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Intergovernmental negotiating committee to prepare a global legally binding instrument on mercury

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Preparation of a global legally binding instrument on mercury

Information on possible transitional arrangements pending phase out of mercury-added products and manufacturing processes in which mercury is used

Note by the secretariat

1. At its third session, held in Nairobi from 31 October to 4 November 2011, the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury requested the secretariat to provide for consideration by the committee at its fourth session information on possible transitional arrangements pending the phase-out of mercury-added products and manufacturing processes in which mercury was used, including information on ideas expressed at the third session and experiences under other multilateral environmental agreements, including the Montreal Protocol on Substances that Deplete the Ozone Layer and the Stockholm Convention on Persistent Organic Pollutants, in dealing with products and processes that have ongoing use. Information on options for how the Conference of the Parties could manage such transitional arrangements was also to be included. The secretariat has prepared the present note in response to the committee's request.

Background

2. The intergovernmental negotiating committee to prepare a global legally binding instrument on mercury has been mandated by the Governing Council of the United Nations Environment Programme in its decision 25/5 to prepare an instrument that includes provisions to reduce the demand for mercury in products and processes. The decision provides that in its deliberations the committee should consider approaches tailored to the characteristics of specific sectors to allow transition periods and phased implementation of proposed actions, where appropriate, as well as the technical and economic availability of mercury-free alternative products and processes.

3. In considering measures to reduce the demand for mercury in products and processes, the draft text considered by the committee at its third session (UNEP(DTIE)/Hg/INC.3/3, annex I) set out four options for mercury-added products and three options for processes in which mercury was used. While there were discussions at the third session on the range of products and processes that might need to be controlled, as well as on the identified need for transitional arrangements or exemptions on controls for certain products, no agreement was reached on either the best mechanism for reducing the demand for mercury in products and processes or possible transitional arrangements. To enhance the

* UNEP(DTIE)/Hg/INC.4/1.

discussions further the secretariat was requested to provide information on possible transitional arrangements pending the phase-out of mercury-added products and manufacturing processes in which mercury was used.

4. For the purposes of the present note, the transition period considered is the period from the entry into force of the instrument to the time when all the measures under the Convention can be enforced by all parties. Such measures have not yet been finalized; however they may result in no mercury use in the manufacture of products or in other processes. The term “transitional arrangements” includes specific actions, such as controls on the use of mercury in the manufacture of products and processes and measures to control releases from such manufacture of products and use in processes; arrangements for identifying the products and processes for which the use of mercury may be allowed; arrangements under which the import, production or use of certain products may be allowed; and other requirements, such as the adoption of national instruments required to implement such measures as well as the development of institutional arrangements or guidance that must be developed by the Conference of the Parties. The transitional arrangements would take into account the control measures that would apply at entry into force of the instrument and would allow parties to make a transition towards achieving the objectives of the instrument. They could include measures specified in the instrument and measures to be determined by the Conference of the Parties.

5. Possible transitional arrangements are discussed below: sections I and II, respectively, provide information on the transitional arrangements operating under the Montreal Protocol and the Stockholm Convention; section III discusses considerations for addressing transitional arrangements under the mercury instrument.

I. Transitional arrangements under the Montreal Protocol on Substances that Deplete the Ozone Layer

6. The Montreal Protocol was opened for signature in 1987, entered into force on 1 January 1989 and has been adjusted and amended a number of times. The Protocol, adopted as a protocol to the Vienna Convention for the Protection of the Ozone Layer, was established to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete the ozone layer, with the ultimate objective of their elimination. The Protocol is intended to take into account technical and economic considerations, bearing in mind the development needs of developing countries and responding to their need for additional financial resources and access to relevant technologies. The control measures are designed, through phased implementation, to work towards the eventual elimination of substances that deplete the ozone layer.

7. The Montreal Protocol controls emissions through the phased reduction and eventual elimination of the production and consumption of controlled substances based on a comparison with production and consumption in designated base years, with the phase-out period for production being slightly longer than that for consumption. The schedules and other aspects of the phase-out of various controlled substances have been updated by the Protocol's governing body, the Meeting of the Parties, through the adoption of adjustments to the Protocol. The Meeting of the Parties has also added substances to the coverage of the Protocol through the adoption of amendments to the Protocol. The Meeting of the Parties considers reports from the Protocol's assessment panels and technical options committees in determining whether to adopt any such adjustments or amendments. The Protocol provides for a number of exemptions to its control measures, including for essential uses and critical uses.

8. Under the Protocol's phase-out approach each party must regulate its production, consumption, import and export of controlled substances to comply with limits applicable to it during a given period. Under specified circumstances a party may transfer some of its production allowance to another party, provided that it notifies the secretariat.

9. The Protocol also includes control measures on trade with non-parties. Such measures include bans on the import of controlled substances from non-parties, the effective dates of the bans varying depending on the substances covered. Additionally, parties are banned from exporting controlled substances to any non-party. The bans on imports and exports also limit the transboundary movement of products, equipment, plants and technology that would facilitate the production of certain controlled substances, unless such equipment improves containment, recovery, recycling or destruction, promotes the development of alternative substances or otherwise contributes to the reduction of emissions of controlled substances. These measures assist in ensuring that parties have no unreported consumption of controlled substances produced in non-parties.

10. The Protocol contains an article reflecting the special situation of developing countries, allowing a delay of ten years in compliance with the control measures on production and consumption.
11. The Protocol also includes an article on the assessment and review of the Protocol's control measures, which specifies the timeframe and mechanism for their review, including the establishment of panels of experts as required. It should be noted that the adoption of new control measures requires the amendment of the Protocol by the Meeting of the Parties, and any proposal for such an amendment must be presented to the parties at least six months in advance of the meeting at which it is proposed for adoption. The parties are required to make every effort to reach agreement by consensus on proposals to amend the Protocol but if such efforts fail they may as a last resort adopt them by a two-thirds majority vote of the parties present and voting, representing a majority of the parties operating under paragraph 1 of Article 5 present and voting and a majority of the parties not so operating present and voting.
12. An amendment to the Protocol must be ratified and does not enter into force for parties that have not ratified it. In contrast, an amendment to an annex to the Protocol enters into force automatically, six months after notification by the Depositary of its adoption, for all parties except for those that have affirmatively objected to it within six months of the Depositary's notification; there is an exception, for an amendment to an annex that involves an amendment to the Protocol itself, which only enters into force when the amendment to the Protocol enters into force.
13. As noted above, the obligation to phase out ozone-depleting substance production and consumption under the Montreal Protocol requires that parties meet certain targets for reduction in comparison to their baseline levels of production and consumption. This in turn requires that parties have sufficient baseline data and the ability to monitor and report on their annual consumption, production, imports and exports to demonstrate that they are meeting their obligations. The method for calculating production and consumption of controlled substances is set out in the text of the Protocol, as are the requirements for reporting on production, consumption, imports and exports.
14. The Protocol recognized the need for financial and technical support to developing country parties and mandated the Meeting of the Parties to establish a financial mechanism. That mechanism comprises the Multilateral Fund for the Implementation of the Montreal Protocol, established by the Meeting of the Parties at its fourth meeting, as well as other multilateral, regional and bilateral cooperation. Financing under this arrangement is targeted at assisting eligible parties to comply with their obligations under the Protocol, including all aspects of phasing out the production and consumption of ozone-depleting substances.
15. Overall, the Montreal Protocol provides a substance-based control system focused on the production and consumption of individual substances rather than the control of individual types of products. It has a financial mechanism available to certain (Article 5) developing country parties that has a strong focus on addressing compliance issues and has been a major factor in assisting countries to meet their phase-out obligations. A number of transitional arrangements, including the phase-down of production and consumption, as well as a delay in implementation for Article 5 country parties, are provided. The Protocol focuses on the national reduction of the production and consumption of listed substances calculated as a percentage of a given base year. It requires countries to have knowledge of the amount of listed substances used nationally in specific years, and then requires them carefully to track production and use to ensure that they meet the specified reduction targets. The information required to establish the initial baseline, for ongoing monitoring and for reporting of consumption data must be gathered by parties, with some inherent costs.

II. Transitional arrangements under the Stockholm Convention on Persistent Organic Pollutants

16. The Stockholm Convention was opened for signature in May 2001, entered into force in May 2004 and was amended in 2009 by the addition of a number of new substances to the list of substances controlled under the Convention. The Convention was established to protect human health and the environment from persistent organic pollutants.
17. The Convention includes measures to reduce or eliminate releases from the intentional production and use of persistent organic pollutants as well as from their unintentional production. For intentionally-used substances, the Convention requires parties to prohibit and/or take the legal and administrative measures necessary to eliminate their production, use, and import and export. It also requires parties to take measures to ensure that controlled substances are imported only for environmentally sound disposal or for a permitted use and exported only for environmentally sound disposal, or to a party for a permitted use or to a non-party that has certified that it will handle the

substances in a manner consistent with the provisions of the Convention. Parties that have regulatory and assessment schemes for new pesticides or new industrial chemicals are also required to regulate with the aim of preventing the production and use of new substances that exhibit the characteristics of persistent organic pollutants, taking into account criteria set out in the Convention. Financial assistance for developing countries is available through the financial mechanism, of which the Global Environment Facility is the principal entity during the interim period. It is recognized in article 13 of the Convention that the extent to which developing country parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country parties of their commitments relating to financial resources, technical assistance and technology transfer.

18. Annexes A and B to the Convention list the two main groups of substances that are subject to the Convention's control provisions: Annex A lists substances to be eliminated and Annex B lists substances to be restricted. In recognition that parties may need time to implement their obligations to reduce or eliminate releases from intentional production, the Convention includes transitional arrangements including specific exemptions for which parties may register. These specific exemptions are set forth in annexes A and B. In addition, Annex B sets forth "acceptable purposes" for which designated substances may be used in accordance with the provisions of the annex.

19. The specific exemption system is designed to be time-limited, with all exemptions expiring after five years unless an extension is requested. A party requesting an extension must submit for consideration by the Conference of the Parties a justification of its continued need for the exemption. The Conference of the Parties may grant an extension for a period of up to five years, and in considering requests for extensions is to take due account of the special circumstances of developing country parties and parties with economies in transition. Parties are allowed to withdraw their registrations for exemptions at any time, and once no parties are registered for an exemption it lapses and may no longer be used.

20. Annex A is divided into five parts. Part I lists the chemicals that are subject to the annex, along with specific exemptions pertaining to some of them, part III sets forth definitions pertaining to two groups of substances, and parts II, IV and V set forth provisions specific to certain substances that have the effect of delaying the Convention's control provisions.

21. At the time that they were listed in part I the substances aldrin, chlordane, dieldrin, heptachlor, hexabromodiphenyl ether, heptabromodiphenyl ether, hexachlorobenzene, lindane, mirex, PCBs and tetrabromodiphenyl ether were the subject of specific exemptions. By May 2009, however, no parties were registered for the exemptions for aldrin, chlordane, dieldrin, heptachlor, hexachlorobenzene or mirex, and consequently those exemptions lapsed. The others remain in effect.

22. Part II of Annex A sets the year 2025 as the phase-out deadline for PCBs in equipment (e.g., transformers, capacitors or other receptacles containing liquid stocks), subject to review by the Conference of the Parties. Part IV of Annex A provides an exemption for the environmentally sound recycling of articles containing hexabromodiphenyl ether and heptabromodiphenyl ether; part V does the same for articles containing tetrabromodiphenyl ether and pentabromodiphenyl ether; both exemptions are subject to periodic review by the Conference of the Parties and absent a decision by the Conference to terminate them sooner will expire in 2030.

23. Annex B of the Convention lists substances for which there is a recognized continuing need; at present it includes only DDT (1,1,1-trichloro-2,2-bis(4-chlorophenyl)ethane) and perfluorooctane sulfonic acid (PFOS), its salts and perfluorooctane sulfonyl fluoride. Parties that register to do so may produce and use these substances for acceptable purposes and in accordance with specific exemptions as set out in the annex. The Conference of the Parties, in consultation with the World Health Organization, evaluates the continued need for DDT for disease vector control at least every three years on the basis of available scientific, technical, environmental and economic information and will review the need for PFOS and related substances for the first time no later than 2015 and then every four years thereafter.

24. Overall, the Stockholm Convention employs substance-based control measures, subject to time-limited exemptions focused on particular uses. The exemption scheme does not require the submission of detailed information by a party unless it wishes to extend an exemption beyond its initial five-year term. As parties must be aware of their needs for particular substances at the time of ratification, however, preliminary work is required to ensure that they register for exemptions in a timely manner to avoid being in non-compliance with the Convention. The mechanism for extending exemptions, along with the lapsing of exemptions for which no party is registered, provides a strong message regarding the need to reduce dependence on controlled substances while allowing time for the adoption of alternatives. In addition to specific exemptions there is also provision for the use of

controlled substances for acceptable purposes where it is recognized that some long-term use is likely to be required. In these cases, the focus is on minimizing use and limiting environmental releases.

III. Possible transitional arrangements pending phase-out of mercury-added products and manufacturing processes in which mercury is used

25. Governments have proposed a number of ways to reduce the demand for mercury in products and processes. While there are differences between the approaches proposed, there are also some areas of agreement. Consistent with Governing Council decision 25/5, Governments have confirmed their intention to reduce the demand for mercury in products and processes. Furthermore, it has been recognized that for some uses a transition period will be required to allow the temporary continued use of mercury-added products and manufacturing processes in which mercury is used. The length of the transition period will depend on the availability of economically and technologically viable alternatives.

26. Given the need for a transition period, Governments will need to consider arrangements for managing control measures for mercury-added products and manufacturing processes in which mercury is used during the period between entry into force of the mercury instrument and the time when all parties are able to implement all such control measures. Two different types of transitional arrangements are described above in the sections on the Montreal Protocol and the Stockholm Convention.

27. It might be beneficial in considering this issue to differentiate between the use of mercury in the manufacture of products that contain mercury and the use of the products themselves; this is so because while there is only one substance to be controlled there are many products containing mercury. These products are very widely disseminated and move freely in trade, although they are only manufactured in a limited number of countries. Many of these mercury-added products are also not “final use” products but, rather, components of other products. Hence, addressing products relatively early in the supply chain would be simpler than addressing them at the stage of final use. Controls on the manufacture of mercury-added products could therefore be included among the measures to control such products.

28. Information has been made available in the past on a range of mercury-added products and processes using mercury, as well as on the availability of alternatives (see, in particular, UNEP(DTIE)/Hg/INC.2/11 and UNEP(DTIE)/Hg/OEWG.2/7/Add.1). Few countries, even those that have undertaken mercury release inventories, will have complete information on the full range of mercury-added products available within their territories. This lack of knowledge and the widespread dissemination of such products will make their regulation a challenge. There are viable alternatives to many mercury-added products and processes using mercury. Awareness of the suitability of such alternatives for particular uses or applications may, however, be limited.

29. Under the provisions on entry into force of the mercury instrument, in the current draft of the instrument entry into force would occur on the ninetieth day after the date of deposit of the thirtieth (or fiftieth, or yet another number, depending on what the parties choose) instrument of ratification, acceptance, approval or accession. Obligations under the mercury instrument would not arise for any individual country, however, until the entry into force of the instrument for that country upon its ratification of the instrument. With the instrument opening for signature in 2013, based on experience with other conventions entry into force of the instrument is unlikely to occur before late 2016 or 2017.

30. The time prior to entry into force of the instrument could be used in a number of effective ways. Governments could use it to increase their knowledge of the mercury-added products and processes using mercury within their territories and to explore options for alternatives. They could also use it to encourage manufacturers of such products to prepare for increased demand for non-mercury products. The time could also be used for research and development on alternatives to mercury-added products and processes using mercury for which viable alternatives are currently lacking.

31. Given the general agreement that it will be necessary to phase in controls on the use of mercury in products over time, one use of the period before entry into force could be to implement an exemption scheme similar to the one operating under the Stockholm Convention. Allowable uses of mercury could be specified in the mercury instrument, possibly in an annex. Parties could be required to register for exemptions at the time of ratification, and exemptions could be extended following assessment by the Conference of the Parties of requests from parties submitted to the secretariat along with supporting documentation. A key consideration is whether an extension request for a mercury-added product would be submitted by the party in which the product was manufactured or the

party in which it was used. Given the widespread and continuing use of mercury-added products, the lack of knowledge of the full extent of their use in many countries and the desire of all parties to comply with their obligations under the instrument, requiring the party where the product is used to seek the exemption might result in a large number of parties submitting requests for exemptions at the time of ratification. This would have resource implications both for parties submitting such requests and for the secretariat, which would need to process them, and would therefore add to the cost of implementing the instrument.

32. Another approach to mercury-added products could be to provide a short-term exemption for all products and processes for the first few years of the Convention. This would be an administratively simple mechanism that would allow parties a further opportunity to identify products and processes for which they had a continuing need while ensuring that they were in compliance with the provisions of the Convention in relation to products from the time of ratification. The exemption could be extended, for a defined and limited period of time, at the request of parties following (in a manner similar to that for extensions under the Stockholm Convention) assessment of information from the requesting parties to justify their need for the exemption. Extension of exemptions could be decided upon by the Conference of the Parties based on an analysis provided either by the secretariat or by a subsidiary group. Exemptions could be granted for a maximum period, perhaps five years, and could expire when no parties were registered for them. This could be an efficient and cost-effective mechanism for managing the exemption process, particularly in the period immediately after entry into force when there are likely to be a large number of countries requesting exemptions. Should it be considered useful to provide a strong message as to the temporary nature of exemptions, the initial exemption period could be relatively short, with requests for exemptions considered by the Conference of the Parties at its second session. Allowing broad-ranging initial exemptions would reduce the demands on parties at the time of ratification, avoid parties being in non-compliance when they have neglected to submit requests for exemptions and reduce the administrative burden on the secretariat in the initial stage of implementation.

33. Another approach to the use of mercury for products and processes in the transitional period, which could be combined with the approach above, would be to focus on minimizing the impact on the environment of the manufacture of products containing mercury and use of mercury in processes. Such an approach could focus on the development and implementation of guidance on the reduction of mercury in mercury-added products and the use of best available techniques in manufacturing to minimize releases to the environment. Given the relatively small number of countries with manufacturing sites, such an approach might produce significant global benefits following actions by a relatively limited number of countries. It could also be combined with the implementation of guidance on environmentally sound management of mercury-containing wastes to ensure that end-of-life products did not result in significant environmental contamination. Such management principles would in any case probably be required under the Convention to manage products already in circulation at the end of their lives.

34. Finally, an approach to the transitional period could be developed similar to that employed under the Montreal Protocol. This would require parties to agree during the negotiation of the instrument to initial targets for reduction in the use of mercury in specific products and processes. The dates by which the targets were to be reached could be set either in absolute terms (i.e., specific years) or as a specified number of years after entry into force of the instrument or entry into force of the instrument for a party. The targets would need to be reviewed by the Conference of the Parties on a regular basis. In the case of the Montreal Protocol, subsidiary bodies provide advice to the Meeting of the Parties on the availability of alternatives and other issues to assist it in determining target dates. A consequence of this approach is a need for the periodic adjustment of the instrument and its annexes to reflect revised target dates and the inclusion of new products or processes. A process specifically for this purpose could be included in the mercury instrument or the committee could decide that the full amendment process should be applicable. In the latter case, amendments to the instrument agreed by the Conference of the Parties could require ratification by each party prior to their entry into force for that party. Each party would also be required to make an analysis of the amount of mercury used in its territory in order to establish its baseline and then be able to assess on an annual basis the amount of mercury used in its territory in order to demonstrate its compliance with the instrument. It should be noted that the development of such analyses would probably require financial support.

35. Implicit in all the approaches outlined above is the need for the Conference of the Parties to be able to take decisions based on sound technical, economic and social information. Such information could be provided through ad hoc arrangements established by the Conference of the Parties or by a permanent subsidiary body mandated to gather and analyse such information and report on it to the Conference of the Parties.

36. Throughout the transitional period, there will also need to be a supply of mercury for the manufacture of allowed products containing mercury and processes using mercury. Measures will be needed to ensure that mercury intended for allowed purposes is not diverted for other uses. Furthermore, as long as products containing mercury are manufactured and on the market there will be a need to reduce releases and exposure, including through public awareness and the development of guidelines by the Conference of the Parties, to manage the waste stream, to recover mercury from the waste stream and store it, and to address public health issues arising as a consequence of mercury exposure. Monitoring the use of mercury in the manufacture of products and in processes using mercury will be necessary in evaluating the effectiveness of the treaty. Where trade between parties, and between parties and non-parties, is involved, the use of specific Customs codes could be considered. The lead time involved in the allocation and use of such codes suggests that consultation with the World Customs Organization should be initiated early.

IV. Possible considerations for the committee

37. As part of the consideration of the measures to be included in the mercury instrument to control mercury-added products and processes in which mercury is used, the committee may wish to consider the possible approaches set out in the present note. In doing so the committee may wish to take into consideration for each approach factors such as the cost of its implementation, the relative speed of its implementation, its impact on the ability of each party to comply with the provisions of the instrument, and its possible impact on risks to human health and the environment. Following these considerations, and in parallel with considering control measures applicable to products and processes and other provisions of the draft mercury instrument being discussed (in particular those on supply, trade, and storage, wastes and contaminated sites), the committee may wish to use one of the possible approaches or a combination thereof to develop a suitable approach to transitional measures.
