ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Transcript of **Mr. Fali S. Nariman's** intervention
At the 3rd Session

## – Introduction to the New York Convention –
## The Convention and Sovereignty

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## "Judicial Dialogue on the New York Convention"

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When nation-states around the world signed the New York Convention, 1958, and when after 1958 it was adopted as a UN Convention old States and newly-formed States acceded to it but one thing that they did not do was to give up State "sovereignty".

This is sometimes known as the Westphalia syndrome. As you all know, the Treaties of Westphalia of the vintage year 1648 ended the 30 years-war in what was then called the Holy Roman Empire and with these treaties began the modern era of nation-states: a new system, the first, of its kind – of a political order called "Westphalian Sovereignty" based upon the concept of a Sovereign State having a defined territory governed by a sovereign (substituted in modern democracies' as "the people") and creating for the first time a prohibition against interference in international affairs in another nation's domestic business.

The Treaty of Westphalia was a first and most important step in the development of international law. It created the basis for national self-determination.

But international law is only as good as it works. Many years ago, my wife and I attended the 72nd Biennial Conference of the International Law Association in Toronto where Canada's former Governor-General Mrs. Adrienne Clarkson was asked to give her impressions about international law, and this is how she began:

"International law has not achieved much, but it is good that it is there".

By contrast, the NYC has achieved much and it is also good that it is there. But the draftsman of the New York Convention of 1958 were very conscious of the fact that international law respected, the full-blown theory of national sovereignty, and they decided that they there was no point to confront this head-on, or there would be no New York Convention. The only reason why the New York Convention has worked is because it has left it to national Courts around the world to interpret its provisions and apply them in individual cases.

At the LCIA Centenary Conference in London (in the year 1995) some old stalwarts – Judge Howard Holtzman and Judge Stephen Schwebel (then a Sitting Judge of the ICJ) envisaged the prospect in the 21st century of a new international Court for resolving disputes on the enforceability of arbitral awards.

But these worthy gentlemen being experienced Arbitrators and men of the world they also recognized that setting up an International Court of Arbitration would be tilting at the wind mills of national sovereignty.

One of them (Judge Schwebel) in his speech recalled the theme of a song of a popular film at the time "*the Man from La Mancha*" where the principal character Don Quixote, who is a dreamer – always dreamed, "*the impossible dream*". An International Court of Arbitration, Schwebel said, was like an impossible dream.

Well, we are now well into the second decade of the 21st century and an International Court of Arbitral Awards continues to remain an impossible dream.

Sovereignty also promotes practices which are different and distinct. Arbitral Tribunals in transnational arbitrations consist of a heterogeneous group with differing concepts on how to conduct their proceedings, with the result that the users (the parties) are often confused with divergent practices.

My good friend Rusty Park (Prof. William Park) - currently President of the LCIA – wrote some years ago that International Arbitration was like a ball-game in which the participants are never quite sure whether it would be American Football or British Rugby that would be played – because no one knew precisely on what occasion the ball could be picked up and thrown forward!

But these are aberrations – they are the occupational hazards of international commercial arbitration as practised by sovereign nation States and we the people around the globe have learned to live with them.

The real problem about an international court of arbitration was, and still is, that it would be a creature of independent sovereign states, and independent sovereigns States act too often like billiard balls which collide, and do not co-operate. In his foreword to a book published to commemorate the 50th anniversary of the International Court of Justice, (the world's highest but least powerful Court), its then President wrote a foreword is which he bemoaned the judicial body's inherent infirmities. "This institution" wrote Judge Bedjaoi "carries a genetic heritage rendered vulnerable by the chromosomes of state sovereignty and therefore by its very nature

seldom spared by the crises, commotions and maladies which affect inter-state relations".[1]

Litigants before the ICJ are always Sovereign States. Like pugilists in an imaginary World Boxing Ring, Judges in the ICJ, when resolving disputes between Sovereign States, always wear kid gloves: because the legal process in the World Court, is often not quite an automatic application of settled rules. Claims presented by States are never fully right or wrong - they have "varying degrees of legal merit"[2] as Prof. Lauterpacht once said. International law rarely offers a definitive judgment on who is right (or wrong). Disputes do get resolved – but far more often they are resolved, or not resolved, diplomatically.[3]

So this is my initial take on sovereignty and the New York Convention – I am anxious to hear more.

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[1] Judge Mohammed Bedjaoi (President of the ICJ) in his foreword to the book titled "The International Court of Justice" 1946-1996 published by, Kluwer Law International.

[2] Lauterpacht, Development of International Law, p. 398.

[3] The Dark Side of Virtue: Reasoning International Humanitarians by David Kennedy, Princeton University Press – 2004 at p. 273