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

Options for regulating mercury in products

Report by the secretariat

At its first session, held from 7 to 11 June 2010, the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury requested the secretariat to prepare a report exploring the advantages and disadvantages of two approaches to regulating mercury in products: first, a total ban with time-limited exemptions; and second, a list of product-specific bans. The report would include possible guidelines for identifying allowable time-limited uses and take into account how to categorize products, potential environmental impacts and social and economic issues. The present report responds to that request.

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Introduction

1. The present report responds to the request of the intergovernmental negotiating committee at its first session, held in Stockholm from 7 to 11 June 2010, for the secretariat to prepare a report exploring the advantages and disadvantages of two approaches to regulating mercury in products: first, a total ban with time-limited exemptions; and second, a list of product-specific bans. The report would include possible guidelines for identifying allowable time-limited uses and take into account how to categorize products, potential environmental impacts and social and economic issues.
2. Under the first of these approaches, a total ban with time-limited exemptions, no mercury-added products would be allowed unless they were listed in an annex to the mercury instrument to be adopted. This approach may be referred to as the “negative-list” approach, because the annex would list the products that would not be subject to the overall commitment to ban or restrict all mercury-added products.
3. Under the second approach, a list of product-specific bans, all mercury-added products would be allowed unless they were listed in an annex to the mercury instrument. This approach may be referred to as the “positive-list” approach, because the only mercury-added products that a party would be required to ban or restrict under the treaty would be those listed in the annex.¹
4. While the present report explores the two approaches in the context of mercury-added products, many considerations discussed may also apply to approaches to tackling industrial processes that use mercury. In addition, some considerations could also apply to other issues that might be addressed under the mercury instrument through the use of negative or positive lists, including mercury compounds that may be subject to coverage under the instrument, mercury wastes, mercury supply sources and atmospheric mercury emissions sources.
5. Chapter I discusses some basic differences between the two approaches, including as they may be applied at the international and national levels. The important observation is made that the approach used at the international level need not limit what approach may be used by a party at the national level. Examples of how the approaches have been used in multilateral environmental agreements are identified.
6. Chapter II recognizes that there may be a continuing need for some mercury-added products during a transitional period after the mercury instrument’s entry into force. Exemptions that could allow the continued manufacture, trade or use of some mercury-added products during this period are discussed. It is noted that the rules for exemptions could take various forms and could make a significant difference in how strict or lax a product listing under the instrument turns out to be. Possible guidelines for identifying allowable time-limited uses, while taking into account potential environmental impacts and social and economic issues, are discussed.
7. Chapter III identifies ways that mercury-added products might be categorized under the two approaches. It is observed that, in addition to the pure negative and positive approaches (i.e., a total ban with time-limited exemptions, or product-specific bans), a hybrid that combines elements of both approaches could be used. For example, a positive list with broad product categories such as batteries, measuring devices, or electrical switches and relays could ban or restrict a large proportion of mercury-added products while omitting obscure, insignificant or unknown uses that may not have a significant impact on global mercury pollution but could pose implementation and compliance challenges to parties.
8. Lastly, in chapter IV, some advantages and disadvantages of the two approaches to regulating mercury in products are explored, bearing in mind the influence of potential environmental impacts and social and economic issues.

I. Options: description and examples

A. Key features

9. With a negative-list approach, no mercury-added products would be allowed under the mercury instrument. The continuing use of some mercury-added products could, however, be permitted through the use of exemptions. The list of exemptions, as is typical of the approach, would appear in an annex to the instrument.

¹ The terms “negative list” and “positive list” are commonly used in respect of international trade agreements. For example, see Organization of American States, Foreign Trade Information System (SICE), www.sice.oas.org/dictionary/SV_e.asp.

10. With a positive-list approach, only the mercury-added products that were subject to bans or restrictions would be listed, usually in an annex. Any products not listed could continue to be used, produced and sold. Again, as with the negative-list approach, the continuing use of some of the disallowed mercury-added products could be permitted through the use of exemptions, which could also be listed in an annex to the instrument.

11. The approach used in the mercury instrument need not necessarily dictate an individual party's approach in implementing its commitments under the instrument. For example, if the instrument regulated mercury-added products with a list of product-specific bans (the positive-list approach), a party could, if it wished, comply with its commitments by enacting a national law or regulation that prohibited all mercury-added products. Alternatively, if the mercury instrument prohibited all mercury-added products except for those that were listed in the annex of exemptions (the negative-list approach), an individual party could nevertheless meet its obligations through a positive-list approach, that is, by enacting a law or regulation naming and prohibiting only those mercury-added products manufactured in its territory. The law or regulation could allow exemptions that corresponded to those listed in the mercury instrument's annex of exemptions. Provided that the individual party had the capacity to identify accurately and regulate all the mercury-added products manufactured in its territory, this positive-list approach could allow it to comply with the negative-list approach used in the mercury instrument.

12. A key difference between the negative-list and positive-list approaches is the entity that bears the burden of action. With a negative-list approach, the default rule would be that all mercury-added products are banned or restricted. At the international treaty level, an individual country seeking an exemption would bear the burden of identifying its need for the exemption and obtaining it. At the national implementation level, an individual manufacturer or user would bear the burden of demonstrating its need for an exemption and obtaining it from the national Government.

13. Under a positive-list approach, the default rule is that no mercury-added products would be banned or restricted unless a decision was made to list them in the annex of banned or restricted products. At the international level, either the intergovernmental negotiating committee or, after the instrument's entry into force, the Conference of the Parties would bear the burden of agreeing upon each product or product class to be added to the annex. At the national implementation level, each Government would bear the burden of satisfying applicable legal requirements for adding a product to its list of banned or restricted products. In both cases, once a product was added to the list of banned or restricted products the burden for seeking an exemption would shift to the party (at the international level) or the manufacturer or user (at the national level), in a manner similar to exemptions under the negative-list approach.

B. Examples in multilateral environmental agreements

14. Numerous multilateral environmental agreements use positive or negative lists to identify the substances, products or uses that are regulated under those agreements. Most chemicals-related agreements employ the positive-list approach.

15. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal identifies hazardous wastes subject to its control measures through the use of several positive-list annexes. These annexes define hazardous waste categories (Annex I), hazardous waste characteristics (Annex III) and specific hazardous wastes (Annex VIII). There is also a separate list of wastes that are not hazardous wastes (Annex IX).²

16. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer both use positive lists to identify the chemical substances that they cover. The Rotterdam Convention includes a positive list of chemicals subject to its prior informed consent procedure, while the Montreal Protocol contains several annexes listing ozone-depleting substances subject to the Protocol's phase-out schedules. Under the Protocol, each annex is split into groups of specific substances, each of which is subject to a particular timetable tailored to that group. For example, chlorofluorocarbons are found in Group I of Annex A, which is subject to the phase-out schedule set out in Article 2A.

2 See Hackett, D. P., "An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal", *American University Journal of International Law and Policy* vol. 5 (1990), pp. 291–323, available at <http://www.auilr.org/pdf/5/5-2-5.pdf>; Jaffe, D., "The International Effort to Control the Transboundary Movement of Hazardous Waste: The Basel and Bamako Conventions" *ILSA Journal of International and Comparative Law*, vol. 2, pp. 123, 133, available at <http://heinonline.org/HOL/Welcome>.

17. Because the positive-list annexes in each of these agreements are not all-inclusive, the parties anticipated adding other substances to the annexes over time. The Montreal Protocol allows its parties to amend its positive-list annexes by a two-thirds-majority vote. Parties have added new controlled substances to the Protocol several times. In contrast, the Rotterdam Convention requires its parties to achieve consensus before they may add chemicals or pesticides to the Convention. After adding many substances at its first meeting, the Conference of the Parties has since then lacked the consensus necessary to add any additional substances, despite continued efforts to do so over many years by a majority of the parties.

18. The above are examples of agreements that use positive lists to identify substances that are subject to the control measures of the agreements. The Stockholm Convention on Persistent Organic Pollutants is another example of such an agreement. It uses the positive-list approach to identify intentionally produced and used substances that are subject to elimination (Annex A) and restriction (Annex B), and to identify unintentionally produced substances whose release is subject to reduction or elimination (Annex C). Once a persistent organic pollutant is listed in Annex A or B, however, the applicable annex functions as a negative list, because all uses of the listed substance are banned or restricted, except for those that appear in the annex's list of exemptions.

19. Most multilateral environmental agreements use the positive-list approach; few use negative lists. An example of the negative-list approach can be found in the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, which is based on the idea that the dumping of wastes or other matter is in principle prohibited, with the exception of five categories of materials specifically listed. The original protocol (which the Dumping Protocol was intended to replace) was based on the idea that dumping was in principle permitted, with some exceptions that were addressed in annexes. The logic of the original text was fully reversed to seek better protection of the environment.³ The Dumping Protocol was adopted in 1995, but has yet to enter into force.

II. Exemptions

20. The present chapter discusses the use of exemptions to allow the continued manufacture, sale or use of some mercury-added products during a transitional period between the mercury instrument's entry into force and the time when such products are no longer allowed. Exemptions are important because achieving the mercury instrument's objectives will probably require a transitional period during which exemptions for some mercury-added products are available, regardless of whether the instrument takes a negative-list or positive-list approach. Moreover, the availability and design of the exemptions and the way in which they function could have significant implications for the potential environmental effectiveness and social and economic impacts of any product provisions under the mercury instrument.

A. Exemption options

21. In the negative-list approach (in which no uses are allowed), the mercury-added products listed in an annex would be the exemptions, and thus would serve as the exceptions to the overall treaty commitment that no mercury-added products would be allowed. Under the positive-list approach, some or all of the listed products or product categories that would be covered under the treaty could include exemptions. For example, a product category such as "batteries" would mean that no mercury-added batteries would be allowed; the listing might, however, include an exemption for a specific type of battery (for example, button cell batteries). These exemptions could be general, applying to all varieties or types of the listed products, or they could be more specific. One option would be to list the exemptions alongside the listed products, in a manner similar to that used in part I of Annex A to the Stockholm Convention.

22. The actual rules for exemptions may make a significant difference in how strict or lax the prohibitions or restrictions on mercury-added products in a mercury instrument may be. Questions that the intergovernmental negotiating committee or the Conference of the Parties may wish to consider include whether exemptions should be available to a party upon demand; whether a party requesting an exemption should provide justification showing that the exemption is necessary; whether there should be any approval process for considering or granting exemptions and, if so, who the decision-making entity should be; and how long each exemption should last.

³ Scovazzi, Tullio, "Implementation of environmental legal regimes at regional level: The case of the Mediterranean Sea", in *The Future of International Environmental Law*, David Leary and Balakrishna Pisupati, eds., (Tokyo, Japan, United Nations University Press, 2010).

23. These kinds of questions could also be asked in respect of the possibility of extensions or renewals of exemptions. Exemptions could be strictly time-limited, with limited or no opportunity for renewal. A negative list using this type of exemption would automatically reduce in size over time so that, eventually, no exemptions would remain. This would result in a total ban on mercury-added products, without the need for the Conference of the Parties to agree to remove the exemptions from the products annex. For a positive-list approach, this type of exemption would eventually result in a total ban for the products listed in the annex.

24. While strict time-limited exemptions could bring valuable environmental and health benefits, they could also result in significant economic and social challenges in countries where the manufacture and use of listed mercury-added products may provide an important source of employment and revenue, or where the products are essential for some other aspect of a party's welfare. This could be especially so if affordable alternatives to the listed products are unavailable. In such situations, allowing time-limited exemptions with more liberal terms of renewal or extension could greatly ease the transition to mercury-free alternatives.

25. Another issue for consideration is whether a subsidiary body should be established under the mercury instrument for the purpose of providing the Conference of the Parties with advice regarding exemptions. The mercury instrument could contain a provision establishing such a body or it could provide authority for the Conference of the Parties to establish such a body after the instrument's entry into force. For example, the parties to the Montreal Protocol established a technology and economic assessment panel which is mandated, among other things, to present technical and economic information relevant to policy, including through the evaluation of nominations for essential-use and critical-use exemptions available under the Protocol.

B. Guidelines for identifying allowable uses

26. The committee may wish to consider whether the mercury instrument should include provisions that would not allow the manufacture or trade of mercury-added products, and whether such provisions should include exemptions for allowable uses that may ease the transition to the reduction or elimination of the use of mercury in products. After the instrument's entry into force, the Conference of the Parties might also consider whether exemptions should be available for newly listed products, if the instrument uses a positive-list approach. Regardless of whether the instrument takes a positive or negative-list approach, the Conference of the Parties may also wish to modify the terms of those allowable-use exemptions that are available in the light of changing circumstances.

27. These kinds of questions could be considered in an ad hoc manner: for example, individual parties could nominate any exemptions that they believe should be made available and could then automatically become entitled to use them simply by registering for them. Alternatively, guidelines could be developed by the committee or the Conference of the Parties for identifying those allowable-use exemptions that should be made available to parties. Such guidelines might anticipate and take into account the potential environmental, social and economic effects of bans or restrictions of mercury-added products. They might include an analysis of how necessary a particular use is and the extent to which affordable, environmentally preferable alternatives are available or are in development, especially in respect of the situations of developing countries and countries with economies in transition.

28. The Nordic Council of Ministers released a report in 2007 presenting a priority working list for the substitution of mercury-added products and processes in which mercury is used.⁴ The methodology employed in that report might be relevant to the development of guidelines for identifying allowable time-limited uses. It includes:

(a) Determination of whether there are viable alternatives to the mercury products being considered;

(b) Separation of the products into three categories, based on the availability of environmentally sound alternatives. The three categories are:

4 Nordic Council of Ministers, "Mercury substitution priority working list: an input to global considerations on mercury management (May 2007), available at www.basel.int/techmatters/mercury/comments/240707hsweden-2.pdf.

- (i) Products for which alternatives are readily available;
 - (ii) Products for which alternatives are available or in development but which might nevertheless require a longer phase-out period as a result of institutional, social or technical challenges;
 - (iii) Products that present substantial challenges for mercury substitution or phase-out, including social and economic factors and a lack of viable alternatives;
- (c) Application of realistic time spans for each product category to be phased out or, in the case of a negative list, consideration of exemptions that are open-ended instead of time-limited and, in the case of a positive list, consideration of whether the product should be omitted from the list.

III. Categorizing mercury-added products

29. The present chapter identifies criteria according to which mercury-added products might be categorized for listing under the negative-list and positive-list approaches. These might include: a product's use, function or type; the kind of control measure to which a product might be subject; the priority that Governments accord to eliminating a product; or the amount of mercury contained in the product. These criteria are not mutually exclusive; in most cases, they could be used in combination with one another.

A. Product use, function or type

30. Mercury-added products categorized by use, function or type would be considered according to the functions or uses that they serve, e.g., lighting or dental products. Under a negative-list approach, they would constitute the products exempted from the overall prohibition on mercury-added products. Under a positive-list approach, they would constitute the products prohibited or restricted under the mercury instrument. Product use, function or type could also be used in a positive list to identify any exemptions that might be available.

31. A key question for categorizing products in this way is how general or specific an annex listing should be. For example, the general category of mercury-added measuring devices includes specific categories such as sphygmomanometers, barometers, gas flow meters and many others. The general category of mercury-added electric switches, contacts and relays includes many specific categories, such as airbag activators in cars, infra-red light detection semiconductors and multiple-pole level switches in excavation machines.

32. Using a general category in an instrument taking a negative-list approach would mean that a broad range of mercury-added products would be eligible for exemption, while using more specific categories would make the exemptions much narrower. Under a positive-list approach, the use of very specific product listings would mean that the mercury instrument covered only a small proportion of mercury-added products unless the annex contained many listings. In some situations very specific listings might be relatively easy to evade or circumvent by revising the description of a mercury-added product so that it did not appear to correspond to a listed category.

33. In contrast, a positive-list approach under which the listings are broad could take on some of the attributes of a negative list. For example, an annex with positive listings such as "batteries" or "mercury-containing lamps" would cover entire categories of mercury-added products, including new products that fell within those categories. Indeed, a positive list containing five broad categories of products – batteries, electric switches and relays, dental amalgam, lighting and measuring devices – could cover around 80 per cent of mercury use in mercury-added products. Because it would be fairly comprehensive, such an approach could reduce the need for the mercury instrument to contain a special amendment procedure for adding mercury-added products to the annex. Accordingly, a positive-list approach using broad, strategically chosen categories could focus on the most important priority uses, without the need to identify and regulate uses that might not contribute substantially to global mercury pollution and that could prove very difficult to control, such as religious or traditional uses.

B. Regulatory approach

34. The mercury instrument could also categorize mercury-added products according to the type of regulation or control measure to which the products would be subject. Such an approach might be necessary if different product groups need to be subject to different rules. For example, under the Stockholm Convention, persistent organic pollutants scheduled for elimination are listed in a different annex to those scheduled for restriction and are subject to different requirements. The alternative regulatory objectives – elimination or restriction – therefore serve as a basis for categorizing substances in

the annexes. While the Stockholm Convention contains no criteria specifying when a persistent organic pollutant should be scheduled for restriction instead of elimination, the substances scheduled for restriction have been so listed to allow for their use for the protection of public health in specific situations (e.g., DDT to control malaria) and when some parties consider the continued use of the substance to be a matter of significant economic importance and uncertainty (e.g., perfluorooctanesulfonic acid).

35. Under the Montreal Protocol, ozone-depleting substances are grouped according to their schedules for phase-out. Categorizing mercury-added products on the basis of when they will no longer be allowed could be accomplished by considering the present or anticipated availability of safer alternatives and the potential social and economic benefits and costs of prompt or delayed action on such products.

C. Prioritizing action

36. Governments could also categorize mercury-added products by deciding which should receive priority attention under the mercury instrument. This approach would probably be most relevant to the question of whether a certain product or product category should be added to a positive list. It might also be relevant to the extent to which exemptions might be made available under both negative-list and positive-list approaches.

37. In the first instance, Governments might consider the need for priority action based on how polluting or threatening to human health and the environment a product or product group is, or how much of the mercury problem is related to the production, use or disposal of a mercury-added product or group. Decisions on whether to prioritize specific mercury-added products or product groups could be influenced further by consideration of the factors identified above; namely, the availability of viable alternatives and whether there are institutional, economic, social or technical barriers to prioritizing a mercury-added product for priority action.

D. Mercury content levels

38. The amount of mercury contained in a mercury-added product could provide another basis for categorization under both the negative-list and positive-list approaches. While the level of mercury content in a product would probably not provide a useful basis for grouping listings within the mercury instrument's annexes, it could be the primary factor in establishing thresholds for the applicability of specific product listings. For instance, if compact fluorescent lamps were included in a positive-list approach, a threshold of x milligrams of mercury per lamp might be established as part of the listing. Those lamps that contained less mercury than the threshold level might be exempt from the listing, or might not be subject to coverage under the listing until a later time. Similarly, in a negative-list approach, products with mercury content levels below specified amounts might not be subject to the control measures applicable to other mercury-added products.

IV. Advantages and disadvantages

39. An evaluation of the respective advantages and disadvantages of the negative-list and positive-list approaches for addressing mercury-added products under the mercury instrument might take several considerations into account, including:

(a) *Environmental effectiveness*: what might be the strengths and weaknesses of each approach in contributing to achievement of the mercury instrument's environmental and health objectives?

(b) *Social and economic impacts*: what might be the costs and benefits of each approach in terms of social welfare and economic development (e.g., the positive and negative impacts on employment, human health (including maternal and children's health), tax revenues, corporate earnings, and research and development (including for safer alternatives), etc.)?

(c) *Implementation*: what might be the legal, institutional, and technical challenges for individual countries in implementing and complying with one or the other approach?

(d) *Treaty drafting*: could either approach present particular difficulties to the intergovernmental negotiating committee in drafting the terms of the mercury instrument?

A. Environmental effectiveness and social and economic considerations

40. The core difference between the negative-list and positive-list approaches is that the negative-list approach covers all mercury-added products, while the positive-list approach focuses only on those products or product categories that are listed for elimination. The negative-list approach is, by definition,

comprehensive, because its basic rule is that no mercury-added products are allowed. Any new mercury-added products are automatically addressed. It is consistent with an objective for the mercury instrument of elimination of all uses of mercury, because it will not allow any mercury-added products after its listed exemptions expire.

41. The positive-list approach may be more consistent with an objective for the mercury instrument of the reduction and, where feasible, elimination of mercury use, because it allows the prioritization of the most problematic mercury uses and, potentially, their elimination, but does not seek to control all uses. The positive-list approach could be especially useful where some mercury applications may be unknown within a country, or where there are minor uses that may not contribute substantially to mercury pollution and which could be difficult to regulate effectively. Under a positive-list approach, a party will not be in breach of its treaty commitments if it fails to regulate a new or unknown mercury-added product that is not covered among the products listed in the annex.

42. The amount of mercury potentially used or avoided under each approach might be viewed as a proxy for determining effectiveness. Using that measure, the negative-list approach could result in the elimination of all mercury in products. A positive-list approach would depend on the number and nature of the mercury-added products or categories of products that are listed. For example, using the five broad categories of products identified above could result in elimination of approximately 80 per cent of mercury. Under either approach, however, the actual reductions achieved would depend on the extent to which parties could successfully implement their commitments, and, in the short term, on the availability and use of exemptions.

43. Most of the costs and benefits associated with implementation of the mercury instrument's product provisions would depend on the specific situations of individual countries and thus would be highly variable from country to country. As a result, most would be difficult to quantify with precision. Indeed, the extent to which exemptions were available – how broad they were, how many parties used them, the procedures for obtaining them, and especially whether they were strictly time-limited or more open-ended – might have a greater influence on the environmental effectiveness and social and economic impacts of a provision on mercury-added products than whether the provision used a negative-list or positive-list approach.

44. Regardless of the approach used, it may be advisable for the committee to consider making allowances for the introduction of new mercury-added products that are substitutes or replacements for existing products that contain higher amounts of mercury. The availability and costs of safer substitute products and alternatives would make a significant difference in the overall costs and benefits to parties of implementing the mercury instrument's product provisions.

B. Implementation

45. As a regulatory approach under national law, the negative-list approach might be easier for national Governments to enact and implement because it can place the burden on producers, distributors or retailers, rather than on the Government, to identify mercury uses and request exemptions for them. A country's ability to enforce such an approach would depend on the strength of its domestic regulatory and enforcement capacities.

46. If it were adopted and implemented at the international level, the comprehensiveness of the negative-list approach might require individual parties to invest considerable effort to demonstrate compliance, because they would need to inventory, regulate and monitor all uses of mercury in products. It might be difficult for a party to establish whether its ban on all mercury-added products was successful, as it might lack the capacity to enforce the ban and might be unaware of some uses, including uses with cultural, traditional or religious significance. Such challenges could be met through the use of exemptions, depending on their availability, extent and nature. It would nevertheless be necessary for countries to identify in advance all types of mercury-added products for which they wished to request exemptions.

47. Such treaty implementation issues might be less challenging under a positive-list approach, because a positive list would only be as comprehensive as the committee – or, after the instrument's entry into force, the Conference of the Parties – agreed that it should be. A positive-list approach would mean that parties would not necessarily need to pursue obscure or unknown uses. Instead, they could prioritize the reduction of mercury-added products by focusing on the most important problems, or those that might yield the greatest environmental, health, economic and social benefits at the most reasonable cost. As stated in the Nordic Council of Ministers paper, establishing and using a list of priorities for phasing out

mercury-added products and uses could help parties to focus on the main problems, and thus achieve cost-effective mercury reductions.⁵

48. As in the case of the negative-list approach, the liberal availability of exemptions could substantially ease the implementation and compliance burdens and uncertainties for parties, especially developing countries and countries with economies in transition, during the initial period and in the medium term after the mercury instrument's entry into force. By contributing to Governments' confidence that they will be able to comply with their treaty commitments, the use of exemptions could allow the committee to agree to a fairly comprehensive positive list consisting of broad product categories rather than a limited number of specific uses. As described above, such an approach could combine some of the respective strengths of the positive-list and negative-list approaches, while avoiding some of the weaknesses.

C. Development of the mercury instrument

49. A mercury instrument that used a positive-list approach for mercury-added products but which initially listed only a few specific products would probably need to be adopted with the expectation that additional products would be added over time to the appropriate annex after the instrument's entry into force. That expectation could, in turn, mean that the committee would need to develop and adopt for inclusion in the instrument procedures and mechanisms for nominating and evaluating other mercury-added products, in addition to procedures under which the Conference of the Parties would add products for listing in the instrument.⁶ Such procedures and mechanisms could be difficult and time-consuming for the committee to develop. In addition, the parties to other chemicals-related conventions have experienced significant challenges in bringing additional substances within the scope of those conventions after their entry into force.

50. Such procedures and mechanisms may not be needed if the committee considers the hybrid approach of a positive list containing broad categories of mercury-added products rather than a list of narrowly defined, individual products. A negative-list approach could also make such procedures and mechanisms unnecessary.

51. The use of a positive-list approach may, however, pose drafting challenges to the committee that may not be present with a negative-list approach. One such challenge could be the way in which allowable uses of mercury-added products are referred to in the instrument. Under the negative-list approach, the only allowable uses would be those listed as exemptions in the annex. Thus, in a provision on international trade in mercury-added products, for example, the instrument could identify all allowable uses simply by referring to those uses listed in the annex. In the case of a positive list, however, such a provision would need to reference uses not covered by the treaty, in addition to those allowed through the exemption process.

52. Another drafting challenge could arise in respect of the introduction of new types of mercury-added products. Parties may conclude that the mercury instrument should not allow the development, trade or use of new types of mercury-added products. A negative-list approach renders such a provision unnecessary because it would not allow any mercury-added product unless it was listed as an exemption. In contrast, a positive-list approach would require a provision on new products, because anything not among the listed products or product categories would be allowed. Defining what are "new" products could be somewhat difficult, so the committee would need to consider this issue carefully if it opted for a positive-list approach in the mercury instrument. Under either approach, the committee may wish to consider whether provision should be made to support the development and use of new substitute and alternative products that could replace products having higher mercury content.

5 Nordic Council of Ministers, *Mercury substitution priority working list: An input to global considerations on mercury management* (May 2007), available at www.basel.int/techmatters/mercury/comments/240707hsweden-2.pdf.

6 For examples of such procedures and mechanisms, please refer to article 8, paragraph 6 of article 19 and paragraph 4 of article 22 of the Stockholm Convention and articles 5–7, article 9, paragraph 6 of article 18 and paragraph 5 of article 22 of the Rotterdam Convention.