

Information, views and proposals on the work of the ADP

Submission by FIELD – Foundation for International Environmental Law and Development

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This submission responds to the invitation to Parties and admitted observer organizations to provide information, views and proposals on the work of the ADP before each session (FCCC/ADP/2012/3, paragraph 22).

- **The legal architecture of the 2015 agreement**

The ADP negotiations are moving into a critical phase, where the structure and content of the 2015 agreement are beginning to take shape. Good legal design will be very important.

- **Considering the latest research on how to design good treaties**

FIELD recommends that in designing the 2015 agreement Parties consider important new research on how treaty obligations should be formulated to make the obligations:

1. Strong
2. Acceptable to as many states as possible.

- **The same legal obligation may be unacceptable if presented in one form, but acceptable if presented in another form**

New research on how to design treaties, by Professor Jean Galbraith (Rutgers School of Law) and a small number of other experts, has demonstrated that how the same legal content is presented in a treaty can be a decisive factor when states decide if they should accept it or not.

Choosing the right legal design format could decide if states accept some obligations in the 2015 agreement.

- **Example: which legal design results in more states accepting International Court of Justice (ICJ) jurisdiction for disputes under a treaty?**

Professor Galbraith's research shows that in treaties where acceptance of ICJ jurisdiction was designed as an opt-in (states need to actively choose to accept it) only a small percentage of states accepted. This is the case under the UNFCCC, where only the Netherlands has opted in. In treaties

where acceptance of ICJ jurisdiction was designed as an opt-out (states are assumed to have accepted, unless they indicate that they do not) 80% of states accepted.

Even if one takes other possible factors into account, the choice between opt-in or opt-out design is clearly a decisive factor.

- **Understanding why some legal design options are more acceptable to states**

The new research has revealed that states have certain “built-in” biases or preferences when they negotiate and ratify treaties. These are similar to the biases that researchers know individuals show when they are faced with choices.

Knowledge about the biases that individuals have can be used to “nudge” people towards certain options by constructing the right “choice architecture”. This is used to market products and in public policy making in some countries.

Researchers are starting to understand how treaties can be designed to align with the biases that states show. This can make treaty obligations stronger and acceptable to more states.

- **Points to consider**

The new research has implications for many aspects of the 2015 agreement, for example MRV and review mechanisms. More research is needed, but FIELD recommends that Parties consider the emerging findings.

For example, if participation in one part of a treaty needs to be optional to ensure wide participation Professor Galbraith recommends considering opt-out provisions or allowing states to make reservations. If this is not possible, she recommends considering optional protocols. Professor Galbraith also suggests that including provisions that for example require reservations or opt-outs to be renewed every few years could discourage reservations or opt-outs.

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