



## **PROPOSAL FOR AN ISDS ADVISORY CENTRE**

### **SURVEY ON THE NON-STATE OBSERVERS' CONTRIBUTION TO AN ISDS ADVISORY CENTRE**

*FOR THE UNCITRAL WORKING GROUP III: INVESTOR-STATE DISPUTE SETTLEMENT REFORM*  
**10 AUGUST 2020**



Institute for  
**TRANSNATIONAL  
ARBITRATION**



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## I. Executive Summary

1. Non-State observers in the UNCITRAL WG III are ready to offer their existing services to an ISDS Advisory Centre, including for capacity building, as well as at various stages of ISDS proceedings.
2. A majority of the respondents to the Survey foresee their participation in an ISDS Advisory Centre on a case-by-case arrangement, with a good majority of those agreeing to discounted rates for their services.

## II. Introduction

3. Following the interventions of the participating States and observers at the 37th session of the UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform (UNCITRAL WG III) on the establishment of an ISDS Advisory Centre, the Center for American and International Law – Institute for Transnational Arbitration (ITA)<sup>1</sup> sought to advance and coordinate an “Advisory Centre Forum” and engage non-State organizations having observer status in UNCITRAL WG III, as well as other non-observer NGOs, in a single response which would assist the States and the UNCITRAL Secretariat in advancing a concrete discussion on the proposed ISDS Advisory Centre.
4. This is in line with the conclusion of the UNCITRAL Secretariat in [A/CN.9/WG.III/WP.168](#) paper: “*Work on an advisory centre would require careful identification of the needs of potential beneficiaries.*” (para. 7) This includes an inclusive approach to the topic, not only with respect to member and observer States,<sup>2</sup> but also with a view to making proper use of the existing services offered and future services to be offered by various organizations linked to ISDS.
5. At the 38<sup>th</sup> session of the UNCITRAL WG III that took place in Vienna between 14-18 October 2019, ITA offered to engage in mapping the services offered or to be offered by non-State observers, in line with the priorities expressed by the States.
6. These priorities are summarized by the UNCITRAL Secretariat in [A/CN.9/WG.III/WP.168](#) paper as follows. The first category of services to be offered by an ISDS Advisory Centre is suggested to be services relating to the legal representation of States involved in ongoing ISDS cases, including assistance in the preparation of the defense or assistance in the overall organization for dealing with ISDS cases. (A/CN.9/WG.III/WP.168, para. 10) The second category of services is focused on policy rather than defense of individual ISDS cases and includes assistance to States in the review of, and potentially amendment to, their

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<sup>1</sup> ITA is represented in this initiative by *Joseph E. Neuhaus* (Sullivan & Cromwell LLP), Chair of the Advisory Board; *Tomasz J. Sikora* (Exxon Mobil Corporation), Senior Vice Chair of the Advisory Board; *Epaminontas E. Triantafilou* (Quinn Emanuel Urquhart & Sullivan UK LLP), Chair ITA UNCITRAL Taskforce; *David Winn*, Director, Institute for Transnational Arbitration, and Vice President, The Center for American and International Law; *Dr Crina Baltag* (Stockholm University), member ITA UNCITRAL Taskforce, member ITA Executive Committee and Young ITA Vice Chair; and *Mihaela Maravela* (Mihaela Maravela Law Office), member ITA UNCITRAL Taskforce.

<sup>2</sup> And this is reflected in the survey to the member and observer States by the UNCITRAL Secretariat: *Questionnaire on the establishment of an advisory centre on investor-State dispute settlement (ISDS)*, <<https://www.surveymonkey.com/r/3BWMNFJ>>

international investment instruments. (A/CN/9/WG.III/WP.168, para. 19) A third category of services could ensure a platform for capacity-building, sharing of best practices among government officials and sharing of information, through training programs, offering trainee and secondment positions, and providing information on ISDS, such as managing a database of precedents. (A/CN/9/WG.III/WP.168, paras 23-24) Fourth, an ISDS Advisory Centre might be established as a facility to also offer ADR services and support early settlement of disputes; specific services might include keeping a roster of experts available to act as mediators or early neutral evaluators. (A/CN/9/WG.III/WP.168, para. 22)

7. The UNCITRAL Secretariat took note of the ITA's initiative.
8. In this context, ITA approached the non-State observers before and during the Resumed 38<sup>th</sup> session of the UNCITRAL WG III that took place in Vienna between 20 and 24 January 2020 and explained the initiative and the intended steps in pursuing it described below.

### III. Methodology

9. The survey was conducted by the ITA during 21 April 2020 – 10 August 2020 (Survey).
10. The purpose of the Survey is to map the services offered by the non-State observers in UNCITRAL WG III, as well as to identify how these existing services or any future ones could be integrated in the proposal of an ISDS Advisory Centre.<sup>3</sup>
11. The Survey collected data from the participating respondents by way of a written questionnaire (*Questionnaire, Annex 2 to this paper*). This was a quantitative exercise.
12. The Questionnaire addressed the following topics: (1) identification of participating non-State observers; (2) the type of services currently offered by respondents in the area of ISDS; (3) the type of advisory/support services respondents would be able to offer within an ISDS Advisory Centre in terms of capacity building; (4) the type of advisory/support services respondents would be able to offer within an ISDS Advisory Centre in terms of dispute prevention; (5) the type of advisory/support services respondents would be able to offer within an ISDS Advisory Centre in terms of representation in disputes; (6) any additional services respondents would be able to offer within an ISDS Advisory Centre; (7) the type of contribution to an ISDS Advisory Centre; (8) financial aspects concerning the participation in an ISDS Advisory Centre; and (9) whether the contribution to an ISDS Advisory Centre should be formalized or rather provided on an ad-hoc basis.
13. The Questionnaire was sent to all non-State observers in the list provided by the UNCITRAL Secretariat, updated as of January 2020.<sup>4</sup>

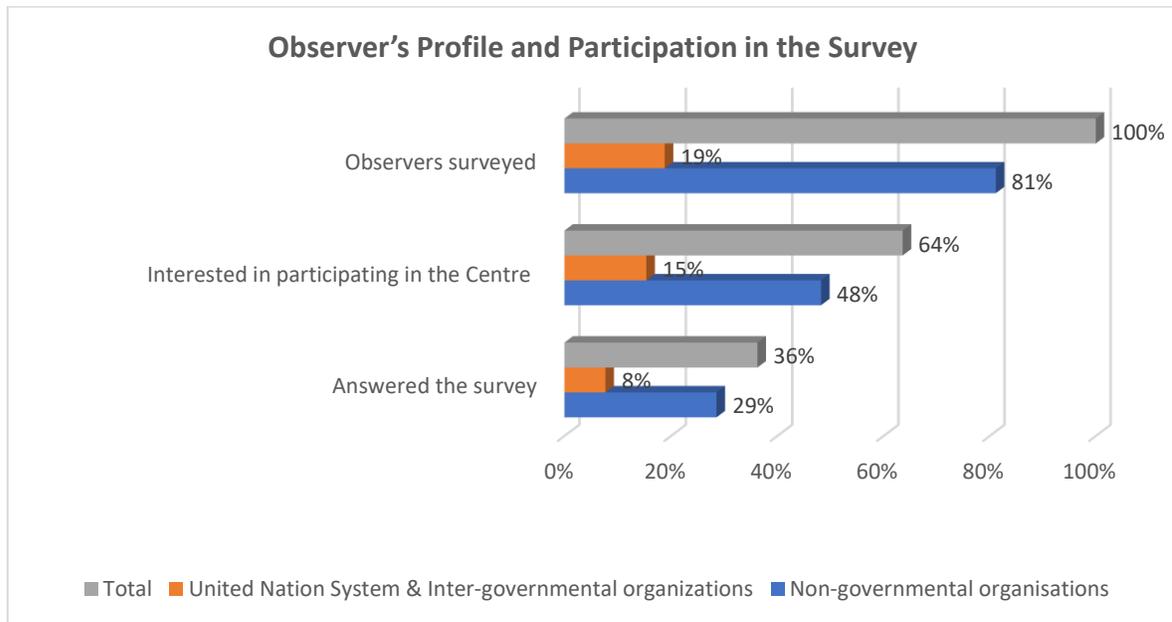
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<sup>3</sup> This Survey is different from, but complementary to, the scoping study that the Columbia Center on Sustainable Investment (CCSI) undertook in 2019, which comprehensively surveyed a wide range of issues and options raised by the problem of securing adequate legal defense in ISDS proceedings. See Columbia Center on Sustainable Investment (Lise Johnson and Brooke Guven), [Securing adequate legal defense in proceedings under international investment agreements](#), November 2019. This Survey is limited in scope, as mentioned, and seeks to identify in practical terms the concrete options for integrating the services offered by the non-State observers in a future ISDS Advisory Centre.

<sup>4</sup> The list as updated before the UNCITRAL WG III, Resumed 38th session, Vienna between, 20-24 January 2020. Other non-observers had been contacted for the purpose of the Survey, without a successful return.

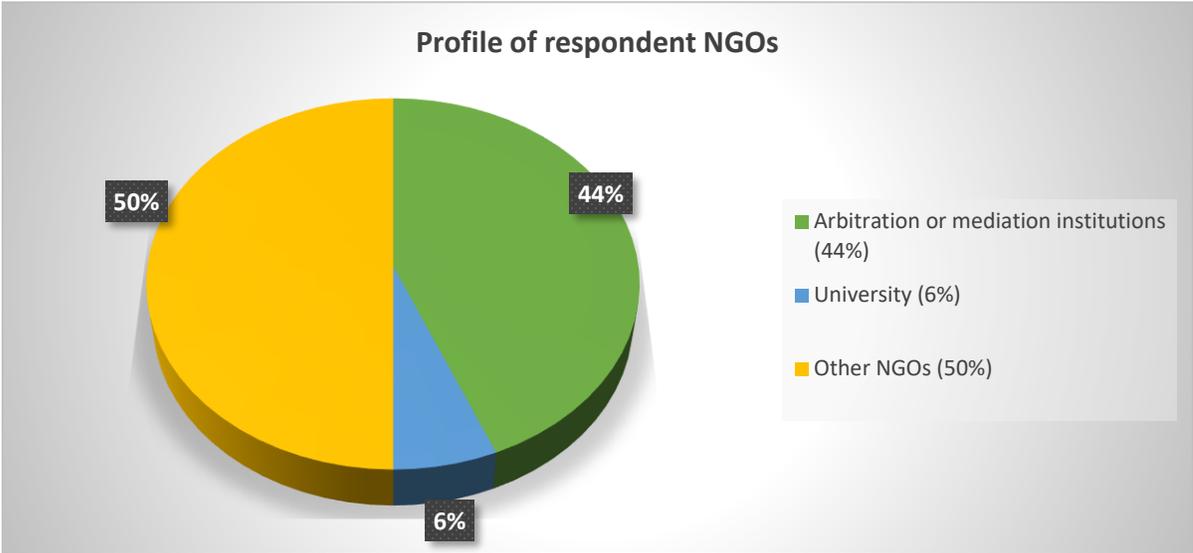
#### IV. Participants in the Survey

14. ITA contacted 69 non-State observers in the UNCITRAL WG III, including organizations from the United Nations System, inter-governmental organizations and non-governmental organizations (NGOs), and provided the link to the online Questionnaire.
15. The 69 observers fall into two main categories: (i) 13 organizations from the United Nations System and inter-governmental organizations, and (ii) 56 NGOs.
16. Out of the 13 organizations from the United Nations System and inter-governmental organizations only one inter-governmental organization answered the Questionnaire. Some of the United Nations System and inter-governmental organizations have stated that the scope of their services does not fall under the scope of the Survey.
17. Out of the 56 NGOs, 16 NGOs participated in the Questionnaire. A majority of the total number of NGOs expressed interest in contributing to or participating in an ISDS Advisory Centre, with a minority indicating that they do not offer the services an ISDS Advisory Centre would potentially offer as outlined in [A/CN.9/WG.III/WP.168](#).
18. The respondents discussed below appear to represent a core group of non-State observers that can provide at least one of the services contemplated for an ISDS Advisory Centre.



**Chart 1: Observer's Profile and Participation in the Survey**

19. Out of the 16 NGOs that answered the Questionnaire, seven are arbitration or mediation institutions; one is an institute affiliated with a university; and the remaining eight are organizations or institutions in the field of arbitration or international law, are broadly engaged in activities promoting the rule of law, or conduct training or teaching activities, including offering hearing facilities for ISDS proceedings.

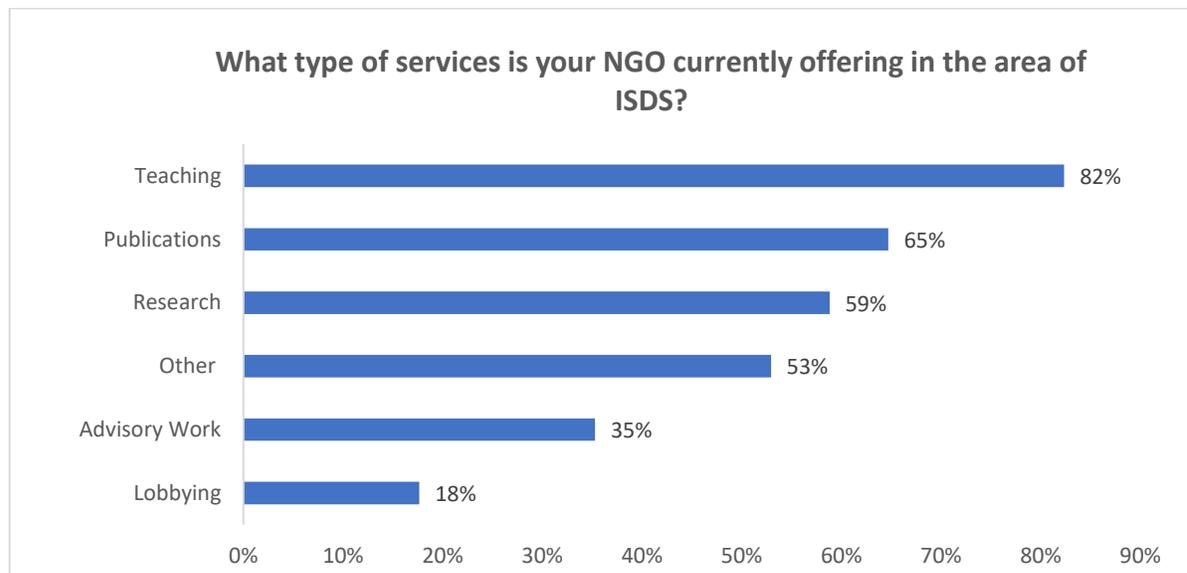


**Chart 2: Profile of respondent NGOs**

## V. Services offered by the surveyed NGOs and inter-governmental organization.

### Overview

20. In terms of services offered by the surveyed NGOs, a significant percentage relate to teaching activities (82%), publications (65%) and research activities (59%). Multiple answers were possible, therefore the percentage for each type of service is calculated from the total number of respondents.



**Chart 3: The type of services offered in the area of ISDS**

21. **Advisory work** is offered across the various categories of NGOs. 50% of the respondents offering these services are arbitration or mediation institutions, while the other 50% are equally divided among the remaining categories (inter-governmental institutions, universities, other academic or research organizations).

22. **Lobbying** with respect to arbitration and ISDS is offered mainly by arbitral institutions.

23. As to **other services** that are currently offered in the area of ISDS, arbitration or mediation institutions offer services such as:

- Administrative and institutional support, training sessions for government officials on ISDS;
- Assisting with drafting of legislation in connection with resolution of international trade disputes; and
- Arbitration or mediation services, including providing hearing facilities and/or streaming services for ad hoc treaty investment cases.

24. The other NGOs offer other services such as:
- Organizing conferences and workshops or events to discuss ISDS issues;
  - Platform for discussions among academia, practicing lawyers and state officials on the issues of investor-state dispute settlement; and
  - Moot training in ISDS (aimed at law students and recent graduates).
25. The inter-governmental institution that participated in the Survey offers pro bono legal assistance and capacity development to eligible governments and private sector companies in investment-related matters, including arbitration, dispute settlement and negotiations.

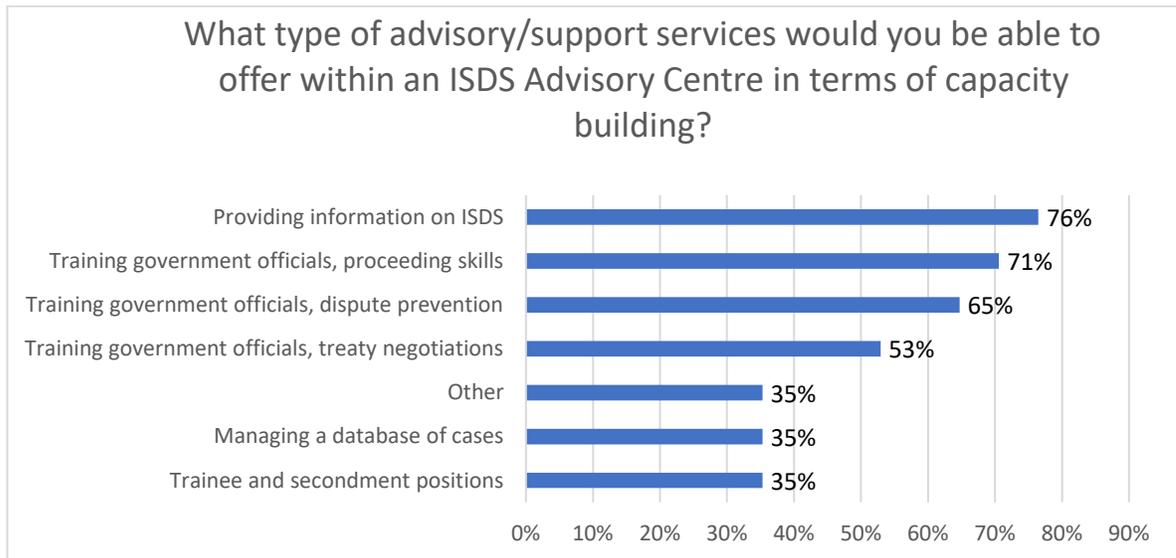
## VI. Type of advisory/support services that might be offered within an Advisory Centre

26. The purpose of the questions under this topic was to explore possible services to be provided within an ISDS Advisory Centre, in three main areas: capacity building, dispute prevention, and representation in disputes.

### 1. Type of advisory/support services that could be offered within an ISDS Advisory Centre in terms of capacity building

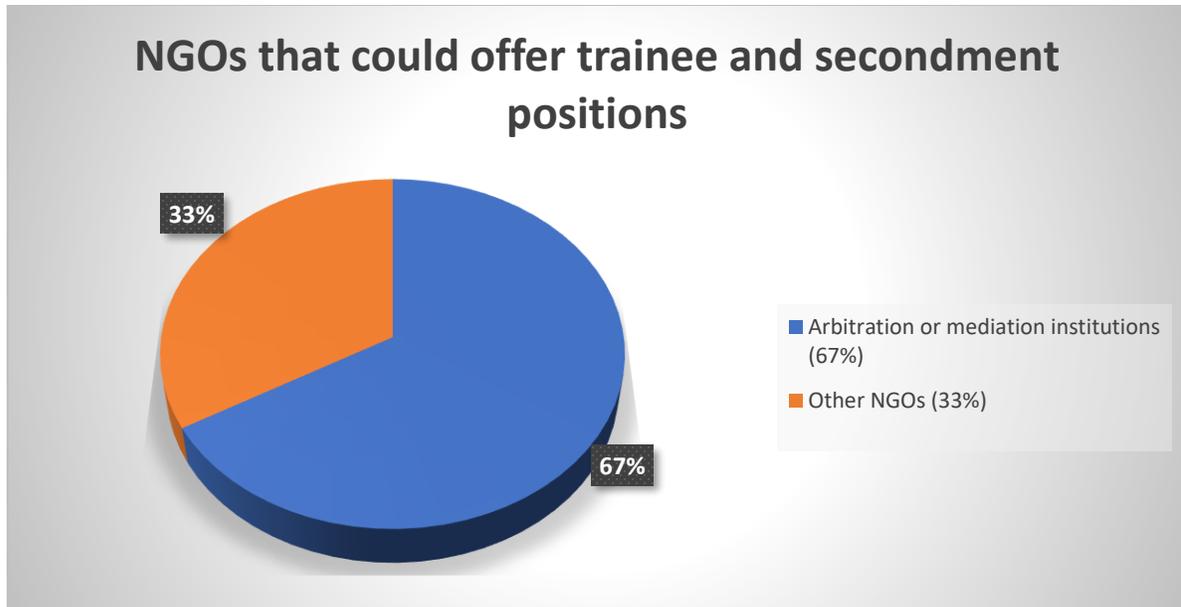
27. A large number of the observers that answered the Questionnaire are able to provide information on ISDS (76%), training of government officials in tools and skills related to the proceedings (71%) and training of government officials in dispute prevention and risk assessment (65%).

28. Multiple answers were possible, therefore the percentage for each type of service is calculated from the total number of respondents.



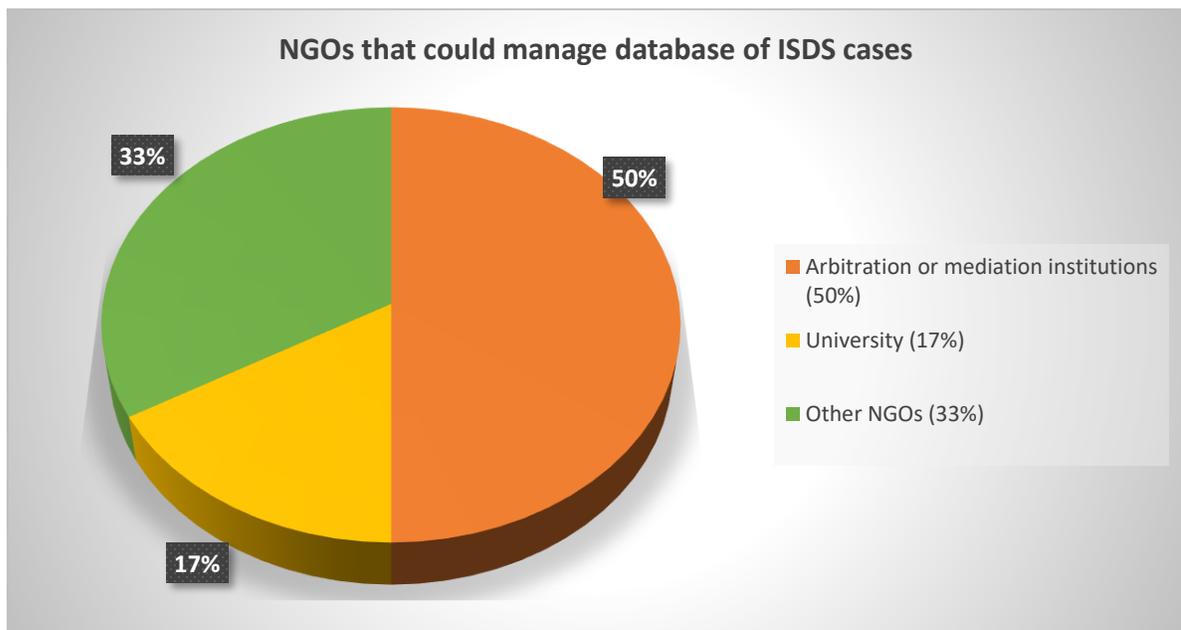
**Chart 4: Type of advisory/support services to be offered within an ISDS Advisory Centre in terms of capacity building**

29. **Trainee and secondment positions** were mentioned mainly by arbitration or mediation institutions, but also by other organizations.



*Chart 5: Trainee and secondment positions*

30. **Managing a database of cases** is a service that could be offered by various type of NGOs.



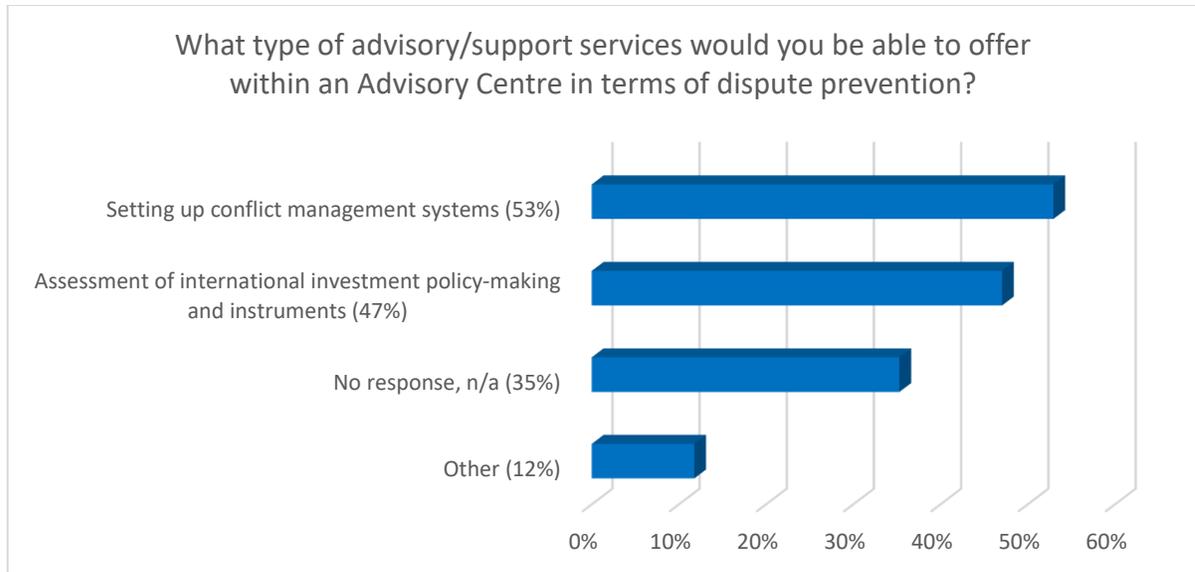
*Chart 6: Managing database of ISDS cases*

31. **Other services** that could be offered in terms of capacity building include:

- (i) The inter-government organization said it could offer: pro bono legal assistance and capacity development to eligible governments and private sector companies in investment-related matters, including arbitration, dispute settlement and negotiations;
- (ii) The NGOs could offer services such as:
  - organizing discussions and sessions on treaty negotiations, interpretation of obligations, and dispute prevention; supporting the exchange of views among academics, practicing lawyers and state officials; and organizing events to increase the understating of ISDS topics, possibly together with universities or arbitration institutions;
  - hearing facilities either at discounted rates or pro bono, depending on the nature of the case and of the parties; and provision of dispute prevention and dispute resolution services, including mediation services.

**2. *Type of advisory/support services that could be offered within an ISDS Advisory Centre in terms of dispute prevention***

32. In terms of dispute prevention, the majority of the respondents suggested they could offer services of dispute prevention.
33. A respondent mediation institution mentioned that it could additionally set up dispute prevention and resolution rules, guidelines and best practices, provision of mediation services, as well as appointment and maintenance of a panel of investor-state mediators and experts and other services consisting of training and education of mediators, investors, state representatives and lawyers on the role and use of mediation.
34. Multiple answers were possible, therefore the percentage for each type of service is calculated from the total number of respondents.



**Chart 7: Type of advisory/support services to be offered within an ISDS Advisory Centre in terms of dispute prevention**

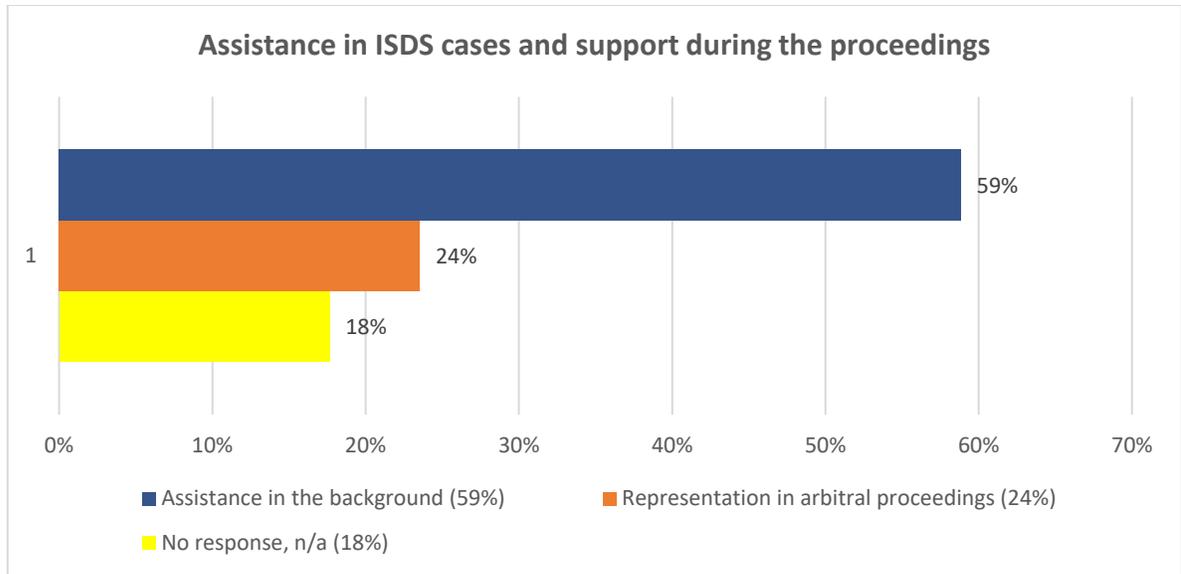
**3. *Type of advisory/support services that could be offered within an Advisory Centre in terms of representation in disputes***

35. In terms of representation in disputes, the Questionnaire included two main categories of services to be offered:

- (i) Assistance in ISDS cases and support during the proceedings, and
- (ii) Other alternative dispute resolution services, in particular mediation.

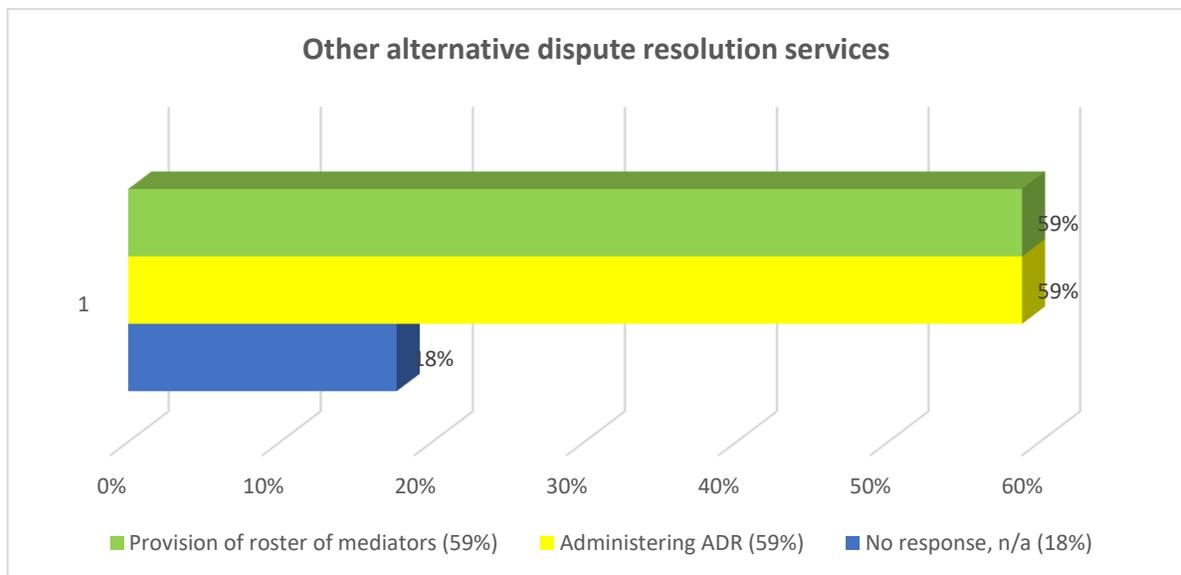
36. For the first category of services in the field of representation in disputes, a large number of respondents could offer assistance in the background (e.g., arbitrator selection, best practices on procedural issues, strategy, risk assessment, evidence collection), while a smaller percentage could offer representation in arbitral proceedings.

37. Multiple answers were possible, therefore the percentage for each type of service is calculated from the total number of respondents.



**Chart 8: Assistance in ISDS cases and support during the proceedings**

38. For the second category of services in the field of representation in disputes (i.e. other alternative dispute resolution services, in particular mediation) a large number of respondents indicated that they could offer both services of administering ADR and provision of roster of mediators.
39. Multiple answers were possible, therefore the percentage for each type of service is calculated from the total number of respondents.

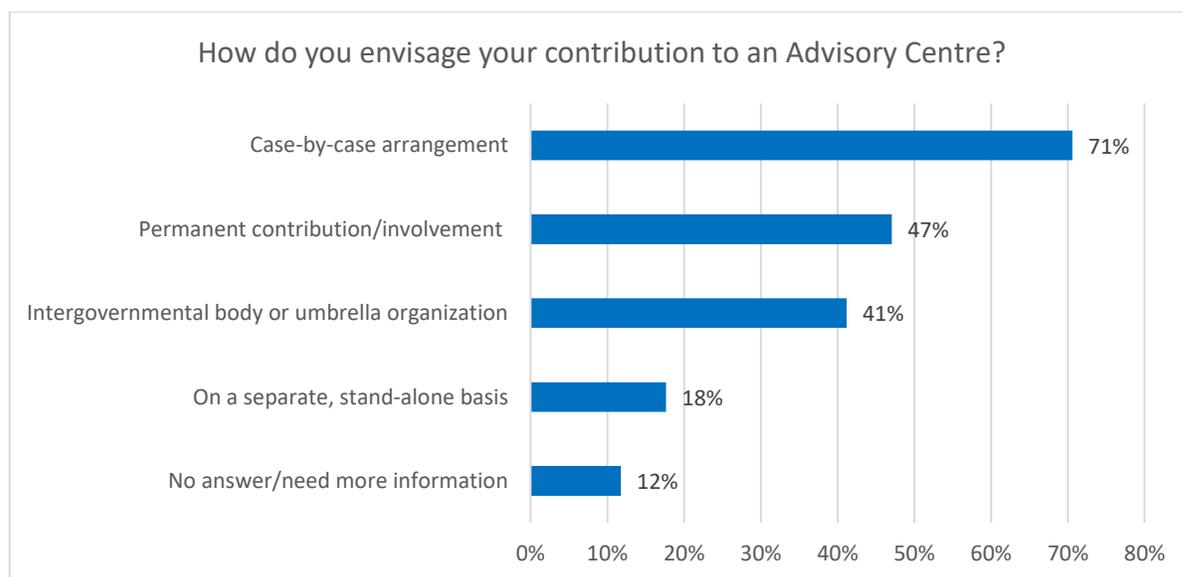


**Chart 9: Other alternative dispute resolution services**

40. **Other services** that could be offered in terms of representation in disputes include:
- Research on the best practices and procedural issues in dispute settlement;
  - Mediation training and education services; and
  - Serving as venue for proceedings.
41. The respondent inter-governmental institution offers pro bono legal assistance and capacity development to eligible governments and private-sector companies in investment related matters, including arbitration, dispute settlement and negotiations.

## VII. Contribution to an ISDS Advisory Centre

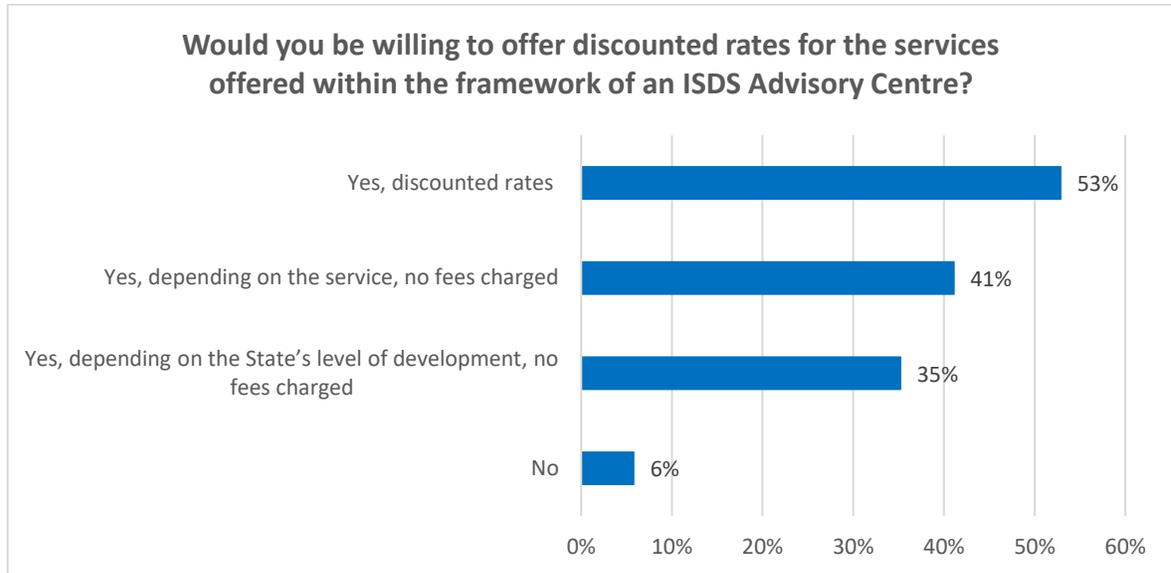
42. The questions under this heading were aimed at identifying the manner in which the respondents would be willing to bring their services within the framework of an ISDS Advisory Centre, in terms of the form in which services would be provided and the respondents' willingness to contribute financially.
43. **In terms of form of providing services**, most of the respondents prefer that services would be provided on a case-by-case arrangement. Multiple answers were possible, therefore the percentage for each envisaged form of participation is calculated from the total number of respondents.



**Chart 10: Contribution to an ISDS Advisory Centre**

44. Nevertheless, half of the respondents opting for a case-by-case arrangement envisaged a permanent contribution as well.
45. **In terms of the financial perspective**, slightly over 50% of the respondents are willing to provide services at a discounted rate. Some of the respondents are willing to offer discounted rates only depending on the State's level of development, while others on a case-by-case basis depending on the level of service required or the level of the State's development. Other respondents are willing to offer discounted fees to their events for public officials. Some of the arbitration centres indicated they would provide free hearing space in ISDS disputes involving developing states. Multiple answers were possible,

therefore observers might offer no fees services both depending on the type of service and depending on the State's level of development, while others might offer no fees services only in one of the two situations included in the survey.

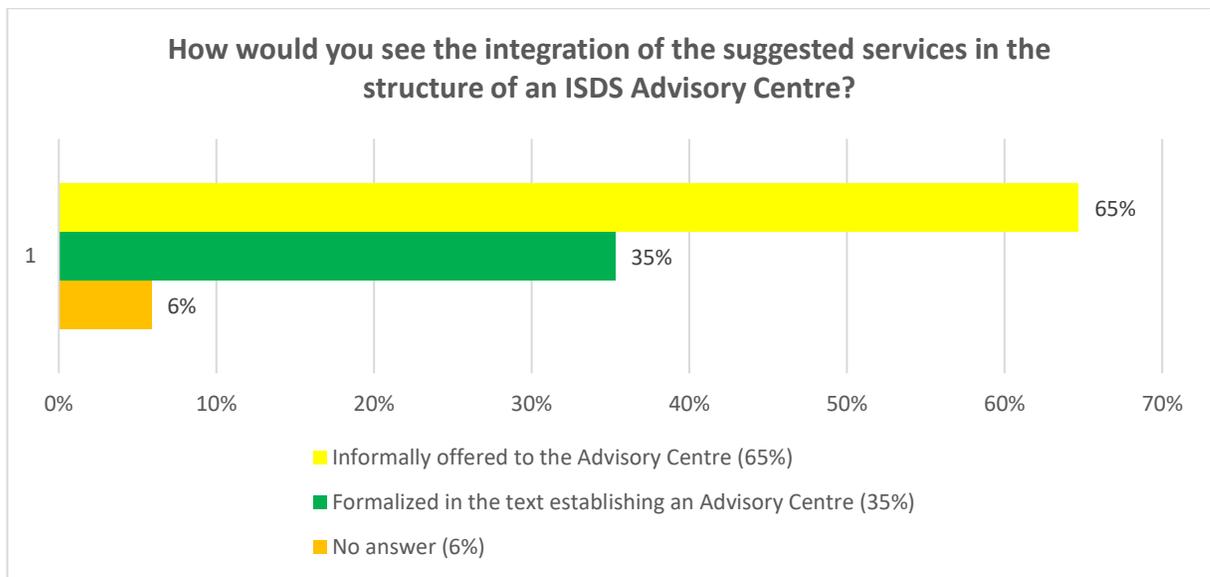


**Chart 11: Discounted rates for the services to be offered within the framework of an ISDS Advisory Centre**

### VIII. Integration of the services in the structure of an ISDS Advisory Centre

46. Most of the respondents prefer that their contribution to an ISDS Advisory Centre would be offered informally. Some of the observers prefer their contribution to be formalized in the text establishing an ISDS Advisory Centre and suggested that a list or roster of supporting NGOs and their services would be useful.

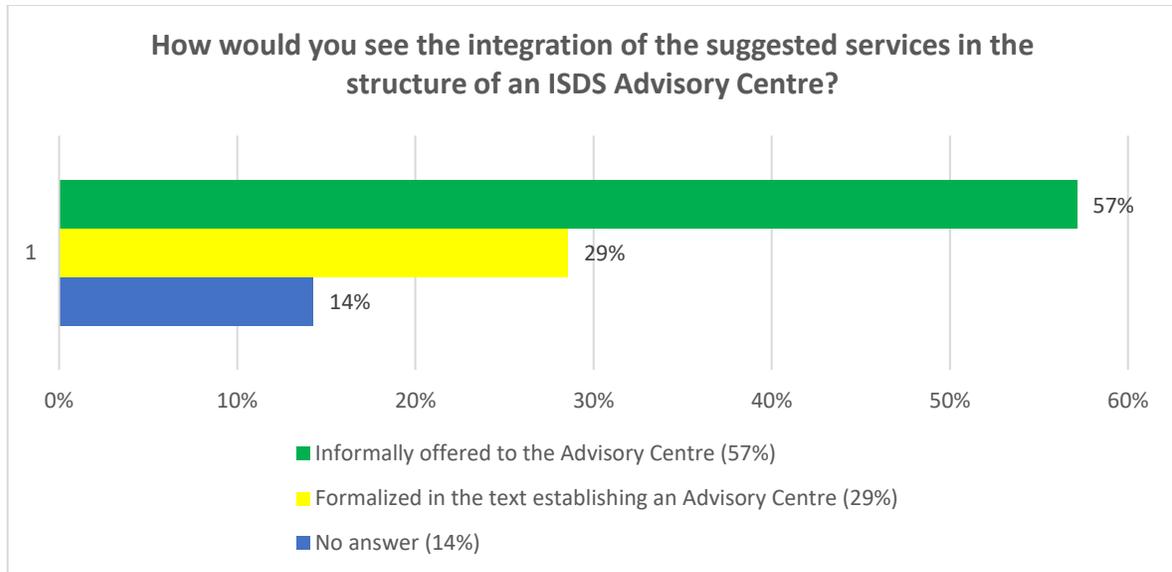
47. Multiple answers were possible, therefore the percentage for each type of preferred form of the contribution is calculated from the total number of respondents.



**Chart 12: Integration of the suggested services in the structure of an ISDS Advisory Centre**

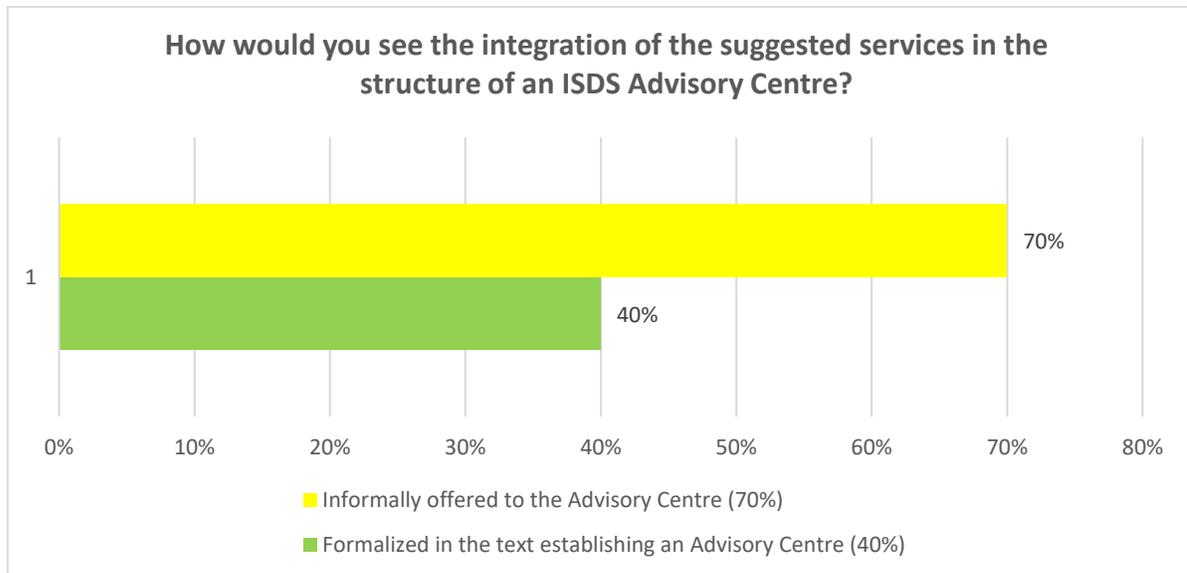
48. Only one observer had chosen both options on how their contribution to an ISDS Advisory Centre could take place, while the others had chosen one or the other.

49. Out of the arbitration or mediation institutions that answered the Questionnaire, more than half prefer that their contribution to an ISDS Advisory Centre would be offered informally.



**Chart 13: Integration of the suggested services in the structure of an ISDS Advisory Centre, answers from arbitration or mediation institutions**

50. Out of the other NGOs that answered the Questionnaire, apart from the arbitration or mediation institutions, a large majority prefers that their contribution to an ISDS Advisory Centre would be offered informally, and one NGO had chosen both options.



**Chart 14: Integration of the suggested services in the structure of an ISDS Advisory Centre, answers from other NGOs, other than arbitration or mediation institutions**

## Annex 1. List of participants in the Survey

1. Asian Academy of International Law Ltd. (AAIL);
2. Association for the Promotion of Arbitration in Africa (APAA);
3. Academy of International Law practice (AAILP);
4. Center for International Legal Studies (CILS);
5. Center for International Investment and Commercial Arbitration (CIICA);
6. European Federation for Investment Law and Arbitration (EFILA);
7. Georgian International Arbitration Centre (GIAC);
8. Hong Kong International Arbitration Centre (HKIAC);
9. International and Comparative Law Research Center;
10. International Development Law Organization (IDLO);
11. International Law Institute (ILI);
12. Institute for Transnational Arbitration, The Center for American and International Law (ITA);
13. Korean Commercial Arbitration Board, International (KCAB International);
14. New York International Arbitration Center, Inc. (NYIAC);
15. School of International Arbitration (SIA/QMUL);
16. Singapore International Mediation Centre (SIMC);
17. Vienna International Arbitral Centre (VIAC).

## Annex 2. Questionnaire

### UNCITRAL Advisory Centre and NGOs

#### Services that NGOs might provide in the context of an Advisory Centre on ISDS

At the thirty-eighth session of UNCITRAL Working Group III in October 2019, general support was expressed for establishing an advisory centre on investor-State dispute settlement (ISDS). ITA has undertaken the task to coordinate the gathering of data from interested NGOs on services which could be offered within the framework of an Advisory Centre.

The purpose of this questionnaire is to assist the UNCITRAL Secretariat in the preparatory work on the establishment of such an Advisory Centre, which requires *inter alia* identification of the services that could be provided within such centre. Further, in the light of the [Questionnaire](#) put forward by the UNCITRAL Secretariat to the Member and Observer States, it would be useful to determine at this early stage the manner in which NGOs could be involved in the Centre.

#### 1. Identification of NGO (\*Required Fields)

Name*	
Representative*	
Address	
Address 2	
City/Town	
State/Province	
ZIP/Postal Code	
Country*	
Email Address*	
Phone Number	

**2. What type of services is your NGO currently offering in the area of investor-state dispute settlement?** The purpose of this question is to identify the type of services offered by your NGO. It would be useful if you could include as much details as possible.

Research
Teaching
Publications
Advisory Work
Lobbying

Other (please describe)

**3. What type of advisory/support services would you be able to offer within an Advisory Centre in terms of capacity building?** With reference to Question 2 above, the purpose of this question and the following two (3-5) is to explore possible services to be provided within an Advisory Centre, in three main areas: capacity building, dispute prevention, and representation in disputes.

Trainee and secondment positions	<input type="checkbox"/>
Providing information on ISDS	<input type="checkbox"/>
Managing a database of cases	<input type="checkbox"/>
Training of government officials in treaty negotiations and interpretation of investment obligations	<input type="checkbox"/>
Training of government officials in dispute prevention and risk assessment	<input type="checkbox"/>
Training of government officials in tools and skills related to the proceedings	<input type="checkbox"/>
Other (please specify)	<input type="checkbox"/>

**4. What type of advisory/support services would you be able to offer within an Advisory Centre in terms of dispute prevention?**

Assessment of international investment policy-making priorities and international investment instruments	<input type="checkbox"/>
Setting up of conflict management systems (such as domestic implementation of, and education surrounding, obligations contained in international investment instruments; early dispute prevention policy; alert procedures; establishment of a lead agency; and setting up a litigation team)	<input type="checkbox"/>
Other (please specify)	<input type="checkbox"/>

**5. What type of advisory/support services would you be able to offer within an Advisory Centre in terms of representation in disputes?**

(1) Assistance in ISDS cases and support during the proceedings, including:	<input type="checkbox"/>
Assistance in the background (e.g., arbitrator selection, best practices on procedural issues, strategy, risk assessment, evidence collection)	<input type="checkbox"/>
Representation in arbitral proceedings	<input type="checkbox"/>

(2) Other alternative dispute resolution services, in particular mediation, including:	<input type="checkbox"/>
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Administering ADR	<input type="checkbox"/>
Provision of roster of mediators	<input type="checkbox"/>

Other (please specify)

**6. Are there any services in addition to the ones above that you would be able to offer within an Advisory Centre?**

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**7. How do you envisage your contribution to an Advisory Centre?** The purpose of this question and the following two questions is to identify the manner in which NGOs would be willing to bring their services listed in the previous 3 questions in the framework of an Advisory Centre. This is of particular significance in the context of Section 4 (questions 4.1-4.3) of the [Questionnaire](#) put forward by the UNCITRAL Secretariat to the Member and Observer States.

In the form of a permanent contribution/involvement	<input type="checkbox"/>
On a case-by-case arrangement	<input type="checkbox"/>
Through an intergovernmental body or other umbrella organization	<input type="checkbox"/>
On a separate, stand-alone basis	<input type="checkbox"/>
Other (please specify)	<input type="checkbox"/>

**8. From a financial perspective, would you be willing to offer discounted rates for the services offered within the framework of an Advisory Centre?**

Yes	<input type="checkbox"/>
Yes, depending on the service, no fees charged	<input type="checkbox"/>
Yes, depending on the State's level of development, no fees charged	<input type="checkbox"/>
No	<input type="checkbox"/>
Details on the Type of Services:	

**9. Subject to the form an Advisory Centre would take, would you prefer to have the contribution of NGO's: (a) formalized in the text establishing an Advisory Centre or instead (b) more informally offered to the Advisory Centre?**

a)	<input type="checkbox"/>
b)	<input type="checkbox"/>
If yes, you may include here any suggested provision(s) / key elements of the provision(s)	