Gilman and Senator Charles Grassley before the Senate Foreign Relations Committee, March 1, 2001, for defense of the certification process.

<sup>7</sup> See the statements by Senators Christopher Dodd, Barbara Boxer, Charles Grassley, Kay Bailey Hutchison, and by Representative Silvestre Reyes in the Senate Foreign Relations Committee hearing, March 1, 2001, for some criticisms of the certification process. For other critical views, see the information and linkages on U.S. Drug Certification on the home page [<http://www.wola.org>] of the Washington Office on Latin America (WOLA), and  
(continued...)

retaining the system might harm the spirit of the Fox-Bush meetings, and miss the opportunity to establish exceptionally friendly relations with the new Fox Administration in Mexico. President Fox has stated that the certification process is unilateral and counterproductive, even if Mexico is fully certified. Despite the pattern of accomplishments in the past, it might be argued that the achievements might have been greater without the certification process. Moreover, in a more cooperative environment, Mexico may be more willing and able to address politically difficult issues like corruption and extradition.

## **Suspend the Certification Process for All Countries for Two Years and Encourage the Early Convening of a High-Level Conference to Develop an Effective Multilateral Strategy**

On January 30, 2001, Senators Dodd, McCain, Hollings, and Hagel introduced S. 219 in the Senate, to suspend the existing drug certification process for all countries for the two fiscal years following enactment, unless the President determined that the certification of one or more countries would advance U.S. drug control goals. Finding that the annual certification process does not foster effective bilateral or multilateral cooperation with the United States, the bill expresses the sense of Congress that the President should take advantage of the period of suspension to convene a conference of drug producing, transit, and consuming countries at the earliest feasible date in 2001 to develop an effective multilateral strategy, and to transmit to Congress no later than one year after enactment the necessary legislation to implement a new strategy. On March 1, 2001, Representative Reyes introduced H.R. 841 in the House with similar provisions.

**Possible Advantages.** Suspension of the certification process for two years would eliminate the unilateral procedure for all countries, and would provide time for the development of a more effective multilateral strategy, with necessary legislation to be transmitted to Congress. In comparison to another proposed approach, this option would not single out Mexico for preferential treatment, and would establish a basis for a broad-based multilateral strategy. Since it gives the President the option to make certifications and impose sanctions if considered useful, it would seem to meet the criteria specified by the Bush Administration in the March 1<sup>st</sup> hearing.

**Possible Disadvantages.** Suspending the process for all countries may be unwise if the main target is Mexico, and developing a broad-based multilateral strategy may be unmanageable and unachievable. At the urging of then President Zedillo of Mexico, the U.N. Special Session on Drug Control was held in June 1998, but the results were fairly limited. For those who favor the existing certification requirements, a disadvantage of suspension for two years would be the danger that it could lead to permanent suspension of the requirements. The proposed legislation to suspend the process for two years was not passed in time to prevent any harm to relations with Mexico from the March 2001 certification decision, but discussion of

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<sup>7</sup>(...continued)

on the Internet site [<http://www.lawg.org/drugcontrol.htm>] of the Latin America Working Group (LAWG).

the modification may have softened the action, and passage this year would set a new pattern for the future. Since the State Department's annual International Narcotics Control Strategy Report (INCSR) would still be made under this proposed legislation, Mexico and other countries might still take offense at this unilateral and often somewhat critical evaluation of drug control efforts.

### **Exempt Mexico from Certification Requirements for a Year, and Require a Comprehensive Plan for Enhanced Bilateral Cooperation within a Short Period**

On February 15, 2001, Senator Kay Bailey Hutchison with 6 cosponsors introduced S. 353 in the Senate, that would exempt Mexico from the drug certification requirements in FY2001, and would require development of a comprehensive plan of proposals by June 30, 2001 for enhanced counter-narcotics cooperation between the United States and Mexico. On February 27, 2001, Representative Kolbe introduced H.R. 753 in the House with similar provisions.

**Possible Advantages.** Exempting Mexico from the certification requirements for a year would avoid the possible harmful effects of a certification decision on relations between the two countries in an early period of the Fox-Bush relationship. While not in time to avoid any negative effects caused by the March 2001 certification, discussion of exemption may have acted to soften the damage, and it would prevent any harmful effects next year if the legislation were modified to cover FY2002. Requiring the President to provide a comprehensive plan for bilateral Mexico-U.S. counter-narcotics cooperation within a short period of time would place the issue in a more manageable bilateral context with two of the most important actors, and it would require President Bush and President Fox to make this a priority issue.

**Possible Disadvantages.** This option singles out Mexico for very special treatment, and may result in criticisms from other countries. It would seem to lack presidential support since the Administration has expressed opposition to exemptions for individual countries or regions. The fact that it leaves the drug certification procedure in place may also bring criticism from various countries, including Mexico. Moreover, as indicated above, the continued issuance of the INCSR may be viewed in a negative light by Mexico, even if it is exempted from certification. As written, S. 353 and H.R. 753 would be unable to prevent any negative effects from the March 2001 certification for FY2001 already issued, but similar legislation could be proposed to cover FY2002.

### **Modify Drug Certification Requirements in FY2002-FY2004 to Require the President to Identify Only Those Countries That Are Subject to Sanctions**

On February 15, 2001, Senators Grassley and DeWine introduced S. 376, that would modify the certification process for FY2002-FY2004 to require the President to identify only those countries that are to be subject to sanctions (i.e. those countries found not to be cooperating fully with the United States in drug control efforts), with provision for exclusion of countries from sanctions on national security grounds.

Under this proposal, for a 3-year trial period, beginning in the coming fiscal year, all countries would be assumed to be fully cooperating with the United States in counter-narcotics efforts, and the President would be required only to identify those presumably few countries that are not fully cooperative and consequently subject to the sanctions. It also requires the identification and description of major drug trafficking organizations in the INCSR as well as the traditional material.

**Possible Advantages.** This option retains major elements of the certification process but places emphasis upon the countries that are not cooperating fully with the United States. Following the pattern of the provisions for imposing sanctions on countries engaging in state-supported terrorism or a pattern of human rights abuse, it would give most countries the benefit of the doubt and single out only those countries engaging in non-cooperative behavior. It also requires the Administration to provide additional information on major drug trafficking organizations in the INCSR in addition to the standard coverage. Since this option retains sanctions for non-cooperating countries, it would seem to meet the criteria specified by the Bush Administration.

**Possible Disadvantages.** Since this measure retains the unilateral evaluation of the certification process with the threat of sanctions, it would be subject to many of the criticisms voiced about the existing process, and it is only in effect for a three year trial period. While focusing on the countries subject to sanctions, the proposed procedures might continue to generate the type of congressional debate that was considered to be harmful by many countries as questions are raised about the initial identification of non-cooperative countries, the final determination of countries subject to sanctions, the omission of countries subject to sanctions for national security reasons, and Congress' power to identify a country subject to sanctions.

### **Provide that Drug Certification Requirements Not Apply to Countries with Which the United States Has Bilateral Counter-Narcotics Agreements and Other Plans**

On March 1, 2001, Senators Boxer and Gramm introduced S. 435 to provide that the drug certification procedures and sanctions would not apply to countries with which the United States has bilateral agreements and other plans related to counter-narcotics efforts. Under this proposal the certification procedures would not apply if the President determined by December 31 of that fiscal year, after consultation with relevant agencies, that a country had a bilateral counter-narcotics agreement with the United States and had made progress in accordance with the agreement. The agreement and other plans with the United States would have to be consistent with major international agreements, address specified major issues, and include timetables and objective and measurable standards. The President would be required to report by the end of December and June on the progress of such countries.

**Possible Advantages.** By exempting from the certification process countries that concluded and made progress on bilateral counter-narcotics agreements, this option would encourage regular and sustained bilateral consultation regarding goals and progress in counter-drug efforts with all countries while avoiding any harmful effects from certification decisions. It would place emphasis upon more

manageable bilateral discussions and give all countries the opportunity to be exempted from the certification process if they met the required conditions, rather than legislatively singling out any country or region for special consideration. The requirement for twice yearly reports, at the end of December and June, would make it likely that counter-narcotics issues would be given a high priority. Since this proposal leaves the certification procedure in place and requires a presidential determination for exemption, it would seem to meet the criteria of the Bush Administration.

**Possible Disadvantages.** While exempting a country with a bilateral agreement from the certification process, this proposal requires the President to make a determination that a county has concluded an adequate counter-narcotics agreement with the United States under specified criteria and that progress is being made in accordance with the agreement. These presidential determinations are fairly similar to presidential decisions about certification, and countries may object to them nearly as much as certification decisions because they are unilateral U.S. decisions, even if accompanied with bilateral consultations. It could also be argued that the proposal sets up a two-stage procedure that might be burdensome and irritating – first a decision to determine whether a country has an adequate bilateral plan and has made sufficient progress for exemption, and then, in the event of inadequate progress, a determination on certification. Moreover, by requiring twice yearly reports, the provision could be seen as even more burdensome than the certification procedure. The fact that Congress appears to have no role in reviewing the presidential decisions under this proposal would be seen as advantageous by some, but would be seen as strongly disadvantageous by others.

## **Later Options with Major Legislative Activity**

### **Modify Certification Requirements for FY2002-FY2004, Require President to Designate Countries Subject to Sanctions, Encourage Development of Multilateral Strategy**

On April 3, 2001, the Senate Foreign Relations Committee marked up and reported out S. 219 *with an amendment in the nature of a substitute*, with elements from several of the previously mentioned proposals. On August 1, 2001, the Senate Foreign Relations Committee approved S. 1401, the Foreign Relations Authorizations Act for FY2002-FY2003, with the provisions of the previously reported S. 219 incorporated as Sections 741-745 in Title VII, Subtitle D, Reform of Certification Procedures Applicable to Certain Drug Producing or Trafficking Countries. The Committee reported out S. 1401 (S.Rept. 107-60) on September 4, 2001, and the measure was placed on the Senate Legislative Calendar.

As reported, S. 219 and Sections 741-745 of S. 1401 would modify the existing drug certification procedures for FY2002 to FY2004. In place of the existing requirements, the bill would require the President to identify by October 1 of each year major drug-transit or major illicit drug-producing countries and to designate each of such countries that has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international

counternarcotics agreements (multilateral and bilateral) and other standards. U.S. assistance would be withheld from any designated countries unless the President determined that the provision of assistance was vital to the national interest of the United States or until the country made substantial counter-narcotics efforts.

The measures also express the sense of Congress that the United States should, at the earliest feasible date in 2001, convene a multilateral conference of relevant countries to develop multilateral drug reduction and prevention strategies, and they urge the President to request legislative changes to implement the strategies no later than one year after enactment. They continue the requirement for the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of individual countries, and they add the requirement to report on major drug trafficking organizations. They also amend the Foreign Narcotics Kingpin Designation Act to allow judicial review of executive branch decisions to freeze the assets of suspected drug kingpins.<sup>8</sup>

**Possible Advantages.** One major advantage of the substitute version of S. 219 as reported, and largely duplicated in S. 1401, is that it is a combination of the other approaches and that it was reported out by the Senate Foreign Relations Committee with support from the majority and the minority. It would modify the certification requirements for three years (FY2002-FY2004) and would require the President to designate only the worst offending countries subject to sanctions, thereby reducing the diplomatic frictions mentioned above. It would make the grounds for designation and sanctions more precise, namely that a country has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international counternarcotics agreements (multilateral and bilateral) and other standards, which are spelled out in detail. At the same time, it calls upon the President to convene a multilateral conference of relevant countries to develop multilateral drug reduction and prevention strategies for the future. It retains the requirement for the annual INCSR report and additionally requires that information on major drug trafficking organizations be included. It also permits judicial review of executive branch decisions under the Foreign Narcotics Kingpin Designation Act.

**Possible Disadvantages.** This approach retains elements of the certification process, with some of the stated disadvantages, and, on the other hand, it modifies the certification requirements for three years only, raising the possibility of reinstatement, with other stated disadvantages. It urges the convening of a multilateral conference to develop future strategies, with uncertainty about the results from such a multilateral effort. Since the U.S. determinations would be unilateral, and since the State Department's annual International Narcotics Control Strategy Report (INCSR) would still be made, Mexico and other countries might still take

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<sup>8</sup> For more detailed comparisons of the existing drug certification procedures and those in S. 219 and S. 1401 as reported out by the Senate Foreign Relations Committee, see CRS Report RL30949, *Drug Certification Procedures: Side-by-side Comparison of Existing Procedures and S. 219 as Reported*, and CRS Report RL30950, *Drug Certification Procedures: A Comparison of Current Law to S. 219 and S. 1401 as Reported*, both by K. Larry Storrs.

offense at these often critical evaluations. Since Congress seems to have no role in reversing the presidential designations, this could be viewed as advantageous by some and disadvantageous by others.

### **Modify Certification Process for FY2002 for Western Hemisphere Countries; President to Designate Countries Subject to Sanctions, Convene Multilateral Conference**

On October 24, 2001, the Senate passed the Foreign Operations Appropriations for FY2002 (H.R. 2506), with an amendment by Senators Dodd and Hutchison (S.Amdt. 1959) that generally incorporated the provisions of S. 219 as reported, except that the modifications would apply only to FY2002 for which funds were being appropriated, and would apply only to countries in the Western Hemisphere. As passed by the Senate, the bill would require the President to identify by November 30, 2001, the major drug-transit or major illicit drug-producing countries in the Western Hemisphere and to designate each such country that has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international counter-narcotics agreements (multilateral and bilateral) and other standards. U.S. assistance would be withheld from any designated countries unless the President determined that the provision of assistance was vital to the national interest of the United States or until the country made substantial counter-narcotics efforts.

Consistent with the provisions of previously reported S. 219, the Senate-passed Foreign Operations Appropriations bill expresses the sense of Congress that the United States should at the earliest feasible date convene a multilateral conference of relevant countries to develop multilateral drug reduction and prevention strategies, and it urges the President to request legislative changes to implement the strategies no later than one year after enactment. It continues the requirement for the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of individual countries, and it adds the requirement to report on major drug trafficking organizations. It also amends the Foreign Narcotics Kingpin Designation Act to allow judicial review of executive branch decisions to freeze the assets of suspected drug kingpins.

**Possible Advantages.** This approach would have the advantages of the approach just above, although it would be for only one fiscal year and would apply only to Western Hemisphere countries. For some this would be advantageous because it would remove a source of friction in relations with Mexico and other Western Hemisphere countries for a year, and would allow enough time for the development of other multilateral strategies.

**Possible Disadvantages.** This approach would also have the disadvantages of the approach just above, but would be limited to one fiscal year. For some, the fact that the legislation applies only to FY2002 and to Western Hemisphere countries would be a disadvantage, leaving the process in place for other countries, and raising the possibility of reinstatement, or a new debate, in the coming year.

## **Modify Drug Certification Process for FY2002 Only; Require President to Designate Countries Subject to Sanctions**

The conference report on the Foreign Operations Appropriations for FY2002 (H.Rept. 107-345 on H.R. 2506) was filed on December 19, 2001, and was approved by the House on December 19, 2001, and by the Senate on December 20, 2001. It contained, in Section 591, major elements of the Senate-passed provisions modifying the annual drug certification procedures. This compromise section provides that the drug certification procedures in Section 490 of the Foreign Assistance Act would not apply during FY2002, essentially providing a one-year waiver of the procedures on a global basis for all major drug-transit and drug producing countries. However, the President is required to make a report within 45 days of enactment identifying the major drug transit and drug producing countries.

He is also required to designate each such country that has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international counter-narcotics agreements (multilateral and bilateral) and other standards. U.S. assistance would be withheld from any of the designated worst offending countries, unless the President determines that the provision of assistance is vital to the national interest of the United States, or until the designated country makes substantial counter-narcotics efforts. In addition, the section clarifies that the President's obligation to make the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of all drug-transit and drug producing countries by March 1<sup>st</sup> remains in force.

**Possible Advantages.** A major advantage of this approach is that it commanded enough support for legislative enactment. It would waive the drug certification procedures for one year for all major drug-transit and drug producing countries, thereby eliminating a dual system that might have existed if the waiver had applied only to Western Hemisphere countries. This approach was supported by the Administration because it provides that the worst-offending countries that are demonstrably failing to meet their international counter-narcotics obligation will be subject to sanctions, but other countries will not be subjected to grading and review. In a letter to Congressman Kolbe, the State Department characterized the approach as a "significant first step toward improving the current narcotics certification process" that "would place a premium on cooperation rather than confrontation with other governments." At the same time, the section specifies that the President's obligation to make the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of all drug-transit and drug producing countries by March 1<sup>st</sup> remains in force.

**Possible Disadvantages.** From the perspective of the proponents of existing drug certification requirements, the disadvantages of this approach are that it waives the requirements for one year, and it lowers the standard for application of sanctions from failing to cooperate fully with the United States in counter-narcotics efforts to failing demonstrably to make substantial efforts to adhere to obligations under international counter-narcotics agreements. For others, another disadvantage of this approach flows from the global nature of the waiver, rather than a more targeted non-confrontational approach focusing on Mexico or the Western

Hemisphere. From the perspective of the critics of the drug certification process, the disadvantages include that the waiver is for only one year and that the provision calling for a multilateral conference to develop more effective multilateral approaches was dropped by conferees.

## **Permanently Require President to Designate Countries Subject to Sanctions under New Procedures, but Permit Use of Previous Procedures**

In September 2002, Congress passed and the President signed the Foreign Relations Authorization for FY2003 (H.R. 1646/P.L. 107-228), with Section 706 of the Act dealing with International Drug Control Certification Procedures. Drawing from S. 1401, mentioned above, the new procedures require the President to make a report, not later than September 15 of each year, identifying the major drug transit or major illicit drug producing countries. At the same time, he is required to designate any of the named countries that has “failed demonstrably,” during the previous 12 months, to make substantial efforts to adhere to international counter-narcotics agreements (defined in the legislation) and to take other counter-narcotics measures. U.S. assistance would be withheld from any designated countries unless the President determines that the provision of assistance to that country is vital to the national interest of the United States or that the designated country subsequently made substantial counter-narcotics efforts. Another subsection clarifies that the requirement for the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of individual countries by March 1 of each year is retained.

Notwithstanding the general suspension of the previous drug certification and sanctions procedures, subsection 706(5)(B) provides that the President may apply those procedures at his discretion. In short, Section 706 requires the President to designate and withhold assistance from the worst offending countries (those that have “failed demonstrably” to make substantial counter-narcotics efforts). It also permits the President to use his discretion to maintain a higher standard and to withhold assistance and apply other sanctions against countries that are failing to cooperate fully with the United States in counter-narcotics efforts whenever he determines that such actions would be helpful. A transition rule provides that for FY2003 the required report must be submitted at least 15 days before foreign assistance funds are obligated or expended.

**Possible Advantages.** A major advantage of this approach is that it commanded the support of the Administration and enough legislative support for passage. In many ways both the critics and the supporters of the old certification procedures could find advantages in the legislation because it sets up permanent new procedures to follow that require the President to designate only the worst offending countries, but it also grants the President the authority to use the old procedures and to apply sanctions against countries that are failing to cooperate fully with the United States whenever he determines that such action would be helpful. In keeping with this approach, the Joint Explanatory Statement of the Committee of Conference indicates that Managers believe that the President should direct U.S. Executive Directors in multilateral development banks to vote against loans for countries failing to qualify for assistance under either the new or the old procedures. Other

advantages of the legislation are that the report is due by September 15 of each year, which gives Congress some leverage and oversight before the beginning of the fiscal year, and that the President's obligation to make the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of all drug-transit and drug producing countries by March 1 remains in force. Still other advantages of the legislation spring from the fact that the standards are more carefully defined. The President is required to designate and withhold assistance from any country that has "failed demonstrably" during the previous 12 months to adhere to its obligations under international counter-narcotics agreements and to take the counter-narcotics measures set forth in Section 489(a)(1) of the Foreign Assistance Act of 1961. Subsection (4) defines international counter-narcotics agreements to include the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, or any bilateral or multilateral agreement between the United States and other countries that addresses a long list of key issues, and includes timetables and measurable standards. Section 489(a)(1) of the Foreign Assistance Act mentions measures to meet the goals and objectives of the U.N. Convention and bilateral and multilateral agreements and to prevent and punish public corruption.

**Possible Disadvantages.** From the perspective of the proponents of the old drug certification requirements, the disadvantages of this approach are that, in general, it permanently suspends the application of the old requirements and reduces the role of Congress in the possible application of sanctions. It lowers the standard for application of sanctions from failing to cooperate fully with the United States in counter-narcotics efforts to failing demonstrably to make substantial counter-narcotics efforts, although the President is permitted to use the old procedures at his discretion. From the perspective of the critics of the drug certification process, the disadvantages include that the old procedures are not amended and repealed but remain available for use at the President's discretion.

## **Active Legislative Measures in 2001-2002**

Building upon the description of the options provided above, this section provides brief summaries of the major measures dealing with major drug trafficking and transit countries with legislative activity in 2001 and 2002. This includes two similar measures (S. 219 and S. 1401) that were reported out by the Senate Foreign Relations Committee in 2001. It also includes two measures that were enacted: H.R. 2506, passed by Congress in mid-December 2001, that temporarily established new procedures for FY2002; and H.R. 1646, passed by Congress in September 2002, that permanently established new certification and designation procedures while leaving the old procedures available as an option.

### **S. 219 in Nature of Substitute – Modify Certification Process in FY2002-FY2004, Require President to Designate Countries Subject to Sanctions, Develop Multilateral Strategy**

S. 219, a free standing bill, was introduced by Senators Dodd, McCain, Hollings, and Hagel on January 30, 2001, and referred to the Senate Foreign

Relations Committee. Initial Committee consideration on February 7, and March 1, 2001.

On April 3, 2001, the Senate Foreign Relations Committee marked up S. 219 with an amendment in the nature of a substitute, with elements from the various proposals. As approved, S. 219 would modify the existing drug certification procedures for a 3-year trial period. In its place, it would require the President to identify by October 1 of each year major drug-transit or major illicit drug producing countries and to designate each country that has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international counternarcotics agreements (multilateral and bilateral) and other standards. U.S. assistance would be withheld from any designated countries unless the President determined that the provision of assistance was vital to the national interest of the United States or until the country made substantial counter-narcotics efforts.

S. 219 as approved also expresses the sense of Congress that the United States should, at the earliest feasible date in 2001, convene a multilateral conference of relevant countries to develop multilateral drug reduction and prevention strategies, and it urges the President to request legislative changes to implement the strategies no later than one year after enactment. It continues the requirement for the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of individual countries, and it adds the requirement to report on major drug trafficking organizations. It also amends the Foreign Narcotics Kingpin Designation Act to allow judicial review of executive branch decisions to freeze the assets of suspected drug kingpins.<sup>9</sup> The measure was reported out without written report on April 5, 2001, and was placed on the Senate Legislative Calendar on April 5, 2001.

### **S. 1401, Foreign Relations Authorization Act for FY2002-FY2003, Sections 741-745 – Modify Certification Process in FY2002-FY2004, Require President to Designate Countries Subject to Sanctions, Develop Multilateral Strategy**

On August 1, 2001, the Senate Foreign Relations Committee approved S. 1401, the Foreign Relations Authorizations Act for FY2002-FY2003, with the provisions of previously reported S. 219 incorporated as Sections 741-745 in Title VII, Subtitle D, Reform of Certification Procedures Applicable to Certain Drug Producing or Trafficking Countries.<sup>10</sup> The Committee reported out S. 1401 (S.Rept. 107-60) on September 4, 2001, and the measure was placed on the Senate Legislative Calendar.

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<sup>9</sup> For more detailed comparisons of the existing drug certification procedures and those in Senate bill S. 219 as reported out by the Senate Foreign Relations Committee, see CRS Report RL30949, *Drug Certification Procedures: Side-by-side Comparison of Existing Procedures and S. 219 as Reported*, by K. Larry Storrs.

<sup>10</sup> For comparison of existing drug certification procedures to the provisions in S. 219 and S. 1401 as reported, see CRS Report RL30950, *Drug Certification Procedures: A Comparison of Current Law to S. 219 and S. 1401 as Reported*, by K. Larry Storrs.

## **H.R. 2506/P.L. 107-115, Foreign Operations Appropriations for FY2002 – Modify Certification Process for FY2002 for All Relevant Countries and Require President to Designate Countries Subject to Sanctions**

On October 24, 2001, the Senate passed the Foreign Operations Appropriations for FY2002 (H.R. 2506), with an amendment by Senators Dodd and Hutchison (S.Amdt. 1959) that generally incorporated the provisions of S. 219 as reported, except that the modifications would apply only to FY2002 and would apply only to countries in the Western Hemisphere. As passed by the Senate, the bill would require the President to identify by November 30, 2001, the major drug-transit or major illicit drug-producing countries in the Western Hemisphere and to designate each such country that has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international counter-narcotics agreements (multilateral and bilateral) and other standards. U.S. assistance would be withheld from any designated countries unless the President determined that the provision of assistance was vital to the national interest of the United States or until the country made substantial counter-narcotics efforts. This version of the bill also expresses the sense of Congress that the United States should at the earliest feasible date convene a multilateral conference of relevant countries to develop multilateral drug reduction and prevention strategies, and it urges the President to request legislative changes to implement the strategies no later than one year after enactment.

The conference report on the Foreign Operations Appropriations for FY2002 (H.Rept. 107-345 on H.R. 2506) was filed on December 19, 2001, and was approved by the House on December 19, 2001, and by the Senate on December 20, 2001. It was signed into law (P.L. 107-115) on January 10, 2002. It contained, in Section 591, major elements of the Senate-passed version. The compromise version provides that the drug certification procedures in Section 490 of the Foreign Assistance Act would not apply during FY2002, essentially providing a one-year waiver of the procedures on a global basis for all major drug-transit and drug producing countries.

However, the President is required to make a report within 45 days of enactment identifying the major drug transit and drug producing countries. He is also required to designate each such country that has failed demonstrably, during the previous 12 months, to make substantial efforts to adhere to its obligations under international counter-narcotics agreements. U.S. assistance would be withheld from any of the designated worst offending countries, unless the President determines that the provision of assistance is vital to the national interest of the United States, or until the designated country makes substantial counter-narcotics efforts. In addition, the section clarifies that the President's obligation to make the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of all drug-transit and drug producing countries by March remains in force.

## **H.R. 1646/P.L. 107-228, Foreign Relations Authorization for FY2003 – Permanently Require President to Designate Countries Subject to Sanctions under New Procedures, but Permit Use of Previous Procedures**

The House International Relations Committee reported out H.R. 1646 on May 4, 2001, without any provisions on drug certification, and the measure was passed by the House on May 16, 2001. The Senate approved H.R. 1646 on May 1, 2002, after incorporating the text of a Senate measure on security assistance (S. 1803) approved in December 2001. Under the conference report on H.R. 1646 (H.Rept. 107-671) filed on September 23, 2002, Section 706 deals with International Drug Control Certification Procedures.

Drawing from S. 1401, mentioned above, the new procedures require the President to make a report, not later than September 15 of each year, identifying the major drug transit or major illicit drug producing countries. At the same time, he is required to designate any of the named countries that has “failed demonstrably,” during the previous 12 months, to make substantial efforts to adhere to international counter-narcotics agreements (defined in the legislation) and to take other counter-narcotics measures. U.S. assistance would be withheld from any designated countries unless the President determines that the provision of assistance to that country is vital to the national interest of the United States or that the designated country subsequently made substantial counter-narcotics efforts.

Another subsection clarifies that the requirement for the yearly International Narcotics Control Strategy Report (INCSR) detailing the performance of individual countries by March 1 of each year is retained. Notwithstanding the general suspension of the previous drug certification and sanctions procedures, subsection 706(5)(B) provides that the President may apply those procedures at his discretion. A transition rule provides that for FY2003 the required report must be submitted at least 15 days before foreign assistance funds are obligated or expended. The conference report on H.R. 1646 was approved by the House by voice vote on September 25, 2002, and was approved by the Senate by unanimous consent on September 26, 2002. It was signed into law (P.L. 107-228) on September 30, 2002.