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Case Machu Picchu Collection – Peru and Yale University

Peru/Pérou – Yale University – Archaeological objects/objet archéologique – Pre 1970 restitution claims/demandes de restitution pre 1970 – Ownership/propriété – Statute of limitation/prescription – Ad hoc facilitator/facilitateur ad hoc – Diplomatic channel/voie diplomatique – Judicial claim/action en justice – Negotiation/négociation – Settlement agreement/accord transactionnel – Cultural Cooperation/coopération culturelle – Conditional restitution/restitution sous condition

Between 1912 and 1916, Hiram Bingham, a history professor at Yale University, shipped to the United States several artefacts that had been excavated at the Machu Picchu site with the authorization of the Peruvian Government. Peru formally requested restitution in 1918 and 1920, but to no avail. In 2001, negotiations between Peru and Yale University resumed. However, the resulting accord discontended the Peruvian Government. As a result, Peru filed suit in the United States against Yale University seeking the return of the collection and damages. In November 2010, the parties signed an agreement on the return of the Machu Picchu collection to Peru. As part of that accord, Yale University and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC) established the UNSAAC-Yale University International Centre for the Study of Machu Picchu and Inca Culture.

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I. Chronology

Pre 1970 restitution claims

- **1911 and 1915: Hiram Bingham III**, an explorer and history professor at Yale University, conducted **three archaeological expeditions** in the archaeological site of **Machu Picchu** with the support of **Yale University** and of the **National Geographic Society** of the United States and the **authorization of the Peruvian Government**.¹ From the Peruvian Government, Bingham also received free use of the State telegraph system, duty free entry into Peru, and a Peruvian military escort.² Between 1912 and 1916, Bingham shipped to the US several crates containing **over 4,000 artefacts** (including mummies, bones, jewellery and pottery). Ever since, the relics have been in the possession of Yale University's Peabody Museum of Natural History.³
- **1918-1920**: The Peruvian Government **requested the return of the artefacts** exported by Bingham with two formal claims, dated 22 November 1918 and 26 October 1920, addressed to the National Geographic Society.⁴
- **1921: Yale returned** some artefacts, although "the most valuable and archaeologically significant artefacts [...] remain[ed] in the custody [...] of Yale".⁵
- **2001**: The Peruvian Government **requested the return of the Machu Picchu collection** by approaching both Yale University and the National Geographic Society. While the latter was favourable to the return of the collection, Yale refused and launched a touring exhibition on "Machu Picchu: Unveiling the Mystery of the Incas" in **2003**.⁶
- **14 September 2007**: The Government of Peru and Yale University reached an **agreement**.⁷ However, **it was not finalized**.
- **December 2008**: As the 2007 agreement fell through, **Peru filed suit in the District of Columbia District Court** seeking the return of the collection and damages. Peru's claim relied on seventeen causes of action, including violation of Peruvian law, breach of contract, unjust enrichment and fraud.⁸
- **July 2009**: The **case was dismissed on procedural grounds** as the District Court of Columbia upheld Yale University's claim that it had no jurisdiction.⁹ Accordingly, the **lawsuit**

¹ During the first expedition no excavation was conducted, the visit mainly served to clean, photograph and document the site. Rosemary Listing, "The Treasure Quest: Peru, Machu Picchu and the Yale Peruvian Expedition of 1911-1916," *Art Antiquity and Law* (2011): 67, 70.

² Stephanie Swanson, "Repatriating Cultural Property: The Dispute between Yale and Peru Over the Treasures of Machu Picchu," *San Diego International Law Journal* 10 (2008-2009): 469, 471-473.

³ *Ibid.*, p. 470.

⁴ *Republic of Peru v. Yale University*, First Amended Complaint, No. 1:08-CV-02109, 20 April 2009, paras. 114-119.

⁵ *Ibid.*, para. 121.

⁶ Listing, "The Treasure Quest," 76.

⁷ Memorandum of Understanding between the Government of Peru and Yale University, September 14, 2007.

⁸ *Republic of Peru v. Yale University*, No. 1:08-CV-02109, Original complaint, 5 December 2008.

⁹ *Republic of Peru v. Yale University*, No. 1:08-CV-02109, Order granting motion to transfer the case to Connecticut, 30 July 2009.

- was transferred to the District Court for the District of Connecticut where Yale University's campus is located.¹⁰
- **February 2010:** Peru withdrew six of its seventeen charges against Yale University. The 6 dismissed charges accused Yale University of fraud and conspiracy with Bingham for deceiving Peru into believing the artefacts would be returned. The remaining charges alleged unlawful export, wrongful retention of the works and, above all, **unjust enrichment:** Peru intended to recover the objects contested as well as the commercial and financial profits gained by Yale through the exploitation of the Machu Picchu collection.¹¹
 - **23 November 2010:** The Republic of Peru and Yale University signed a **Memorandum of Understanding** thanks to the intervention of US Senator Christopher Dodd.¹² According to this agreement Yale undertook to return all artefacts to Peru upon completion of an inventory.¹³
 - **December 2010:** A series of meetings were held between Yale and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC) "to guide the return of the Materials and to ensure their preservation and the continuation of scientific research through a program of ongoing collaboration".¹⁴
 - **11 February 2011:** Yale University and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC) signed a **partnership agreement establishing the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture.**¹⁵

II. Dispute Resolution Process

Ad hoc facilitator – Diplomatic channel – Judicial claim – Negotiation – Settlement agreement

- The Peruvian Government has been concerned with the restitution of the Machu Picchu collection from the very beginning. In 1918 and 1920, it sought the return of the collection by submitting formal requests based on Peruvian laws.¹⁶ Although the collection was not repatriated, the Peruvian Government submitted a new request only in 2001. However, while

¹⁰ *Republic of Peru v. Yale University*, 3:09-cv-01332, 8 November 2009.

¹¹ Egidio Di Benedetto, "Peru Drops Six Charges in Suit," Yale Daily News, March 22, 2010, accessed November 3, 2011, <http://www.yaledailynews.com/news/2010/mar/22/peru-drops-six-charges-in-suit/>.

¹² Listing, "The Treasure Quest," 78; see also John Christoffersen, "Senator Christopher Dodd Says Artifacts Held by Yale Belong to Peru," *Artdaily.org*, June 10, 2010, accessed June 30, 2010, http://www.artdaily.com/index.asp?int_sec=2&int_new=38572.

¹³ Memorandum of Understanding Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture, February 11, 2011.

¹⁴ *Ibid.*

¹⁵ *Ibid.* See also Andrew Princz, "Machu Picchu Collection Is Peru-Bound," *The Art Newspaper*, March 7, 2011, accessed March 31, 2011, <http://www.theartnewspaper.com/articles/Machu+Picchu+collection+is+Peru-bound/23368>.

¹⁶ *Republic of Peru v. Yale University*, First Amended Complaint, No. 1:08-CV-02109, 20 April 2009, paras. 114-116.

- the National Geographic Society was favourable to return the collection, Yale refused, saying it had fully complied with Peruvian legislation.¹⁷
- Between 2003 and 2007, the Peruvian Government reinforced its efforts to negotiate. This was due to the determination of the then Peruvian President Alejandro Toledo, who made it a priority to pressure Yale University to release the pieces. In addition, the Peruvian claim gained momentum from the wave of disputes launched by the Italian Government to recover prized classical antiquities from certain US museums.¹⁸ As a result, a preliminary settlement agreement was concluded in 2007,¹⁹ whereby the University undertook to transfer legal title to all the artefacts to Peru, while retaining possession of some of them. However, despite broad statements of cooperation and good will from both sides, this agreement was not implemented. The Peruvian Government affirmed that it was unfavourable to the country and its cultural heritage.²⁰ It also did not accept Yale's insistence that the University had valid title and that the return was the result of a magnanimous act on its part. More precisely, the parties failed to agree on which artefacts could remain at the Peabody Museum.²¹ In effect, Yale had unilaterally introduced in its draft agreement the criterion of "museum quality" of the pieces in order to select the objects that could be returned.²²
 - Following the failure of the 2007 agreement, Peru formally withdrew from negotiations and filed suit at the District Court for the District of Columbia alleging that Yale University's continued possession of the Machu Picchu artefacts violated Peruvian Law.²³
 - However, in late 2010, Peruvian stance changed as the Government dropped the lawsuit and returned to the negotiation table. This was mostly due to the intervention of Christopher Dodd, a US Democratic Senator of Connecticut, member of the Senate Foreign Relations Committee and chairman of its subcommittee on Latin America. He met many times with Peruvian President Alan Garcia and other government officials as well as with Yale representatives to facilitate a settlement of the dispute.²⁴ Crucially, in a statement Senator Christopher Dodd said: "These artifacts do not belong to any government, to any institution or to any university – they belong to the people of Peru. I plan to work with both parties to resolve this dispute quickly, amicably, and return the artifacts to their rightful owners".²⁵ His intervention led to the conclusion of the Memorandum of Understanding of 23 November 2010 and to the Partnership Agreement of 11 February 2011. With the latter, the parties agreed on the

¹⁷ Rupert Cornwell, "Peru Tells Yale It Wants Its Machu Picchu Treasures Back (after 100 Years)," *The Independent*, February 3, 2006, accessed July 14, 2011, <http://www.independent.co.uk/news/world/americas/peru-tells-yale-it-wants-its-machu-picchu-treasures-back-after-100-years-465452.html>.

¹⁸ Hugh Eakin, "Inca Show Pits Yale against Peru," *The New York Times*, February 1, 2006, accessed November 3, 2011, <http://www.nytimes.com/2006/02/01/arts/design/01mach.html?pagewanted=all>.

¹⁹ Memorandum of Understanding between the Government of Peru and Yale University, September 14, 2007.

²⁰ Swanson, "Repatriating Cultural Property," 491-492.

²¹ *Ibid.*, 486-491.

²² *Ibid.*

²³ *Republic of Peru v. Yale University*, No. 1:08-CV-02109, Original Complaint, 5 December 2008.

²⁴ Christoffersen, "Senator Christopher Dodd Says Artifacts Held by Yale Belong to Peru."

²⁵ Daniel Hernandez, "Yale Agrees to Return Machu Picchu Artifacts to Peru, Ending Dispute," *Los Angeles Times*, November 22, 2010, accessed November 3, 2011, <http://latimesblogs.latimes.com/laplaza/2010/11/peru-yale-artifacts-dispute-inca.html>.

establishment of the UNSAAC-Yale University International Centre for the Study of Machu Picchu and Inca Culture in Cusco, Peru.

III. Legal Issues

Ownership – Statute of limitation

- The controversy over the Machu Picchu collection between Peru and Yale University was something of a test case as it did not originate from the classical events of theft, illicit exportation or spoliation under foreign domination, i.e. colonization or armed occupation. Moreover, this dispute raised interesting questions pertaining to, *inter alia*, recognition of sovereign authority over national cultural heritage and limitation periods.
- The **first legal issue** that is necessary to discuss is that of **ownership**. This issue should be examined in light of the pertinent Peruvian legislation. At the time of the Bingham expeditions, the most relevant legal texts were the Civil Code of 1852 and the Supreme Decree of 27 April 1893.
 - o Article 522 of the Civil Code provided that all treasures and other buried objects that are found on vacant or public property belong to the finder.²⁶
 - o The Supreme Decree of 1893 was aimed to preserve the archaeological objects found in the territory of the Republic of Peru. Its Article 1 acknowledged that its aim was to prevent the mutilation, excavation and removal of artefacts from Peruvian sites. Further, Article 6, part 2, of the Decree forbade exploration or excavation of archaeological sites in Peru. It also declared that any site which may be found within the national territory was declared national monument. Finally, Articles 3 and 4 of the 1893 Decree established that permission to conduct excavations in Peru could be granted only by the National Conservation Commission.²⁷
 - o The above-mentioned Article 6, part 2, was added to the 1893 Supreme Decree with a Decree of 2 September 1911, issued by the then President of Peru Augusto Leguia. The decree of 1911 declared all Incan monuments to be “national property” and that only duplicates of objects could be taken out of the country.²⁸
 - o Bingham was allowed to conduct excavation with a Decree of 31 October 1912, issued by the then President of Peru Guillermo Billinghurst. The Decree acknowledged that the permission requested was contrary to the 1893 Decree, but allowed Bingham to conduct the excavations in the Department of Cuzco as an exception (and retrospectively), until December 1912. The Decree also contained certain conditions. The most important of these was that the Government of Peru reserved to itself the right to request from Yale University and the National Geographic Society the return of the unique specimens and duplicates. Furthermore, a “working agreement” was

²⁶ Swanson, “Repatriating Cultural Property,” 483.

²⁷ Listing, “The Treasure Quest,” 69-70.

²⁸ Ibid.

- annexed to the 1912 Decree. This constituted an official contract according to which Bingham had to place at the disposal of the Consul of Peru in New York all archaeological or geological specimens that have been exported from Peru within two years of the date of their arrival.²⁹
- On 17 January 1916 a new decree was issued. This concerned the exportation of the artefacts found during Bingham's third expedition, which took place between 1914 and 1915. This decree stated "that all the excavated materials would be brought to Lima for examination at the National Museum before anything was shipped to Yale, and that all materials would be recognized as national property of Peru and would be returned upon request".³⁰ Therefore, this Decree allowed the exportation of the objects excavated after 1912, notwithstanding the terms of the decree of 1911. However, the 1916 decree also established that such materials constituted national property of Peru and that Yale University and the National Geographic Society "pledge to return, in the term of eighteen months from [the date of issue], the artefacts whose export had been authorized".³¹
 - In light of the above, it is clear that Peru did have laws in force at the time of Bingham expeditions governing archaeological finds and vesting ownership of any artefacts unearthed from Peruvian soil in the State.
 - In spite of the above, Yale rebuffed all restitution requests. At first, Yale simply postponed a response. Subsequently, it asserted that all artefacts exported by Bingham had been repatriated at the beginning of the 1920s. Next, Yale claimed that the artefacts have been permanently transferred to Yale University pursuant to Article 522 of the 1852 Civil Code, which provided that all treasures and other buried objects that are found on vacant or public land belong to the finder. In addition, the University argued that both the 1911 and 1912 decrees were invalid because they were based on the 1893 decree that had been previously voided.³²
 - Peru countered the argument that ownership had passed to Yale by asserting that the items had been simply loaned and subject to a demand for return at will. It did so by continuously upholding the validity of the decrees of 1911, 1912 and 1916.³³
- The **second legal issue** to be pointed out concerns the **timeliness of the legal action**. It was evident that the relevant statutes of limitations barred Peru's legal action in the courts of Columbia and Connecticut, since the artefacts were removed prior and after 1916.³⁴ However, this issue was never discussed in court as the lawsuit was discontinued.

²⁹ Ibid., 74-75.

³⁰ Swanson, "Repatriating Cultural Property," 480.

³¹ Ibid.

³² Ibid., 483-484.

³³ Ibid.

³⁴ In particular, Connecticut has a fifteen-year statute of limitations regarding adverse possession and a six-year statute of limitations for breach of contract (ibid.).

IV. Adopted Solution

Cultural Cooperation – Conditional restitution

- The Memorandum of Understanding of 23 November 2010 and the Partnership Agreement of 11 February 2011 were functional to the repatriation of the collection. As they stand, these agreements offer concrete incentives for both sides. On the one hand, they offer the opportunity to enter into a partnership to help protect and study Peruvian cultural heritage. On the other hand, the agreements help enrich American cultural life through research, educational programs and loans.
- In concrete terms, the parties did not simply agree on the restitution of the contested artefacts: Yale University and the Universidad Nacional de San Antonio Abad del Cusco **established the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture**. This jointly administered Center includes a museum exhibition space, a storage site for archaeological artifacts, a laboratory and a research area. The accord outlines the essential functions of the Center, which include the preservation of the artefacts, making the objects available for study and to the public and promoting research through conferences. The agreement also creates a framework for academic exchange between Yale University and UNSAAC, including fellowships and support for visiting scholars. Finally, the accord establishes that, in recognition of Yale's historic role in the scientific investigation of Machu Picchu, the Center will loan a small number of artefacts for display at the Yale Peabody Museum of Natural History.³⁵

V. Comment

- From a strictly legal point of view, the case of the Machu Picchu collection was quite straightforward: although the Peruvian legislation in force at the relevant time vested title to the artefacts unearthed from Peruvian soil in the State and provided for the return of the objects exported by Bingham, Peru had no legal means to oblige Yale to return the contested artefacts because of the relevant statutes of limitation had elapsed.
- Moreover, the treaties adopted under the aegis of UNESCO, that is, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (1970 UNESCO Convention) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 (1995 UNIDROIT Convention), were inapplicable *ratione temporis*.
- In spite of the above, it was evident that Yale's manifest disregard of Peruvian legislation was inconsistent with the trend of repatriation which developed at the beginning of the 2000s mostly as a result of UNESCO's standard-setting activity – regardless of the fact that legal technicalities allowed it to retain the collection.

³⁵ See Memorandum of Understanding Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and Inca Culture, February 11, 2011.

- It is interesting to note that the stance maintained by Yale University was at variance with the principles contained in the 1970 UNESCO Convention and 1995 UNIDROIT Convention. First, one of the recitals of the 1970 UNESCO Convention reads: “cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles”. Second, Article 2 of the 1970 UNESCO Convention states that, besides the illicit import or export of cultural property, the “impoverishment of the cultural heritage of the countries of origin of such property” is also caused by the “transfer of ownership”. Third, Article 3(2) of the 1995 UNIDROIT Convention states that “a cultural object which has been [...] lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place”.
- Moreover, although Peru had no legal means to oblige Yale to return the collection, there existed several arguments that compelled the University to repatriate Peru’s cultural heritage. Apart for the public sentiment – the movement for repatriation had spurred popular protests and initiatives in both Peru and the United States – there were ethical considerations. In this respect it is worth mentioning that the International Council of Museums (ICOM) Code of Ethics establishes that museums must not acquire “by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held” (Principle 2.2). It further provides that museums should be prepared to develop partnerships and “to initiate dialogues for the return of cultural property to a country or people of origin” (Principles 6.1 and 6.2). This is particularly important when it “can be demonstrated [that cultural objects] have been exported or otherwise transferred in violation of the [law], and shown to be part of that country’s or people’s cultural or [...] heritage” (Principle 6.3). Still with regards to ethics, it is worth considering that Bingham as well as the National Geographic Society of the United States did not support Yale’s retentionist approach as they had affirmed that the contested objects belonged to the Peruvian Government.³⁶ In this regard, it is also worth mention that the preamble and Article 2 of the 1970 UNESCO Convention stress that “international co-operation constitutes one of the most efficient means of protecting each country’s cultural property”.
- In summary, it can be argued that Yale ultimately agreed to resolve the case by negotiating an accord in order to avoid reputational harm and build a *cooperative partnership* based on mutual benefit. In effect, the creation of the UNSAAC-Yale University International Center appears to be an ideal compromise. Richard C. Levin, President of Yale University, explained that “[t]his agreement ensures the expanded accessibility of these Machu Picchu collections for research and public appreciation in their natural context and with the guidance of two great universities”.³⁷ In addition, the agreement reached by the parties also represents a suitable solution to recognize Yale’s custodianship of the pieces, that is, of the funds and efforts poured into preservation, study and exhibition over the past ninety years. One can only agree with Richard Burger, a Yale University professor, that “[...] the courts were not the best venue to decide this [case]” and “that the agreement will be a milestone in international

³⁶ Listing, “The Treasure Quest,” 67 and 76.

³⁷ Christoffersen, “Yale Agrees to Return Incan Artifacts to Peru.”

archaeological restitution cases, and that the resulting academic, scientific and institutional outcomes could be emulated in similar situations”.³⁸

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