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Assessing ISDS Reform Proposals



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Three Approaches to Reform

1. Incremental reform (US/Japan)

Support ISDS but new and improved version

2. Systemic reform (EU/Canada)

Replace ISDS with a MIC & appeal mechanism

3. Transformational reform (Brazil/SA)

Reject international claims by investors

Three Benefits of UNCITRAL

1. Consider a range of reforms

No particular choice pre-determined

2. Participate “without prejudice”

Work on best reform options w/o committing

3. Select from menu of options

States can pick and mix at the end

Three Advantages of the MIC

1. Neutrals not partisans

Arbitrator selection is problematic in asymmetrical, repeat player fields

2. Narrows two gaps

- Need arbitrators to give effect to the joint intentions of the treaty parties
- Need treaty parties to internalize their interests

3. Reduces uncertainty and costs

Need to resolve key uncertainties to streamline future cases/costs

Three Areas for Improvement

1. Selection of good/independent judges

Concerns re quality & bias; pro re diversity

2. Financing of the MIC

Need a balance b/w states paying and user fees; hybrid public/private

3. Need better appeals process

Need to impose filters on appeal, including special leave to appeal

Conclusion

1. Be Strategic

Participate on a “without prejudice” basis

2. Be Flexible

Sequence procedural & substantive reforms

3. Be Realistic

Don't let the great be the enemy of the good