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**Preparation of a global legally binding
instrument on mercury**

Concept of essential use in international agreements

Note by the secretariat

1. At its meeting in Bangkok from 19 to 23 October 2009, the ad hoc open-ended working group to prepare for the intergovernmental negotiating committee on mercury agreed on a list of information that the secretariat would provide to the committee at its first session to facilitate the committee's work. Among other things, the secretariat was requested to provide information on the concept of "essential use" as it is used in other international agreements. The present note responds to that request.

Introduction

2. A global mercury instrument, like other multilateral treaties, will be most effective if its obligations are clearly stated and all parties are able to implement them fully. Numerous exceptions to the rule can diminish a treaty's effectiveness. Sometimes, however, there is a need to allow the temporary continuation of activity that is otherwise contrary to the obligations of a treaty. The concept of essential use is one of the ways that a treaty can accommodate that need.

3. Chapter I of the present note describes the concept of "essential use" and distinguishes it from other types of exemptions, including general exemptions, exemptions that temporarily delay application of a legal obligation and emergency exceptions. Chapter II provides further details on how essential-use and similar exemptions function under the Montreal Protocol on Substances that Deplete the Ozone Layer, the Stockholm Convention on Persistent Organic Pollutants and the United Nations Economic Commission for Europe Convention on Long-Range Transboundary Air Pollution. A brief conclusion appears in chapter III.

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I. Exemption types commonly used in multilateral treaties

4. One way that a multilateral treaty may allow flexibility in implementation by the parties to it is through the use of exemptions from some of the treaty's legal requirements. Several types of exemptions exist. The present chapter provides an overview of four such exemptions: general exemptions, exemptions that temporarily delay application of a legal obligation, essential-use exemptions and emergency exceptions.

A. General exemptions

5. General exemptions are available to all parties to a treaty, sometimes automatically or sometimes upon a party's notification to the secretariat. General exemptions essentially place an otherwise covered product or activity outside the scope of a treaty, either indefinitely or for a specified period of time. They tend not to diminish effectiveness because they do not lead to significant releases of regulated substances or to significant levels of regulated activity or, in some cases, because the implementation of a treaty commitment would not be feasible for most parties without them. For example, the Stockholm Convention contains general exemptions for trace amounts of unintentional persistent organic pollutant contaminants in products and articles, quantities of persistent organic pollutants occurring as constituents of articles manufactured or already in use before entry into force of the relevant obligation and quantities of persistent organic pollutants used as closed-system site-limited intermediates in the production of chemicals that are not persistent organic pollutants.¹ Another example of such an exemption is found in paragraph 6 of article 2H of the Montreal Protocol, which states that "calculated levels of consumption and production under this Article shall not include the amounts used by the Party for quarantine and pre-shipment applications".

B. Exemptions that temporarily delay application of a legal obligation

6. Exemptions that temporarily delay the application of a legal obligation may be available to all parties or, in some cases, only to a particular category of parties. A broad example of the latter is Article 5 of the Montreal Protocol, which entitles developing countries that annually consume less than 0.3 kilograms per capita of ozone-depleting substances to delay their compliance with certain of the Protocol's phase-out requirements for 10 years.²

7. Temporary exemptions may be available to parties only upon request, and sometimes only with the consent of other parties. Under the World Trade Organization (WTO) Agreement on Technical Barriers to Trade, developing country members may request specified, time-limited exceptions in whole or in part from obligations under the Agreement.³ A technical committee of all WTO members considers such requests, taking into account the special development and trade needs of the requesting members, along with their technological development. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction allows any State party to apply for a 10-year extension if it believes that it will be unable to ensure the destruction of all anti-personnel mines in its territory within the time prescribed by the Convention.⁴ The Convention sets out detailed procedures governing the application and consideration of such requests, which the parties to the Convention may grant by a majority vote.

8. What are termed "specific exemptions" under the Stockholm Convention also fit within this category. These exemptions allow the continued production or specified uses of certain persistent organic pollutants that are listed in Annexes A or B of the Convention. A specific exemption for a substance expires five years after the listing of the substance enters into force under the Convention but

1 Stockholm Convention on Persistent Organic Pollutants (2001), annex A, part I, (i)–(iii); annex B, part I, (i)–(iii), available at <http://chm.pops.int/Convention/tabid/54/language/en-US/Default.aspx#convtext>.

2 Montreal Protocol on Substances that Deplete the Ozone Layer (1999) (as adjusted and amended), art. 5.1, as reprinted in Montreal Protocol Handbook (2009), 15, http://www.unep.ch/ozone/Publications/MP_Handbook/MP-Handbook-2009.pdf.

3 World Trade Organization Agreement, Agreement on Technical Barriers to Trade Agreement (1994), art. 12.8, available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

4 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), art. 5, paras. 3–6, available at <http://www.icrc.org/ihl.nsf/FULL/580?OpenDocument>.

with the approval of the Conference of the Parties may be extended for up to five years more. Further details are provided below in chapter II.

C. Essential-use and similar exemptions

9. Essential-use exemptions allow the continued use of prohibited substances or processes when alternatives to such use are not reasonably available. These exemptions generally apply only to uses that are necessary, or very important to, the economy, national security or public health of a party, and are intended to allow such uses only until technically and economically viable alternatives are available. A key element is the limitation on the time for which the exemption is available.

10. Essential-use exemptions are permitted by the Montreal Protocol, Article 2 of which states, for certain of the substances controlled under the Protocol, that the ban on the production and consumption of such substances will not apply to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be essential. Beyond that the Protocol neither defines essential uses nor specifies how the exemption process should work. The Protocol's governing body, however, has adopted several decisions on the procedures and criteria for the essential-use exemption. The Protocol also provides for what are termed "critical use" exemptions, which are functionally similar to essential-use exemptions but apply only to agricultural uses of methyl bromide. Further details are provided below in chapter II.

11. The Convention on Long-Range Transboundary Air Pollution features an essential-use exemption under its Protocol on Persistent Organic Pollutants and its Protocol to Abate Acidification, Eutrophication and Ground-level Ozone.

12. The Stockholm Convention features what are called "acceptable purpose" exemptions. They are similar to essential-use exemptions except that the time period for their applicability is more open-ended. One such exemption is for DDT. A consensus that DDT required elimination notwithstanding, it was recognized that in some regions DDT remained an important tool in the fight against malaria. Thus, Part II of Annex B to the Convention establishes a DDT register and detailed procedures to allow the continued use of DDT for disease vector control while minimizing environmental releases and supporting the transition to safer alternatives. Another such exemption was adopted by the Conference of the Parties of the Convention at its fourth meeting. In contrast to that for DDT, the exemption for perfluorooctane sulfonic acid (PFOS) was based not on the need to protect public health but rather on an acknowledgement that some parties considered the continued use of PFOS to be a matter of great economic importance.

13. Chapter II describes these exemptions under the Montreal Protocol, the Stockholm Convention and the Convention on Long-Range Transboundary Air Pollution in greater detail.

D. Emergency exceptions

14. Emergency exceptions allow a party (or an entity under the legal jurisdiction of a party) on a temporary basis to suspend its compliance with a treaty obligation if doing so is necessary to prevent imminent loss of life or property. Examples are found in treaties that involve shipping at sea. The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and its 1996 Protocol protect the marine environment by prohibiting or regulating the dumping and incineration of wastes at sea. The treaty's prohibitions may be suspended if doing so is necessary for the protection of human life or a vessel and "dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur".⁵ The authority to set the basic criteria for determining exceptional and emergency situations rests with the parties.⁶ The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, contains similar emergency-use exceptions in

5 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972 (as amended in 2006) (London Convention), art. V, para. 1, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D16925/LC1972.pdf; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, art. 8, para. 1, available at <http://www.admiraltylawguide.com/conven/dumping1972.html>.

6 London Convention, art. XIV, para. 4 (e); Protocol to the London Convention, art. 18, para. 1.6.

respect of its provisions to prevent the pollution of the marine environment by ships from operational or accidental causes.⁷

15. In the area of chemicals regulation, the Meeting of the Parties to the Montreal Protocol established by decision an emergency-use exception for ozone-depleting substances that are otherwise eligible for essential-use exemptions. The Meeting of the Parties to the Protocol thus decided “to allow the Secretariat, in consultation with the Technology and Economic Assessment Panel, to authorize, in an emergency situation . . . consumption of quantities not exceeding 20 tonnes of ozone-depleting substances for essential uses on application by a Party prior to the next scheduled Meeting of the Parties. The Secretariat should present this information to the next Meeting of the Parties for review and appropriate action by the Parties.”⁸

16. A year later, the Meeting of the Parties adopted a similar decision regarding critical-use exemptions for methyl bromide, allowing “a Party, upon notification to the Secretariat, to use, in response to an emergency event, consumption of quantities not exceeding 20 tonnes of methyl bromide.”⁹ Neither of these decisions contains a definition of the term “emergency.”

17. The persistent organic pollutants protocol to the Convention on Long-Range Transboundary Air Pollution also contains an emergency-use exception. The exception allows a party to use prohibited or restricted persistent organic pollutants to manage public health emergencies if:

- (a) No suitable alternative measures are available to the party to address the situation;
- (b) The measures taken are proportional to the magnitude and severity of the emergency;
- (c) Appropriate precautions are taken to protect human health and the environment and to ensure that the substance is not used outside the geographical area subject to the emergency;
- (d) The exemption is granted for a period of time that does not exceed the duration of the emergency;
- (e) Upon termination of the emergency, any remaining stocks of the substance are managed in compliance with the terms of the Protocol.¹⁰

II. Detailed examples of essential-use and similar exemptions

18. The present chapter provides further details of how essential-use and similar exemptions function under the Montreal Protocol, the Stockholm Convention and the Convention on Long-Range Transboundary Air Pollution.

A. Montreal Protocol

1. Scope and eligibility

19. The Montreal Protocol aims to phase out the production and consumption of substances that deplete the stratospheric ozone layer. The Protocol allows essential-use exemptions for the majority of listed ozone-depleting substances and allows critical-use exemptions for methyl bromide.¹¹ The procedures and criteria detailing how these exemptions function are not specified in the Protocol, but have been established in decisions of the Protocol’s Meeting of the Parties. All parties subject to the control measures set out in the Protocol’s Articles 2–2E and 2G–2I are eligible to request these exemptions.¹²

7 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, (MARPOL 73/78), available at http://www.imo.org/InfoResource/mainframe.asp?topic_id=950.

8 Decision VIII/9: Essential-use nominations for controlled substances for 1997 through 2002, para. 10, reprinted in Montreal Protocol Handbook (2009), 113, 114, http://www.unep.ch/ozone/Publications/MP_Handbook/MP-Handbook-2009.pdf.

9 Decision IX/7: Emergency methyl-bromide use, reprinted in Montreal Protocol Handbook, 167.

10 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (1998), art. 4.2 (b), available at <http://www.unepce.org/env/lrtap/full%20text/1998.POPs.e.pdf>.

11 Montreal Protocol, arts. 2A, para. 4, 2B, para. 2, 2C, para. 3, 2D, para. 2, 2E, para. 3, 2G, 2H, para. 5, 2I.

12 Decision XX/3: Essential-use exemptions for Parties operating under paragraph 1 of Article 5, chapeau, reprinted in Montreal Protocol Handbook 121, 122.

2. Procedure and criteria

20. A party may apply for these exemptions by submitting a nomination to the secretariat. The Protocol's Technology and Economic Assessment Panel then evaluates the nomination, using criteria established by the Meeting of the Parties. After receiving the Panel's recommendations, the Meeting of the Parties decides whether to grant the requested exemption and what its specific terms will be. The Protocol's rules of procedure allow the Meeting of the Parties to take such decisions by a two-thirds majority vote. The Meeting of the Parties considers, grants and reviews exemptions on an annual basis.

21. In assessing essential-use nominations, the Meeting of the Parties applies the following criteria and procedure:

- (a) A use of a controlled substance qualifies as "essential" only if:
 - (i) It is necessary for health or safety or is critical for the functioning of society (encompassing cultural and intellectual aspects);
 - (ii) There are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health;
- (b) Production and consumption of a controlled substance for essential uses should be permitted only if:
 - (i) All economically feasible steps have been taken to minimize the essential use and any associated emission of the controlled substance;
 - (ii) The controlled substance is not available in sufficient quantity and quality from existing stocks of banked or recycled controlled substances, also bearing in mind the developing countries' need for controlled substances;
- (c) Production for essential uses is allowed in addition to production to supply the basic domestic needs of parties operating under paragraph 1 of article 5 of the Protocol prior to the phase-out of the controlled substances in those countries.¹³

22. A similar review process applies to nominations for critical uses of methyl bromide, except the eligibility standard is that the "specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption" and the nominating party must demonstrate "that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes".¹⁴

B. Stockholm Convention

1. Scope and eligibility

23. The objective of the Stockholm Convention is to protect human health and the environment from persistent organic pollutants.¹⁵ Parties are required to eliminate the production, use, import and export of chemicals listed in Annex A and to restrict production and use of chemicals listed in Annex B.¹⁶ Nevertheless, parties may continue to use or produce an Annex A or B chemical for a limited period if they register for a specific exemption specified in the applicable Annex, and they may continue to use or produce an Annex B chemical for an indefinite period of time by registering for an acceptable purpose specified in Annex B.

24. Article 4 of the Convention establishes a register of specific exemptions, which details exemption procedures and lists the parties that have registered for the various exemptions that are in effect. Any party may take advantage of an available exemption by registering for it. For a specific exemption, States register by notifying the secretariat in writing upon becoming a party. For an acceptable-purpose exemption, parties may register at any time by notifying the secretariat.

¹³ Decision IV/25, para. 1, reprinted in Montreal Protocol Handbook 110.

¹⁴ Decision IX/6: Critical-use exemptions for methyl bromide, para. 1, reprinted in Montreal Protocol Handbook, 166.

¹⁵ Stockholm Convention, above, note 1, art. 1.

¹⁶ *Ibid.*, art. 3, para. 1. An additional Annex C lists persistent organic pollutants that are unintentionally produced. Exemptions do not apply to Annex C.

2. Procedure and criteria

25. The Conference of the Parties may consider listing a new persistent organic pollutant in the annexes to the Convention in response to a recommendation that it should do so from the Convention's Persistent Organic Pollutants Review Committee, following a proposal from a party that the chemical at issue should be listed. As part of its consideration of whether to list the chemical the Conference of the Parties also considers whether to allow for any exemptions or acceptable purposes; the Conference may list the chemical without allowing for any exemptions. The Convention states no criteria or guidance for the Conference of the Parties to follow in deciding whether to list a chemical in the annexes to the Convention or to allow specific or acceptable purpose exemptions. Its only explicit requirement is that the Conference, "taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures, in Annexes A, B and/or C".¹⁷

26. Because any party may claim a current specific or acceptable-purpose exemption by registering for it, there are no criteria for determining whether the party may receive the exemption. The Conference of the Parties has, however, adopted criteria and procedures that apply when a party requests an extension of a specific exemption. Details for each type of exemption follow.

(a) Acceptable purpose

27. The requirements of an acceptable-purpose exemption are set out in the Annex B listing that establishes it. In the case of DDT, for example, a party that registers for the exemption is to produce or use DDT in accordance with World Health Organization guidelines and only when locally safe, effective and affordable alternatives are not available.¹⁸ The party must report information about its DDT use, conditions and management strategies every three years, and it is encouraged to develop and implement a DDT action plan, which includes the implementation of suitable alternatives.¹⁹

28. As noted above, Annex B lists acceptable-purpose exemptions for two chemicals, DDT and PFOS. There is no provision in the listings for the automatic expiration of these exemptions. They do provide, however, for the Conference of the Parties to evaluate periodically the continued need for the exemptions.²⁰

(b) Specific exemption

29. Any State, on becoming a party, may register for one or more specific exemptions by notifying the secretariat in writing. The exemption for a given chemical expires five years after the entry into force of the Convention in respect of the chemical, but with the approval of the Conference of the Parties may be extended for a period of up to five years.²¹

30. To request an extension for a specific exemption, a party must submit a report to the Secretariat justifying its continuing need for registration of that exemption.²² The report is circulated to all parties and a review is carried out on the basis of all available information.²³ When there are no longer any parties registered for a particular type of specific exemption, no new registrations may be made with respect to it.²⁴ In that case the exemption lapses and is no longer available to any parties, including new parties to the Convention.

17 Ibid., art. 8, para 9.

18 Ibid., annex B, part II, para. 2.

19 Ibid., para. 5 (a).

20 Ibid., para. 6; see also Stockholm Conference of the Parties, Decision SC-4/17, Listing of perfluorooctane sulfonic acid, its salts and perfluorooctane sulfonyl fluoride, part III, para. 5, available at <http://chm.pops.int/Programmes/NewPOPs/DecisionsRecommendations/tabid/671/language/en-US/Default.aspx>.

21 Stockholm Convention, art. 4.

22 Ibid., para. 6.

23 Ibid.; see also Conference of the Parties, Decision SC-1/24, annex 1, Review process for entries in the Register of Specific Exemptions, available at <http://chm.pops.int/Portals/0/Repository/COP1/UNEP-POPS-COP.1-SC-1-24.English.PDF>, revised in Decision SC-3/3, annex, Revised process for the review of entries in the Register of Specific Exemptions, available at <http://chm.pops.int/Portals/0/Repository/COP3/UNEP-POPS-COP.3-SC-3-3.English.PDF>; Decision SC-2/3, para. 3, Review process for entries in the Register of Specific Exemptions, available at <http://chm.pops.int/Portals/0/Repository/COP2/UNEP-POPS-COP.2-SC-2-3.English.PDF>.

24 Stockholm Convention, art. 4, para. 9.

31. The Conference of the Parties has adopted detailed criteria for its consideration of requests to extend specific exemptions. There are separate criteria for requests pertaining to exemptions for production and exemptions for use. Those for production exemption requests are as follows:

(a) The requesting party must have submitted a justification for the continuing need for the exemption that establishes that the extension is necessary for health or safety or is critical for the functioning of society;

(b) The requesting party's national implementation plan required under article 7 of the Convention must contain a strategy aimed at phasing out the production for which the extension is requested as soon as is feasible;

(c) In accordance with the strategy referred to in the preceding subparagraph the requesting party must have taken all feasible measures to minimize the production of the chemical and to prevent illegal production, human exposure and release into the environment;

(d) The chemical must be unavailable in sufficient quantity and quality from existing stockpiles;

(e) In the case of a developing country party or a party with an economy in transition, the party must have requested technical or financial assistance pursuant to article 12 or financial assistance pursuant to article 13 of the Convention in order to phase out as soon as is feasible the production for which the extension is requested.²⁵

32. The criteria that the Conference of the Parties is to apply when reviewing a request for an extension to a specific exemption for the use of a listed persistent organic pollutant are similar, but include the requirement that there are no technically and economically feasible alternatives that are available and acceptable to the Party from the standpoint of environment and health and that can entirely replace the use in the Party as from the expiry date of the specific exemption.²⁶

C. Convention on Long-Range Transboundary Air Pollution

33. The Convention on Long-Range Transboundary Air Pollution aims to reduce and prevent air pollution, including long-range transboundary air pollution. Some of its eight protocols contain essential-use-type exemptions; two are considered here: the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone, which allows for certain one-time extensions expiring no later than 2007, and the Protocol on Persistent Organic Pollutants, which allows parties to grant essential-use exemptions to entities within their jurisdictions.

1. Protocol to Abate Acidification, Eutrophication and Ground-level Ozone

(a) Scope and eligibility

34. The Protocol to Abate Acidification, Eutrophication and Ground-level Ozone includes an annex VIII that sets limit values for the sulphur content of fuel. Parties to the Protocol were obliged to implement these limit values no later than 2005; parties were required by fixed dates to ban the marketing of diesel and petrol with a sulphur content that did not comply with the listed specifications. A party could, however, extend the marketing period for a maximum additional two (or in some cases, three) years if the ban would raise severe difficulties for its industries in making the necessary changes in their manufacturing facilities".²⁷ Any party to which the ban applied could claim the exemption.

(b) Procedure and criteria

35. Each party made its own determination as to whether it would experience severe difficulties; there were no additional criteria, and the determination was not subject to the consent of other parties. In electing to take advantage of the exemption, a party was required to specify, in a declaration to be deposited together with its instrument of ratification, acceptance, approval or accession, that it intended

25 Decision SC-2/3, annex, paras. (A) (1) (a)–(e).

26 Ibid., annex, paras. (B) (2) (a)–(f).

27 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (1999), annex VIII, table 8, "Note"; table 9, "Note"; table 10, "Note"; table 11, "Note," available at <http://www.unece.org/env/lrtap/full%20text/1999%20Multi.E.Amended.2005.pdf>.

to extend the time period and present written information on the reason for this to the Executive Body of the Convention.²⁸

2. Protocol on Persistent Organic Pollutants

(a) Scope and eligibility

36. The Protocol on Persistent Organic Pollutants, like the Stockholm Convention, seeks to ban or restrict the production and use of persistent organic pollutants. The Protocol allows a party to grant to an entity under its jurisdiction an exemption in respect of a listed chemical, provided that the exemption is not granted or used in a manner that would undermine the objectives of the Protocol.²⁹ Such an exemption may include a minor application judged to be essential by the Party if the party has not previously granted the exemption.³⁰ Exemptions may be granted for a maximum of five years.

(b) Procedure and criteria

37. The exemptions are not subject to approval by other parties. A party granting one, however, must ensure that no suitable alternatives exist for the proposed use; that adequate precautions are taken to ensure that emissions to the environment are minimized; and that upon termination of the exemption any remaining stocks of the substance are treated in compliance with relevant provisions of the Protocol.

38. In addition, a party that grants an exemption must submit a report to the secretariat within 90 days, which the secretariat must make available to all parties. The report must include, at a minimum:

- (a) Chemical name of the substance subject to the exemption;
- (b) Purpose for which the exemption was granted;
- (c) Conditions under which the exemption was granted;
- (d) Length of time for which the exemption was granted;
- (e) Those to whom, or the organization to which, the exemption applies;
- (f) Estimated emissions of the substance that will result from the exemption and an assessment of their contribution to the total emissions of the substance from the parties.³¹

III. Conclusion

39. The concept of essential use enables the adoption of an ambitious goal and a rigorous path to its being achieved, but acknowledges that some parties may have difficulties in meeting their obligations in the short term. Many treaties – including many multilateral environmental agreements – reflect the recognition that the ability to implement an obligation can vary by party. Allowing an essential use by a party is a way of accommodating those differences while retaining a treaty's overall rigor and ambition.

40. In some cases the process for allowing an essential use by a party is in the hands of the governing body of the convention at issue. In other cases it is left to the discretion of the party concerned. In the latter case, the circumstances and criteria for approval are generally predefined, and are not solely the prerogative of the concerned party to determine.

28 Ibid.

29 Convention on Long-Range Transboundary Air Pollution Persistent Organic Pollutants Protocol, art. 4.2.

30 Ibid.

31 Ibid., art. 4.3.