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**EXECUTIVE BODY FOR THE CONVENTION ON LONG-RANGE
TRANSBOUNDARY AIR POLLUTION**

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**MECHANISMS FOR AMENDING THE PROTOCOL ON PERSISTENT ORGANIC
POLLUTANTS**

Note by the ad hoc group of legal experts

INTRODUCTION

1. At its twenty-third session in December 2005, the Executive Body, with the exception of one Party, agreed to invite an ad hoc group of legal experts to prepare a discussion paper on mechanisms for amending the Protocol on Persistent Organic Pollutants (POPs). The report of the session noted that “[d]elegations did not favour negotiating a new Protocol” and that “[t]he options to be considered should include opt-out or the current opt-in procedures as well as the possibilities for individual ratification of chemicals” (ECE/EB.AIR/87, para. 31).
2. Pursuant to this agreement, an ad hoc group of legal experts met on April 27 in The Hague. Representatives from Finland, Germany, Italy, the Netherlands, Norway, the United

Kingdom, the United States and the European Community participated in the meeting in their expert capacity.

3. This discussion paper identifies five amendment procedures, which have been grouped into three main categories. These three categories are elaborated in Sections III, IV and V. Section VI addresses the issue of amendments containing either one or a bundle of chemicals. Section VII contains important final remarks. Current procedures under the Protocol are summarized in Section I.

I. CURRENT PROCEDURES FOR AMENDING THE PROTOCOL ON POPS

4. The current procedures for amending the Protocol are contained in its article 14. These are summarized in the following two paragraphs.

5. As regards amendments to the Protocol and to annexes I–IV, VI and VIII:

(a) Such amendments shall be adopted by consensus of the Parties present and shall enter into force, for the Parties which have accepted them, on the ninetieth day after two thirds of the Parties have deposited their instrument of acceptance; and

(b) Executive Body decision 1998/2 applies to provision of information on, and evaluation of, proposals to amend annex I, II or III. Any changes to that decision 1998/2 shall be decided on by consensus and shall take effect sixty days later.

6. As regards amendments to annexes V and VII:

(a) Such amendments too shall be adopted by consensus of the Parties present; and

(b) They shall become effective ninety days after they are communicated to all Parties by the Executive Secretary, except for those Parties which have submitted a notification of non-acceptance, and provided that at least sixteen Parties have not submitted such a notification.

II. THREE CATEGORIES OF AMENDMENT PROCEDURES

7. In discussing the various procedures for amending legal instruments, the ad hoc group identified three main categories. The first category consists of the classical procedure for ratification and is further elaborated in Section III of the present note. A second category

comprises procedures that do not require ratification. These are discussed in Section IV. A third category provides for a hybrid procedure and is explained in Section V.

III. CLASSICAL PROCEDURE OF RATIFICATION

8. Probably the most common amendment procedure is one where Parties express their consent to be bound by way of depositing their instruments of ratification (acceptance/approval). Typically under this procedure, an amendment will enter into force, for those Parties having ratified it, when a certain number of instruments of ratification have been deposited.

9. In analysing the classical procedure of ratification, the ad hoc group made the following observations:

(a) As was already noted in paragraph 5 above, the Protocol on POPs (article 14.3) itself takes this approach with respect to amendments to the body of the Protocol and to annexes I–IV, VI and VIII.

(b) In this context, the ad hoc group stressed a point of legal terminology. The report of the twenty-third session of the Executive Body referred to “the current opt-in procedures” under the Protocol (ECE/EB.AIR/87, para. 31). However, the Protocol on POPs currently does not contain an opt-in procedure, and the ad hoc group understood that reference in the report to be to the classical ratification procedure of article 14.3.

(c) The classical procedure is well precedented. Almost all multilateral environmental agreements contain this type of amendment procedure, although many of them require it for amendments of the convention text itself, while providing different (often “lighter”) procedures for amending their (technical) annexes.

(d) At the respective national levels, the classical amendment procedure enables the administration and the legislative branch to fully analyse and consider the amendment and its implications before expressing its consent to be bound by it.

(e) Generally speaking, the classical amendment procedure requires more time at the national level than do most other amendment procedures; this also has implications for the timing of the entry into force of the amendment.

IV. PROCEDURES NOT REQUIRING RATIFICATION

10. The category of procedures not requiring ratification includes the opt-out procedure (see paras. 11–12 below) and the opt-in procedure (see paras. 13–14 below). Related procedures are those which allow decisions to have legally binding effect upon the Parties (see paras. 15–16 below).

A. Opt-out procedure

11. Under an opt-out procedure, an amendment becomes effective for all Parties after a certain period after its adoption, except for those Parties that have notified the depositary they cannot accept the amendment.

12. In analysing the opt-out procedure, the ad hoc group made the following observations:

(a) As was noted earlier, the Protocol on POPs provides for this procedure with regard to amendment of its Annexes V and VII.

(b) Many multilateral environmental agreements contain the opt-out procedure for amending their annexes. Under some agreements, the opt-out procedure is applicable to an annex which constitutes an important element of the agreement (e.g. one related to listing chemicals for notification under the Rotterdam Convention or the Basel Convention). Under other agreements (e.g. the Convention on Biological Diversity) the opt-out procedure applies to annexes which do not directly relate to the key objective of the agreement.

(c) Generally speaking, amendments for which an opt-out procedure applies will enter into force more expeditiously than when the classical procedure set out in Section III above is used, and this may strengthen the effectiveness of the agreement.

(d) Under the opt-out procedure, each Party retains full control over the decision on whether to be bound, although it has to undertake action (notifying its non-acceptance) if it does not wish to be bound by the amendment.

(e) The period between adoption of the amendment and its entry into force should be chosen in a way that allows Parties to undertake the necessary administrative and/or legislative preparations for implementation at the national level.

B. Opt-in procedure

13. Under an opt-in procedure, a Party does not need to deposit an instrument of ratification, but can express its willingness to be bound by an amendment by way of a notification of acceptance.

14. In analysing the opt-in procedure, the ad hoc group made the following observations:

(a) Multilateral environmental agreements do not contain opt-in procedures, although all opt-out procedures allow Parties to withdraw their earlier notification of non-acceptance, thereby providing, in effect, for a form of opt-in procedure.

(b) Under the opt-in procedure, each Party retains full control over the decision on whether to be bound and has to undertake express action (notifying its acceptance) if it wishes to become bound by the amendment.

(c) Amendments for which an opt-in procedure applies will probably enter into force more expeditiously than if the classical procedure set out in Section III above is used.

C. Decisions with legally binding effect

15. In some instances, multilateral environmental agreements specifically allow for the adoption of decisions with legally binding effect.

16. In discussing decisions with legally binding effect, and realizing that these were expressly authorized by the texts of the respective treaties, the ad hoc group noted the following precedents:

(a) For controlled substances (i.e., substances included in the regime by way of the classical procedure of ratification), the Montreal Protocol on substances that deplete the ozone layer contains an "adjustment procedure" which allows for setting (or changing) the phase-out schedule of these controlled substances by way of a decision by the Meeting of the Parties. Such decisions are taken by consensus (or, as a last resort, by a two-thirds majority of Parties, representing a majority of developed-country Parties and of developing-country Parties), and will normally enter into force after six months; such decisions will bind all Parties.

(b) Both the 1999 Gothenburg Protocol and the 1994 Oslo Protocol also provide that adjustments to emission ceilings and reductions shall be adopted by consensus and shall become

effective for all Parties ninety days after notification of the adopted amendment by the Executive Secretary.

(c) The Rotterdam Convention also allows for binding decision-making with regard to amendments of the annex containing the chemicals that are subject to the prior informed consent procedure. Once adopted by consensus, the amendments contained in such decisions enter into force for all Parties, on a date to be specified in the decision.

V. A HYBRID AMENDMENT PROCEDURE

17. The Stockholm Convention on POPs contains a hybrid amendment procedure which combines the opt-out procedure with the “classical” approach of ratification. A similar approach can be found in the United Nations Convention to Combat Desertification.

18. In short, the Stockholm Convention first provides for an opt-out procedure for amending the core annexes dealing with the elimination, restriction and unintentional production of POPs (annexes A, B, and C). However, the procedure also allows Parties to only become bound by any such amendment by way of the “classical” route of ratification. Any Party that wants to make use of the “classical” route with regard to such amendments has to declare, when becoming a Party to the Convention, “that, with respect to it, any amendment to Annex A, B or C shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto”.

19. In discussing the hybrid procedure, the ad hoc group noted the following:

(a) The hybrid procedure provides Parties with some flexibility in that they can choose one of the two amendment procedures. They can make this choice once, upon ratification of the Convention, and not each time an amendment is adopted.

(b) The hybrid procedure under the Stockholm Convention is part of the original Convention; it was not introduced later, after the Convention had already entered into force. Hence, the hybrid approach cannot be introduced in an identical manner in the Protocol on POPs, which has already entered into force. However, with proper drafting, introducing the opt-out procedure into the current Protocol in practice would create a system similar to the hybrid procedure of the Stockholm Convention: for adding any new substances, the opt-out procedure would be applicable to those Parties which have ratified the new opt-out procedure, while the current, classical ratification procedure for amendment would remain applicable to those Parties which have not ratified the opt-out procedure and to new Parties which have indicated, on accession, that they will not be bound by the amendment. The opt-out procedure can be extended

to other annexes of the Protocol on POPs by introducing a new paragraph in article 14 of the Protocol making it explicit that, as with the Stockholm Convention, these two procedures exist in parallel under the Protocol.

(c) Entry into force of amendments under a hybrid approach is likely to be more expeditious than under a classical ratification process. However, because fewer Parties may be subject to an opt-out procedure, it is potentially slower than a pure opt-out procedure.

VI. RATIFICATION OF CHEMICALS: INDIVIDUALLY OR BUNDLED

20. Pursuant to the invitation by the Executive Body (ECE/EB.AIR/87, para. 31), the ad hoc group also discussed the issue of either including several chemicals in one amendment (bundling) or including them in a series of amendments, each amendment containing a chemical.

21. In this regard, the ad hoc group made the following observations:

(a) This issue is not dependent on the type of amendment procedure for adding new chemicals. Put differently, both approaches (individual and bundling) are possible under any type of amendment procedure, including under the current amendment procedures of the Protocol.

(b) The Executive Body may choose between the two approaches on a case-by-case basis.

(c) Should the Executive Body in a given case opt for the individual approach for, for example, four substances, this would require it to adopt four separate decisions (amendments). However, should the Executive Body opt for a bundling of those four chemicals, one decision (amendment) listing those four substances would suffice.

(d) Bundling various chemicals into one amendment might have an impact on ratification should any one Party have issue with any one such chemical.

(e) The choice between these two approaches is not contingent upon when the proposals for amendments were received and would be made by the Executive Body at the meeting when, after evaluation of the proposed substances in accordance with its decision 1998/2, the Parties are to decide on the addition of chemicals to annexes of the Protocol.

VII. FINAL REMARKS

22. The ad hoc group recalled that the inclusion in the Protocol of a new procedure for adding chemicals will have to follow the current “classical” amendment procedure set out in article 14.3 of the Protocol. Thus, the introduction of any new amendment procedure would in itself be an amendment requiring adoption by consensus, and would enter into force, for the ratifying Parties, when two thirds of the Parties have deposited their instruments of ratification (acceptance).

23. It was noted that the authority to decide to adopt an amendment to the Protocol lies with the Parties to the Protocol.

24. The ad hoc group realized that the current discussion paper was formulated in the context of the Protocol on POPs. It was noted, however, that many of the observations contained in the paper are of a more general nature and therefore not necessarily restricted to the case of the Protocol on POPs. Hence, where relevant, the paper may inform the Executive Body’s deliberations on other protocols under the Convention on Long-range Transboundary Air Pollution.