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The Defector, the Missing Map and the "Hidden Majority" - Coping With Fragmented Tribunals in International Disputes

by T.G. Nelson

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The Defector, the Missing Map and the "Hidden Majority" – Coping With Fragmented Tribunals in International Disputes

Timothy G. Nelson[*]

An international arbitral tribunal typically consists of three members. Each of them has an equal vote, with the majority ruling. The ultimate disposition of the case, therefore, is usually expected to represent the common will of at least two tribunal members.

But what if there is no commonality of "will"? What if each of the arbitrators espouse mutually irreconcilable views about how the case should be decided? What if the "minority" (dissenting) voice seems to align itself with one of the "majority"? What if a "concurring" opinion (written by one of the majority members) seems at odds with the final dispositif?

The phenomenon of the "fractured" tribunal is mercifully rare, but real nevertheless. This article explores the way the issue has arisen, and the way in which it has been resolved in some of the leading international cases. As noted below, international tribunals have striven to uphold arbitral awards, even in cases where the reasoning is "atomized" as between the individual members. Primacy thus tends to be given to the ultimate vote of a tribunal (as expressed in a *dispositif*) rather than what has gone before in the individual members' stated reasons. Nevertheless, the potential for mischief persists, particularly when an award is badly drafted or where there is dysfunctionality in the panel deliberations.

The discussion below will examine the leading ICJ, ICSID, UNCITRAL and ad hoc decisions on this issue, including the well-known cases of *Guinea-Bissau*, *Rann of Kutsch* as well as more recent ICSID annulment case *Alapli v. Turkey*. We will start, however, with the less celebrated ICJ advisory opinion in *Yakimetz*, which, in the author's submission, had a significant influence on how this issue is analyzed.

1. The *Yakimetz* Case and the "Fractured" Majority

(a) Mr. Yakimetz's Long Legal Fight with the UN Results in a Fractured Majority

When he reported for duty as a minor UN official in New York in late 1977, Vladimir Victorovich Yakimetz could not have foreseen that his career would effectively be ended by a fractured tribunal majority – much less that his case would shape arbitral law on this issue.

In December 1977, a vacancy arose for the position of "Reviser" in the Russian Translation Service of the United Nations.[1] On the recommendation of the Soviet Mission to the UN, the job was given too Dr. Victor Yakimetz (a USSR civil servant) "on a fixed-term secondment

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[1] *See Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, ICJ Written Record ("*Yakimetz ICJ Record*"), I.C.J. Pleadings at 109 ¶¶ 6-7.

basis for a period of five years."[2] The "secondment" designation apparently was standard for Soviet bloc citizens recruited to the UN staff.[3]

Dr. Yakimetz did well and (with the encouragement of the Soviet Mission) was later promoted to the Office of Programming and Coordination of the Secretariat's Department of International Economic and Social Affairs ("PPCO/DIESA").[4] He also sat on an internal UN promotions board committee.[5] In late 1982, his term was extended to December 1983, and he was told by his UN Supervisors that he might get further extensions.[6]

But in early 1983, Dr. Yakimetz's Soviet colleagues suggested he return to Moscow for a "vacation" – an invitation that was not wholly cordial.[7] According to a U.S. Senator who sponsored his cause, he was really being recalled because he had refused to engage in spying:

> In 1982 . . . Mr. Yakimetz was instructed by officials of the Soviet mission at the U.N. to engage in activities he knew to be inconsistent with his oath as an international civil servant. He refused, and was consequently ordered back to Moscow.[8]

On February 9, 1983, Dr. Yakimetz applied for and obtained political asylum in the United States, and a day later he resigned from the Soviet civil service.[9] In Cold War parlance, he had become a defector. He made clear, however, that he still wanted to continue working at the U.N., and wrote to his supervisor to assure him "of my continued dedication and devotion to the United Nations and my wish and intention to continue to perform all my obligations under my employment contract."[10] The U.S. State Department threw its weight behind efforts to keep him there and also supported a congressional bill to obtain expedited citizenship for him.[11]

This, however, was to no avail: the UN Secretary-General, "surrender[ing]" to "USSR pressure,"[12] placed Dr. Yakimetz on "special leave" effective March 1, 1983 and, ordering

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[2] *Yakimetz v. U.N. Secretary-General,* Judgment No. 333, at 239, 240-41 (U.N. Admin. Trib. 1984), http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_00333_E.pdf ("*Yakimetz UNAT Decision*").

[3] Abdelaziz Megzari, *The Internal Justice of the United Nations: A Critical History 1945-2015*, at 271 (2015).

[4] *Yakimetz UNAT Decision* at 241; *see also* Megzari, *supra* n. 3, at 272 (explaining that the Soviet authorities had lobbied for this transfer).). At the time, the "close intervention by the USSR Permanent Mission to the United Nations in the career of their seconded nationals" apparently was "generally accepted as normal by the senior management of the United Nations." *Id.*

[5] *Yakimetz ICJ Record* at 110 ¶ 13.

[6] *Yakimetz UNAT Decision* at 241; *see also* Megzari, *supra* n. 3, at 272.

[7] *See Soviet Employee at U.N. Gets Asylum*, N.Y. Times, Feb. 13, 1983, at 3 ("*Soviet Employee*"). According to then-U.S. Ambassador Jeane Kirkpatrick, "Mr. Yakimetz defected to the United States" after Soviet officials indicated he would face an investigation when he returned to in Russia. 130 Cong. Rec. 9,855 (Apr. 25, 1984) (quoting letter from Jeane J. Kirkpatrick, U.S. Rep. to U.N., to Sen. Daniel Patrick Moynihan (Sept. 27, 1983)).

[8] 130 Cong. Rec. 9,855 (Apr. 25, 1984) (statement of Sen. Moynihan). Senator Moynihan remarked that it was "no closely held secret of the intelligence community" that Soviet diplomats were utilized to conduct espionage when resident in the United States. *Id.* Viewers of the recent FX series *The Americans* might be forgiven for thinking that Soviet diplomats of that era were engaged in little else but espionage.

[9] *See Yakimetz UN Admin. Trib. Decision* at 241-42; *Soviet Employee*, *supra* n. 7.

[10] *Yakimetz UNAT Decision* at 241-42.

[11] 130 Cong. Rec. 9,855 (Apr. 25, 1984) (quoting letter from Jeane J. Kirkpatrick, U.S. Rep. to U.N., to Sen. Daniel Patrick Moynihan (Sept. 27, 1983)).

[12] Megzari, *supra* n. 3, at 273. According to contemporaneous reports, "Mr. Perez de Cuellar felt that to grant the request of Mr. Yakimetz and the Americans would turn the matter into an East-West issue and that that *(cont'd)*

him that he "should not enter the premises of the United Nations until further notice" – effectively expelling him from UN Headquarters.[13] He was later told that, despite his "excellent" performance reviews, his UN employment would not be extended beyond December 1983.[14]

In January 1984, Dr. Yakimetz challenged the Secretary-General's decision before the United Nations Administrative Tribunal ("UNAT") in Geneva; the body empowered to review UN staffing decisions and to rescind decisions lacking a legal basis.[15] His petition sought reinstatement on the basis (among other things) that he had been denied "reasonable consideration" of employment and that the loss of his job had been due to political factors.[16] He claimed he was entitled to protection under a then-applicable General Assembly resolution, "'staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment.'"[17] The UN Secretary-General maintained that Dr. Yakimetz had always been on secondment from the USSR civil service, and thus had no expectation of further employment.[18] .

His case was dealt with in the spring 1984 session in Geneva by a three-member tribunal[19] consisting of Mr. Endre Ustor (of Hungary) as presiding member, Mr. Samar Sen (of India) and UNAT Vice President Arnold Kean (of the United Kingdom).[20] In its June 1984 decision, UNAT rejected his challenge by a 2-1 vote.

All three UNAT members accepted that Dr. Yakimetz had been a seconded employee, but they failed to agree on much else. The minority member (Mr. Kean), would have upheld Yakimetz's claim "that he was illegally denied his right to reasonable consideration for a career appointment."[21] The two-member majority, Messrs. Ustor and Sen issued a joint majority opinion holding that: (1) Dr. Yakimetz was a secondee, without any "legal expectancy of any type of further appointment following the end of his fixed-term appointment";[22] and (2) although the UN Secretary-General was bound by the principle that Dr. Yakimetz should be given "every reasonable consideration for a career appointment," the

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(cont'd from previous page)
would be harmful to the United Nations." *U.N. Chief Rejects Soviet Defector's Job Plea*, New York Times Jan. 4, 1984.

[13] *Yakimetz UNAT Decision* at 242. In Megzari's view, the expulsion was "rather swift and harsh," and the denial even of the ability to drink "coffee" with colleagues at the UN Headquarters cafeteria was "particularly demeaning." Megzari, *supra* n. 3, at 273. He also notes that "special leave" was something usually used to accommodate a staff members' "illness" or "child care" needs. *Id.*

[14] *Yakimetz UNAT Decision* at 243.

[15] Under its then governing statute, UNAT had the power to hear "applications alleging non-observance of contracts of employment of staff members" of the UN Secretariat; it possessed power to "rescind[]" decisions if an application was "well founded." U.N. Admin. Trib. Statute arts. 2, 9 (as amended), *reprinted in* Megzari, *supra* n. 3, at 541, 544, 546. Tribunal "judgments" were to be reached by "majority vote" and were required to include "the reasons on which they [were] based." *Id.* art. 10.

[16] *Yakimetz UNAT Decision* at 256 (Dissenting Opinion of Mr. Arnold Kean).

[17] *Yakimetz UNAT Decision* at 245 (quoting Mr. Yakimetz's letter of Dec. 13, 1983).

[18] *See id.* at 246 (citing UN Secretary-General letter of Dec. 21, 1983).

[19] Under the rules, a dispute was to be determined by a panel of three Tribunal members, as designated to hear the case by the UNAT President. Rules of the UNAT, art. 6(1), http://untreaty.un.org/UNAT/Rules.htm.

[20] The composition was not "fortuitous," but instead represented "one member from Eastern Europe, one from the Western countries and one from the Non-Aligned countries." Megzari, *supra* n. 3, at 275.

[21] *Yakimetz UNAT Decision* at 256 (Dissenting Opinion of Mr. Arnold Kean).

[22] *Id.* at 248.

evidence showed he had been given such consideration.[23] But the UNAT majority also "express[ed]" its "dissatisfaction" with the UN Secretary-General's conduct, in particular his failure to memorialize clearly that he actually "had given the question of [Dr. Yakimetz's] career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution."[24]

But, in seeming contradiction, the UNAT tribunal member from the Eastern Bloc (Mr. Ustor) issued a separate opinion holding that Dr. Yakimetz should never have been considered "eligible" for a career appointment at all. Mr. Ustor added, controversially, that because of the "circumstances" in which Dr. Yakimetz had "elected to break his ties with his country," he "'could no longer claim to fulfil the conditions governing employment in the United Nations and could not expect that any consideration would lead to his career employment.'"[25] Mr. Ustor rounded things off by saying the UN Secretary-General "[did] not deserve the disapproval expressed in the [majority]judgement" – i.e. the very joint opinion he had himself signed.[26]

There were thus three points of view embedded within the UNAT opinion. Motivated partly (but not exclusively) by this contradiction, Dr. Yakimetz sought and obtained permission to take his case to the International Court of Justice: This created means for reversal of the UNAT decision,[27] and thus a potential pathway to reinstatement.

(b) The ICJ Advisory Opinion

The ICJ was asked to address two aspects of the UNAT decision: (i) "whether . . . the tribunal had fail[ed] to exercise jurisdiction vested in it" "by not responding to the question [of] whether a legal impediment existed" to Dr. Yakimetz's "further employment in the United Nations"; and (ii) whether the tribunal "err[ed]" on any question "of law relating to provisions of the Charter of the United Nations."[28]

In its May 1987 Advisory Opinion, the ICJ answered both questions in the negative.[29] On the first question (excess of jurisdiction), it rejected the claim unanimously. It held that, although a tribunal's "conscious[] or inadvertent[]" omission to "exercise jurisdictional powers vested

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[23] *Id.* at 247, 251-52.
[24] *Id.* at 252.
[25] *Id.* In other words, defectors should not get job extensions. In making this remark, Judge Ustor purported to quote a past UN committee report saying that "international officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." *See id.* at 250 (citation omitted). As Mr. Kean noted in his dissent, Mr. Ustor had taken that quotation badly out of context, and there was no actual authority for this proposition. *See id.* at 256 (footnote).
[26] *See id.* at 253.
[27] Under its then statute, a UNAT decision was not capable of being confirmed until an advisory opinion had been issued. *See* U.N. Admin. Trib. Statute art. 11 (as amended), *reprinted in* Megzari, *supra* n. 3, at 547.
[28] *Yakimetz ICJ Record* at 30-32.
[29] In doing so, it stressed that, because its advisory role was limited to the questions before it, it would "not necessarily have to deal with the problems raised by certain administrative steps taken, or which should have been taken, by the Secretariat, and which have been the subject of criticism." *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, 1987 I.C.J. 18, Advisory Opinion, ¶ 27 ("*Yakimetz Advisory Opinion*"). Stripping away the circumlocution, this was a clear signal that the Court was unwilling to descend into politically sensitive factual issues.

in it" could be an excess of jurisdiction,[30] in this case, UNAT had "addressed its mind" to the factual and legal issues presented by Dr. Yakimetz's application.[31] It mattered not whether or not the outcome was correct, because the three UNAT members had plainly considered whether the rejection of Dr. Yakimetz's application was lawful.[32]

The ICJ explained that, while the dissenter (Mr. Kean) thought Yakimetz had been denied proper consideration, and the concurring member (Mr. Ustor) thought Yakimetz was never entitled to any consideration,[33] the "remaining member" (Presiding Arbitrator Sen) plainly could *not* have shared Mr. Ustor's view that there was an "absolute bar" to re-employment.[34] The UNAT's official majority judgment "occupied the middle ground between Mr. Ustor and Mr. Kean."[35] Thus, UNAT "***as a body, represented by the majority which voted in favour***" of the final decision, plainly had drawn conclusions on the relevant issues, even if those conclusions "were not spelled out as clearly in the Judgement as they ought to have been."[36] On this basis, it held that there had been no "fail[ure] to exercise jurisdiction."

On the second question (whether UNAT committed legal error relating to provisions of the UN Charter), the ICJ held (by a 11-3 vote)[37] that no such error had arisen. It hewed closely to question of whether *UNAT* had misapplied the UN charter in the course of deciding the claims as pled (as opposed to whether the *Secretary-General* had acted lawfully).[38] In framing the issue so narrowly, the ICJ was thus able to avoid revisiting the merits of the UNAT decision (or the Secretary-General's conduct).[39]

(c) The Unasked Question: Was There Actually a Decision?

The scope of review in *Yakimetz* was circumscribed by the form of the questions put to the Court (excess of jurisdiction and legal error). The ICJ was *not* directly asked whether the fractured nature of the UNAT majority decision had legal consequences of its own. As one of the Court's members, Judge Stephen Schwebel, noted:

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[30] *Id.* ¶ 46 (quoting *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, 1973 I.C.J. 166, 189 ¶ 51).
[31] *Id.* ¶¶ 51, 58.
[32] *See id.* ¶ 51 ("The Court is asked whether the Tribunal failed to exercise jurisdiction on a particular point; the question is not whether the conclusion of the Tribunal on the point was correct or not, but whether it addressed its mind to it.").
[33] *Id.* ¶ 50.
[34] *Id*.
[35] *Id*.
[36] *Id.* ¶ 53 (emphasis added).
[37] Notably, "[a]ll of the three ICJ judges from socialist countries," and "[a]all the six judges from developing Non-Aligned countries voted in favor," while the three dissenting judges were from Western countries. Megzari, *supra* n. 3, at 277. In this sense, the ICJ vote "mirrored" the UNAT judgment itself.
[38] *See Yakimetz Advisory Opinion* ¶¶ 66, 75.
[39] *Id.* ¶¶ 80; *see also id* ¶ 89 . The dissenters were far less generous. Judge Sir Robert Jennings (of the UK) found that there had been a legal error, and that UNAT had failed properly to analyze whether the Secretary-General had given due "consideration" to Dr. Yakimetz's request. *See Yakimetz Advisory Opinion*, Dissent of Sir Robert Jennings, 1987 I.C.J. at 151-52. Judge Schwebel (of the U.S.) agreed; he also poured scorn on the decision to exclude Dr. Yakimetz from the premises. *See id.*, Dissenting Opinion of Judge Schwebel, 1987 I.C.J. at 113. Judge Evensen (of Norway) also considered that Yakimetz had been denied basic "decency." *Id.*, Dissenting Opinion of Judge Evensen, 1987 I.C.J. at 168, 170. Even Judge Ago (of Italy), who joined in the majority decision, remarked that UNAT's judgment lacked "clarity and exhaustiveness." *Id.* Separate Opinion of Judge Ago, 1987 I.C.J. at 106 ¶ 1.

> while the *Yakimetz* judgment of the tribunal was challenged in court on multiple grounds, it was not claimed by counsel for Yakimetz nor thought by the International Court of Justice to be 'inexistent', or a nullity, on the ground that there was a lack of a genuine majority for the judgment adopted.[40]

Nevertheless, the ICJ's reasoning does touch on this issue. In examining whether UNAT had "addressed its mind" to the legal issues, the ICJ held that it was advisable to look not just at the "text of its Judgement; but it may also be appropriate to consult separate or dissenting opinions appended to it."[41] Thus, both the separate declaration of Mr. Ustor plus the dissent of Mr. Kean were considered together with the main judgment.[42] The ICJ was also willing to tolerate some imperfections in the manner in which the UNAT majority expressed its views.

The ICJ made clear that fractured reasoning among majority members was not, in itself, improper; on the contrary, the diversity of opinion potentially "clarifi[ed]" the majority's thinking,[43] and even Judge Ustor's concurrence was seen as helpful:

> It may even be said that the greater the measure of revealed disagreement within the Tribunal on the point, the more certain it is that it was considered and debated, not overlooked or passed over.[44]

These observations resonated in the next "fractured majority" case to reach the ICJ: the case of *Guinea-Bissau*.

2. Guinea-Bissau v. Senegal and the Missing Map

While the *Yakimetz* controversy was working its way through the UN tribunals and ICJ, a very different dispute was brewing in West Africa. In 1985, the governments of Senegal and Guinea-Bissau agreed to submit a maritime boundary dispute to inter-state arbitration before a three-person arbitral tribunal.[45] This too resulted in a "fractured" decision.

The three-member *Guinea-Bissau* tribunal was asked: (1) to decide whether a 1960 agreement concluded by an exchange of letters between the former colonial powers (France and Portugal) had "the force of law" between the two states; and (2) if not, to "draw" the "maritime delimitation line."[46] The *compromis* further provided that "all questions of substance or procedure" would be taken "by a majority of its members."[47] The Tribunal (as formed in 1986) consisted of ICJ judge Mohammed Bedjaoui of Algeria (appointed by

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[40] Stephen W. Schwebel, *May the Majority Vote of an International. Arbitral Tribunal be Impeached: The 1996 Freshfields Lecture*, 13 Arb. Int'l 145, 152 (1997).
[41] *Yakimetz Advisory Opinion* ¶ 48.
[42] *Id.* ¶ 49.
[43] *Id.*
[44] *Id.* ¶ 51.
[45] *Case Concerning the Delimitation of Maritime Boundary Between Guinea-Bissau and Senegal*, 20 R.I.A.A. 119 (ad hoc arbitration 1989). It was agreed that each party would appoint one arbitrator, and the third (to function as presiding arbitrator) would be appointed by either consent of the parties or mutual agreement of the two arbitrators. *Id.* at 122.
[46] *Id.* at 122-23 (quoting parties' agreement, art. 2) (quotations translated from French original).
[47] *Id.* (quoting agreement, art. 4).

Guinea-Bissau), former ICJ judge Andre Gros of France (appointed by Senegal), and Argentine jurist Julio Barberis, serving as Tribunal President.[48]

On 31 July 1989, an award was issued. The majority (Arbitrator Barberis and Judge Gros, with Judge Bedjaoui dissenting) held that, although the 1960 agreement did not directly delimit those maritime spaces which did not exist at that date (*e.g.*, exclusive economic zones), it did expressly mention the territorial sea, the contiguous zone and the continental shelf.[49] The majority opinion therefore viewed the 1960 agreement as delimiting the "continental shelf between the Parties over the whole extent of that maritime space as defined at present."[50] Having reached this view, the majority held that there was no need either to answer the second question or to append a boundary-line map.[51] Judge Bedjaoui issued a dissenting opinion that included his views on the correct delimitation line (generally more favorable to Guinea-Bissau), together with a map showing what he thought the boundary should be.[52]

In addition, President Barberis issued a separate "declaration," expressing the view that the majority's answer to the first question "could have been more precise."[53] He would have preferred an award that answered the question in a "partially affirmative and partially negative" manner that (in effect) would then have allowed the Tribunal to append a map.[54] Had this been done, he explained, "the Tribunal could have determined the boundary for the waters of the exclusive economic zone or the fishery zone, a boundary which might or might not have coincided with the line drawn by the 1960 agreement."[55]

This "declaration" drew a strong reaction from Judge Bedjaoui. In his view, the Barberis declaration had revealed the Award to be "incomplete and inconsistent with the letter and spirit of the Arbitration Agreement with regard to the single line desired by the Parties" and, since it emanated from the Tribunal President, *"justifie[d] more fundamental doubts as to the existence of a majority and the reality of the Award."*[56]

Spurred by this, Guinea-Bissau then brought a proceeding before the ICJ, seeking a declaration that the award was inexistent and/or null and void. It asked, in relation to the Barberis opinion:

> What weariness, what psychological pressure, what wear and tear (the deliberations dragged on for months on end) caused him finally to associate his name with one text, while at the same time disassociating himself from it by another one? Did he approve one first and with regret? Did he then change his mind and consider he was correcting the effects of the first by the second? What is meant by the conditional

[48] *Id.* ¶¶ 2-3.
[49] *Id.* ¶ 85.
[50] *Id.*
[51] *Id.* ¶¶ 87-88.
[52] *Id.* at 154-213 (Dissenting Opinion of Arbitrator Bedjaoui).
[53] *Id.* at 154 (Declaration of President Barberis).
[54] *Id.*
[55] *Id.*
[56] *Id.* at 213 ¶ 161 (Dissenting Opinion of Arbitrator Bedjaoui) (emphasis added).

> phrase used by the President, "I would have answered . . . . "? What conditions had to be fulfilled so that he could respond as he pleased?[57]

Guinea-Bissau thus contended that the Barberis declaration "contradicted and invalidated his vote, thus leaving the Award unsupported by a real majority."[58]

Rejecting this argument, the ICJ held that President Barberis's declaration (in particular his statement that the Tribunal's answer to the first question "could have been more precise") was not a disavowal of an award, and "discloses no contradiction with that of the Award."[59] As to his stated preference that the award be phrased differently, this merely "represented. . . an indication of what he considered would have been a better course," not a suggestion that the Award deviated from what was legally required.[60] His concurrence thus did not "contradict[]" the award itself.[61]

In any event, the court held that, even if his declaration did contradict the majority's reasoning, "*such contradiction could not prevail over the position which President Barberis had taken when voting for the Award*."[62] It explained:

> As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal.[63]

Thus, the ICJ held (unanimously on this point), "the contention of Guinea-Bissau that the Award was inexistent for lack of a real majority cannot be accepted." [64]

Although the Court's referred to the "practice of international tribunals" without specifying any one past case, one of its members, Judge Schwebel, later said that this was a reference to *Yakimetz*.[65] As he explained:

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[57] *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Memorial Submitted by the Government of the Republic of Guinea-Bissau, vol. I, at 69 ¶ 189. The French original reads:

> Par quelle lassitude, dans quel contexte psychologique, sous l'effet de quelle usure du temps (le délibéré s'était éternisé pendant de longs mois) a-t-il finalement associé son nom à un texte, en même temps qu'il s'en dissociait par un autre? a-t-il approuvé l'un d'abord et avec regrets? s'est-il ensuite ravisé et a-t-il cru corriger les effets du premier par le second? Quel est le sens étrange du conditionnel employé par le président "j'aurais répondu . . . "? Quelles conditions devaient donc être réalisées pour qu'il puisse répondre comme il l'entendait?

[58] *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 1991 I.C.J. 53, Judgment ¶ 30.

[59] *Id.* ¶ 31.

[60] *Id.* ¶ 32.

[61] *Id.*

[62] *Id.* ¶ 33 (emphasis added).

[63] *Id.*

[64] *Id.* ¶ 34.

[65] Schwebel, *supra* n. 40, at 151 (in view of the recent *Yakimetz* case, the ICJ "did not have far to look" for past practice). The reasons for the *Guinea-Bissau* court not expressly citing its then-recent *Yakimetz* decision are obscure, but might be a reflection of *Yakimetz*'s political nature. *Yakimetz* was cited, however, by Judge *(cont'd)*

> The analogy between the declaration of President Barberis and the statement of President Ustor is plain. In both cases, the tribunal presidents made clear that they would have preferred a decidedly different judgment than the one rendered. In both cases, they nevertheless voted for the less preferable judgment which, only by their vote, was adopted.[66]

Schwebel viewed the *Guinea-Bissau* decision as showing that (as in *Yakimetz*) the mere existence of a fractured majority is not sufficient to plead "inexistence" of the award itself:

> The claim of Guinea-Bissau in the end boiled down to the complaint that the tribunal had voted for what it could muster a majority for rather than for what a majority of its members thought to be right. That complaint was well founded. But it did not follow that the resultant award was inexistent, null and void, or even voidable.[67]

In support of this view, Schwebel also pointed to a line of cases from the Iran-US Claims Tribunal where one arbitrator (often the US arbitrator), while favoring a more generous award to the investor, nevertheless stated that the arbitrator had voted with the majority in order to constitute a majority.[68] Another example of this is the *Rann of Kutch* arbitration, in which the two party-appointed arbitrators published "proposals" for the outcome of the boundary dispute between India and Pakistan. When the chairman Judge Lagergren, authored an opinion that split the territory 90%-10% in India's favor, the arbitrator appointed by Pakistan issued a "declaration" that, having had "the advantage of reading the opinion of the Chairman and in light of it, I concur in and endorse the judgment of the Learned Chairman," thus creating a majority sufficient to rule on the disputed boundary.[69] A further example, from the late 1990s, was the ICSID case of *AMT v. Zaire*, an investment treaty claim for damages for impairment of a car battery factory in Kinshasa – in that case, there were three very different opinions on damages among the tribunal members, but [who?] expressly acquiesced in the final award.[70]

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Weeramantry in a dissenting opinion: for that judge, *Yakimetz* was relevant to answering the "inexistence" question (on which he voted with the majority), but left open the question whether the award should be annulled for jurisdictional error (on which he would have voted to sustain Guinea-Bissau's challenge). *See Guinea-Bissau*, Dissenting Opinion of Judge Weeramantry, 1991 I.C.J. at 162.

[66] Schwebel, *supra* n. 40, at 151-52.

[67] *Id.* at 153.

[68] *See, e.g.*, *Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 165 (1989) (Concurring Opinion of George Aldrich) (expressing the view that "the Claimant should be awarded compensation for its JSA interests approximately ten million dollars more than that determined by the Award. Nevertheless, I concur in the Award with respect to this determination in order to form a majority."); *Granite State Mach. Co. v. Iran*, 1 Iran-U.S. Cl. Trib. Rep. 442, 450 (1982) (Concurring Opinion of Judge Mosk) (arbitrator "concurred in the award in this case so as to end protracted deliberations"; and "to form the majority for the award"); *Econ. Forms Corp. v. Iran*, 3 Iran-U.S. Cl. Trib. Rep. 42, 55 (1983) (Concurring Opinion of Howard M. Holtzmann) (similar statement); *Starrett Hous. Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 159 (1983) (Concurring Opinion of Howard M. Holtzmann) (same).

[69] *Rann of Kutch Arbitration (India v. Pakistan)*, 17 R.I.A.A. 1, 571 (ad hoc arbitration 1968) (Opinion of Nasrollah Entezam).

[70] *See Am. Mfg. & Trading, Inc. v. Zaire* No. ARB/93/1, Award (ICSID 1997), *reprinted in* 36 I.L.M. 1534. One arbitrator (Mr. Heribert Golsong) issued an individual opinion that addressed both liability and quantum, including "stringent requirements of prompt, adequate and effectively realizable compensation as laid out by Article III, to assess the measure of compensation in the favor of the Claimant." *Id.*, Statement of Individual opinion of Mr. Heribert Golsong ¶ 21. He indicated that his joining the final majority vote to "strengthen the

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All of these cases are arguably distinguishable from the "fractured majority" scenario in *Yakimetz* and *Guinea-Bissau*, however, because the vote in those cases (albeit belated) was an express change of mind, such that the "concurring" opinions were very clearly subordinate to those of the majority.

By century's end, therefore, two ICJ decisions (along with some Iran-US Claims tribunal decisions) had dealt with the "fractured" tribunal. The result was that the *vote* (rather than the individual opinions) was to be viewed as paramount. As long as that vote had an articulable basis (and could lead to a workable outcome), the individual decision-makers' thought process could not impeach it. To quote the separate opinion of Judge Ni in *Guinea-Bissau*:

> [J]udges or arbitrators do not vote as a mere matter of formality. They do so in order to express their precise position. They are fully aware of the substantive implications of their vote. . . . The vote indicates their final decision. If the [concurring] declaration, as in this case, raises an uncertainty as to whether a judge or arbitrator concurs with or dissents from a judgment or an award, it is the vote that constitutes the authentic expression of his attitude.[71]

Such was the state of the law when, in 2014, the same issue arose within the ICSID system, through the *Alapli* case.

3. Alapli

Alapli is the ICSID case that most explicitly deals with the issue of the "fractured" tribunal. The case originated with an alleged investment in a power plant in Turkey, with a complex history. The right to own and operate the power plant was conferred by a contract signed in 1998 between the Turkish government and a Turkish company.[72] In November 2000, these rights were assigned to a new Turkish company,[73] which was 100% owned by a Netherlands company (Alapli). Alapli, in turn, was wholly owned by Turkish nationals.[74]

Still later, in 2002, the Turkish government enacted legislation that eliminated government guarantees for "certain energy sector projects not finalized before December 31, 2002 (Law No. 4628) and made certain restrictions to energy sales agreements."[75] In an ICSID arbitration, Alapli claimed that these measures violated both the Energy Charter Treaty ("ECT") and the Netherlands-Turkey Bilateral Investment Treaty ("BIT").

In response, Turkey challenged ICSID jurisdiction, claiming (among other things) that (1) Alapli did not hold an "investment" because it never made any real capital "contribution" towards the concession; and (2) in any event, the transfer of interests to Alapli had been

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necessary authority of the award," despite his different views on liability as well as the proper standard for quantum. *Id.* ¶ 1. Another arbitrator (Mr. Kéba Mbaye) stated that he concurred in the award's reasoning, but dissented with respect to the amount of damages. *Am. Mfg. & Trading*, Declaration of Mr. Kéba Mbaye. All three arbitrators ended up voting for the award.

[71] *Guinea-Bissau*, Separate Opinion of Judge Ni, 1991 I.C.J. at 99.

[72] *Alapli Elektrik B.V. v. Turkey*, No. ARB/08/13, Award Extracts ¶ 311 (ICSID 2012).

[73] *Id.* at 2 (Factual Background Summary).

[74] *Id.* at 1-2.

[75] *Id.* at 2.

effected after a dispute had become likely – meaning that (in Turkey's view) there had been an abusive attempt to create jurisdiction over a pre-existing dispute.

These arguments had mixed success. One arbitrator (the Hon. Marc Lalonde, appointed by Alapli) rejected them in their entirety. One arbitrator (Professor William Park, the presiding arbitrator) upheld Argument 1, finding there was no "investment" because Alapli "never made a contribution to the Alapli Project sufficient to create for itself the status of an investor under either the ECT or the Netherlands-Turkey BIT."[76] The other arbitrator (Professor Brigitte Stern, appointed by Turkey) upheld Argument 2, finding that there was no "*bona fide* investment," as

> it is clear that Claimant, as a Dutch company, acquired its investment for the sole purpose of manufacturing international jurisdiction, at a time when the project was already in great difficulty and the facts that are at the root of the dispute with Turkey were already known to the Sponsors of the Project.[77]

Together, Arbitrators Park and Stern formed a 2-1 majority, voting for dismissal.[78] The majority Award stated:

> The Majority has considered the two lines of reasoning set forth below. Although Arbitrator Stern and Arbitrator Park do not necessarily assign the same weight to the various components in these overlapping lines of reasoning, both members conclude that jurisdiction is clearly absent.[79]

The *dispositif* then stated that "[i]n light of the Majority's decision, the Tribunal dismisses with prejudice all claims for lack of jurisdiction under the Netherlands-Turkey BIT and the ECT."[80]

Alapli then sought annulment of the award on grounds, inter alia, of serious procedural irregularity and/or excess of jurisdiction. Among other things, it contended that the Tribunal had failed to observe the requirement in article 48(1) that "[t]he Tribunal shall decide questions by a majority of the votes of all its members."[81] Had each of Turkey's objections been voted upon one by one, it argued, the case would have been resolved in its favor.

The ICSID ad hoc annulment committee formed to hear the challenge (consisting of Professor Bernard Hanotiau, Karl-Heinz Böckstiegel and Makhdoom Ali Khan) disagreed. It held that the *Alapli* tribunal had been within its rights to find that "the only material question on jurisdiction for a resolution of the dispute between the parties that it had to decide was whether or not it had jurisdiction."[82] If that question was resolved in the negative, the case was over. It was not necessary to conduct a separate "vote" on whether the Tribunal had

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[76] *Id.* ¶ 337.
[77] *Id.* ¶¶ 416-17.
[78] *Id.* ¶ 312.
[79] *Id.* ¶ 313.
[80] *Id.* ¶ 425.
[81] ICSID Convention, art. 48.
[82] *Alapli Elektrik B.V. v. Turkey*, No. ARB/08/13, Decision on Annulment ¶ 152 (ICSID 2014).

jurisdiction on the basis of any one issue. By reaching a decision on this point (albeit on separate grounds), the Tribunal "accomplished" its task.[83]

Alapli also attacked the award on the basis that its reasoning was internally contradictory. The ad hoc committee also disagreed with this, however, finding that there was no requirement of unanimity in the reasoning that led to the conclusion and that, in any event, the reasoning of the two majority arbitrators was complementary, not contradictory.[84] Yet it stressed that it was the voting, not the internal reasoning, that gave force to the Award:

> [E]ven assuming for purposes of the present analysis that the lines of reasoning employed by Arbitrators Park and Stern were contradictory, this would not affect the validity of the Award in any way. In the *ad hoc* Committee's view, what matters for the validity of the Award is how the Majority *voted*. The fact that the members of the Majority may not have agreed on the reasoning leading up to the identical vote is irrelevant.[85]

As an elaboration on the inconsistency argument, Alapli argued that, if one analyzed the arbitrators' reasoning on an issue-by-issue basis, there was a "hidden" majority in favor of jurisdiction.[86] It noted that, according to the claimant/applicant, one arbitrator (Professor Park) "voted in favor of jurisdiction *ratio temporis*" whereas Arbitrator Stern supposedly "voted in favor of jurisdiction *ratione personae* and *ratione materiae*" – and that if one combined these votes with the dissent (which would have sustained jurisdiction on all three bases) one would find a "real" majority upholding jurisdiction.[87] The *Alapli* ad hoc committee took pains to refute this argument on the facts of the case – it refused to accept that Arbitrator Stern would have upheld jurisdiction on any ground.[88]

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[83] *Id.* ¶ 153.
[84] *See id.* ¶¶ 156, 161.
[85] *Id.* ¶ 165. The *Alapli* committee considered that the ICSID Rules "envisage[] that arbitrators may disagree as to the reasoning underlying their award and allow[] them to formulate a separate/dissenting opinion," and also "allows arbitrators making up the majority to formulate an individual opinion." *Id.* ¶ 166.
[86] *See id.* ¶ 184.
[87] *Id.*
[88] *See id.* ¶ 185-95. On the committee's reasoning, "[t]he arbitrators making up the Majority manifestly did not vote against each other's position, but acknowledged them as possible lines of reasoning leading up to the same outcome." *Id.* ¶ 187. In the committee's view, Arbitrator Park ultimately "expressed no opinion" on the abuse of rights/jurisdiction *ratione temporis* issue (the one that Arbitrator Stern found dispositive), *id.* ¶ 188, whereas Arbitrator Stern (on its reading) had not actually reached a concluded view on the issues of jurisdiction *ratione personae/materiae*. *Id.* ¶ 194. This seems a rather narrow interpretation of Arbitrators Stern's and Parks's respective opinions. For example, Arbitrator Park had made certain statements that, on a more expansive interpretation, could be read as suggesting that he doubted the basis of the *ratione temporis* objection. *See id.* ¶ 188 (quoting Arbitrator Park as acknowledging that Alapli "may have been established pursuant to 'legitimate corporate planning,'" a factor that arguably negates an "abuse of rights" claim); *see also id.* ¶ 192 (quoting Arbitrator Stern as stating that "[t]he uncontested fact that a Dutch company owns the shares of Atam Alapli seems sufficient to consider that there is indeed in this case a foreign investor which is the legal owner of an investment." (alteration in original)).

4. Lessons on the "Fractured" Tribunal

(a) The Primacy of Outcome-Voting

The *Alapli* committee is in line with the ICJ's approach in *Yakimetz* and *Guinea-Bissau*, as focusing on the vote, not the reasoning; if anything, it was even more explicit in this respect

> what matters for purposes of making up a majority is not the reasoning of that majority's members, but their votes. . . . [T]he relevant procedural requirement is the identity of votes within a majority, and not an identity in reasoning.[89]

All of this harks back to the part of the *Yakimetz* Advisory Opinion where the ICJ analyzed the tribunal decision as fundamentally stemming from the *result* for which "the Tribunal as a body, represented by the majority" had voted, and upheld that result even though the reasons for that result "were not spelled out as clearly in the Judgement as they ought to have been."[90]

(b) The Future of Dissents and Concurrences

The separate opinion (whether a concurrence or dissent) is quite familiar in arbitration.[91] Importantly, however, there are several different models for decision-making, not all of which permit "separate" or "concurring" opinions. As Justice Ruth Bader Ginsburg explains:

> [There are] three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States – generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees.[92]

In the "seriatim" system described by Justice Ginsburg, and familiar to Commonwealth practitioners, every single member of the bench, in principle, is responsible for delivering his or her own separate opinion, regardless of whether he/she is in the majority. In the U.S. "middle way," as exemplified by the United States Supreme Court, the judges typically confer after hearing argument, and reach a provisional "vote" on the outcome, at which point,

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[89] *Alapli*, Decision on Annulment ¶ 170.

[90] *Yakimetz Advisory Opinion* ¶ 53.

[91] For example, under the ICSID Convention, "[a]ny member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent." The *Alapli* committee added:

> the ICSID Convention does not set forth any formal requirements for individual opinions. Therefore, arbitrators are free to choose how to structure and present their separate opinions. There is no specific requirement, much less a fundamental procedural rule . . . that an arbitrator append his/her individual opinion after the signature page of an award. Therefore, if the majority agrees, the individual opinions of each arbitrator may be included in the text of the award.

Alapli, Decision on Annulment ¶ 169.

[92] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 134 (1990). The concept of the "single opinion of the Court" originated with Chief Justice Marshall in the early nineteenth century. Mark Alan Thurman, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 421, 426-27 (1992).

a majority member writes the court's "opinion,"[93] which will explain the disposition of the case.

Consciously or not, arbitral practice resembles the U.S. Supreme Court model, rather than the British or continental model. The majority opinion in the award is effectively the "opinion of the Court," and the final order is the *dispositif* where the result is displayed.

Some critics would appear to view the "fragmented" tribunal as part of a larger problem: they argue that dissents (and, by implication, concurrences) are weakening confidence in arbitration generally.[94] In terms of the effectiveness of the award *as a legal instrument*, however, dissents do not undermine the effectiveness of the outcome.[95] A dissenter has, by definition, been outvoted; this is simply a function of odd numbers. Moreover, as the *Yakimetz* Advisory Opinion notes, a robust dissent is a source of "revealed disagreement," which may in fact help elucidate (and even validate) the majority's conclusions:

> Declarations or opinions drafted by members of a tribunal at the time of a decision, and appended thereto, may contribute to the clarification of the decision. Accordingly the wise practice of the Tribunal, following the example of the Court itself, has been not only to permit such expressions of opinion but to publish them appended to the judgement.[96]

It must be said, however, that a "concurrence," being a separate majority viewpoint, raises more complex issues than a simple dissent. The solution in *Yakimetz* (and subsequent cases) has been to treat the concurring opinion as being subordinate to the majority vote itself – such that even a strident or dogmatic concurrence has essentially the same status as a "belated vote" type of opinion (a la *Rann of Kutch*) in which the majority member says he/she disagreed with the majority's reasoning but voted for the result anyway. Viewed in those terms, a concurring opinion ought not, in theory, prejudice the ultimate enforcement of the award.

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[93] The "prerogative" of selecting the author of the majority opinion is with the Chief Justice, if he/she is in the majority; if not, the prerogative lies with the most senior Associate Chief Justice in the majority. *See* Paul J. Wahlbeck, *Strategy & Constraints on Supreme Court Opinion Assignment*, 154 U. Penn. L. Rev. 1729, 1731 (2006).

[94] *Compare* Richard M. Mosk & Tom Ginsburg, *Dissenting Opinions in International Arbitration*, *in Liber Amicorum Bengt Broms* 259, 259 (Matti Tupamäki ed., 1999) (arguing that "dissenting opinions, although not always beneficial, can enhance the arbitral process and should be authorized in international arbitration"), *with* Alan Redfern, *Dissenting Opinions in International Arbitration: The Good, the Bad and the Ugly*; 20 Arb. Int'l 223, 242 (2003) (after surveying various incidents involving uncooperative dissenters, arguing that "the present leniency towards dissenting opinions, however, offensive they may be, has gone too far" (footnote omitted)), *and* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrator in Investment Arbitration*, *in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821, 834 (Mahnoush Arsanjani et al. eds., 2011) (arguing that party-appointed arbitrators undermine the process by dissenting and strongly urging the principle of "*nemine dissentiate*").

[95] Dissenting opinions can, of course, be influential when an award is subject to an annulment process. An example is Arbitrator Stern's dissent in the *Occidental* decision of 2012, holding that a claimant's entitlement to damages should be reduced because (in her view) it only beneficially owned 60% of the subject investment. *Occidental Petroleum Corp. v. Ecuador*, No. ARB/06/11, Dissenting Opinion of Arbitrator Stern ¶¶ 133-65 (ICSID 2012) The annulment committee explicitly endorsed her view and reduced the final award accordingly. *Occidental Petroleum Corp. v. Ecuador*, No. ARB/06/11, Decision on Annulment ¶ 583-90 (ICSID 2015). But this is a function of the annulment powers expressly granted to ad hoc committees under the ICSID Convention; the fact remains that, unless and until a committee exercises such a power, the majority's award remains valid.

[96] *Yakimetz Advisory Opinion* ¶ 49.

Theory, however, does not always match reality. A badly structured award can enrage a losing party, and send it on the hunt for "annulment" points. A venturesome litigant might also note that in each of *Yakimetz*, *Guinea-Bissau* and *Alapli* the reviewing body was able to reconcile the concurrence with the eventual result; on this view, there has yet to be a case where a patent inconsistency between the concurrence and the majority opinion was fully tested. With all that in mind, there is some wisdom in Schwebel's cautionary words:

> [A]rbitrators, especially presiding arbitrators, should exercise caution in setting out positions which are or may be seen as differing from those for which they have voted. The risk of misunderstanding may be less in a large court such as the International Court of Justice where, if one or another judge exercises views which do not sit well with his vote, in any event that vote rarely is critical to the majority. But two-to-one votes are common in international arbitration. If an arbitrator expresses views at sharp variance with his vote, while his vote will stand he may roil the parties and prejudice the execution of the award.[97]

(c) The Specter of the "Hidden Majority" – is Issue-Voting a Viable Alternative?

As noted above, the *Alapli* committee found that there was, in fact, no "hidden majority" favoring jurisdiction in that case. But the notion of a "hidden majority" is still alive and well, the more so when the number of decision-makers increased. Within the United States (with a nine-member Supreme Court), the nine justices from time to time express such disparate views on a given set of issues that one can plausibly patch together a "cross-cutting" majority on certain issues that differs from the ultimate outcome.[98]

In 1991, Cross and Harris observed, with respect to the English system that:

> it not infrequently happens that an appeal will succeed though the majority are against the appellant on each of the individual points which the appeal raises. Suppose that five points were involved in a case coming before the House of Lords, and suppose there are five Law Lords sitting, each may be for the appellant on one point, though against him on the other four. The appellant will win, although he lost four to one each point raised by him.[99]

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[97] Schwebel, *supra* n. 40, at 152.

[98] *See, e.g.*, Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 767 (1980), ("[If] the concurring and dissenting opinions share a common line of reasoning, but differ in their application of the law to the facts . . . there are in effect two majorities: the plurality and concurrence agreeing on the result, and the concurrence and dissent agreeing on the fundamental legal principles involved."); Michael Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L.J. 207, 215 (2008) (analyzing situations where "the petitioner won because the outcome was controlled by votes for the judgment, not by votes on each issue"). A possible example of such a case is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968): the issue there was whether an arbitral award should be vacated because of an undisclosed conflict. Four of the nine justices voted for vacatur on the basis that there should be no "appearance" of conflict, *see id.* at 150 (plurality opinion of Justice Black), two justices voted with the majority but appeared to endorse a more pragmatic approach, *see id.* at 151-52 (White, J., concurring, joined by Marshall, J.); the three dissenters also appeared to favor a more practical standard. *Id.* at 154-55 (Fortas, J., dissenting, joined by Harland and Stewart, JJ.).

[99] Rupert Cross & J.W. Harris, *Precedent in English Law* 92 (4th ed. 1991). For an English case where the majority case was very hard (if not impossible) to discern, *see. e.g.*, *Esso Petroleum Ltd. v. Comm'rs of Customs & Excise* [1976] 1 W.L.R. 1, concerning whether a series of commemorative 1970 England World Cup soccer *(cont'd)*

Cross and Harris also state (without much discussion) that "according to Scots procedure, the appellant will lose in such a case because the court's opinion on each issue would be taken separately."[100] Indeed, calls for "issue voting" have been made within the U.S. system from time to time.[101]

Within the arbitral community, Professor Manuel Conthe has proposed replacing the standard majority rule enshrined in Rules of Arbitration with an ancillary "issue-by-issue" voting rule, which might read as follows:

> When the decision on the award depends on the opinions held by arbitrators on two or more distinct issues, the president may split the deliberation into the relevant distinct propositions, take a vote on each one and base the award on the resulting outcomes.[102]

If "issue voting" is to be implemented, however, this brings with it its own complications, including issues of who gets to decide the sequence of "issues" to be voted upon, whether to break matters up into "sub-issues," and what happens when the decision-makers disagree about that sequencing and organization.[103]

What is more, "issue voting" will not necessarily cure the ills that it affects to cure; it may even lead to greater paradoxes. In a 1996 article, then-Professor John Rogers[104] took the "issue voting" concept to task, demonstrating that it actually has more potential for inconsistency than outcome voting. He constructs a scenario, for example, in which issue-by-issue voting resulted in the execution of a defendant, even though this result was opposed by a real majority of Supreme Court justices:

> If, for instance, there are three constitutional challenges to a criminal defendant's capital conviction and different groups of only three justices agree with each challenge, the criminal could be executed although all justices independently find the conviction unconstitutional . . . . The only way to defend headlines like "JONES EXECUTED; ALL JUSTICES AGREE CONVICTION UNCONSTITUTIONAL" would be to explain that the justices voted issue-by-issue on what the law is, and the application of this law requires execution. But who made the decision? Who did the applying? Each justice can say that if the court had agreed with him or her, the defendant would not have been executed. But this is not how the public thinks judges should act. Judges should not be voting on the law like legislators but should be applying the law and bearing responsibility for the proper application of the law. It

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team "coins" (given out "free" to purchasers of petroleum/gasoline at UK service stations) had been offered for "sale" at those stations, for purposes of sales tax legislation. The majority (by a 4-1 vote) held against the taxation authorities, but the grounds for affirmance, as laid out in the four Law Lords' separate speeches, were in many respects internally contradictory (and meanwhile, England's World Cup team lost in the quarter-finals).

[100] *Cross & Harris*, *supra* n. 99, at 92-93.

[101] *See, e.g.*, David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Geo. L.J. 743, 744-45 (1992).

[102] Manuel Conthe, *Majority Decision in Complex Arbitration Cases: The Role of Issue-by-Issue Voting*, 8 Spain Arb. Rev. 5, 5 (2010).

[103] *See* John M Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 Vand. L. Rev. 997, 1022 (1996).

[104] Now a Circuit Judge of the United States Court of Appeals for the Sixth Circuit.

> would fundamentally undermine the responsibility of the judiciary to permit, or require, judges to vote for results that they oppose.[105]

Applying this to the *Alapli* situation, even accepting the (rejected) "hidden majority" theory, would the result have been any more palatable if, using an issue-voting approach, jurisdiction had been upheld? The Turkish side would have been able to say (just as in Rogers's example) that two of the three arbitrators actually considered that there was no jurisdiction. One would simply be trading one "hidden majority" for another.

(d) Can a "Non-Decision" Lead to an "Inexistent" Award?

Even with outcome-voting, there is still the question of what to do when there is literally no discernible outcome.[106] For law students, this may bring to mind Lon Fuller's 1949 article, *The Case of the Speluncean Explorers*.[107] In that scenario, a group of cave-explorers, while trapped underground, had decided to draw lots to see which of their entourage should be killed and eaten, so that the others could ward off starvation.[108] When the case reaches the fictitious "Supreme Court of New Westgarth," the five-judge panel fails to render a decision not just because every single judge has a different approach (*e.g.*, some favor a "natural law" analysis,[109] another requires strict construction of the criminal statutes[110]), but also because one of the judges finds it all too much, and abstains from making a decision.[111] The court is thus divided 2-2.

But whatever the ills of the *Speluncean Explorers* case, it is not really a case of true non-decision, because in most appellate systems (including New Westgarth's), a divided appellate decision means that the verdict of the lower court stands.[112] The Spelunceans may have been doomed to execution, but at least that is a discernible outcome.[113] By contrast, if arbitrators do their basic job of rendering some kind of decision, the case remains unresolved.

In any case involving three decision-makers, there is a theoretical risk that no consensus at all will emerge; indeed, this risk has long been recognized as being intrinsic to a tripartite decision-making.[114] Yet such cases appear to have been very rare.

One case where it did happen was the *Brčko* awards of 1997 and 1998, two boundary delimitation awards involving disputed territory between Croatia and Bosnia.[115] The three-

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[105] Rogers, *supra* n. 103, at 1022 (footnote omitted).
[106] The "no-decision" situation being discussed here, where the arbitral award reveals total disagreement among the arbitrators, should be distinguished from situations of sheer delay, where no decision comes about. Cases of egregious delay may prompt a challenge to the arbitrator or arbitrator concerned (on the basis that the arbitrators concerned are incapable of discharging their functions), but these raise different policy issues.
[107] Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).
[108] *Id.* at 618.
[109] *Id.* at 620-22, 626.
[110] *Id.* at 632, 636-37.
[111] *Id.* at 631.
[112] *Id.* at 645.
[113] For them, very discernible indeed.
[114] *See* Bernard Gold & Helmut F. Furth, Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 Harv. L. Rev. 293, 308 (1954); *see also* David J. McLean & Sean Patrick Wilson, *Is Three a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 Pepp. Disp. Resol. L.J. 167, 183 (2008).

person Brčko tribunal, established under the UNCITRAL Rules (1976) as part of the 1995 Dayton Accords, was composed of co-arbitrators appointed by the disputant states, with Roberts B. Owen (a former U.S. State Department legal advisor), as presiding arbitrator. When the First Brčko Award was finalized, however, the two co-arbitrators were unwilling to sign the final award:

> Following the Rome hearing, the Tribunal conducted its deliberations in Washington, D.C. All three arbitrators were present and fully participated in the deliberations. However, during the last day of deliberations, both Professor Sadikovic and Dr. Popovic refused to sign the Award.[116]

This presented a case of possible "no-decision" because, ordinarily, under Article 31 of the UNCITRAL Rules (1976), the award would need to be signed by at least a majority of the tribunal to be valid. But the Dayton negotiators found a solution for this: they extracted a commitment from the Bosnian and Croatian teams that, in the event of a deadlock between co-arbitrators, "the decision of the presiding arbitrator will be final and binding upon both parties."[117] To put matters beyond doubt, Mr. Owens even obtained written confirmation from the parties to this effect.[118] As he explained:

> These polar positions and accompanying intense animosities, consistently in evidence from the opening of the Dayton conference onward, made clear from the outset that any party-appointed arbitrator would encounter significant difficulties in conducting himself with the usual degree of detachment and independence. The parties therefore decided to change the rule on decision-making in view of the substantial likelihood that an arbitral resolution could be achieved only by the two parties' agreeing that the rulings of the Presiding Arbitrator will be treated as decisive.[119]

By these means, the tribunal president's vote essentially became the vote of "sole umpire" (or even a super-vote or "casting vote").[120] Had this mechanism not been available, however, it is unclear how the case could have been resolved.

In his 1996 lecture, Judge Schwebel appears to acknowledge that, in rare cases, "inexistence" might be a viable basis for challenging the award:

> to demonstrate that an arbitral award is "inexistent" may be theoretically feasible but is practically difficult. Suppose that the award in this case, while requiring a majority vote for adoption, received the favourable vote of only one arbitrator; there would be

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(cont'd from previous page)

[115] *See Arbitral Tribunal for Dispute over Inter-Entity Borders in Brčko Area*, Award (UNCITRAL 1997), *reprinted in* 36 I.L.M. 396 ("*1997 Brčko Award*"); *see also* Christoph Schreuer, *The Brčko Award of 14 February 1997*, 11 Leiden J. Int'l L. 71 (1998).

[116] *1997 Brčko Award* ¶ 27. The same issue recurred with the Supplemental Award. *See Arbitral Tribunal for Dispute over Inter-Entity Borders in Brčko Area*. Supplemental Award ¶ 5 (UNCITRAL 1998). As to background, see Christoph Schreuer, *The Brčko Supplemental Award of 15 March 1998*, 11 Leiden J. Int'l L. 493 (1998).

[117] *1997 Brčko Award* ¶ 2.

[118] *See id.* ¶ 5 n.2.

[119] *Id.* ¶ 5.

[120] At the time, Schreuer urged that this practice be adopted in less "politically charged" cases because it would "[s]trengthen[] the hand" of the presiding arbitrator and "increase the readiness of party-appointed arbitrators to reach compromise." Schreuer, *supra* n. 115, at 74.

> no award. Or suppose that there was a majority but a lack of genuine will because an arbitrator forming part of the majority was coerced or insane. Such a majority could not produce a valid award. One can imagine such cases but their occurrence will surely be rare.[121]

In the U.S. domestic sphere, a recent possible example of a "non-decision" is the *Norfolk Southern* case.[122] In that situation, there was a private contract that provided for the lease of property, with a provision for renewal and an "appraisal" mechanism to fix the amounts due in the event for the renewal period. Under these arrangements, each party was to appoint an "appraiser," who would then appoint a third appraiser.[123] In late 2014, the third appraiser emailed the parties a document titled "Majority Decision for Settlement Purposes Subject to Extraordinary Appraisal Assumptions."[124] The majority decision stated that the third appraiser and one of the party-appointed appraisers had "assented to" the decision, but that the third arbitrator:

> reserve[d] his assent without prejudice or time limitation subject to the following extraordinary appraisal assumptions: 1) Norfolk Southern in fact has marketable title of the occupancy corridor; and 2) [Norfolk Southern's appraiser's] ATF value is reasonable, which it appears to be . . . [I]f either of these extraordinary assumptions are found to not be true, [the third appraiser] . . . reserves the right to withdraw his assent.[125]

In subsequent litigation, the award was challenged under the U.S. Federal Arbitration Act, Section 10(a)(4), which allows for vacatur where the arbitrators have "imperfectly executed [their power] that a mutual, final, and definite award upon the subject matter submitted was not made."[126] Although an Eastern Virginia federal court rejected this argument,[127] this decision was reversed (and the vacatur petition upheld) on appeal to the United States Court of Appeals for the Fourth Circuit. To quote the Fourth Circuit's opinion:

> An award is not "final" under the FAA if it fails to resolve an issue presented by the parties to the arbitrators.
>
> We have such a case here. [The third appraiser] "reserve[d] his assent" to the award "subject to" two "extraordinary appraisal assumptions" — that Norfolk Southern had marketable title and that the ATF value used by Norfolk Southern's appraiser was reasonable . . . . [The third appraiser] made clear that he might withdraw his assent – thus dissolving the compromise and the arbitration award itself – at some point in the future. [He] did not merely base his assent on certain assumptions, but rather *reserved*

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[121] Schwebel, *supra* n. 40, at 152-53.
[122] *Norfolk S. Ry. v. Sprint Commc'ns Co.*, 883 F.3d 417, 2018 WL 1004805 (4th Cir. 2018) ("*Norfolk S. (4th Cir.)*").
[123] *Id.* at 420.
[124] *Id.* at 421.
[125] *Id.* at 421-22 (first, second and sixth alterations in original).
[126] 9 U.S.C. § 10(a)(4).
[127] *Norfolk S. Ry. v. Sprint Commc'ns Co.*, No. 2:15 cv 16 (E.D. Va. Aug. 25, 2016), *rev'd*, 883 F.3d 417 (4th Cir. 2018).

> *the right to withdraw* his assent if his assumptions proved to be incorrect. This outcome cannot be squared with any conception of "finality."[128]

This case arguably falls within the "rare" exception identified by Schwebel of there being a total non-decision; a failure among the three panelists to reach true and final consensus.

Consider also a case where three arbitrators issue three different opinions stating what the damages are, with no actual *dispositif* indicating a final agreed amount. In that situation, there might be scope for arguing that no actual decision has been made. The best "insurance" against that result is that, as seen in the various Iran-U.S. Claims Tribunal cases, a diligent and rational arbitrator has no interest in seeing the case fail for want of a majority. There is thus always a strong centripetal force that drives at least two arbitrators towards consensus on what the number should be. It is the "mathematics of the majority."

* * *

The conventional wisdom (as reflected in *Yakimetz* and *Alapli*) is that each arbitrator has the right to issue a separate opinion, whether as a concurrence or as a dissent. Both cases (as well as *Guinea-Bissau*) strongly affirm this right, despite the uncertainties it engendered in those instances.

No-one seriously disputes that an arbitrator should and must decide a dispute according to his/her conscious and impartial assessment of the case merits, having regard to the interests of justice. And yet, compromise is inevitable. Judge Schwebel explains:

> [S]o much of the judicial and arbitral process is characterized by judges and arbitrators voting to form a majority rather than voting to express what each of them may see as the optimum judgment. In a collective body, there is very frequently a process of accommodation of differing views, sometimes sharply differing views. The result may be the consecration of the least common denominator. That may not be a noble result, but it is a practical result. It is better than no result. . . . So much of the process of writing a judgment is a process of eliminating points and passages on which majority agreement cannot be reached.
>
> In short, the judicial and arbitral process is an exemplar of the wise dictum that the best must not be permitted to be the enemy of the good.[129]

For every arbitrator, however, there is a balancing. Is it wiser to exercise restraint, rather than to unburden oneself of every last thought one might hold about the dispute? If one is able to hold one's tongue (or pen) without compromising the integrity of the decision-making process, then restraint may indeed be a virtue. If not – where silence would be untenable – then dissent, or even a pointed concurrence, may be the preferable course.

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[128] *Norfolk S.(4th Cir.)*, 883 F.3d at 423 (second alteration in original) (citations omitted).
[129] Schwebel, *supra* n. 40, at 153.