

2023
Volume 5, Issue 2



Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration





ITA IN REVIEW

VOL. 5

2023

No. 2

TABLE OF CONTENTS

ARTICLES

YOUNG ITA WRITING COMPETITION WINNER. GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF ARBITRATION AFTER ZF AUTOMOTIVE	<i>Michael Arada Greenop & Augusto García Sanjur</i>	1
YOUNG ITA WRITING COMPETITION FINALIST. THE NEW YORK CONVENTION ON THE ENFORCEMENT OF DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES	<i>David Molina Coello</i>	44
NAFTA AND THE USMCA: THE SUBSTANTIAL DIFFERENCES	<i>The Hon. Bernardo Sepúlveda-Amor</i>	85
ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS IMPACT ON INTERNATIONAL ARBITRATION IN INDIA	<i>Sushant Mahajan</i>	90
BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY	<i>Iván Larenas Lolas</i>	95
THIRD-PARTY FUNDING: A TOOL TO DETER INVESTOR MISCONDUCT?	<i>Dr. Üzeyir Karabiyik & Charles B. Rosenberg</i>	107

INTERVIEWS

PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS	<i>Rafael T. Boza & The Hon. Charles Brower</i>	112
---	---	-----

BOOK REVIEWS

GUÍA DE ARBITRAJE DE INVERSIÓN CO-EDITED BY YAEL RIBCO BORMAN AND SANDRO ESPINOZA QUIÑONES	<i>Pilar Álvarez</i>	130
--	----------------------	-----

YOUNG ITA

#YOUNGITATALKS MEXICO AND CENTRAL AMERICA: HABILIDADES Y ESTRATEGIAS EN EL ARBITRAJE: CÓMO PRESENTAR MEJOR EL CASO	<i>Liliana Pérez Rodríguez</i>	139
---	------------------------------------	-----



ITA IN REVIEW

BOARD OF EDITORS

EDITORS-IN-CHIEF

Rafael T. Boza
Pillsbury Winthrop Shaw Pittman LLP,
Houston

Charles (Chip) B. Rosenberg
Squire, Patton, Boggs
Washington, D.C.

BOARD OF EDITORS

MEDIA EDITOR

Kelby Ballena
Allen & Overy LLP, Washington, D.C.

EXECUTIVE EDITOR

Albina Gasanbekova
Mitchell Silberberg & Knupp LLP,
New York

EXECUTIVE EDITOR

J. Brian Johns
United States Federal Judiciary,
Savannah

EXECUTIVE EDITOR

Raquel Sloan
White & Case LLP, New York

CONTENT EDITORS

Thomas W. Davis
Dentons, Frankfurt

Menalco Solis
White & Case LLP, Paris

ASSISTANT EDITORS

TJ Auner
Jones Day, Los Angeles

Matthew Brown
Houthoff, New York

Emma Bohman-Bryant
Quinn Emanuel Urquhart & Sullivan,
London

Julie Bloch
B. Cremades & Asociados, Madrid

Raúl Pereira Fleury
Ferrere Abogados, Paraguay

Katie Connolly
Norton Rose Fulbright, San Francisco

Rinat Gareev
ILF PC, Dubai & New York

Jose Angelo (Anjo) David
Attorney at Law, Washington, D.C.

Anna Isernia Dahlgren
United States Federal Judiciary, Fort
Collins

Naimeh Masumy
Energy Arbitration Review, Tehran

Jessica Sblendorio
Clifford Chance, Frankfurt

Julia Sherman
Three Crowns, Washington, D.C.

Paula Juliana Tellez
Brigard Urrutia, Bogota

Pem Tshering
Sidley Austin, Singapore

ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

© 2023 - All Rights Reserved.

PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS

by The Hon. Charles N. Brower, interviewed by Rafael T. Boza

For the 40th anniversary of the Iran-US Claims Tribunal, Rafael Boza interviewed Judge about his experience serving on the Court.

Rafael Boza: Good afternoon, everyone. My name is Rafael Boza and I thank you for joining us this afternoon with Judge Brower to have a conversation about the Iran-US Claims Tribunal (the Tribunal), including its development, its history, its future, and the views of Judge Brower on several interesting topics related to the Tribunal.

I could spend the whole hour talking about Judge Brower's résumé and accolades, and his general accomplishments. But I am going to make a short introduction in order to get us straight to the point.

Judge Brower is currently Judge *ad hoc* at the International Court of Justice (ICJ) where he was first appointed in 2014 and he is sitting in three active cases, two by appointment of the US and one by appointment of Colombia. He is also appointed to the Inter-American Court of Human Rights by Bolivia. He has served on the Iran-US Claims Tribunal since 1983, and he has continuously served on the Tribunal except for a short period of time in which he was serving in the White House as Special Counsel for the President of the US.

Judge Brower has practiced law with White & Case for over 30 years in New York City and Washington, DC and has been involved in arbitrations for most of his professional career. He has also served as President of the American Society of International Law and has been on the Board of Editors of the American Journal of International Law. He has been involved with the Institute for Transnational Arbitration (ITA), which is where I had the pleasure of meeting Judge Brower about 10 to 15 years ago. He has received the Pat Murphy Award for exceptional civic contribution and extraordinary professional achievements, and last year he was also awarded a lifetime achievement award by the ITA.

Without further ado, Judge Brower, it is a pleasure to have you here and a privilege to have you share your thoughts with us.



Judge Brower: Thank you.

Rafael Boza: We all know that the Iran-US Claims Tribunal arose after the Iranian Revolution, but can you give us a bit of a historical context for the Tribunal, if you will?

Judge Brower: Of course. Thank you very much and thank you for that kind introduction. On November 4, 1979, 52 Americans were seized as hostages at the American embassy in Tehran. Eventually, they were held for 444 days. Reacting to that, President Carter, 10 days later on November 14, 1979, froze all Iranian government assets that were within the jurisdiction of the US, which of course included branches of American banks abroad in London and Hong Kong, among others. It would be called perhaps a “Mexican standoff.” Iran wanted its money back; the US wanted its hostages back. Iran was under the pressure of two resolutions of the UN Security Council to return the hostages and free them.¹ It was also under the pressure of an action brought by the US against Iran at the International Court of Justice, which pretty soon resulted in what is the equivalent of a preliminary injunction ordering the hostages to be released because it is against international law to seize and imprison diplomats,² and later was an International Court of Justice judgment to the same effect.³

Now this was a time when there was an election in 1980 for the presidency of the US. Jimmy Carter ran for re-election and Ronald Reagan became the Republican candidate. Once the election was in progress, at one point, there was concern that Reagan would be elected and he might be a tougher nut to crack than Jimmy Carter

¹ Sec. Council Res. 457 (1979) [on diplomatic relations between Iran and the United States], available at <https://digitallibrary.un.org/record/5826?ln=en>; Security council resolution 461 (1979) [on detention of persons of United States nationality in Iran], available at <https://digitallibrary.un.org/record/9656?ln=en>.

² Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Order on Request for the Indication of Provisional Measures of Dec. 15), ICJ General List No 64, available at <https://www.icj-cij.org/sites/default/files/case-related/64/064-19791215-ORD-01-00-EN.pdf>.

³ Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 23 (Order of Dec. 24, 1979), available at <https://www.icj-cij.org/sites/default/files/case-related/64/064-19791224-ORD-01-00-EN.pdf>.



from the Iranian point of view. Then, of course, the election was held early in November and Reagan won. That is when actual serious negotiations began.

The negotiations were taking place in Algeria with the intermediation of the Algiers government. The Americans and the Iranians never met face-to-face, and eventually the Algiers Accords⁴ were negotiated by Warren Christopher in the lead, who was then the Deputy Secretary of State, and the deal basically was: the US got its hostages back and Iran got its money back. Those of you who were old enough to watch the Reagan Inauguration in January of 1981, would have seen split-screen televisions with Reagan being sworn in and giving his speech on one-half of the screen and the American hostages arriving at Rhein-Main Air Force Base in Frankfurt, Germany to be medically checked before they be sent on to the US on the other-half of the screen.

Rafael Boza: That is the historical context. You mentioned the Algiers Accords, which obviously is the international instrument that gives legitimacy to the Tribunal.

Judge Brower: Right.

Rafael Boza: That was negotiated during the Carter administration?

Judge Brower: Well, yes, but also post-election of Reagan.

Rafael Boza: In those three months, between November 1980 and January 1981, the US negotiated with Iran through Algiers for the Algiers Accords.

Judge Brower: Exactly, and the Tribunal had to be legitimized by the US Supreme Court, and actually the Accords allowed a six-month period for that happen – knowing that someone who did not like it, and who was a claimant in court in US court against Iran, would take it to the US Supreme Court. This happened in a case called *Dames & Moore*.⁵ In *Dames & Moore*, the US Supreme Court basically blessed

⁴ Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), Jan. 19, 1981, available at https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration_.pdf; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), Jan. 19, 1981, available at <https://iusct.com/wp-content/uploads/2021/02/2-Claims-Settlement-Declaration.pdf> (together, Algiers Accords).

⁵ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).



the Iran-US Claims Tribunal as constitutionally acceptable under the Fifth Amendment as a substitute for the then-existing 300 or more cases in US federal courts, mostly, against Iran, by American claimants being removed as part of the Accords from the US courts.

Rafael Boza: There was no arbitration agreement that could be relied on, to go to the Tribunal to seek redress for their claims. They were in US courts obviously trying to get some relief.

Judge Brower: Right.

Rafael Boza: The Tribunal was established through the Algiers Accords through a specific document, a declaration, which authorizes the Tribunal to come into effect. How was that actually negotiated? Because it is a unique piece of international law that has not been replicated. How was it negotiated?

Judge Brower: It was negotiated by Warren Christopher, and a delegation including the then legal adviser to the State Department, and the Iranians with the Algerians in-between. It was complicated because you were dealing with English, French, Arabic and, of course, Farsi. There was a lot of translation going back and forth. We have never had any arguments about any disagreement between any versions, as far as I know. It was signed in English, and we have always worked with the English text at the Iran-US Claims Tribunal, even though the two official languages of the Tribunal are Farsi and English.

Rafael Boza: The Algiers Accords provide that there would be a period of time for claims to be made before the Tribunal. That period was between January 1981 and January 1982 for disputes between private individuals and entities and the Iranian government. Given that, why are there still disputes after 40 years?

Judge Brower: Well, to be more precise, that limitation was for claims by nationals of one country against the other state party (official claims). Official claims were claims based only on contracts for provision of goods and services. There are also claims of a limited nature between the two states (A-Cases). A-Cases are complaints by one state party that the other state party breached the Algiers Accords. A-Cases can be filed at any time. A-Cases still could be filed if someone had a claim.



The question was what is left and why is there anything left. Well, the answer is there are fairly few things left and they are all A-Cases, state-to-state claims, and they are essentially all Iranian claims against the US. All the official cases have been resolved by one of three means: (1) an award was issued, and of course it was necessarily paid out of the security account that was established, starting with \$1 billion of the returned Iranian assets and with a mechanism for being replenished; (2) a great number of settlements were reached which would be recorded as awards on agreed terms and paid out of the securities account; or, (3) claims of less than \$250, which were quite a large number, were settled along the way in, I believe, the late 1990s by an agreement between the US and Iran in a lump sum settlement to cover all of those claims. Those claims were shunted off by the US to a foreign claim settlement commission run out of the State Department in Washington, DC, which had to operate in accordance with precedence that had already been established at the Tribunal.

So, we are down to a few state-to-state claims. They are dealt with by all nine judges, not panels of three as was the case with the nationals. Six of the nine are civil law trained lawyers: three Iranian lawyers and three third-country lawyers; and then you have the three American common law lawyers. Now, presently one of the three American common law lawyers is not American: that is Sir Christopher Greenwood, formerly of the International Court of Justice, from the UK. He of course is a common law lawyer.

I will tell you one anecdote, which will tell you why things take a long time. Judge Ansari, with whom I sat in the 1980s in chamber cases, said to me once: You know what is the difference between you-Americans and us-Iranians? I said, I am sure you will educate me. He said, well, my house in the Hague, where I live with my family, has a bottom floor that goes out to the garden in the back. It is sort of an informal room, recreation room, like a family room. Then on the ground floor above it, which is the ground floor to the front of the house, is a kitchen and dining room and so on and so forth. One evening in the summer we had the doors open downstairs. I was sure somebody had entered the house and so I ran down the stairs and sure enough



someone had entered the house. As soon as he saw me, he ran out to the garden and climbed over the garden wall. I climbed over the garden the wall and I chased him until I just could not go any more. He was younger. He got away but if I had gotten a hold of him, I would have been beating the living daylights out of him. He said, now Americans, what does American do? He goes downstairs, the guy is out over the fence, fine. Problem solved. Maybe I will call the police. I said that is pretty accurate for the American view, I think.

Rafael Boza: That is, if you are not in Texas.

Judge Brower: Well, those who have negotiated with the Iranians in other situations will all tell you they will never, never, never, never, I could say never a hundred times, stop negotiating or arguing until they are totally convinced that there is just nothing left to be wrung out of the situation. It is difficult for some presidents of the Tribunal to just drop the guillotine or stop the watch and say that is enough. And of course it is just one case at a time. You only do one case at a time. They happen to be involved now in deliberations on the hearing of exemplary cases from the thousands of foreign military sales claims that were made by the US government to Iran when it was under the rule of the Shah. That has been going on for a long time and I am glad to say that I did not have to sit on that particular case.

Rafael Boza: Talking about the Tribunal a little bit more broadly as a creation of international law, technically there is not anything like it because it was created for the specific purpose of dealing with investment claims. Obviously, the International Centre for Settlement of Investment Disputes (ICSID) exists, but it is a different kind of creature. The Tribunal is two nations getting together and agreeing on a single tribunal to resolve disputes between their nationals and nationals of another country. That is something that has not been repeated in history. What is your take on that particular aspect of the Tribunal?

Judge Brower: Well, it is unique because not many of these peaceful dispute settlement mechanisms arise out of what I refer to as a “Mexican standoff” where there are two parties and neither one has prevailed in war. There have been many post-WWI and post-WWII commissions or tribunals that would settle a series of



claims, but it was a form, I suppose, of victor's justice. As a tribunal limited by the discreet volume of work before it, it is quite unusual. Now there is, of course, the UN Compensation Commission⁶ which was formed as a suborganization of the UN Security Council, to handle millions of claims against Iraq arising out of the unlawful invasion and occupation of Kuwait in 1990. Again, that is different. It obviously had a discrete number of claims within a certain time and there were so many that it had to be handled in much more of an administrative manner. You could not have a nine-member tribunal dealing with all of those cases. That is different. I guess in peaceful dispute settlement, you have to be inventive and put something together that suits the situation. We have never had quite a situation like we had with Iran.

Rafael Boza: Do you think it could be useful to try to maybe expand the jurisdiction of the Tribunal to deal with, for example, the nuclear deal or the sanctions that the US has imposed on Iran for so many years?

Judge Brower: Well, Iran has chosen to try and do that at the International Court of Justice in two of the three cases on which I am sitting. They are Iran versus the US. One of them is entitled *Alleged Violations of the 1955 Treaty of Amity Economic Relations and Consular Rights*.⁷ They are there making claims of breach of sanctions. A second case which actually was the first to be brought deals with the fact that under what is called the US terrorism legislation, the US government was empowered by domestic statute to seize, not only freeze but seize, certain Iranian assets.⁸ In that case, \$2 billion I believe that were on deposit at the Federal Reserve Bank in New York had been allocated pursuant to a US statute approved by the Supreme Court to so-called terrorism claimants –people with judgments against Iran for the fact that somebody in the family was killed.

⁶ United Nations Compensation Commission, <https://uncc.ch/home>.

⁷ *Alleged Violations of the 1955 Treaty of Amity Economic Relations and Consular Rights (Iran v. U.S.)*, 2021 I.C.J. 9 (Judgment on Preliminary Objections of Feb. 3) available at <https://www.icj-cij.org/case/175/judgments>.

⁸ *Certain Iranian Assets (Iran v. U.S.)* 2023 I.C.J. (Judgment of March 20), available at <https://www.icj-cij.org/case/164>.



Rafael Boza: You do not think there is an opportunity maybe through diplomatic channels, or informal diplomatic channels, to expand the jurisdiction of the Iran-US Claims Tribunal to deal with things that were not initially contemplated?

Judge Brower: Well, the nuclear deal, the Joint Comprehensive Plan Of Action (JCPOA), was never a legally binding instrument. It was a political arrangement, and I have written about it a little bit in my separate opinion on jurisdictional objections in the case that I just mentioned.⁹ I believe that the political situation on both sides – Iran under the president who was just replaced within the last few months by the election of a much more hardline president; the political realities on both sides of this were such that what was entered into as the JCPOA, the nuclear deal, could not have gotten through the necessary parts of government that would have to be involved to become a legally binding agreement. Neither side wants to make a legal proposition at this point. It is in political negotiation.

Rafael Boza: Once the handful of cases that the Tribunal has in its docket are completed, which could take any number of years–

Judge Brower: Do not ask me for a prediction on that!

Rafael Boza: –should the Tribunal dissolve? One the case load is completed, should the Tribunal be dissolved?

Judge Brower: Yes, when the last award is issued, that is the end of the Tribunal.

Rafael Boza: OK

Judge Brower: We are settled.

Rafael Boza: The Tribunal has done a monumental amount of work in its 40 years of existence and the volume of cases that it has resolved is about 4,000. I found statistics that said 4,700 but you corrected me that it is about 4,000. How do you view the impact of the Tribunal in terms of international law in general?

Judge Brower: We are looking now at the substance of its decisions or awards. Its impact has been quite considerable, actually. Of course, I have been sitting – apart

⁹ Alleged Violations of the 1955 Treaty of Amity Economic Relations and Consular Rights (Iran v. U.S.), 2021 I.C.J. 48 (Judgment on Preliminary Objections, Separate, Partly Concurring and Partly Dissenting, Opinion of Judge *ad hoc* Brower of Feb. 3) available at <https://www.icj-cij.org/case/175/judgments>.



from the Iran-US Claims Tribunal and the ICJ – in a long series of arbitrations usually under the initials of ISDS (investor-state disputes) initiated under bilateral investment treaties, and occasionally, NAFTA or the Energy Charter Treaty. Decisions of the Iran-US Claims Tribunal have probably had the most impact in that area of expropriation cases. Other cases deal with contractual issues of the garden variety, but the really big cases largely have been, and the most cited or noted ones, have involved expropriation. It happens to be a favorite subject of mine, but quite apart from that, when I am sitting as an arbitrator, I expect cases in which I have been involved to be cited back to me by one side or the other—trying to persuade the Tribunal, and generally speaking there has been quite an influence –

Rafael Boza: At least one member of the Tribunal would have to remember what they said.

Judge Brower: You come to expect that. I believe now the current volume is 40 or 41 of the Iran-US Claims Tribunal Reports, published by Cambridge University Press. I have them all sitting here on my library shelves in another room. That is quite a volume of precedence. Also, necessarily also, because the Tribunal adopted in the Algiers Accords the UNCITRAL arbitration rules, subject to refinements made by the Tribunal in order to adjust the rules to the fact that you have a nine-member court. That adoption really got the UNCITRAL rules into business. They were founded in 1976. The Tribunal was established January 1981, and that really—my former law clerk and then later colleague in The Hague, David Caron, has published a book together with Lee Caplan, who has just done a second edition, or a third edition, I cannot recall which, on the UNCITRAL rules as used by the Iran-US Claims Tribunal. They are good authorities, and they are frequently referred to as well.¹⁰

Rafael Boza: We have a question from the audience: How about the Security Council Resolution 2231 that endorsed the nuclear deal (JCPOA)? Does that give enough standing to bring the nuclear deal to the Tribunal?

¹⁰ THE UNCITRAL ARBITRATION RULES. A COMMENTARY (David D. Caron & Lee M. Caplan eds., 2013).



Judge Brower: In a sense, it is already in the International Court of Justice in the case to which I referred. There the complaint is only against the sanctions that had been suspended by the nuclear deal. Which deal, obviously, President Trump withdrew from. What Iran wants in that case is a judgment from the Court, which of course would be legally binding, that the US should abolish the sanctions which were restored once the US left the nuclear deal. My opinion is public, and I have taken the view at the jurisdictional stage that to do so is an abuse of process, because the objective if achieved would subject the US to a legally binding requirement to basically honor the nuclear deal, making it bound to live by it, whereas Iran is not bound to live by it, because the JCPOA is not a legally binding agreement in itself. That is the field of battle on that subject.

Rafael Boza: You have mentioned that the Tribunal's influence in international law was mostly felt in the field of expropriation law. What is your take on the tests that are being developed in the international arena specifically in ICSID related to the regulatory powers of the states: For example, when the states are regulating validly, expropriation should not be an applicable claim.

Judge Brower: Well, the usual problem is this: Of course, generally speaking, in many of the bilateral investment treaties and other investment promotion and protection treaties, expropriation is valid if it is for a public purpose, it is not discriminatory and there is a provision for prompt, adequate and effective compensation. Where things usually fall apart is absence of compensation or insufficient compensation. That is the definition of what is the appropriate application of the police powers because the doctrine of what is lawful and unlawful is well established. You have to meet those requirements. It is quite interesting: states have done very well. If you look at the exit statistics or the UNCTAD statistics, states do very well. They do, by and large, a bit better than the investors. But there is a whole lot of uninformed people in the West, like the lady senator from Massachusetts and a guy named Bill Moyers who used to be a close associate in the Lyndon Johnson White House, who have been very public about saying how horrible this all is. It is all for corporations. A lot of people are really not informed well on the



subject. Somebody caught their ear and said the right words and it sort of played into some kind of a predisposition. I have seen cases in which, to take an example, the *Ethyl versus Canada* NAFTA case,¹¹ in which I sat. People screamed – screamed – in the environmental community when the case was settled for, I think, \$13 million. What they did not know was that an internal Canadian body which deals with the issues of whether or not provincial laws are compatible, or federal laws are compatible, with trade law of Canada had ruled against Canada before we even found jurisdiction, and so they had no leg to stand on. Yet, the environmental activists who are less, how should I say, less rational perhaps, just screamed about this: “How could you settle with these people?” Just ignoring the fact that Canada was done in on its own turf. That is a bit of a digression.

Rafael Boza: No, for example, we just saw a case from Colombia coming out of ICSID, the *Eco Oro* case,¹² in which Colombia regulated and designated as an environmentally protected area, land that it had previously given in concession to mining companies, removing the concession or part of the concession that it had previously granted. That was not considered an expropriation. The states are starting to get a little bit more leniency, I think, in terms of their regulatory power, specifically for environmental purposes.

Judge Brower: You see it also in the negotiation of new bilateral investment treaties, or the models. Look at the US, which I have accused from time to time of being a primary offender in how it handles investor-state cases. You look at the 2012 model, which I believe is the most current one. Many states are trying to denounce treaties if they are subject to denunciation, and then negotiate the new ones with very elaborate, almost footnote-like provisions related to indirect expropriation. A lot of what is happening is in the actual treaty formation and negotiation area. There are unfortunate tendencies in the procedural sense, principally the European Union idea of a completely state-appointed 15-member International Investment Court that

¹¹ *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, (June 24, 1998), available at https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf.

¹² *Eco Oro Minerals Corp. v. Colombia*, ICSID Case No. ARB/16/41, Award (Sept. 9, 2021), available at <https://www.italaw.com/cases/6320>.



excludes the investors from their present role of having an equal role in constitution of the Tribunal.

Rafael Boza: We have a question from the audience, and this goes back to the Iran-US Claims Tribunal: To what extent have apparent limitations on actions by some Iranian lawyers have precluded some of them from taking the bench, and how has that impacted the international tribunals as we discussed them today? Specifically, maybe politics and the genders of the Iranian lawyers.

Judge Brower: It is distinguishing between lawyers and people, and the Iranians that have become judges of the Tribunal?

Rafael Boza: Yes. For example, apparently there is a Nobel Prize winner who was precluded from taking the bench because of her gender or her politics. Do you know about that case?

Judge Brower: Well, I am not familiar with that particular case. But knowing what I have learned about Islam and the role it plays in the Iranian state under the present constitution, and so on and so forth, I think generally speaking females are not favored a lot as far as public involvement is concerned or political involvement, except for a very few lawyers defending what they regard as human rights cases in Iran. I can tell you that to be an Iranian judge of the Iran-US Claims Tribunal is in part a wonderful thing and in part not such a wonderful thing. The wonderful thing is you are getting to live in The Hague. As I say, when I was there in the 1980s, all the fancy automobiles, the BMWs, Mercedes and so on and so forth in the portion of our Tribunal parking lot allocated to the members of the Tribunal were Americans. Now they are all from the Iranian judges, and two of the three judges on the American side own and use bicycles but do not own cars in The Hague.

Rafael Boza: I think in The Hague it is probably better to own a bicycle than a car.

Judge Brower: Well, you are certainly in the majority.

Rafael Boza: Except when it rains.

Judge Brower: Yes, and it is safer than riding a bicycle down in Washington, DC, I am sure, but in any event, however, I think, let us put it this way, with one very odd and explicable exception, no Iranian judge has ever voted against the Iranian



government's position in a case. Period. Now, American judges have voted against the US's positions and against US claimants. I think it would be personally dangerous, that is the way I analyze it, for an Iranian judge to do otherwise, and they profess very vocally at times: "To be judges. We are independent. We are impartial." But when you look at the record of decisions, there becomes, shall we say, a serious question about that. There are some other countries, where if a national of that country is appointed in an international proceeding as an arbitrator, that person just cannot go home, or his family will not be safe. He or she may have left the country, if they do not follow what I call, the party line. That is just the reality, and it is supported by the decisions.

Rafael Boza: One of the audience members has provided the name of the judge who was not allowed to be a part of the Tribunal because of her gender, and that is Shirin Ebadi, if I am pronouncing that name correctly. If not, I apologize. But she used to be a judge, is what it says, and she was removed from the bench in 1979 because of her gender.

Judge Brower: I think, if I have the name right, I suspect that that is someone who is defending people accused by the Iranian authorities of some crime, or anyway, of doing something that was not liked by the authorities. I could be wrong, but that is what comes to mind when I hear the name.

Rafael Boza: Judge, tell us a little bit about your work in the Inter-American Court of Human Rights, talking about the discrimination case.¹³

Judge Brower: That is an interesting case, and because I am in the process of writing, with some help, my professional memoirs and that is covered there as well, I have been reading those decisions of 20 years ago.¹⁴ It is an interesting case, because it involved the disappearance of individuals, many years before, by the then-dictatorship of Colonel Hugo Banzer. By the time it came to the court—

¹³ Trujillo-Oroza v. Bolivia, Inter-Am. C.H.R., Judgment (Jan. 26, 2000), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_64_ing.pdf.

¹⁴ The memoir is now published. HON. CHARLES N. BROWER, JUDGING IRAN. A MEMOIR OF THE HAGUE. THE WHITE HOUSE, AND LIFE ON THE FRONT LINE OF INTERNATIONAL JUSTICE (2023).



Rafael Boza: Forgive me for interrupting, but I wanted to make sure that everybody knew Judge Brower was appointed by Bolivia to this case.

Judge Brower: Yes. Exactly. By the time it came to the Court to be heard 20 years or more later, the same Colonel Hugo Banzer was the democratically elected president of Bolivia.

Rafael Boza: This can only happen in Latin America.

Judge Brower: Incredible case of political survival from one system to another. In any event, it was quite interesting because the government of Bolivia conceded jurisdiction and liability. Essentially the question we ultimately had to decide was, what was the relief? Of course that got me into a whole different field, because in such a case there are many forms of relief: monetary, or orders to the government to do a better investigation of what happened, or can they find the remains, and so on and so forth. That was quite intriguing. And just as an aside, how I got to this position: the then-senior official dealing with this in Bolivia got a hold of a friend of his who happened to be in Costa Rica, and that was a person with whom I had worked during the five years before I went back to The Hague in 2000. I was representing Costa Rica in international matters, and that Costa Rican former attorney general said to his Bolivian friend: “Do not appoint a Bolivian as judge *ad hoc*. Do not even appoint anybody from Latin America. Appoint someone from a completely other part of the world with I guess a global or decent reputation in international adjudication.” The idea being that the judge *ad hoc*, then might be given more distance and certainly would not be seen as having geographically favored arguments of some kind. The president at the time was Antônio Augusto Cançado from Brazil, who is now a colleague on the International Court of Justice, and I wrote a separate opinion in that case after consulting with him, just contributing to the Court’s jurisprudence of the Court’s basis for jurisdiction in that case. It is sort of who you get to know along the way and so that is where I wound up.

Rafael Boza: We have a question from the audience: Can you give us a view of when, what months, you are working in The Hague as a judge of the Tribunal? What was your schedule as a Judge of the Tribunal?



Judge Brower: Well, I have been a judge in different capacities since 1983. Periods I was a titular judge, rather than a substitute judge rather than stepping in for other cases. I was there from January 16, 1985, through the end of March 2008. During that time we had very few cases that were heard by all nine judges. We were in chambers of three, and most of the year, excluding maybe two of the summer months, we would have two hearings each month, usually one big case and one smaller case. It was impossible to do anything else other than that. I would fly to the US periodically because I was, during most of that period, a member of the Board of Governors of the American Bar Association and we would meet around the country. But that was limited. Otherwise, I was constantly in The Hague. Constantly in The Hague. And of course, the pressure on the Tribunal and especially from the American side of course, was to get through the cases of nationals as fast as possible, get those cleaned up, and then we went into the dual national cases. And that is when I left. We had in my chamber, apart from dual national cases and the eventual state to state cases, we just had 10 cases left, none of which was seeking more than \$10 million. We had been through the big cases, and so it was time for me to step out. And I would continue as a substitute judge, of course. Now, it was completely different when I went back to the beginning of 2000. I will add that I was first appointed by the Reagan administration, and when I went back at the beginning of 2001, it was because I had been reappointed as a titular judge by the outgoing Clinton administration. So, having been appointed by the next previous American administration to these two cases at the ICJ, the name begins with a T, I have some record of being acceptable to all administrations.

Rafael Boza: Crossing political boundaries, which is what we need to do.

Judge Brower: I finished a case in which I had been substituted earlier, the last case of a dual national, and therefore the last case of any national of either side. We were quickly into these interminable hearings and then deliberations of the state-to-state cases. And because of the pace of that work, which I think I have described, I was able to take on a lot of arbitrations outside the Tribunal. And they of course caused me to go to London, Paris, Zurich, I think, Geneva, Singapore, the US. And I



could do that while being present for all the sessions of the Tribunal to carry out my duties there.

Rafael Boza: In that vein, how many cases do you think you have arbitrated directly in that Tribunal? Because in your career I am sure there are many.

Judge Brower: I would have to go through page by page, or index by index through 40 or 41 volumes of the reporter. Anyway, it sure has been a lot. That is all I can say. I do know, because a US lawyer did in a survey in certain success years, in two-year period, I would have 25 cases outside the Tribunal. Eventually my Iran-US Claims Tribunal paid law clerk could not handle both the work there and my other arbitrations, so I had a hire another clerk in 2007 on my own payroll, someone to deal with the other arbitrations.

Rafael Boza: We have a few arbitrators in the audience that are in that situation. And with that said, we are five minutes to the time, so I guess we can open it to Q&A, and there is a question from the audience that asks: Did the Tribunal have any role in returning the bodies of the eight servicemen who were killed during the Operation Eagle Claw in Iran? Which was the rescue operation in 1980, I believe.

Judge Brower: Referring to the Desert One raid?

Rafael Boza: No, this was, I think this was, if I am not mistaken, this was an attempt to rescue the hostages from the embassy back in 1980.

Judge Brower: That is the Desert One raid that Jimmy Carter launched in an area called Desert One with Delta Force. It never was able to make two steps towards Tehran because of an aircraft crash. I think a helicopter ran into one of the transport aircraft and the whole thing had to be scrubbed. And the Secretary of State at the time resigned in protest over ever having launched the war, which made Senator Muskie of Maine, Secretary of State for the last eight months or so of the Carter administration. I was not aware, or I do not recall that bodies would have been left on site because the military creed is “no soldier left behind.”

Rafael Boza: It seems strange.

Judge Brower: In any event, I cannot tell you, because I am not aware of the fact that the Tribunal, once it was established as of January 19–



Rafael Boza: 1981.

Judge Brower: Yes. I am old enough to still keep trying to put 19 instead of 20 before my references to years on the calendar. There may have been a lot going on outside the Tribunal, but in The Hague between Iran and the US, of which we would not be aware.

Rafael Boza: And the jurisdiction of the Tribunal, obviously was limited to the extent provided in the Algiers Accords; so, it would not have participated in other topics that were outside the Court's jurisdiction.

Judge Brower: No. And those claims basically had to be tied to the revolutionary period, effectively.

Rafael Boza: I do not know if anyone in the audience has any additional questions. Feel free to raise your hand. Somebody is asking if you have any recommended homework reading.

Judge Brower: Oh well, I can tell you, there was a book published in 1998 by a guy named Brower and a then-former law clerk by the name of Jason Brueschke, published by Kluwer, entitled, strangely enough, *The Iran-United States Claims Tribunal*.¹⁵ It won the relevant book prize that year of the American Society of International Law. It happens to be in the process of a second edition after so many years, bringing things up to date. I do not suggest you wait for that because it is still in progress. There is another book available written by my now-deceased colleague George Aldrich. I think the title is *Jurisprudence of the Iran United States Claims Tribunal*.¹⁶ But the book that I mentioned that I co-authored dealt, not with just the jurisprudence, but a lot of procedural and stuff about challenges and so on and so forth that is, well, it is as far as I am concerned, and I realize I could be subject to "Ah! Is he just advertising his own book?" Well, frankly, there is not much else out there that is as comprehensive as that one. Look it up.

¹⁵ CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN - UNITED STATES CLAIMS TRIBUNAL* (1998).

¹⁶ GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1996).



Rafael Boza: Well, Judge, if we do not have any more questions from the audience, I thank you so much for the time that you have devoted to being with us, and I have thoroughly enjoyed talking to you about all this. Again, thank you.

Judge Brower: Thank you very much, and thanks to everyone who took the trouble to attend. I hope you feel you have learned something, or at least on the path of learning something useful, and it has been a pleasure to have the opportunity to speak with you.

Rafael Boza: I am sure we have all learned a lot. Thank you so much Judge and we will see you soon. Hopefully in Houston.

Judge Brower: Goodbye.



JUDGE CHARLES N. BROWER is judge *ad hoc* of the International Court of Justice (the World Court). First appointed in 2014 he sits in three active cases (two by appointment of the US and one by Colombia). Judge Brower has been a Judge of the Iran-US Claims Tribunal continuously since 1983, and from 1999 to 2002 also sat as Judge *ad hoc* of the Inter-American Court of Human Rights (by appointment of Bolivia). Earlier he served (1969-1973) in the US Department of State successively as Assistant Legal Adviser for European Affairs, Deputy Legal Adviser and Acting Legal Adviser on international law to the US Government. In 1987 he took leave from the Iran-US Claims Tribunal to serve in the White House as sub-Cabinet-rank Deputy Special Counselor to the President of the US.

Judge Brower practiced with the law firm White & Case LLP for 30 years, and since 1980 principally as counsel and arbitrator in international arbitrations. Since 2001 he has been an Arbitrator Member of London's Twenty Essex (barristers) Chambers. In 2013 The American Lawyer named him "the reigning king of international arbitrators."



RAFAEL T. BOZA is Special Counsel at Pillsbury Winthrop Shaw Pittman LLP. Rafael T. Boza focuses his practice on all aspects of international arbitration, dispute resolution and litigation. He also practices in transactions and corporate matters. He has over 20 years of experience advising local and multinational companies, litigating and arbitrating. His experience includes providing legal services in the US and abroad, utilizing his comprehensive legal knowledge of multiple jurisdictions, including the US, Latin America, and Europe. He is a litigator in arbitrations, domestic and international, and in Texas and federal courts in a variety of matters. He participates in complex, high-stakes, ICC, ICSID, LCIA and other international arbitration cases. He has also arbitrated cases (as arbitrator) since 2003 in a variety of economic sectors, including commercial, construction, investment, and intellectual property disputes in mostly *ad hoc* cases.

**INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW**

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a



free subscription to ITA's quarterly law journal, *World Arbitration and Mediation Review*, a free subscription to ITA's quarterly newsletter, *News and Notes*, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, *News and Notes*. All ITA members also receive a free subscription to ITA's *World Arbitration and Mediation Review*, a law journal edited by ITA's Board of Editors and published in four



issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.



TABLE OF CONTENTS

ARTICLES

- YOUNG ITA WRITING COMPETITION WINNER.
GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF
ARBITRATION AFTER ZF AUTOMOTIVE *Michael Arada Greenop &
Augusto García Sanjur*
- YOUNG ITA WRITING COMPETITION FINALIST.
THE NEW YORK CONVENTION ON THE ENFORCEMENT OF
DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE
FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES *David Molina Coello*
- NAFTA AND THE USMCA: THE SUBSTANTIAL DIFFERENCES *The Hon. Bernardo Sepúlveda-Amor*
- ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS
IMPACT ON INTERNATIONAL ARBITRATION IN INDIA *Sushant Mahajan*
- BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY *Iván Larenas Lolas*
- THIRD-PARTY FUNDING: A TOOL TO DETER INVESTOR MISCONDUCT? *Dr. Üzeyir Karabiyik &
Charles B. Rosenberg*

INTERVIEWS

- PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS *Rafael T. Boza &
The Hon. Charles Brower*

BOOK REVIEW

- GUÍA DE ARBITRAJE DE INVERSIÓN ARBANZA *Pilar Álvarez*
CO-EDITED BY YAEL RIBCO BORMAN AND SANDRO ESPINOZA QUIÑONES

AND MUCH MORE.

www.itainreview.org

The Institute for Transnational Arbitration
A Division of The Center for American and International Law

5201 Democracy Drive
Plano, Texas, 75024-3561
USA