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

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Item 3 of the provisional agenda*

Preparation of a global legally binding instrument on mercury

**Approach to possible elements of Articles 10 and 11 prepared
by the co-chairs of the contact group on emissions and releases**

Note by the secretariat

At its third session, held in Nairobi from 31 October to 4 November 2011, the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury requested the co-chairs of the contact group on emissions and releases established at that session, with the support of the secretariat, to develop an approach to possible elements of articles 10 and 11 of the legally binding instrument. The approach would include approaches that committed parties to taking particular measures to control and/or reduce emissions but allowed flexibility to reflect national circumstances, along with approaches that committed parties to developing nationally determined measures to control and/or reduce emissions. The approaches prepared by the co-chairs in response to the committee's request are annexed to the present note.

* UNEP(DTIE)/Hg/INC.4/1.

Annex

Approach to possible elements of Articles 10 and 11

Background

A. Objective of the intersessional work

1. At the third session of the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury a contact group was established to discuss the articles related to mercury emissions to air and releases to land and water in the draft text (Articles 10, 11 and 11 alt). The contact group met four times during the third session, reaching agreement on a number of issues; it did not, however, resolve all outstanding policy issues during its discussions.

2. To enable further progress to be made, the committee tasked the co-chairs of the contact group on emissions and releases, with the support of the secretariat, to develop an approach to possible elements of Articles 10 and 11. The approach would include approaches that committed parties to taking particular measures to control and/or reduce emissions but allowed flexibility to reflect national circumstances, along with approaches that committed parties to developing nationally determined measures to control and/or reduce emissions.

B. Results of the committee's third session

3. The contact group on emissions and releases reached general agreement on some matters during the committee's third session, some of which will result in changes to the draft text of the legally binding instrument. As these agreed changes were not presented to the committee in plenary and agreed as the basis for further work, however, they are not included in the revised draft text that is presented in document UNEP(DTIE)/Hg/INC.4/3.

4. The areas of general agreement included the following:

(a) There is a need for the mercury instrument to address emissions and releases and for parties to take action on emissions and releases;

(b) The term "unintentional" is an unnecessary qualifier of "emissions" and should be deleted;

(c) The mercury instrument must be compatible with the need for developing countries and countries with economies in transition to develop their power generation capacity;

(d) The articles on emissions and releases are not intended to impose restrictions that would impede the process of development. Reduction of emissions may therefore need to be in relative rather than absolute terms;

(e) There is a need for flexibility, in that some provisions could allow countries discretion in the implementation of their commitments (i.e., consistent with paragraph 28 (a) of decision 25/5 of the Governing Council of the United Nations Environment Programme);

(f) Emissions and releases from artisanal and small-scale gold mining should be addressed in the specific articles on that subject and not in Article 10 or Article 11.

5. The importance of financial and technical assistance in enabling some parties to implement measures was also recognized. However, the co-chairs consider that, as these issues are cross-cutting and are relevant to a wider range of implementation issues and there was a contact group specifically established to deal with them, the issue of financial and technical assistance was not within their mandate and is therefore not addressed in the present paper.

C. Some issues

6. The starting point is the need for the legal instrument to set out clearly an obligation on parties to tackle emissions, together with clarity about the steps that they will need to take nationally to meet this obligation – whether it is a "direct" obligation (which could be, for example, to apply best available techniques) or "indirect" (for example, to prepare a plan, with the plan itself setting out what action a party is proposing to take). The scheme in the instrument will need both to give parties confidence that the problem of emissions will be addressed by sufficient action collectively and to give

reassurance that there is sufficient flexibility to accommodate national circumstances and the need for development to meet the needs of parties' populations.

7. The articles on emissions and releases will be read in the context of and be consistent with other parts of the treaty – in particular the objective and the preamble. The current draft contained in document UNEP(DTIE)/Hg/INC.4/3 sets out in Article 1 two possible objectives. The preamble has not yet been considered in detail by the committee, but currently includes a proposal for a reference to the principles set on in the Rio Declaration on Environment and Development, including the principle of common but differentiated responsibilities. While these elements have yet to be negotiated, the committee will need to ensure that ultimately articles 10 and 11 are consistent with and avoid unnecessary duplication of what is set out elsewhere. The committee will therefore wish to negotiate these elements at its fourth session with that in mind.

8. The co-chairs considered issues of sources (e.g., categories of sources, thresholds for size, and possibly different measures for new (or substantially modified) and existing installations), whether proposed measures should apply to all parties or only to significant aggregate emitters, and the range of measures that could be used (e.g., the application of best available techniques/best environmental practices (BAT/BEP), limit values or emission targets and national goals or reduction targets (numerical or policy). Each of those measures could be structured to provide flexibility in application.

9. The co-chairs also noted that the mercury instrument would probably contain provisions allowing the Conference of the Parties to amend the instrument's annexes. It would therefore be possible for Annex F and Annex G to evolve over time, for example to start with the main or largest sources and expand once they are dealt with or more money becomes available.

I. Possible approaches to emissions to air

10. Two broad approaches to emissions to air were identified in the mandate. The co-chairs propose that the two approaches might be implemented as follows, in summary form:

A. Approaches that commit parties to taking particular measures to control and/or reduce emissions but allow flexibility to reflect national circumstances

- (a) Each Party would be required to take measures to control and/or reduce emissions;
- (b) Categories of major sources would be identified in an annex;
- (c) Parties could choose one or more of the measures listed in the annex, for example:
 - (i) Application of BAT/BEP;
 - (ii) Emissions targets/standards to be defined by the Conference of the Parties and applied at the installation level could be set in terms of total emissions (set at the national level but applied on an installation basis) or set in terms of power generation;
 - (iii) Percentage reduction (a minimum or a range) in an amount to be determined by the Conference of the Parties;
- (d) Flexibility in implementation for each Party could be achieved by:
 - (i) Acknowledging that the concept of BAT/BEP includes a reflection of national technical, social and economic circumstances;
 - (ii) Allowing Governments or regulated entities to decide on the technologies to be used to meet emissions values, or percentage reductions at facilities, including through the application of multi-pollutant control strategies, noting that this would apply also to existing facilities;
 - (iii) Applying measures at the installation level, thereby allowing for growth at the sector level;
 - (iv) Allowing parties to set the size thresholds for installations, possibly allowing for progressive improvement over time.

B. Approaches that commit parties to developing nationally determined measures to control and/or reduce emissions

- (a) Each Party would be required to take measures to control and/or reduce emissions;
- (b) Categories of major sources would be identified in an annex;
- (c) Each Party would submit for review by the Conference of the Parties its national plan indicating the measures to be used by it and its expected target/goal/outcome, which could include:
 - (i) A menu of suggested measures in an annex, e.g.:
 - a. BAT/BEP (including continuous monitoring);
 - b. Limit values, with the choice of value and technology left to the Party and/or regulated entities;
 - c. Multi-pollutant control strategies;
 - (ii) Measures applied to a category or varied depending on the situation of each installation. A Party might adopt different measures in relation to different categories of sources listed in the annex, according to its technical and practical needs;
- (d) The Conference of the Parties would review at regular intervals whether, collectively, the implementation of the plans was making progress towards the goals of the convention;
- (e) To assist parties, the Conference of the Parties could provide guidance and promote an exchange of information about BAT/BEP, limit values and multi-pollutant strategies.

C. Common elements of the approaches

11. It is clear that there are some elements that are common to both approaches described above, for example:
- (a) An inventory of sources could be required to establish the situation of each Party;
 - (b) Each Party could be required to indicate its proposed implementation strategy;
 - (c) Growth in sectors would be allowed;
 - (d) The flexibility of the BAT/BEP concept would allow the selection of technology and its application to meet national circumstances – what is “available” would be determined nationally in the light of local technical, economic and social considerations and not at the global or regional level, and could include multi-pollutant approaches;
 - (e) Monitoring of overall progress by the Conference of the Parties would require regular reporting on implementation:
 - (i) The Conference of the Parties might wish to develop guidance to assist parties in monitoring at the national level;
 - (ii) Continuous monitoring could be included within the BAT/BEP requirement, at least for larger and/or new installations.

12. Either approach could include provisions setting out a schedule according to which measures should be applied, for example within a defined number of years of entry into force.

II. Possible approaches to releases to land, soil and water

13. Measures to address releases to land, soil and water are clearly essential. In identifying the nature of those measures, the co-chairs noted that many of the potential sources of those releases were the subject of other substantive articles, including for example:

- (a) Manufacture of products containing mercury during the transitional period (Article 6);
- (b) Processes using mercury during the transitional period (Article 7);
- (c) Waste management and disposal (Article 13);
- (d) Storage (Article 12);
- (e) Contaminated sites (Article 14);

(f) Artisanal and small-scale gold mining (Article 9);

(g) Other industrial processes in which mercury is present as a contaminant and may be released to land or water (not covered in other articles).

14. The co-chairs noted that the draft substantive articles for the majority of these potential sources already contained some provisions to address releases to land, water and soil or that such provisions could readily be inserted into those articles.

15. Accordingly, the co-chairs propose for the consideration of the committee that, as a general principle, the issue of releases from the sources identified above be dealt with in the relevant substantive articles. The co-chairs suggest also that further consideration of approaches to addressing releases, including whether the two approaches and measures identified above for emissions could be applied to releases, be deferred until later in the negotiations, at which time the need for additional measures could be determined. In principle either of the approaches suggested above for emissions to air could apply to releases, although there is no reason in principle why the same approach should be adopted for releases to land and water as is adopted for air emissions.
