

## Introduction

The Zero Mercury Working Group (ZMWG) welcomes the draft treaty text prepared by UNEP in preparation for INC 3. The draft text represents the range of government positions submitted to UNEP, and thus contains many options, alternatives, and bracketed provisions. In this document, ZMWG provides its preliminary recommendations regarding which options and alternatives should form the basis for further work by the INC, and identifies key draft provisions which warrant support, modification, or deletion as the negotiations proceed.

## Relationship with Other International Agreements (Article 1 bis)

Article 1 bis, paragraph 1 states that the mercury treaty would not affect rights and obligations under other treaties. Similar language was proposed and rejected under the Stockholm Convention because in interpreting international law, where two treaties address the same subject area, the most recent treaty is viewed favorably as the intent of the international community, since it was ratified with the parties aware of the first agreement. Since the paragraph 1 text can be viewed as an attempt to negate this rule of interpretation, adoption of the proposed language may needlessly encourage WTO challenges affecting the supply and trade provisions of the mercury treaty. ZMWG recommends rejection of proposed paragraph 1 text in Article 1 bis. We note that if paragraph 1 is deleted, paragraph 2 of Article 1 bis would remain, containing text similar to the Stockholm Convention indicating the Mercury Convention and other trade and environment treaties are “mutually supportive”.

## Supply and Trade (Articles 3-5)

Two alternatives are presented in Article 3 regarding primary mercury mining. Option 1 would prohibit mining for export purposes within 0-5 years (depending upon the alternatives chosen), and phase-out all mercury mining within 3-5 years. Option 2 would leave the phase-out of mining to the discretion of a party based upon what the party determined to be economically feasible, and require compensation for not mining. Since primary mining is the least preferred source of mercury, because it adds new mercury to the global pollution problem and is itself a significant source of mercury pollution, ZMWG supports adoption of option 1 in Article 3, with a 3 year maximum phase-out of primary mining. Option 2 of Article 3 should be removed from further consideration.

Under Article 4, alternative 2 of paragraph 2(b) weakens the requirement that governments consent to the import of mercury, and paragraph 4 would undermine the trade provisions of the treaty by deferring inappropriately to the Basel Convention. These provisions should be removed from further consideration. ZMWG supports

Paragraph 2 bis containing the domestic approval authorities needed to implement the trade provisions of the treaty, and paragraph 3(b) requiring that the trade of mercury for use as dental amalgam be in the encapsulated form, to minimize the potential for the illegal divergence of this mercury for ASGM purposes.

The Article 5 non-party trade provisions are currently weak, in that exports to non-parties are not limited to uses allowed under the convention, and thus are inappropriately less stringent than the trade provisions with parties. The preferred approach for non-Parties is to prohibit exports to non-Parties outright, but at a minimum, any exports for use should be limited to allowable uses under the Convention after the exporter receives an exemption, just as is proposed for products under Article 6, option 1, alternative 2, par. c.

#### Products (Article 6)

Option 1 (positive list) would prohibit production, import or export of listed mercury-added products, except in the case of allowable use exemptions. Option 2 uses a negative list approach, stating that manufacture of mercury-added products is generally prohibited, unless an allowable use exemption listed has been obtained.

Option 3 proposes that Parties nominate and register mercury added products in one of 3 categories: (1) prohibited products, (2) products for which a transition period is required; and (3) products deemed an “essential use” due to the lack of feasible alternatives. Option 4 does not provide any product list to be controlled, but recommends a more voluntary approach for limiting use of mercury in products through fiscal incentives to promote alternatives and by regulating sale of mercury.

ZMWG recommends adoption of option 2 as the basis for further negotiations because the negative list approach would discourage new uses of mercury and place a higher burden on manufacturers and others wishing to prolong their use of mercury where non-mercury alternatives are available. Options 3 and 4 as currently presented should be removed from further consideration. A voluntary approach to phasing out mercury products will not produce meaningful results, given the product partnership has been pursuing this approach for the past six years with very limited impact. Important details of option 3 are unclear or lacking, such as which products fall within which categories and when those decisions will be made, how products move between categories, etc. It is simply unacceptable to defer decisions on which products should be targeted for phase-out to the COP - since this is something that the treaty should indicate up-front.

Option 2 should be further refined by including Paragraph 4 of option 1, and deleting Paragraph 5 of option 2. Paragraph 4 of option 1 contains proposed text prohibiting the trade of equipment used to make phased out products in order to discourage non-parties from making these products. Paragraph 5 of option 2 (repeated as Paragraph 6

of Option 1), currently in brackets, would make the phase-out non-mandatory and subject to Party unilateral waivers, and thus is similar to option 4 and should be removed from further consideration.

With respect to trade, we support language in the draft text requiring a Party trading with non-Parties to obtain an allowable use exemption, so that trade with non-Parties is at least as stringently regulated as trade with Parties.

#### Processes (Article 7)

Three alternatives regarding allowable-use exemptions for mercury use processes are proposed for Paragraph 1. Option 1 is a positive list approach, where processes concerned are listed in Annex D; option 2 is a negative list approach, meaning that there is a general ban of mercury in all processes apart from the processes receiving an allowable use exemption under Article 8. Option 3 proposes listing processes as 'prohibited', for 'phase -out' and 'essential', but like the similar proposal on products, no specifics are proposed.

ZMWG supports the negative list approach for processes (option 2), and urges governments which may have a reservation about the negative list approach for products to nevertheless support this approach for processes. There are fewer processes involving mercury, and therefore fewer unknowns about what would be covered under a negative list approach.

ZMWG recommends rejection of Option 3 as too flexible and lacking detail about what would be covered and when, and we do not believe there is a need for an “essential use” category here, since any challenging issues can be handled through the Article 8 exemption process. For this reason, ZMWG opposes any “acceptable or essential use” exemption in Article 7 (or in Article 8, par. 10, for the same reason).

ZMWG recommends inclusion of the Paragraph 6 text prohibiting the export of equipment used in mercury-added production processes, to discourage non-parties from using mercury in processes to be prohibited by the treaty.

#### Allowable Use Exemptions (Article 8)

Two overall options are presented, with different alternative paragraphs under option 1. Under one set of alternatives under option 1, COP review and approval would be required before an exemption is granted (par. 1, alternative 2), the duration of the exemption would be a maximum of 5 years (par. 4, alt. 2), and parties seeking the request would need to provide information on the availability of non-mercury alternatives and steps taken to eliminate the use of mercury as soon as possible (pars. 5 and 7).

Option 2 would create an open-ended exemption process, allowing Parties the ability to unilaterally declare exemptions of unlimited duration upon submission of a notification, and condition the phase-out of mercury use upon providing financial assistance and technology transfer. Another provision of option 2 would delay the phase-out mandates by 10 years for all developing countries.

ZMWG recommends that option 2 be removed from further consideration as too open-ended, resulting in exemptions too easily obtained for too long a period of time. Within option 1, ZMWG recommends adoption of the elements of option 1 which provide for COP review and approval (par. 1, alternative 2), require parties to make meaningful demonstrations to the COP that an exemption is appropriate (bracketed text in pars. 5 and 7), limit the exemption duration to a reasonable period of time (par. 4, alternative 2), and provides the COP with authority to end the availability of exemptions when non-mercury alternatives are globally available (par. 9, alternative 2).

#### Artisanal Small-scale Gold Mining (ASGM- Article 9)

The draft treaty text can be viewed as addressing three related subject areas: (1) the countries covered; (2) the obligations expected; and (3) controlling mercury import and export pertaining to ASGM. With respect to which parties must comply, the draft text presents two options – all parties which have ASGM activities, or those parties with ASGM above a certain volume of gold production. ZMWG recommends rejection of the production threshold approach, since it will prove challenging in some countries to determine the ASGM-related gold production quantity. Moreover, production levels may change significantly over time so even parties with limited activity now should have programs in place which can be implemented and expanded as the situation on the ground changes.

With respect to the nature of the obligations, ZMWG recommends the text which addresses both the ASGM sector and the use of mercury in the sector. Looking at mercury use only will be too limiting given the complexity of the problem. Regarding plan development, we find alternative 1 repetitive of existing obligations under the treaty, and thus prefer alternative 2 as more straightforward and simple. Similarly, we favor the second alternative on international cooperation since it elaborates on possible activities in this area, and alternative 2 and its associated elements of the plan in Annex E as more straightforward and complete.

Regarding the issue of ASGM related mercury trade, ZMWG supports treaty text which provides for an allowable use exemption (time bound, quantity limited – see above) to export or import mercury for ASGM consistent with alternative 2. Some countries that have large gold production with the use of mercury might not be able to immediately comply with the treaty requirements or will need time to reduce demand so all the mercury needed would be available domestically. The Article 8 exemption process

would be amended to provide for exemptions under Article 9. ZMWG recommends the removal of ASGM from Annex D (list of industrial processes) since ASGM is best left as a separate article.

### Emissions (Articles 10 and 11)

Two overall options are presented, one leaving Articles 10 (air) and 11 (other media) separate (option 1), and one combining them into one Article (option 2). Aside from this difference, the two options are largely the same, so the important substantive issues are presented as bracketed text within both options.

The key issues raised by the bracketed text include whether BAT requirements are mandatory for new and/or existing facilities, how long facilities would have to comply, whether BAT or the annex would include emission limit values, and whether BAT would be provided free of charge.

ZMWG recommends the adoption of treaty text which subjects new and existing facilities to the mandatory BAT compliance obligation as soon as possible, and therefore opposes any bracketed text which would weaken this mandate. In addition, ZMWG supports the inclusion of threshold limit values and reduction benchmarks as part of the mandatory control obligation. Accordingly, we recommend inclusion of most of the bracketed language in paragraph 4 of Option 1 to implement BAT/BEP measures, but oppose the language requiring BAT to be supplied “free of charge” to anyone as a poison pill.

Regarding priority source categories in the annexes, ZMWG opposes the inclusion of ASGM in these provisions, since ASGM warrants a separate control regime under Article 9. We support the inclusion of the other additional air source categories.

Overall, ZMWG supports an approach which targets significant pollution sources to all media, and the preparation of BAT guidelines which address all relevant media for the targeted source categories. If the Articles are combined, all media-related definitions should be reviewed and changes made to ensure a multi-media approach suitably addresses all appropriate forms and sources of mercury.

### Storage (Article 12)

The key issues under Article 12 are: (1) what mercury is covered under the storage article; (2) the development of storage guidelines; and (3) international and regional coordination and cooperation.

Regarding which mercury is covered under Article 12, the broader coverage is preferred, especially the inclusion of mercury whose classification falls out of the Basel Convention. Thus ZMWG recommends using alternative 1 of paragraph 1 as the basis for further discussion.

ZMWG opposes language which defers development of storage guidelines to the Basel Convention, in part because the Basel Convention has limited jurisdiction in this area. For this reason, ZMWG recommends rejection of option 2 in this Article. ZMWG also believes creating an Annex for these guidelines may prove unworkable, given their likely length and complexity.

On the issues of coordination and cooperation, ZMWG supports Secretariat assistance to facilitate regional storage planning, but opposes language suggesting every party or every region must develop one storage facility as premature and likely unnecessary.

#### Wastes (Article 13)

The draft treaty text contains many alternatives, and within the alternatives bracketed text, so for simplicity purposes, ZMWG provides its recommendations on wastes on four key issues: (1) scope; (2) trans-boundary movement; (3) relationship to the Basel Convention; and (4) waste minimization.

Regarding scope, greater clarity is needed in this Article regarding how wastes from emission sources covered under Articles 10 and 11 will be handled under the treaty, so that there is no gap in coverage between the BAT documents produced under Articles 10 and 11, and the waste guidelines produced in Article 13.

ZMWG supports the alternative 1 text in paragraph (1)(c) regarding trans-boundary movement of mercury wastes, limiting such movement to between developed countries, or from developing countries to developed countries after the exporting Party has received the written consent of the importing State and determines that the importing state has environmentally sound disposal facilities.

ZMWG opposes text wherever it appears in Article 13 deferring policymaking or guideline development to the Basel Convention. ZMWG believes text encouraging cooperation and coordination between the two Conventions is the better approach, since the mercury treaty should retain primary authority to set waste policy and ensure consistency between the treaty waste provisions and other treaty aspects.

Paragraph 3 contains relatively weak text regarding the need to minimize waste generation. ZMWG recommends strengthening this provision by requesting the COP to establish time sequenced mercury waste reduction targets, taking into account the product and process phase-outs established under Articles 6 and 7.

#### Contaminated Sites (Article 14)

Two overall options are presented. Option 1 contains bracketed text which would alter the scope of the mandate drastically. The key distinction in the bracketed text is whether parties “shall remediate” or “shall endeavor to remediate” contaminated sites, the former creating a mandatory obligation to remediate sites and the latter making it merely optional. Similarly, there is bracketed text as to whether parties “may” (discretionary) or “shall” (obligatory) cooperate. Option 1 also contains provisions on

developing best available technology for remediation, which would be helpful to countries that develop programs.

Option 2 is a simple two sentence provision, generally encouraging governments to develop strategies for identifying contaminated sites, and to remediate sites in an environmentally sound way, but not requiring anything.

ZMWG recommends removing option 2 from further consideration since it is not responsive to the needs of parties or victims of contaminated sites, particularly in the developing world.

As noted above, within option 1, there is a huge disparity of views regarding the nature of the obligations appropriate for contaminated sites. As a way of moving forward, ZMWG recommends inclusion of a mandatory inventory and site characterization requirement, so that parties obtain the necessary baseline information needed to prioritize sites and identify emergency situations.

With respect to the guideline development under option 1, in paragraph 3(c), the bracketed term “where feasible” must be removed from the text, if the INC truly wants the guidelines to address the concerns of victims.

Text should be added to paragraph 3 to encourage polluters to pay the remediation costs and appropriate compensation to victims, in particular, language seeking the development of guidance on allocating financial responsibility for addressing contaminated sites.

In addition, guideline development should cover the safe management of wastes generated from site remediation, and related text should require the safe management of remediation wastes in accordance with Article 13. Finally, the text should ensure local populations are informed about the site characterizations and the risks they face.

#### Financial and Technical Assistance (Articles 15, 16)

Before addressing the draft treaty text, ZMWG wishes to remind delegates regarding the need for *interim assistance* before the treaty comes into force. Funds will be needed to begin planning and implementation work, particularly in areas such as ASGM. This work will be crucial in determining how quickly the mercury control measures will have a positive impact on the global supply, demand and emission profiles.

Two alternatives are presented in **Article 15** regarding financial resources and mechanisms. Option 1 (with various alternative text) encourages developed countries to support developing countries to achieve the objective of this Convention, recognizing that some developing countries will require capacity-building and technical and [adequate] financial assistance linked to compliance (and reporting) using a mechanism

that will operate and be monitored under the authority of the Conference of the Parties. The nature of the fund is still not yet defined, although paragraphs 4 and 5 contain some permutations with options of how the fund can be reviewed in the future for effectiveness.

Option 2 provides for the establishment of a “stand alone multilateral mercury fund” for providing financial and technical cooperation/transfer of technologies, between developed and developing-country Parties so that these Parties may apply the control measures set forth in this Convention. Contributions from developed-country Parties and other donors must cover *all costs* incurred by developing-country Parties to enable them to comply with the control measures set forth in this Convention. Activities for mercury management and control are then provided overviewed by an executive committee established by the COP.

In general, ZMWG recommends text which is consistent with the following architecture:

- The financial mechanism shall include a Dedicated Fund to ensure adequate resources are available to facilitate compliance and discourage non-compliance.
- The mechanism shall operate under the authority and guidance of the Conference of the Parties, who will ensure resources are allocated consistent with COP priorities, and the resources are allocated by a transparent process that provides for diverse decision-making and representation of the parties.
- The financial support mechanism shall be designated and operated to facilitate compliance and discourage non-compliance with the obligations of this Convention
- The governance structure for the Dedicated Fund shall provide for representation of developing nations, and operational transparency.
- Each Party shall include in its reports submitted pursuant to Article 22 (Reporting) information demonstrating how it has implemented the provisions of this article.
- The principle of polluter pays is reflected in how the mechanism is used.

On the other hand, ZMWG recommends rejection of draft text language which makes compliance “contingent” upon financial assistance, particularly where the private sector can and should bear this responsibility. This kind of language appears in many forms and places in the proposed text.

Regarding technical assistance in **Article 16**, ZMWG supports Option 1 paragraph 1 (including the bracketed NGO language), opposes 1 bis and option 3 as poison pills (i.e., requiring developed countries to provide technology “free of charge”); and opposes language on partnerships in the treaty itself (as unnecessary since the COP could do it anyway, but this kind of language may encourage non-binding provisions for control measures).



Awareness raising, research and monitoring, communication and information (Articles 18-23)

In **Article 18**, the term “socially viable” in paragraph 1(c) is vague and not consistent with the need to exchange information, so it should be deleted. The proposal to move paragraph 3 to Article 4 (international trade) should be rejected, since it may limit the role of the designated national authority only to information exchange regarding trade. In paragraph 4, considering the important contributions NGOs have and will make to treaty development and implementation, ZMWG strongly recommends the inclusion of NGOs for information exchange.

In **Article 19**, ZMWG supports inclusion of the bracketed text in paragraphs (a) and (b) to ensure the public is provided relevant information, so they understand the risks from mercury exposure and the party’s plans to reduce such risks.

In **Article 20**, ZMWG supports the inclusion of the bracketed text to facilitate data collection under the Convention.

In **Article 22**, two reporting options are presented. ZMWG opposes option 2 since it would confuse/prolong/delay the reporting process and its follow up implementation by potentially providing any Party with self-declared compliance “waivers”. ZMWG recommends using option 1 as the basis for further discussion.

In **Article 23**, ZMWG supports inclusion of the bracketed text in paragraph 2 as part of the treaty effectiveness evaluation.

Reservations (Article 33)

ZMWG strongly opposes the ability of parties to make reservations to this Convention. All parties must be bound by all terms of the Convention for it to work effectively and achieve the desired results. We note the Stockholm Convention does not provide for reservations.

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The **Zero Mercury Working Group** (ZMWG) is an international coalition of more than 90 public interest environmental and health non-governmental organizations from 45 countries from around the world formed in 2005 by the European Environmental Bureau and the Mercury Policy Project. *ZMWG strives for zero supply, demand, and emissions of mercury from all anthropogenic sources, with the goal of reducing mercury in the global environment to a minimum. Our mission is to advocate and support the adoption and implementation of a legally binding instrument which contains mandatory obligations to eliminate where feasible, and otherwise minimize, the global supply and trade of mercury, the global demand for mercury, anthropogenic releases of mercury to the environment, and human and wildlife exposure to mercury.* ([www.zeromercury.org](http://www.zeromercury.org))

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