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Item 3 of the provisional agenda*

**Review and assessment of options for enhanced voluntary measures
and new or existing international legal instruments**

**Report on implementation options, including legal, procedural and
logistical aspects**

Note by the secretariat

1. The Governing Council of the United Nations Environment Programme, in its decision 24/3 IV on chemicals management, established an ad hoc open-ended working group of Governments, regional economic integration organizations and stakeholder representatives to review and assess options for enhanced voluntary measures and new or existing international legal instruments for addressing the global challenges presented by mercury.
2. At its first meeting, the Ad Hoc Open-ended Working Group on Mercury requested the secretariat to undertake intersessional work in a number of areas in preparation for its second meeting.
3. Annexed to the present note is a report on implementation options that describes the process, including legal, procedural and logistical aspects, by which countries would pursue implementation options. A study on options for the global control of mercury (document UNEP(DTIE)/Hg/OEWG.1/2) and the report of the Ad Hoc Open-ended Working Group on Mercury on the work of its first meeting (document UNEP(DTIE)/Hg/OEWG.1/6) were taken as the starting point for this analysis. The annexed report is being circulated as submitted and has not been formally edited.

Suggested actions

4. The Ad Hoc Open-ended Working Group on Mercury may wish to consider the implementation options outlined in the annexed report in developing the options for addressing mercury to be forwarded to the Governing Council.

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

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Executive Summary

I. Introduction

1. At its first meeting, the ad hoc open-ended working group on mercury (OEWG, or Working Group) began its review and assessment of options for enhanced voluntary measures and new or existing international legal instruments to reduce risks from releases of mercury. For the intersessional period leading up to its second meeting, the Working Group requested the secretariat to undertake, *inter alia*, the following work:

“ . . . For the analysis of implementation options, to describe the process, including legal, procedural and logistical aspects, by which countries would pursue the options of a new free standing convention, a new Protocol under the Stockholm Convention and voluntary arrangements, using document UNEP(DTIE)/Hg/OEWG.1/2 and the report of the Working Group’s first meeting as a starting point. . . .”

2. This Analysis responds to that request to the secretariat by focusing on the process regarding the three options that the Working Group identified. Information about financial considerations and mechanisms may be found in a companion paper, “Financial Resources for Long-term International Action on Mercury: The Global Environment Facility and the Structure of the Multilateral Fund.”

II. Elements of Long-term International Action

3. The options of a new free-standing convention, a new protocol under the Stockholm Convention, and enhanced voluntary arrangements represent various ways to design and implement a framework for long-term international action on mercury. Whether it is legally binding, voluntary, or a package of voluntary and legal elements, the framework or package should provide the overall international structure for collaborative action. The structure could, in turn, be comprised of specific contents, or elements. These elements might reflect the priorities identified in Decision 24/3 of the Governing Council, paragraph 19. They could be grouped in four categories:

- (a) Elements that frame the issue by providing context for the mercury problem and confirming the intent of Governments to address it;
- (b) Specific actions or activities to address the problem, which would be based upon the seven mercury priorities that the Governing Council identified in Decision 24/3, paragraph 19;
- (c) Arrangements related to implementation of those actions, which Governments may make to enhance the likelihood that their efforts to address the challenges of mercury under the framework are effective; and
- (d) Policy guidance and administration of the framework, which may also include provisions for changing or further developing the framework as may be necessary over time.

4. The secretariat has produced a separate document containing a detailed outline of elements that may be common to any comprehensive mercury framework and that could collectively form the basis for a framework, regardless which option Governments may ultimately select. Part 2.1 of this Analysis contains a table that summarizes that outline.

III. Further Analysis of the process regarding Options

5. This Part contains the further analysis that the Working Group requested of the options of a new mercury protocol to the Stockholm Convention, a new free-standing convention, and a voluntary mercury framework. These options are discussed within the contexts of legally binding and voluntary frameworks, as applicable, and also the context of an overarching “package” that could contain both voluntary and legal elements.

6. For each of the two legal options, the Analysis discusses approaches in which the scope of the instrument could be comprehensive or narrow. A comprehensive instrument would include many

elements intended to address most or all of the global mercury priorities, while a narrow instrument might address only one or two priorities or include relatively few elements.

A. Protocol under the Stockholm Convention

7. Under this option, Parties to the Stockholm Convention on Persistent Organic Pollutants (POPs) would develop and adopt a protocol to the Convention. As a legal matter, the protocol would be a separate, independent treaty from the Convention. It would have a legally separate governance body from the Convention and would not alter the existing obligations of Parties under the Convention.

8. The threshold question in respect to a protocol is whether the Stockholm Convention, given its scope, allows the development of such a protocol concerning mercury, and whether the Conference of the Parties (COP) would have the authority to launch negotiations in the first place. The Conference of the Parties would need to examine and determine the relationship between the objective of the Convention “to protect human health and the environment from persistent organic pollutants” and its relevant provisions and possible international action on mercury, before deciding on the development of a protocol. The argument in support of the development of a protocol might be based on the fact that anthropogenic releases of any species of mercury have the potential eventually to transform in the environment into methylmercury, which has the characteristics of a POP. Thus, based on that argument, the Stockholm Convention COP would derive its authority to develop and adopt the protocol from its power accorded in article 19 of the Convention to undertake any additional action that may be required to protect human health and the environment from the POP, methylmercury. On the other hand, there might be argument that taking control measures to address methylmercury and its precursors would firstly require the process envisaged in article 8 of the Convention to list the chemical in Annex C, before taking decision to develop a new protocol which might constitute additional measures beyond those contained in the Convention. In any event, the Conference of the Parties needs to decide by consensus whether to launch negotiations on the protocol.

9. For a comprehensive, legally binding mercury framework, the provisions of the protocol could be similar to the Stockholm Convention, except for those governing the institutional arrangements and implementation measures which could be shared with the Convention. As in the parent Convention, some of the core commitments could be identified in the body of the protocol, then elaborated in technical annexes that would specify more particularly the standards or targets that would need to be met and the policies and measures by which they might be achieved.

10. On the other hand, a narrow Stockholm mercury protocol that was part of an overarching framework or “package” of voluntary and legal elements would include only a limited number of elements. These might include those elements that Governments agreed could not be successfully undertaken absent an international legal mandate.

11. Whether comprehensive or narrow, a Stockholm mercury protocol would naturally lend itself to being included within the “synergies” recommendations of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination Among the Basel, Rotterdam and Stockholm Conventions. This would be so because the protocol would be part of the overall Stockholm Convention framework, and thus could be considered to fall within the scope of the Ad hoc Joint Working Group’s recommendations, without the need to revise them.

12. The Stockholm Convention process for considering a mercury protocol could be triggered in two ways: (1) the UNEP Governing Council could invite the Stockholm Conference of the Parties to consider the matter, or (2) the COP could consider it under its own initiative. Whether it was responding to an invitation from the Governing Council or considering the issue on its own, the Stockholm COP would have the exclusive power to decide whether or not to launch negotiations on a Stockholm mercury protocol.

13. The Stockholm COP now meets on a biennial schedule. The next regular meeting at which it could consider a mercury protocol will be COP-4 in May 2009. Thus, if the Governing Council decided at its twenty-fifth session in February 2009 to invite the Conference of the Parties to the Stockholm Convention to consider initiating discussions to develop a protocol on mercury, the COP could do so soon thereafter. Debating this issue would require a reconsideration of the COP’s agenda and priorities, and may detract from the COP’s ability to deal with other important agenda items at COP-4.

14. If the COP decided not to accept an invitation from Governing Council to launch negotiations, or if the COP was unable to conclude discussion and take a decision on the matter at COP-4, then no further action could occur on the protocol until the next COP meeting (i.e., two years later), unless the COP agreed to establish a working group to consider the matter further during the intersessional period.

15. The length of time that might be needed to negotiate and adopt a Stockholm mercury protocol would depend on whether it had a comprehensive or narrow scope, the frequency of intersessional working group meetings for developing it, and whether the COP agreed to an extraordinary COP meeting for it.

16. The arrangements for secretariat support for the negotiation processes should be decided by the Conference of the Parties, which could request the Stockholm Convention Secretariat to provide required services, or invite other entities, such as UNEP to provide such support, or a combination of both. In all cases, the availability of sufficient funding and resource allocation would be imperative.

B. New Free-Standing Convention

17. Under this option, a new free-standing convention on mercury would be developed through an intergovernmental negotiating process. If the Governing Council at its twenty-fifth session in February 2009, while deciding on international action on mercury, decides to develop such a convention, it might request the Executive Director to convene an intergovernmental negotiating committee to prepare the convention, and to convene a diplomatic conference for its adoption, indicating the approximate timeframe to commence and end the respective actions. This is similar to the process used for the development and adoption of the Stockholm Convention. It would require extra-budgetary financial resources to cover such negotiating process. A set of rules of procedure might be adopted at the first session of the intergovernmental negotiating committee to govern the organization and proceedings of the committee. Following the past practice, all States would be invited to participate in the negotiating process, while relevant organizations would be invited to attend the sessions as observers.

18. While the decision of the Governing Council establishing this negotiating process is likely to provide general policy guidance regarding the future convention, its contents, both substance and structure, would be determined by collective decisions of States negotiating this convention. It may be reasonable to assume that the convention would take the “control measures approach” that has been used for the Stockholm, Rotterdam, and Basel Conventions.

19. Should there be a decision to conclude a “narrow” convention, it could set out the procedure to evolve itself to adjust its scope of measures over time to include additional mercury priorities. This possibility is roughly analogous to the precedent of the prior informed consent (PIC) procedure, which began as a voluntary procedure under the FAO International Code of Conduct on the Distribution and Use of Pesticides and the UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade, and then was adopted as a legally binding procedure under the Rotterdam Convention. Under an overarching mercury package of voluntary and legal elements, Governments could over time expand the scope of the legal instrument to include progressively more of those elements that were originally voluntary. A key factor in the potential success of this approach would be to ensure that the original legal instrument contained adequate mechanisms to allow Parties to expand it without too much difficulty.

20. In launching negotiations for a free-standing mercury convention, the Governing Council could invite the Basel, Rotterdam, and Stockholm COPs to be supportive of the negotiating process to make their contribution with a view to ensuring cooperation and coordination between those three conventions and the future convention on mercury. The Governing Council also could invite the mercury intergovernmental negotiating committee (INC) to give due consideration to establishing linkages with the work and arrangements under the three Conventions, as well as ways and means to ensure synergy with SAICM and other relevant processes. The intended scope of the free-standing convention would probably have a significant influence on the length of time required to negotiate and adopt it. The Stockholm Convention, a comprehensive instrument, required slightly less than six years between its first INC and its entry into force.

C. Voluntary Mercury Framework

21. A voluntary mercury framework could stand alone or be part of an overarching package of voluntary and legal elements. In the latter case, a Stockholm mercury protocol, free-standing convention, or other instrument could contain some or all of the legal elements.
22. A voluntary mercury policy framework could include many or all of the common elements that the secretariat has identified in its separate outline paper. In respect to the specific actions or activities that the framework may contain, the development and application of BAT/BEP guidelines could be important for several of them. The framework itself would not normally contain detailed BAT/BEP guidelines, but could instead establish processes for their development after the framework was adopted.
23. A voluntary mercury framework could be undertaken as part of the SAICM; as part of another existing process; or as a new, stand-alone process launched by the Governing Council and UNEP. Acknowledging (a) the international community's desire to achieve greater cooperation and coordination within the chemicals cluster and, more generally, the United Nations system; (b) the value of further strengthening SAICM; and (c) the fact that mercury already falls within SAICM's Global Plan of Action, the Analysis focuses on development and housing a voluntary mercury framework within SAICM and its International Conference on Chemicals Management (ICCM).
24. If the Governing Council decided that it would like the mercury framework to be part of SAICM, then it could ask ICCM-2 (which is scheduled to meet in May 2009) to consider initiating negotiations to develop a non-binding arrangement. If the Governing Council decided that the framework should contain both voluntary and legal elements, then it could ask ICCM-2 to consider developing the overarching, voluntary framework and elements, and it could separately inaugurate an appropriate, parallel process (such as an INC or a request to another chemicals convention) for developing the legal elements.
25. Before inviting the ICCM to take up the question, the Governing Council would need to resolve key political questions at its 25th session and fully define the terms of reference for the development of the framework, including its scope, rather than leave that work to ICCM-2, which would not have time to do it. SAICM could probably develop and adopt a voluntary arrangement for the mercury framework within a three-year timeframe. While SAICM process under the auspices of ICCM might develop and govern the framework, the vehicles for implementation would need to remain where they are, because SAICM and ICCM would likely not have the capacity to administer and carry out implementation activities.

Acronyms and Abbreviations

AHJWG	Ad hoc Joint Working Group
BAT	best available techniques
BEP	best environmental practices
COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the meeting of the Parties
FAO	Food and Agricultural Organization
GC	Governing Council
GEF	Global Environment Facility
GMEF	Global Ministerial Environment Forum
GPA	Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities
ICCM	International Conference on Chemicals Management
IEA	International Energy Agency
IFCS	Intergovernmental Forum on Chemical Safety
IGO	intergovernmental organization
INC	intergovernmental negotiating committee
IOMC	Inter-Organization Programme for the Sound Management of Chemicals
LDCF	Least Developed Countries Fund
MeHg	methylmercury
NGO	non-governmental organization
OEWG	Open-ended Working Group
OPS	Overarching Policy Statement
PIC	prior informed consent
POPs	persistent organic pollutants
QSP	Quick Start Programme
SAICM	Strategic Approach to International Chemicals Management
SCCF	Special Climate Change Fund
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

Further Analysis of Implementation Options for Long-term International Action on Mercury

I. Introduction

A. Background and Purpose of This Analysis

26. UNEP Governing Council Decision 24/3 IV established an ad hoc open-ended working group (the “Working Group,” or “OEWG”) of Governments, regional economic integration organizations, and stakeholder representatives to review and assess options for enhanced voluntary measures and new or existing international legal instruments to reduce risks from releases of mercury. The Working Group is guided by the global mercury priorities set out in GC 24/3 IV, paragraph 19. The first OEWG meeting (OEWG-1) took place in Bangkok, 12-16 November 2007. Decision 24/3 IV also requested UNEP Chemicals, in its service as secretariat for the Working Group, “. . . to prepare the analytical and summary reports necessary for [the OEWG’s] work. . . .” Among other materials it prepared for OEWG-1, the secretariat presented a study entitled, “Analysis of Possible Options to Address the Global Challenges to Reduce Risks from Releases of Mercury,” UNEP(DTIE)/Hg/OEWG.1/2 (hereinafter “document OEWG.1/2”).¹

27. The OEWG-1 requested the secretariat to undertake intersessional work , *inter alia*, as follows:

“. . . For the analysis of implementation options, to describe the process, including legal, procedural and logistical aspects, by which countries would pursue the options of a new free standing convention, a new Protocol under the Stockholm Convention and voluntary arrangements, using document UNEP(DTIE)/Hg/OEWG.1/2 and the report of the Working Group’s first meeting as a starting point. . . .”

28. This Analysis responds to that request to the secretariat.

B. Scope and Structure

29. The scope of this Analysis is defined in the Working Group’s instructions to the secretariat for intersessional work, as quoted above. The Analysis builds on document OEWG.1/2 and should be read as a supplement to it. The Analysis focuses on the three options that OEWG-1 identified. In addition to evaluating the Stockholm protocol and free-standing convention options within the context of a legally binding mercury framework, this Analysis explores them, along with the voluntary option, within the context of an overarching framework or “package” that could contain both voluntary and legal elements. The Analysis mentions other options identified in document OEWG.1/2 only in passing. Moreover, it does not discuss the “status quo” option of taking no further long-term international action.

30. Document OEWG.1/2 repeatedly took note of the important role that financial considerations will play in the ability of developing countries and countries with economies in transition to implement further long-term international action on mercury, regardless whether that action is taken within a voluntary or legally binding context. Aside from a brief discussion of the Strategic Approach to International Chemicals Management (SAICM) Quick Start Programme (QSP) in respect to the voluntary mercury framework, the scope of the present Analysis does not include financial considerations or mechanisms. Instead, that information may be found in a companion paper, “Financial Resources for Long-term International Action on Mercury: The Global Environment Facility and the Structure of the Multilateral Fund.”

31. This Analysis is presented in three Parts:

(a) Part 1 (the present Part) is the Introduction;

¹ Available at <http://www.chem.unep.ch/mercury/OEWG/Documents.htm>.

(b) Part 2, as a precursor to the further analysis, discusses the elements of long-term international action on mercury that may be common to any comprehensive mercury framework, regardless which option Governments may ultimately select. The Part describes a way to categorize the common elements of a mercury framework, and includes a table of possible elements. The Part also identifies the three basic forms of a framework;

(c) Part 3 contains the further analysis requested by OEWG-1 of the process regarding the options of a new mercury protocol to the Stockholm Convention, a new free-standing convention, and a voluntary mercury framework. As mentioned above, these are discussed within the contexts of legally binding and voluntary frameworks, as applicable, and also within the context of a package of voluntary and legal elements.

II. Elements of Long-term International Action

32. The options of a new free-standing convention, a new protocol under the Stockholm Convention, and enhanced voluntary arrangements represent various ways to design and implement a framework for long-term international action on mercury. Whether it is legally binding, voluntary, or a package of voluntary and legal elements, the framework or package can represent the overall international structure for collaborative action. The structure would, in turn, be comprised of specific contents, or elements.

33. This Part provides an overview of the various elements that could provide the content for any of these three basic forms of frameworks. It includes a table that groups possible elements into four categories. The Part then briefly examines the basic forms of a framework that the Working Group may wish to consider.

A. Common Elements of a Mercury Framework

34. The key elements of a mercury framework should reflect the priorities identified in Decision GC 24/3, paragraph 19. The elements may be grouped in four categories:

- (a) Elements that frame the issue;
- (b) Specific actions or activities to address the problem;
- (c) Arrangements related to implementation of those actions; and
- (d) Policy guidance and administration of the framework.

35. Each of these categories of elements is briefly described below. The secretariat has produced a separate document containing a detailed outline of proposed common elements that collectively could form the basis for a mercury framework. That outline is summarized in a table immediately following the brief descriptions.

1. Elements that frame the issue

36. This category is comprised of elements that would provide context for the mercury problem and confirm the intent of Governments (and possibly other stakeholders) to address it. The elements may include a preamble or declaration that contains an expression of political commitment and a description of political and institutional background under which the framework is developed. They may include guiding principles and the scope of the framework. Additionally, they would include the framework's overall objective.

2. Actions or activities to address the problem

37. This category of elements consists of the actual commitments or actions that Governments and other participants may undertake to accomplish the overall objective of the framework. The elements might be based upon the seven mercury priorities that the Governing Council identified in Decision 24/3, paragraph 19. They could contain many of the strategic objectives in the revised OEWG.1/2 tables that appeared in Annex I of the OEWG-1 report, UNEP(DTIE)/Hg/OEWG.1/6.

38. Discussions at OEWG-1 made clear that best available techniques and best environmental practices (BAT/BEP) could have an important role in the implementation of these elements, and that

there should be provision for the development of guidelines on BAT and BEP for the relevant areas. Thus, in developing a mercury framework, negotiators could include provisions that establish processes for experts to develop detailed BAT/BEP guidelines after the framework was adopted. Usually, neither a working group such as the OEWG making recommendations on possible options, nor the Governing Council in considering those options, nor the negotiators of any potential framework would attempt to undertake that detailed, in-depth task themselves. Instead, the task of developing detailed BAT/BEP guidelines, being technical in nature, would normally be left to appropriately nominated experts.

3. Arrangements related to implementation

39. This category includes those arrangements that Governments may make to enhance the likelihood that their efforts to address the challenges of mercury under the framework are effective. The category can include provisions for, *inter alia*, information exchange; the development of national strategies or programs; monitoring, reporting, and review; technical assistance and capacity building; financial resources and assistance; and effectiveness evaluation and review of commitments under the framework.

4. Policy guidance and administration

40. This category may include elements related to overall policy guidance, oversight, and administration of the framework. The elements in this category may also include provisions for changing or further developing the framework as may be necessary over time.

Summary Table of Possible Common Elements

A. Elements that Frame the Issue	<ol style="list-style-type: none"> 1. Expression of political commitment 2. Principles, scope of framework 3. Objective
B. Specific Actions to Address the Challenges Posed by Mercury	<ol style="list-style-type: none"> 1. Reduce supply of mercury 2. Reduce demand for mercury in products and processes 3. Reduce international trade of mercury 4. Reduce or eliminate atmospheric emissions of mercury 5. Achieve environmentally sound management of mercury-containing wastes 6. Find environmentally sound storage solutions for mercury 7. Remediate existing contaminated sites 8. Increase knowledge
C. Arrangements Related to Implementation	<ol style="list-style-type: none"> 1. Information exchange and public awareness 2. Implementation strategies 3. Monitoring, reporting, and review 4. Financial resources and technical assistance 5. Effectiveness evaluation and review of commitments
D. Policy Guidance and Administration	<ol style="list-style-type: none"> 1. Policy guidance or oversight process 2. Administrative services

B. Basic Forms of a Framework

41. A framework for long-term international action to reduce the risks from mercury could exist in one of the following basic forms:

(a) A **voluntary, non-legally binding policy framework** for commitments or actions undertaken voluntarily at the national, sectoral, or global levels. While such a framework could, and should, complement the UNEP Mercury Partnerships Programme, it would differ from the Partnerships Programme by being primarily a *policy making* framework, rather than exclusively an *implementation* framework.

(b) A **legally binding framework** for national, sectoral, or global commitments and actions. Both the free-standing convention and Stockholm Convention protocol options could serve as such a legally binding framework. The framework might typically contain a mixture of “hard” (mandatory) and “soft” (discretionary) commitments that, together, could comprehensively address the full scope of the global mercury problem.

(c) An **overarching framework of voluntary and legal elements**. In this “middle ground” approach, the overall framework and many of its elements may be non-legally binding. However, the framework would include certain legal elements. These could appear in an instrument containing a limited range of “hard” (mandatory) commitments for important priorities or strategic objectives that may not be possible or practicable for countries to undertake voluntarily. A free-standing legal instrument, or the Stockholm protocol option, could be used for these elements, or they may be contained in a different legal instrument. The remaining elements could be undertaken under a formal, voluntary framework; under existing UNEP mandates; by individual countries working at the national level; or in a combination of these approaches.

III. Further Analysis of the process regarding Options

42. Building upon the analysis of options in document OEWG.1/2 and the report of the Working Group’s first meeting, this Part provides additional information to the Working Group about the options of a new protocol under the Stockholm Convention, a new free-standing mercury convention, and enhanced voluntary arrangements to address the global challenges of mercury. Following are comments that apply generally to all of the options.

43. Regardless of whether the Governing Council may establish an intergovernmental negotiating committee (INC) to develop a free-standing convention, decide to invite the Stockholm Convention Conference of the Parties to consider developing a protocol, or ask the secretariat of UNEP or another entity to develop a voluntary arrangement, the Governing Council would need to include in its decision clear policy guidance on the nature and scope of the instrument or arrangement, the range of substantive elements that should be included in it, and any specific considerations the Governing Council may have in respect to those elements. For the Governing Council at its 25th session to elaborate on a decision containing such policy guidance, its deliberations will be based upon the Open-ended Working Group’s recommendations. In its decision to launch negotiations to develop the Stockholm Convention, the Governing Council at its 19th session used the conclusions and recommendations of the Ad Hoc Working Group on Persistent Organic Pollutants of the Intergovernmental Forum on Chemical Safety (IFCS) as the basis of its consideration on that matter, and it instructed the INC to take those conclusions and recommendations into account.² One may anticipate that any analogous decision on mercury taken by the Governing Council at its 25th session would similarly rely upon the prior output of the ad hoc OEWG on mercury, established to providing technical basis of its policy consideration on this matter.

44. For each of the two legal options, this Analysis discusses approaches in which the scope of the instrument could be comprehensive or narrow. In such passages, “scope” refers to the range of global mercury priorities that the approach may address, including the range of specific elements that the instrument may contain. Thus, a comprehensive approach would include many elements intended to

² See UNEP Governing Council, *International action to protect human health and the environment through measures which will reduce and/or eliminate emissions and discharges of persistent organic pollutants, including the development of an international legally binding instrument*, para. 8, UNEP/GC.19/13 C (1997), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=96&ArticleID=1470&l=en>.

address most or all of the global mercury priorities, while a narrow instrument may address only one or two priorities or include relatively few elements.

45. “Scope” could also be used to describe the number of countries that might be party to an instrument, or to the number of countries that might be subject to specific provisions of the instrument. For example, if an instrument contained emissions thresholds, below which countries were not subject to some or all of the instrument’s measures, then the scope of that instrument could be described as narrow, depending on where the thresholds were set. This Analysis does not use the term “scope” in that way.

A. Protocol under the Stockholm Convention

46. This section builds upon Part 3.4.1 of document OEWG.1/2.

47. Under this option, Parties to the Stockholm Convention would develop and adopt a protocol to the Convention. As a legal matter, the protocol would be a separate, independent treaty from the Convention, while certain linkage between the two would be anticipated to justify the development of such a protocol specifically under the Stockholm Convention. . It would have a legally separate governance body from the Convention—such as “the Meeting of the Parties” (MOP), or, if the Conference of the Parties to the Stockholm Convention is to serve for the protocol, “Conference of the Parties serving as the Meeting of the Parties”—and it would not alter the existing obligations of Parties under the Convention, unless the protocol contains the provisions designed to do so.

1. Legal aspect of launching negotiations to develop a protocol

48. The threshold question in respect to a protocol to the Stockholm Convention is whether the Stockholm Convention, given its scope, allows the development of such a protocol concerning mercury, and whether the Conference of the Parties (COP) would have the authority to launch negotiations in the first place. In this regard, the Conference of the Parties might need to examine and determine the relationship between the scope of the Convention covering persistent organic pollutants and international action on mercury, before deciding on the development of a protocol. Such deliberations might involve debate on the interpretation of the provisions of the Convention..

49. The legal argument in support of a protocol to the Stockholm Convention might be based on the fact that anthropogenic releases of any species of mercury have the potential eventually to transform in the environment into methylmercury,³ and on the fact that methylmercury has the characteristics of a POP.⁴ Based on that argument, the Stockholm Convention COP would derive its authority to develop and adopt the protocol from Article 19.5(d) of the Convention:

50. The Conference of the Parties shall . . . perform the functions assigned to it by the Convention and, to this end, shall . . . (d) Consider and undertake any additional action that may be required for the achievement of the objectives of the Convention.

3 See, e.g., UNEP Chemicals, GLOBAL MERCURY ASSESSMENT 34, fig. 2.2 (2002), <http://www.chem.unep.ch/mercury/Report/GMA-report-TOC.htm>.

4 In considering whether to initiate negotiations on a mercury protocol, Stockholm Convention Parties may, as a policy matter, wish to explore whether methylmercury (MeHg) would meet the screening criteria for additional POPs contained in Annex D of the Convention. However, there is no legal requirement that they must do that. Indeed, none of the original twelve POPs were subjected to Annex D screening; some of them arguably may not have been qualified for listing had such screening been required. Instead, Governments made a policy decision that they would treat the twelve substances as POPs. Negotiators for a Stockholm mercury protocol could make a similar policy decision in respect to methylmercury, if they wished. Even if methylmercury were subjected to Annex D criteria, it would most likely satisfy them. The body of scientific evidence well-establishes that methylmercury is toxic, bio-accumulative, and subject to long-distance environmental transport in migratory species. Methylmercury does not meet the Annex D criteria for persistence in water, soil, or sediment. However, its half-life in fish species (which provide the main source of methylmercury exposure in humans) ranges between 130-1030 days, for experimental observations greater than three months, with the observed differences being due to body size of the species and ambient water temperature. See Marc Trudel and Joseph B. Rasmussen, *Modeling the Elimination of Mercury by Fish*, 31 ENVIRONMENTAL SCIENCE & TECHNOLOGY 1761-22 (1997), <http://pubs.acs.org/cgi-bin/jtext?esthag/31/i06/html/es960609t>. These facts should satisfy the Annex D, para. 1(b)(ii) criterion of “Evidence that the chemical is otherwise sufficiently persistent to justify its consideration within the scope of [the Stockholm] Convention.”

51. Thus, based on that argument, the COP would be within its mandate to adopt a protocol concerning mercury if it believed that doing so was necessary to advance achievement of the objectives of the Convention.

52. It might be noted, however, any action of the Conference of the Parties needs to be consistent with the Convention. Under Article 1, the overarching objective of the Convention is “to protect human health and the environment from persistent organic pollutants.”⁵ Methylmercury is a persistent organic pollutant produced naturally in the environment from mercury that is emitted from anthropogenic and other sources. Protecting human health and the environment from methylmercury requires addressing all anthropogenic sources of mercury, yet anthropogenic emissions of mercury in its non-organic forms may not be covered by the Stockholm Convention as it presently exists. Thus, the COP might be required to consider means that it deems necessary to achieve the Convention’s objective of protecting human health and the environment from the persistent organic pollutant methylmercury, including the feasibility of the development and adoption of a protocol that could include all forms of mercury within its scope.⁶ In this context, there might be argument that taking control measures to address methylmercury and its precursors would firstly require the process envisaged in article 8 of the Convention to list the chemical in Annex C, before taking decision to develop a new protocol which might constitute additional measures beyond those contained in the Convention.

53. Readers should note that this reasoning is based on mercury’s role as a POPs precursor, and would not apply to substances that do not share that characteristic.

54. A different legal argument in support of the Stockholm COP’s authority to develop a mercury protocol could be that the “objectives of the Convention” may be interpreted to include any chemical substances, including inorganic ones, that share the characteristics of persistence, bio-accumulation, long-range environmental transport, and adverse effects. However, it could be difficult to reconcile this argument with the Convention’s overarching Article 1 objective of protecting human health and the environment from persistent *organic* pollutants. Accordingly, this argument may likely not satisfy the political test described above.

2. Design and synergies

55. Governments could use a Stockholm mercury protocol for either a comprehensive legally binding mercury framework or as the legal component of an overarching framework of voluntary and legal elements.

(a) Legally binding framework

56. For a legally binding mercury framework, the protocol could include many or all of the common elements identified in the “Summary Table of Possible Common Elements,” *supra* page 10. The overall structure of the protocol could be similar to the parent Stockholm Convention. As in the parent Convention, some of the core commitments could be identified in the body of the protocol, then elaborated in technical annexes that would specify more particularly the standards or targets that would need to be met and the policies and measures by which they might be achieved. Some of the protocol’s implementation elements (e.g., implementation strategies; monitoring, reporting, and review; technical assistance and capacity building; and financial resources) might not need to be established *de novo*, but instead could reference or build upon the corresponding provisions of the Convention.

57. In addition to those common elements identified in the Summary Table, the protocol could (but would not be required to) contain provisions for other implementation elements such as dispute

5 Examples of additional “objectives” under the Convention include, among others: the objective to reduce or eliminate releases of POPs from intentional production and use (art. 3); the objective to reduce or eliminate releases of POPs from unintentional production (art. 5); and the objective to reduce or eliminate releases of POPs from stockpiles and wastes (art. 6). All of these specific objectives fall within the scope of the Convention’s overarching objective, as it is spelled out in Article 1.

6 There would be little point in negotiating or adopting a Stockholm protocol that was limited to anthropogenic releases of methylmercury. Instead, anthropogenic releases of MeHg could probably be added to the Stockholm Convention under its existing Article 8 procedures for listing additional POPs. However, because anthropogenic releases of MeHg represent only a small part of the global mercury problem, the value of this approach would likely be limited.

resolution and non-compliance. Which elements were included in the protocol would likely be influenced by any recommendations that the Governing Council might make to the Stockholm COP, but would ultimately depend on the Stockholm COP's independent decisions on the matter. As in most multilateral environmental treaties, the protocol could contain both "hard" (mandatory) and "soft" (discretionary) commitments.

58. A Stockholm mercury protocol would naturally lend itself to being included within the "synergies" recommendations of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination Among the Basel, Rotterdam and Stockholm Conventions (AHJWG). This would be so because the protocol would be part of the overall Stockholm Convention framework, and thus could be considered to fall within the scope of the AHJWG's recommendations, without the need for their revision. These recommendations regard, *inter alia*, coordinated use among the three Conventions of regional offices and centers; synchronized and streamlined national reporting, coordinated compliance mechanisms and cooperation on technical and scientific issues; joint outreach, public awareness, and information exchange; joint managerial functions, resource mobilization and financial management; joint legal and information services; and coordinated meetings among the Conventions.⁷ The AHJWG's recommendations may be considered, respectively, by each of the Basel, Rotterdam, and Stockholm COPs at their next meetings.

(b) Overarching framework of voluntary and legal elements

59. As part of an overarching framework or "package" of voluntary and legal elements, a Stockholm protocol might include only a limited number of the common elements identified in the Summary Table of Possible Common Elements. These could include those elements that Governments agreed could not be successfully undertaken absent an international legal mandate. Thus, the protocol would likely be much narrower in scope under this approach than it would be for a comprehensive, legally binding mercury framework. Depending on the scope and depth of its commitments, a narrow protocol may not require all of the elements related to implementation that are identified as "Arrangements Related to Implementation" in the Summary Table, or it may not require those elements to be elaborated as extensively as may be needed for the legally binding framework. These elements may include, in particular, the need for national implementation plans; monitoring, reporting, and review; technical assistance and capacity building; and financial resources.

60. The comments about synergies in Paragraph 58 above would apply equally here. However, unlike a Stockholm protocol that constituted a comprehensive legally binding mercury framework, a limited protocol that was part of an overarching package of voluntary and legal elements might contribute to fragmentation within the overall effort to address mercury. This could occur because the protocol would be governed by a COP/MOP functioning within the context of the Stockholm Convention, while the overall mercury framework and its voluntary elements would likely be governed under a different institutional structure with a different perspective. These separate governing structures could make policy coordination somewhat more difficult than might be the case if the legal elements for mercury were contained in a free-standing instrument that was developed and established as part of an overarching package of voluntary and legal elements. This risk could probably be minimized if the Stockholm Convention COP and the entity developing the voluntary elements of the framework both carefully stressed the need for achieving synergies and coordination between all parts of the framework package.

3. Launching the process

61. The Stockholm Convention process for considering a protocol could be triggered in two ways: (1) the UNEP Governing Council could invite the Stockholm Convention Conference of the Parties to consider the matter, or (2) the COP could consider it under its own initiative. Whether it was responding to an invitation from the Governing Council or considering the issue on its own initiative, the Stockholm COP would have the exclusive authority to decide whether or not to launch negotiations on a Stockholm protocol.

⁷ See Report of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination Among the Basel, Rotterdam and Stockholm Conventions and the work of its third meeting, UNEP/FAO/CHW/RC/POPS/JWG.3/3, annex I (2008), http://ahjwg.chem.unep.ch/documents/3rdmeeting/ahjwg03_03_REP.pdf.

(a) Invitation from Governing Council

62. The Governing Council could invite the Stockholm Convention COP to consider launching negotiations on a protocol by taking a formal decision to that effect as part of a decision on mercury. The extent to which the Governing Council might submit a detailed outline of recommendations to the COP—including the specific nature of the overarching mercury framework it was proposing and the substantive elements it believed should be included in the protocol—could make a difference in the COP's willingness to accept the invitation. Thus, a Governing Council invitation that contained fully defined suggestions similar in detail to instructions it might give to an intergovernmental negotiating committee could be more helpful for the COP.⁸ The Governing Council's invitation, by itself, would not place the issue on the Stockholm COP's provisional agenda. To do that, a Stockholm Convention Party or Parties would need to propose the item to the Convention secretariat, at least six weeks before the beginning of the meeting.⁹

(b) Initiative of Stockholm Conference of Parties

63. A Stockholm Convention Party or Parties could also propose the agenda item without a corresponding decision and invitation from the Governing Council. The Party could do this either before the Governing Council's session (anticipating that the Governing Council would subsequently adopt a supporting decision or not), or after a Governing Council session in which the Council had not adopted a decision on the protocol. Either way, if the COP approves its agenda to include consideration on mercury, it would consider the issues associated with a protocol concerning mercury under its own initiative. The proposing Party or Parties could, before the COP meeting, provide detailed information on the possible scope of the protocol and the elements that it might contain. This would be especially necessary if the Governing Council did not adopt an invitational decision, or if it did not provide its own detailed recommendations to the COP on the nature, scope, and content of the instrument.

(c) Decision and mandate

64. Regardless of whether the COP accepts the invitation of the Governing Council to develop a protocol or the COP considers it under its own initiative, the Stockholm Convention secretariat will be required to report to the COP on the administrative and budgetary implications that the proposal may have.¹⁰ Thus, a Party or Parties that propose this agenda item may wish to cooperate with the secretariat to consider how to accommodate those implications.

65. The Stockholm Convention COP now meets on a biennial schedule. The next regular meeting at which it could consider a mercury protocol will be COP-4 in May 2009. That meeting will occur in the third month following the Governing Council's twenty-fifth session, where the Governing Council is scheduled to consider the outcomes of the work of the ad hoc OEWG with a view to taking a decision on the Working Group's final report.¹¹ Thus, if the Governing Council decided at its twenty-fifth session to request the Stockholm Convention Conference of the Parties to consider initiating discussions to develop a protocol on mercury, and if the COP decides to include it on its agenda, it could do so soon thereafter.

66. If the COP decided to initiate negotiations to develop a protocol, then the COP could establish an ad hoc working group with the mandate to that effect. The COP's decision could provide the body's mandate and instructions, which could include a timeline for undertaking and concluding negotiations. In addition, or alternatively, a Party could call for the COP to work on the matter in an extraordinary meeting to be held between COP-4 and COP-5 (which will otherwise be two years after COP-4). An extraordinary COP meeting could occur if at least one third of Stockholm Parties supported it.

⁸ The Governing Council's decision to launch the Stockholm INC can provides an example of such instructions. Please see Governing Council Decision 19/13 C, *supra* note 2 (including cited references and attached annex).

⁹ See Stockholm Convention Rules of Procedure, rules 10-11, Decision SC-1/1, annex, UNEP/POPS/COP.1/31 (2005), <http://chm.pops.int/Convention/COPs/DecisionsRecommendations/tabid/208/language/en-US/Default.aspx#>. After the secretariat has produced the provisional agenda, but before the beginning of the meeting, a Party may propose additional agenda items. Subject to agreement by the secretariat and the COP President, such items can be included in a supplementary provisional agenda. See *id.*, rule 12. When adopting the agenda for an ordinary meeting, the COP may delete, defer, or amend items, and may add those that it considers to be "urgent and important." *Id.*, rule 13(a).

¹⁰ See *id.*, rule 15.

¹¹ See Decision GC 24/3 IV, para. 34.

Stockholm Convention observers, including non-Party States, would ordinarily be allowed to participate in discussions pertaining to the protocol within working groups and, to a lesser extent, plenary sessions of the COP. However, only Stockholm Convention Parties would be permitted to participate in formal negotiations and decision-making, unless the COP agreed to different rules of procedure.

(d) No decision

67. If the COP decided not to accept an invitation from Governing Council to launch negotiations, or if the COP was unable to conclude discussion and take a decision on the matter at COP-4, then no further action could occur on the protocol until the next COP meeting (i.e., two years later) unless the COP agreed to establish a working group to consider the matter further during the intersessional period.

4. Timeline for negotiations

68. If the COP decided to launch negotiations on a protocol, the timeline for how long it might take to develop and adopt the instrument would be influenced by (1) how narrow or broad a scope the COP may decide the protocol should have and (2) the frequency of subsidiary body or extraordinary COP meetings that the COP may authorize to develop the protocol. The frequency of negotiation sessions would be directly influenced by the availability of extra-budgetary funds to support the costs of convening them, including those costs associated with ensuring participation of developing countries and countries with economies in transition. Additionally, the productivity of these sessions may be influenced by the assurances and arrangements regarding the availability of financial resources to assist those countries with their implementation of any resulting agreement. The protocol's entry into force would depend largely on the number of countries that it required to ratify, accept, approve, or accede to it.

69. If the COP agreed to develop a protocol of relatively narrow scope, and if it authorized a working group to undertake frequent intersessional work and agreed that an extraordinary COP meeting should take place, then the COP plausibly could finalize and adopt a protocol in a relatively shorter period than the time required for a comprehensive legally binding instrument/

70. In contrast, if the COP envisaged a comprehensive or complex instrument, but agreed to no extraordinary COP sessions and only one working group meeting during intersessional periods, then the protocol would likely require much longer time.

5. Additional considerations

(a) Impact on Stockholm agenda

71. Developing a protocol would necessarily be intensive and would demand a significant portion of the Convention Parties' and secretariat's attention. In respect to the secretariat, the Conference of the Parties might call upon the Executive Director of UNEP, who provides the secretariat functions of the Convention, to make necessary arrangements for secretariat support for such negotiations, noting that the UNEP secretariat has done this previously for numerous treaty negotiations. In any case, the availability of sufficient funding and resource allocation would be imperative.

72. Debating a protocol and undertaking the negotiations required to develop it would constitute an additional, major agenda item that most Stockholm Convention Parties will not have anticipated in their original conception of the Convention. Debating this issue would require a reconsideration of the COP's agenda and priorities. It would likely detract from the COP's ability to deal with other important agenda items at COP-4, such as the process of adding POPs to the Convention, or could result in pressure to open the Convention to amendment. Moreover, it could continue to have a substantial impact during the subsequent time during which Parties would negotiate and adopt the protocol.

(b) Interim action on mercury

73. Any binding mercury instrument will likely take several years to negotiate, adopt, and enter into force. Interim, voluntary mercury mitigation measures could be desirable between GC-25 and an

instrument's entry-into-force date, both to address the mercury problem now, and to begin establishing procedures and mechanisms that could contribute to successful implementation of the instrument.

74. Governments, UNEP, and other intergovernmental organizations (IGOs) could develop and implement complementary, voluntary interim measures under the Stockholm protocol option, especially in respect to those elements that may not require a legally binding instrument for their effective implementation. These measures could be specifically identified in a Governing Council decision, similarly to the way the Governing Council requested the Executive Director to initiate immediate action on POPs as part of its decision GC 19/13 C, in which it also established the intergovernmental negotiating committee for the Stockholm Convention.¹² However, because the protocol negotiation process would operate under the authority of the Stockholm Convention COP rather than the Governing Council, it could be somewhat more difficult in some situations to integrate those interim measures into the protocol process, unless the Conference of the parties would accept to make corresponding arrangements. Additionally, because the Governing Council could only invite but could not be assured that the Stockholm Convention COP will accept its invitation to launch protocol negotiations, the Governing Council's decision might need to make clear that commencement of these interim measures should not be contingent on a corresponding, affirmative decision by the COP.

(c) **Financial resources**

75. For information on this topic, please refer to the "Financial Resources" companion paper.

B. Free-Standing Convention

76. This section builds upon Part 3.4.2 of document OEWG.1/2.

77. Multilateral environmental conventions have taken one of two basic approaches: a *framework/protocols approach*, or a *control measures approach*. The framework/protocols approach sets up a framework and governance structure for addressing a broad problem, but leaves the development of most legally binding targets, timetables, and other specific control measures for future, supplementary protocols. Examples include the 1985 Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, the 1979 UNECE Convention on Long-range Transboundary Air Pollution (LRTAP) and its eight protocols, and the 1992 UN Framework Convention on Climate Change and its Kyoto Protocol.

78. In contrast, the control measures approach contains the binding commitments that Governments collectively believe are needed to address the problem. It usually includes one or more technical annexes that may list specific chemicals that are subject to the basic control measures, or that provide additional, specific details of how the control measures will work. The control measures approach is the one that has been used for legally binding instruments in the chemicals and wastes cluster (namely, the Stockholm, Rotterdam, and Basel Conventions). Therefore, it may be reasonable to assume that it, and not the framework/protocol approach, would be the most appropriate approach to use for a free-standing mercury convention.¹³ The comments within this section are thus made in the context of a control measures approach to a free-standing convention.

1. Design

79. Governments could use a free-standing convention for either a comprehensive legally binding mercury framework or as the legal component of an overarching framework of voluntary and legal elements.

¹² See Decision GC 19/13 C, *supra* note 2, para. 13.

¹³ For more information on the framework/protocols and control measures approaches, please see document OEWG.1/2, paras. 241-48. Note that a convention using a control measures approach is not precluded from adopting protocols. There could be numerous reasons why Parties to such a convention may decide to supplement it with a protocol. However, unlike a framework convention, the convention with a control measures approach would not *depend* on the adoption of a protocol to establish some or all of the basic control measures needed to achieve its objective.

(a) Legally binding framework

80. For a comprehensive, legally binding mercury framework, the basic design of the free-standing convention could include many or all of the common elements identified in the Summary Table of Possible Common Elements (see page 10). Its overall structure could be similar to the Stockholm Convention, with the core commitments identified in the body of the convention. Some of these commitments could then be elaborated in technical annexes, which would specify more particularly the standards or targets that would need to be met and the policies and measures by which they might be achieved. Also similarly to the protocol option, the free-standing convention could (but would not be required to) contain provisions for other implementation elements, such as dispute resolution and non-compliance. As in most multilateral environmental treaties, the free-standing convention could contain both “hard” and “soft” commitments. It would be up to the Governing Council, in its decision on the matter, to provide an INC with policy guidance on the range of substantive elements to include in the free-standing convention, as well as any specific considerations the Governing Council may have in respect to those elements, while details of the provisions of the convention should be negotiated and collectively decided by the INC.

(b) Overarching framework of voluntary and legal elements

81. In the case of an overarching framework or package of voluntary and legal elements, a free-standing mercury convention could comprise the legal component of the package. As such, it would include only a limited number of the common elements identified in the Summary Table of Possible Common Elements. The treaty would be narrower in scope under this approach than it would be for a comprehensive, legally binding mercury framework, and it would likely deal only with those global mercury priorities that could not reasonably be implemented without a legally binding instrument. Depending on the scope and depth of its core commitments, a narrow instrument would either not contain all of the elements related to implementation that are identified as “Arrangements Related to Implementation” in the Summary Table, not require those elements to be elaborated as extensively as may be needed for a comprehensive legally binding framework, or both. These elements may include, in particular, the need for national strategies; monitoring, reporting, and review; technical assistance and capacity building; and financial resources. Of course, some or all of these may still be necessary or desirable as elements of the *voluntary* part of a mercury package.

82. An example of a narrow instrument could be one that dealt with the reduction of mercury supply, including measures that pertain to international trade of mercury or that could have impacts on international trade. Such international measures could be necessary because it is usually difficult—and sometimes impossible—for countries to implement effective trade-related measures intended to protect human health and the environment unless they do so within a multilateral legal framework. Nevertheless, even if measures restricting international mercury trade were the only legal elements included within an overall mercury package, the instrument would probably still need some kind of governance or oversight body to adopt formal decisions, amend the instrument if changed situations required it, or direct the secretariat to take new, specific actions. Section 0 below discusses governance options in more detail.

83. Particularly relevant to the notion of a narrow or limited mercury instrument is the possibility that its scope could be expanded over time to include additional mercury priorities. This possibility is roughly analogous to the precedent of the prior informed consent (PIC) procedure, which began as a voluntary procedure under the FAO International Code of Conduct on the Distribution and Use of Pesticides and the UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade, and then was adopted as a legally binding procedure under the Rotterdam Convention. Among other reasons, the PIC procedure began as a voluntary one because there was originally not a consensus among Governments that a legally binding instrument was desirable, and there was a lack of agreement as to how the procedure should work and what its scope should be.

84. Under an overarching mercury framework of voluntary and legal elements, Governments could over time expand the scope of the legal instrument to include progressively more of those elements that were originally voluntary. These could, of course, include the specific substantive actions and activities required to address the global challenges of mercury, identified by the Governing Council as global mercury priorities and listed as “Specific Actions to Address the Challenges Posed by Mercury” in the Summary Table of Possible Common Elements on page 10. They could also include arrangements related to implementation of those actions, which may not have been included in the original legal

instrument, as well as aspects of administration and governance that may warrant strengthening over time. A key factor in the potential success of this approach would be to ensure that the original legal instrument contained adequate mechanisms to allow Parties to expand it without too much difficulty. These might include amendment procedures with supermajority instead of consensus decision-making rules, provisions for adopting or amending annexes that would allow the instrument's scope to be expanded without the necessity of amending its core text, and automatic entry into force for such amendments, with an "opt out" safeguard.

2. Cooperation and coordination with chemicals conventions and relevant processes

85. In launching negotiations for a free-standing mercury convention, the Governing Council could invite the Basel, Rotterdam, and Stockholm COPs to be supportive of the negotiating process to make their contribution with a view to ensuring cooperation and coordination between those three conventions and the future convention on mercury. The Governing Council also could invite the mercury INC to give due consideration to establishing linkages with the work and arrangements under the three Conventions, as well as ways and means to ensure synergy with SAICM and other relevant processes. , .

3. Synergies and governance

86. The approach to governance for a free-standing mercury convention—whether the treaty may represent a comprehensive, legally binding mercury framework or the legal component of an overarching framework of voluntary and legal elements—might raise questions about synergies, the number of treaties within the chemicals cluster, and the relationship the new instrument might have to progress on enhanced cooperation and coordination among the three chemicals and wastes conventions. Such concerns could be addressed during the negotiating process of the future convention, when Governments at the INC consider the provisions governing control measures and institutional arrangements for oversight and implementation of the convention. For example, they could consider measures to ensure synergy among national actions with regard to chemicals and wastes management designed for the implementation of the convention concerning mercury and other relevant international instruments. At the international level, such synergy could be addressed in the design of institutional arrangements for collective policy consideration and decision-making by the Parties (e.g. conference of the parties and modalities of its operations), subsidiary bodies on technical matters, secretariat functions, and implementation measures (e.g. financial mechanism).

4. Launching the process and timeline

87. As this Analysis suggested earlier in Paragraph 43, Working Group members should recognize that the Governing Council will mainly rely upon the Working Group's recommendations for most of the specific terms for the negotiation of the convention at the INC, in the same way it relied upon the IFCS Ad Hoc Working Group on POPs for most of its instructions to the INC charged with developing the Stockholm Convention.¹⁴

88. Whether it intended a comprehensive legally binding mercury framework or the legal component of an overarching framework of voluntary and legal elements, the Governing Council would launch the negotiating process for a free-standing convention by requesting the Executive Director to prepare for and convene an INC mandated to develop it. The decision could set out policy guidance concerning the nature and scope of the instrument, and could include any preferences the Governing Council may have in respect to the instrument's governance. The decision could establish approximate dates by when the INC would be expected to commence its work and when a diplomatic conference would be expected to adopt the completed instrument (in the case of the Stockholm Convention, the INC was requested to begin in early 1998 and the diplomatic conference was requested to conclude the treaty "by the year 2000").¹⁵ The decision might also instruct the Executive Director to take steps to initiate immediate actions on mercury to help address the mercury problem during the period when the binding instrument was being developed, and to prepare for the instrument's implementation.

14 See Decision GC 19/13 C, *supra* note 2.

15 See *id.*, paras. 11-12. In fact, the INC completed its negotiations in December 2000 and the diplomatic conference took place in Stockholm in May 2001.

89. INCs and diplomatic conferences operate under their own rules of procedure, which usually provide that substantive decisions are to be taken by a specific modality of decision-making they have agreed to.¹⁶ After the treaty was adopted by the diplomatic conference, the convention would be open for signature and ratification, and it would enter into force under its own terms. The length of time required for such instruments to be negotiated and to enter into force could vary significantly. For instance, the total time between the first INC for the Stockholm Convention and its entry into force was slightly less than six years. The scope of the convention, extra-budgetary resources available for the negotiating process, and the number of ratifications required to bring the convention into force probably have a significant influence on the length of time required for its negotiation and adoption.

5. Additional considerations

(a) Interim action on mercury

90. The development and entry into force of the convention will likely take several years. Therefore, interim, voluntary mercury mitigation measures could be desirable between GC-25 and an instrument's entry-into-force date, both to address the mercury problem now, and to begin establishing procedures and mechanisms that could contribute to successful implementation of the instrument. Governments, UNEP, and other intergovernmental organizations (IGOs) could develop and implement complementary, voluntary interim measures under the Stockholm protocol option, especially in respect to those elements that may not require a legally binding instrument for their effective implementation. These measures could be specifically identified in a Governing Council decision, similarly to the way the Governing Council requested the Executive Director to initiate immediate action on POPs as part of its decision GC 19/13 C, in which it also established the intergovernmental negotiating committee for the Stockholm Convention.¹⁷

(b) Financial resources

91. For information on this topic, please refer to the "Financial Resources" companion paper.

C. Voluntary Mercury Framework

92. Document OEWG.1/2, Part 3.1.1, identifies several options for enhanced voluntary action on mercury. This section of the Analysis builds upon that document and the discussion at OEWG-1 and presents further considerations on a possible voluntary, non-legally binding mercury policy framework.

93. A voluntary mercury framework could stand alone or be part of an overarching framework or package of voluntary and legal elements. In the latter case, a Stockholm mercury protocol or free-standing convention could contain some or all of the legal elements, as this Analysis has discussed in previous sections. Other existing instruments—such as the Basel, Rotterdam, or Stockholm Conventions, or the Kiev PRTR Protocol to the Aarhus Convention—could also contain specific legal elements that might be considered part of a package.¹⁸

16 See, e.g., Stockholm INC, Rule of Procedure 37, in Intergovernmental Negotiating Committee for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants, *Report of the Intergovernmental Negotiating Committee on the Work of Its First Session*, UNEP/POPS/INC.1/7, annex I, "Rules of Procedure for the Meetings of the Intergovernmental Negotiating Committee" (1998) (applied *mutatis mutandis* to diplomatic conference in Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants Stockholm, *Final Act*, UNEP/POPS/CONF/4 (2001)); see also United Nations General Assembly, VIENNA CONVENTION ON THE LAW OF TREATIES, art. 9.2, May 22, 1969, 1155 United Nations Treaty Series 331 (stating adoption of treaty text at an international conference takes place by vote of two-thirds of States present and voting, unless by same majority they decide to apply different rule).

17 See Decision GC 19/13 C, *supra* note 2, para. 13.

18 Please refer to Document OEWG.1/2, Part 3.2, for descriptions of these options.

1. Relationship to Mercury Partnerships Programme

94. In April 2008, the UNEP Mercury Programme completed an “Overarching Framework for the UNEP Global Mercury Partnership.”¹⁹ The Partnership Framework was developed by UNEP in consultation with Governments and other stakeholders under the responsibility of the Executive Director. It will be forwarded to the twenty-fifth session of the Governing Council as part of the progress report that Governing Council requested on the implementation of Decision GC 24/3.

95. The Global Mercury Partnership Framework and the voluntary mercury framework that is the subject of this section of the Analysis are not synonymous, although they are of course related. The development of the Partnership Framework and the OEWG’s review and assessment of options for enhanced voluntary measures and new or existing international legal instruments are separate processes undertaken pursuant to different parts of Decision GC 23/4. By encompassing implementation rather than policy development, the Mercury Partnership Programme and Partnership Framework can, and should, be an important complement to any enhanced voluntary or legally binding approach for dealing with mercury that the Working Group may recommend for the Governing Council’s consideration. Nevertheless, Working Group participants should be clear that the Mercury Partnership Programme and Partnership Framework are distinct from the voluntary mercury framework that this section of the Analysis discusses.

2. Design

96. A voluntary mercury policy framework could include many or all of the common elements identified in the Summary Table of Possible Common Elements on page 10, *supra*. Thus, it could contain (1) a section of elements that frame the issue, including an expression of political commitment, guiding principles and scope, and an overall objective; (2) actions or activities to address the problem, based upon the seven mercury priorities that the Governing Council identified in Decision GC 24/3, paragraph 19; (3) arrangements related to implementation, such as information exchange, implementation plans or programs, monitoring, reporting, and review, technical assistance and capacity building, financial resources and assistance, and effectiveness evaluation and review of commitments under the framework; and (4) arrangements for administration and governance of the framework, including the provision of secretariat services and a process or body responsible for overall policy guidance and oversight.

97. In respect to the specific actions or activities that the framework may contain, the development and application of BAT/BEP guidelines could be important for several of them. As discussed above in Paragraph 38 of this Analysis, the framework itself would not contain detailed BAT/BEP guidelines, but could instead establish processes for their development after the framework was adopted.

3. Institutional arrangements and process

98. A voluntary mercury framework could be undertaken as part of the SAICM; as part of another existing process;²⁰ or as a new, stand-alone process launched by the Governing Council and UNEP. Acknowledging (a) the international community’s desire to achieve greater cooperation and coordination within the chemicals cluster and, more generally, the United Nations system; (b) the value of further strengthening SAICM; and (c) the fact that mercury already falls within SAICM’s Global

19 See Report of the meeting on the United Nations Environment Programme (UNEP) Global Mercury Partnership, UNEP(DTIE)/Hg/Partnership.1/4 (2008), http://www.chem.unep.ch/MERCURY/UGMP/Meeting_Documents.htm.

20 For example, the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA), adopted in 1995, is a non-legally binding UNEP program designed to provide practical guidance to national and regional authorities to address marine degradation from land-based activities. The GPA contains short sections on suggested international action on POPs and heavy metals. Located in The Hague, the GPA oversees a clearing house mechanism that, for chemicals, is subsumed under existing mechanisms of the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), the International Programme on Chemicals Safety, UNEP, and IFCS. See generally UNEP-GPA website, <http://www.gpa.unep.org/>; Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, *Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities* (Washington D.C. 1995), UNEP(OCA)/LBA/IG.2/7, available at http://www.gpa.unep.org/documents/full_text_of_the_english.pdf.

Plan of Action, this Analysis focuses on development and housing of a voluntary mercury framework within SAICM and its International Conference on Chemicals Management (ICCM).

99. If the Governing Council decided that it would like the mercury framework to be part of SAICM, then it could ask ICCM-2 to consider initiating negotiations to develop the non-binding agreement. The Governing Council's request could contain an outline of the elements it believed should be included in the framework. If the Governing Council decided that the framework should contain both voluntary and legal elements, then it could ask ICCM-2 to consider developing the overarching, voluntary framework and elements, and it could separately inaugurate an appropriate, parallel process (such as an INC or a request to another chemicals convention) for developing the legal elements. As mentioned in Paragraph **Error! Reference source not found.** above, these two processes could be convened so that their sessions were held concurrently, or back-to-back.

100. In either event, ICCM-2 would take up the question under its agenda item for emerging issues, pursuant to its function to "focus attention and call for appropriate action on emerging policy issues as they arise and to forge consensus on priorities for cooperative action."²¹ In inviting the ICCM to take up the question, the Governing Council would need to define the terms of reference for the development of the framework, including its scope. In other words, the Governing Council would need to resolve key political questions at its twenty-fifth session, before forwarding the proposed framework to ICCM. These key questions include the legal nature, scope, and basic elements of the framework, as well as who would provide the resources needed to pay for its development and implementation. By resolving these, Governing Council would allow ICCM-2 to focus on whether or not it should agree to the proposal, and not on negotiating what the elements of the framework should be (which it would not have time to do).

101. SAICM could probably develop and adopt the mercury framework within a three-year timeframe. This would likely include four international meetings, plus regional meetings, the latter of which proved to be critical during the Preparatory Committee negotiations on the SAICM. The SAICM secretariat would probably require three additional staff to support these negotiations. It would be important for there to be no ambiguity as to what institution would bear chief responsibility for this task: while the UNEP Mercury Programme and possibly other IGOs would need to provide significant support to the process, the SAICM secretariat would need to be the lead entity coordinating it.

102. The multi-stakeholder, multi-sectoral approach of SAICM would lend itself to broader stakeholder participation than is typically the practice within UNEP Governing Council processes. Presumably, the rules of procedure that are being developed for ICCM will continue past SAICM practices in this respect, and would be applied to negotiations to develop a voluntary mercury framework.

103. While SAICM and ICCM would develop and govern the framework, the vehicles for implementation would need to remain where they are, because SAICM and ICCM would likely not have the capacity to administer and carry out implementation activities. These vehicles include, e.g., Governments; the UNEP Mercury Programme and UNEP Mercury Partnership Programme; members of the Inter-Organization Programme for the Sound Management of Chemicals (IOMC), including the United Nations Development Programme (UNDP); the World Bank; the International Energy Agency (IEA); nongovernmental organizations (NGOs); and other stakeholders.

4. Additional considerations

(a) Financial resources

104. As has often been noted, the success of any framework to address the challenges of mercury will depend significantly on the availability of financial resources to assist developing countries and countries with economies in transition in their implementation of it. These resources will be available only to the extent that donor Governments provide them. For a voluntary mercury framework under the SAICM, the SAICM's Quick Start Programme (QSP) could be adapted to serve as a medium through which donors could channel financial resources. Alternatively, or additionally, the Global Environment Facility (GEF) could provide assistance through its international waters focal area, or donors could

21 SAICM OPS, para. 24 (j), *supra* note **Error! Bookmark not defined.**

request the GEF to administer a special mercury fund, similar in concept to the Least Developed Countries Fund (LDCF) or the Special Climate Change Fund (SCCF). Because the GEF presently has no significant resources available to support mercury projects, the feasibility of all of these GEF options would depend on the willingness of donors to provide new financial resources for that purpose. (For a more detailed discussion of these GEF approaches, please refer to the Financial Resources companion paper.)

(b) Interim action on mercury

105. The comments made previously in respect to the value of voluntary, interim action on mercury during development of a legally binding mercury option apply also to this voluntary mercury framework option.
