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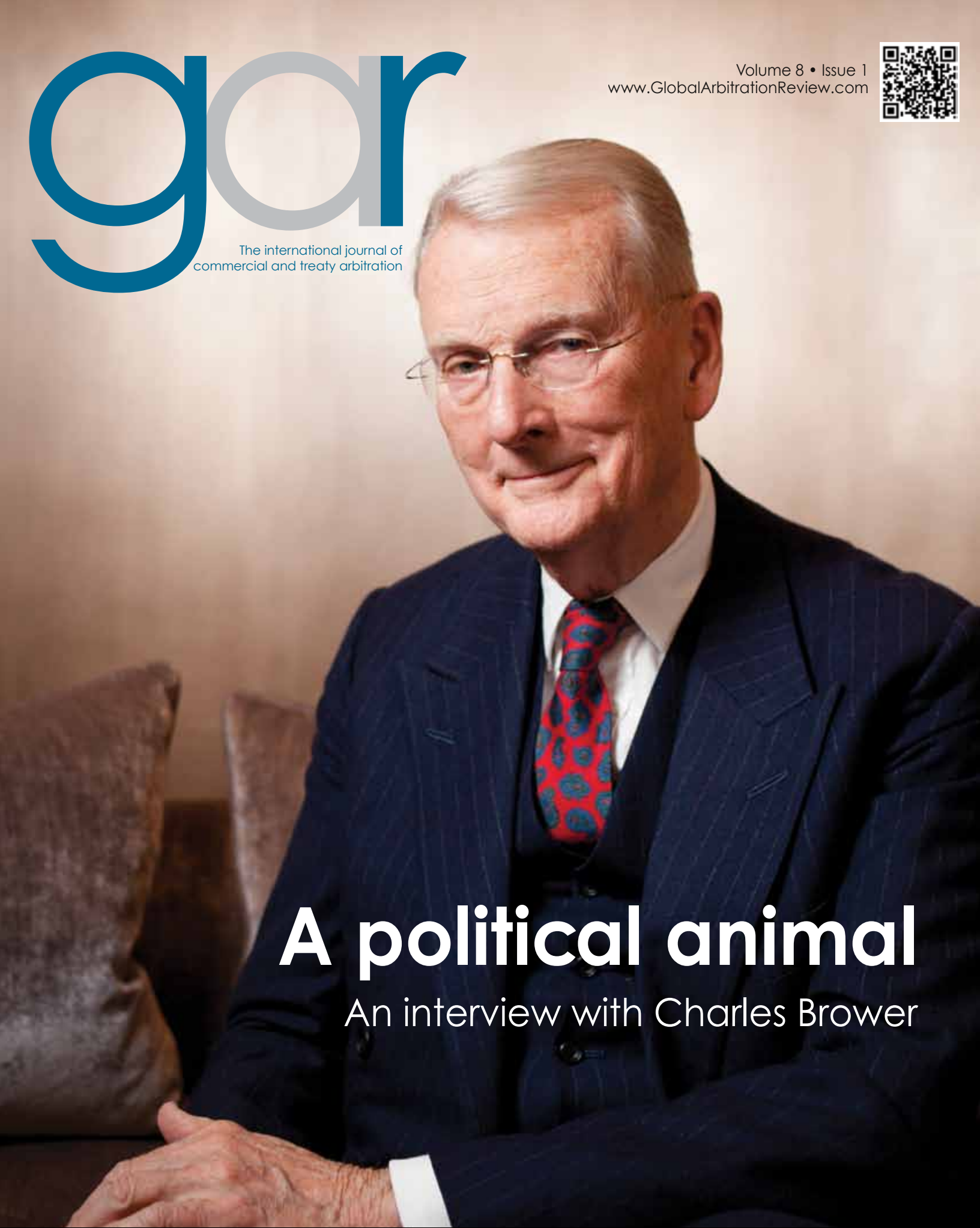

A political animal

An interview with Charles Brower

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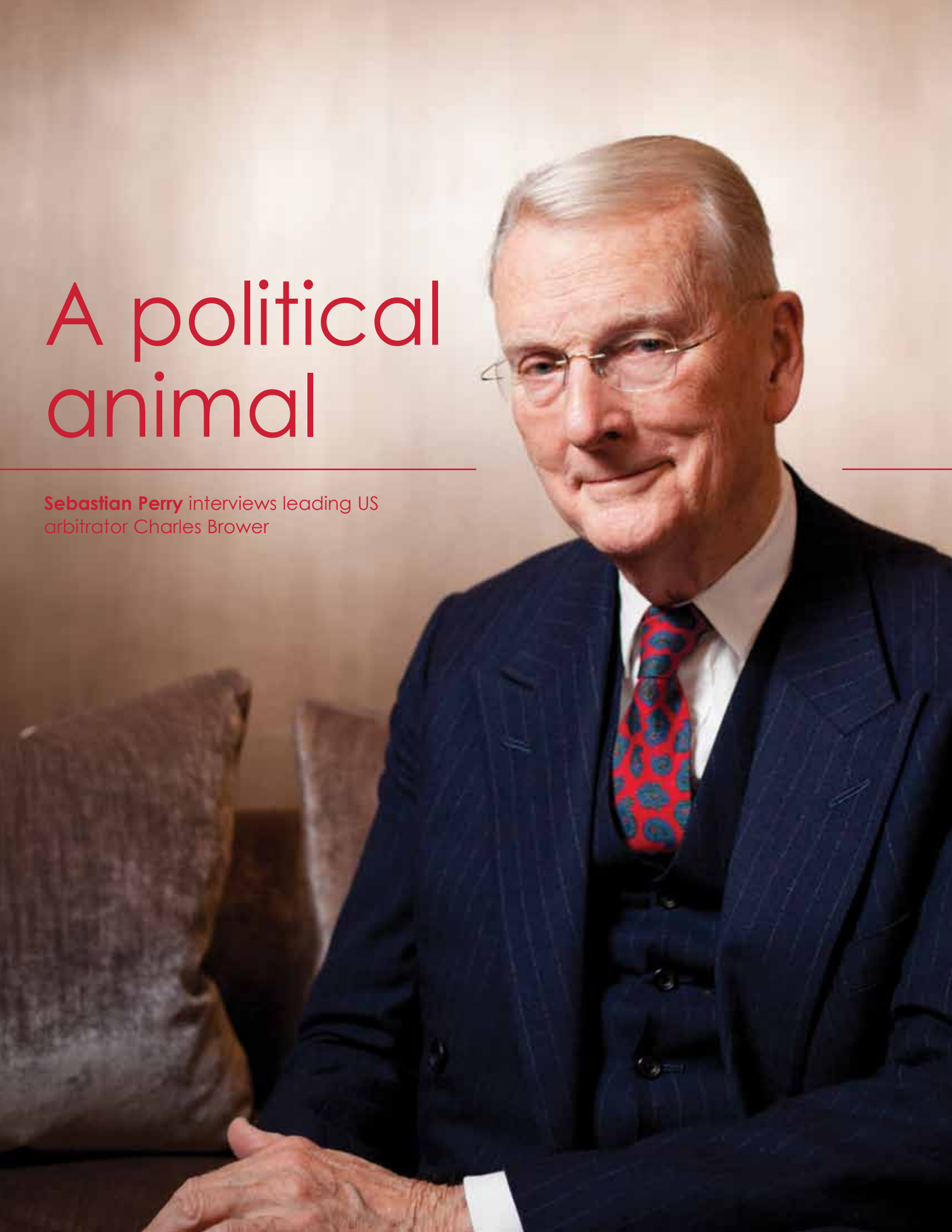
A political animal

Sebastian Perry interviews leading US arbitrator Charles Brower



When a European think tank published a report last year criticising investment arbitration, it included a list of 15 arbitrators that it reckoned had sat on more than half of all known investment treaty cases. Two names topped the list in terms of number of appointments: Brigitte Stern and Charles Brower.

The 77-year old has a caseload that would make much younger lawyers balk. A biennial ranking by a US magazine that also takes in big-ticket commercial cases named him "the world's busiest arbitrator" in 2009 and 2011. But he's also a controversial figure, perceived by some as predisposed towards investors much as Stern is held up as a favourite of states. Brower rejects this and says he'd gladly accept more state appointments if only he were asked.

His career nearly took a different course. Keenly interested in politics since his youth, he was elected to local office in his home state of New Jersey and campaigned for Republican candidates on the national stage. He spent four years in the State Department under Nixon, helping to negotiate a trade agreement with Russia. Later, he helped Reagan survive the Iran-Contra scandal.

In a 2005 memoir, Republican insider David Abshire recalled Brower as "a tall, imposing man, whose dark, chalk-striped suits contrasted with his pale blond hair." Brower was a "legal bulwark", with "a rare ability to take the measure of shifting political power and build a base of strength for us [while] serving a delicate cause".

But arbitration rather than politics claimed him in the end. An early proponent of international arbitration in the US, he got valuable exposure to it as a judge at the Iran–United States Claims Tribunal, the body that is still dealing with the economic fallout of Iran's 1979 revolution. He has served on the tribunal for the best part of 30 years and The Hague remains his permanent residence.

Exporting that expertise to private practice, he can take a share of the credit for White & Case's reputation in the field, having co-founded the firm's Washington, DC, office and served as a mentor to current practice members such as Abby Cohen Smutny. He retired from the partnership in 2000 to focus on arbitrator work, joining 20 Essex Street Chambers in London.

Since then he's sat on many high-profile cases, including *White Industries v India* – the case that held India liable for court delays and has reportedly led the state to order a review of all its investment treaties.

Brower has a reputation for tenacity and outspokenness, whether in arbitral deliberations or on the conference circuit. He has issued some scathing dissents in recent cases – for example, *Daimler v Argentina*, *HICEE v Slovakia* and *Impregilo v Argentina* – and has no truck with arguments that dissenting opinions undermine the system.

Likewise, he's been swift to attack radical ideas for reform such as doing away with the system of party appointments. "Any proposal that alters any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution", he argued in a speech last year.

In a candid interview, Brower talks about the demands of his workload, why clients should be better at supervising their counsel, and how sitting on a tribunal can be a lot like a marriage.

How did you become involved in international arbitration?

It was only after I came back to White & Case in 1973 following my time in the State Department. The firm was interested in starting an office in Washington, DC.

The work was initially all administrative law – suing the US government on behalf of clients over stupid regulations. But I always had it in mind that if I had the chance to get into international arbitration, I would jump at it. I knew it existed because my firm had represented Aramco in its arbitration with the Kingdom of Saudi Arabia in the 1950s. That was over an exclusive concession that the King had granted to Aristotle Onassis to transport oil from the country. Stephen Schwebel worked on the case at the beginning of his career.

After I'd been in the DC office for a while, I got a call from Sir Edward Singleton – a former president of the Law Society who was then a consultant at Macfarlanes – who asked if I'd like to join him as counsel on an arbitration under New York law. The client was Skanska, a Swedish construction company. He didn't have to ask me twice.

This was a developmental period in international arbitration, so I figured one case made me an expert. I got myself onto various conference programmes and into some publications. Then I got a call from Parker Drilling Company in Oklahoma – at the time, the largest oil and gas driller on land. They'd been kicked out of Algeria and were interviewing various firms for an arbitration against Sonatrach. They asked me to take the case.

So I was 45 years old before I ever really got involved in this business. Because my firm did a lot of work for Indonesia I ended up representing the state in the first *Amco Asia* arbitration at ICSID. That dispute lasted 11 years, though I was absent for part of it because of the Iran–US Claims Tribunal.

What effect did your time on the Iran tribunal have on your practice?

I got an enormous amount of experience at the tribunal. From 1988, when I rejoined White & Case, until 2000, when I left the partnership, I did virtually nothing but act as counsel in international arbitrations, which is attributable in part to the exposure I got at the tribunal.

President Reagan appointed you to the tribunal in 1983. How did you get the gig?

When Reagan was elected, I had hoped to be appointed legal adviser to the State Department. I'd already served as acting legal adviser under Nixon. My name was put forward but the role is subject to confirmation by the Senate. It turns out six influential conservative Republican senators – including Barry Goldwater – signed a letter begging Reagan not to appoint me. They objected to the fact that I had represented an amicus curiae in litigation the senators had brought, in which I defended President Carter's authority to terminate the Mutual Defense Treaty with Taiwan without the approval of Congress. Basically, they were attacking me for upholding presidential power.

I didn't know until early 1981 that someone else would get the State Department job, by which time the members of the Iran tribunal had been appointed. But Richard Mosk [one of the US judges on the tribunal] decided to leave at the end of 1983 and I put myself forward for the role. By that time, everybody in Washington knew what a stupid thing those senators had done in shooting me down and I managed to get Goldwater to send another letter to the president supporting me.

You also took time out to help Reagan during the Iran-Contra scandal. What did you do for him?

When I was in the State Department, one of the people I was farmed out to work with was David Abshire, who was the assistant secretary for congressional relations and later ambassador to NATO.

The story broke in November 1986 that the US had been selling arms to Iran to secure the release of American hostages in Lebanon, with the funds diverted to the Contra guerillas in Nicaragua. Reagan denied any knowledge of this and appointed a commission led by a retired senator, John Tower,

to investigate. Both houses of Congress also formed special investigative committees. Reagan asked Abshire to be a cabinet-level special counsellor to deal with the political aspects of the investigation and ensure everyone would have access to the information they needed. Abshire agreed, subject to a few conditions – one of which was that I serve as his deputy.

My assignment wasn't a legal one. My main job was convening the general counsels of all affected departments and agencies, including the CIA, the State Department, and the Departments of Defense and Justice. We'd meet at regular intervals to go over the document requests and make sure the stuff got out. We didn't want any suggestion the White House was stonewalling.

I got six months' leave from the Iran tribunal but I was back within three months. The Tower report found no evidence that Reagan knew about the affair. It did say insufficient control had been exercised over [Reagan's national security adviser] Admiral Poindexter and [military aide] Oliver North, who was the real problem.

Abshire wrote a book about the experience called *Saving the Reagan Presidency*. Is that a fair claim?

It was a very important role. But the real question was, did President Reagan know about the sale of arms? This was effectively solved when Poindexter testified before Congress and said he never told the president.

Do you believe Reagan didn't know?

The late Arthur Liman, who was the New York counsel hired by the Senate investigative committee, wrote a book saying he always believed Poindexter fell on his sword for Reagan. In any event, the world was satisfied that Reagan was detached and didn't know about it.

When did you make the transition to being an arbitrator in investment treaty cases?

It was really after I retired as a partner at White & Case. Even in the 1980s and '90s it was a global law firm with 40 offices, so I was mostly conflicted out of arbitrator work. I did sit on the first NAFTA case against Canada [brought by Ethyl Corp in 1997], but for the most part I had to turn the work down.

On top of that, there was, and still is, a sort of prejudice at the big firms against partners using their time in a way that doesn't leverage associates or bring in large fees. We were able to combat that by saying we'd have more credibility with clients if we'd been on both sides of the table as counsel and arbitrator. I retired as an equity partner, went back to the Iran tribunal and joined 20 Essex Street at the same time. It took a while for word to get around but eventually I started getting appointments.

How many cases do you have on at the moment?

Right now it's around 20, outside of the Iran tribunal. About two-thirds are investment treaty disputes and the other third are commercial cases – although you'd have to classify some of those as investment disputes, albeit based on contracts rather than treaties. For instance, I was on an ICC panel that recently issued an award exceeding US$2 billion in favour of Dow Chemical against Kuwait's state-owned petrochemical company.

Is there an upper limit for you in terms of number of cases?

Oh yes, everybody has an upper limit. I do turn down cases. Taking on too much can be a problem, so one needs to be as vigilant and as honest as one is capable of being with oneself.

How much of your time does the Iran-US Claims Tribunal take up?

The work on the tribunal varies. The current president would like to be very active and has made rather heavy demands as to how much time we should reserve for the tribunal over the next two years. In the B61 case, we had 16 weeks of hearings over a year-and-a-half and then two years of deliberations. So I was really scrambling during the time we were hearing that case because my other cases didn't stop.

Everyone at the tribunal has got something else to do – either teaching somewhere or hearing other arbitrations.

How much longer do you think the tribunal will take to finish its work?

It's impossible to determine. We have to continue until we finish the last case or we're told to stop by the two states, which would mean they've come to some kind of settlement – presumably in the framework of a more comprehensive settlement. But it doesn't appear that that is going to happen any time soon.

How many clerks do you employ?

I've always had one employed by the Iran tribunal, but the pace of activity at the tribunal has been such that that person can also work for me on other arbitrations. But about five years ago it got to the point that I needed more support, so I decided to hire an additional law clerk on my own payroll.

My first two were former clerks at the International Court of Justice – one of them, Stephan Schill, is now at the Max Planck Institute. I've had a series of clerks since then. I spend a lot of time soliciting recommendations and I get a lot of applications. It takes an inordinate amount of time but as my other half, Shirley, says: "It's your mental health insurance".

It's hard work for them but also an incomparable opportunity. If they don't have a job lined up somewhere after working with me, I sit down and help them with that. One of my old clerks, Jeremy Sharpe, went to White & Case and is now chief of investment arbitration at the State Department.

What kind of work do your clerks do for you?

Now you get into touchy territory because there's a certain amount of controversy about what tribunal secretaries should do. I've been asked some probing questions about my clerks' activities in connection with a challenge against me in 2010.

I spent months dealing with it and the party that challenged me kept asking for more details of what the clerks had researched for me, to the point where the enquiries touched on the deliberative process. The challenge was rejected but it's a sensitive issue.

Toby Landau has argued that arbitrators with a "back office" can create an imbalance on a tribunal and turn deliberations into "trial by combat". Do you agree?

There might be something to that, but it's more a question of efficiency and the ability to stay on top of things. Practically all the busiest arbitrators have help – they couldn't handle the volume of cases otherwise.

I know one arbitrator who is very slow and constantly complains that they have no help. That person has a tremendous number of cases. There have been delays in cases as a result.

You seem to get appointed almost exclusively by claimants in investment cases. Is that accurate?

In fact I have been appointed by states in four or five cases, including Tanzania and Macedonia. But the market pushes you in a certain direction. When I met Sir Derek Bowett for the first time – in the 1980s, when he had the professorship at Cambridge University that James Crawford now holds – I asked him: "Don't you feel funny doing all this work for Iran and Libya?" He said: "I'd be glad to work for the United States but I haven't been asked."

People get pigeonholed. When you start out as an arbitrator, you get asked by your friends. The people I knew were mostly at large American law firms representing claimants, so that's where the appointments came from.

Are you ever asked to be tribunal chair?

Yes, almost exclusively these days in commercial cases. I'm chairing a gas pricing dispute right now between two multinationals that is worth over US$100 million – alongside Wolfgang Peter and Michael Polkinghorne of White & Case in Paris.

I chaired three cases with Lord Slynn as a party-appointed arbitrator when he was alive. I've also been appointed as chair by the ICC a number of times, I suppose at the recommendation of the US national committee.

I've enjoyed all these cases – they're "real lawyers' cases" as we call them.

A recent report criticising investment arbitration named you as among 15 arbitrators who have sat on 55 per cent of all known investment treaty cases. Do you think it would strengthen the system's legitimacy if there were a larger pool of people deciding these cases?

There's no doubt that it would, although I suppose the naysayers would find some other reason for attacking the system.

To give you an example, it was striking that the *White Industries* award relied heavily on the earlier decision in *Chevron v Ecuador* – and that you sat on both tribunals. You've also been on several panels that have endorsed an expansive use of most-favoured-nation clauses. Would these decisions be less controversial if the same people weren't deciding the same issues over and over?

That's why they get appointed, I guess. If there were more people involved in these decisions and the case law went more heavily one way or the other – theoretically, yes, that would be more persuasive. But that's not the way parties think. I've no doubt I got picked for the *White Industries* case because of Chevron, but this was a unanimous decision; I didn't make it happen. On *White Industries*, I sat with Bill Rowley and Christopher Lau, both of whom are very independent-minded.

Do you think criticisms that arbitration is a "mafia" or closed shop are justified?

When I'm asked as a party-appointed arbitrator who I would propose to chair a case, I much prefer to serve with someone I know well from previous cases. I have probably sat more with David Williams than I have with any other individual. Likewise, I have sat many times with Marc Lalonde, Bill Rowley and Karl-Heinz Böckstiegel. It's like the difference between courtship and marriage.

As for being a closed shop, it's no different from the bench in the UK. The system of judicial appointments has become more transparent than it was, but it's essentially based on the recommendations of those involved concerning who should rise.

You do get surprised sometimes. I've been in cases with international arbitrators of great standing whom I would never recommend because of how they have handled a case. People like to serve with those they can trust.

You and Brigitte Stern are often held up as examples of the polarisation in investment arbitration between those who seem aligned with the interests of investors and those more disposed towards states. Do you think that's fair?

I find that most unfortunate because I have been appointed by states in some cases. As an advocate at White & Case, I probably worked more for states than claimants. That was one of the ways we marketed ourselves – that we knew how both sides think.

But it's where history takes you. As I've often said, I'm not pro-state and I'm not pro-investor – I'm pro-investment. And investment requires a couple of things: attracting the investor and giving security that what attracted the investor is real.

In fact, I've been on a number of cases in which the investor that appointed me received a unanimous award dismissing its claims, most recently in *Vannessa Ventures v Venezuela*, but also *Azpetrol v Azerbaijan* and *Chemtura v Canada*.

You were challenged in the *Perenco v Ecuador* case on the basis of remarks published in an interview. Has that made you more cautious about speaking to the press?

I suppose it should. I've had family advice to that effect. It certainly makes me a little more conscious of what might cause trouble, but I think it's important to speak with the press and I always have.

In *Perenco*, I was challenged on the basis of an interview with a trade rag called *Metropolitan Counsel*. I went over the interview carefully before it went out and couldn't imagine there would be any problem.

But what happened is that Ecuador had convinced Perenco's counsel to agree that any challenge would be decided by the secretary general of the Permanent Court of Arbitration, applying not the ICSID Convention but the IBA guidelines on conflicts of interest. The secretary general rejected three grounds but upheld a fourth – that what I had said could create the appearance of bias. But ICSID did not in fact accept the disqualification. In the end I resigned at the request of the party that had appointed me. I think Perenco felt it was safer not to go through a challenge process under ICSID but instead live up to its agreement with Ecuador.

Do you see challenges as an occupational hazard?

I don't get challenged a lot but in 2010 it happened four times. I was challenged unsuccessfully at the Iran-US Claims Tribunal, which was tit-for-tat for a challenge that the US government made to a new Iranian member of the tribunal. There was the challenge regarding my clerks, which I already mentioned. Then there was the *Perenco* challenge, and another in an ICSID case involving Tanzania on the basis of a blog post by one of my clerks that I shouldn't have approved. I haven't – touch wood – been challenged since.

What's the biggest change you've seen to the way arbitration is conducted?

In 1993, I co-edited a book called *International Arbitration in the 21st Century: Towards "Judicialisation" and Uniformity?* It turned out to be a good prediction. The UNCITRAL Model Law was already in place but since then there's been a lot more soft law and judicialisation of the process.

Old-time arbitration types bemoan the fact but I must say, if you get a detailed request for production of documents early in the case, it makes you learn about the case a lot earlier than you would otherwise have to. You can't just wait until the hearings to read the pleadings and hope it'll be settled in the meantime.

As national courts are increasingly swamped with other cases, it's understandable that companies going to international arbitration will want to run it like a trial as much as they can.

You gave a speech last year comparing arbitration to car design in which you urged the audience to resist innovations that don't build on the "classic model". Is there anything you would change about arbitration if you could?

I'm more in the business of arguing against what I think are misguided ideas for change than arguing for change. You can't prevent evolution, but I don't often think, "Gee, if we only changed this..."

Corporate counsel express increasing concern at the length and expense of arbitration, I'm told. But it's the parties that make it expensive. They have to exercise supervision of their outside counsel and to be hands on. In every case I had as counsel, I always asked that the client's general counsel and hopefully a senior executive would be present for at least one session to see what happens.

Arbitrators' fees and expenses are a tiny percentage of the costs of a case. But in appointing arbitrators and chairs, parties need to focus on getting an honest answer as to whether they have the time. Some people are more honest and self-critical than others about that.

You've been vocal in your opposition to Jan Paulsson's idea of doing away with the party-appointment system in favour of unilateral appointments by institutions.

Yes, and I think it's clear that the battle has been won by my side. The latest White & Case/Queen Mary survey showed that 76 per cent of respondents prefer party appointments. I can't tell you how many people have told me how unwise they think the idea is. Thank god somebody stepped up and really put the dagger in.

As an arbitrator, are there any styles of advocacy that particularly impress or repel you?

No arbitrator likes to hear counsel ranting and raving at each other – which is not exclusively an American habit, but it is largely. As a result of my membership in chambers, I sit on a lot of cases involving English law and I see very good advocacy from English barristers.

Do you have a favourite place to arbitrate?

My favourite place would always be somewhere I haven't been. But the reality is I'm predominantly in London, with Paris second.

I've been in New York a fair amount but not lately. Most of the ICSID cases I'm on are heard in Europe rather than DC, and the one Stockholm case I've had was heard entirely in London.

I've got cases coming up in Singapore and Miami. I would like to have one in New Zealand – I gather there was an ICSID hearing there recently.

Do you share the concern of some arbitrators about the rise of third-party funding of international arbitration? Should it make a difference when awarding costs, for example?

I don't really have a view. I can see that just as some people in the US and UK need legal aid to get access to justice in the courts, there are people with legitimate claims who need financial help to get justice via arbitration.

But with the exception of the *Quasar de Valores v Russia* case [where Spanish minority shareholders in Yukos had their case funded for free by the majority shareholder, Menatep, and were denied costs as a result], I haven't been confronted with the issue and haven't had to think about it. My days are filled with thinking about things I do have to think about.

You've worked for both Nixon and Reagan. What do you think of the Republican party today?

I was very active in Republican politics in my home state of New Jersey when I was younger and contemplated for a time a career in politics. I was elected to local office and campaigned for President Ford – I supported him against Reagan for the 1976 nomination.

Since the Reagan era, however, I have not been politically active. Most of my old Republican pals have remained steadfastly loyal to the party, but some obviously have become disaffected. When Reagan was asked why he left the Democratic Party in the 1960s, he said, "I didn't leave the party. The party left me." I guess that's how they feel about the Republican party.

Did you vote in the last election?

Oh yeah. As a foreign resident, I'm still allowed to vote, but only in the place I formerly voted. My vote is in the District of Columbia, which is overwhelmingly Democratic, so it doesn't make any difference.

Can you imagine yourself retiring?

What does retiring mean? I'm retired now, from White & Case! Some people can go on until their 90s; others should retire much earlier. At the Iran tribunal, Gaetano Arangio-Ruiz has only just retired at 92, and he's sharp as a tack. Eventually the market tells people when their time is up. Kenneth Rokison told me a story about Lord Wilberforce, who lived to the age of 92. In his later years, he was asked: "Are you still sitting in cases?" And he said: "Well, not really, because when parties want to appoint me they insist on a life insurance policy and they can't find anybody to underwrite it."

We hope we'll realise when the tide is turning. But I'll always be busy as long as I'm capable.