

IPEN Initial Views on the Draft Mercury Treaty Text

Following INC2, IPEN prepared a document outlining some key concerns that needed to be addressed in a draft mercury treaty text. This note compares these IPEN concerns with the new draft mercury treaty text as described in UNEP(DTIE)/Hg/INC.3/3, along with some additional elements for consideration.

IPEN Concern #1: Releases to all media

A key issue which appears unclear is whether the future mercury instrument will be a treaty focused predominantly on the control of air emissions, or whether it will follow the precedent of the Stockholm Convention and control mercury releases to all media: air, water and land. When mercury is released into the environment it bio-accumulates and bio-magnifies in the food chain. As the objective of the mercury treaty is to protect human health and environment from mercury, releases to all media have to be controlled to impede deleterious effects to humans and the environment.

IPEN believes it is very important that the future instrument be an all-media mercury control treaty that addresses all anthropogenic sources of mercury releases. Mercury moves between media. When mercury is released to land or water, much of it ends up in the air. When mercury is released to the air, it subsequently deposits on the land and into water systems. A treaty focusing only on controlling air emissions is very limiting and will not achieve the protection to human health and the environment that the governments and civil society seek within these negotiations. Furthermore, a focus on air may result in shifts of releases to other environmental media. It will encourage operators to reduce their mercury air emissions by shifting these releases to the land, into water systems, and into products. This could lead to a global treaty that actually intensifies local mercury pollution and exposure. It would be ironic to name the treaty the *Minamata Convention* without it containing strong measures to control mercury releases into water bodies such as those that caused the Minamata disaster. On a similar note, one of the significant sources of mercury exposure to human health is from diet. For some vulnerable populations, this may mean relying on a diet of fish that may be contaminated by mercury.

Many governments at INC2 indicated support for a treaty that will control mercury releases to all media and one government proposed merging Articles 10 and 11 to achieve this objective. This proposal is supported by IPEN and would bring together and integrate measures to control mercury emissions into air with measures to control mercury releases into water and land. A multimedia approach to mercury releases facilitates a comprehensive assessment of the country situation. Procedures such as the UNEP mercury toolkit can be used and perfected by countries in the development of their national implementation plans. Some other

governments, however, appear to favor deleting Article 11 without expanding the scope of Article 10 to incorporate measures to address mercury releases to water and land. IPEN encourages government delegates to give full consideration to the potential negative impacts of a future treaty that fails to integrate controls on mercury emissions into air with controls on releases of mercury into water and land. Such a treaty would likely fail to adequately address important mercury polluting practices and could promote ongoing mercury releases to the environment by shifting releases from air to other environmental media.

How the draft treaty text handles this issue

The draft treaty text has two options: 1) retain separate articles 10 (atmospheric emissions) and 11 (releases to water and land) or 2) combine Articles 10 and 11 and Annexes F and G into a single Article 11.alt and Annex G.alt. IPEN supports option 2, merging the articles into Article 11.alt. However, the current draft text does not adequately address this important issue.

1. The Article should simply be called “Emissions and releases” and “unintentional” should be deleted throughout the text. This is because Annex G.alt includes controls on intentional sources such as manufacturers that produce mercury added products and gold mining using mercury, therefore using “unintentional” is inaccurate.
2. Application of BAT/BEP should be required for new and existing release sources with goals for emission reduction and elimination that are consistent with standards required by the treaty.
3. Addressing the full life cycle of mercury, including in products and waste streams, should be reflected in the Article and relevant Annex. This would include focusing on mercury releases from products and proper controls when mercury is released from waste or other methods of disposal or treatment such as recycling. Therefore, IPEN proposes the word “products” should be included and added to 11.alt para2: “...to the water and land AND PRODUCTS from the source categories listed in Annex G.alt, subject to the provisions of that annex.” IPEN supports the provision of a comprehensive list of banned mercury-containing products including skin lightening creams and other cosmetics.
4. The concept of significant aggregate sources should be eliminated. This two-tier approach is likely to create a system that limits access to financial assistance. Hence, possibly only a relatively small number of countries will receive significant support from the financial mechanism to address their emission sources. For other countries, national efforts to address these sources may be largely voluntary and unsupported. The article should be strengthened to allow Parties to access financial and technical assistance to address mercury sources in their jurisdiction. Therefore, the draft text should be amended to require each Party to adopt a national goal consistent with treaty goals for reducing and eliminating its mercury emissions and releases to all environmental media; to develop a national plan to reduce and eliminate these emissions; and then to implement the plan. If the Convention is to be successful, it will need to stimulate full participation from all governments in all regions.

5. For purposes of clarity, Annex G should combine all source categories in a single list. Separate lists of source categories only serve a function if the concept of significant aggregate emitters is retained. IPEN does not believe this concept is useful.

6. Measures to promote education, training and awareness-raising with regard to the action plan should be included.

IPEN Concern #2: Developing BAT/BEP guidelines

The manner in which the BAT/BEP Guidelines are developed will be important. IPEN agrees that the preparation of detailed BAT Guidelines will need to go to an expert group with final adoption by the Conference of the Parties (COP). However, there presently exists no internationally accepted definition of what the term “best available techniques” means as applied to the control of mercury releases. The INC process must therefore come to an agreement on a general definition of BAT for the control of mercury releases and also on the objectives, guiding principles and policy framework that the legal instrument’s BAT Guidelines will incorporate. This agreement should be reflected in Article 10 or its annexes as it provides the structure and elements needed to implement the obligations of the legal instrument. If this is not done, government officials that sign the final legal instrument will likely have a range of very different views about the type and the nature of the Convention’s BAT obligations. Following this, the expert group charged with drafting BAT Guidelines will almost certainly become paralyzed and unable to produce a useful product that will achieve the protection of human health and the environment from mercury releases.

How the draft treaty text handles this issue

The draft treaty text does not provide for defining BAT in Article 10 and instead charges the first Conference of the Parties with the responsibility of adopting or developing BAT and/or BEP guidelines. The text will therefore need to be amended to define BAT. It will also need to be amended to include a clear statement of the objectives, guiding principles and policy framework that its BAT Guidelines should incorporate. The proposed text of these amendments should be worked out in a contact group at the INC and should be sufficient to provide clear guidance to the expert group in order to help ensure that the BAT Guidelines the expert group prepares will be adequate to achieve actual reductions in mercury emissions and releases. Note that the contact group will not develop the actual BAT/BEP guidelines (role of the expert group), but instead focus on defining what BAT means, including its objectives and guiding principles. Given that good BAT Guidelines will be centrally important to successful Convention implementation, the expert group that will be charged with drafting these guidelines should be given the opportunity to succeed in its work and not be saddled with an undefined task that is sure to fail.

IPEN Concern #3: ASGM and large-scale mining

IPEN was pleased to see the general recognition among delegates that mandatory obligations are needed to address ASGM, which is estimated to be the second largest source of mercury air emissions, and that its impact to workers in the sector and the surrounding community are significant. IPEN would support provisions regarding mercury from the ASGM sector that outline significant reduction and elimination goals and requirements for developing action plans to achieve the targets for reduction or elimination and facilitate accessibility to financial and technical assistance for Parties to implement these provisions. For developing countries and countries with economies in transition, these obligations should be closely linked to the availability of appropriate and adequate technical and financial assistance. Each Party with ASGM within its jurisdiction should be required to develop, implement, report upon, and periodically update a comprehensive plan of action aimed at eliminating mercury use and mercury releases in ASGM. These plans should include:

- A statement of national objectives, reduction targets, and measures that will be used toward achieving the targets;
- Measures that the Party will take to limit the mercury supply available to ASGM including how it will ban legal and illegal mercury imports and restrict other sources of mercury supply to this sector;
- Measures that the Party will take to prohibit, restrict, or discourage the worst practices, including whole ore amalgamation, using cyanide during or after mercury, open amalgam burning, burning amalgam inside homes, and child labor;
- Measures that the Party will take to clean up and remediate mercury-contaminated land and water in ASGM areas and surrounding communities, as well as measures to attempt to restore habitat;
- Requirements to develop a transitional plan that includes sustainable development initiatives, incentives to relinquish and trade-off existing mercury stocks, provisions of alternative livelihoods and assistance and/or other financial and technical aid to specific groups of workers or communities that currently depend on activities that release mercury to the environment for their livelihood.

A global mercury-control treaty will also need to address mercury releases from large-scale mining; both nonferrous and ferrous metals mining and refining operations. In the USA, where data is available, the amount of mercury and mercury compounds in wastes dumped at metal ore mining sites in one year (2008) was more than 2,200 metric tons. This indicates that the global total of mercury and mercury compounds contained in all dumped mining wastes at all past and present metal ore mining operations must be extremely large. These dumped wastes are continuously subject to weathering activities and other natural processes that result in high but unrecorded air emissions, water discharges, and other mercury releases from mining waste dumps. Mining of ferrous and nonferrous metals should be included as a source category in Annex F and acted upon in a treaty that addresses releases to all media as described above.

How the draft treaty text handles this issue

Article 9 of the draft treaty text has two options; one which involves “taking measures” and another (1bis alternative 2) which requires a national action plan. IPEN prefers requiring the development of a national action plan which is eligible for funding from the financial mechanism. This option would allow for a systematic and explicit process that outlines the objectives of the plan and the role of the Party with respect to the goals of mercury reduction from the ASGM sector, the policies and programs and the timeframe to achieve the objectives.

1. Annex E option 1 specifically lists four prohibited practices which should be part of a Party’s obligations in the national action plan.
2. Annex E option 1 describes components of the national action plan including objectives, reduction targets, and measures to eliminate the four prohibited practices. This should be retained.
3. None of the options for national action plans in the current draft text include a requirement to describe measures a Party will take to limit the mercury supply available to ASGM, including how it will ban mercury imports and restrict other sources of mercury supply. This requirement should be added. The national action plan should require each Party to submit an inventory of mercury supply for the ASGM sector and the timeframe for reducing levels of mercury supply from each source, including imports of mercury.
4. None of the options for national action plans in the current draft text include a requirement to clean up and remediate mercury-contaminated land and water in ASGM areas and surrounding communities. This requirement should be added. The failure to include provisions that aim to identify and remediate mercury contaminated sites (water and land) will result in ongoing mercury exposure to vulnerable communities including workers.
5. The draft treaty text fails to include provisions for transition assistance and/or other aid to specific groups of workers or communities that currently depend on activities that use or release mercury to the environment for their livelihood.

No single Article describes actions on large-scale mining, however several are pertinent.

1. Both ferrous and nonferrous metals should be included in a single annex describing source categories (Annex F/G).
2. Other relevant Articles for mercury releases from large-scale mining (both current and legacy sites) are described below, including wastes (Article 13), contaminated sites (Article 14), and financial considerations (Article 15).

IPEN Concern #4: Wastes

IPEN believes the mercury treaty should have specific provisions to address the management of mercury-containing wastes and not simply delegate its responsibility on this important issue to the Basel Convention. We expect the future mercury treaty will centrally include within its objectives the protection of human health and the environment. This is not a specific objective of the Basel Convention. Nor does the Basel Convention fully address issues relating to the domestic handling, collection, transport, and alternatives for management of mercury wastes. On the other hand, because overlaps between the mandates of a mercury treaty and the Basel Convention will exist, concerns about overlapping authority should be addressed and the development of guidelines on wastes under the mercury treaty should be done in consultation with the Basel Convention.

How the draft treaty text handles this issue

Article 13 of the draft text includes two options and IPEN favors a mandatory version of Paragraph 2, alternative 2 for the reasons described above. The following recommendations should be considered by the participating countries at INC3:

1. It is important that the Conference of the Parties “shall develop guidelines” for mercury waste management and not “consider devising.”
2. The draft treaty text should retain language that the guidelines shall take into account guidance on storage and relevant provisions of the Basel Convention.
3. Retain with amendments bracketed text requiring Parties to minimize and prevent the generation of mercury waste and implement public awareness campaigns.
4. Include requirements for Parties to prepare action plans as proposed in bracketed text (remove the brackets).
5. There is a need to outline liability and compensation requirements in this Article. Provisions on liability and compensation for damage caused by movement of wastes are bracketed and should be retained.
6. Cooperation between Parties, IGOs, and others for the purpose of developing and maintaining capacity for environmentally sound storage/disposal of mercury wastes is bracketed and should be retained.

IPEN Concern #5: Contaminated sites

At INC2, governments indicated support for Convention provisions addressing contaminated sites. Different views were expressed, however, on whether such provisions should be voluntary or mandatory. Complicating factors in this discussion include: the extremely high costs associated with remediating mercury-contaminated sites; the challenges to developing countries and countries with economies in transition of finding the needed resources to

remediate such sites; and concerns by donor countries and others that the costs of comprehensive programs to remediate all mercury-contaminated sites would overwhelm the capacity of any conceivable financial mechanism.

A way forward that IPEN supports would be to include provisions in the treaty that mandate Parties to prepare, implement, and report on plans for developing a comprehensive inventory of mercury-contaminated sites (including mercury compounds) within their jurisdiction, including a full characterization and evaluation of each site and health impacts on the affected populations. Where possible, the responsible party should be identified, and in all cases, the source of the mercury contamination and pollution should be identified. If the contamination is continuing, it should be stopped. Immediate and long-term potential health impacts should be identified and highlighted and full information should be provided to potentially impacted communities, taking into account vulnerable populations. The plan should also include mechanisms for implementing Rio Principle 10: *Access to information*; Rio Principle 13: *Compensation for Victims of Pollution and other Environmental Damage*; and Rio Principle 16: *The Polluter Pays Principle*. The primary responsibility for compensation and site remediation should rest with the responsible parties, but the treaty should also include provisions to promote international cooperation to address the most problematic sites where the responsible party cannot be identified or where it lacks the necessary level of resources. When mercury contaminants are/were removed and moved to another location for cleanup of mercury contaminated sites, they should be collected, transported and disposed of in an environmentally sound manner in order to prevent them from becoming a source of continuing contamination afterwards. A legally binding instrument on mercury should not ignore the contributions of mercury contaminated sites to the ongoing challenge of reducing and preventing ongoing exposure to mercury to health and the environment. If the objective of the mercury legal instrument is expected to focus on the protection of human health and the environment from mercury exposure, specific obligations on its Parties to protect the public from mercury contaminated sites is necessary and should be an integral component of the instrument. It would be ironic to name a global mercury control treaty the *Minamata Convention* without it including any obligations on its Parties to protect the public from contaminated sites.

How the draft treaty text handles this issue

Article 14 of the draft treaty text takes two approaches to this topic: 1) vague voluntary measures as presented in option 2 and in the previous draft elements paper presented at INC2; or 2) voluntary or mandatory actions to remediate the sites. IPEN supports a mandatory approach to address mercury contaminated sites as described above. The legal text to support mandatory measures should be strengthened in the current text.

1. The draft text offers a choice between mandatory and voluntary actions related to contaminated sites. IPEN supports provisions in the legal instrument that places mandatory obligations on Parties to address contaminated sites, including legacy sites.
2. Actions such as identifying, assessing, and prioritizing remediation are present in the text and these should be mandatory, not optional as one alternative indicates.

3. The draft text should include provisions for identifying the responsible party for the purpose of compensation and site remediation. This is currently absent from the draft treaty text.

4. The draft text should include a mechanism for implementing Rio Principles 10, 13 and 16. These principles are stated as follows:

Rio Principle 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Rio Principle 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Rio Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.¹

These elements should be part of actions related to contaminated sites but are currently absent from the text.

5. The draft text should clearly state that mercury contaminants removed from contaminated sites should be collected, transported and disposed of in an environmentally sound manner as required in Article 13 Mercury Wastes.

IPEN Concern #6: Financial mechanism and its link to compliance

Like many delegations at INC2, IPEN sees merit in a Convention financial mechanism that links a Party's access to funds with the fulfillment of its compliance obligations. This

¹UNEP. Rio Declaration on Environment and Development. Principle 13 and 16.

<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

approach, however, would cause serious problems if critically important Convention provisions are made voluntary, as the implementation of such provisions, arguably, would then not be eligible to receive support from the Convention financial mechanism.

The draft elements paper proposed that many important provisions would be voluntary. These included, among others: the preparation and implementation of National Implementation Plans; measures addressing ASGM and contaminated sites; and for most countries, the control of mercury emissions from power plants, metal refining; waste incinerators and cement plants. In these and similar areas, IPEN supports mandatory obligations to develop, implement, report on, and update plans (with details on what these plans should address spelled out in relevant articles). This approach brings critically important treaty provisions into its compliance regime, making them open to support from the financial mechanism.

Regardless of the particular mechanism, however, IPEN believes that the Convention financial mechanism should provide privileged access to Least Developed Countries (LCDs) and Small Island Developing States (SIDs). This might include, among others: relaxation of co-finance requirements, assistance in developing funding proposals, and broader latitude in project eligibility.

How the draft treaty text handles this issue

1. Language connecting the financial mechanism with compliance is present in Article 15, which includes financial assistance links to “...comply with the control measures set forth in this Convention.”

2. The concern over whether critically important Convention provisions are made voluntary and therefore would not be eligible to receive support from the Convention financial mechanism still exists in the draft text as shown in the following examples:

- National Implementation Plans (Article 21) contains various text options including weak language such as “in a position to do so”. This suggests ineligibility for financial assistance.
- Text options for ASGM (Article 9) include weak options such as “consider taking measures” which suggests ineligibility for financial assistance for the second largest source of mercury pollution.
- Language options for dealing with contaminated sites (Article 14) include “shall endeavor” which suggests ineligibility for financial assistance despite the interest in naming the treaty the *Minamata Convention*.
- Text such as “should encourage” as applied to BAT (Articles 10, 11, and 11alt) suggests that measures to control mercury emissions from power plants, metal refining, waste incinerators and cement plants could also be seen as voluntary and not eligible for financial assistance.

3. The financial mechanism text lacks language providing privileged access to Least Developed Countries (LCDs) and Small Island Developing States (SIDs). This is important to ensure that funding prioritizes countries that need it the most.

IPEN Concern #7: Naming the treaty

The proposal to name the global mercury treaty the *Minamata Convention* is highly significant. IPEN believes that naming the global mercury control treaty the *Minamata Convention* would directly connect the Minamata tragedy to global efforts to protect human health and the environment from mercury pollution. Therefore, if the treaty is to bear the name *Minamata*, the victims and their legitimate demands must be honored and the lessons of the Minamata tragedy must be applied to the treaty.

More than fifty years have passed since Minamata disease was first diagnosed and victims' groups continue to have legitimate dissatisfaction with the responses to this tragedy. Victims' groups want all victims to be recognized and compensated. They want a comprehensive health study of people in the impacted areas (which has still never happened). They want to ensure that the Polluter Pays Principle is fully and properly implemented. They want the present potentially unsafe landfill, which was temporarily constructed with large amounts of highly contaminated mercury sludge dredged from Minamata Bay (without taking account of long-term durability and earthquake-resistance), to be reviewed as soon as possible. They also want it to be improved as necessary by means of environmentally sound practices, and monitored periodically as a final solution. Finally, the Minamata victims' groups want a health and welfare system established that will enable residents to live secure lives.

IPEN stands in solidarity with the Minamata victims' groups that insist that the ongoing tragedy must be properly addressed by the Government of Japan and the Chisso Corporation before the Convention can take the name the *Minamata Convention*. This means that public commitment and concrete steps toward a genuine resolution of outstanding issues should be taken before the diplomatic conference in 2013.

At INC2, Mr. Katsuaki Miyamoto, Mayor of Minamata, Japan, appealed "for human and environmental considerations to be accorded high priority in the mercury negotiations." This, we believe, would mean nothing less than fully honoring the victims and their demands for elusive justice.

Minamata groups' naming statement

http://www.ne.jp/asahi/kagaku/pico/mercury/INC2_NGO/Minamata_Statement_110123_en.pdf

IPEN Honoring Minamata Statement

<http://www.ipen.org/hgfree/media/honoring%20minamata%20statement.pdf>

How the draft treaty text handles this issue

The draft treaty text does not deal with this issue.