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Content:
3. TWO CASE STUDIES OF FACT-FINDING: FLEXI-VAN AND GENERAL MOTORS

C. Filling Gaps in Evidence by Drawing Inferences

In the Flexi-Van Order, the Tribunal supported its fact-finding methodology by pointing out that "[o]ther tribunals which have adjudicated international claims in the past have also . . . required what they considered to be sufficient evidence and from that have drawn reasonable inferences." Particularly, the Tribunal cited judge Lauterpacht's separate opinion in the case concerning Certain Norwegian Loans. "[S]ome prima facie distribution of the burden of proof there must be . . . [T]he degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting." Similarly, the Tribunal found support in the celebrated holding of the Mexican-United States General Claims Commission that "when the claimant has established a prima facie case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonabledoubt without pointing out some reason for doubting."

4. OTHER FACT-FINDING TECHNIQUES DEMONSTRATED IN TRIBUNAL CASES

E. Drawing Inferences from Silence

The failure of a party promptly to voice displeasure with a given course of events in abusiness transaction has been significant in the Tribunal's decisionmaking. For example, in determining whether a contract has been breached, generally great emphasis has been placed on whether a party has made a contemporaneous written complaint. Silence in the face of apparent nonperformance often leads the Tribunal to draw an adverse inference. I appreciate that American businessmen often forego making written complaints, in the belief that such protests might jeopardize already fragile business relationships. While I cannot criticize this business approach, it is clear, based on Tribunal
Awards, that failing to object can be expensive if disputes wind up in arbitration.

Similarly, failure to mention a point clearly in correspondence, has led to inferences as to the intent of the party, based on the familiar logic that a party could have mentioned an item specifically if that is what it had intended. In some cases this approach has, in my view, been applied inappropriately, leading me to criticize an award on the ground that "[s]ilence cannot cry so loudly." 

44 Flexi-Van, 1 IRAN-U.S.C.T.R. at 457
45 1957 I.C.J.9, 34, 39

Referring Principles:
XII.1 - Distribution of burden of proof