# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

# RECUEIL DES SENTENCES ARBITRALES

Commission for the Settlement of Claims under the Convention of 7 August 1892 concluded between the United States of America and the Republic of Chile

**Case of Grace Brothers & Co. v. Chile, Nos. 16, 19, 20, 21, 22, and 29, decision of 10 April 1894**

Commission pour le règlement des réclamations en vertu de la Convention du 7 août 1892 conclue entre les États-Unis d'Amérique et la République du Chili

**Affaire concernant Grace Brothers & Co. c. Chili, Nos 16, 19, 20, 21, 22, et 29, décision du 10 avril 1894**

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## Case of Grace Brothers & Co. *v.* Chile, Nos. 16, 19, 20, 21, 22, and 29, decision of 10 April 1894[1]

## Affaire concernant Grace Brothers & Co. c. Chili, N°s 16, 19, 20, 21, 22, et 29, décision du 10 avril 1894[2]

Parties who have given voluntary aid and comfort to the enemy of the respondent State may not appear in the Commission (Article I of the Convention)—access to arbitration is a purely conventional privilege and the contracting Parties decide who can appear and what class of claims may be presented in the arbitration.

Voluntary aid and comfort exist in cases where the articles furnished would be seized as contraband of war if captured at sea or where the supply of articles would involve the crime of high treason if provided to the enemy—commerce of neutrals outside this scope not subject to any restriction other than that which may be imposed thereon by the usages of nations.

Acts need not be intentionally committed on behalf of one belligerent and against the other to be considered voluntary—acts which were forced upon the parties to be considered involuntary—the willingness to give aid and comfort can be established if the person committing the acts in his sound senses can and must know that such acts involve an increase of the strength of one of the belligerents to the detriment of the other.

Existence of contract previous to the commencement of the war is an inadmissible excuse—the state of war is a case of superior force which suspends, modifies or alters all contracts, returning to the contracting parties the liberty they had compromised in the time of peace.

Scope of contraband of war—articles of contraband are those which serve for the war directly and indirectly—the former always subject to confiscation whereas the latter only confiscated when it is shown that there was an intention to increase the strength of the adversary—articles to be considered contraband of war if and whenever administered directly to a hostile fleet.

Claims dismissed for want of jurisdiction based on the fact that the claimants have given voluntary aid and comfort to the enemies of Chile.

*Dissenting opinion (Mr. Goode)*

Claimants not to be charged with giving aid and comfort unless they have violated the neutrality laws in dealing with Peru—subjects of neutral State entitled to continue their ordinary trade and to the right to sell even contraband of war, subject only to the right of seizure.

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[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2781.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2781.

Les parties qui ont volontairement assisté et soutenu l'ennemi de l'État défendeur ne peuvent comparaître devant la Commission (article I de la Convention)—l'accès à l'arbitrage représente un privilège purement conventionnel et les Parties contractantes décident des personnes admises à comparaître ainsi que des prétentions qui peuvent être présentées dans le cadre de l'arbitrage.

Constituent des cas d'assistance et de soutien volontaires les cas dans lesquels les articles fournis feraient l'objet d'une saisie en tant que contrebande de guerre s'ils étaient interceptés en mer ou dans lesquels la fourniture d'articles impliquerait un crime de haute trahison si elle était au bénéfice de l'ennemi—le commerce effectué par des Parties neutres en dehors de ce cadre ne peut être soumis à aucune restriction autre que celle qui peut être imposée en vertu des usages des nations.

Il n'est pas nécessaire que les actes soient commis intentionnellement au nom d'un belligérant et à l'encontre de l'autre pour qu'ils puissent être considérés comme volontaires—les actes imposés aux parties sont considérés comme involontaires—la volonté de fournir de l'assistance et du soutien peut être établie si la personne qui commet les actes avec discernement peut et doit savoir que de tels actes renforcent la puissance de l'un des belligérants au détriment de l'autre.

La conclusion d'un contrat avant le début de la guerre ne constitue pas une excuse admissible—l'état de guerre représente un cas de force majeure qui suspend, modifie ou altère tout contrat, réintégrant les parties contractantes dans la liberté qu'elles avaient compromise en temps de paix.

Portée de la contrebande de guerre—les articles de contrebande sont ceux qui profitent directement ou indirectement aux efforts de guerre—les premiers font toujours l'objet d'une confiscation, alors que les seconds ne sont confisqués qu'en cas d'intention manifeste d'accroître la puissance de l'adversaire—articles à considérer comme contrebande de guerre chaque fois qu'ils sont fournis directement à une flotte hostile.

Réclamations rejetées pour défaut de compétence puisque les demandeurs ont volontairement assisté et soutenu les ennemis du Chili.

*Opinion dissidente (M. Goode)*

Les demandeurs ne peuvent être accusés de fournir assistance et soutien tant qu'ils n'ont pas contrevenu aux lois de neutralité en traitant avec le Pérou—les sujets d'un État neutre ont le droit de poursuivre leur commerce ordinaire et même le droit d'écouler de la contrebande de guerre, sous réserve uniquement du droit de saisie.

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The honorable agent of the respondent government has filed a motion setting forth that the memorialists, having given voluntary aid and comfort to the Government of Peru during the war between that country and Chile, have no right to present their claims before this commission pursuant to the express provisions of Article I of the convention of Santiago, of August 7, 1892.

In support of the motion, the respondent government has produced duly authenticated extracts from the account current of the house of W. R. Grace & Co. with the Government of Peru, and several communications exchanged between the heads of the claimant firms and the said government and its agents, from which it appears that the said firms during the war between Chile and Peru were the official purveyors of the Peruvian Government; that they furnished it and charged to its account the coal for the ship *Andrew Johnson,* on January 15, 1881; that they furnished and charged on account the supplies for the Peruvian navy (December 31, 1880, and January 15, 1881); that they provided and charged on account the electric wires and batteries intended for the reserve of the Peruvian army (October 31, 1880, and December 18, 1881); that they guaranteed Mr. Charles E. Pettie the sum he asked for the remodeling of Remington rifles, old style, belonging to the Peruvian Government (January 17, 1881); that they advanced to Mr. Bogardus, agent of Peru in the United States, and charged on account, the sum of $10,994 for the purchase of arms in the latter country (February 17, 1881); that they advanced sums of money to the Peruvian consul-general in San Francisco to defray the expenses of the embargo of certain Chilean vessels which had arrived there laden with nitrate (June 25, 1880, and December 28, 1881).

The account current and the correspondence aforesaid corroborate these facts and are to be found collated in the pamphlet entitled Documentary Evidence on Behalf of Respondent Government. The agent of Chile maintains that all these facts, in connection with the items inserted in the account current and other documents, constitute aid and comfort voluntarily given by the memorialists to the enemies of Chile, which deprives them of access to this commission.

The memorialists deny these allegations and recapitulate their arguments in the document entitled Statement and Brief of Claimants in Answer to the Motion of the Respondent Government to Dismiss the Claim, in the manner following:

> 1st. That the payments made by W. R. Grace & Co. to Peru were made out of funds in their hands belonging to the Peruvian Government. The fact that that government was at war with Chile did not release the claimants from their obligation to pay their debt to Peru, either directly or on the order of the government of that country.
>
> 2d. That the funds in the hands of W. R. Grace & Co. arose from commercial transactions between it and the Government of Peru prior to the breaking out of the war between Peru and Chile. Such state of war could not alter the commercial relation between the parties.
>
> 3d. That all of the articles complained of were furnished by claimants to Peru in compliance with a contract entered into between them and the Government of Peru prior to the breaking out of hostilities between Chile and Peru, and their contractual obligation to perform that contract continued notwithstanding such war.

4th. That the articles complained of and mentioned in the schedules and the documents of respondent were not contraband of war.

5th. That the claimants being neutral citizens of the United States, a friendly country to both Chile and Peru, had a right to carry on their commercial business with the government or citizens of either of the belligerents without molestation.

6th. That even though the articles were contraband, the only penalty was the peril of seizure if captured *in transitu* by the Chilean Government. That the penalty did not go beyond the contraband goods and attach in any way to the person of the neutrals or to their goods not contraband.

7th. That the evidence shows that claimants were not only willing but actually did sell the same articles to the Republic of Chile during the war, after the occupation of Lima.

8th. That General Lynch, being military commander of the Chilean forces of occupation in Callao, charged the house of Grace Bros. & Co. with having given aid and comfort to the Peruvians, and threatened to confiscate certain of their property as being enemies of Chile, but upon an investigation of the charge not only revoked his threat, but returned the property to them, and afterward paid them for the property which he seized and used in military operations. That by the conduct of the commander of its armies the Government of Chile is estopped from setting up a breach of neutrality on the part of the claimants.

9th. That the account current on which the agent of the respondent government relies to establish the aid and comfort to the enemies of Chile was made out long after the capture of Lima by Chile, and when the war had definitely ended.

In view of these antecedents we must ascertain what voluntary aid and comfort means, and whether the memorialists have really given such aid and comfort voluntarily to the enemies of Chile.

The principle of aid and comfort in the matter of claims is a modern creation in international law; it rests upon the fact that access to courts of arbitration is a purely conventional privilege; that it is the contracting parties who should decide the character of persons who can appear before these courts, and what class of claims may be presented thereto.

According to the terms of Article I of the convention of Santiago, among others, no parties may appear who have given voluntary aid and comfort to the enemy of the respondent state. The question here is not an imputed crime, harmful to certain claimants, but a conventional stipulation which limits the field of action of the commission, founded on the very just principle that it would not be proper for the state that has suffered through the acts of persons who have given aid and comfort to its enemy to be bound to grant to these the advantages it has accorded to those who have preserved a strict neutrality. Upon establishing this limitation, the contracting parties have not had in view any penalty for acts violative of international practices; they only and simply

refuse to accord a privilege to those whose voluntary acts have tended to favor their enemies.

The difficulty is, then, to formulate a rule that shall determine when aid and comfort has been given, and in what measure neutrals, who, as a general rule, have the right to maintain commercial relations with the belligerents, are to be excluded from the benefits aimed at by the treaty from which this commission derives its authority, because of the fact of having continued their habitual commercial transactions with the enemy and even those growing out of contracts. In other words, to what restrictions is the trade of a neutral subject who later on may find himself in the necessity of appearing before a commission of arbitration established under conditions similar to those the convention of Santiago provides, if he does not wish to see himself deprived of the privileges of such convention in consequence of a motion such as that made by the agent of the respondent government?

The precedents that may serve for the proper solution of this point are not numerous. On the 3d of March 1863 a law of the United States was enacted entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts of the United States". Section 3 thereof provides that "Any person claiming to have been the owner of such abandoned or captured property may . . . prefer his claim to the Court of Claims, and on proof . . . that he has never given any aid or comfort to the present rebellion."

Another official act, which is an international agreement, is the treaty concluded between France and the United States on the 15th of January 1881, which contains, in its first article, some dispositions absolutely the same as those of the convention of Santiago of August 7, 1892.

In the interpretation of the law of the 3d of March 1863 and of the convention of January 15, 1881, the jurisconsults and the arbitrators who have been called upon to decide the question of aid and comfort given the enemy have frequently started from different bases, and, at times very strict, excluding from the legal or conventional benefits claims of persons who have given the enemy really slight, unconscious, and accidental aid and comfort. There is, therefore, since modern publicists have not occupied themselves in determining this question, room to indicate under what circumstances the aid and comfort furnished by a neutral to one of the belligerents will deprive him of the prospective redress for acts committed by the civil or military authorities of the other belligerent to which otherwise he would be entitled.

In the absence of precise rules in this matter, it is necessary to attempt to establish the limits within which commercial transactions may constitute the *exceptio pacti* contemplated by Article I of the convention of Santiago.

In all cases where the aid to the enemy has been furnished in flagrant violation of international laws or the rules established by the belligerent in interest *(blocus par ex.)* it is undeniable that there has been aid and comfort. In the

second place, in all cases in which the acts committed would have involved the crime of high treason, if they had been committed by the subjects of a nation in behalf of the enemies thereof, we would have to admit that aid and comfort in the sense established by Article I of the convention of Santiago has existed.

The same rule should be applied to cases wherein the alleged acts refer to the furnishing of articles which should be considered as contraband of war and subject, therefore, to confiscation had they been seized and been the subject of trial at the proper time.

Outside of these limits, which determine the cases in which access to this commission may be refused, it is undeniable that the commerce of neutrals is not subject to any restriction other than that which may be imposed thereon by the usages of nations. The neutral who may have furnished one of the belligerents articles that may be considered as contraband, has given aid and comfort thereto, since the furnishing and transporting to the enemy of articles which by their nature may serve directly or indirectly in the war is considered as illegal. The neutral, *in fine*, who has committed an act the natural consequences of which would be to increase the strength of one of the belligerents to the prejudice of the other, has given aid and comfort, because, if, instead of acting in his neutral character, the acts committed by him had been in behalf of the enemy of his own country, he would have made himself liable for the crime of high treason.

Aid and comfort, according to the terms of Article I of the before-cited convention, must be voluntary.

In order that voluntary aid and comfort may exist, it is not necessary that the acts should have been intentionally committed in behalf of one belligerent and against the other. There may be a voluntary act without a hostile intention, as a hostile act may also be done involuntarily. So, in the case before us, the agent of the Government of Chile has incorrectly accused the claimants of the act of having furnished voluntarily ten launches to the Peruvian Government. This furnishing was done by order of that government, and the claimant houses, though not desiring to do it, were forced into that loan, and the fact that they did not protest before their diplomatic representative for this violation of their neutral character can not be invoked against them. They submitted to the conditions of the stronger. It is the same as if the magistrates of a city, threatened with death, should reveal the place where the national funds were secreted; or a countryman who, under the same circumstances, should have given aid and comfort to the enemy by showing him the topography of the country. We believe further that the planter who has accepted the price of forage furnished the enemy has not given it voluntary aid and comfort because if he had declined the money he could not thereby have prevented the enemy on the march from taking what he needed for the supply of the troops or the train of his army. In other words, the willingness to give aid and comfort to the enemy without assuming a hostile character towards the other party, can be considered as established in all cases in which he who commits those acts in

his sound senses can and must know that such acts involve an increase of the strength of one of the belligerents to the detriment of the other.

In their reply the claimants have maintained that the acts charged against them should be excused by reason of the contracts which existed previous to the commencement of the war. Those contracts, in their judgment, had restricted their liberty obliging them to carry out during the whole period of the hostilities what they had engaged to do before the commencement thereof. Under the point of view of the voluntary aid and comfort contemplated by the terms of Article I of the convention of Santiago, that excuse is inadmissible. The state of war is a case of superior force which suspends, modifies, or alters all contracts, returning to the contracting parties the liberty they had compromised in time of peace. If, after the commencement of hostilities, the contracting party persists in giving aid and comfort to one of the belligerents he can not invoke, as regards the consequences of his acts, the restriction of his free action through contracts existing previous to the commencement of the hostilities. This principle can and must be admitted if the analogy of the cases of contraband and high treason are admitted. As a fact, a neutral who, in time of peace, should promise to furnish a foreign state a quantity of arms, ammunition, field telegraphs, for example, or provisions, he could not prevent the confiscation thereof, should they be seized, on the ground that they were articles that he had agreed to furnish to one of the belligerents pursuant to contracts made previous to the outbreak of hostilities. Precisely the same thing occurs in the case of high treason. No previous contract would protect one who, to the prejudice of the interests of his country, furnishes the enemy money for the purchase of arms or to increase his financial resources.

These principles established, we will enter upon the examination of the grounds of the motion of the respondent government and the arguments of the memorialists, viewed in the light of these principles.

We have shown that voluntary aid and comfort exist in cases where the articles furnished would constitute and would be seized as contraband of war if they were captured on the sea, and in cases in which the resources supplied would involve the crime of high treason had they been furnished to the enemy of a nation by a citizen thereof. Within these propositions the fact that what constitutes contraband of war is frequently vague, variably laid down by the publicists, and often the subject of agreements may give rise to controversy.

On this subject no treaty between the United States and Chile changes the general principles established by science relative to contraband of war. It is necessary, then, to accept, so as to determine the principle governing this point, the opinions of the most impartial jurisconsults representing the most liberal modern ideas. Rivier, for example, in his *Lehrbuch über das Volkerrecht,* section 68, gives the following definition of contraband of war: "Articles of contraband are those which serve directly for the war—that is to say, arms of all kinds, materials and ammunition for firearms, explosive material, army supplies, articles of equipment, clothing, and uniforms. Next follow articles

which serve indirectly for war, such as iron in bulk, lumber for construction, the rigging, sails, and materials which after preparation may be used in the war, also pitch, tar, and horses. While the first of these articles may be always confiscated, the latter will only be when the circumstances *shall be of such a nature as to show the intention to increase the strength of the adversary.*

"Articles of food and money are not to-day considered as articles of contraband. The exception must be admitted that articles of food must be considered as contraband of war when they are furnished directly to a hostile fleet. It is the same with coal furnished a fleet. Dispatches carried to an enemy the conveyance of men, war vessels, and transports are also contraband."

This definition would by itself be sufficient to determine whether the houses of Grace & Co. have been guilty of acts which, considered in the light of contraband of war, constitute, an *exceptio pacti* pursuant to the provisions of Article I of the convention of Santiago; without going into a simultaneous consideration of whether the acts charged would have also constituted the crime of high treason if they had been committed by the citizens of a state in behalf of the enemies thereof. Reconsidering some of the allegations made by the memorialists and denied by the respondent government, it appears to us undeniable that, according to the declarations of John W. Grace, partner in the house (pages 18 to 22 of the claimants' depositions), the house of Grace Bros. & Co. "were purveyors of naval supplies for the Peruvian squadron, and that the articles that it sold embraced all kinds of articles necessary to a ship, from a needle to an anchor, all sorts of supplies, food, rope, sails, pitch, anchors, chains, and other articles."

In accordance with the principles expressed by Rivier, pursuant to those recognized by modern science, and in conformity with the terms of the formal and textural declaration of one of the heads of the claimants' houses, the latter have furnished anchors, pitch, tar, sails, all articles of contraband. Would a citizen furnishing the enemy of his country such articles be punishable or not?

The house of W. R. Grace & Co. has furnished:

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| December 31, 1880. Provisions and naval supplies to the squadron in December 1880 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . | $35,796.88 |
| January 15, 1881. Provisions and naval supplies for the squadron during the first fortnight of January 1881, as per annexed receipt . . . . . . . . . . . .. . . . . . . . . . . .. . . . . . . . | 14,806.36 |

According to Rivier and all modern writers, provisions should be considered as articles of contraband whenever administered directly to a hostile fleet, which has been done in this case. The voluntary supplies given by a citizen to the enemy of his country would constitute a *corpus delicti* in a trial for high treason. We have no doubt whatever that the said houses have given the Government of

Peru, to the detriment of that of Chile, articles intended to directly assist in the prosecution of military operations, as may be proven by the following items:

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| October 31, 1880. For electric wire and batteries intended for the use of the reserve corps of the army, as per invoice . . . . . . . . | $6,690.81 |
| December 18, 1881. To amount of the following invoices for electric wire and batteries embarked by order and at the expense of the supreme government, less product of the sale of said articles returned to New York, as per statement of sale herewith . . . | 2,752.47 |

See with regard to cables intended for military operations, Calvo, *Droit International,* sections 2721 and 2722, and Martens, *Volkerrecht II.* sec. 132; and also the report of Mr. Renault in the *Annuaire de l'Institut de Droit International,* Vol. 1. 1879-1880, p. 370.

Would not the furnishing of such articles by a neutral be considered as contraband of war? And if it were done in behalf of the enemy of his country, would not the citizen so doing suffer all the force of the law?

As regards the charge in the account current mentioned above:

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| March 18, 1881. To salary to the mechanic Charles E. Pettie, under contract for remodeling Remington rifles, old style | $450.00 |

Mr. Edward Eyre, one of the heads of the houses of W. R. Grace & Co. and Grace Brothers & Co., has not wavered in acknowledging (p. 43 of claimants' depositions) that there was no money in the country (Peru) other than the paper money issued by the dictator, and that they (the said houses) were requested by the Government of Peru to guarantee to this man (Pettie) that he would receive the $450, and that they (Grace) paid him with a draft on New York. The mechanic objected to doing the work and accept Peruvian money. Would not a Chilean citizen who should guarantee the payment of such work, done in behalf of the Peruvian Government during the war with the Government of Chile, render himself liable to be tried by the courts of his country?

Let us also note that W. R. Grace & Co. spontaneously loaned the consul-general of Peru the funds necessary to attach the Chilean cargoes of nitrate while the proceeds of the sale of those cargoes constituted for the Government of Chile a valuable resource for the continuation of the war.

Note the items of the account current:

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| December 28, 1881. To payment to the consul-general in San Francisco to continue his efforts to embargo the nitrate laden in Tarapacá by the Chileans . . . . . . | $300 |

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|---|---|
| June 25, 1880. Payment to the consul-general at San Francisco for instituting prosecution and attachment of the nitrate embarked at Tarapacá by the Chilean authorities . . . . . . . . . . . . . . . . . . . . . . . . . . | 500 |

Finally let us cite the following charge:

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| February 17, 1881. Payment of the bills of the special commissioner for the purchase of arms in the United States—Mr. G. Bogardus . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . | $10,994.02 |

And in connection with this item the letter written by W. R. Grace & Co. to the minister of war of Peru, in which he tells him with respect to this advance for the purchase of arms: " In this case, Mr. Minister, as in all the others, we came forward in all willingness with our services and money."

We believe that the voluntary aid and comfort are proven in a clear and conclusive manner, and that the efforts of the claimants, when they affirm (Recapitulations 1 and 2 of the statement and brief of claimants in answer to the motion of the respondent government) that the payments were made out of funds belonging to the Government of Peru cut no figure, since from their own spontaneous declaration and the confessions set forth on pages 56 and 57 of the depositions for the claimants, it appears that the house of W. R. Grace & Co. advanced funds of its own to Peru to carry out its obligations, in the hope of reimbursing itself later on from the proceeds of the sales of nitrate. And it even appears that the voluntary advances overbalanced the sum proceeding from said sales, a considerable balance resulting in favor of W. R. Grace & Co.

From the facts established it can not be doubted that the houses of W. R. Grace & Co. and Grace Bros. & Co. have given voluntary aid and comfort to the enemies of Chile, and therefore it is held that the motion of the agent of the respondent government be granted, and that claims Nos. 16, 19, 20, 21, 22, and 29 be dismissed for want of jurisdiction.

**Dissenting opinion of Mr. Goode**

The agent of the Republic of Chile has submitted a motion to dismiss these cases for the reason that Grace Brothers & Co. and William R. Grace & Co. are justly chargeable with having given aid and comfort to the enemies of Chile during the years 1880, 1881, and at other times. In support of this motion he has produced certain documentary evidence, consisting of extracts from the general account current of W. R. Grace & Co. with the Government of Peru, presented to said government in 1886, and copies of correspondence between the parties in relation to some of the items charged in said account.

In opposition to said motion the agent of the United States has filed the depositions of Robert T. Clayton, Edward Eyre, Alberto Falcon, O. G. H. E. Kehrhahn, John B. Mulloy, and Henry J. Schenck.

The first item in the general account current relied upon by the Republic of Chile is the following: "January 15, to balance due by the supreme government on the price of the cargo of coal on the ship *Andrew Johnson,* as per vouchers annexed."

The testimony of John W. Grace, Henry J. Schenck, and Edward Eyre proves that this cargo of coal was offered for sale in open market and bought by the Government of Peru as the highest bidder; that it was sold by the claimants in the ordinary course of business upon commission, and that they had no other interest in the transaction whatever.

The next two items are the following: "December 31, 1880. To provisions and naval supplies furnished the squadron in 1880.—January 15, 1881. To provisions and naval supplies furnished the squadron during the first fortnight of January 1881, as per vouchers annexed."

The testimony shows that the provisions and naval supplies referred to were such as were furnished by the claimants to all their customers alike in their general business as ship chandlers.

. . .

The next item reads as follows: " October 31, 1880. To balance of the invoices for insulated wire, electric batteries for the reserve corps of the army."

The testimony shows that the wire and batteries were shipped by W. R. Grace & Co. to the Government of Peru by its orders and at its expense; that they were paid for with the money of Peru in the hands of the claimants; and that claimants did not know at the time of the transaction, and have never known, what use was intended to be made of them.

. . .

The next item reads as follows: "March 18, 1881. To salaries to the mechanic Charles E. Pettie, under contract to remodel Remington minie rifles."

In regard to this item the testimony shows that Pettie, a mechanic and American citizen, had been employed by the Peruvian Government to repair some old rifles; that at that time there was no money in the country except paper issued by the dictator, and that the claimants were asked to guarantee that this man would receive $450, which was paid to him by a draft on New York, and out of the funds of the Peruvian Government.

As to this item, if the claimants are justly chargeable with having given aid and comfort to anybody, an American citizen, and not the Government of Peru, was the beneficiary.

Another item in the general account current is the following: "July 30, 1880. To value of three launches loaned the supreme government and lost in the blockade of Callao, as per record herewith."

It appears from the testimony that ten launches, including the three in question, were forcibly seized by the Government of Peru and used for defensive purposes. As to the seizure of these launches, Mr. Eyre testifies as follows:

> The next item is for the value of three launches. The Government of Peru decided that it was advisable—somewhere in 1880—to make use of all the lighters that were in the bay of Callao for a defense around the discharging dock, or Darsena, as it is called. The chief naval authority in the port notified all the owners of lighters, including the Pacific Steam Navigation Company, the Discharging Dock Company, Grace Brothers & Co., and others, that they would require the lighters, and proceeded to take them. I wish to explain here that the lighters were taken by the authorities, and were not voluntarily tendered or offered by any of the owners. When the Chilean authorities took possession of the port, and we went to find our lighters, we found that three of them had disappeared or been lost. And when the government—Peruvian Government—was re-established, I personally presented petition asking for payment of the lighters that had been lost, and after some trouble in proving the loss and value of the lighters succeeded in getting a decree recognizing the obligation on the government's part.

In this statement he is fully sustained by the testimony of Kehrhahn, Schenck, Falcon, John W Grace, and Mulloy.

I have thus noticed the most important items in the general account current between the claimants and the Government of Peru. It would be impossible to refer to all of them without extending this paper beyond reasonable limits.

After careful examination of all the testimony introduced on both sides, I think the facts may be fairly stated as follows: That long anterior to the war, and as far back as the year 1868, the claimants had furnished the Peruvian Government with naval supplies and provisions; that in the year 1877 they entered into contract with Peru; under which they continued to furnish the same articles; that after the declaration of war in April 1879, and until the capture of Lima in January 1881, the claimants continued to carry out their contract with Peru, that after the Chilean fleet had taken possession of the port of Callao and the Peruvian navy had ceased to exist, the claimants entered into a similar contract with Chile, by which they furnished similar stores and provisions to the Chilean navy; that the claimants, as general merchants and ship-chandlers, were engaged in legitimate trade and commerce with Peru and Chile, and with no purpose of extending aid and comfort to either belligerent; that the claimants had a mercantile house in Peru and in the city of New York; that they had a contract with Peru for the sale of its nitrate in the United States and Canada, and for furnishing naval stores and supplies; that in keeping the account current the claimants charged themselves with the proceeds of the sale of the nitrate and credited themselves with the prices of the articles furnished at the request and by order of Peru. In other words, that the various items of which complaint is made were paid for not with the money of the claimants, but with the money of Peru in the hands of the claimants and subject to the order of Peru. That the claimants observed strict neutrality between the belligerents is abundantly shown by the testimony.

. . .

Certain communications from the claimants addressed to the Peruvian minister of state are adduced for the purpose of sustaining the charge of aid and comfort. These communications are couched in polite and complimentary terms, such as are usually employed in diplomatic intercourse, and were evidently written for the purpose of making pleasant impression upon the Peruvian minister and securing his favorable action upon the subject under discussion, but they are not sufficient to establish the fact that the claimants have given aid and comfort to the enemies of Chile.

In the case of the United States *v.* Lumsden *et al.* (1st Bond's Reports, page 5), in which the defendants were tried for the attempted violation of the neutrality laws of the United States, the court said:

> No proposition can be clearer than that some definite act or acts of which the mind can take cognizance must be proved to sustain the charges against these defendants. Mere words, *written* or spoken, though indicative of the strongest desire and the most determined purpose to do the forbidden act, will not constitute the offense.

No case can be found in which the mere words or expressions of sympathy for one belligerent have been held by any court to constitute a breach of neutrality towards the other belligerent. What is the law applicable to the facts, as disclosed by the testimony in this case? Article I. of the convention under which the commission has been organized provides that:

> All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile, . . . shall be referred to three commissioners, etc.

What is the meaning of the words "aid and comfort," as here employed? It is to be presumed that they were used by the treaty-making power with reference to the well-established principles of international law. Unless there be a breach of neutrality there can be no giving of aid and comfort to a belligerent. If the claimants, citizens of the United States, have done any act that amounts to breach of neutrality towards Chile in her war with Peru, they have given aid and comfort to the enemies of Chile, but not otherwise. In other words, the claimants can not be charged with giving aid and comfort unless they have violated the neutrality laws in their dealings with Peru. Have they done so? I think not. If the claimants in the regular course of trade had sold to Peru arms and munitions of war, the transaction would have been entirely legitimate. In the case of the *Santissima Trinidad* (7 Wheaton, 340) Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States, says:

> There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war to foreign ports for sale. It is a commercial venture which no nation is bound to prohibit, and which exposes the persons engaged in it to the penalty of confiscation.

In Wheaton's *International Law,* Boyd's 3d edition, page 595, the same doctrine is stated as follows:

> A neutral government is bound not to assist a belligerent in any way. On the other hand, the subjects of the neutral are entitled to continue their ordinary trade, and when that trade consists in exporting arms, or ships of war, there arises conflict between the rights of a belligerent and the rights of neutral subjects. A government may not in any case sell munitions of war to a belligerent, but its subjects may provided they sell indifferently to both parties in the war, and provided the trans-action is purely commercial one, and not done with the intent of assisting in the war, *animo adjuvandi,* but simply for purposes of gain. The right which war gives to a belligerent is that of seizing such goods as are contraband, when on their way from the neutral state to his adversary.

Conceding, therefore, for the sake of the argument, that some of the articles sold by the claimants to Peru were contraband of war, I submit that they had the right to sell them, subject only to the right of seizure *in transitu* by the Chilean Government. (See Kent's Commentaries, part 1st, vol. 1, and 11th volume of Opinions of Attorneys-General, page 451.)

But in my opinion the documentary evidence relied upon by the respondent is insufficient to show that any of the goods sold by the claimants to Peru were contraband. They are not found in the list of prohibited articles enumerated in the treaties between the United States and Chile, Peru, or any of the South American republics. The manifest object of those treaties was to promote and encourage free and unrestricted commerce. They only prohibited the transportation and sale of such articles as are actually used in war. The articles mentioned in the documentary evidence referred to were not of that character, and if they had been, the only penalty would have been confiscation in the event of their seizure by Chile while *in transitu* between the United States and Peru.

The learned counsel for the Republic of Chile in support of their contention have cited decisions of the Court of Claims and the Supreme Court of the United States. In my opinion, those decisions have no application whatever to the question now under consideration. They involve the construction of the nonintercourse act of Congress, approved July 13, 1861. They were based upon law of Congress and not upon the law of nations; they involved the question of loyalty and not the question of neutrality. There is a very broad distinction between the two. It is altogether illogical to say that the claimants have given aid and comfort to Peru because they may have done something for which as citizens of the United States they might have been convicted of treason in the late war between the United States and the Confederate States. The phrase "aid and comfort" is comparatively new in international law, and no well-defined meaning has been given, to it by international law writers. It was first employed, I believe, in the treaty between France and the United States establishing a commission for the settlement of French and American claims.

That commission decided that the Le Mores, two French citizens, were not chargeable with giving aid and comfort to the enemies of the United States, although the evidence proved that they had delivered 609 bales of gray cloth to the Confederate authorities under a contract with the Quartermaster's Department to supply the cloth for the army of the Confederate States. This is a very important decision, rendered by an international tribunal under a convention containing the same provision in regard to aid and comfort and should be accepted as strongly persuasive authority in these cases.

In view of the facts and circumstances, I feel convinced that the dismissal of these cases will operate as a great hardship upon the claimants. They have done nothing that good faith did not require in the fulfillment of their contract with Peru, made before the commencement of hostilities with Chile; they have done nothing in violation of the laws of nations which prescribe the duties of neutrals toward belligerents; they have made no discrimination whatever in their dealings with Chile and Peru, and have treated both belligerents alike. If Chile thought proper to declare war against Peru she had the right to do so, but she had no right to interdict legitimate trade between Peru and a neutral American citizen, she had no right to stop the wheels of commerce and thereby inflict loss upon an unoffending neutral. The rights of neutrals should be respected as well as those of belligerents.

If the views of my honorable colleagues are correct, a neutral can only deal with a belligerent at his peril. A declaration of war by one nation against another involves not only the destinies of the two belligerents, but the rights and interests of the rest of mankind. No trade can be carried on with one belligerent without giving aid and comfort to enemies of the other. According to my understanding, such is not a fair construction of the phrase "aid and comfort" used in the first article of the treaty; and I feel constrained to dissent from the decision which has been rendered.

## Case Frederick H. Lovett *et al. v.* Chile, No. 43, decision of 10 April 1894[1]

## Affaire concernant Frederick H. Lovett *et al.* c. Chile, Nº 43, décision du 10 avril 1894[2]

Government responsible for the offense committed in its territory only when the claimant government can furnish the proof that that government was able to prevent

[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2990.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2990.