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Constituting Tribunals in Investment Arbitration: A Report on Timing and Methods



**Investment Arbitration Subcommittee
of the IBA Arbitration Committee**

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Introduction

1. The IBA Investment Arbitration Subcommittee (the ‘IA Subcommittee’) observed that there was limited data about the time it takes to constitute arbitral tribunals in investment arbitrations and queried whether any lessons could be learned from such data. The IA Subcommittee has thus worked with four of the major arbitral institutions administering investment arbitrations to obtain that data and related statistics.¹ This short note (1) summarises the data received and (2) sets forth conclusions that the IA Subcommittee has drawn therefrom, with recommendations on methods to adopt to promote efficiency.

Data on the constitution of arbitral tribunals

2. The IA Subcommittee sets forth below a summary of the information received from, in alphabetical order, the ICC,² ICSID,³ PCA,⁴ and SCC⁵ (together, the ‘Institutions’) on the average time it takes to constitute arbitral tribunals.
3. In reviewing the statistics for constituting arbitral tribunals, the IA Subcommittee has focused on timeframes in two scenarios: (a) when the presiding arbitrator is appointed by the institution pursuant to the default procedure under the applicable arbitration rules; and (b) when the presiding arbitrator is appointed according to a procedure agreed by the parties.
4. For the purposes of this note, the IA Subcommittee has chosen not to focus on the appointment of sole arbitrators, as there are relatively few in investment arbitration, but on the appointment of presiding arbitrators (as opposed to co-arbitrators), as the Institutions have observed that this step in constituting a three-member arbitral tribunal is often the most complex and time-consuming.

1 This project was initiated under the leadership of Caline Mouawad and Maxi Scherer, Co-Chairs of the IA Subcommittee in 2022–2023, and completed by Xavier Andrade and Erica Stein, Co-Chairs of the IA Subcommittee in 2024–2025. This project would not have been possible without the invaluable input provided by the following arbitral institutions and task force members (listed in alphabetical order): ICC (Ziva Filipic and Asli Yilmaz), ICSID (Martina Polasek and Catherine Kettlewell), PCA (Martin Doe, Evgeniya Goriatcheva and Markel Eguiluz Parte), and SCC (Caroline Falconer (and Natalia Petrik prior to her departure from the institution)), alongside Kabir Duggal, Elodie Dulac, Sarah Grimmer, Ioana Knoll-Tudor, Mevelyn Ong, Ana Maria Ordoñez, Michele Potestà, and Gabriele Ruscilla. The IA Subcommittee would also like to thank Álvaro Martínez for his support.

2 The ICC provided information directly to the IA Subcommittee solely for purposes of this report and will not otherwise make such information public, although it can be provided upon request.

3 ICSID included in its analysis all cases registered between 1 January 2013 and 31 December 2022, with the full tribunal appointed by 11 October 2023, whether based on contracts, investment laws or treaties, between an investor and a State (or a subdivision or agency of a State). Further, it should be noted that all data provided by ICSID stems from cases under the 2006 ICSID Arbitration Rules, whereas one of the objectives of the 2022 ICSID Rules was to improve time and cost efficiency. ICSID’s report to the IA Subcommittee is attached at Annex 1 of this report.

4 The PCA has limited its analysis to the constitution of three-member tribunals in investor-State arbitrations between 1 January 2013 and 31 December 2022 and has not considered contract-based arbitrations and other types of proceedings (including some rare instances of investor-State arbitrations conducted by a sole arbitrator). The PCA’s report to the IA Subcommittee is attached at Annex 2 of this report.

5 The SCC’s report to the IA Subcommittee is attached at Annex 3 of this report.

5. It should be noted that the Institutions sometimes use different terms for similar concepts and record data following the terms and concepts in their respective rules. The result is that the Institutions' statistics have been tracked differently. For example, some of the Institutions consider the 'appointment date' to be the date on which an arbitrator accepts the nomination, while others consider the nomination date itself, regardless of acceptance. Similarly, some Institutions' rules foresee a registration date that starts the clock in the proceedings, which is not the case, for example, under the UNCITRAL Rules. Therefore, not every Institution provided information on the same issues or, if information was provided, it was not always based on comparable data points. In light of this, the summary below simply highlights the key information received.

Average timeframes under default procedures in arbitration rules

6. The Institutions provided information regarding appointing presiding arbitrators under the default procedure in their applicable rules. The IA Subcommittee summarises the information received from each, in turn.

ICC

7. Where the ICC is to appoint an arbitrator, the default method is that the ICC Court will make an institutional appointment in consultation with the ICC National Committee or Group.⁶ In practice, the ICC Secretariat works with the ICC National Committee or Group to recommend a candidate. The ICC Court then considers the suitability of such candidate, and if it agrees with the recommendation, formally appoints such candidate as arbitrator. The ICC Rules also contemplate that the ICC Court may also, in some circumstances, appoint an arbitrator directly – ie, without the recommendation of an ICC National Committee or Group. These circumstances include where: (i) one or more of the parties is a state or may be considered a state entity; (ii) where the ICC Court considers that it is appropriate to appoint an arbitrator from a country where there is no National Committee or Group; or (iii) where the President of the ICC Court certifies to the ICC Court that 'circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate'.⁷ The ICC does not specifically track the timing of appointments of presiding arbitrators in investment arbitrations, but it appears that the default procedure can be relatively quick considering that the ICC Court can make a direct appointment when a state or state entity is involved.

ICSID

8. If parties in an ICSID Convention arbitration are unable to appoint a member of the tribunal within 90 days after the registration of the request for arbitration or such period as they may agree, either party may ask the Chair of the ICSID Administrative Council to appoint the missing arbitrator(s).⁸ When a party requests the appointment of the presiding arbitrator under Article 38 of the ICSID

6 Article 13(3) of the 2021 ICC Rules.

7 Article 13(4) of the 2021 ICC Rules.

8 Article 38 of the ICSID Convention.

Convention, ICSID may initially offer to conduct a strike-and-rank list or a ballot, to assist parties in selecting a mutually agreeable candidate.⁹

9. If the parties do not agree on a strike-and-rank or a ballot procedure, or if the ballot procedure does not result in the appointment of a mutually acceptable candidate, the Chair will consult with the parties and appoint the presiding arbitrator from the ICSID Panel of Arbitrators, pursuant to Convention Article 38 and Arbitration Rule 18. The Chair's appointment pursuant to the default provision must be made from the ICSID Panel of Arbitrators and Conciliators.¹⁰ The Chair uses best efforts to appoint the missing arbitrator(s) within 30 days after receipt of the request to appoint, consulting the parties as far as possible.¹¹ If two or more arbitrators are missing, the Chair will first appoint the other arbitrators before proceeding to appoint the president of the tribunal.¹² At the time of the proposal of the candidate, the Chair will give the parties an opportunity to raise any circumstance that may show that the person lacks the required qualities under Article 14 of the ICSID Convention. If the parties in an ICSID Additional Facility case are unable to appoint a member of the tribunal, a party can request the Chair of the Administrative Council to make the corresponding appointment.¹³ In this case, the appointment can be made from outside the ICSID Panel of Arbitrators and Conciliators.¹⁴ Generally speaking, when the Chair of the ICSID Administrative Council appointed the arbitrator(s) under the default method, the average time was: (i) 157 days from the appointment of the claimant's arbitrator to the appointment of the president; (ii) 113 days from the appointment of the respondent's arbitrator to the appointment of the president; (iii) or a total of 237 days from the registration of the request for arbitration to the appointment of the president.¹⁵

PCA

10. The PCA has provided information on cases where it assists in administering the constitution of the arbitral tribunal under the UNCITRAL Rules.¹⁶ In this respect, the parties to an arbitration conducted under the UNCITRAL Rules may request the assistance of an 'appointing authority' in certain circumstances. For example, where within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.¹⁷ Additionally, if the two co-arbitrators do not agree on a presiding arbitrator within 30 days after the second arbitrator's appointment, the presiding arbitrator will be appointed by the appointing

9 See *Report of ICSID to the IBA Investment Arbitration Subcommittee*, p19.

10 Article 38 of the ICSID Convention. See also ICSID website for current list: <https://icsid.worldbank.org/resources/panels-of-arbitrators-and-of-conciliators>.

11 Rule 4(4) of the 2006 ICSID Arbitration Rules; Rule 18(3) of the 2022 ICSID Arbitration Rules.

12 Rule 4 of the 2006 ICSID Arbitration Rules; Rule (18) of the 2022 ICSID Arbitration Rules, Article 6 of the 2006 ICSID Additional Facility Arbitration Rules and Rule 30 of the 2022 ICSID Additional Facility Arbitration Rules.

13 Article 6(4) of the ICSID (Additional Facility) Arbitration Rules.

14 Under Rule 26 (2022) ICSID Additional Facility Arbitration Rules, instead of the Chair of the Administrative Council, the parties may request the Secretary-General to appoint the missing arbitrator(s).

15 See *Report of ICSID to the IBA Investment Arbitration Subcommittee*, p28.

16 In many of those cases, the PCA goes on to provide full support in administering the arbitration proceedings.

17 Article 9(2) of the 2021 UNCITRAL Rules.

authority using the ‘UNCITRAL List-Procedure’.¹⁸ The UNCITRAL List-Procedure consists of the following:

- (a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;
- (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;
- (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
- (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the [presiding] arbitrator.¹⁹

11. The UNCITRAL Rules further provide that, ‘[u]nless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the [PCA], one of whom would serve as appointing authority’.²⁰ If all parties have not agreed on the choice of an appointing authority within 30 days after such a proposal has been received by all other parties, ‘any party may request the Secretary-General of the PCA to designate the appointing authority’.²¹ This procedural step ensures that the arbitration process progresses without undue delay, particularly in instances where the appointing authority’s intervention is necessary for arbitrator appointments.²²
12. However, delay may occur when parties cannot agree on an appointing authority. Without agreement, the UNCITRAL Rules require a party to request the Secretary-General of the PCA to designate the appointing authority, which can then proceed with the arbitrator appointment(s). While the Secretary-General proceeds with the designation of an appointing authority as promptly as possible upon receipt of a request of this kind, the Secretary-General first needs to be *prima facie* satisfied, on the basis of a screening of the documentation submitted, that he/she is competent to designate an appointing authority (which may occasionally entail requesting further information from the parties). Accordingly, a designation procedure will inevitably delay the full constitution of the tribunal to some extent, while an agreement between the parties regarding the choice of the appointing authority will typically result in time savings. That said, the choice by the parties of an unreliable appointing authority (who, for instance, fails to act as requested) can also lead to significant delays.

18 Articles 8(2) and 9(3) of the 2021 UNCITRAL Rules.

19 See Article 8(2) of the 2021 UNCITRAL Rules. It should be noted that the UNCITRAL Rules foresee that the parties may agree that this list procedure should not be used, or that the appointing authority may determine ‘in its discretion that the use of the list-procedure is not appropriate for the case’.

20 Article 6 of the 2021 UNCITRAL Rules.

21 Article 6(4) of the 2021 UNCITRAL Rules further provides that, ‘if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party’s request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority’.

22 Article 6 of the 2021 UNCITRAL Rules.

13. When the Secretary-General of the PCA serves as the appointing authority, there is a practice of consulting with the parties regarding their preferred (presiding) arbitrator profile. This approach is intended to increase the chances that the list-procedure will be successful (ie, that the parties will identify at least one common candidate) and to lead to an appointment that corresponds closely to the joint preferences of the parties.²³ (ICSID follows the same practice when the Chair of the Administrative Council or the Secretary-General is appointing authority, subject to the agreement of the parties.²⁴) In 10 out of 12 PCA-administered cases where the UNCITRAL List-Procedure was used, a common candidate for appointment was identified.²⁵
14. Although the PCA regularly appoints by way of list-procedure and is often successful, the UNCITRAL List-Procedure may fail where, between the parties, all names are struck.²⁶ The risk of this occurring is heightened when the list contains three names (the minimum foreseen in the UNCITRAL List-Procedure), compared to when the list identifies more names. When a list-procedure fails, the appointing authority typically makes a direct appointment without consulting the parties further.²⁷ In light of this, the Secretary-General of the PCA regularly proposes a modification to the UNCITRAL List-Procedure to provide parties with greater certainty about the outcome of the appointment process and minimise delays in reaching an appointment.²⁸ This modified approach limits the number of strikes by each side to ‘half minus one’, ensuring that at least one common candidate remains on the list.²⁹ The parties are offered an odd number of candidates (say, nine) and agree to restrict themselves to an even number of strikes (say, four for a list of nine). They then list the remaining candidates, and the appointing authority appoints based on the parties’ preferences. Thus, even if both sides use all of their strikes, one candidate always remains.³⁰ The PCA will, therefore, typically construct lists of more than three names, with some lists including more than 10 names.³¹ Consequently, the appointing authority avoids selecting a candidate who was not previously notified to the parties.
15. Applying the procedures above, in cases where the PCA assisted in administering the constitution of the arbitral tribunal, the average duration was: (i) 167 days from the appointment of the claimant’s arbitrator to the appointment of the presiding arbitrator; (ii) 103 days from the appointment of the

23 See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, pp42-43.

24 Many investment treaties designate one of ICSID, the PCA, or the SCC as appointing authority in investor-State arbitrations carried out under the UNCITRAL Rules. See, e.g., respectively: (i) CPTPP and Singapore-Myanmar BIT; (ii) Argentina-Japan BIT and Iran Model BIT 2001 (other examples at: <https://pca-cpa.org/en/resources/instruments-referring-to-the-pca/>); and (iii) Netherlands-Slovak Republic BIT and Mauritius Model BIT 2002.

25 See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, p48.

26 This is also ICSID’s experience. See Report of ICSID to the IBA Investment Arbitration Subcommittee, pp16–17.

27 Brooks Daly, Evgeniya Goriatcheva, and Hugh Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014) [4.19]; Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press 2013) 111.

28 See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, p49.

29 See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, pp48-49.

30 Brooks Daly, Evgeniya Goriatcheva, and Hugh Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014) [4.20 – 4.22].

31 Brooks Daly, Evgeniya Goriatcheva, and Hugh Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014) [4.12 – 4.18]. The lists circulated during the relevant 2013–2023 period ranged from 3 to 17 candidates. See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, p12.

respondent's arbitrator to the appointment of the presiding arbitrator; (iii) or a total of 202 days from the initiation of the arbitration³² until the appointment of the presiding arbitrator.³³

SCC

16. Where the SCC is to appoint an arbitrator, that appointment is made directly by the SCC Board.³⁴ In investment arbitrations, the average duration from the initiation of the arbitration to the constitution of the tribunal is 91 days, on average 44 days after the appointment of the respondent's arbitrator.³⁵ (It should be noted that the sample size of SCC investment arbitrations resulting in these statistics is smaller than that of ICSID and the PCA.)

Timeframes applying party agreements

17. Sometimes, instead of following the default procedures described in the preceding section, parties agree to their own methods to appoint the presiding arbitrator, some requiring the involvement of the Institutions. In recent ICSID practice, for instance, the default method has rarely been used. Most commonly, parties agree to: (i) the co-arbitrators appointing the presiding arbitrator; (ii) the institution running a 'ballot' procedure; (iii) the institution running a 'strike-and-rank' list procedure; or (iv) their own bespoke procedure.

Appointment by co-arbitrators

18. With respect to (i) – appointment by co-arbitrators – from the 446 ICSID cases reviewed, the co-arbitrators were entrusted to appoint the presiding arbitrator in 85 cases.³⁶ In those cases, the average time for constituting the arbitral tribunal was 175 days from the registration of the request for arbitration to the appointment of the presiding arbitrator.³⁷ This reduced by 62 days the average length of tribunal constitution in ICSID cases as compared to its default procedures (237 days). The Institutions have observed that co-arbitrator appointments generally take longer when the parties agree that consultations may take place between a party and the co-arbitrator that it appointed in the selection of the presiding arbitrator.

Ballot procedure

32 As an arbitration is commenced by the communication of a notice of arbitration by the claimant to the respondent and is 'deemed to commence on the date on which the notice of arbitration is received by the respondent', all time periods are therefore calculated from this commencement date. *See Report of the PCA to the IBA Investment Arbitration Subcommittee*, p38.

33 This average excludes the top- and bottom-5 per cent outlier values to account for significant outlier cases in which the constitution of the tribunal took much longer than usual for reasons unrelated to the arbitrators, the institution, or the appointing authority.

34 SCC Rules, Appendix I (Articles 3 and 4).

35 *See SCC Report to the IBA Arbitration Subcommittee*, p55.

36 ICSID was the only institution that provided data in this regard. *Report of ICSID to the IBA Investment Arbitration Subcommittee*, pp17–19. The PCA has not provided information under this category because the default position under the UNCITRAL Rules is for the co-arbitrators to appoint the presiding arbitrator, with the UNCITRAL List-Procedure – and the PCA's involvement – to follow in the event the co-arbitrators' joint appointment fails.

37 *Report of ICSID to the IBA Investment Arbitration Subcommittee*, pp33.

19. With respect to (ii) – ballot procedure – the parties are provided with a list of candidates.³⁸ Each party must then indicate, independently and without the knowledge of the other, whether they agree or disagree to the appointment of each of the proposed candidates. If both parties happen to agree on the same candidate, then that candidate is appointed as arbitrator. If there is more than one candidate whose appointment both parties have agreed to, the parties can agree that the institution will have discretion over which one of the agreed candidates is ultimately appointed.³⁹ The ballot procedure may result in none of the candidates being selected, which would then require another procedure to appoint the presiding arbitrator. Parties to ICSID proceedings have used ballot procedures frequently in the past, but decreasingly in recent history, likely because they take longer (constitution takes on average 237 days from the registration of the request, which incidentally corresponds to the number of days under ICSID’s default procedures) and do not have the certainty of a candidate being selected. For its part, the PCA rarely engages ballot procedures.⁴⁰

Strike-and-rank procedure

20. With respect to (iii) – strike-and-rank procedure – this is, as discussed in the previous section, a default procedure under the UNCITRAL Rules. To recall, strike-and-rank requires the institution to provide a list of candidates. A variation of this, which gives the parties a greater say in the candidates for consideration without knowing which candidate(s) were proposed by the other side, is as follows: each side submits an equal number of candidates to the institution without the other side on copy; the institution compiles a list of the names provided by the parties as well as an equal number candidates provided by it; and the institution circulates the compiled list of names to the parties. Each party then strikes a certain number of candidates (ensuring that there are sufficient candidates to allow one candidate to be selected) and ranks the remaining candidates.⁴¹ As noted in the previous section, the number of strikes may vary depending on the number of candidates. The candidate with the best ranking is appointed or, if two or more candidates have the same ranking, the institution selects one of them, at its discretion or by coin toss. In ICSID’s experience, strike-and-rank procedures are, on average, almost as efficient as ICSID’s default rules, resulting in the appointment of the presiding arbitrator in 249 days as of the registration of the request for arbitration.⁴² ICSID’s data indicates that it may prove more efficient not to bifurcate the ‘vetoing/striking’ process from the ‘ranking’ process.⁴³

Bespoke appointment methods

21. With respect to (iv) – bespoke appointment methods – parties frequently come up with their own bespoke appointment methods. In one notable case at the PCA, the parties agreed on a multi-tiered

38 For an example of a ballot form see, <https://icsid.worldbank.org/sites/default/files/documents/Annex%2013%20-%20Sample%20Ballot.pdf>

39 See, eg, *Report of ICSID to the IBA Investment Arbitration Subcommittee*, p18–19.

40 No PCA cases during the relevant period followed a ‘ballot’ method or a nomination from an institutional roster or panel of arbitrators. See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, p49.

41 For a more detailed variation of this, see Ben Juratowitch, ‘A Protocol for Agreeing on A Presiding Arbitrator’, 1 February 2022, available at: <https://jsumundi.com/en/document/publication/en-a-protocol-for-agreeing-on-a-presiding-arbitrator>.

42 *Report of ICSID to the IBA Investment Arbitration Subcommittee*, p33.

43 See ‘EXAMPLE’ illustrated in *Report of ICSID to the IBA Investment Arbitration Subcommittee*, pp34–35.

approach where: (i) they first sought agreement on a presiding arbitrator through candidate lists exchange; (ii) failing that, the co-arbitrators, consulting with parties, tried to make the appointment; and (iii) as a last resort, a modified list-procedure by an appointing authority was planned, though the appointment was ultimately made by the co-arbitrators.⁴⁴ The data provided suggests that, on average, bespoke procedures do not result in noticeable improvements to efficiency when compared to alternative methods. Often, these party-agreed methods involve multiple steps, including periods for the parties to attempt to agree on the choice of a presiding arbitrator. As a result, the overall average period for the constitution of the tribunal tends to be longer. For instance, when party-agreed procedures were adopted in the PCA-administered cases, the average length of time from the initiation of the arbitration until the appointment of the presiding arbitrator was 235 instead of 202 days.⁴⁵ The SCC's statistics show that, when the parties deviate from the SCC's default rules, the tribunal's constitution takes on average about a month longer as of registration (117 instead of 91 days), and 20 days more on average after the appointment of respondent's arbitrator (64 instead of 44 days).⁴⁶ ICSID has even observed that party-agreed methods may be so complex that they 'eventually lead to default'.⁴⁷

Lessons learned from the data and suggested appointment methods

22. From the data set forth in the preceding section, it can be concluded that the most common appointment methods in investment arbitration, in particular for appointing the presiding arbitrator, can be categorised from quickest to slowest as follows:
- Direct appointments by institutions;
 - Joint appointments by the co-arbitrators;
 - Strike-and-rank procedures;
 - Ballot procedures; and
 - Bespoke party-agreed procedures.
23. When institutions are called upon to assist the parties in constituting arbitral tribunals, there is no doubt that default methods are the quickest. However, if parties wish to deviate from the default methods while relying on institutions for assistance,⁴⁸ they may wish to keep the following in mind:

44 See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, p49.

45 See *Report of the PCA to the IBA Investment Arbitration Subcommittee*, p51. This average excludes the top- and bottom-5 per cent outlier values.

46 See *Report of the SCC to the IBA Investment Arbitration Subcommittee*, p56.

47 See *Report of ICSID to the IBA Investment Arbitration Subcommittee*, p16.

48 A revision included in ICSID's 2022 Rules calls the parties' attention to the possibility of requesting assistance of the Secretary-General with an appointment (2022 ICSID Arbitration Rule 17, 2022 Additional Facility Rule 25). In practice, the Secretary-General will consult with the parties to determine the method most suitable to the circumstances.

- Avoid too many layers of methods that may not generate a final candidate for appointment (eg, several subsequent ballots followed by a list-procedure);
 - Avoid unlimited strikes in a list-procedure;
 - Favour simplicity by avoiding too many steps and time limits that may end in default or delay, or simply become unworkable;
 - Avoid including too many candidates on a list-procedure (more on this below);
 - Be clear on instructions to the institution whether to exclude candidates previously considered by the parties for a list-procedure and, if so, provide their names.
24. As for the number of candidates, it should be borne in mind that the more candidates that are foreseen for inclusion in an appointment procedure, the more time it will take for the parties and institutions to ensure that the candidates meet the applicable requirements and qualifications.
25. First, it will take time to vet the candidates' availability and conflicts. To accelerate the process, the parties could request assistance from the relevant institution. Vetting will typically cover the candidates' prior or ongoing appointments to ascertain that there is no conflict of interest or perception of bias⁴⁹ and determine general capacity and availability to preside over the case.
26. Second, it will take time to ensure that the candidates meet any treaty or rules requirements. For instance, the ICSID Convention sets out restrictions as to the nationality of the arbitrator(s),⁵⁰ as do the ICC and SCC Rules under certain circumstances.⁵¹ For their part, while the UNCITRAL Rules do not impose strict nationality requirements, they do provide that the appointing authority shall take into account 'the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties'.⁵² Further, the applicable treaty may impose other requirements, eg, that the arbitrators have expertise in certain areas, such as public international law.
27. Third, it may take time to consider properly candidates that would fulfil the parties' and institutions' interest in promoting diversity in arbitral appointments. This interest is now increasingly reflected in treaty language. For instance, the Canada Model Treaty employs language actively encouraging increased diversity, providing that: 'The disputing parties are encouraged to consider greater diversity in arbitrator appointments, including through the appointment of women.'⁵³ The Netherlands Model BIT similarly provides that 'the appointing authority shall strive for gender and geographic diversity'.⁵⁴

49 Stavros Brekoulakis and Anna Howard, 'Impartiality and the Construction of Trust in Investor-State Dispute Settlement' (2023) 38 ICSID Review 644; Tobias Traxler, 'Pro-Claimant bias in arbitrator selection' (2024) 27 Journal of International Economic Law 54; see also Doak Bishop, Caline Mouawad and Jessica Beess und Chrostin, 'Composition of the Arbitral Tribunal' in Stefan Kröll, Andrea Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023) pp968–974.

50 Article 38 of the ICSID Convention; see also Rule 13(2) of the 2022 ICSID Arbitration Rules.

51 Article 13(5) of the ICC Rules; Article 17(6) of the SCC Rules.

52 Article 6(7) of the 2021 UNCITRAL Rules.

53 Canada Model Treaty, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download>, Art.30.1.

54 The Netherlands Model BIT 2019, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> Art. 20.1.

28. With the above parameters in mind, the IA Subcommittee and Institutions have identified four examples of alternate methods for appointing presiding arbitrators that can contribute to efficiently constituting arbitral tribunals:

Alternate method 1: Co-arbitrator involvement

Co-arbitrator involvement is the most frequently used by the parties and has been identified from the statistics as the speediest. An efficient method involving the co-arbitrators could follow these steps:

- (1) Claimant appointment.
- (2) Respondent appointment within [#] days from the claimant's appointment.
- (3) Presiding arbitrator appointment pursuant to a strike-and-rank list-procedure as follows:
 - (a) The co-arbitrators/institution provide 5 to 7 candidates within [#] days of the acceptance of the arbitrator appointed by the respondent.
 - (b) Co-arbitrators/institution confirm availability and no conflict with each candidate before the candidates are proposed to the parties.
 - (c) The parties strike and rank candidates within [#] days.

Alternate method 2: Institutional involvement

- (1) Claimant appointment.
- (2) Respondent appointment within [#] days from the acceptance of the arbitrator appointed by the claimant.
- (3) Presiding arbitrator appointment via a strike-and-rank list-procedure with institution's assistance:
 - (a) Institution and the parties each nominate 4 candidates (12 in total).
 - (b) Institution to contact the parties about the results of the availability and conflict check of the arbitrators.
 - (c) Institution to ask parties to submit a replacement name for a candidate that has indicated is not available or has a conflict of interest.
 - (d) Institution to provide the list of candidates to the parties without disclosing who proposed each candidate.
 - (e) The 12 candidates to be ranked by the parties (each party entitled to strike 5 candidates (ie, 'half minus one')).

Alternate method 3: ICSID template

This example adapted from the ICSID's Arbitration Rules for Expedited Arbitration (see Rules 77 and 78 of the 2022 ICSID Arbitration Rules and 81 and 82 for the 2022 ICSID Additional Facility Rules), which include a clause that can be used as a template for a parties' agreement.

- (1) A three-member tribunal shall be appointed in accordance with the following procedure:
 - (a) each party shall appoint an arbitrator ('co-arbitrator') within 20 days after the [notification on the method of constitution of the tribunal]; and
 - (b) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of the acceptances from both co-arbitrators.
- (2) ICSID's Secretary-General shall appoint the arbitrators not yet appointed if:
 - (a) an appointment is not made within the applicable time limit referred to in paragraph (1);
 - (b) the parties notify ICSID's Secretary-General that they are unable to agree on the President of the Tribunal; or
 - (c) an appointee declines the appointment or does not accept his/her appointment within 10 days of receipt of the request for acceptance.
- (3) The following procedure shall apply to the appointment by ICSID's Secretary-General of any arbitrators pursuant to paragraph (2):
 - (a) ICSID's Secretary-General shall first appoint the co-arbitrator(s) not yet appointed. ICSID's Secretary-General shall consult with the parties as far as possible and use best efforts to appoint the co-arbitrator(s) within 15 days after the relevant event in paragraph (2);
 - (b) within 10 days after the later of the date on which both co-arbitrators have accepted their appointments or the relevant event referred to in paragraph (2), ICSID's Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;
 - (c) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to ICSID's Secretary-General within 10 days after receipt of the list;
 - (d) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and
 - (e) if the selected candidate declines the appointment or does not accept his/her appointment within 10 days of receipt of the request for acceptance, ICSID's Secretary-General shall select the next highest-ranked candidate.

Alternate method 4: PCA modified list-procedure

As explained at paragraph 14 above, when acting as the appointing authority under the UNCITRAL Rules, the Secretary-General of the PCA often proposes that the parties agree to a modification of the list-procedure foreseen under the UNCITRAL Rules. This procedure would typically unfold as follows:

- (1) The claimant appoints the first co-arbitrator.
- (2) The respondent appoints the second co-arbitrator, typically within 30 days of the claimant's appointment of the first co-arbitrator (unless the parties agree to another period).
- (3) Unless the co-arbitrators agree on the appointment of a presiding arbitrator (typically within 30 days of the appointment of the second co-arbitrator) or the parties are able to agree directly on the appointment of a presiding arbitrator, the appointing authority shall proceed with the appointment of the presiding arbitrator at either party's request. Ideally, the parties will have agreed on an appointing authority in advance (whether the PCA Secretary-General or another person/entity), in order to avoid delays in the appointment procedure. The appointment procedure will then comprise the following steps:
 - (a) The appointing authority consults the parties regarding (i) their preferred presiding arbitrator profile; and (ii) their willingness to limit the number of names that each side may strike from the list of candidates to be circulated.
 - (b) The appointing authority compiles a list of at least three potential presiding arbitrators (although the lists circulated by the PCA Secretary-General will usually include at least around seven candidates), after ascertaining each candidate's availability and the absence of conflicts of interest.
 - (c) The list of candidates is circulated to the parties, accompanied by each candidate's declaration of acceptance and statement of impartiality and independence (including any relevant disclosures, if applicable).
 - (d) Each party will (i) strike up to 'half minus one' of the proposed names (eg, up to four names out of a nine-candidate list), which will not be considered for appointment; (ii) number the remaining names on the list in the order of its preference; and (iii) return the list to the appointing authority without copying the other party (typically within 15 days after the receipt of the list). In some PCA cases, the parties have agreed that 'strikes' be excluded altogether, meaning that the parties are limited to ranking the candidates on the list and/or commenting on the relative qualifications and suitability of the candidates.
 - (e) Within one business day of receiving the parties' respective lists, the appointing authority appoints one of the candidates in the list as presiding arbitrator on the basis of the preferences indicated by the parties. If there is a tie between the ranking of two candidates, the appointing will exercise its discretion in appointing one of them as presiding arbitrator.

29. It should be noted that the recommendations contained in this report are mainly focused on expediting the appointment procedure, without prejudice to other interests and priorities that parties may have in constituting the tribunal in a given case.

Annex 1:

ICSID report to IBA Investment Arbitration Subcommittee

ICSID DATA- IBA Survey

I. Introduction

A. Data Assumptions

For purposes of this survey, we have sorted and analyzed the data based on the following assumptions and ICSID-specific considerations:

- All arbitration cases registered between January 1, 2013 and December 31, 2022;
- Only original cases (*i.e.* no post-award remedy proceedings) and no reconstitutions;
- Cases under the ICSID Convention and Additional Facility Rules (we do not track constitution information under other rules, *e.g.* UNCITRAL);
- Cases registered in the relevant period with constituted tribunals as of October 11, 2023, *i.e.* with all three members of the tribunal appointed;
- Includes all cases regardless of the basis of consent (*i.e.* investment contract, investment law and investment treaty).
- The date of the appointment of an arbitrator/president is the date of the acceptance of the appointment;¹
- The tribunal is constituted on the date the Secretary-General notifies the parties that all arbitrators have accepted their appointments;²
- There were 39 instances in which the Respondent appointed an arbitrator before the Claimant in accordance with different methods of constitution of a tribunal (agreed or default), which resulted in negative numbers in the period from the Claimant's appointment to the Respondent's appointment. These negative values have been replaced with a zero to avoid impacting the number of cases in the survey and we have confirmed that the results are qualitatively the same;
- An ICSID arbitration begins with the registration of the request for arbitration, and
- Only considered three-member tribunals.

One of the objectives of the 2022 ICSID Rules was to improve time and cost efficiency. ICSID reviewed the length of tribunal constitutions and provided data on the average duration from registration to tribunal constitution.³ It concluded that, in practice, it takes longer to constitute tribunals than the time frames provided for under the ICSID Convention and Rules. The reasons for delay included: (i) settlement negotiations between the parties; (ii) no initial participation by the respondent due to delay in organizing its defense; (iii) methods that provide for a long appointment process; (iv) no immediate request by a party for the Chair of the Administrative Council to appoint a missing arbitrator after the expiry of the 90-day period provided in Art. 38 of the Convention; and (v) party-agreed methods that eventually lead to default. These reasons for lengthy constitution periods still exist, and ICSID continues to observe a trend of party agreements on methods of constitution that are overly complex and sometimes lead to a lengthy appointment process.

ICSID changed its rules to address some of these issues in the 2022 Rules. For example, the default method of constitution in Article 37(2)(b) of the ICSID Convention and 2022 ICSID Arbitration Rule 15 (or 2022 Additional Facility Arbitration Rule 24) is automatically triggered 45 days after registration, rather than upon request 60 days after registration. Another example is a provision calling the parties' attention to the

¹ The appointee has 15 days pursuant to (2006) ICSID Arbitration Rule 5(3) or 20 days pursuant to (2022) ICSID Arbitration Rule 19(3) to accept an appointment from the date when ICSID seeks the acceptance of an appointment. ICSID only has available data with regard to the date of acceptance, not the date of appointment.

² (2006) ICSID Arbitration Rule 6(1) and (2022) ICSID Arbitration Rule 21(1).

³ See [ICSID Rule Amendments, WP 1, Vol. 3, p. 902](#).

possibility of requesting assistance of the Secretary-General with an appointment (2022 ICSID Arbitration Rule 17, 2022 Additional Facility Rule 25). This gives the parties more options concerning the method of appointment. The parties can ask the Secretary-General to propose a list of candidates for party ranking, a ballot (see below) or any other viable mechanism. In practice, the Secretary-General will consult with the parties to determine the method most suitable to the circumstances. In doing so, the Centre aims to balance the prompt constitution of a tribunal, on the one hand, and to allow the parties sufficient time to seek agreement on the appointment of mutually agreeable candidates.⁴ ICSID is thus ready to assist with appointments and apply methods that lead to the expeditious constitution of tribunals.

For purposes of this survey, it is too early to compare the effects of the 2022 ICSID Arbitration Rules with the data that is available. Almost all the data concerns tribunal constitutions prior to the 2022 amendments.

It should be noted that most cases with a lengthy constitution period were suspended by agreement of the parties (*e.g.* the outliers with the longest time periods referred to below). ICSID does not subtract such suspension periods in its calculation of timeliness, which are therefore included in the average and median numbers below.

B. The Appointment Process Under the ICSID Arbitration Rules

The time to constitute the tribunal may vary depending how long it takes the parties to determine the number of arbitrators, the method of their appointment and to select and appoint the members of the tribunal. The parties may agree to take as much time as they wish to constitute a tribunal. However, if a party asks ICSID to appoint an arbitrator, ICSID endeavors to complete the appointment within 30 days of the request.

i. Method of Constitution of the Tribunal

Parties should agree on the number of arbitrators on a tribunal and the method of their appointment. If they cannot agree, ICSID Rules provide for a default mechanism. Under the 2006 ICSID Arbitration Rules, a party may request that this default mechanism be triggered. Under the 2022 ICSID Arbitration Rules, the default mechanism applies automatically if the parties do not agree on the method of constitution within 45 days after registration.

The method of appointment must be established before the Secretary-General can act on an appointment made by a party.

a. Party Agreement

As a first step in the appointment process, the parties should refer to the contract, treaty or law containing consent to ICSID Convention or ICSID Additional Facility arbitration. This instrument may include a prior agreement on the number of arbitrators and/or the method of their appointment.

Absent a prior agreement, ICSID invites the parties to agree on the number of arbitrators and the method of their appointment when ICSID registers the request for arbitration.

⁴ For instance, even though the ICSID Rules provide for a default method of appointment (*e.g.* Article 38 of the ICSID Convention or Article 6(1) of the 2006 Additional Facility Arbitration Rules) for missing arbitrators, before proceeding to a direct appointment by the Chair of the Administrative Council or the Secretary-General, ICSID offers the parties a ballot or a strike-and-rank mechanism for the appointment of the presiding arbitrator. While it is understood that this process may increase the time period for the tribunal constitution, it is intended to ensure that the parties select a mutually agreed president of the tribunal to resolve their dispute.

A tribunal must always consist of a sole arbitrator or any uneven number of arbitrators. The parties are otherwise free to adopt any workable method of appointment that suits their needs, including provisions on time limits and special procedures.

The parties may, but are not required, to appoint arbitrators from the ICSID Panel of Arbitrators.

The most common agreements for three-member tribunals are:

- Each party appoints one co-arbitrator, and the parties agree on the third arbitrator, the president of the tribunal. If the parties fail to agree, the Secretary-General (or the Chair of the Administrative Council) of ICSID appoints the president.
- Each party appoints one co-arbitrator, and the co-arbitrators agree on the third arbitrator, the president of the tribunal. If the co-arbitrators fail to agree, the Secretary-General (or the Chair of the Administrative Council) of ICSID appoints the president.

Parties may agree to use a list procedure to constitute the tribunal. List procedures can be used to appoint a sole arbitrator, the president of the tribunal, or all members of the tribunal. Commonly used list procedures include:

- The parties exchange a list of candidates; each party informs the other party of the candidate(s) whom it accepts or rejects. The candidate that is accepted by both parties is appointed or, if two or more candidates are acceptable, ICSID selects one of them,
- The parties request that ICSID provide them with a list of candidates. Each party can strike a certain number of these candidates and rank the remaining candidates. The candidate with the best ranking is appointed or, if two or more candidates have the same ranking, ICSID selects one of them,
- The parties and ICSID nominate candidates for a list, and the parties are not informed which candidates were nominated by ICSID or the other party. Each party can strike a certain number of these candidates and rank the remaining candidates. The candidate with the best ranking is appointed or, if two or more candidates have the same ranking, ICSID selects one of them.

ICSID supports all efforts by parties to agree on the method of appointment and will follow the agreed method and fully facilitate the process.

b. Default Mechanism

In summary, the default formula contained in the ICSID Rules provide that:

- The tribunal consists of three arbitrators,
- Each party appoints one co-arbitrator, and
- The parties jointly agree on the third arbitrator, the president of the tribunal.

ii. Appointment of Arbitrators

Once the number and method of constitution of the tribunal has been determined, ICSID can act on the appointments.

The ICSID Rules provide a default method if appointments are required for the completion and constitution of the tribunal.

The following methods for appointment of the president have been used in ICSID cases: (i) Article 38 of the ICSID Convention (Chair of the Administrative Council), (ii) party agreement (which does not involve ICSID in the process), (iii) appointment by co-arbitrators, (iv) ballots, (v) strike-and-rank lists, (vi)

Secretary-General direct appointments, and (vii) external institutions in special circumstances (*e.g.* contract or treaty provides for an appointing authority other than ICSID).

With respect to ICSID involvement in appointments, the parties may agree on ICSID assisting with the appointment of the president of the tribunal or a party may request the appointment of a missing arbitrator(s) under the default mechanism.

a. ICSID Assistance with Appointments

The parties may request the assistance of the Secretary-General with an appointment at any time. This could concern the appointment of a sole arbitrator, the president of the tribunal, or all members of a tribunal not yet appointed.

The Secretary-General's involvement may be pursuant to party-agreement on the method of constituting the tribunal (*e.g.*, the parties agree that the president is to be appointed by the Secretary-General), or on an *ad hoc* basis when the parties are unable to agree on the appointment of the president (they do need agreement to request the assistance of the Secretary-General). For example, if the parties are to appoint the president of the tribunal jointly but are unable to agree on the president, they can request the Secretary-General's assistance before resorting to the default mechanism to appoint the missing arbitrator(s).

The parties may stipulate any criteria they would like the Secretary-General to consider in the appointment process.

If the parties do not indicate any process for appointment of the president, the Secretary-General may propose a procedure such as a ballot or a list procedure.

A [ballot](#) proceeds as follows:

- ICSID provides the parties with a ballot form containing the names of several candidates;
- Each party is given a date to return its completed ballot form, indicating the candidates it accepts or rejects;
- A party is not required to share its completed ballot with the other party;
- If the parties agree on a candidate from the ballot, that person will be deemed to have been appointed by agreement of the parties;
- If the parties agree on more than one proposed candidate, ICSID selects one of them and informs the parties of the selection.

A list procedure proceeds as follows:

- ICSID provides the parties with a list of several candidates;
- Each party can strike a certain number of candidates and rank the remaining candidates;
- The candidate with the best ranking is appointed or, if two or more candidates have the same ranking, ICSID selects one of them.

Any appointment pursuant to a procedure proposed by the Secretary-General is considered an appointment by agreement of the parties under the established method for constituting the tribunal.

Under the 2022 ICSID Arbitration Rules, if the procedure does not lead to an appointment, the parties can request additional assistance from the Secretary-General pursuant to ICSID Arbitration Rule 17 or ICSID Additional Facility Rule 25. A party may also invoke the default mechanism in Article 38 of the ICSID Convention and ICSID Additional Facility Rule 26 if 90 days have elapsed after registration.

b. Default Mechanism for Appointing an Arbitrator

If the parties to an ICSID Convention case are unable to appoint a member of the tribunal within 90 days after registration of the Request for arbitration, either party may ask that the Chair of the Administrative Council to appoint the arbitrator(s) not yet appointed (Article 38 of the ICSID Convention). Alternatively, the parties may agree to a different period or procedure. If the request under Article 38 of the ICSID Convention or ICSID Additional Facility Arbitration Rules concerns both a co-arbitrator and the president of the tribunal, the Chair/Secretary-General will appoint the co-arbitrator first.

The purpose of Convention Article 38 is to facilitate the completion of the constitution of an arbitral tribunal; accordingly, any request made pursuant to Convention Article 38 and Arbitration Rule 18 must relate to all appointments that have not been made. Until the Chair has made the relevant appointments, the parties retain the right to appoint the arbitrator or arbitrator(s) not yet appointed pursuant to Convention Article 37.

When a party requests the appointment of the presiding arbitrator under Article 38 of the ICSID Convention, ICSID may offer to initially conduct a strike and rank list or alternatively a ballot described above.

With the strike-and-rank list, ICSID proposes 5 potential candidates. The parties may strike up to two candidates and must rank the remaining candidates in their preferred order. Each party returns its completed list to ICSID and need not share its list with the other party. The candidate with the least points will be appointed as the president of the tribunal. That person is deemed to have been appointed by agreement of the parties. If two candidates have the same ranking, ICSID selects one of them, who then is deemed to have been appointed by agreement of the parties.

If the parties opt for the ballot procedure instead, ICSID provides the parties with a list of 5 potential candidates and requests that each party indicate which candidates it would accept. Each party returns its completed ballot to ICSID and need not share its ballot with the other party. If the parties agree on a candidate, that person is deemed to have been appointed by agreement of the parties. If the parties agree on more than one candidate, ICSID selects one of them who then is deemed to have been appointed by agreement of the parties.

If the parties do not agree on a strike-and-rank or a ballot procedure, or if the ballot procedure does not result in the appointment of a mutually acceptable candidate, the Chair will appoint the presiding arbitrator from the ICSID Panel of Arbitrators, following consultations with the parties, pursuant to Convention Article 38 and Arbitration Rule 18.

Parties have frequently decided to choose the ballot or strike-and-rank procedure. As indicated above, a ballot procedure does not always result in the appointment of the presiding arbitrator. If the ballot procedure fails, then the request for the appointment under Article 38 resumes, which extends the period for the appointment of the president of the tribunal and constitution of the tribunal. The strike-and-rank procedure as outlined above will always result in an appointment, therefore, the Article 38 appointment is not necessary.

For ICSID Convention cases, the appointment by the Chair must be made from the Panel of Arbitrators.

Before the candidate is appointed, the Chair/Secretary General consults with the parties about the candidate to be nominated, giving them an opportunity to raise any circumstance showing that the person lacks the required qualities under Article 14 of the ICSID Convention or the corresponding ICSID Additional Facility Arbitration Rule.

The parties may appoint missing arbitrators under the established method of constitution or by agreement at any time prior to completion of the process.

The Chair/Secretary-General will use best efforts to complete the appointment process within 30 days of the request for appointment.

C. Challenges to Arbitrators under ICSID Rules in the Context of Tribunal Constitutions

We understand that the present survey focuses on data concerning challenges to arbitrators affecting tribunal constitutions. In this respect, under the ICSID Rules:

- All proposals for disqualification are considered after the constitution of the tribunal and do not affect the process of constituting the tribunal.⁵
- If a proposal is submitted before the constitution of the tribunal, it is not addressed until the tribunal has been constituted and the party challenging has confirmed that it maintains the proposal.

Consequently, proposals to disqualify an arbitrator do not delay the constitution of the tribunal in ICSID cases.

⁵ See Article 58 of the ICSID Convention; (2006) ICSID Arbitration Rules 9; (2022) ICSID Arbitration Rule 23; and (2006) ICSID Arbitration Rules (Additional Facility) Article 15. Under (2022) ICSID Additional Facility Arbitration Rule 30(2)(a), the decision on the proposal for disqualification is made by the Secretary-General.

II. Survey Results

1. How many tribunals were constituted in investment treaty cases administered by your institution during the relevant time period?

A total of **446 cases** with tribunals were constituted in the relevant period under the ICSID Convention and ICSID Additional Facility Rules. In 33 of these cases, the instrument of consent was an investment contract; in 5 of these cases, the instrument of consent was an investment contract and an investment law, in 6 cases, the instrument of consent was an investment law, and the remaining 402 cases had investment treaties or a combination of treaties and other instruments as basis of consent.

2. Overview of the length of time to constitute a tribunal

a. During the relevant time period, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant's arbitrator, and (iii) nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal?

2.a.i. Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal – 130 days

2.a.ii Average length of time from the Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal – 100 days

2.a.iii. Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal – 220 days

b. What is the shortest time period and the longest time period (i.e., the range) for each of (i), (ii), and (iii)?

2.b.i Shortest to longest time period from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal – 0 days ~ 858 days

2.b.ii Shortest to longest time period from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal – 0 days ~ 851 days

2.b.iii. Shortest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 12 days ~ 1252 days⁶

c. In cases involving a challenge to an arbitrator before or immediately after the constitution of the tribunal (i.e., before the first procedural conference), what was the average length of time and the range to constitute a tribunal? On average, how long did it take to resolve challenges in these cases?

We understand that the present survey focuses on data concerning challenges to arbitrators affecting tribunal constitutions. In this respect, under the ICSID Rules:

⁶ This particular case was suspended for 495 days prior to any appointment of the members of the tribunal.

- All proposals for disqualification are considered after the constitution of the tribunal and do not affect the process of constituting the tribunal.⁷
- If a proposal is submitted before the constitution of the tribunal, it is not addressed until the tribunal has been constituted and the party challenging has confirmed that it maintains the proposal.

Consequently, proposals to disqualify an arbitrator do not delay the constitution of the tribunal in ICSID cases.

3. Default appointment methodology to constitute a tribunal

a. What is the default appointment method of your institution (number of arbitrators and the method of constitution, including time limits)?

With respect to default appointment methods, ICSID has:

- a) default rules for the method of constitution of the tribunal (Art. 37(2)(b) of the ICSID Convention, (2006) ICSID Arbitration Rule 3, (2022) ICSID Arbitration Rule 16, Articles 6(1) and 9 (2006) ICSID Additional Facility Arbitration Rules, Rule 24(2) (2022) ICSID Additional Facility Arbitration Rules), and
- b) default rules for the appointment of missing arbitrator(s) (Art. 38 of the ICSID Convention, (2006) ICSID Arbitration Rules 4 and 18, Articles 6(4) and 10 (2006) ICSID Additional Facility Arbitration Rules, Rule 26 (2022) ICSID Additional Facility Arbitration Rules).

Triggering of the default rule on the method of constitution does not necessarily trigger the default rule on the appointment of missing arbitrator(s). Therefore, in ICSID Convention cases, the Chair of the Administrative Council appoints the missing arbitrator(s) and in Additional Facility cases the Secretary-General appoints the missing arbitrator(s). These provisions are transcribed below.

A. Default provisions on method of constitution of the tribunal

ICSID Convention cases

Art. 37(2)(b) ICSID Convention

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Rule 3 (2006) ICSID Arbitration Rules

(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:

(a) Either party shall in a communication to the other party:

⁷ See Article 58 of the ICSID Convention; (2006) ICSID Arbitration Rules 9; (2022) ICSID Arbitration Rule 23; and (2006) ICSID Arbitration Rules (Additional Facility) Article 15. Under (2022) ICSID Additional Facility Arbitration Rule 30(2)(a), the decision on the proposal for disqualification is made by the Secretary-General.

(i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and

(ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;

(b) promptly upon receipt of this communication the other party shall, in its reply:

(i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and

(ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 16 (2022) ICSID Arbitration Rules

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.

ICSID Additional Facility cases

Article 6(1) (2006) ICSID Additional Facility Arbitration Rules

(1) In the absence of agreement between the parties regarding the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties, all in accordance with Article 9 of these Rules.

Article 9 (2006) ICSID Additional Facility Arbitration Rules

(1) If the parties have not agreed upon the number of arbitrators and the method of their appointment within 60 days after the registration of the request, the Secretary-General shall, upon the request of either party promptly inform the parties that the Tribunal is to be constituted in accordance with the following procedure:

(a) either party shall, in a communication to the other party:

(i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and

(ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;

(b) promptly upon receipt of this communication the other party shall, in its reply:

(i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and

(ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President; and

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in paragraph (1) of this Article shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 24(2) (2022) ICSID Additional Facility Arbitration Rules

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.

B. Default rules on appointment of missing arbitrators

ICSID Convention cases

Article 38 ICSID Convention

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Rule 4 (2006) ICSID Arbitration Rules

- (1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.
- (2) The provision of paragraph (1) shall apply mutatis mutandis in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.
- (3) The Secretary-General shall forthwith send a copy of the request to the other party.
- (4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Articles 38 and 40(1) of the Convention, he shall consult both parties as far as possible.
- (5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 18 (2022) ICSID Arbitration Rules

- (1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chair appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.
- (2) The Chair shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.
- (3) The Chair shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

Additional Facility cases

Article 6(4) (2006) ICSID Additional Facility Arbitration Rules

(4) If the Tribunal shall not have been constituted within 90 days after the notice of registration of the request for arbitration has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the "Chairman") shall, at the request in writing of either party transmitted through the Secretary-General, appoint the arbitrator or arbitrators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate an arbitrator to be President of the Tribunal.

Article 10 (2006) ICSID Additional Facility Arbitration Rules

- (1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.
- (2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.
- (3) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 26 (2022) ICSID Additional Facility Arbitration Rules

- (1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Secretary-General appoint the arbitrator(s) who have not yet been appointed.
- (2) The Secretary-General shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.
- (3) The Secretary-General shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

b. During the relevant time period, how many cases followed the default appointment method?

Data for Default Rule on Appointment of Missing Arbitrator(s) – Article 38 of the ICSID Convention and Article 6(4) of the Additional Facility Rules

Under both the ICSID Convention and the ICSID Additional Facility Rules, a party may request the Chair of the Administrative Council/Secretary-General to appoint an arbitrator regardless of whether it is an agreed or default method of constitution of the tribunal. The difference is that under the ICSID Convention, the Chair must appoint the arbitrator from the ICSID Panel of Arbitrators and Conciliators. The Additional Facility Rules allow the Chair/Secretary-General to appoint outside of the ICSID Panel of Arbitrators.

Of the total of 446 cases, and in those cases with the default method of constitution, a party requested the Chair of the Administrative Council/Secretary-General to make the appointment of a missing arbitrator in **85 cases**.⁸

Of these 85 cases, **72 appointments** were made pursuant to Article 38 of the ICSID Convention and **13 appointments** in accordance with Article 6(4) of the ICSID Additional Facility Arbitration Rules.

Of the 72 appointments pursuant to Article 38 of the ICSID Convention, a party requested the Chair to appoint a co-arbitrator for the other party in **6 cases** and a presiding arbitrator in **66 cases**.

The 13 appointments made pursuant to Article 6(4) of the ICSID Additional Facility Arbitration Rules were only with respect to the presiding arbitrator.

- **For this subset of cases, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant's arbitrator, and (iii) nomination/appointment of Respondent's arbitrator until the appointment of the presiding arbitrator/constitution of the tribunal?**

Data for Default Rule on Appointment of Missing Arbitrator(s) – Article 38 of the ICSID Convention and Article 6(4) of the Additional Facility Rules

The data below refers to the **85 cases with default method of appointment** where a party requested the Chair of the Administrative Council/Secretary General to make the appointment of a missing arbitrator in accordance with Article 38 of the ICSID Convention and in accordance with Article 6(4) of the ICSID Additional Facility Arbitration Rules.

3.b.i. Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal with the default method of appointment – 157 days

3.b.ii. Average length of time from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal with the default method of appointment – 113 days

3.b.iii. Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal with the default method of appointment – 237 days

- **What is the shortest time period and the longest time period (i.e., the range) for each of (i), (ii), and (iii)?**

Data for Default Rule on Appointment of Missing Arbitrator(s) – Article 38 of the ICSID Convention and Article 6(4) of the Additional Facility Rules

The data below refers to the **85 cases with default method of appointment**.

3.b.i. Shortest to longest time period from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal – 0 days ~ 707 days

⁸ The cases with an agreed method of constitution are reported in section 4 *infra*.

3.b.ii. Shortest to longest time period from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal – 0 days ~ 525 days

3.b.iii. Shortest to longest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 132 days ~ 738 days

- c. For this subset of cases (default appointment methodology), in cases involving a challenge to an arbitrator before or immediately after the constitution of the tribunal (i.e., before the first procedural conference), what was the average length of time and the range to constitute a tribunal? On average, how long did it take to resolve challenges in these cases?**

We understand that the present survey focuses on data concerning challenges to arbitrators affecting tribunal constitutions. In this respect, under the ICSID Rules:

- All proposals for disqualification are considered after the constitution of the tribunal and do not affect the process of constituting the tribunal.⁹
- If a proposal is submitted before the constitution of the tribunal, it is not addressed until the tribunal has been constituted and the party challenging has confirmed that it maintains the proposal.

Consequently, proposals to disqualify an arbitrator do not delay the constitution of the tribunal in ICSID cases.

- d. During the relevant time period, how many cases, if any, followed the default appointment method of another set of arbitral rules?**

None.

4. Non-default/party-agreed methodology to constitute a tribunal

Of the 446 cases in the relevant period, there were **361 cases** in which the parties agreed on a method of constitution of the tribunal.

- a. Who appointed the tribunal members and with what frequency?**

- (i) Party Appointed Arbitrators
- Each party appointed an arbitrator

⁹ See Article 58 of the ICSID Convention; (2006) ICSID Arbitration Rules 9; (2022) ICSID Arbitration Rule 23; and (2006) ICSID Arbitration Rules (Additional Facility) Article 15. Under (2022) ICSID Additional Facility Arbitration Rule 30(2)(a), the decision on the proposal for disqualification is made by the Secretary-General.

Of the 361 cases in which the parties agreed on a method of constitution, each party appointed an arbitrator in all 361 cases.

- Other (e.g., party agreement to use appointing authority)

None.

(ii) Chair/ President

- By appointing authority by agreement of the parties (e.g., Secretary-General, Chairman of the ICSID Administrative Council, etc.)

Of the 361 cases in which the parties agreed on a method of constitution in **21 cases** the president was appointed by the Secretary-General.

- By co-arbitrators

Of the 361 cases in which the parties agreed on a method of constitution, in **85 cases** the president was appointed by the co-arbitrators, either directly or through another formula, e.g. a strike-and-rank list method with candidates proposed by the co-arbitrators.

- By agreement of the parties (using method under (d) below)

Of the 361 cases in which the parties agreed on a method of constitution:

- In **37 cases** the president was appointed as a result of a ballot with candidates proposed by ICSID;
- In **52 cases** the president was appointed as a result of a strike-and-rank list method with candidates proposed by ICSID; and
- In **165 cases** the president was appointed pursuant to other formulae agreed by the parties.

- By other

In one case the appointment of the president was made by an external institution.

b. What party-agreed methods were used to appoint the Chair/President of the Tribunal under (c)(ii) and which was the most popular method?

- **Nomination from institutional roster/panel of arbitrators of one person (without ballot/list ranking)**
Not applicable.
- **Nomination outside of institutional roster/panel of arbitrators of one person (without ballot/ list ranking)**
Not applicable.
- **Ballot (agree/disagree) – indicate range of number of candidates**

Usually five candidates per ballot.

○ **List ranking – indicate range of number of candidates**

Range of five to seven candidates per strike-and-rank list.

○ **Other (describe)**

1. Party agreement for co-arbitrators to make appointment of the president or provide a strike-and-rank list of candidates from which the parties select in order of preference.

2. Party agreement for the Secretary-General to appoint the president

Most popular method - The most popular method was co-arbitrator assistance (85 appointments out of 361 cases).

c. Describe examples of party-agreed methods that were efficient/worked well (including, as measured by shortest time from appointment of the Claimant’s arbitrator to the constitution of the tribunal).

EXAMPLE A

An example of an efficient method of constitution of the tribunal agreed upon by the parties with ICSID involvement followed these steps:

- i. Claimant appointment after confirmation of the method of constitution.
- ii. Respondent appointment within 21 days from the acceptance of the arbitrator appointed by the Claimant.
- iii. President appointment via a strike and rank procedure with ICSID’s assistance:
 - a. ICSID and the parties each nominate 4 candidates (12 in total).
 - b. ICSID to contact the parties about availability and conflict check.
 - c. ICSID to provide the list of candidates to the parties without disclosing who proposed each candidate.
 - d. The 12 candidates to be ranked by the parties (each party entitled to strike 2 candidates).

An example of a case that used this type of method of constitution took **76** days from the appointment of Claimant’s arbitrator to constitution.

EXAMPLE B

Another example of an efficient method of constitution of the tribunal agreed upon by the parties but with co-arbitrator involvement, which is the most frequently used by the parties, followed these steps:

- i. Claimant appointment after confirmation of the method of constitution.

- ii. Respondent appointment within 30 days from Claimant’s appointment.
- iii. President appointment pursuant to a strike-and-rank list as follows:
 - a. The co-arbitrators/ICSID provide 5 to 7 candidates within 10 days of the acceptance of the arbitrator appointed by Respondent.
 - b. Co-arbitrators/ICSID confirm availability and no conflict with each candidate before the candidates are proposed to the parties.
 - c. The parties strike and rank candidates within 7 days.

An example of a case that used this type of method of constitution had **89 days** between the time from the appointment of Claimant’s arbitrator to constitution.

d. Describe examples of party-agreed methods that were not efficient/ did not work well (including, as measured by shortest time from appointment of the Claimant’s arbitrator to the constitution of the tribunal).

Delays and complications have arisen in the following situations: (i) consecutive ballots or a high number of candidates for strike-and-rank lists; (ii) parties failing to agree on qualifications and other requirements (e.g. for example, nationality limitations, language, number of appointments in investment cases, number of appointments as president, in addition to confirming lack of conflict), (iii) parties commenting on proposed candidates; and (iv) complex methods which eventually led to default. Below is an example of an otherwise efficient method of constitution which may have been delayed because of these issues.

EXAMPLE

An example of an inefficient method of constitution of the tribunal agreed by the parties with ICSID involvement followed these steps:

- i. Each party appoints one arbitrator.
 - ii. Parties to agree on president on the following basis:
 - a. The co-arbitrators provide a list of candidates; if they fail to do so, ICSID provides a list of 10 candidates.
 - b. The parties advise of any conflicts (without any specific detail on what constitutes a conflict) with proposed candidates within four days;
 - c. Once the list of 10 candidates is cleared of conflicts each party has the right to veto three of the 10 candidates;
 - d. The parties provide their list of vetoed candidates to ICSID.
 - e. Each party then ranks their remaining seven candidates from 1 to 7 (1 being the most preferred and 7 the least).
- e. For this subset of cases that used non-default/party-agreed methods, during the relevant time period, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant’s arbitrator, and (iii) nomination/appointment of**

Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal?

Ballots

Below is the data reflecting the requested information for the **37 cases** that used the ballot as the method of appointment:

4.e.i Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 150 days

4.e.ii Average length of time from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 125 days

4.e.iii Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 237 days

Strike-and-Rank List

Below is the data reflecting the requested information for the **52 cases** that used the strike-and-rank method of appointment:

4.e.i Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 144 days

4.e.ii Average length of time from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 119 days

4.e.iii Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 249 days

Co-arbitrator Appointments

Below is the data reflecting the requested information for the **85 cases** that had co-arbitrator proposals or appointments as the method of appointment:

4.e.i Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 86 days

4.e.ii Average length of time from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 62 days

4.e.iii Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 175 days

Secretary-General Appointments

Below is the data reflecting the requested information for the **21 cases** that the Secretary-General was the appointing authority:

4.e.i Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 163 days

4.e.ii Average length of time from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 143 days

4.e.iii Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 296 days¹⁰

Other Party-Agreed Methods of Appointments

Below is the data reflecting the requested information for the **165 cases** that the parties agreed on other methods of appointment:

4.e.i Average length of time from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 114 days

4.e.ii Average length of time from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 87 days

4.e.iii Average length of time from registration to appointment of presiding arbitrator/constitution of the tribunal with non-default/party-agreed method – 198 days

- f. What is the shortest time period and the longest time period (i.e., the range) for each of (i), (ii), and (iii)?**

Ballots

Below is the data reflecting the requested information for the **37 cases** that used the ballot as the method of appointment:

4.f.i Shortest to longest time period from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal – 25 days ~ 525 days

4.f.ii Shortest to longest time period from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal – 11 days ~ 525 days

4.f.iii Shortest to longest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 116 days ~ 698 days

Strike-and-Rank List

Below is the data reflecting the requested information for the **52 cases** that used the strike-and-rank method of appointment:

4.f.i Shortest to longest time period from Claimant's appointment to appointment of presiding arbitrator/constitution of the tribunal – 38 days ~ 396 days

4.f.ii Shortest to longest time period from Respondent's appointment to appointment of presiding arbitrator/constitution of the tribunal – 24 days ~ 353 days

4.f.iii Shortest to longest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 62 days ~ 1252 days

¹⁰ SG Appointments were often preceded by a complex party-method that did not generate a presiding arbitrator.

Co-arbitrator Appointments

Below is the data reflecting the requested information for the **85 cases** that had co-arbitrator proposals or appointments as the method of appointment:

- 4.f.i Shortest to longest time period from Claimant’s appointment to appointment of presiding arbitrator/constitution of the tribunal – 14 days ~ 253 days
- 4.f.ii Shortest to longest time period from Respondent’s appointment to appointment of presiding arbitrator/constitution of the tribunal – 14 days ~ 212 days
- 4.f.iii Shortest to longest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 84 days ~ 629

Secretary-General Appointments

Below is the data reflecting the requested information for the **21 cases** that the Secretary-General was the appointing authority:

- 4.f.i Shortest to longest time period from Claimant’s appointment to appointment of presiding arbitrator/constitution of the tribunal – 17 days ~ 383 days
- 4.f.ii Shortest to longest time period from Respondent’s appointment to appointment of presiding arbitrator/constitution of the tribunal –1 day ~ 351 days
- 4.f.iii Shortest to longest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 112 days – 807 days

Other Party-Agreed Methods of Appointments

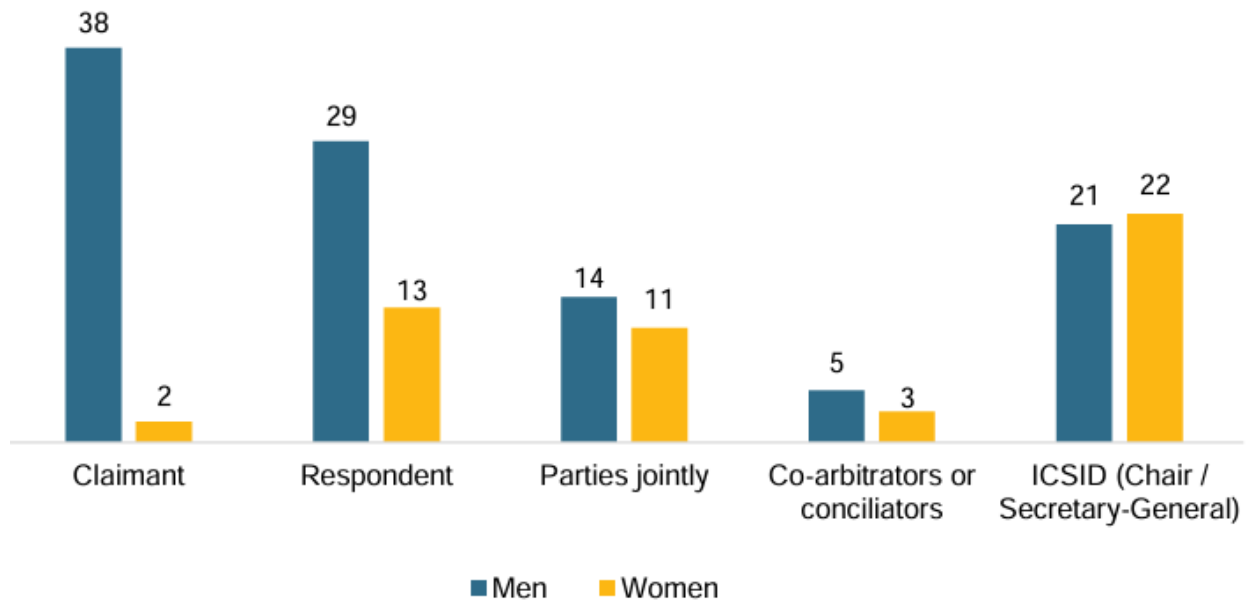
Below is the data reflecting the requested information for the **165 cases** that the parties agreed on other methods of appointment:

- 4.f.i Shortest to longest time period from Claimant’s appointment to appointment of presiding arbitrator/constitution of the tribunal –0 days ~ 858 days
- 4.f.ii Shortest to longest time period from Respondent’s appointment to appointment of presiding arbitrator/constitution of the tribunal –0 days ~ 851 days
- 4.f.iii Shortest to longest time period from registration to appointment of presiding arbitrator/constitution of the tribunal – 12 days ~ 944 days

- 5. We are interested in finding out whether there is any correlation between the method of appointment and the resulting diversity of tribunals. As a proxy for other types of diversity, we propose to look at gender diversity. Did any of the specific methods listed under Points 4(c) and 4(d) result in a greater number of women being appointed?**

The following graph shows the most recent data recorded for the appointments (from January 1, 2023 to December 31, 2023) by ICSID and the Parties:

ICSID DATA- IBA Survey



ICSID appointed 43% of all female appointees during this period. This demonstrates the institution's commitment to gender diversity and shows that the methods of constitution involving ICSID contribute toward greater gender diversity.

Annex 2:

PCA report to IBA Investment Arbitration Subcommittee

Questions to Institutions re: Tribunal Constitution

RESPONSES OF THE PERMANENT COURT OF ARBITRATION

Relevant time period: Jan. 1, 2013 – Dec. 31, 2022

1. How many tribunals¹ were constituted in investment treaty cases administered by your institution during the relevant time period?

In investment treaty cases administered² by the Permanent Court of Arbitration (hereinafter, the “PCA”) between January 1, 2013 and December 31, 2022, a total of **211 three-member tribunals** have been constituted.

While this represents the total number of tribunals constituted during the relevant time period, there is a small percentage of cases for which the PCA does not have access to all the information regarding the tribunal constitution process, for example because the tribunal constitution took place before the case came to the PCA. Accordingly, the figures provided in reply to questions 2 to 5 below are based on the cases for which the relevant information is available to the PCA.

Further, the vast majority of the investment treaty cases administered by the PCA during the relevant time period was conducted under the UNCITRAL Arbitration Rules (hereinafter, the “UNCITRAL Rules”), whether under their 1976, 2010, 2013 or 2021 version (and subject to any amendments that the disputing parties may have agreed upon). Consequently, several of the statistics set out below are based—as further explained where applicable—on the procedure foreseen under the UNCITRAL Rules.

Finally, the PCA has added some comments below to put its answers in context and ensure that this exercise is as meaningful as possible.

2. Overview of the length of time to constitute a tribunal

- a. During the relevant time period, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant’s arbitrator, and (iii) nomination/appointment of Respondent’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal?

As a general rule, the PCA recommends using the median, rather than the average, as the statistical value to assess the overall length of time to constitute a tribunal. The average value can be heavily affected by outlier cases, while the median remains more indicative of the underlying sample. Examples of such outlier cases include a PCA case where the claimant did not proceed with the appointment of the first co-arbitrator until more than seven years after the filing of its notice of arbitration. In another outlier case, the tribunal constitution process was suspended

¹ For the purpose of this survey, please only consider three-member tribunals.

² This includes new registry cases received by the PCA during the relevant period (*i.e.*, it does not include cases received prior to 2013 even if the tribunal constitution process may have been ongoing after January 1, 2013, but it includes all new cases received in 2022, even if some of these tribunals may have not been fully constituted until after December 31, 2022).

for more than four years pending the conclusion of related proceedings. Such suspension periods have not been excluded from the calculation of the time period to constitute the tribunal.

If average values are to be relied upon, the PCA recommends excluding a percentage (e.g., 5%) of outlier values from the underlying sample of cases. We would be happy to provide such figures if requested.

There is no formal registration process required for initiating an arbitration under the UNCITRAL Rules. An arbitration is commenced by the communication of a notice of arbitration by the claimant to the respondent, and is “deemed to commence on the date on which the notice of arbitration is received by the respondent”. All time periods are therefore calculated from this commencement date. This also means that that the starting-point used here is different from the starting-point used by ICSID.

In many instances, the commencement of the arbitration long pre-dates the moment when the PCA became involved in the case, which typically happens either when (i) the PCA’s assistance is sought with the constitution of the tribunal in the role of designating or appointing authority (hereinafter, the “AA”); or (ii) a tribunal has been fully constituted and decides on PCA administration together with the parties.

The average and median length of time for the periods described at (i)-(iii) above in investment treaty cases administered by the PCA during the relevant period is as follows:

Time period	Average (days)	Median (days)
<i>From initiation/registration of the arbitration until the appointment of the presiding arbitrator/constitution of the tribunal</i>	239.5 ³	168
<i>From nomination/appointment of Claimant’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	182.2	141.5
<i>From nomination/appointment of Respondent’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	118.1	77.5

³ There is no formal registration process required for initiating an arbitration under the UNCITRAL Rules. An arbitration is commenced by the communication of a notice of arbitration by the claimant to the respondent, and is “deemed to commence on the date on which the notice of arbitration is received by the respondent”. All time periods are therefore calculated from this commencement date.

- b. What is the shortest time period and the longest time period (*i.e.*, the range) for each of (i), (ii), and (iii)?

The range of periods for items (i)-(iii) is as follows:

Time period	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	42	2869
<i>From nomination/appointment of Claimant's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	0	1691
<i>From nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	0	1638

The '0' values above derive from a case in which the AA appointed all three members of the tribunal on the same date pursuant to a treaty requirement.⁴

Several of the longest periods to constitute a tribunal arose due to (i) a very long delay between the service of the notice of arbitration and the appointment of the first arbitrator (as there is no time requirement between these two steps under the UNCITRAL Rules); or (ii) an AA designated by the parties (other than the Secretary-General of the PCA) failing to act when called upon.

- c. In cases involving a challenge to an arbitrator before or immediately after the constitution of the tribunal (*i.e.*, before the first procedural conference), what was the average length of time and the range to constitute a tribunal? On average, how long did it take to resolve challenges in these cases?

Under the UNCITRAL Rules, a party first has to send a notice of its challenge to all other parties, the arbitrator who is challenged and the other arbitrators.⁵ Upon receipt of that notice, all parties may agree to the challenge, and the arbitrator may also withdraw from his or her office (neither of which implies acceptance of the validity of the grounds for the challenge). If there is no such agreement or withdrawal, the party making the challenge may elect to pursue it, and it shall then seek a decision by the AA. On this basis, the time to resolve challenges has been calculated from the date of the notice of challenge (which is the moment after which a challenge has the potential to disrupt the tribunal constitution process). In turn,

⁴ In this case, the underlying investment treaty provided that the three members of the arbitral tribunal shall be appointed by the AA.

⁵ The challenging party shall send this notice within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances that allegedly give rise to justifiable doubts as to the arbitrator's impartiality or independence became known to that party.

the challenge has been deemed resolved on the date on which (i) the AA issued a decision on the challenge; (ii) the challenged arbitrator resigned; or (iii) the challenge was withdrawn.

It should also be noted that not all PCA cases include a first procedural conference. As such, a challenge has been considered to be relevant for purposes of this question (and question 3.c below) if it was notified before the conclusion of the terms of appointment (which are typically finalized immediately before or after the first procedural conference, if there is one).

The average, median and range of the length of time to constitute a tribunal in PCA-administered investment treaty cases which involved a challenge to an arbitrator before or immediately after the constitution of the tribunal (hereinafter, an “Early Challenge”) is as follows:

Time period	Average (days)	Median (days)	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	333.2 ⁶	281	141	782
<i>From nomination/appointment of Claimant’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	299.7	272	116	782
<i>From nomination/appointment of Respondent’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	236.9	191.5	37	722

On average, and subject to the abovementioned considerations, it took 77.6 days⁷ to resolve each Early Challenge. This is calculated on a per-challenge basis, since there were some cases which involved more than one Early Challenge.

⁶ These statistics rely on the date of the appointment of the presiding arbitrator, in line with the approach followed for questions 2.a and 2.b above. In all cases where no AA was agreed upon by the parties prior to the challenge, the periods include the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required to resolve the challenge in question and make any necessary appointments (the designation of AA step is further described under Question 3(a) below).

⁷ In all cases where no AA was agreed upon by the parties prior to the challenge, the period includes the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required to resolve the challenge in question (the designation of AA step is further described under Question 3(a) below).

3. Default appointment methodology to constitute a tribunal

- a. What is the default appointment method of your institution (number of arbitrators and the method of constitution, including time limits)?

As previously discussed, the PCA will rely on the methodology foreseen under the UNCITRAL Rules for purposes of answering this question.

Under the UNCITRAL Rules, if the parties have not previously agreed on the number of arbitrators, and after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.⁸ This notwithstanding, under the 2010/2013/2021 versions of the UNCITRAL Rules (Art. 7(2)), if no other parties have responded to a party's proposal to appoint a sole arbitrator and the party or parties concerned have failed to appoint a second arbitrator in accordance with the Rules, the AA may, at the request of a party, appoint a sole arbitrator "if it determines that, in view of the circumstances of the case, this is more appropriate".

The UNCITRAL Rules do not specify who is to act as AA (except under the UNCITRAL Expedited Arbitration Rules, which identify the PCA Secretary-General as the default AA). Article 6 of the 2010/2013/2021 versions of the UNCITRAL Rules provides that, "[u]nless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the [PCA], one of whom would serve as appointing authority". If all parties have not agreed on the choice of an AA within 30 days after such a proposal has been received by all other parties, "any party may request the Secretary-General of the PCA to designate the appointing authority".⁹ The procedure for the designation of an AA under the 1976 version of the UNCITRAL Rules is essentially the same, except that such designation may not be triggered until an AA is required to act, for example due to an explicit failure to appoint the sole, presiding or second arbitrator in accordance with the Rules (unless the parties agree otherwise, naturally).¹⁰ Accordingly, in all cases where no AA has been previously agreed upon by the parties prior to commencement of the arbitration, the periods for the constitution of tribunals include the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required for appointments to be made.

⁸ See Article 5 of the 1976 UNCITRAL Rules and Article 7(1) of the 2010/2013/2021 UNCITRAL Rules.

⁹ Article 6(4) further provides that, "if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority".

¹⁰ See Articles 6(1)-(2) and 7(2)-(3) of the 1976 UNCITRAL Rules.

If three arbitrators are to be appointed, the UNCITRAL Rules provide that “each party shall appoint one arbitrator”¹¹ and that “[t]he two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal”.¹²

If any of the arbitrators is not appointed in accordance with that procedure, the UNCITRAL Rules provide that the relevant arbitrator shall be appointed by the AA. Specifically, if within 30 days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the AA to appoint the second arbitrator.¹³ Similarly, if within 30 days after the appointment of the second arbitrator the two co-arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the AA in accordance with the following methodology (hereinafter the “UNCITRAL List-Procedure”):

The appointing authority shall appoint the [presiding] arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

- (a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;
- (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;
- (c) After the expiration of the above period of time the appointing authority shall appoint the [presiding] arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
- (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the [presiding] arbitrator.¹⁴

With regard to list-procedures, when the Secretary-General of the PCA acts as the AA in a case, he typically consults the disputing parties with regard to the desired (presiding) arbitrator profile. This approach is intended to increase the chances that the list-procedure will be successful (*i.e.*, that the parties will select a common

¹¹ The 2010/2013/2021 version of the UNCITRAL Rules (at Art. 10(1)) further clarifies that, where there are multiple parties as claimant or respondent, “unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator”.

¹² See Article 7(1) of the 1976 UNCITRAL Rules and Article 9(1) of the 2010/2013/2021 UNCITRAL Rules.

¹³ See Article 7(2) of the 1976 UNCITRAL Rules and Article 9(2) of the 2010/2013/2021 UNCITRAL Rules.

¹⁴ See Articles 6(3) and 7(3) of the 1976 UNCITRAL Rules, and Articles 8(2) and 9(3) of the 2010/2013/2021 UNCITRAL Rules. This procedure is also followed for the appointment of a sole arbitrator when the parties fail to reach an agreement on his/her choice.

candidate)¹⁵ and to lead to an appointment that corresponds closely to the joint preferences of the parties.

- b. During the relevant time period, how many cases followed the default appointment method?

For purposes of this question, the PCA has considered two sets of data as representative of the default appointment methodology under the UNCITRAL Rules.

The first set of data comprises cases in which the parties entirely followed the default appointment method under the UNCITRAL Rules and did not require the intervention of an AA, namely: (i) the first arbitrator was directly appointed by the only claimant party, or jointly appointed by all claimant parties; (ii) the second arbitrator was directly appointed by the only respondent party, or jointly appointed by all respondent parties; and (iii) the third (and presiding) arbitrator was jointly appointed by the two other arbitrators.¹⁶ During the relevant time period, at least 99 PCA-administered cases followed this appointment methodology (hereinafter, the “Strict Default Methodology”).

The second set of data, in turn, comprises cases in which the parties followed the default appointment method under the UNCITRAL Rules (as described in the previous paragraph) and, to the extent that they required the intervention of an AA (which may have been the PCA Secretary-General or a different AA agreed by the parties or designated by the PCA), the AA followed the default appointment method foreseen under the UNCITRAL Rules. In other words, the AA would have made a direct appointment if requested to appoint the second arbitrator; and, if requested to appoint the presiding arbitrator, the AA would have conducted an UNCITRAL List-Procedure or, if so required, made a direct appointment (see question 3.a above). During the relevant time period, at least 134 PCA-administered cases followed this appointment methodology (hereinafter, the “Extended Default Methodology”).

- For this subset of cases, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant’s arbitrator, and (iii) nomination/appointment of Respondent’s arbitrator until the appointment of the presiding arbitrator/constitution of the tribunal? (*the next two questions are addressed jointly*)
- What is the shortest time period and the longest time period (*i.e.*, the range) for each of (i), (ii), and (iii)?

¹⁵ As seen below, in 10 out of 12 PCA-administered cases where the UNCITRAL List-Procedure was used, a common candidate for appointment was identified through the list-procedure.

¹⁶ Cases in which the parties agreed to an extension of the 30-day period for the appointment of the second arbitrator or the presiding arbitrator have still been considered to have followed the default appointment methodology.

For the subset of cases following the Strict Default Methodology, the average, median, shortest and longest length of time for the periods described at items (i)-(iii) above in cases administered by the PCA during the relevant period is as follows:

Time period	Average (days)	Median (days)	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	188	144	42	1691
<i>From nomination/appointment of Claimant's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	155.2	115.5	14	1691
<i>From nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	107.8	61	11	1638

For the subset of cases following the Extended Default Methodology, the average, median, shortest and longest length of time for the periods described at items (i)-(iii) above in cases administered by the PCA during the relevant period is as follows:

Time period	Average (days)	Median (days)	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	226.7	150.5	42	2869
<i>From nomination/appointment of Claimant's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	170.4	129	14	1691
<i>From nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	107.2	58.5	4	1638

- c. For this subset of cases (default appointment methodology), in cases involving a challenge to an arbitrator before or immediately after the constitution of the tribunal

(i.e., before the first procedural conference), what was the average length of time and the range to constitute a tribunal? On average, how long did it take to resolve challenges in these cases?

Subject to the observations set out at question 2.c above, the average, median and range of the length of time to constitute a tribunal in PCA-administered cases which followed the Strict Default Methodology and involved an Early Challenge is as follows:

Time period	Average (days)	Median (days)	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal¹⁷</i>	260.25 ¹⁸	216.5	144	607
<i>From nomination/appointment of Claimant's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	232.3	198.5	116	607
<i>From nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	185.9	158.5	37	592

On average, and subject to the considerations discussed at question 2.c above, it took 72.9 days¹⁹ to resolve each Early Challenge in this subset of cases.

¹⁷ These statistics rely on the date of the appointment of the presiding arbitrator, in line with the approach followed for question 3.b above.

¹⁸ These statistics rely on the date of the appointment of the presiding arbitrator, in line with the approach followed for questions 2.a and 2.b above. In all cases where no AA was agreed upon by the parties prior to the challenge, the periods include the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required to resolve the challenge in question and make any necessary appointments (the designation of AA step is further described under Question 3(a) below).

¹⁹ In all cases where no AA was agreed upon by the parties prior to the challenge, the period includes the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required to resolve the challenge in question (the designation of AA step is further described under Question 3(a) below).

In turn, the average, median and range of the length of time to constitute a tribunal in PCA-administered cases which followed the Extended Default Methodology and involved an Early Challenge is as follows:

Time period	Average (days)	Median (days)	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal²⁰</i>	302.3 ²¹	218	144	782
<i>From nomination/appointment of Claimant's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	277.8	202	116	782
<i>From nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	219.7	171	37	722

On average, and subject to the considerations discussed at question 2.c above, it took 69.4 days²² to resolve each Early Challenge in this subset of cases.

- d. During the relevant time period, how many cases, if any, followed the default appointment method of another set of arbitral rules?

Based on the information available to the PCA, there were no PCA-administered cases during the relevant time period which followed the default appointment method of another set of arbitral rules.

²⁰ These statistics rely on the date of the appointment of the presiding arbitrator, in line with the approach followed for question 3.b above.

²¹ These statistics rely on the date of the appointment of the presiding arbitrator, in line with the approach followed for questions 2.a and 2.b above. In all cases where no AA was agreed upon by the parties prior to the challenge, the periods include the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required to resolve the challenge in question and make any necessary appointments (the designation of AA step is further described under Question 3(a) below).

²² In all cases where no AA was agreed upon by the parties prior to the challenge, the period includes the time required for the designation of an AA by the PCA Secretary-General, in addition to the time actually required to resolve the challenge in question (the designation of AA step is further described under Question 3(a) below).

4. Non-default/party-agreed²³ methodology to constitute a tribunal

a. Who appointed the tribunal members and with what frequency?

(i) Co-arbitrators

- Each party appointed an arbitrator
- Other (*e.g.*, party agreement to use appointing authority)

During the relevant period, at least 371 co-arbitrators were appointed by one of the parties in line with the Strict Default Methodology (*i.e.*, the first arbitrator was appointed by the claimant(s), or the second arbitrator was appointed by the respondent(s)). In total, there were at least 172 PCA-administered cases in which both co-arbitrators were appointed respectively by each of the parties.

During this period, there has been one PCA-administered case in which the first arbitrator was appointed by an AA.²⁴ There have been at least 25 PCA-administered cases in which the second arbitrator was appointed by an AA. The PCA is not aware of other methodologies for the appointment of a co-arbitrator not involving an AA.

(ii) Chair/ President

- By appointing authority by agreement of the parties (*e.g.*, Secretary-General, Chairman of the ICSID Administrative Council, etc.)
- By co-arbitrators
- By agreement of the parties (using method under (d) below)
- By other

During the relevant period, the presiding arbitrator was appointed:

- by an AA in at least 47 PCA-administered cases;
- jointly by the co-arbitrators in at least 118 PCA-administered cases;
- jointly by the parties in at least 20 PCA-administered cases; and
- pursuant to an *ad hoc* procedure not involving an AA in at least 5 cases.

²³ “Party-agreed” covers both (i) methodologies set forth in an investment treaty or trade promotion agreement by the Contracting States, and (ii) methodologies agreed by the parties to the arbitration.

²⁴ In this case, all three members of the tribunal were appointed by the AA pursuant to the underlying treaty.

- b. What party-agreed methods were used to appoint the Chair/President of the Tribunal under (c)(ii) and which was the most popular method?
- Nomination from institutional roster/panel of arbitrators of one person (without ballot/list ranking)
 - Nomination outside of institutional roster/panel of arbitrators of one person (without ballot/ list ranking)
 - Ballot (agree/disagree) – indicate range of number of candidates
 - List ranking – indicate range of number of candidates
 - Other (describe)

Appointment by AA (47 cases)

The majority of the PCA-administered cases in which the presiding arbitrator was appointed by an AA involved a methodology based on the UNCITRAL List-Procedure. The lists circulated by AAs during the relevant period ranged from 3 to 17 candidates, and featured various mechanisms:

- In 12 cases, the AA followed the UNCITRAL List-Procedure (see question 3.a above). In 10 of these cases, a common candidate resulted from the list-procedure; in 2 cases, the AA proceeded to a direct appointment following the failure of the list-procedure.
- In 11 cases, the parties agreed to modify the UNCITRAL List-Procedure such that the number of candidates from the list to which each party could object was limited to no more than half of the candidates (which ensured that at least one common candidate would remain on the list).²⁵ This is an approach frequently proposed by the PCA Secretary-General to parties.
- In 11 further cases, the parties agreed to other modifications to the UNCITRAL List-Procedure (sometimes including a limit to the number of candidates from the list to which each party could object). These other modifications could include requirements regarding the exact number of candidates on the list or the profile of the candidates on the list (*e.g.*, language skills, exclusion of certain candidates that had been previously considered by the parties), as well as other adjustments to the ranking procedure.²⁶

²⁵ Typically, this approach entails that the AA will circulate a list containing an uneven number of candidates and that the number of ‘strikes’ by each side will be limited to “half minus one”.

²⁶ In one PCA case, the agreed list-procedure provided that the parties would be invited to confer if there was a tie between two candidates. In another case, each party was allowed to consult with its party-appointed arbitrator regarding the candidates on the list.

In addition to those cases which involved a list-procedure, there were 4 PCA-administered cases in which the AA made a direct appointment of the presiding arbitrator without resorting to a list-procedure.

Further, there were 9 PCA-administered cases during the relevant period in which the AA appointed the presiding arbitrator pursuant to a different *ad hoc* procedure agreed by the parties. These procedures often included an initial stage during which the parties attempted to agree on the choice of the presiding arbitrator (either by exchanging lists of potential candidates or through direct discussions), failing which either party could ask the AA to appoint the presiding arbitrator pursuant to some sort of list-procedure.

Joint appointment by the parties (20 cases)

As stated above, there were 20 PCA-administered cases during the relevant period in which the presiding arbitrator was appointed by agreement of the parties.

Ad hoc procedure not involving an AA (5 cases)

In five other PCA cases, the presiding arbitrator was appointed pursuant to an *ad hoc* procedure agreed by the parties that did not require the intervention of an AA. One of these cases involved a multi-tiered procedure pursuant to which (i) the parties would first try to agree on the choice of the presiding arbitrator by exchanging lists of candidates; if this failed, (ii) the co-arbitrators would attempt to agree on the choice of a presiding arbitrator in consultation with the parties; and, if this also failed, (iii) the AA would conduct a modified list-procedure for the appointment of the presiding arbitrator (the appointment in this case was ultimately made by the co-arbitrators). Other *ad hoc* procedures involved a list or similar procedure conducted directly by the co-arbitrators (as opposed to an AA), often through the PCA.

No PCA cases during the relevant period followed a “ballot” method or a nomination from an institutional roster or panel of arbitrators.

- c. Describe examples of party-agreed methods that were efficient/worked well (including, as measured by shortest time from appointment of the Claimant’s arbitrator to the constitution of the tribunal).

As described at question 4.b above, the Secretary-General of the PCA regularly proposes a modified list-procedure, pursuant to which the number of strikes by each side is limited to “half minus one”. This approach ensures that at least one common candidate will remain on the list, such that the AA will not be required to exercise its discretion in appointing the presiding arbitrator (*i.e.*, by selecting a candidate not included in the list previously circulated to the parties). In other words, to the extent that the parties will be aware of all candidates under consideration, this modified list-procedure can give parties greater certainty about the outcome of the appointment process, without lengthening the time to appointment.

Beyond the modified list procedure, the PCA has not identified any party-agreed method that has (consistently) proved to be significantly more efficient or expeditious than others. In fact, to the extent that these party-agreed methods often entail several steps, including periods for the parties to attempt to agree on the choice of a presiding arbitrator, the period for the constitution of the tribunal tends to be longer.²⁷ As such, it would appear that the parties in some PCA cases have favored the opportunity to find a mutually agreeable candidate for presiding arbitrator at the expense of a slightly lengthier appointment process.

- d. Describe examples of party-agreed methods that were not efficient/ did not work well (including, as measured by shortest time from appointment of the Claimant's arbitrator to the constitution of the tribunal).

When the parties have tried to depart from the default appointment methodology under the UNCITRAL Rules, they have not always succeeded in arriving to a swift appointment. As explained in the question above, multi-stepped appointment methods can be quite time-consuming. In particular, there have been numerous PCA-administered cases in which the parties have allocated a sizeable amount of time to attempting to mutually agree on the choice of a presiding arbitrator, but have failed to reach consensus to that effect.

Another factor that can cause delays in the constitution of the tribunal is the lack of agreement between the parties on an AA. Even if the underlying arbitration agreement is silent on this matter, the parties may agree on the choice of an AA (including the Secretary-General of the PCA) at the outset of the arbitral proceedings. Absent such an agreement, the UNCITRAL Rules provide that a party shall request the Secretary-General of the PCA to designate an AA, which would then proceed with the appointment of the relevant arbitrator, as applicable. While the Secretary-General proceeds with the designation of an AA as promptly as possible upon receipt of a request of this kind,²⁸ an agreement between the parties regarding the choice of the AA will typically result in time savings. That said, if the parties choose an unreliable AA who dithers or fails to act, that can cause much more significant delays.

²⁷ Precisely, many of these party-agreed methods foresee specific deadlines for each step of the process, meaning that the parties are able to determine the expected duration of the appointment process in advance.

²⁸ Before he can proceed with the designation of an AA, the Secretary-General of the PCA first needs to be *prima facie* satisfied, on the basis of a screening of the documentation submitted, that he is competent to designate an AA.

- e. For this subset of cases that used non-default/party-agreed methods, during the relevant time period, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant’s arbitrator, and (iii) nomination/appointment of Respondent’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal? *(the next two questions are addressed jointly)*
- f. What is the shortest time period and the longest time period (*i.e.*, the range) for each of (i), (ii), and (iii)?

The subset of cases considered for purposes of these questions covers all cases not included under the Extended Default Methodology, namely, those cases in which the parties agreed on an *ad hoc* appointment method and/or, to the extent that the intervention of an AA was required, the AA did not follow the default appointment method foreseen under the UNCITRAL Rules (that is, the AA did not make a direct appointment of the second arbitrator or it did not conduct an UNCITRAL List-Procedure for the appointment of the presiding arbitrator). During the relevant time period, at least 56 PCA-administered cases used a non-default/party-agreed appointment method.²⁹

For the subset of cases that used a non-default/party-agreed appointment method, the average, median, shortest and longest length of time for the periods at items (i)-(iii) above in cases administered by the PCA during the relevant period is as follows:

Time period	Average (days)	Median (days)	Shortest time period (days)	Longest time period (days)
<i>From initiation/registration of the arbitration, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	254.1	228.5	62	710
<i>From nomination/appointment of Claimant’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	208.4	171	0 ³⁰	632
<i>From nomination/appointment of Respondent’s arbitrator, until the appointment of the presiding arbitrator/constitution of the tribunal</i>	140	110	0	367

²⁹ For the avoidance of doubt, this subset comprises all cases in which at least one of the members of the tribunal was appointed pursuant to one of these non-default/party-agreed appointment methods (even if other members of the same tribunal might have been appointed pursuant to a default method).

³⁰ As mentioned earlier, there was one PCA case in which the AA appointed all three members of the tribunal on the same date pursuant to an *ad hoc* procedure.

5. We are interested in finding out whether there is any correlation between the method of appointment and the resulting diversity of tribunals. As a proxy for other types of diversity, we propose to look at gender diversity. **Did any of the specific methods listed under Points 4(c) and 4(d) result in a greater number of women being appointed?**

In the relevant period, the PCA has not identified any significant correlation between the method of appointment and the number of women being appointed to tribunals. This is probably due to the great variety of appointment methods that have been used in PCA-administered cases, many of which depend on various forms of interaction among the disputing parties, the arbitrators and/or the AA.

By way of example, when the Secretary-General of the PCA has acted as the AA, a woman has been appointed more often as a result of a direct appointment by the Secretary-General than as a result of the application of other appointment methods (*e.g.*, a list-procedure). However, the sample size for this type of appointment method is too small to reach any conclusions.

In this vein, it is noted that, when asked to act as an AA for the appointment of an arbitrator (and in particular, when requested to appoint a presiding arbitrator pursuant to a list-procedure), the Secretary-General of the PCA typically takes into account a variety of factors, subject to any specific requirements that the treaty parties or disputing parties may have identified. In this context, geographic and gender diversity are also key considerations in each case.

Further, as mentioned at question 4.c above, the Secretary-General of the PCA usually consults the disputing parties with regard to the desired (presiding) arbitrator profile. As such, the Secretary-General takes into account any preferences that the parties may express with regard to diversity considerations.

Annex 3:

SCC report to IBA Investment Arbitration Subcommittee

Questions to Institutions re: Tribunal Constitution

Relevant time period: Jan. 1, 2013 – Dec. 31, 2022

SCC Arbitration Institute's responses

1. How many tribunals were constituted during the relevant time period?

A total of 33 tribunals were constituted in the aforementioned period.

2. Overview of the length of time to constitute a tribunal

a. During the relevant time period, what is the average length of time from (i) initiation/registration of the arbitration, (ii) nomination/appointment of Claimant's arbitrator, and (iii) nomination/appointment of Respondent's arbitrator, until the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal?

(i) Initiation/registration of the arbitration till appointment of presiding/sole arbitrator/constitution of the tribunal: **103 days**

(ii) Nomination/appointment of Claimant's arbitrator till the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal: **103 days**

(iii) nomination/appointment of Respondent's arbitrator till the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal: **55 days**

b. What is the shortest time period and the longest time period (*i.e.*, the range) for each of (i), (ii), and (iii)?

(i) Initiation/registration of the arbitration till appointment of presiding/sole arbitrator/constitution of the tribunal:

a. Shortest: 36 days

b. Longest: 223 days

(ii) Nomination/appointment of Claimant's arbitrator till the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal:

a. Shortest: 36 days

b. Longest: 223 days

(iii) nomination/appointment of Respondent's arbitrator till the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal:

- a. Shortest: 9 days
 - b. Longest: 176 days
- c. In cases involving a challenge to an arbitrator before or immediately after the constitution of the tribunal, what was the average length of time and the range to constitute a tribunal? Data n/a

3. Default appointment methodology to constitute a tribunal.

- a. What is the default appointment method of your institution (number of arbitrators and the method of constitution, including time limits)?

In accordance with Article 2 of Appendix III (Investment treaty disputes) to the SCC 2017 and 2023 Arbitration Rules,

(1) The parties may agree on the number of arbitrators.

(2) Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the SCC Board, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances, decides that the dispute is to be decided by a sole arbitrator.

Further, where the parties have not agreed to a procedure, or when the parties have not appointed their arbitrators within the time period set by the board, the tribunal is appointed under Article 17 (3) to (7) in the following manner:

If there are multiple claimants and respondents in a dispute, the parties shall jointly appoint an arbitrator. If either side fails to make a joint appointment, the board may appoint the entire tribunal.

- i. When appointing a tribunal, the board considers the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties. Moreover, when more than one arbitrator is appointed on the tribunal, the nationalities of the party are

also considered where the chairperson of the tribunal shall be of a different nationality than the parties, unless agreed otherwise.

- b. During the relevant time period, how many cases followed the default appointment method?

18 cases

- For this subset of cases, what is the average length of time from
 - (i) initiation/registration of the arbitration and nomination/appointment of Claimant's arbitrator until the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal? 91 days
 - (iii) nomination/appointment of Respondent's arbitrator until the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal? 44 days

- What is the shortest time period and the longest time period (*i.e.*, the range) for
 - (i) initiation/registration of the arbitration and nomination/appointment of Claimant's arbitrator until the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal? 36 days and 154 days respectively
 - (iii) nomination/appointment of Respondent's arbitrator until the appointment of the presiding arbitrator/sole arbitrator/constitution of the tribunal? 9 days and 85 days respectively

- c. For this subset of cases (default appointment methodology), in cases involving a challenge to an arbitrator before or immediately after the constitution of the tribunal, what was the average length of time and the range to constitute a tribunal?

N/A

4. Non-default/party-agreed methodology to constitute a tribunal.

- a. How many cases involved the constitution of a three-member tribunal under the non-default/party-agreed method?

15 cases

- (i) Registration and appointment of Claimant's arbitrator to constitution of the tribunal:
 - a. Average length of time: 117 days
 - b. Shortest: 46 days
 - c. Longest: 223 days
 - (ii) nomination/appointment of Respondent's arbitrator to constitution of the tribunal:
 - a. Average length of time: 64 days
 - b. Shortest: 17 days
 - c. Longest: 176 days
- b. How many cases involved the appointment of a sole arbitrator under the non-default/party-agreed method?
- None



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