

## PRODUCTION OF EVIDENCE

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not readily find that the lines adopted in these circumstances by the 1935 Decree are not in accordance with the traditional Norwegian System."<sup>246</sup> Judge Read in his Dissenting Opinion in the *Asylum Case* concluded that Colombia had "established considerably more than a *prima facie* case," and added:

The question remains whether the third day of January has been proved to have been a time of political disturbance of a revolutionary character. This is a matter peculiarly within the knowledge of the territorial State, and, in my opinion, Colombia was not bound to establish more than a *prima facie* case. There can be no doubt that Colombia has discharged the burden of proof to this extent. On the other hand Peru has not furnished a scintilla of evidence with regard to the political conditions obtaining in Lima at the beginning of January 1949.<sup>247</sup>

If the facts stated by the claimant Government are substantiated only by partial proof, judgment in its favor has been held warranted when the respondent Government could easily have rebutted such statements, if untrue, by submitting evidence within its control.<sup>248</sup> The United States Foreign Claims Settlement Commission, in dealing with Cuban cases, followed the practice of holding, "in the absence of evidence to the contrary," that property shown to have been owned in Cuba by claimants had been taken by Cuba pursuant to its nationalization decrees.<sup>249</sup>

Cheng, in his treatise *General Principles of Law as Applied by International Courts and Tribunals*, has stated the controlling principle aptly:

In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e., *prima facie* evidence. . . : The inference in every case must, however, be one which can reasonably be drawn. The situation, as es-

<sup>246</sup> [1959] I.C.J. at 140.

<sup>247</sup> [1950] I.C.J. at 326-27.

<sup>248</sup> De Lemos Case (Great Britain v. Venezuela), 1903, RALSTON'S REPORT (1904), 302, 319; Brun Case (France v. Venezuela), French-Venezuelan Mixed Claims Commission, 1902, RALSTON'S REPORT (1906) 5, 25; Hatton Case (United States v. Mexico), 1923, OPINIONS 6-10 (1929); Janin v. État allemand (Franco-German Mixed Arbitral Tribunal), 1 RECUEIL DES DECISIONS 774 (1922).

<sup>249</sup> Floyd W. Auld, Dec. No. CU-20, Nov. 23, 1966; Wallace and Catherine Tabor, Dec. No. CU-14, Oct. 26, 1966; The Schwarzenbach Huber Co., Dec. No. CU-21, Jan. 13, 1967; Mary Pauline Seal, Dec. No. CU-125, Aug. 23, 1967, Ms COMM. RECORDS.

established by *prima facie* evidence, coupled with the adverse presumption arising from the nonproduction of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation.<sup>250</sup>

*Section 37. Judgment by Default.* Giving judgment by default against a State on account of its failure to appear before the tribunal is a more serious matter than making an award to one party on the basis of a *prima facie* case opposed only by meager evidence on behalf of the other party. The possibility of such action appears to have been contemplated in arbitral agreements in but a few instances.<sup>251</sup> No recent instance of such a provision has been found. The rules of the Mixed Arbitral Tribunals appear in some cases to have contemplated a judgment in the event of the failure of a party to appear.<sup>252</sup> The agreement of April 20, 1910, between Italy and Peru, submitting the *Canevaro Case* to arbitration, provided that "should said documents, proofs, or briefs not be presented within this period, an arbitral sentence shall be passed as if the same did not exist."<sup>253</sup> In Article IV of the Treaty of Ghent, December 24, 1814, between the United States and Great Britain, submitting to arbitration the question of the boundary in the Bay of Fundy, provision was made for a determination first by two commissioners, and in the event of their disagreement, of the reference of the case to "some friendly sovereign or state" on the basis of the reports of the commissioners or on the report of one commissioner together with the grounds upon which the other commissioner shall "have refused, declined or omitted to act. . . ." The Article concluded:

<sup>250</sup> *Supra*, note 53, at 323, 325.

<sup>251</sup> Convention for the Establishment of a Central American Court of Justice, art. XV, 2 MALLOY, TREATIES 2402; Prize Court Convention of 1907, art. 40, 2 AM. J. INT'L L. SUPP. 192 (1908).

<sup>252</sup> See Franco-German Rules, art. 73, 1 RECUEIL DES DÉCISIONS 54 (1922); Austria-Belgian Rules, art. 70, *id.* at 180. For cases invoking such rules, see *Bumillier v. État Allemand* (Franco-German Tribunal), *id.*, 3:389, 390 (1923); *Schreider v. Metenett* (Franco-German Tribunal) *id.* 2:334 (1923); *Deutsch-Sudamerikansche Bank et Office Allemand v. Vaquin et Schwertzer et Office Français* (Franco-German Tribunal) *id.*, 8:140 (1929).

<sup>253</sup> PROTOCOLES DES SÉANCES ET SENTENCE 6 (1912). For similar provisions, see *Alsop Case* (United States v. Chile), 1909, 3 TREATIES, CONVENTIONS (Redmond) 2508; *Yuille, Shortridge and Co. Case* (Great Britain v. Portugal), 1861, sec. 3, DE LAPRADELLE & POLITIS, 2 RECUEIL 89, 90 (1923).

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