IPEN Views on the Mercury INC2 Elements Document

January 2011

IPEN is very disappointed by the secretariat paper *Draft elements of a comprehensive and suitable approach to a global legally binding instrument on mercury*.[1] We thank the secretariat for its work, but in our view, the paper lacks ambition. Mercury pollution represents a large and serious global threat to human health and the environment and a robust and ambitious global response to this threat is needed. Instead, the measures contained in the secretariat's draft elements paper, taken as a package, are inadequate. These measures, taken together, are insufficient to drive the actions that will be needed to reduce releases of mercury to the global environment on the scale required to adequately protect human health and the environment and bring down global mercury pollution so that fish are once again safe to eat.

We therefore call upon national and regional delegations to the Intergovernmental Negotiating Committee (INC) to introduce and support strengthening amendments that will lead to the adoption of a sufficiently strong and comprehensive global mercury control treaty so that future generations may be spared the neurological damage from exposure to mercury that prevents children from achieving their full mental potential.

After years of debate, the world community reached agreement that a global legally-binding instrument to control mercury pollution is needed. The INC was then established to prepare the instrument. Unfortunately, the secretariat's draft paper presented to INC2 as the proposed basis for negotiations envisions a treaty regime that is largely aspirational and voluntary. If its approach is accepted by the INC, it appears that only a handful of the largest and most industrial developing and transition countries will be subject to critical compliance requirements. At the same time, the financial mechanism proposed in the draft appears to strictly limit the provision of financial and technical support to compliance activities. If this approach is adopted, only a few countries may be fully eligible to receive treaty compliance support from the financial mechanism.

The draft even proposes that the preparation of National Implementation Plans (NIPs) will be voluntary (Article 21). If this is approved, NIP preparation may not be considered a compliance activity and may not automatically be eligible for financial support. The experience of the Stockholm Convention has taught that for many countries, preparing a NIP is essential for

[1] UNEP(DTIE)/Hg/INC.2/3 Draft elements of a comprehensive and suitable approach to a global legally binding instrument on mercury

national ratification, for establishing a comprehensive understanding of national sources, and for meaningful engagement in Convention implementation.

Examples of IPEN's concerns with the *Draft elements* document include use of the term "*not allow*"; how mercury-containing products are handled; mercury-using manufacturing processes; artisanal and small-scale gold mining; atmospheric emissions; and remediation of contaminated sites. Each of these is discussed below.

"Not Allow"

In Articles 3 (Mercury supply sources), 7 (Mercury-added products), and 8 (Manufacturing processes in which mercury is used), the draft elements paper uses the term "*not allow*" in place of more ordinarily used phrases such as *ban, prohibit,* or *prevent*. These articles should be amended to change the term "*not allow*" to "*prohibit*" in all appropriate locations.

The term "*not allow*" does not have a clear meaning. It appears to have never been previously used in other legal instruments and lacks a precise legal definition. It is a passive term and it is not clear that requiring a Party to *not allow* an activity creates an affirmative legal obligation on the Party to actually stop or prevent the activity from taking place. According to the draft elements paper, this phrase was chosen to allow for "*situations in which the specified activity does not occur in a Party's territory and the Party may therefore not need to adopt a law or regulation to address it.*" We do not find this justification compelling. The possible loophole created by the use of this term far outweighs the relatively small additional burden on Parties that is created by replacing the term "*not allow*" with "*prohibit*" or "*prevent.*"

Article 7: Mercury-added products

In IPEN's view, Article 7 should ban all mercury-added products other than those subject to an exemption. Instead, the secretariat draft of Article 7 proposes that only those mercury-added products that are listed in Annex C will be subject to control by the Convention.

If the secretariat's proposal is accepted, Annex C should be amended to include the categories: Mercury-Containing Pesticides and Biocides, and Mercury-Containing Paints and Pigments.

The secretariat draft provides an unclear picture of how exemptions will work. It appears that draft Article 7:

- Has the INC negotiate all allowable use exemptions;
- Provides no procedure for establishing or renewing time-limited exemptions; and
- Provides no procedure for updating the list(s) of exemptions after the Convention enters into force.

Article 7 should be amended to allow for time-limited exemptions. The secretariat's draft calls for only one type of exemption: an allowable use exemption. An allowable use exemption may be appropriate, at least in the medium term, for products such as compact fluorescent lamps. (Although in the longer term, as energy-efficient mercury-free lamps become affordable, this allowable use may need to be repealed.) However, without provisions for time-limited

exemptions, there will be unstoppable pressure to grant allowable use exemptions even for highly polluting uses that Parties can easily phase-out over a number of years, thereby providing exemptions of indefinite duration for uses of mercury-added products that can and should be phased-out.

The article should also establish an orderly procedure for amending Annex C to add other categories of mercury-containing products so that the Convention will be able to respond to new products and new information.

Article 8: Manufacturing processes in which mercury is used

The article includes no provisions for establishing any global timeline for the phase-out of any mercury-using manufacturing processes even though such a procedure could be very useful, for example, in achieving a relatively rapid final global elimination of mercury cell chlor-alkali plants.

Annex D, which lists all the mercury-using processes that will be subject to control under the Convention, has only two proposed entries: Chlor-alkali production and Vinyl chloride monomer (VCM) production. It should be expanded to also list other chemical production processes that utilize mercury compounds as catalysts. This would include, among others, acetaldehyde production and polyurethane production. The original Minamata disaster was caused by water discharges into Minamata Bay from a mercury-catalyzed acetaldehyde production plant. It would be ironic to adopt a global mercury control treaty named the Minamata Convention which contains no provisions to ban or control the chemical production process that was responsible for causing the Minamata disaster.

Article 8 requires each Party with one or more facilities that use mercury in the manufacturing processes listed in Annex D to prepare a national action plan to reduce and eliminate its use of mercury in such processes. Article 8, however, nowhere states that these Parties have any obligation to implement the plans they prepare.

The national action plans called for in Article 8 are required to include the elements listed in Part II of Annex D. Part II appropriately requires that the plan include an inventory of the number and type of facilities that use mercury in the manufacturing processes including estimates of the amount of mercury that they consume annually. Part II, however, does not require any measurements or estimates of mercury emissions or mercury releases from those facilities. This data is essential. At present, the international community has absolutely no data on mercury emissions and environmental releases from mercury catalyzed VCM production. This process was estimated by UNEP in 2008 to consume 770 metric tons of mercury. Since only approximately half of this consumed mercury has been accounted for, VCM production might be among the highest contributors to global anthropogenic mercury pollution. But since no data is available, no one knows.

Draft Article 8.2 prohibits the introduction of mercury-using manufacturing processes or facilities listed in Annex D that were not used or present in the territory of the Party at the date of entry into force of the Convention. This provision has two serious problems. First, it provides a

license that allows those Parties where such facilities presently exist to expand their number and size with no upper limit. Second, it encourages Parties that may want to build and operate such facilities in the future to quickly build plants before the Convention enters into force. In this way, the period before entry into force operates as an unlimited license for Parties to build as many facilities as they want. The article should be amended to put clear limits and restrictions on the construction of new facilities of these kinds and on the expansion of existing ones. If a cut-off date is needed to allow countries with pre-existing facilities to continue operation, the date to use should be the date of the Diplomatic Conference that adopts the Convention and not the date of the Convention's entry into force.

Article 9: Artisanal and Small Scale Gold Mining

Artisanal and small-scale gold mining (ASGM) is ranked by UNEP as the second largest source of global mercury air emissions, contributing an estimated 18 percent of total air emissions from all sources. ASGM is also a very large source of direct mercury discharges to water systems. It causes severe occupational and community mercury exposure, and, although it brings money into communities, it also often causes local inflation which disrupts local economies and often has the effect of making poor communities even poorer. With very high and rising gold prices, ASGM practices will continue to expand unless measures are imposed to control this practice. Draft Article 9 however appears to propose only voluntary measures for addressing ASGM. This could place Party efforts to address ASGM outside of the Convention compliance regime thus possibly making these activities ineligible for support from the Convention's financial mechanism.

Article 9 in the draft begins with an aspirational statement of intent:

Each Party that has artisanal and small-scale gold mining within its territory at the date of entry into force of this Convention for it shall reduce and, where possible, eliminate the use of mercury in such mining.

Article 9, however, includes no real compliance obligations. All that Parties are actually obliged to do toward achieving this laudable aspirational goal is to "*consider taking measures.*" There are no obligations to actually do anything. The draft justifies this as providing Parties with "*flexibility and non-binding approaches.*" Whether intentional or otherwise, the draft also gives full flexibility to donor Parties with regard to whether or not they provide technical and financial assistance in support of measures to reduce and eliminate mercury use in small-scale gold mining.

Draft Article 9.2 indicates that technical and financial assistance in support of national measures to reduce and eliminate the use of mercury in gold mining will be voluntary. It states: "*Parties <u>may</u> cooperate with one another and with relevant intergovernmental organizations*" (emphasis added) in the provision of technical and financial assistance and other related matters. In IPEN's view, costs associated with ambitious and effective national programs to reduce and eliminate mercury use in ASGM will be considerable. A robust global mercury control treaty will need to include obligations on donor Parties to provide substantial support to such programs.

Article 9 should be amended to require each Party with artisanal and small-scale gold mining on its territory to develop and implement a national action plan whose objective is to minimize and eliminate the use of mercury in ASGM. Such plans should include:

- A statement of national objectives, reduction targets, and measures that will be used toward achieving the targets;
- Measures the Party will take to limit the mercury supply available to ASGM including how it will ban mercury imports and other sources of mercury supply to this sector;
- Measures the Party will take to prohibit, restrict, or discourage the practice of whole ore amalgamation – the worst of all gold mining practices; and
- Measures and mechanisms the Party will use to clean up, remediate and rehabilitate ASGM sites after mining activity ends.

Parties should periodically report to the Convention their progress under the plans and Article 9 should indicate that the plans will be periodically updated.

This approach gives Parties considerable flexibility, but it also places Party activities to reduce and eliminate the use of mercury in ASGM firmly within the Convention compliance regime and therefore makes these activities eligible for support from the Convention financial mechanism.

Articles 10: Atmospheric Emissions

According to UNEP's 2008 Global Atmospheric Mercury Assessment, the unintentional sources of mercury releases (fossil fuel combustion, metals mining and smelting, cement production and waste incineration) taken together account for more than 70% of all atmospheric mercury emissions. This suggests that the effectiveness of Convention measures to address these sources will be critical. IPEN agrees with the draft elements paper that obligations to require and promote the use of best available techniques (BAT) should be at the center of Convention measures aimed at addressing these sources. However, we have serious concerns about the specifics of the proposed text.

We agree with the critical elements paper that it would be too complicated to attempt to incorporate detailed BAT Guidelines into the Convention text itself, and that therefore 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. Article 10.4 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.

Unless such amendments are adopted by the INC and incorporated into the Convention text, the expert group charged with drafting BAT Guidelines will almost certainly become paralyzed and be unable to produce a useful product. 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.

We have several other concerns about this article as well. It appears that the draft does not think through the implications of having Article 10 address only atmospheric emissions, but not releases to water or land. This article is drafted to address four sources listed in Annex E: coal-fired power plants and industrial boilers; non-ferrous metals production facilities; waste incineration facilities; and cement production factories. The draft elements paper appears to propose no measures to control mercury releases to water and land from these very large sources. However, if the Convention places controls on only the air emissions from these sources and not on other media, this would invite media shifting. Operators would, in effect, be encouraged and rewarded for reducing mercury air emissions by means that create additional mercury water and land pollution. Articles 10 and 11 should therefore be combined into a single article that utilizes BAT to control both mercury air emissions and also mercury releases to water and land. This combined article should refer to a single Annex E that is expanded to also include sources listed in draft Annex F and other significant mercury sources for which establishing a BAT standard would be useful.

An unintentional mercury source of particular concern is mercury emissions from the use of fossil fuels for residential and industrial heating. UNEP's 2008 Global Atmospheric Mercury Assessment estimates this source contributes 20% of all global anthropogenic air emissions, making it one of the largest sources. However, the draft elements paper does not appear to address this important source in any way. Article 10 and Annex E should be amended to address and control this important source.

IPEN finally proposes amending Article 10.5 to remove the two tier approach in which a relatively small number of (large, highly industrial) Parties with "significant aggregate mercury emissions" will be subject to detailed compliance obligations while other Parties will not be required to develop and implement national action plans aimed at addressing the Article 10 sources. The article should be amended to require each Party to adopt a national goal for reducing and eliminating its atmospheric mercury emissions and releases; to develop a national plan to reduce and where feasible, eliminate these emissions; and then to implement its plan.

The two tier approach suggests that possibly only a relatively small number of countries will receive significant support from the financial mechanism to address their Annex 10 sources. For other countries, national efforts to address these sources may be largely voluntary and unsupported. IPEN is concerned that this approach will not achieve its intended objective. We believe that if the Convention is to be successful, it will need to stimulate full participation from all interested governments in all regions. People in many Least Developed Countries and Small Island Developing States have the greatest stake in the success of this Convention, especially those with no good alternatives to a heavily fish-based diet. Their governments need to become fully engaged in this Convention and its implementation in order to build the global momentum

that will be needed to persuade those countries with the highest total mercury emissions to do what is necessary to bring down their total emissions.

Article 13: Contaminated Sites

The original Minamata disaster resulted from the contamination of Minamata Bay by a mercury-catalyzed acetaldehyde production plant. Draft Article 13 in the secretariat's paper, however, is purely voluntary and does not include any compliance obligations on Parties requiring them to do anything to address contaminated sites on their territories. This places Party efforts to address contaminated sites outside the Convention compliance regime and thus possibly ineligible for support from the Convention's financial mechanism. 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 such as Minamata Bay.

The treaty should obligate its Parties to develop and implement plans to address mercury-contaminated sites. Elements of these plans should include:

- The identification and assessment of mercury-contaminated sites on their territories, including abandoned sites left after the closure of facilities;
- Procedures for adequately implementing the Polluter Pays Principle in order to hold responsible parties liable for remediation costs and to ensure that all victims of mercury pollution receive proper compensation;
- Measures to prevent mercury contamination from spreading;
- National guidelines to ensure that sites contaminated by mercury and mercury compounds are remediated in an environmentally sound manner;
- National guidelines to ensure human exposure to mercury is minimized before, during, and after remediation, with special consideration for vulnerable populations;
- Procedures to investigate health impacts on persons living near mercury-contaminated sites, taking into account impacts on vulnerable populations; and
- Measures to provide information to people living near mercury-contaminated sites on the risks of mercury exposure.