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**Intergovernmental Negotiating Committee
to prepare a global legally binding
instrument on mercury**

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Item 4 of the provisional agenda*

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

Draft final provisions

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 its work. Among other things, the secretariat was requested to provide “materials addressing ... standard articles on final provisions that are typically included in multilateral environmental agreements”. In response to that request the secretariat has prepared draft versions of such provisions for consideration by the committee, which are set out in the annex to the present note.
2. The draft versions have been prepared taking into account precedents contained in existing international conventions in the field of the environment, which are often referred to as multilateral environmental agreements, including the following:
 - (a) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;
 - (b) Convention on Biological Diversity;
 - (c) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;
 - (d) Stockholm Convention on Persistent Organic Pollutants;
 - (e) United Nations Framework Convention on Climate Change;

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

(f) United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa;

(g) Vienna Convention for the Protection of the Ozone Layer.

3. To the maximum extent possible the draft versions have been reproduced from the convention text on which they are based without material alteration, with only minor adjustment and without editing. The provisions of the conventions on which specific draft provisions are based are cited in footnotes to those provisions.

4. In the draft provisions the global legally binding instrument to be negotiated by the intergovernmental negotiating committee is referred to as the "Convention". This is done purely for convenience and is not intended to prejudge what the committee may decide as to the name of the instrument that it has been mandated to prepare.

Annex

Draft final provisions

Article __. Settlement of disputes¹

1. Parties shall seek a settlement of any dispute between them concerning the interpretation or application of this Convention through negotiation or other peaceful means of their own choice.
2. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party that is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, with respect to any dispute concerning the interpretation or application of the Convention, it recognizes one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
 - (a) Arbitration in accordance with procedures set out in Annex __, part I; and
 - (b) Submission of the dispute to the International Court of Justice.
3. A Party that is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedure referred to in paragraph 2 (a).
4. A declaration made pursuant to paragraph 2 or paragraph 3 shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depositary.
5. The expiry of a declaration, a notice of revocation or a new declaration shall not in any way affect proceedings pending before an arbitral tribunal or the International Court of Justice unless the parties to the dispute otherwise agree.
6. If the parties to a dispute have not accepted the same procedure pursuant to paragraph 2 and if they have not been able to settle their dispute through the means mentioned in paragraph 1 within twelve months following notification by one party to another that a dispute exists between them, the dispute shall be submitted to a conciliation commission at the request of any party to the dispute. The conciliation commission shall render a report with recommendations. Additional procedures relating to the conciliation commission are set out in Annex __, part II.

Article __. Amendments to the Convention²

1. Amendments to this Convention may be proposed by any Party.
2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. The text of any proposed amendment shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate the proposed amendment to the signatories to this Convention and, for information, to the Depositary.
3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths³ majority vote of the Parties present and voting at the meeting.
4. The adopted amendment shall be communicated by the Depositary to all Parties for ratification, acceptance or approval.

1 Rotterdam Convention, article 20; Stockholm Convention, article 18; Basel Convention, article 20; Vienna Convention, article 11; Climate Change Convention, article 14; Convention on Biological Diversity, article 27; Desertification Convention, article 28.

2 Rotterdam Convention, article 21; Stockholm Convention, article 21; Basel Convention, article 17; Vienna Convention, article 9; Climate Change Convention, article 15; Convention on Biological Diversity, article 29; Desertification Convention, article 30.

3 Adoption of an amendment by a three-fourths majority is provided for in the Rotterdam Convention, the Stockholm Convention, the Basel Convention, the Vienna Convention and the Climate Change Convention, while the adoption of an amendment to the Convention on Biological Diversity requires a two-thirds majority.

5. Ratification, acceptance or approval of an amendment shall be notified to the Depositary in writing. An amendment adopted in accordance with paragraph 3 shall enter into force for the Parties having accepted it on the ninetieth day after the date of deposit of instruments of ratification, acceptance or approval by at least three fourths of the Parties. Thereafter, the amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits its instrument of ratification, acceptance or approval of the amendment.

Article __. Adoption and amendment of annexes⁴

1. Annexes to this Convention shall form an integral part thereof and, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto.

2. Any additional annexes adopted after the entry into force of this Convention shall be restricted to procedural, scientific, technical or administrative matters.⁵

3. The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention:

(a) Additional annexes shall be proposed and adopted according to the procedure laid down in paragraphs __ of Article __;⁶

(b) Any Party that is unable to accept an additional annex shall so notify the Depositary, in writing, within one year from the date of communication of the adoption of the additional annex by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-acceptance in respect of an additional annex and the annex shall thereupon enter into force for that Party subject to subparagraph (c) below; and

(c) On the expiry of one year from the date of the communication by the Depositary of the adoption of an additional annex, the annex shall enter into force for all Parties that have not submitted a notification in accordance with the provisions of subparagraph (b) above.

4. The proposal, adoption and entry into force of amendments to annexes to this Convention shall be subject to the same procedures as for the proposal, adoption and entry into force of additional annexes to the Convention.

5. If an additional annex or an amendment to an annex is related to an amendment to this Convention, the additional annex or amendment shall not enter into force until such time as the amendment to the Convention enters into force.

Article __. Right to vote⁷

1. Each Party to this Convention shall have one vote, except as provided for in paragraph 2 below.

2. A regional economic integration organization, on matters within its competence, shall exercise its right to vote with a number of votes equal to the number of its member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right to vote, and vice-versa.

4 Rotterdam Convention, article 22, which in addition includes specific procedures regarding the amendment of annex III to that convention; Stockholm Convention, article 22; Basel Convention, article 18; Vienna Convention, article 10; Climate Change Convention, article 16; Convention on Biological Diversity, article 30; Desertification Convention, article 31.

5 While this draft provision is based on comparable provisions in the existing conventions cited above, it should not be deemed to prejudice any outcome of deliberations of the Committee on this matter.

6 Reference may be made to the provisions governing amendments to the Convention.

7 Stockholm Convention, article 23; Basel Convention, article 24; Vienna Convention, article 15; Climate Change Convention, article 18; Convention on Biological Diversity, article 31; Desertification Convention, article 32; Rotterdam Convention, article 23.

Article __. Signature⁸

This Convention shall be open for signature at __ by all States and regional economic integration organizations from __ to __, and at the United Nations Headquarters in New York from __ to __.⁹

Article __. Ratification, acceptance, approval or accession¹⁰

1. This Convention shall be subject to ratification, acceptance or approval by States and by regional economic integration organizations. It shall be open for accession by States and by regional economic integration organizations from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.
2. Any regional economic integration organization that becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.
3. In its instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall declare the extent of its competence in respect of the matters governed by this Convention. Any such organization shall also inform the Depositary, who shall in turn inform the Parties, of any relevant modification in the extent of its competence.

Article __. Entry into Force¹¹

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the fiftieth¹² instrument of ratification, acceptance, approval or accession.
2. For each State or regional economic integration organization that ratifies, accepts or approves this Convention or accedes thereto after the deposit of the fiftieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.
3. For the purposes of paragraphs 1 and 2, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of that organization.

Article __. Reservations¹³

No reservation may be made to this Convention.

8 Rotterdam Convention, article 24; Stockholm Convention, article 24; Basel Convention, article 21; Vienna Convention, article 12; Climate Change Convention, article 20; Convention on Biological Diversity, article 33; Desertification Convention, article 33.

9 The name of the place where the instrument to be adopted by a conference of plenipotentiaries may be signed and the period during which it will be open for signature will be inserted.

10 Rotterdam Convention, article 25; Stockholm Convention, article 25; Basel Convention, articles 22 and 23; Vienna Convention, articles 13 and 14; Climate Change Convention, article 22; Convention on Biological Diversity, articles 34 and 35; Desertification Convention, article 34.

11 Rotterdam Convention, article 26; Stockholm Convention, article 26; Basel Convention, article 25; Vienna Convention, article 17; Climate Change Convention, article 23; Convention on Biological Diversity, article 36; Desertification Convention, article 36.

12 For the Rotterdam Convention, the Stockholm Convention and the Climate Change Convention, the required number of instruments of ratification, acceptance, approval or accession for the Convention to enter into force is 50. For the Vienna Convention, the Basel Convention and the Convention on Biological Diversity, the number of ratification and other relevant instruments required for entry into force is 11, 20 and 30, respectively.

13 Rotterdam Convention, article 27; Stockholm Convention, article 27; Basel Convention, article 26; Vienna Convention, article 18, Climate Change Convention, article 24; Convention on Biological Diversity, article 37; Desertification Convention, article 37.

Article __. Withdrawal¹⁴

1. At any time after three years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depository.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depository of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

Article __. Depository¹⁵

The Secretary-General of the United Nations shall be the Depository of this Convention.

Article __. Authentic texts¹⁶

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at _____ on this __ day of __, two thousand and thirteen.¹⁷

14 Rotterdam Convention, article 28; Stockholm Convention, article 28; Basel Convention, article 27; Vienna Convention, article 19; Climate Change Convention, article 25; Convention on Biological Diversity, article 38; Desertification Convention, article 38.

15 Rotterdam Convention, article 29; Stockholm Convention, article 29; Basel Convention, article 28; Vienna Convention, article 20; Climate Change Convention, article 19; Convention on Biological Diversity, article 41; Desertification Convention, article 39.

16 Rotterdam Convention, article 30; Stockholm Convention, article 30; Basel Convention, article 29; Vienna Convention, article 21; Climate Change Convention, article 26; Convention on Biological Diversity, article 42; Desertification Convention, article 40.

17 The date of the adoption will be inserted after a conference of plenipotentiaries has adopted the instrument.

Annex ____**I. Arbitration procedure¹⁸**

The arbitration procedure for purposes of paragraph 2 (a) of Article ____ of the Convention shall be as follows:

Article 1

1. A Party may initiate recourse to arbitration in accordance with Article ____ of the Convention by written notification addressed to the other party to the dispute. The notification shall be accompanied by a statement of the claim, together with any supporting documents, and state the subject-matter of arbitration and include, in particular, the articles of the Convention the interpretation or application of which are at issue.

2. The claimant party shall notify the Secretariat that the parties are referring a dispute to arbitration pursuant to Article _____. The notification shall be accompanied by the written notification of the claimant party, the statement of claim and the supporting documents referred to in paragraph 1 above. The Secretariat shall forward the information thus received to all Parties.

Article 2

1. If a dispute is referred to arbitration in accordance with Article 1 above, an arbitral tribunal shall be established. It shall consist of three members.

2. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the President of the tribunal. The President of the tribunal shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.

4. Any vacancy shall be filled in the manner prescribed for the initial appointment.

5. If the parties do not agree on the subject-matter of the dispute before the President of the arbitral tribunal is designated, the arbitral tribunal shall determine the subject-matter.

Article 3

1. If one of the parties to the dispute does not appoint an arbitrator within two months of the date on which the respondent party receives the notification of the arbitration, the other party may inform the Secretary-General of the United Nations, who shall make the designation within a further two-month period.

2. If the President of the arbitral tribunal has not been designated within two months of the date of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a party, designate the President within a further two-month period.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of the Convention and international law.

¹⁸ Stockholm Convention, Annex G. See also Rotterdam Convention, Annex VI; Basel Convention, Annex VI; and Convention on Biological Diversity, Annex II, part I.

Article 5

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.

Article 6

The arbitral tribunal may, at the request of one of the parties, recommend essential interim measures of protection.

Article 7

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

- (a) Provide it with all relevant documents, information and facilities; and
- (b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Article 8

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its costs and shall furnish a final statement thereof to the parties.

Article 10

A party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

Article 12

Decisions of the arbitral tribunal on both procedure and substance shall be taken by a majority vote of its members.

Article 13

1. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings.
2. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five more months.

Article 15

The final decision of the arbitral tribunal shall be confined to the subject matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

Article 16

The award shall be binding on the parties to the dispute. The interpretation of the Convention given by the award shall also be binding upon a Party intervening under Article 10 above insofar as it relates to matters in respect of which that Party intervened. The award shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

Article 17

Any controversy which may arise between those bound by the final decision in accordance with Article 16 above, as regards the interpretation or manner of implementation of that decision, may be submitted by any of them for decision to the arbitral tribunal which rendered it.

II. Conciliation procedure¹⁹

The conciliation procedure for purposes of paragraph 6 of Article __²⁰ of the Convention shall be as follows:

Article 1

1. A request by a party to a dispute to establish a conciliation commission pursuant to paragraph 6 of Article __ shall be addressed in writing to the Secretariat. The Secretariat shall forthwith inform all Parties to the Convention accordingly.
2. The conciliation commission shall, unless the parties to the dispute otherwise agree, be composed of three members, one appointed by each party concerned and a President chosen jointly by those members.

Article 2

In disputes between more than two parties, parties in the same interest shall appoint their members of the commission jointly by agreement.

Article 3

If any appointments by the parties are not made within two months of the date of receipt by the Secretariat of the written request referred to in Article 1, the Secretary-General of the United Nations shall, upon request by any party to the dispute, make those appointments within a further two-month period.

Article 4

If the President of the conciliation commission has not been chosen within two months of the second member of the commission being appointed, the Secretary-General of the United Nations shall, upon request by any party to the dispute, designate the President within a further two-month period.

¹⁹ Stockholm Convention, Annex G; Rotterdam Convention, Annex VI; Convention on Biological Diversity, Annex II, part 2.

²⁰ Reference may be made to the provisions governing the settlement of disputes.

Article 5

1. The conciliation commission shall, unless the parties to the dispute otherwise agree, determine its own rules of procedure.

2. The parties to the dispute and the members of the conciliation commission are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the commission.

Article 6

The conciliation commission shall take its decisions by a majority vote of its members.

Article 7

The conciliation commission shall render a report with recommendations for resolution of the dispute within twelve months of being established, which the parties to the dispute shall consider in good faith.

Article 8

Any disagreement as to whether the conciliation commission has competence to consider a matter referred to it shall be decided by the commission.

Article 9

The costs of the conciliation commission shall be borne by the parties to the dispute in shares agreed by them. The commission shall keep the record of all its costs and shall furnish a final statement thereof to the parties.
