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

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Item 3 of the provisional agenda*

**Preparation of a global legally binding instrument
on mercury****Relationship between the future mercury instrument and the
Basel Convention on the Control of Transboundary Movements
of Hazardous Wastes and Their Disposal****Note by the secretariat**

1. At its first session, from 7 to 11 June 2010, the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury agreed on a list of information that the secretariat would provide to the committee at its second session to support its further deliberations. Among other things, the secretariat was requested to provide an analysis of possible gaps and overlaps in relation to the future mercury instrument and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, including additional information on and clarification as to the applicability of the Basel Convention for the sound management of mercury waste. The present note responds to that request.

Introduction

2. In mandating the development of a global legally binding instrument on mercury, the Governing Council of the United Nations Environment Programme (UNEP), in paragraph 27 (f) of its decision 25/5, requested the intergovernmental negotiating committee to include provisions to address mercury-containing waste and remediation of contaminated sites. In paragraph 28 (d) of the same decision, the Governing Council called upon the committee to consider the need to achieve cooperation and coordination and to avoid the unnecessary duplication of proposed actions with relevant provisions contained in other international agreements and processes. The global legally binding instrument on mercury should therefore be mutually supportive of and complementary to other multilateral environmental agreements. At the committee's first session, numerous Governments called for the provisions of the new mercury instrument to be coordinated with those of other instruments, particularly the Basel Convention and the Stockholm Convention on Persistent Organic Pollutants, to avoid regulatory duplication and confusion and to ensure legal certainty.

* UNEP(DTIE)/Hg/INC.2/1.

3. For the Committee's first session, the Secretariat of the Basel Convention provided its views on how mercury and mercury compounds were covered under the scope of the Convention and on how the Convention could contribute to any international effort to tackle the global challenges posed by mercury (UNEP(DTIE)/Hg/INC.1/INF/3). During that session, however, while representatives underlined the need for coordination with the Convention, some noted the existence of gaps and overlaps between the future mercury instrument and the Convention that would require further analysis. The secretariat was requested to provide further information and clarification to the committee at its second session as to such gaps and the applicability of the Basel Convention to the environmentally sound management of mercury waste.

4. In responding to that request the present note takes as a starting point the default options described in document UNEP(DTIE)/Hg/INC.1/5 for substantive provisions that might be included in the mercury instrument to reduce the supply of mercury, to enhance capacity for environmentally sound storage, to reduce international trade in mercury, to reduce atmospheric emissions of mercury and to address mercury-containing waste. The secretariat has also built upon information provided by the Secretariat of the Basel Convention (UNEP(DTIE)/Hg/INC.1/INF/3), elements put forward by representatives at the committee's first session and related country submissions.

5. Chapter I of the present note identifies possible gaps and overlaps in relation to the future instrument on mercury and the Basel Convention, while chapter II provides elements for a possible approach based on the example of the Stockholm Convention.

I. Possible gaps and overlaps in relation to the future instrument on mercury and the Basel Convention

A. Parties

6. The many parties to the Basel Convention notwithstanding, there are no assurances that the parties to the new mercury instrument will be identical to those to the Basel Convention. Consequently, when contemplating the Convention's applicability and the adoption of provisions under the mercury instrument that could lead to some mercury waste issues being directly dealt with by provisions of the Convention, the committee may wish to consider an approach that establishes linkages between the two instruments while respecting the sovereignty of individual States that may not be parties to both instruments.

B. Scope

7. The successful implementation of any international agreement depends on a clear and shared understanding of the scope and provisions thereof. Both the Convention and the future instrument on mercury may share the common objective of protecting human health and the environment from the adverse effects of hazardous chemicals. While the future mercury instrument will take a life-cycle approach to mercury control, however, the Convention pertains to end-of-life of substances or objects. Consequently, relevant provisions of the Convention apply to mercury only when it is classified as waste.

C. Definition and classification of mercury waste

8. The Convention applies to hazardous wastes and other wastes. In Article 2, it defines "waste" as substances or objects that are disposed of, are intended to be disposed of or are required to be disposed of under national law. In the case of mercury, the issue of disposal as part of the waste definition may be problematic in the light of the limited disposal options available.

9. "Hazardous wastes" are defined to include certain wastes and waste streams which are:

(a) Listed in any of the categories in Annex I, unless they do not possess any of the hazardous characteristics defined in Annex III to the Convention;

(b) Not covered under the above-mentioned description, but are defined as or considered to be hazardous wastes under the domestic legislation of the party of export, import or transit.

10. The wastes regulated by the Convention are further clarified by the lists of wastes contained in Annexes VIII and IX. To be considered hazardous, therefore, a waste must be listed in Annex I or II, and must possess some hazardous characteristics. In addition, any waste defined as or considered to be hazardous under the law of an exporting, importing or transit country is considered to be hazardous waste under the Convention. The classification of hazardous waste is therefore not universal, but rather country-based or region-based. From a practical perspective, this leads to myriad interpretations, creating legal uncertainty and, in some cases, loopholes, with some wastes considered waste or

hazardous waste in one country and not in another, a result that is amplified by the absence of thresholds above which wastes are considered hazardous.

11. In document UNEP(DTIE)/Hg/INC.1/INF/3, the Secretariat of the Basel Convention states that wastes having as constituents mercury or mercury compounds are defined as hazardous wastes and are covered by the Convention (paragraph 1 (a) of article 1, category Y29 of annex I and categories A1010, A1030 and A1180 of annex VIII). The possibility of having differing national understandings or regional discrepancies cannot, however, be dismissed. For example, mercury contained in an article might very well be treated as household rather than hazardous waste by some parties. This question also arises, in the case of recycled or reclaimed materials, which are in most cases only considered to be hazardous only if they contain hazardous impurities above a certain threshold. In that respect, the Convention does not establish a mercury content threshold above which a waste would fulfil the criteria that make it hazardous.

12. The committee, in developing the future mercury instrument, may therefore wish to develop a common definition of mercury waste and to provide for its uniform application. At the committee's first session, it was suggested, as put forward in document UNEP(DTIE)/Hg/INC.1/5, that the instrument could establish threshold values for mercury and its compounds in the overall waste stream that would render such waste subject to the instrument's mercury waste provisions. To allow for a common and shared approach to what is to be defined as mercury waste, the committee may also wish to make provision in the instrument for the Conference of the Parties to develop standard analytic or sampling methodologies, which the Convention does not provide for. It might also be useful to specify in the instrument when mercury, whether or not intentionally added or used in a process, is required to be disposed of.

13. Lastly, many representatives at the committee's first session called for clear definitions of terms used in the mercury instrument, saying that they should be consistent with the Convention's provisions. Indeed, various expressions related to waste have been used, such as "mercury wastes", "mercury-containing waste" and "elemental mercury waste", while the expression "waste consisting of elemental mercury and wastes containing or contaminated with mercury" was used later in the Convention's technical guidelines to embrace all mercury-related waste.¹ Discussions at the committee's first session and at preparatory meetings showed that some terms related to mercury waste management were not universally understood, but instead encompassed varying concepts and legal features. To tackle this shortcoming, the UNEP mercury supply and storage partnership area is preparing a glossary of terms and definitions used in UNEP and Basel Convention documents to describe various aspects of the storage and disposal of mercury and mercury-containing waste. This work aims to achieve a common understanding of these terms and could contribute to the negotiations at a later stage.

D. Management of mercury waste

14. The UNEP Governing Council, by its decision 25/5, agreed that in developing the mercury instrument the intergovernmental negotiating committee should include provisions to address mercury-containing waste and recognized the need to facilitate the environmentally sound management of mercury.

15. A central goal of the Basel Convention is environmentally sound management, which is defined in article 2 of the Convention as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes". As stated by the Secretariat of the Convention, environmentally sound management means taking on the issue through an integrated life-cycle approach, which involves strong controls that apply from the generation of a hazardous waste to its storage, transport, treatment, reuse, recycling, recovery and final disposal.²

16. While the concept of environmentally sound management finds its origin in the Convention and is obligatory for parties to the Convention, the committee might wish to clarify the concept further, for example regarding the way in which an exporting country could verify an importing State's waste management practices to allow for an informed export decision, as no such measure is described in the Convention.³

1 Draft technical guidelines on the environmentally sound management of elemental mercury and wastes containing or contaminated with mercury, sixth draft, October 2010.

2 <http://www.basel.int/convention/basics.html>.

3 For example, paragraph 2 (g) of Article 4 states that each party shall take the appropriate measures to prevent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will

17. By its decision VIII/33, the Conference of the Parties to the Convention agreed to include in the Strategic Plan for the Implementation of the Basel Convention a new focus area on mercury wastes. The Conference of the Parties instructed the Secretariat, among other things, to develop guidelines on environmentally sound management of mercury wastes, with emphasis on the development of sound disposal and remediation practices. Those guidelines, covering all forms of mercury waste, including elemental mercury, are under development and will be presented to the Conference of the Parties at its tenth meeting, in October 2011, for possible adoption.

18. The committee might consider whether the mercury instrument should specify which treatment methods parties should require, such as the recovery and environmentally sound storage of mercury derived from recycling (as put forward in document UNEP(DTIE)/Hg/INC.1/5). The Convention's guidelines on environmentally sound management embrace most (if not all) aspects of mercury waste treatment, but they only have a normative value and are not legally binding. Furthermore, in conjunction with the various steps in the waste treatment hierarchy, these guidelines consider, for example, recovery and recycling but do not tackle the marketing of reclaimed mercury. The Convention and its technical guidelines thus neither favour nor prohibit a specific treatment method, and the committee may therefore wish to do otherwise in the mercury instrument. The Convention and its guidelines also fail to distinguish clearly between treatment requirements for elemental mercury and those for mercury-containing wastes. In terms of recycling as a source of supply, the Convention does not limit it to specified uses; the committee might therefore wish to do so in the mercury instrument.

E. Storage of mercury

19. At the committee's first session, many representatives saw provisions on the environmentally sound storage of mercury as a key feature of the mercury instrument. Several representatives highlighted the importance of environmentally sound storage of mercury from stockpiles, wastes and anthropogenic sources to prevent the re-entry of mercury into the global marketplace and the possibility of future releases to the environment.

20. Consequently, the committee may wish to include provisions in the mercury instrument requiring the Conference of the Parties to develop guidance on which storage options are to be considered environmentally sound, both for the purposes of transboundary movement and for the environmentally sound management of mercury. This should complement the existing provisions under the Basel Convention and those being developed. Such guidance could specify when elemental mercury must be accepted in an environmentally sound storage facility based on level of purity, level and nature of impurities, radioactivity and other considerations; acceptance procedures, including verification, container specifications, certifications and other matters; and facility-related requirements for permanent or temporary underground or above-ground storage, monitoring, inspection, emergencies and record keeping.

21. Permanent and temporary storage of waste are identified as disposal operations D12 and D15, respectively, in section A of annex IV to the Convention. As previously stated, however, when considering the applicability of the Convention to a material, one should keep in mind that there may be regional, national and even local differences in the definition of hazardous wastes, and when substances, preparations or articles become wastes, when they are by-products and when they lose their waste status. This issue is particularly relevant in the case of the environmentally sound storage of mercury: while permanent or temporary storage are defined as disposal operations under the Convention, the related provisions only affect waste. The environmentally sound storage of mercury derived from stockpiles and other human-caused sources destined for acceptable uses would not fall under the scope of the Convention as they would not be classified as wastes. They would therefore need to be covered under a storage provision in the mercury instrument.

22. Regarding the Convention's draft technical guidelines on the environmentally sound management of elemental mercury and wastes containing or contaminated with mercury, they include specific sections on environmentally sound techniques and technologies for storage (interim and long-term). As mentioned previously, given that the tool is normative and not legally binding in

not be managed in an environmentally sound manner. Paragraph 9 of Article 6 provides that "the Parties shall require that each person who takes charge of a transboundary movement of hazardous wastes or other wastes sign the movement document either upon delivery or receipt of the wastes in question. They shall also require that the disposer inform both the exporter and the competent authority of the State of export of receipt by the disposer of the waste in question and, in due course, of the completion of disposal as specified in the notification. If no such information is received within the State of export, the competent authority of the State of export or the exporter shall so notify the State of import.

nature, the committee may nonetheless wish to consider the inclusion of provisions of a binding nature.

23. The committee may also wish to make provision for parties to cooperate in developing arrangements to enhance capacity for domestically and regionally sited environmentally sound storage, including through regional storage sites. Two regional projects funded by the Government of Norway are being executed by the Chemicals Branch of the UNEP Division of Technology, Industry and Economics in Asia and the Pacific and Latin America to identify suitable options for mercury storage. These projects will contribute to enhancing knowledge about long-term storage of mercury, which is of critical importance for its environmentally sound management.

F. Transboundary movement of mercury

24. The committee may wish to make provision for parties to permit the export of elemental mercury and specified mercury compounds only for a use allowed to the importing party under the mercury instrument or for the purpose of environmentally sound storage when, as stated by several representatives at the committee's first session, safe storage facilities do not exist in the exporting country. Such provisions would be similar to those on exemptions for trade in persistent organic pollutants under article 3 of the Stockholm Convention.

25. The control of transboundary movements of hazardous wastes, which are to be minimized consistent with their environmentally sound management, is the primary focus of the Basel Convention. In the case of mercury, however, the provisions governing such movements would apply only to mercury considered to be waste, and would not impose any limitation on movement for other purposes such as reuse, recycling or recovery.⁴ Furthermore, under the Convention the parties may allow for the transboundary movement of hazardous wastes and other wastes that are required as raw material for the recycling or recovery industry in the State of import. Consequently, the committee might not be fully satisfied with the application of the Basel Convention to the transboundary movement of mercury waste as it is not specifically limited to environmentally sound storage or allowed uses.

26. Parties to the Basel Convention are precluded from exporting hazardous wastes or other wastes to non-parties, except under special dedicated agreements. A provision to that effect in the mercury instrument might prove to be inconsistent with other provisions, especially when parties differ from one agreement to another. Lastly, the Ban Amendment to the Basel Convention, adopted in 1995 at the third meeting of the Conference of the Parties but not yet entered into force, which would prohibit transboundary movements of hazardous wastes destined for final disposal and for recovery from States listed in annex VII to the Convention (member States of the Organization for Economic Cooperation and Development, the European Union and Liechtenstein) to non-listed States, might also be inconsistent with the mercury instrument.

G. Capacity-building, financial and technical assistance

27. At the committee's first session, representatives identified several challenges that developing countries and countries with economies in transition had to face when dealing with mercury wastes. In short, most of them lack the resources, staff, expertise and infrastructure to allow for sound mercury waste management.

28. The Basel Convention contains provisions on technology transfer and capacity-building, especially through the establishment of regional or subregional centres for training and technology transfer regarding the management and minimization of hazardous and other wastes. As highlighted in the note by the secretariat on options for the delivery of technical assistance and capacity-building (UNEP(DTIE)/Hg/INC.1/9), however, the regional centres have difficulty fulfilling their mandates, largely because of their reliance on funding from the voluntary technical cooperation trust fund of the Convention and other mainly non-mandatory sources.

29. Bearing in mind the potentially high costs associated with mercury waste management and the need to support some countries in tackling the issue, the committee might wish to consider these issues under the provisions related to a financial mechanism within the mercury instrument and to consider whether regional centres established under the Basel and Stockholm conventions could be of assistance.

⁴ Paragraph 4 of Article 2 defines "disposal" as any operation specified in Annex IV to the Convention. Section A of that annex includes operations which do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses, while section B of the annex includes operations that may lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses.

30. At the committee's first session, some representatives advocated the principle of common but differentiated responsibilities in the implementation of commitments under the future mercury instrument. Some also favoured linking compliance to the provision of financial and technical assistance. Such an interlinked arrangement could involve a financial mechanism based on assessed contributions, possibly on the model of the Montreal Protocol on Substances that Deplete the Ozone layer, in contrast to the voluntary Technical Cooperation Trust Fund of the Basel Convention.

H. Reporting

31. The committee may, when considering reporting under the mercury instrument, wish to take into account the reporting requirements set out under the Basel Convention. This would be in line with paragraph 28 (d) of decision 25/5, by which the Governing Council of UNEP agreed on the need to achieve cooperation and coordination and to avoid the unnecessary duplication of proposed actions with relevant provisions contained in other international agreements and processes.

II. Possible approaches

32. There are a number of potentially relevant precedents for the Basel Convention's possible interaction with the future mercury instrument. These include the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention, which were adopted in 1998 and 2001, respectively. The Rotterdam Convention explicitly excludes waste from its scope, while the approach and scope of the Stockholm Convention are comparable to the substance life-cycle approach considered by the Governing Council for a legally binding instrument on mercury.

33. The Stockholm Convention, in its article 6, provides for interaction with the Basel Convention. First, to avoid any legal vacuum, it considers together stockpiles, wastes and products and articles upon becoming wastes, consisting of, containing or contaminated with listed chemicals and makes provision for their identification. It specifies when stockpiles of listed chemicals shall be deemed to be waste (when they are no longer allowed to be used). It then tackles the management of such wastes, and establishes an obligation to destroy or irreversibly transform their persistent organic pollutant content, explicitly banning disposal operations that might lead to recovery, recycling, reclamation, direct reuse or alternative uses.

34. Second, when dealing with transportation across boundaries, the Stockholm Convention requires relevant international rules, standards and guidelines to be taken into account. In paragraph 2 of its article 6, it also calls for close cooperation between the Conference of the Parties and the appropriate bodies of the Basel Convention in respect of, among other things, establishing the necessary levels of destruction and irreversible transformation (necessary to ensure that persistent organic pollutant characteristics are not exhibited); determining the methods that constitute environmentally sound disposal; and establishing, as appropriate, the concentration levels of chemicals listed in Annexes A, B and C to define low persistent organic pollutant content as referred to in paragraph 1 of Article 6.

35. Article 6 of the Stockholm Convention establishes the basic obligations for parties in respect of persistent organic pollutant wastes, including that parties should take into account relevant international rules, standards and guidelines in respect of the international transport of such wastes. While the Stockholm Convention vests its Conference of the Parties with final decision-making authority regarding persistent organic pollutant wastes, it requires the Conference to cooperate closely with appropriate bodies of the Basel Convention when considering aspects of persistent organic pollutant waste management in which those bodies may have expertise. That approach might be useful for the committee to consider as it develops provisions to deal with mercury wastes under the new instrument.

36. In support of the above, attention is drawn to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, adopted in 2009 under the auspices of the International Maritime Organization, which aims to provide globally applicable ship-recycling regulations for international shipping and for ship-recycling activities. The Convention clearly interacts with the Basel Convention, whose parties adopted in 2002 technical guidelines for the environmentally sound management of the full and partial dismantling of ships. While the text defines "ship recycling", "ship recycling facility" and "recycling company" for the scope of the Convention, it also, under its regulation 3, urges parties to take into account "the relevant and technical standards, recommendations and guidance developed under the Basel Convention" when developing measures for implementation. The Hong Kong Convention has not yet entered into force.

III. Conclusion

37. When considering the relationship between the future mercury instrument and the Basel Convention, the committee may wish to keep a number of issues in mind. First, parties to the Basel Convention and to the future mercury instrument will probably not be exactly the same, so it cannot be presumed that all States will be bound by the same legal commitments that are relevant to mercury wastes. Second, while consistency with the definitions used under the Basel Convention will be desirable, some terms related to mercury wastes may need to be defined more precisely under the mercury instrument. Third, the legal force of the Convention's mercury-related provisions may not be considered sufficient to meet the committee's objectives in developing a legally binding instrument on mercury. Environmentally sound management, best available techniques, best environmental practices and emissions control, are addressed in the Basel Convention's draft technical guidelines on the environmentally sound management of elemental mercury and wastes containing or contaminated with mercury that the Convention secretariat is currently developing. They are not, however, part of the Basel Convention's core provisions. Lastly, there may be legal uncertainties regarding when a substance or object becomes a waste or a by-product, is classified as hazardous waste or loses its waste status; the committee might wish to address such uncertainties in the future mercury instrument.
