Assessing ISDS Reform Proposals
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