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**Intergovernmental negotiating committee
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**Preparation of a global legally binding
instrument on mercury**

Options for the structure of the mercury instrument

Note by the secretariat

Introduction

1. At its meeting held 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 intergovernmental negotiating committee at its first session to facilitate its work. Among other things, the secretariat was requested to prepare a description of options for the structure of the mercury instrument, based upon paragraph 27 of decision 25/5 of the Governing Council of the United Nations Environment Programme.
2. The present note responds to that request. It is based on a review of the structures of legally binding conventions of global scope, with a particular focus on legally binding multilateral environmental agreements. For purposes of the present note, the term “structure” means the organization of the constituent parts of a legally binding instrument that enables those parts to function as a whole. In identifying options for the structure of the mercury instrument, the note does not endeavour to define or discuss the specific content of the constituent parts: it neither specifies substantive measures nor discusses how such measures might be implemented, including whether they might be binding or voluntary. In accordance with Governing Council decision 25/5, the note presents options for the structure of an instrument that is global and legally binding and relates only to mercury.
3. The basic structure of nearly all modern legally binding multilateral environmental agreements is very similar: each contains a preamble, introductory provisions, control measures, provisions related to implementation, provisions establishing treaty institutions, provisions related to the further development of the treaty and standard administrative provisions, which are often referred to as “final

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

provisions”.¹ The specific treaty provisions within each category may vary considerably, but the categories themselves remain consistent. Chapter I of the present note presents an outline of this typical overall structure.

4. While this overall structure is common, the control measures of a multilateral environmental agreement may take significantly different forms. Control measures are those provisions of a treaty that are intended specifically to prevent, minimize or redress the problem that prompted the treaty’s adoption. The term does not include, at least for the purposes of the present note, provisions related to implementation such as provisions requiring parties to submit national action plans, engage in scientific and technical cooperation, exchange information, report on national implementation or provide financial resources and technical assistance, which are reflected in section (d) of the outline presented in chapter I. Examples of control measures include articles 3–6 of the Stockholm Convention on Persistent Organic Pollutants (which are supplemented by annexes to the Convention related to those articles) and articles 4 and 6–9 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

5. Chapter II of the present note sets out three options for how the control measures of a comprehensive, legally binding mercury convention might be structured. While the options are presented as three distinct types, none of them, in practice, has a fixed form; each can occur in different variations, and the characteristics of one type can overlap with those of another. The essential distinctions between these three structural options are the degree to which their control measures are distributed between a convention and its annexes or protocols (if any) and whether all the control measures are adopted together as a package or in separate, legally distinct instruments. The three options are as follows:

(a) Control measures plus annexes: the control measures appear in the convention and are supplemented or elaborated upon by one or more annexes, which form an integral part of the convention;

(b) Convention plus protocols: the convention includes the standard structure and categories of provisions identified in chapter I but some or all of the control measures appear in separate protocols; the convention and its protocols are legally distinct treaties that may be adopted separately from one another;

(c) Umbrella agreement: the convention (the umbrella agreement) is succinct and does not contain substantive provisions or control measures; the latter appear instead in detailed annexes. The entire agreement, including the umbrella agreement and annexes, is adopted as a package and the individual parts of the package are not severable from one another.

6. A number of conventions are referred to in the present note to illustrate the principles discussed. A list of those conventions, including internet addresses, may be found in the annex to the present note.

I. Basic structure of legally binding multilateral environmental agreements

7. Modern legally binding multilateral environmental agreements of global scope consistently share the basic structure outlined below.² In paragraph 27 of its decision 25/5 the Governing Council agreed that the mercury instrument to be negotiated by the intergovernmental negotiating committee should include a number of provisions, listed in subparagraphs (a)–(i) of paragraph 27. A number of the provisions in the outline below are marked by footnotes indicating that they correspond to one of the

1 Final provisions may relate to matters such as the right to vote, signature, ratification, entry into force, reservations, withdrawal, the depositary and authentic texts. For additional information, please refer to document UNEP(DTIE)/Hg/INC.1/7 on final provisions that are typically included in multilateral environmental agreements.

2 This generalization holds true for a broad range of multilateral environmental agreements and many other legally binding multilateral agreements. See, for example, the Stockholm Convention; the Basel Convention; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; the United Nations Framework Convention on Climate Change and its Kyoto Protocol; the Convention on Biological Diversity and its Cartagena Protocol on Biosafety; the Convention on International Trade in Endangered Species of Wild Fauna and Flora; the World Health Organization Framework Convention on Tobacco Control; the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa; the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

subparagraphs in paragraph 27. Those that are not footnoted are standard provisions of the sort that are often found in multilateral environmental agreements. The basic structure is as follows:

- (a) Preamble;
- (b) Introductory provisions, which may include some or all of the following:
 - (i) Objectives;³
 - (ii) Scope;
 - (iii) Principles;
 - (iv) Definitions;
- (c) Control measures (including annexes, if any);⁴
- (d) Provisions related to implementation, which may address some or all of the following:
 - (i) National or regional action plans;
 - (ii) Scientific and technical cooperation;
 - (iii) Knowledge awareness;⁵
 - (iv) Information exchange;⁶
 - (v) Monitoring, reporting and review of national implementation;⁷
 - (vi) Financial resources and technical assistance;⁸
 - (vii) Effectiveness evaluation;
 - (viii) Non-compliance;⁹
- (e) Institutional provisions, which may include:
 - (i) Conference of the parties;
 - (ii) Subsidiary bodies, including scientific bodies;
 - (iii) Secretariat;
- (f) Other provisions, which may include:
 - (i) Settlement of disputes (sometimes developed further in an annex or protocol);
 - (ii) Liability (sometimes developed further in an annex or protocol);
- (g) Provisions related to the further development of the instrument, which may include:
 - (i) Amendments to the convention;
 - (ii) Adoption and amendment of annexes (if any);
 - (iii) Adoption of protocols;
- (h) Final provisions.

3 Governing Council decision 25/5, paragraph 27 (a).

4 Chapter II of the present note sets out options for the structure of the control measures that will be necessary to give effect to subparagraphs 27 (b)–(f) of Governing Council decision 25/5.

5 Governing Council decision 25/5, paragraph 27 (g).

6 Ibid.

7 Provisions of this type are related to compliance, on which the Governing Council called for provisions in its paragraph 27 (i) of decision 25/5. Most multilateral environmental agreements set out such provisions in separate articles (particularly in the case of reporting), and do not include them in the provisions relating to determining and treating cases of non-compliance. Compare, for example, articles 15 (reporting) and 17 (non-compliance) of the Stockholm Convention.

8 Governing Council decision 25/5, paragraph 27 (h).

9 Ibid., paragraph 27 (i).

II. Options for the structure of control measures

8. As described in the introduction, control measures are those provisions of a treaty intended specifically to prevent, minimize or redress the problem that gave rise to the treaty's adoption. The present chapter discusses three options for how the control measures of a comprehensive, legally binding mercury convention might be structured. The essential distinctions between these three structural options are, first, the degree to which the control measures are distributed between the body of the convention and any annexes or protocols; and, second, whether all the control measures are adopted together as a package or in separate, legally distinct instruments. The options include:

(a) **Control measures plus annexes:** The control measures appear in the body of the instrument and are supplemented or elaborated upon by one or more annexes, which form an integral part of the convention;

(b) **Convention plus protocols:** The convention includes the standard structure, categories and provisions described above in chapter I, but some or all of the control measures appear in separate protocols to the convention; the convention and protocols are legally distinct treaties;

(c) **Umbrella agreement:** The body of the convention (the umbrella agreement) is succinct and contains no control measures or other substantive provisions; the latter appear instead in detailed annexes, each of which may consist of more than one discrete part. The entire agreement, including the umbrella agreement and annexes, is adopted as a package and the individual parts of the package are not severable from one another.

<i>Option</i>	<i>Distribution of control measures</i>	<i>Adoption</i>
Control measures plus annexes	Convention body; additional technical information and substantive provisions appear in one or more annexes.	Annexes are adopted as an integral part of convention; annexes may be amended or additional annexes adopted later.
Convention plus protocols	Some control measures may appear in convention body; most measures appear in protocols.	Convention and protocols are usually adopted separately; each is a legally distinct treaty.
Umbrella agreement	All control measures appear in detailed annexes.	Umbrella agreement and annexes are adopted as a package.

9. While the present chapter presents the three structural options as distinct types, it is important to recognize that none of them, in practice, is a fixed form: each may occur in different variations and the characteristics of one type can overlap with those of another. Virtually all modern legally binding multilateral environmental agreements of global scope, however, employ annexes to some extent. Annexes allow the text of a convention itself to be kept relatively brief and clear, avoiding or minimizing text that is long and unwieldy and therefore difficult to understand and implement. In addition, because most conventions allow their parties to amend or adjust annexes more easily than the conventions themselves, the use of annexes can allow parties to adapt to changed circumstances more quickly than if they were able to adjust aspects of the control measures only by amending the conventions.

10. There is a fourth option for the structure of control measures, in addition to the three presented here, which is rarely employed in modern legally binding multilateral environmental agreements of global scope. Under this option all control measures for a multilateral environmental agreement are set out in their entirety in the main body of the agreement and are not elaborated upon or supplemented by any annexes. This option is generally eschewed because of the advantages offered by annexes described in the preceding paragraph and the risk that a convention that does not employ annexes will be long, unwieldy and difficult to understand, implement and amend.

A. Control measures plus annexes

11. Under the first option, the control measures would appear in the body of the convention and would be supplemented or elaborated upon by one or more annexes that form an integral part of the convention. In most cases, the rules set out in a convention governing the amendment of annexes are more flexible than those governing amendment of the convention itself. This flexibility allows parties to

modify or adjust control measures appearing in annexes more easily than they can amend control measures set out in the body of the convention.

12. Virtually all legally binding multilateral environmental agreements of global scope, including all the chemicals and wastes conventions, use the control measures plus annexes option to varying degrees. Annexes may be limited to technical information that supplements the control measures contained in the convention body. In some cases, annexes to a convention may contain substantive provisions that augment or elaborate the control measures set out in the convention itself.

13. In some cases control measures are fully elaborated in the body of a convention, while technical annexes list technical specifications and specific substances (or classes of substances) that are subject to the control measures. Examples of this approach feature in, among others, the Basel Convention, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. This approach is most often employed when the various substances, products or processes subject to a multilateral environmental agreement can be grouped into more or less broad classes that can be regulated under common control measures.

14. In other cases substantive annexes are employed. In such cases control measures are expressed in the convention itself in fairly concise terms and are then elaborated more fully in detailed annexes. Thus, the annexes contain substantive control provisions, not just technical specifications. This approach may be advantageous when the control measures are complex and detailed and when they vary according to substance or class of substance. Putting the detailed and technical control measures in annexes can help keep the convention itself from becoming unwieldy and can thus maintain the clarity with which fundamental obligations are set out in the convention itself. Moreover, it may allow those details of the control measures that appear in the annexes to be modified or fine-tuned more easily than they could be if they were set out in the convention.

15. The Stockholm Convention exhibits this approach in its annex A, part II, measures on polychlorinated biphenyls, and in its annex B, part II, measures on DDT. In both cases the annexes go beyond providing technical specifications and include significant detail on how parties are to implement and comply with the relevant control measures in articles 3 and 6. Outside the chemicals and wastes cluster, annexes II–IX of the United Nations Convention on the Law of the Sea provide significant additional details on procedures, mechanisms and requirements related to control measures set out in the convention.

16. A unique variation of this “control measures plus substantive annexes” approach appears in the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, which includes four regional implementation annexes that apply to Africa, Asia, Latin America and the Caribbean and the Northern Mediterranean, respectively. Each annex establishes detailed, region-specific approaches to addressing desertification, yet applies to all convention parties (especially in respect of financial and technical assistance). This approach is an appropriate way to address desertification, which is a phenomenon whose causes and effects vary by geographical region. In contrast, the approach would probably not be suitable for addressing the global challenges of mercury, which are not unique to individual geographical regions.

17. A mercury convention using the control measures plus annexes option might have the following structure:

- (a) Convention body that would include:
 - (i) Preamble;
 - (ii) Introductory provisions;
 - (iii) Control measures addressing mercury, including those contemplated by Governing Council decision 25/5, paragraph 27;
 - (iv) Provisions related to implementation, including technical and financial assistance and compliance;
 - (v) Institutional provisions;
 - (vi) Other provisions (e.g., dispute settlement and liability);

- (vii) Provisions related to further development of the instrument;
- (viii) Final provisions;
- (b) Annexes that would elaborate on the requirements of the control measures specified in the convention body. For each mercury priority area, they might include annexes containing some or all of the following:
 - (i) Technical specifications;
 - (ii) Names of applicable products, processes, sources, etc.;
 - (iii) Mandatory and discretionary guidelines for implementing the control measures, including schedules and flexibility measures, where appropriate.

18. An advantage of this option for mercury is that it could allow the control measures in the body of the convention to be written clearly and succinctly, with a focus on desired outcomes rather than on technical, implementation and procedural details. Such details, where needed, could appear in the annexes.

19. A convention using this approach could be adapted to changed circumstances or evolving needs through the following procedures, which would be set out in the convention:

- (a) Amendments to the convention: adopted under a consensus or supermajority voting rule; as the amended convention becomes a new agreement, convention amendments typically apply only to parties that ratify, accept or accede to them;
- (b) Amendments or adjustments to the annexes: adopted under a consensus or supermajority voting rule; when adopted under a consensus rule, they can apply automatically to all parties or there can be provision for a party either to opt in or opt out by notifying the depositary within a fixed period. In the case of the Montreal Protocol, adjustments are adopted under a combination supermajority or double-majority voting rule and are binding on all parties, without the opportunity to opt out;¹⁰
- (c) New annexes: adopted under a consensus or supermajority voting rule; they can apply automatically to all parties or there can be provision for a party either to opt in or opt out by notifying the depositary within a fixed period.

B. Convention plus protocols

20. Under the “convention plus protocols” option, the convention could include the basic overall structure identified above in chapter I but few, if any, control measures. The control measures would appear instead in separate protocols to the convention, which could be adopted at the same time as the convention or after the convention has entered into force. The convention and each protocol would be legally distinct treaties; parties to the convention would not be required to sign, ratify or accede to any protocol. Indeed, the States adopting the convention could provide that other States that are not parties to the convention could nevertheless become parties to the protocols.¹¹

21. Prominent examples of the convention plus protocols option include the United Nations Framework Convention on Climate Change and its Kyoto Protocol, and the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol. Perhaps one of the purest examples is the Convention on Long-range Transboundary Air Pollution: the Convention itself contains no substantive control measures, all of which are found in its eight protocols, which deal with ozone, persistent organic pollutants, heavy metals, sulfur, volatile organic compounds, nitrogen oxides and financing for monitoring and evaluation. Each protocol shares a common structure and uses the underlying Convention’s Executive Body, Implementation Committee and secretariat.

¹⁰ See Montreal Protocol, article 2.9.

¹¹ See, for example, United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (1998) and its Kiev Protocol on Pollutant Release and Transfer Registers, article 24 (2003) (stating that the Protocol is open for signature by all States that are members of the United Nations); see also Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, article 9, para.1 (2000) (stating that the Protocol is open for signature by any State that is a party to the Convention or has signed it).

22. In the context of mercury, the convention plus protocols approach could be employed in two ways. First, a basic convention could be developed using the overall structure identified in chapter I but not including any control measures. Thus, the convention would contain a preamble, introductory provisions, provisions related to implementation, provisions establishing treaty institutions, provisions related to the further development of the instrument and final provisions. The mercury control measures would appear in a separate protocol that could be adopted at the same time as the underlying convention. The protocol itself could employ a “control measures plus annexes” structure. The main advantage of this option is that it could be used as a framework to address mercury and, perhaps at a later time, additional substances other than mercury. Because the present note discusses structural options in the context of a mercury-only instrument, that idea is not explored here.

23. In the second way in which this option could be employed, the intergovernmental negotiating committee could develop a basic convention similar to that just described but applying only to mercury and including some control measures. Other mercury control measures would be developed in separate protocols. For example, atmospheric emissions of mercury might be addressed in a separate protocol. This approach could be applicable if negotiators believed that the control measures for one or more of the mercury priorities would be particularly complex or if they believed it would not be feasible to develop and adopt them as part of the basic mercury convention. A drawback of dividing the control measures between an underlying convention and separate protocols in this fashion is that it could result in a fragmented mercury regime, in which the different instruments have different parties or in which some mercury priorities are not addressed until some unspecified time in the future.

24. A mercury convention using the convention plus protocols approach might have the following structure:

- (a) A convention body that would include:
 - (i) Preamble;
 - (ii) Introductory provisions;
 - (iii) Control measures addressing mercury, including those contemplated by Governing Council decision 25/5, paragraph 27;
 - (iv) Provisions related to implementation, including technical and financial assistance and compliance (such matters could also be addressed under one or more protocols);
 - (v) Institutional provisions;
 - (vi) Other provisions (e.g., dispute settlement and liability, which could also be addressed under one or more protocols);
 - (vii) Provisions related to further development of the instrument, including the adoption of protocols;
 - (viii) Final provisions;

(b) Annexes elaborating the requirements of the control measures specified in the convention body;

(c) Protocols addressing aspects of mercury not dealt with in the convention itself. Because each protocol would be a legally distinct treaty, it would also contain some or all of the basic structures and provisions identified above in chapter I.

25. Under the convention plus protocols approach, the parties to the mercury instrument could adapt to changed circumstances or evolving needs through procedures regarding convention amendments, amendments and adjustments of annexes and adoption of new annexes like those discussed above in paragraph 19. In respect of protocols the parties could also use the following procedures:

(a) New protocols could be adopted by the parties to the convention so that they bound only the States that ratified, accepted or acceded to them;

(b) Existing protocols, including protocol annexes (if any), could be amended or adjusted by the parties to the protocol through procedures like those described above in paragraph 19. The specific procedures could be set out in the convention or in the protocols.

C. Umbrella agreement

26. Under this option, individual substantive agreements could be negotiated together and adopted as a package under an umbrella agreement. The umbrella agreement would be succinct, containing no control measures or other substantive provisions. All substantive provisions and control measures would appear in annexes, which could be fully developed agreements, each consisting of more than one discrete part. The umbrella agreement and the annexes would be adopted together as a package, the individual parts of which would not be severable from one another. The Marrakesh Agreement Establishing the World Trade Organization is a prominent example of such an umbrella agreement.¹²

27. Although the Marrakesh Agreement, including its package of annexes, is very complicated, the option that it illustrates might be suitable for mercury. An umbrella agreement is useful when some or all of the control measures required to address a given matter are complex and will be developed to a high degree of detail and when different categories of control measures either warrant different approaches, structures or procedures or require their own associated annexes, schedules or appendices.

28. The key difference between an umbrella agreement and the convention plus protocols approach is that the entire umbrella agreement, including all annexes, is adopted as a package at the same time, whereas a convention and its protocols are often developed and adopted separately over time. The chief difference when compared to the control measures plus annexes approach is that the overarching umbrella agreement contains no control measures; they appear only in the annexes. Provisions related to financial assistance and compliance, if they are fully developed and agreed, would also probably be included as annexes, whereas under the control measures plus annexes approach they would usually be found in the convention itself.

29. A mercury convention in the form of an umbrella agreement might have the following structure:

(a) A limited main body (the umbrella agreement) that would include:

- (i) Preamble;
- (ii) Introductory provisions;
- (iii) Some provisions related to implementation;
- (iv) Institutional provisions;
- (v) Provisions related to further development of the instrument;
- (vi) Final provisions;

(b) Separate annexes including one or more of the provisions listed in paragraphs 27 (b)–(f) of Governing Council decision 25/5, which could also include provisions relating to:

- (i) Capacity-building and technical and financial assistance;
- (ii) Compliance;
- (iii) Other matters such as settlement of disputes and liability;
- (iv) Establishment of specialized subsidiary bodies such as technical committees and technical and financial assistance funds;
- (v) Further development of the annexes.

Each issue-specific annex could include its own annexes, schedules or appendices, as appropriate.

30. Under the umbrella agreement option, the parties could adapt the agreement to changed circumstances or evolving needs through the procedures identified above in paragraph 19. The specific procedures to amend or adjust the issue-specific annexes could appear in the umbrella agreement and apply to all annexes or could appear in and apply separately to the individual annexes, as appropriate.

¹² Paragraph 2 of article II of the Marrakesh Agreement states explicitly that the “agreements and associated legal instruments included in annexes 1, 2, and 3” of the agreement “are integral parts of this Agreement, binding on all Members”.

Annex

Multilateral agreements cited in the present note

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), <http://www.basel.int/text/documents.html>

Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), <http://www.cbd.int/biosafety/protocol.shtml>

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (1998), <http://www.unece.org/env/pp/documents/cep43e.pdf>

Convention on Biological Diversity (1992), <http://www.cbd.int/convention/convention.shtml>

Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973, as amended), <http://www.cites.org/eng/disc/text.shtml>

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1992), <http://www.opcw.org/chemical-weapons-convention/download-the-cwc/>

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), <http://www.un.org/millennium/law/xxvi-22.htm>

Kiev Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (2003), <http://www.unece.org/env/pp/prtr/docs/prtrtext.htm>

Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), <http://unfccc.int/resource/docs/convkp/kpeng.pdf>

Marrakesh Agreement Establishing the World Trade Organization (1994), http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), <http://www2.ohchr.org/english/law/crc-conflict.htm>

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), <http://www.pic.int/home.php?type=t&id=49&sid=16>

Stockholm Convention on Persistent Organic Pollutants (2001), http://www.pops.int/documents/convtext/convtext_en.pdf

United Nations Convention on the Law of the Sea (1982), http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994), <http://www.unccd.int/convention/text/convention.php>

United Nations Framework Convention on Climate Change (1992), <http://unfccc.int/resource/docs/convkp/conveng.pdf>

World Health Organization Framework Convention on Tobacco Control (2003), http://www.who.int/fctc/text_download/en/index.html