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Interstate Dispute Resolution at a Crossroads: Reconsidering the I'm Alone Arbitration

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I. INTRODUCTION

Before sunrise on March 20, 1929, Captain Jack Randell and his crew anchored their ship, the *I'm Alone*, in the Gulf of Mexico, approximately 10 miles from the Louisiana coast. The *I'm Alone*'s cargo included large quantities of liquor for smuggling into Cajun country during the height of Prohibition. At 6:00 a.m., the *I'm Alone* was spotted by the U.S. Coast Guard cutter *Wolcott*, which ordered the *I'm Alone* to "heave to" for boarding and examination. Captain Randell and his crew ignored the demand, and the chase was on. Two days later, the *I'm Alone* was sunk in the middle of the Gulf of Mexico, one of its crew was dead, and the events had set in motion an arbitration between the United States and Canada decided by two of the leading jurists of the time, U.S. Supreme Court Justice Willis Van Devanter and Canadian Supreme Court Justice Lyman P. Duff.

The substantive decisions of the *I'm Alone* case are well analyzed in scholarship. In particular, authors have focused on the import of the case for the development of the rule of "hot pursuit" – the chasing of a ship from territorial waters into non-territorial waters, now addressed in Article 111 of the UN Convention on the Law of the Sea.[1] However, the unique dispute resolution proceedings utilized for this case have gone unexplored.[2] While the 20th and early 21st centuries have seen states rely on increasingly legalistic forms of dispute resolution, they earlier (including into the early 20th century) employed a more flexible form of dispute resolution that often resembled a structured form of diplomacy. The *I'm Alone* case sits at the crossroads of this history, and involved a hybrid process incorporating elements of the previous diplomatic mode of arbitration, resulting in a decision *ex aequo et bono*, with elements of the more legal process that would soon become dominant.

The *I'm Alone*'s procedural aspects, largely neglected in academic literature, can inform the choices of those who design dispute resolution bodies and draft dispute settlement clauses and treaties. As states sit at another

1. *See, e.g.,* Robert C. Reuland, *The Customary Right of Hot Pursuit on the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 VA. J. INT. L. 557, 573, 585 (1992); Nicholas M. Poulantzas, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 63 (2d ed. 2002); Ivan Shearer, *The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards at Peacetime*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 440 (Michael C. Schmitt & Leslie C. Green eds., 1998).

2. Coincidentally, the *I'm Alone* procedure was addressed in *ZF Automotive US Inc. v. Luxshare Ltd.,* 142 S. Ct. 2078 (2022), decided by the U.S. Supreme Court on June 13, 2022 as this article was being finalized. The discussion of *I'm Alone* by the Supreme Court, however, was brief and contains none of the below analysis.

crossroads and reconsider means of dispute resolution, both interstate and investor-state, older mechanisms for dispute resolution deserve another look.

This article proceeds as follows. Part 1addresses the two treaties between the United States and United Kingdom to combat liquor smuggling by sea into the United States. Part 2 details the facts of the sinking of the *I'm Alone*. Part 3 then walks through the arbitral process, including the Commissioners' decisions on the merits and damages. Part 4 examines the unique aspects of these proceedings in more detail, including the historical setting of the case in the development of interstate dispute resolution, the exceptional identities of the two Commissioners, the decision *ex aequo et bono*, and the monetary award for moral damages, or pecuniary satisfaction, considering whether these unique aspects of the *I'm Alone* proceeding might be useful for today's interstate disputes. Part 5 provides a brief conclusion.

II. THE TREATY

The *I'm Alone* was not alone in smuggling liquor into the United States during Prohibition, which lasted from 1920 to 1933. Liquor smuggling by sea into the United States was, in fact, such a pervasive problem during the first few years of Prohibition that in 1924 the United States negotiated a series of treaties with other countries to address the issue. These treaties included two with the United Kingdom, for which Canada was a dominion with independent governing authority.[3] In the first of these treaties, dated January 23, 1924, the United Kingdom agreed that the United States could board, search, and if necessary, seize British-flagged ships, including those registered in Canada, suspected of smuggling liquor into the United States.[4] Explicitly stating that U.S. territorial waters extended only three miles from the coast, the parties expanded the scope of the U.S. territorial activities.[5] They agreed that "[t]he rights conferred by this article shall not be exercised

3. Canada would not fully govern its own foreign affairs until 1926, and was recognized by the United States as independent from the United Kingdom in 1927. *See* James Brown Scott, *The British Commonwealth of Nations*, 21 AM. J. INT'L L. 95, 100 (1927); *see also* U.S. Dep't of State, Office of the Historian, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Canada*, https://history.state.gov/countries/Canada (last visited Oct. 14, 2022).

4. Convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, 43 Stat. 1761 (1924) ("Convention").

5. Eighteenth century governments and legal scholars disagreed whether territorial waters included four leagues (twelve miles), or one league (three miles). *See* Keener C. Frazer, *The I'm Alone Case and the Doctrine of Hot Pursuit*, 7 N.C. L. REV. 413, 418-419 (1929). The view has since converged on the territorial sea comprising twelves miles from the territorial baseline, as reflected in the United Nations Convention on the Law of the Sea Art. 3, Dec. 10, 1982, 1833 *U.N.T.S.* 397.

at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."[6] In other words, the treaty permitted the United States to board, search, and seize British vessels up to one-hour's sail from shore which, depending on the speed of the ship, could be considerably more than three miles.

While the 1924 treaty permitted the United States to search or seize smuggling vessels, it did not expressly permit the United States to sink those vessels. But that is arguably what U.S. law permitted at the time. The Volstead Act of 1920, which gave legislative effect to the 18th amendment to the U.S. Constitution (the Prohibition amendment), authorized the Coast Guard to pursue liquor smuggling vessels.[7] U.S. regulations giving teeth to the Volstead Act authorized the U.S. Coast Guard to use force and engage in hot pursuit to compel inspection and examination of ships suspected of liquor smuggling.[8]

Under the treaty, if the owners of a British-flagged vessel believed that the U.S. rights detailed in the treaty had been wrongfully exercised, the claim could "be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties."[9] The relevant clause refers to "any claim *by a British vessel*" of wrongful search or seizure, and that such claim "*shall be referred*" to arbitration.[10] On its face, this clause would appear to be a grant of a private right of action to the British vessel (or, presumably, its owner *in rem*) against the United States. This was not, of course, how it was understood at the time – the *I'm Alone* case was asserted by the Canadian government against the United States under a theory of diplomatic protection – but the wording of the arbitration clause is a precursor to modern bilateral investment treaties with private rights of action.

According to Article IV, the two appointed commissioners were to issue a "recommendation" at the conclusion of proceedings, rather than an award or judgment. The Parties nonetheless agreed that "[e]ffect shall be given to

6. Convention, *supra* note 5, at Arts. I & II(3).

7. The National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305-323.

8. U.S. Department of Treasury, Instructions, Customs, Navigation and Motor Boat Laws and Duties of Boarding Officers (1923) at 1, para. 3 ("Where the law gives him the right to board, search, or seize, he may use any force at his disposal to accomplish this purpose."), para. 5 ("If any foreign vessel be encountered within 3 nautical miles of the coast of the United States or her island possessions and if instead of heaving to or stopping when ordered to do so by an armed vessel of the United States, this foreign vessel attempt to escape, she may be chased and stopped by force, even though she may have proceeded during the chase more than 12 nautical miles from the coast of the United States…").

9. Convention, *supra* note 5, at Art. IV.

10. *Id.*

the recommendations contained" in the commissioners' report.[11] The use of two commissioners, rather than three, gave rise to the possibility that no such recommendation could be provided. The prospect of this negative outcome was addressed in the treaty itself, which called for the claim to be referred to the Claims Commission set up in 1910 between the United States and the United Kingdom, to address any "pecuniary claims" if no recommendation was provided by the two commissioners.[12] The dispute resolution clause did not specify the law applicable to settle claims under the treaty.

III. THE CHASE

The *I'm Alone* was well known to U.S. authorities.[13] Registered in Nova Scotia, Canada, the *I'm Alone* was a "rum runner," a three-sail schooner smuggling booze into the United States from Canada starting in or around 1923.[14] In the subsequent dispute, Canada was forced to concede that the *I'm Alone* "had unquestionably been engaged… under various owners, in endeavouring to smuggle liquor into the United States."[15] The U.S. Coast Guard had tracked the boat's movements from Canada to parts of New England for years, but had failed to apprehend it. Aware of the potential danger of arrest, the bootleggers behind the liquor smuggling ring moved their base of operations to British Honduras (Belize).[16]

The *I'm Alone* set out from British Honduras on March 12, 1929, with its cargo of liquor, evading local customs authorities by claiming that its destination was another British port: Hamilton, Bermuda.[17] The reference to Hamilton as the intended destination is noted in the U.S. pleadings in the *I'm Alone* arbitration with simply-stated sarcasm: "It is further averred that the

11. *Id.*

12. *Id.*

13. *See The International Incident of the "I'm Alone*," THE GOODSON BLOGSON (Mar. 20, 2015), http://dukelawref.blogspot.com/2015/03/the-international-incident-of-im-alone.html.

14. Joseph Anthony Ricci, "*All Necessary Force": The Coast Guard and the Sinking of the Rum Runner "I'm Alone"*, University of New Orleans Theses and Dissertations 14 (2011), https://scholarworks.uno.edu/td/1342.

15. The Canadian Minister (Vincent Massey) to the Secretary of State (Henry L. Stimson), April 9, 1929, ¶ 2. "I'm Alone" Case (Can. V. U.S.), *reprinted in* 3 U.S. DEP'T OF STATE, ARB. SERIES NO. 1 (1933).

16. The Secretary of State (Henry L. Stimson) to the Canadian Minister (Vincent Massey), Mar. 28, 1929, "I'm Alone" Case (Can. V. U.S.), *reprinted in* 3 U.S. DEP'T OF STATE, ARB. SERIES NO. 1 (1933).

17. Answer of the Government of the United States of America to the Claim of His Majesty's Government in Canada in Respect of the Ship I'm Alone, "I'm Alone" Case (Can. V. U.S.), *reprinted in* 3 U.S. DEP'T OF STATE, ARB. SERIES NO. 3 (1933).

place of anchorage referred to in the third paragraph of the claim [off the coast of Louisiana] is not a point on the route from Belize to Hamilton."[18] Captain Randell – a British veteran of the Boer War and World War I – guided his ship from Belize to the Louisiana coast, near Trinity Shoals.[19] He would anchor in waters outside of U.S. territorial limits, and faster, smaller "mosquito boats" from the shore would collect the liquor from the *I'm Alone*.[20]

At 6:00 am on March 20, the crew of the U.S. Coast Guard cutter *Wolcott* spotted the *I'm Alone* anchored off the coast of Louisiana.[21] The captain of the *Wolcott*, Frank Paul, used a megaphone to hail the *I'm Alone* and request boarding. According to reports, Captain Randell presciently replied, "you can shoot and sink me, but be damned if you will board me."[22] *Wolcott* formally hoisted flags to signal a request to board, and the *I'm Alone* signaled back "no," turning for the high seas.[23] The *Wolcott* chased with deck guns visibly trained on the smaller vessel. After two hours of pursuit, the *I'm Alone* stopped, and Captain Paul rowed from the *Wolcott* to the *I'm Alone* to discuss the matter. Captain Randell reportedly offered Captain Paul a drink upon boarding, which was declined.

The two men were unable to reach a resolution. Captain Paul then returned to the *Wolcott*, and the *I'm Alone* took off again. Captain Paul gave chase as the *I'm Alone* headed further south, radioing Coast Guard headquarters that he had insufficient men to seize the *I'm Alone* without assistance. During the chase, the *Wolcott* fired wax rounds and other non-lethal ammunition at the *I'm Alone*, damaging her sails, injuring Captain Randell, and tattering the Union Jack that flew on her mast.[24]

At some point during the chase, the *Wolcott* broke off, only to re-engage with the *I'm Alone* further south. Finally, two days later (March 22, 1929), a second Coast Guard cutter, the *Dexter*, caught up with the *I'm Alone* and the *Wolcott*. After ordering the *I'm Alone* to heave to or be fired upon, and once again being rebuffed, the *Dexter* opened fire on the upper parts of the *I'm*

18. *Id*. at 2.

19. Ricci, *supra* note 11, at 13.

20. *Id.* at 9.

21. The remaining descriptions of the events of March 20-22, 1929, are drawn from Ricci, *supra* note 11, and from the correspondence between the parties that followed the sinking.

22. Ricci, *supra* note 15, at 18.

23. *Id.*

24. *Id.* at 21.

Alone.[25] Having damaged the ship, the crew of the *Dexter* ceased fire and once again ordered the *I'm Alone* to heave to or be fired upon. Once again the crew of the *I'm Alone* demurred. The *Dexter* opened fire again, this time aiming at the hull. At 9:03 am on March 22, the *I'm Alone* was sunk. Its nine crewmen were cast into the choppy waters of the Gulf of Mexico. Eight were rescued by the *Wolcott* and *Dexter* but one crew member, Leon Mainguy, drowned despite the efforts of the two U.S. crews to save him.[26]

The location of the *I'm Alone* when it sank was almost directly in the center of the Gulf of Mexico, far from the territorial waters of any state. The press at the time (both in Canada and the United States) highlighted the potential violations of international law in the pursuit and sinking. The *New Orleans Picayune* proclaimed Captain Randell, the captain of the *I'm Alone*, a "hero."

IV. ARBITRAL PROCEEDINGS AND ARGUMENTS

A. Initiation of Arbitration

The Canadian government demarched the U.S. government in Washington four days later, on March 26. After several exchanges of notes, the two governments were unable to reach a diplomatic resolution.[27] The United States therefore proposed arbitration under Article IV of the January 1924 treaty, which applied due to Canada's recent independence in foreign relations and succession to Britain's treaties. The Canadian government accepted the offer to arbitrate within a week. The *Advocate of Peace Through Justice*, a leading journal of the international peace movement, wrote an editorial supporting the pending arbitration, concluding that "[h]ere again is an illustration of the truth expressed years ago by Elihu Root, that there is no

25. Ironically, after it was decommissioned, the *Dexter* was converted into a party ship on Lake Michigan, providing what is colloquially known as a "booze cruise," before it was scuttled in 2010. *See* Marc Montgomery, *History: March 22, 1929 – prohibition, rum running, high seas diplomatic row*, RADIO CANADA INT'L (Mar. 22, 2016), https://www.rcinet.ca/en/2016/03/22/history-march-221929-prohibition-rum-running-high-seas-diplomatic-row/.

26. Ricci, *supra* note 11, at 22.

27. *See* Diplomatic Correspondence between the Governments of the United States and Canada concerning the Sinking of the "*I'm Alone*," together with an Opinion of Attorney General William D. Mitchell and the Conventions of January 23 and June 6, 1924, for the Prevention of Smuggling of Intoxicating Liquors, "*I'm Alone*" Case. (Washington, Government Printing Office, 1931).

dispute between nations that cannot be settled peaceably if only the parties are so disposed."[28]

In its initial arbitral submission, the Canadian government claimed $386,803.18, for the loss of the *I'm Alone*, its cargo, and remuneration to its crew, including the widow and children of Leon Mainguy.[29] Each side then appointed its Commissioner. The United States appointed Willis Van Devanter, an associate justice on the U.S. Supreme Court. Although he did not author many opinions, Van Devanter was known as a conservative justice on the Supreme Court, ruling against the expansion of government power – a view that later would put him at odds with the administration of Franklin Roosevelt.[30] Canada initially appointed Eugène LaFleur, a renowned Canadian litigator who had served as President of the International Boundary Commission between the United States and Mexico and had been nominated by Canada to serve as a judge on the Permanent Court of International Justice.[31] LaFleur passed away suddenly in 1930 before the case began in earnest, and Canada appointed Lyman P. Duff, a justice on its Supreme Court, to replace him, perhaps as a nod to the U.S. appointment.[32] Duff, a renowned Canadian jurist, was appointed Chief Justice of the Canadian Supreme Court in 1933, while serving on the *I'm Alone* Commission. [33]

In the meantime, the United States, relying on an analysis by esteemed code-breaker Elizebeth Friedman, had uncovered the ownership structure of the *I'm Alone*. Using 23 decoded messages, Friedman and her staff were able to establish that while the ship was technically registered in Canada and owned by a Canadian corporation, that corporation was owned and managed by U.S. citizens.[34] The content of the decoded messages also established that

28. AMERICAN PEACE SOCIETY EDITORIAL, *Arbitration of the "I'm Alone" Case,* 91 ADVOCATE OF PEACE THROUGH JUSTICE 336, 337 (Arthur Deerin Call ed., 1929). Root was a former U.S. Secretary of State and Secretary of War, and co-founder and first President of the American Society of International Law, who was a leading proponent of an international court to resolve interstate disputes.

29. Claim Made by His Majesty's Government in Canada under the Provisions of Article IV of the Convention Concluded January 23, 1924 between the United States and Great Britain, "I'm Alone" Case. (Washington, Government Printing Office, 1931). The claim would be worth approximately $6.4 million at the time of this writing.

30. *See Willis Van Devanter*, LAW LIB.-AM. LAW AND LEG. INFO, https://law.jrank.org/pages/11064/Van-Devanter-Willis.html. (last visited Oct. 13, 2022).

31. AMERICAN PEACE SOCIETY EDITORIAL, *supra* note 21.

32. *See* David Ricardo Williams, *Eugene Lafleur,* DICTIONARY OF CANADIAN BIOGRAPHY, http://www.biographi.ca/en/bio/lafleur_eugene_15E.html (last visited Oct. 13, 2022).

33. Gerald Le Dain, *Sir Lyman Duff and the Constitution*, 12(2) OSGOODE HALL L. J. 261 (1974).

34. Carrie Hagen, *The Coast Guard's Most Potent Weapon During Prohibition? Codebreaker Elizebeth Friedman*, SMITHSONIAN MAG., Jan. 28, 2015.

the U.S. beneficial owners of the *I'm Alone* were engaged in the conspiracy to smuggle liquor into Louisiana.[35] In other words, this was a U.S. liquor smuggling operation using the cover provided by Canadian incorporation and British flagging. This decoded information was provided for the first time with the U.S. answer.

The two Commissioners reviewed the claim submitted by the Canadian government and the answer submitted by the U.S. government. The Commissioners thereafter submitted three sets of questions to the parties:

- "The first question is whether the Commissioners may enquire into the beneficial or ultimate ownership of the *I'm Alone* or of the shares of the corporation that owned the ship. If the Commissioners are authorized to make this enquiry, a further question arises as to the effect of indirect ownership and control by citizens of the United States upon the Claim; viz., whether it would be an answer to the Claim under the Convention, or whether it would go to mitigation of damages, or whether it would merely be a circumstance that should actuate the claimant Government in refraining from pressing the claim, in whole or in part."

- "The second question relates to the right of hot pursuit. Further, it has two aspects, and it is based upon the assumption that the averments in the Answer with regard to the location and speed of the *I'm Alone* are true. The question in its first aspect is whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the pursuit and beyond that distance at its termination. The question in its second aspect is whether the Government of the United States has the right of hot pursuit of a vessel when the pursuit commenced within the distance of twelve miles established by the revenue laws of the United States and was terminated on the high seas beyond that distance."

https://www.smithsonianmag.com/history/coast-guards-most-potent-weapon-during-prohibition-codebreaker-elizebeth-friedman-180954066/.

35. *Id.* As a result of this work, the Coast Guard established a formal cryptoanalytic unit in 1930, headed by Ms. Friedman. Friedman's work led to the indictment of over 100 individuals who were part of a vast liquor-smuggling conspiracy.

- "The third question is based upon the assumption that the United States Government had the right of hot pursuit in the circumstances and was entitled to exercise the rights under Article II of the Convention at the time when the *Dexter* joined the *Wolcott* in the pursuit of the *I'm Alone.* It is also based upon the assumption that the averments set forth in paragraph eight of the Answer are true. The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone.*"[36]

The Parties thereafter each submitted one concise brief answering these three sets of questions, followed by a hearing. The Commissioners provided an interim report in which they found for Canada on the third question, as discussed below. A second hearing without further briefing was held solely on the issue of damages, followed by a final joint report.

B. Binding Arbitration vs. "Recommendations"

Before turning to the first question posed, the United States led its brief with a preliminary argument regarding the ultimate work product to be produced by the Commissioners. Relying on the language of Article IV of the treaty referring to "recommendations," the United States argued that this was not an arbitration at all.[37] Rather, the United States explained,

> … the Commissioners have a jurisdiction wider and more elastic than that of a court or even a board of arbitrators: that they are in fact constituted by article 4 of the convention the authoritative advisers of the two Governments, with the duty of recommending a course which, under all circumstances, they deem it wise for the two Governments to pursue.[38]

36. S.S. "I'm Alone" (Canada v. United States), Joint Interim Report of the Commissioners dated the 30th June, 1933, 3 R.I.A.A. 1609, 1613-1615 (1935) [hereinafter "Joint Interim Report"].

37. Contrast the language in this treaty to the Hay-Herbert Treaty between the same two countries, signed in 1903, which set up a tribunal to determine a portion of the border between Alaska and Canada. That treaty called for a "tribunal" to "consider judicially" the questions submitted by the parties, after which the tribunal was to submit a "decision" which was "final and binding."

38. Answering Brief of the Government of the United States of America to the Claim of His Majesty's Government in Canada in Respect of the Ship "I'm Alone" under the Provisions

Conceding that both the U.S. Secretary of State and the Canadian Foreign Minister referred to the Article IV process as "arbitration" in their correspondence following the sinking of the *I'm Alone*, the United States argued that Article IV actually provides a "midway" solution.[39] Article IV, the United States argued, provided a two-tier solution: if the Commissioners could agree that the claim lacked merit, the claiming government had a graceful means for withdrawing the claim before it was submitted to arbitration. If the Commissioners could not agree on a result, the parties could proceed to arbitration before the Claims Commission.[40] The recommendatory framework, the United States submitted, was similar to the "commissions of inquiry" envisioned in the 1899 and 1907 Hague Peace Agreements.[41] "Unquestionably," the United States wrote in its brief, "there is room in the sphere of international controversy for the intervention of advisers of this sort."[42] Regardless, the United States argued, to proceed under Article IV as if the Commissioners were hearing an arbitration could result in what was essentially a full arbitration followed by a second full arbitration, which would be inefficient.[43] The Canadian memorandum only briefly addressed this issue, offering this aside:

> It is true that the Commissioners, if they agree, are to make 'recommendations' in a joint report and it may be suggested that recommendations differ from decisions. The Canadian Government is not concerned at the moment to discuss to what extent this may be true as to matters arising in connection with the claim itself. It must be remembered that the Convention expressly provides that effect is to be given to the recommendations made but this provision would cover only such recommendations as relate to matters strictly within the jurisdiction of the Commissioners, that is to say, the validity of the claim

of Article 4 of the Convention Concluded January 23, 1924, between His Majesty and the United States, at 1, "I'm Alone" Case. (Washington, Government Printing Office, 1931) [hereinafter "U.S. brief"].

39. U.S. brief, *supra* note 31, at 3.

40. The United States did not address a third possibility, that the Commissioners would be united in finding for the claimant.

41. *Id.* at 4. Notably, while the practice of commissions of inquiry to assist in the resolution of disputes had existed during the 19th century, it got a spark from the sinking of another ship: the *U.S.S. Maine*, the destruction of which in the Havana harbor led to the Spanish-American war of 1898. *See, e.g.*, DANIEL GORMAN, INTERNATIONAL COOPERATION IN THE EARLY TWENTIETH CENTURY 91, at (2017).

42. U.S. brief, *supra* note 31, at 4.

43. *Id.* at 3-4.

> having regard to the defences raised. A recommendation that the claim should not be pressed would be entirely outside the scope of the reference.[44]

The Commissioners' interim and final reports do not explicitly address this issue.

C. Beneficial Ownership

Regarding the first questions posed by the Commissioners, the Canadian argument was lengthy but straightforward. British law governed the ship's nationality and did not permit looking behind the ship's flag.[45] The treaty at issue certainly did not contemplate looking to the nationality of the owners of the vessel, as opposed to the registration of the vessel. The Canadian brief noted that when the treaty was drafted, it was already known that U.S. citizens were smuggling liquor into the United States and that "citizens of the United States might be interested to some extent in the operation of the vessels carrying alcoholic beverages," and yet no provision was made in the treaty for such cases.[46] "An affirmative answer to the first question," Canada concluded, "involves the proposition that the authorities of the United States would be at liberty to exercise the treaty rights in an improper or unreasonable manner provided the ultimate or beneficial interest was wholly vested in citizens of the United States, notwithstanding the vessel properly bore the British flag."[47]

The United States, for its part, conceded the legal contentions made by the Canadian government, but in keeping with its argument regarding the "recommendatory" nature of the Commissioners' work, urged that Commission recommend that Canada drop its case. The United States wrote that "after full consideration," the Commissioners should "feel disposed to recommend that His Majesty's Government should do in the instant case what a court might not do: i.e., disregard the corporate form and take cognizance of the fact… that the *I'm Alone* was actually operated under the direction and control of citizens of the United States for the purpose of transporting liquor

44. Brief Submitted on Behalf of His Majesty's Government in Canada in Respect of the Claim of the British Ship "I'm Alone" under the Provisions of Article IV of the Convention Concluded the 23rd January, 1924, Between His Majesty and the United States of America, at 10, "I'm Alone" Case. (Washington, Government Printing Office, 1931) [hereinafter "Canadian brief"].

45. *Id.* at 11-12.

46. *Id.* at 11.

47. *Id.* at 12.

into the United States in violation of the municipal law of the United States."[48] The United States pointed to a very similar case involving the liquor-smuggling ship *Tomoko*, which, while British flagged, was beneficially-owned by U.S. citizens. The Canadian government was prepared to make a claim with respect to the *Tamoko*, which had been seized. However, the American ownership was discovered prior to the claim being submitted, so the Canadian government refrained from bringing the claim.

With respect to this first question, the Commissioners failed to reach a definitive conclusion in their initial report, writing:

> The Commissioners think they may enquire into the beneficial or ultimate ownership of the *I'm Alone* and of the shares of the corporation owning the ship; as well as into the management and control of the ship during the venture in which it was engaged; and that this may be done as a basis for considering the recommendations which they shall make. But the Commissioners reserve for further consideration the extent to which, if at all, the facts of such ownership, management and control may affect particular branches or phases of the claim presented.[49]

The Commissioners returned to this issue in their final report, discussed below.

D. Hot Pursuit

With respect to hot pursuit, the Canadian government argued that since the pursuit began outside territorial waters as recognized by the 1924 treaty (beyond 3 miles), "[t]he pursuit from beginning to end was, therefore, on the High Seas which are open to all nations and subject to no territorial jurisdiction."[50] Canada pointed to a similar treaty negotiated among the Baltic States in 1925, which expressly included a right to hot pursuit of ships suspected of smuggling contraband if the pursuit began within 12 miles of shore; no such right was granted in the 1924 treaty.[51]

48. U.S. brief, *supra* note 31, at 7-8.
49. Joint Interim Report, *supra* note 29, at 1614.
50. Canadian brief, *supra* note 36, at 13.
51. *Id.* at 15.

Although U.S. law arguably provided the right not only to pursue but to sink the *I'm Alone,* the United States focused its brief argument entirely on the treaty and customary international law. The U.S. Supreme Court had already decided that the treaty had superseded relevant U.S. law in a case involving the interdiction of a different vessel, the *Mazel Tov*.[52] The United States argued that the rights provided by the treaty and customary international law are of little value without the right to pursue, because in every case the ship would flee: "it may be inquired in what sense 'rights' can be said to have been conferred upon the United States if their exercise is dependent, as a practical matter, upon the consent of the master of the suspected vessel."[53] Under Canada's view, the United States pointed out, "the convention intends to attach no legal significance to the signal to stop" which would precede search and seizure.[54]

In the interim report, the Commissioners indicated that they could not reach agreement "on the proper answer" to the second set of questions, "nor have they reached a final disagreement on the matter."[55] The Commissioners therefore proposed that the proceeding go forward so that they could give "further consideration to the matter and… announce their agreement or disagreement thereon as the case may be."[56] Ultimately, in light of their decision on the third question, the Commissioners concluded that this question was no longer material and declined to answer it.[57]

E. The Sinking of the *I'm Alone*

The third question was whether, assuming the United States had a right to pursue the *I'm Alone* into international waters, it could legally sink the ship for failure to comply with the Coast Guard's orders. The United States argued that if it had a right to stop a ship for search and seizure, which included the right to pursue and take reasonable measures such as the firing of warning shots, then it must also include the right to follow through on those warnings if the ship failed to heed them.[58] The United States further argued

52. Cook v. United States (The Mazel Tov), 288 U.S. 102, 122 (1933). Justice van Devanter recused himself from the Mazel Tov case, presumably due to a perceived conflict with his work on the I'm Alone case.

53. U.S. brief, *supra* note 31, at 15.

54. *Id.*

55. Joint Interim Report, *supra* note 29, at 1614.

56. *Id.*

57. *See* G.G. Fitzmaurice, *The Case of the I'm Alone*, 17 BRIT. Y.B. INT'L L. 82, 88 n.1 (1936).

58. U.S. brief, *supra* note 39, at 23-24.

that the purpose of the treaty was to prevent illegal activity – the smuggling of liquor into the United States. When the crew of the *I'm Alone* failed to heave to, only the ship's sinking could achieve this purpose.[59] The United States pointed to a similar incident involving the ship *Siloam*. In that case, it was Canadian forces that attacked and severely damaged a U.S.-flagged ship caught illegally fishing in Canadian waters. In light of the clearly illegal activity being carried out by the *Siloam*, the United States chose not to pursue a claim against Canada, even though "at least as much aggressive action [was taken] by the Canadian officials as was taken by the officers of the Coast Guard in the instant case."[60] The United States argued that its decision regarding the *Siloam* is "in harmony" with its arguments regarding its right to sink the *I'm Alone*.[61]

Canada's argument on this point was simple. The United States had no express right under the treaty to sink a British-flagged ship suspected of smuggling liquor, in territorial waters or international waters, and customary international law did not recognize such a right.[62]

The Commissioners found against the United States on the third question:

> … the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that… the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.[63]

F. Damages

Having found no legal justification for the sinking of the *I'm Alone*, the Commissioners set to determine compensation for the breach. The Commissioners held one more hearing without the submission of additional written briefs, and then rendered a second decision.

59. *Id.* at 24.
60. *Id.*
61. *Id.*
62. Canadian brief, *supra* note 36, at 18-19.
63. Joint Interim Report, *supra* note 29, at 1615.

It is here that the Commissioners found the beneficial ownership of the *I'm Alone* to be relevant. The Commissioners found that since "the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States," no compensation ought to be paid for loss of the ship or the cargo.[64] Charles Cheney Hyde, writing in the American Journal of International Law a few months after the decision was rendered, asserted that this part of the decision "has much significance":

It bears testimony to the reasonableness of the requirement that a respondent State should not, through the agency of an arbitral or other agency or commission, be subjected to the burden of paying damages necessarily accruing to the direct benefit of its own nationals.[65]

The decision in this regard is a predecessor to better known cases on corporate nationality, including *Barcelona Traction, Nottebohm*, and various decisions of the Iran-U.S. Claims Tribunal.[66]

The Commissioners continued, however, that the sinking of the *I'm Alone* was "an unlawful act," which required an apology from the United States to Canada and the payment of $25,000. The Commissioners further recommended that the United States pay an additional $25,000 in compensation to the *I'm Alone* crew, including the heirs of Leon Mainguy.[67] A mere two weeks after the decision, the United States sent a diplomatic note to the government of Canada acknowledging that it had paid the recommended amounts, and – again noting the *I'm Alone*'s illegal smuggling operation – apologized for its sinking.[68]

64. S.S. "I'm Alone" (Can./U.S.), Joint Final Report of the Commissioners dated January 5, 1935, 3 R.I.A.A. 1609, 1617-18 (Jan. 30) [hereinafter Joint Final Report].

65. Charles Cheney Hyde, Editorial Comment, *The Adjustment of the I'm Alone Case*, 29(2) AM. J. INT'L L. 296, 298 (1935).

66. *See, e.g.*, JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW 680 n.95 (9th ed. 2019) (citing *I'm Alone* among these other cases regarding corporate nationality).

67. Joint Final Report, *supra* note 55, at 1618.

68. Note from Cordell Hull, Sec'y State U.S., to William Duncan Herridge, Minister Dominion Canada (Jan. 19, 1935).

V. REFLECTIONS ON THE *I'M ALONE* PROCEDURE

The design of interstate dispute resolution bodies is very much a function of international relations.[69] The duration of the dispute resolution body (permanent or ad hoc), the identity of the adjudicators, whether to employ a claims commission model for individual claims, the format of the decision (including whether it is final and binding), *et cetera*, are all decisions made by states not necessarily to advance justice, but to advance their political and diplomatic needs. In many cases, two disputing states are looking for a politically palatable way to resolve a dispute that will permit their relations to continue undisturbed. In other cases, one state is looking for a statement of illegality by a body of legal authority in order to advance its diplomatic goals in other fora.

Historically, interstate dispute resolution has taken a wide variety of forms to accommodate varying international relations scenarios. Current interstate dispute resolution has a more consistent character, tending to be highly legalistic and hotly contested, akin to courtroom proceedings.[70] The present international dispute system is centered around a series of permanent courts and tribunals, including the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea, the World Trade Organization Dispute Settlement Body, and various regional courts. It also includes ad hoc arbitrations like those managed by the Permanent Court of Arbitration (PCA), which are also quite formal in procedure and differ little from the proceedings in the permanent courts and tribunals.

While losing states largely adhere to the decisions of international courts and tribunals, there are many examples of states refusing to comply. Indeed, lack of compliance has been a concern since the ICJ's very first judgment in *Corfu Channel*, when Albania refused to pay the damages awarded to the United Kingdom. More recently, Kenyan officials in 2021 indicated that they would not recognize the ICJ's judgment in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*.[71] Enforcement issues are not limited to permanent courts, and extend to ad hoc arbitration as well. For example, China has firmly disavowed the arbitral award in the *South China Sea* dispute

69. *See, e.g.* Mark Pollack, *International Relations Theory and International Courts and Tribunals*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (2020).

70. By "interstate" dispute resolution, I am referring to disputes between two or more states, not involving private parties.

71. *See, e.g.,* Clive Schofield, Pieter Bekker & Roberg van de Poll*, The World Court Fixes the Somalia-Kenya Maritime Boundary,* 25 AM. SOC'Y INT'L L. INSIGHTS, Dec. 2021 at 1, 5.

(following a procedure administered by the PCA).[72] In any event, this mode of dispute resolution in theory tends to serve the ends of the multilateral system, or the state seeking a determination of illegality for other diplomatic purposes. However, it may be less suited (or at least less flexible) to resolve disputes between two states who genuinely want a resolution in order to maintain good relations.

That the United States' complied so quickly with the award in the *I'm Alone* case – complete with an apology for actions that it viewed as legally and morally justified – may be due to the nature of the relationship between the two states in the 1930s. It may also be due to the prevailing sense that compliance with arbitral awards was a moral or legal imperative. For example, in paying the *Norwegian Shipowners* award rendered by the PCA in 1922, the United States wrote,

> By this action the Government of the United States gives tangible proof of its desire to respect arbitral awards and it again acknowledges devotion to the principle of arbitral settlements even in the face of a decision proclaiming certain theories of law which it cannot accept. Faithful to its traditional policy, my Government is most desirous to promote the judicial determination of international disputes of a justiciable character and in this interest to give its due support to judicial determinations. . . . [Nevertheless,] my Government finds itself compelled to say that it cannot accept certain apparent bases of the award as being declaratory of that law or as hereafter binding upon this Government as a precedent…[73]

Acknowledging these possible explanations for the prompt U.S. response to the decision, the parties' cooperation and the positive U.S. response to the award also warrants an examination of the procedure to see if any lessons might be drawn from it for similar disputes in the future. The *I'm Alone* procedure included several features that distinguished it from the more legalistic Permanent Court of International Justice (PCIJ) and PCA processes that were gaining traction at the time (see Section 4.1, below). First, the initial arbitration consisted of two Commissioners, one appointed by each state, without a neutral third (see Section 4.2, below), which required the

72. *See, e.g.,* Hannah Beech, *China Slams the South China Sea Decision as a 'Political Farce'*, TIME (July 13, 2016).

73. *Norwegian Shipowners' Claims (Nor. v. U.S.), Hague Ct. Rep. (Scott) 1 (Perm. Ct. Arb. 1922)*

Commissioners to engage in negotiation with each other. That both states appointed justices from their Supreme Courts in the *I'm Alone* case is also highly significant. Second, the process contemplated two tiers, with a binding "recommendation" from the two Commissioners if one could be reached, followed by a more formalized legal process run by a standing claims commission if a recommendation could not be reached. At the recommendatory phase, the Commissioners were not bound to apply the law but could also rule *ex aequo et bono*, which they appear to have done (see Section 4.3, below). Third and relatedly, the procedure provided for great flexibility, which included the exercise of judicial efficiency by the Commissioners that permitted the Commissioners to avoid some of the more contentious legal issues (see Section 4.4, below). Fourth, the Commissioners in the *I'm Alone* case ordered the United States to provide an apology and pay pecuniary satisfaction – perhaps the only instance of a tribunal ordering a state to pay money to another state for moral damage (see Section 4.5, below).

A. The *I'm Alone* Procedure in Historical Context

The *I'm Alone* case, and its unique procedure, came at an interesting crossroads in the history of interstate disputes. Hundreds of ad hoc interstate arbitrations preceded the *I'm Alone* case. Many were little more than extensions of diplomacy: each side appointed an equal number of commissioners, often well-respected lawyers or retired diplomats, to examine the claim and work out a negotiated resolution that would be binding on the parties. As an alternative, a single neutral arbitrator, typically a foreign sovereign, was appointed to resolve the dispute. Disputes were resolved in this manner primarily to provide political cover for the statesmen involved. Where a diplomatic resolution could not be reached without one side or the other suffering domestic blowback, but where a solution had to be reached to preserve international relations, international arbitration provided a means for taking the resolution out of the domestic leaders' hands. The key to this model of dispute resolution was the reputation of the arbiter. If the states placed the matter in the hands of a well-respected decision-maker or commission, the results would be accepted by the two sides and the larger public. It was comparatively less important whether the arbitrators strictly applied international law or resorted to equitable principles.

An example of this process, again involving the United States and Canada, was the dispute over San Juan Island. Due to an ambiguity in the Oregon Treaty of 1846, which set the western part of the boundary between the United States and Canada, both sides claimed ownership of the island group in the channel between what is now the State of Washington and Vancouver

Island. This dispute, which resulted in the landing of both sides' armies on tiny San Juan Island, could not be diplomatically resolved without offending, on the U.S. side, the settlers of the Oregon Territory and their sense of manifest destiny, and on the Canadian side, the politically powerful Hudson Bay Company. After a bloodless armed standoff of over a decade, the United States and United Kingdom resorted to ad hoc arbitration, handing the matter to Kaiser Wilhelm I, the emperor of Germany. In 1871, in a one-page decision with no legal reasoning, Wilhelm awarded the San Juan Islands to the United States. The British army withdrew shortly thereafter.[74]

Around the turn of the 20th century, a push for a standing, legalistic, and impartial mode of dispute resolution – for an international court – took hold. In the United States and more broadly, this movement was led by lawyer Elihu Root. Root served as Secretary of State and Secretary of War between 1899 and 1909 in the McKinley and Roosevelt administrations. He did not have a problem *per se* with the existing system of ad hoc arbitration as a means of resolving preexisting disputes. Root believed, however, that a better-developed international law, with clearly defined obligations and consequences, could circumvent the possibility of disputes in the first place.[75] He did not trust states to develop international law through treaties; what he envisioned was an international court modeled on common law, with the power to develop international law, and a league of nations whose primary purpose was to impose sanctions on states that did not comply with court rulings.[76] Ad hoc arbitration was insufficient to develop international law, Root reasoned, because the power of states to appoint arbitrators for individual cases (as opposed to electing judges for a standing court) cast doubt on their impartiality.[77]

Root's vision of an international court was only partially fulfilled. It ran into the headwind of Democratic President Woodrow Wilson who, rejecting the views of his Republican predecessors, did not believe that international law held the key to world peace.[78] Instead, Wilson envisioned a political

74. Alfred Tunim, The Dispute Over the San Juan Island Water Boundrary (1931)(M.A. thesis, University of Montana)(on file with ScholarWorks at the University of Minnesota)

75. *See, e.g.,* Mary Ellen O'Connell, *Elihu Root and Crisis Prevention*, 95 PROC. OF THE AM. SOC'Y INT'L L. 115 (2001).

76. *See, e.g.,* Stephen Wertheim, *The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914-1920*, 35 DIPLOMATIC HIST. 797 (2011).

77. Elihu Root, *The Permanent Court of International Justice*, 17 PROC. OF THE AM. SOC'Y OF INT'L L.1 (1923) (writing that arbitration "was not a very good way for getting legal rights decided, because as a general rule arbitrators, selected by one side or the other in a particular controversy, tend to represent that side of the controversy with the result that there is negotiation and compromise rather than judicial decision.").

78. *See* O'Connell, *supra* note 66.

body comprised of states to maintain world peace diplomatically. The League of Nations arising from Wilson's work eventually included an international court, the Permanent Court of International Justice (PCIJ), which heard its first case in 1923.[79] The PCIJ partially embodied Root's dream of an international court, as it was comprised of standing, independent judges. However, the PCIJ was not charged with developing international law in the common law manner. Due to disagreement between Republicans and Democrats, the United States joined neither the League of Nations nor the PCIJ.[80]

There were also more formalized arbitration mechanisms by the 1920s that the United States and Canada could have utilized in their treaties regarding liquor smuggling. The PCA had been operating for three decades, having been established at the Hague Peace Conference of 1899. The PCA was established specifically to hear interstate disputes, and while each arbitration would be heard by an ad hoc tribunal chosen by the parties (or appointed by an appointing authority), the PCA featured an organized administration that relieved states from having to agree to a new set of rules and arrange for the administration of each case. The PCA rules were more similar to courtroom proceedings than ad hoc arbitration. The very first PCA arbitration was filed by the United States (the *Pious Funds* case), the United Kingdom was involved in the second case (the *Japanese House Tax* case), and the third case – the infamous *Preferential Treatment of Claims of Blockading Powers* case – involved both the United States and the United Kingdom.[81] The United Kingdom and United States engaged in one PCA arbitration against each other – the *North Atlantic Coast Fisheries* case – in 1909.[82]

In short, formalized legalistic arbitration was available to the United States and Canada. In fact, the U.S.-U.K. treaties to prevent liquor smuggling during prohibition were part of a larger U.S. program that involved treaties with several other countries, and PCA arbitration was referenced in all of the

79. *S.S. Wimbledon (UK, France, Italy and Japan v. Germany), Judgment*, 1923 I.C.J. (Aug. 17, 1923), https://www.icj-cij.org/en/pcij-series-a. This was technically the world's second international court; the first was the Central American Court of Justice, established in 1907 as the first experiment with Root's view of a world judiciary.

80. It is worth noting here that the 1924 treaty, with its referral of disputes to a two-person commission or a Claims Commission, entered into force after the PCIJ had been up and running for two years. The United Kingdom was party to two cases before negotiating the relevant treaty with the United States: as claimant in the *S.S. "Wimbledon"* case, and as respondent the *Mavrommatis Concessions* case.

81. The Pious Fund of the Californias (U.S. v. The United Mexican States), Judgment, 1902 P.C.I.J. (Oct. 13, 1902); Japanese House Tax (Ger., Fr., and Gr. Brit. / Japan), Judgment, 1905 P.C.I.J. (May 21, 1905); Preferential Treatment of Claims of Blockading Powers against Venezuela (Ger., Gr. Brit. and It. v. Venez.), Judgment, 1904 P.C.I.J. (Feb. 21, 1904)

82. The North Atlantic Coast Fisheries Case (Gr. Brit. / U.S.), Judgment, 1910 P.C.I.J. (Sept. 6, 1910)

treaties except the ones with the United Kingdom. Each of these treaties had a similar dispute resolution program to the U.S.-U.K. treaties, including a first round of arbitration with just two arbitrators issuing a binding "recommendation." However, if that first round failed, each of the non-U.K. treaties required the parties to proceed to PCA arbitration; it appears that the U.S.-U.K. treaty required reversion to the existing claims commission merely for efficiency.[83]

Regardless, the two-stage dispute resolution process called-for in all of the various Prohibition-era treaties, including the 1924 treaty between the United States and the United Kingdom, eschewed at least in the first instance the sort of formal arbitration they could have undertaken at the PCA. The parties to these treaties preferred a *sui generis* process akin to the earlier commission models, in which the arbitrators were granted leeway to resolve the dispute, with the threat of formalized arbitration if that process failed.[84] The diplomatic record is silent as to why the United States structured these dispute resolution clauses in this unique manner, at least as far as this author could locate. The benefit sought may be similar to that sought through mediation/arbitration, or med-arb, clauses used in commercial arbitration. By this process, arbitrators provide an initial legal analysis of the claim, based on the statement of claim and answer. If the parties do not settle at that point, a formal arbitration commences. The initial analysis provides information to the parties that could direct them toward settlement. The threat of a binding arbitration award arising from a formalized process will motivate the disputing parties (or, in the *I'm Alone* case, their appointed Commissioners) to find reasonable common ground to settle the dispute efficiently and informally.[85] There is at least one precedent aside from the *I'm Alone* for something like this. In 1862, the United States and Peru presented a dispute to the King of Belgium for resolution; the King indicated that based on an initial review of the facts and the law, he would feel constrained to decide against the United

83. Edwin D. Dickinson, *Treaties for the Prevention of Smuggling*, 20(2) AM. J. INT'L L. 340, 343-344 (1926).

84. Contrary to the U.S. assertion at the time, this first stage was clearly an arbitration, rather than a mediation. Whereas a mediated result would have to be accepted by the parties to become binding, the relevant treaty required that the "recommendation" issued in the first stage of *I'm Alone* to be binding on the parties as soon as it was rendered, making that "recommendation" an arbitral award. Indeed, the recommendation is included in the United Nations' Reports of International Arbitral Awards. *See* 3 *R.I.A.A.* 1609 (1935).

85. *See* Katie Shonk, *What is Med-Arb*, HARV. L. SCH. PROGRAM ON NEGOT. DAILY BLOG (Mar. 14, 2022), https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/.

States. Based on this initial assessment, the United States abandoned the claim before it proceeded any further.[86]

Many modern treaties require that states engage in some form of diplomatic negotiation as a precondition to a legal dispute resolution process, but the format for these negotiations is usually left unspecified.[87] A more formalized process for diplomatic negotiation engaging legal experts, perhaps using the *I'm Alone* model, the 1862 U.S.-Peru model, or the modern med-arb model, as a first stage of interstate dispute resolution may prove fruitful.

B. The Arbitrators

Like the *I'm Alone* commission, many interstate dispute commissions of the 19th century were comprised of an even number of commissioners. This ensured equal representation of both sides in the dispute resolution process, but it also meant that a final award was not always possible. Also, because these were negotiated determinations, they were not necessarily guided by law nor resulted in reasoned decisions. Each disputing party expected its appointed commissioners to vigorously represent its arguments but to compromise if possible. What these commissions gained in terms of fairness in representation and negotiating leeway they lost in terms of the legitimacy derived from judicial independence and legal decision-making.[88]

Other commissions were odd-numbered, often meaning that whichever side had more commissioners on the panel won the case. Some commissions were comprised of two or four commissioners plus a neutral umpire; if the commissioners could not negotiate a result, the matter would be transmitted to the umpire for a final decision. The presence of the umpire provided incentive for the commissioners to be reasonable in their negotiations, but did not force the commissioners (or the umpire) to hew to legal considerations. Still other cases operated more like modern arbitration, with each side choosing one arbitrator and the parties jointly appointing a neutral chairperson, with a majority of the tribunal issuing a binding decision on a legal basis. The difficulty with these solutions, from the perspective of state parties, was

86. JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 216-217 (1929); 11 JOHN BASSETT MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1593, 1612 (1898).

87. *See, e.g.,* William P. Lane, *Keeping Good Faith in Diplomacy: Negotiations and Jurisdiction in the ICJ's Application of the CERD*, 35(3) B.C. INT'L & COMPAR. L. REV. 33, 38-41 (2013).

88. *See, e.g.,* Robert Koehane, Andrew Moravscik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000) (addressing requirements for interstate dispute resolution to be accepted by those in political power).

the possibility of one side's appointed arbitrator or commissioner being completely ignored by the majority, fostering resentment by the losing party and a lack of acceptance by political constituents.

Another model of dispute resolution required that entire matters be referred to an outside authority. As noted above, one key to the early arbitration processes, however designed, was the reputation of the arbitrators. One notable characteristic of 19th and early 20th century interstate arbitration – absent in today's more legalistic processes – was the frequent use of a third-party sovereign to resolve a dispute.[89] Of the 347 interstate cases between 1794 and the formation of the *I'm Alone* commission in 1930, approximately one-third were resolved by a third-party sovereign appointed by the disputing parties. Often, but not always, this was the head of state – kings and presidents.[90] The sovereigns themselves rarely did the hard work of factual inquiry and legal analysis necessary to resolve a dispute, instead referring the matter to trusted government advisers, but their supervision of the arbitration provided much needed legitimacy.[91] In other instances, a lower-level government official from a third state heard the case – typically an ambassador from a neutral country who had served in the region where the dispute arose, and who would therefore presumably have some understanding of the disputing states' concerns.[92]

Less frequently, a high-ranking jurist from a third country was asked to arbitrate the dispute. The advantage to such an approach for legitimacy are obvious: jurists would bring a sheen of legalism to the proceedings, even if the decision was not legal in nature. The United States and the United Kingdom both appear to have focused on this option at the end of the 19th century. In 1895, the United Kingdom and Portugal appointed the president of Florence's court of cassation to resolve a colonial boundary dispute. The Chief

89. Unless otherwise noted, the information in Section 5.2 is derived from A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1989 (3rd ed. 1990).

90. *Id.* For example, in 1818 the czar of Russia was asked to resolve a dispute between the United States and Great Britain arising from the latter's encouragement of slaves to cross lines during the War of 1812; the King of Prussia was requested in 1842 to resolve the "Portendick" claims between Great Britain and France; in 1876, the U.S. president was tasked with resolving a boundary question between Argentina and Chile.

91. For example, in the late 1820s, the United States and United Kingdom requested the King William of the Netherlands to resolve a border dispute involving the border between Vermont and Canada. William referred the matter to his Foreign Minister, Baron Verstolk van Soelen. *See* John P. D. Bunbabin, *The 1831 Dutch Arbitration of the Canadian-American Border Dispute: Another View,* 75(4) NEW ENG. Q. 622, 629 (2002). Similarly, Emperor Wilhelm referred the San Juan Island dispute to three eminent German judges. *See* Tunim, *supra* note 65, at 54.

92. For example, in 1874, the British Minister to China was asked to resolve a claim by Japan against China involving the deaths of Japanese citizens on the island of Formosa (Taiwan).

Justice of the Supreme Court of Canada was appointed in 1898 by the United States and Peru to resolve the claim of the former U.S. Consul to Peru.[93] The United States and Siam in 1899 appointed the Chief Justice of the British Court for China and Japan as arbitrator in another diplomatic protection case on behalf of a U.S. national.[94] In 1929, the United States and Guatemala appointed the Chief Justice for British Honduras to hear an expropriation claim. Combining both the practices of appointing heads of state and Supreme Court justices, in 1922 the United Kingdom and Costa Rica appointed William H. Taft, the then-sitting Chief Justice of the U.S. Supreme Court and former U.S. President, to hear a claim of diplomatic protection.[95]

Building on this practice, rather than appointing a third-party judge, the parties in *I'm Alone* chose to appoint their own Supreme Court justices to hear the case. This, too, was not without precedent, at least for the United States. Former U.S. Supreme Court Justice William Strong sat as sole arbitrator in an 1894 interstate arbitration hearing claims of diplomatic protection of a U.S. citizen against Haiti.[96] Justice Owen J. Roberts was an umpire for the U.S.-Germany Mixed Claims Commission, which resolved over 20,000 claims of U.S. nationals against Germany arising from World War I.[97]

States today may consider whether they can appoint their own or other states' Supreme Court justices to hear interstate disputes. To be sure, there has been a shift in in international arbitration – first noted in the 1990s – from "grand old" men and women to "technocrats," that is, a shift from well-known diplomats, judges, and academics who were not necessarily specialists in international arbitration but who had reputational legitimacy, to lawyers knowledgeable specifically about the substance and procedure of international arbitration and who brought technical prowess.[98] Supreme Court justices as arbitrators arguably combine the best elements of both the grand old men/women model and the technocrats model. They brought reputational

93. Ralston, *supra* note 80, at 216.

94. *Id.* at 219.

95. This practice was not limited to the United States and the United Kingdom. In 1910, Costa Rica and Panama appointed U.S. Chief Justice E. Douglass White to resolve a boundary dispute. In 1919, Germany and Romania appointed Robert Fazy, a judge on the Swiss Federal Tribunal, to hear a diplomatic protection claim. U.S. Chief Justice Charles Evans Hughes was appointed to a tribunal hearing a boundary dispute between Guatemala and Honduras in 1930.

96. The *Pelletier* matter (1894). *See* Moore, *supra* note 80, at 1749, 1793; Ralston, *supra* note 80, at 213.

97. *See., e.g.,* Joseph Conrad Fehr, *Work of the Mixed Claims Commission*, 25(10) ABA J. 845 (1939).

98. *See generally,* YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

authority and gravitas to the proceedings, making decisions more likely to be accepted by the losing country's leaders and public, while also bringing procedural skill and judicial sensibilities to the case. In other words, some of the same qualities that give the respective Supreme Courts in the two countries their authority would extend to the arbitral proceedings between the states. Although appointment of Supreme Court justices to interstate disputes is unusual today, states have appointed Supreme Court justices as judges *ad hoc* in several recent ICJ cases.[99]

Use of a two-person tribunal would be more unusual in modern disputes, but the benefits of such a model should be strongly considered. The unique genius of the *I'm Alone* appointments is that they combined the diplomatic nature of the early commission model – which required the two sets of government-appointed commissioners to arrive at a negotiated result, enhancing the sense of representation of each side – with the perceived legalism and independence inherent in the appointment of a Supreme Court justice. The Commissioners' decision, although to the result of compromise due to the two-person panel format, retained legitimacy by virtue their identity.

C. The Decision *Ex Aequo et Bono*

As Sir Gerald Fitzmaurice explained of the *I'm Alone* case at the time, "the Commissioners cannot be regarded as having intended to give a strictly legal decision."[100] Fitzmaurice interpreted the recommendations, which included scant legal reasoning, as having been made *ex aequo et bono* "and to state what they considered had best be done by the parties in order to achieve a satisfactory settlement."[101] Of course, the finding that the sinking of the *I'm Alone* was unlawful cannot be regarded as anything other than a legal decision, but the reasoning behind that decision is scant, and the exclusion of any compensation to Canada on the basis of the U.S. nationals' beneficial ownership of the *I'm Alone* as well as the award of pecuniary satisfaction (discussed below) were not made on the basis of law.

The use of *ex aequo et bono* to arrive at the decision in *I'm Alone* is another significant signpost at the crossroads in international dispute resolution. In the 1800s and early 1900s, decisions were often made without any legal reasoning, and many arbitral tribunals were explicitly charged with

99. For example, Pakistan appointed the former chief justice of its Supreme Court, Tassaduq Hussain Jillani, in the *Jadhav* matter. Similarly, Australia appointed a former Supreme Court justice, Ian Callinan, in the *Questions relating to the Seizure and Detention of Certain Documents and Data* matter.

100. Fitzmaurice, *supra* note 49, at 94.

101. Fitzmaurice, *supra* note 57, at 95.

deciding a case *ex aequo et bono*.[102] That practice has fallen by the wayside in modern dispute resolution, coincident with the rise of legal realism. The ICJ Statute, for example, provides that decisions shall be made according to international law (by the sources detailed in Article 38(1) of the Court's statute), or *ex aequo et bono* if the parties agree to the latter (Article 38(2)). In none of the ICJ's 182 cases (as of this writing) has a party requested that the Court make a decision *ex aequo et bono*, and thus this power has never been exercised.[103] Similarly, Article 42 of the ICSID Convention for the settlement of investor-state disputes provides an option for *ex aequo et bono*; in the 869 ICSID cases resolved or currently pending as of December 31, 2021, the parties have opted for a decision *ex aequo et bono* in only two cases, both of which were heard in the 1980s.[104]

What are the prospects of a resurgence of *ex aequo et bono* as the basis for interstate awards? As one prominent international disputes scholar explained, an authorization for a decision *ex aequo et bono* "achieves maximum flexibility [but] does so at considerable cost to predictability."[105] In a dispute between two friendly nations, such as the United States and Canada, perhaps flexibility would be more useful than predictability. Today, international disputes – as with much of international relations – center around the concept of the international rules-based order, with legal bodies applying a set of rules largely derived from treaties or customary international law. The predictability inherent in this regime enhances the authority, impartiality, and legitimacy of the proceedings. To the extent that dispute resolution requires flexibility, courts and tribunals tend to extend the reach of existing international law, rather than to operate under concepts of fairness or equity.[106] A proceeding *ex aequo et bono* between two states would simply raise too many questions about the basis of the decision and bias. It therefore appears unlikely that states would again adopt a two-stage approach with a first stage applying equitable principles, with legal principles reserved for the second stage.

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102. *See., e.g.,* Dudley B. Bonsal, *International Claims: A Lawyer's View on a Diplomat's Nightmare*, 49 PROC, OF THE AM. SOC'Y INT'L L. 62, 65 (1955) (discussing claims commissions, noting that "[f]requently, there will be reference to the duty of the commission to determine claims 'equitably and justly' or 'ex aequo et bono.'").

103. Shai Dothan, *Ex Aequo et Bono: The Uses of the Road Never Taken*, in RESEARCH HANDBOOK ON THE INTERNATIONAL COURT OF JUSTICE (Achilles Skordas ed., 2021).

104. Marko Jovanović, *The Role of Ex Aequo et Bono in ICSID Arbitration*, REVIJA KOPAONIČKE ŠKOLE PRIRODNOG PRAVA 147 (2021).

105. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 631 (2nd ed. 2009).

106. *See, e.g.,* Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L. L. 189 (2015).

D. Efficiency

Although the proceedings took several years, the condensed nature of the pleadings is also an important feature of the *I'm Alone* case. The case included only four written submissions (the statement of claim, the answer, and one memorial by each side), which were remarkably concise. The subjects of the memorials were determined not by the parties, but by the Commissioners. The Commissioners issued their three questions after reading the claim and answer, thereby taking firm hold of the proceedings at an early stage and giving clear guidance to the parties. The Commissioners held one hearing on the merits and, having found against the United States on the third question, held a second hearing on damages without any further written submissions. The Commissioners exercised judicial economy[107] in not answering the second question on hot pursuit, even though this was the question of most interest to academics at the time.[108] If not necessarily speedy, these proceedings were certainly efficient.

The irony of these two Commissioners adopting such a strong-handed approach is that the proceedings mirrored civil law in this respect, not the common law system that both arbitrators oversaw as Supreme Court justices. Such an inquisitorial approach is controversial in modern arbitration.[109] Modern arbitrators must also be mindful of the parties' right to be heard, which has been described as the "sword of Damocles" in arbitration.[110] A violation of the right to be heard may result in the vacatur of the award in court.[111]

Tracking the procedure used in the *I'm Alone* case, we can see that the approach was neither strictly inquisitorial nor a violation of the right to be heard. Each side was permitted a full opportunity to present their case in their statement of claim and answer. Only after these two initial pleadings did the arbitrators take hold of the case and provide a short list of questions most relevant to resolving it. The questions were neutral and did not presuppose

107. *See generally*, David M. Bigge, *Judicial Economy in Investor-State Disputes*, KLUWER ARB. BLOG (May 25, 2017), http://arbitrationblog.kluwerarbitration.com/2017/05/25/judicial-economy-investor-state-disputes/; Frazer, *supra* note 6, at 420-22.

108. *Id*.

109. Robert B. von Mehren, *Burden of Proof in International Arbitration*, PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INT'L ARBITRATION 123 (Albert Jan van den Berg ed., 1996).

110. Mattias J. Terlau, *The German Understanding of the Right to Be Heard in International Arbitration Proceedings*, 7 AM. REV. INT'L. ARB. 289 (1996).

111. *See generally,* Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Art. V(1)(b), June 7, 1959, 330 U.N.T.S. 38.

an outcome.[112] The parties were treated equally and were able to answer questions as they saw fit. Rather than take command of the case in an inquisitorial fashion or deny the right to be heard, the arbitrators' method provided focus to the case. This presumably reduced costs, and permitted the arbitrators to drill down on the most germane issues. Modern judges and arbitrators would do well to consider such an approach in commercial, investor-state, or interstate cases. Along these lines, although not modeled on the *I'm Alone* procedure, the ICJ recently issued a decision in the dispute between Nicaragua and Colombia requesting that the parties limit their oral submissions to two specific questions.[113]

There has been a recent push for expedited procedures in commercial and investor-state arbitration in order to speed the process and reduce costs,[114] but this movement has not yet reached the realm of interstate disputes, where proceedings are still led by the parties (the ICJ is largely silent even during hearings) and often take several years.[115] An efficient, expedited arbitral hearing with more guidance by the arbitrators would require a robust statement of claim and answer (so that the arbitrators can closely examine and, if appropriate, later narrow the legal issues presented), but such robust initial pleadings are already commonplace. Since there is little or no discovery possible in interstate disputes, there is no reason a party should not be able to harness all of the facts at the opening stages of the case, permitting the arbitrators to provide guidance from the outset.

Perhaps most critically, the *I'm Alone* Commissioners left one of the central legal questions of the case – regarding hot pursuit from territorial waters – unresolved. Modern international lawyers may find this surprising, as international courts and tribunals usually address each of the parties' submissions (in judgments and awards that often run hundreds of pages) even if such examination is not strictly necessary to resolve the case. Perhaps if Elihu Root's model for an international court had been adopted, such expansiveness would be warranted as a means of judicial lawmaking. But in the

112. *See* Paula Hodges, *Drive for Efficiency and the Risks for Procedural Neutrality – Another Tale of the Hare and the Tortoise?*, 6(2) DISP. RES. INT'L. 193 (2012).

113. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Miles from the Nicaragua Coast (Nicaragua v. Colombia)*, Order, Oct. 4, 2022.

114. *See generally,* Kristen E. Boon, *Investment Treaty Arbitration: Making a Place for Small Claims*, 19 J. OF WORLD INV. & TRADE 667, 678 et seq (2018) (addressing proposals for ICSID expedited procedures and existing expedited procedures utilized by the International Chamber of Commerce).

115. There have been calls to revise ICJ procedure to provide for more efficiency, for example in the enforcement of provisional measures. *See, e.g.,* Massimo Lando, *Compliance with Provisional Measures Indicated by the International Court of Justice*, 8 J. INT'L. DISP. SETTLEMENT 22 (2017).

system we have, more circumspection among courts and tribunals may be useful where possible, to leave room for states to flesh out for themselves the content of international law.

E. Moral Damage and Pecuniary Satisfaction

The *I'm Alone* case may be unique in the history of interstate disputes in having ordered pecuniary satisfaction. The path to damages in interstate disputes is at this point well-worn, but it was a relatively new schematic when *I'm Alone* was decided. In the *Chorzów Factory* decision rendered by the Permanent Court of International Justice, which preceded the *I'm Alone* decision by only a few years, the Court wrote that,

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[116]

Reparation for internationally wrongful acts typically consists of restitution where possible. If restitution is not possible, then the state committing the wrongful act is required to pay compensation for damages. If neither restitution nor compensation is possible (because damages are not pecuniary or otherwise calculable), the state owes "satisfaction."[117] Satisfaction can take several forms, but is generally "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."[118] Satisfaction may simply be the finding of the relevant court or tribunal against the state that committed the wrongful act.[119]

Turning back to the *I'm Alone* case, the Commissioners ordered the United States to pay $25,000 to Canada and apologize for the breach of international law, and pay an additional $25,000 to the crew of the *I'm Alone*. The apology is clearly a form of satisfaction, and the payment to the crew constituted compensation for the damage suffered. But what about the $25,000 payment to Canada? This is often cited as the only, or one of only

116. *The Factory at Chorzow (Germany* v. *Poland*), 13 Sept. 1928, P.C.I.J., Merits, p. 47.

117. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Arts. 34-37 Int'l L. Comm'n A/56/10 (2001).

118. *Id.* Art. 37(2).

119. *See generally* Judgement, *The Corfu Channel Case (United Kingdom v. Albania),* 1949 I.C.J. Reports 37.

two (depending on the author),[120] examples of a monetary award paid by a state for moral damage. The award is described alternatively as "punitive damages," "pecuniary satisfaction," or "symbolic damages for non-pecuniary injury."[121] While the 1924 treaty did not contemplate pecuniary satisfaction *per se*, it granted the Commissioners broad power to make binding "recommendations" to the two states, and did not limit their deliberations to strictly legal considerations. This particular element of the decision may be what caught Fitzmaurice's attention when he described the result as *ex aequo at bono*.

The rarity of pecuniary satisfaction in interstate disputes may be the result of international legal systems incorporating elements of both common law and civil law systems. Punitive damages are available in a few common law systems, but they are rarely if ever available in civil law systems. Punitive damages may also be impractical. All monetary awards against states, even those that are purely compensatory, are very difficult if not impossible to enforce, but most compensatory awards are paid voluntarily. Pecuniary satisfaction may be a different story; the *I'm Alone* case aside, it seems highly unlikely that a state would pay an award for pecuniary satisfaction in a case where it believes it has acted justly.

That said, there is a parallel between the payment provided following the *I'm Alone* proceeding, and the provision of *ex gratia* payments by states. In both cases, states often deny any wrongdoing and the payment is not considered reparation for an internationally wrongful act, but is nonetheless

120. The other example is the arbitration between New Zealand and France regarding the sinking of the Rainbow Warrior in the Port of Auckland. The arbitral tribunal provided various forms of satisfaction and compensation, and additionally "Specifically, it recommended that France contribute US $2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries." Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 274 (1990).

121. Stephan Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility*, 3 AUSTRIAN REV. OF INT'L. & EUR. L. 101, 127 (1998). Wittich posits that these damages may be compensation: Canada had claimed over $30,000 in compensation for the cost of repatriating the surviving *I'm Alone* crewmen and legal expenses. *Id.* at 121-122. But the award itself makes no link between this claim and the $25,000 payment, instead linking it directly to the apology owed by the United States for the apparent moral damage. In addition, the same author points out that the two Commissioners were from common law courts systems that regularly would have imposed punitive damages for intentional wrongs. *See also* Patrick Dumberry, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes*, 3(1) J. OF INT'L. DISP. SETTLEMENT 205, 215 (2012); *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Commentaries 106 Int'l L. Comm'n A/56/10 (2001).

provided to satisfy a claim by another state.[122] An arbitral tribunal like the *I'm Alone* commission, not limited to strictly legal proceedings, may be able to recommend *ex gratia* payments as a means for resolving a dispute.

VI. CONCLUSION

"Unquestionably," the United States writes in its brief in the *I'm Alone* case, "there is room in the sphere of international controversy for the intervention of advisers of this sort."[123] Yet with the dominance of legalistic dispute resolution today, the flexibility and efficiency inherent in the hybrid *I'm Alone* procedure has been lost. Such flexibility and efficiency may be particularly useful in current contexts similar to the Prohibition-era treaties, in which there are two (or more) friendly governments in an ongoing relationship of cooperation. Modern analogs may be the treaties governing cooperation on the cross-border illicit narcotics trade. The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, for example, includes a dispute resolution provision requiring resort to the International Court of Justice (ICJ).[124] The ICJ is an unnecessarily antagonistic forum for disputes that are likely to be technical in nature and likely involve parties that would want to continue cooperating in their fight against the drug trade.[125] Notably, as in many modern treaties prior to the submission of the dispute to the ICJ, the parties are required to consult on a means to resolve the dispute amicably through "negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice."[126] A method similar to that employed in the *I'm Alone* dispute might be useful to parties to the Convention for this first round of resolution prior to the submission of the dispute to the ICJ. The method might also be considered as an explicit part of the dispute resolution process in future similar treaties.

In summary, the United States and the United Kingdom adopted a hybrid system for the resolution of the *I'm Alone* dispute, which incorporated elements of both the diplomatic means of dispute resolution of the 19th century, and the legalistic procedure of the future. The result was a decision *ex*

122. *See generally* Marian Nash Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 AM. J. INT'L L. 319 (1989) (discussing the U.S. *ex gratia* payment provided to Iran for the downing of a commercial Iran Air flight by the U.S.S. Vincennes).

123. U.S. Brief, *supra* note 31, at 4.

124. *Convention against Illicit Traffic* in *Narcotic Drugs* and *Psychotropic Substances*, Dec. 20, 1988, 1582 *U.N.T.S.* 95.

125. *Id.* Art. 32(2).

126. *Id.* Art. 32(1).

aequo et bono rendered by two Supreme Court justices that included a recommendation of pecuniary satisfaction, which the United States paid within the week. Unfortunately, the *I'm Alone* case, like the hundreds of cases that predated the more legalistic procedures that predominated interstate disputes from the mid-20th century onward, has largely been ignored in terms of its procedure. There is much to consider, and possibly utilize, from the procedure of the *I'm Alone* case and other 19th and early 20th century cases. States should pay attention to these models as they continue to search for the best legal procedures for resolving their disputes.

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