



UNIVERSITÉ
DE GENÈVE

FACULTÉ DE DROIT
Centre du droit de l'art



United Nations
Educational, Scientific and
Cultural Organization

In partnership with
UNESCO

Morgan Drake, Alessandro Chechi, Marc-André Renold

July 2016

Case 89 Moche Archaeological Objects – Peru v. Johnson

Peru/Pérou – Benjamin Johnson – Archaeological object/objet archéologique – Post 1970 restitution claim/demandes de restitution post 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Criminal offence/infraction pénale – Enforcement of foreign law/applicabilité du droit public étranger – Illicit exportation/exportation illicite – Illicit importation/importation illicite – Illicit excavation/fouille illicite – Ownership/propriété – Procedural issues/limites procédurales – Request denied/rejet de la demande – Donation

After the discovery of the Moche site of Sipán (Peru) in the mid-eighties, many archaeological objects were looted and smuggled out of the country. In 1987, a smuggler who had been involved in the exportation of these objects to the United States contacted United States Customs agents and led to the eventual seizure of 89 Moche artifacts from Benjamin Johnson, a private collector. The government of Peru sued to retrieve the artifacts from Johnson. Peru's claim was unsuccessful and the 89 archaeological objects remained in Johnson's possession.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

ART-LAW CENTER – UNIVERSITY OF GENEVA

PLATFORM ARTHEMIS

art-adr@unige.ch – <https://unige.ch/art-adr>

This material is copyright protected.

I. Chronology

Post 1970 restitution claims

- **1987:** The Moche site of Sipán (Peru) was discovered and looting began shortly thereafter.¹
- **August 1987:** Michael Kelly, who had been working with David Swetnam to illicitly import archaeological objects into the United States (US), brought certain artifacts to Benjamin Johnson's home "that he believed to have come from Peru".²
- **18 September 1987:** Kelly voluntarily contacted US Customs to reveal his role in the illegal importation into the US of Peruvian artifacts, and agreed to become an informant for the federal investigation that was then initiated.
- **1989:** Swetnam and his wife were charged with several crimes relating to smuggling, including conspiracy and customs violations. Swetnam plead guilty to charges relating to nine artifacts and was sentenced to six months in prison, of which he served four.³
- **29 June 1989:** After the Swetnam conviction, Peru brought the instant action against Johnson for the return of artifacts in his collection which Peru alleged came from the looted site of Sipán.⁴

II. Dispute Resolution Process

Judicial claim – Judicial decision

- After the suits against the smugglers were complete, the Government of Peru filed a legal action in the US District Court for the Central District of California (District Court) against Johnson for the recovery of archaeological objects in his collection which were believed to have been smuggled out of Peru from the site of Sipán.⁵

III. Legal Issues

Criminal offence – Enforcement of foreign law – Illicit exportation – Illicit importation – Illicit excavation – Ownership – Procedural issues

- In order to secure the repatriation of the 89 Moche archaeological objects, Peru would have to prove that the artifacts in question actually originated in Peru and not in Bolivia or Ecuador where the ancient Moche society also flourished. Unfortunately for Peru, the District Court found that the possibility that the items could have been excavated in Peru and were identified

¹ Yates, "Swetnam, Drew, Kelly Smuggling Ring of Objects from Sipán".

² *Government of Peru v. Johnson*, 720 F.Supp. 810, 814.

³ Yates, "Swetman, Drew, Kelly Smuggling Ring of Objects from Sipán".

⁴ *Government of Peru v. Johnson*, 720 F.Supp. 810, 811.

⁵ Yates, "Peru v. Johnson".

as belonging to a culture that was in Peru was not enough to justify that the artifacts be returned to that country when they could just as plausibly have been excavated in Bolivia or Ecuador.⁶ Peru would have needed to prove to the court beyond reasonable doubt that the items in question had originated at a site in Peru's borders. Without proper documentation or factual evidence this was simply not possible.

- Even if Peru had been able to prove that the items in question had been excavated from a Peruvian site they would still have to prove ownership over the items, which was problematic without the exact date of excavation due to the country's changing laws.⁷
- The law that was in place in Peru from 1929 to 1985 allowed private individuals to keep archaeological items found before 1929. Regarding items excavated between 1929 and 1985, the same law required that privately owned pre-Columbian artifacts had to be registered in a book that could be found in the National Museum of History within one year of the opening of the book or be surrendered as property to the State. Peru was unable to identify this book, or its location, or if the book had ever been opened to the court's satisfaction.⁸
- On 5 January 1985, the previous law was repealed and a new law was enacted. A Peruvian law expert explained to the District Court that this law meant that "after [5 January 1985] there is also the obligation for private persons to register their archeological objects and if they do not comply with this obligation that could mean that the objects belong to the State".⁹ The court was unable to discern if the enactment of the new law nullified the old. The court decided that in either case, if a private owner took an artifact out of Peru within one year of the opening of the book mentioned in the 1929 law, then title would not have transferred to Peru.¹⁰
- In February 1985, the President of Peru issued a Supreme Decree claiming all Pre-Hispanic artistic objects as belonging to the "nation's cultural wealth" and thus could not be removed from the country. The court found that this decree did not establish national ownership.
- On 22 June 1985, the Peruvian Parliament passed a law that claimed all archeological sites belonged to Peru. The Court ruled that if an artifact was excavated from 5 January 1985 to 22 June 1985, it would belong to the individual that excavated them and not the State.¹¹
- The District Court came to the conclusion that the above laws could be found to have little more effect than export restrictions, and do not create ownership in the State. Just as in *United States v. McClain*, the Court decided that the State's laws did not sufficiently translate an intention of ownership that could be binding upon American citizens.¹²

⁶ *Government of Peru v. Johnson*, 720 F.Supp. 810, 812-813.

⁷ *Ibid.*, 813-816.

⁸ *Ibid.*, 813.

⁹ *Ibid.*

¹⁰ *Ibid.*, 813-814.

¹¹ *Ibid.*, 814.

¹² *Ibid.*, 814-15.

IV. Adopted Solution

Request denied – Donation

- The District Court rejected the Government of Peru’s claim after finding that Peru could not prove ownership of the 89 Moche archaeological objects due to a lack of information regarding where and when the items were excavated. Title and possession of the 89 Moche artifacts thus remained with Johnson.
- Johnson sold a number of pieces to a collector who eventually donated a Moche gold monkey head to the Museum of New Mexico in Santa Fe (New Mexico).¹³ The museum entered into a Memorandum of Understanding with Peru and repatriated the artifact in 2011.¹⁴

V. Comment

- Peru’s inability to prove to the Court’s satisfaction that the 89 Moche archaeological objects in question had come from a Peruvian site and when that excavation happened was a large part of what barred the Peruvian Government from obtaining restitution. In an article on antiquities law, Marion Forsyth discusses how proving provenance when artifacts have been smuggled out of a country can be nearly impossible, especially when the artifacts are from a culture that spanned across two or more modern day countries.¹⁵ Peru tried to answer this complication by bringing in an expert witness who attributed the artifacts to Peru, and more specifically, the Moche culture of Peru. However, as the court pointed out, the Moche culture was also present in Bolivia and Ecuador, and Peru’s expert could not prove to the Court’s satisfaction that the items came solely out of Peru.¹⁶ This same problem has been the downfall of multiple restitution cases in US courts.¹⁷ “Absent documented excavation of the objects, there [is] no proof of their findspot”¹⁸ and it is highly unlikely that looters are going to register their excavations with the governments that are taking from. Obviously, this is a major problem for reparations cases involved in an illicit industry that the United Nations Educational, Social, and Cultural Organization (UNESCO) estimates makes \$5 billion annually.¹⁹
- Several suggestions have been made to help combat the problems art-rich countries face when they come into US courts seeking reparations. One such suggestion is the development of “International Cultural Property Trusts”, or ICPTs, which would take away the problem created by ancient cultures spanning several modern States. It is suggested that countries who fall within ancient cultural borders, for example, Peru, Bolivia, and Ecuador were all inhabited by the Moche culture, would come together to form a trust for the cultural heritage that those

¹³ Yates, “John Bourne Collection”.

¹⁴ United States Department of Justice Office of Public Affairs, “Peruvian Artifact Repatriated”.

¹⁵ Forsyth, “International Cultural Property Trusts,” 197-198.

¹⁶ *Government of Peru v. Johnson*, 720 F.Supp. 810, 812-813.

¹⁷ Kaye, “Art Wars: The Repatriation Battle,” 83.

¹⁸ Forsyth, 200-201.

¹⁹ *Ibid.*, 197.

countries share and that the ICPT would have ownership of the artifacts. This would allow for courts to find that if an object is undoubtedly Moche, that it must have come from one of the ICPT States. This would go a long way to establishing the ownership US courts require by investing each State's interest in artifacts into a collaboratively owned and operated trust. With ICPTs, a court would not be able to prevent repatriations just because an object could have come from either Guatemala or Mexico, establishing that it had to have come from one of those countries in the ICPT would be enough. It would further aid to help consolidate and clarify national ownership laws of States.²⁰

- Another suggestion is for governments to provide economic incentives that undermine the incentives of the illicit art trade. This proposal works to prevent both the supply and the demand of the illicit art market. One suggestion is to reward finder's fees to locals who discover artifacts and turn them into the State. This would act as an economic incentive for the locals, and the State could then decide if a piece was to be placed in national care, or if it could be sold to the international market. By cutting economic advantages for finders to go through illegal channels and by providing a legitimate, well supplied market for those demanding antiquities, this plan would help to stifle the prosperity of the illicit market. Another example of providing economic incentive to stanch illicit excavations can be seen by Italy's hiring of known *tombaroli* (grave diggers) to prevent the clandestine excavation of archeological sites. This provides protection for the sites and steady employment for the *tombaroli*.²¹
- While the above suggestions are still hypothetical, the US is able to impose import restrictions through Cultural Property Implementation Act (CPIA).²² However, the process to acquire import restrictions is lengthy and difficult. In order for these import restrictions to apply, the US must enter into a bilateral or multilateral agreements with foreign States, who must show that their cultural patrimony is in jeopardy from pillage and that the State has taken efforts to secure that patrimony. Once these agreements are formed, no archaeological or ethnological material may be imported into the US without the proper documentation. Any attempts to import these materials without the proper documentation will result in forfeiture and seizure.²³ In 1990, Peru successfully concluded a bilateral agreement with the United States for an emergency ban to protect Moche artifacts from entering the United States without the proper documentation. This agreement was broadened to protect other Peruvian Pre-Columbian cultures in 1997.²⁴

²⁰ Forsyth, 200-210. For further explanation into ICPTs, see the full article.

²¹ Villanueva, "Free Trade and the Protection of Cultural Property," 570-576.

²² 19 U.S.C.S. § 2601 et seq. With the CPIA, which was enacted in 1983, the US implemented the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (17 November 1970, 823 UNTS 231).

²³ 19 U.S.C.S. § 2601.

²⁴ Kaye, 84-91. For additional information about the US/Peru bilateral agreement see: <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/peru>.

VI. Sources

a. Bibliography

- Forsyth, Marion. “International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation.” *Chicago Journal of International Law* no. 8, (2007): 197-211.
- Kaye, Lawrence. “Art Wars: The Repatriation Battle.” 31 *New York University Journal of International Law & Politics*, no. 79-94.
- Villanueva, Robin Hardy. “Free Trade and the Protection of Cultural Property: The Need for an Economic Incentive to Report Newly Discovered Antiquities.” *George Washington Journal of International Law & Economics* (1995): 547-580.

b. Court decisions

- *Government of Peru v. Johnson*, 720 F.Supp. 810.

c. Legislation

- Peru, Law No. 6634 of 1929.
- Peru, Law No. 24047 of 1985, General Law on the Protection of the Cultural Patrimony of the Nation.
- United States, 19 U.S.C.S. § 2601.

d. Documents

- United States Department of Justice Office of Public Affairs. “Peruvian Artifact Repatriated.” *Federal Bureau of Investigations National Press Release*. Accessed June 10, 2016. Publication December 8, 2011. <https://www.fbi.gov/news/pressrel/press-releases/peruvian-artifact-repatriated>.

e. Media

- Yates, Donna. “Swetnam, Drew, Kelly Smuggling Ring of Objects from Sipán.” *Trafficking Culture*. Accessed June 6, 2016. Published August 17, 2016. <http://traffickingculture.org/encyclopedia/case-studies/swetnam-drew-kelly-smuggling-of-objects-from-sipan/>.
- Yates, Donna. “Peru v. Johnson.” *Trafficking Culture*. Accessed June 6, 2016. Published February 21, 2013. <http://traffickingculture.org/encyclopedia/case-studies/peru-v-johnson/>.
- Yates, Donna. “John Bourne Collection.” *Trafficking Culture*. Accessed July 15, 2016. Published August 17, 2016. http://traffickingculture.org/case_note/john-bourne-collection.