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# Repatriating Cultural Property: The Dispute Between Yale and Peru Over the Treasures of Machu Picchu

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## I. INTRODUCTION

The repatriation of cultural property is a controversial issue throughout the world. It creates a sharp divide between states with a wealth of antiquities, such as Greece or Peru, and states which, lacking such extensive cultural property, have nonetheless built international museums housing the patrimony of other nations. The conflict surrounding the proper ownership of the Elgin marbles, probably the most famous dispute over cultural property, is but one example of many.<sup>1</sup> In recent years, calls for the repatriation of cultural property have become increasingly common, involving world famous museums such as the Metropolitan Museum of Art and the J. Paul Getty Museum.

This Article will examine the ongoing dispute over the Incan artifacts currently housed at the Peabody Museum at Yale University. These artifacts, originally unearthed by Yale professor Hiram Bingham in his excavations of Machu Picchu and surrounding areas, have generated significant controversy between the University and the Peruvian Government. Although Peru did not have the clear legal framework for the ownership of cultural patrimony at the time of Bingham's expeditions when the artifacts were found,<sup>2</sup> the nation's patrimony was a central subject of public, intellectual and legal debate even in 1911, the year of Bingham's first expedition.

This Article will examine Bingham's three expeditions to Peru, focusing on the legal framework and controversy surrounding his excavation and exportation of thousands of artifacts to Yale. Following this discussion will be an examination of the equally contentious failed negotiations for the return of these Incan artifacts to Peru and the legal frameworks proposed by Peru and Yale for their repatriation. Many of the arguments about the nature and meaning of cultural patrimony that surfaced during the original expeditions were repeated in the course of Peru and Yale's negotiations, demonstrating the different legal frameworks of Peru and the United States. While the result of the initial debates was the export of thousands of Incan artifacts to the United States, there should have been an opportunity in the recent negotiations for a settlement that did not repeat the neocolonial aspects of Bingham's original expeditions and instead addressed the questionable manner in which the objects were originally exported. Most recently, these debates have become the subject of a

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1. See JOHN HENRY MERRYMAN, ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 346–363 (2007).

2. See *Ley General del Patrimonio Cultural de la Nación* (2004, No. 28296) (Peru).

complaint filed in U.S. District Court for the District of Columbia after the most recent negotiations broke down.<sup>3</sup>

An overall examination of the historical record pertaining to the three expeditions demonstrates that Peru never transferred full legal title over the artifacts to Yale and that Yale's legal arguments for retaining possession are based primarily on procedural loopholes. Although the outcome of the current lawsuit between Yale and Peru in a United States Court is highly uncertain, important ethical considerations, more recent developments in international law, and the problematic history of the objects clearly point to the need for their return to their country of origin.

## II. HIRAM BINGHAM AND MACHU PICCHU

Hiram Bingham, an untenured professor at Yale University, originally "discovered" the archaeological site of Machu Picchu in 1911.<sup>4</sup> Almost any Peruvian will quickly inform the listener, however, that the local population already knew of the site's existence and simply aided Bingham in bringing it to the attention of the world at large.<sup>5</sup> Perhaps the most diplomatic way to frame the issue is to consider Hiram Bingham as the academic discoverer of the world-famous site,<sup>6</sup> which was recently named one of the Seven Wonders of the World.<sup>7</sup>

Over the course of three expeditions to Peru in 1911, 1912, and 1914, Bingham excavated and exported more than 4,000 objects,<sup>8</sup> almost all of

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3. On December 5, 2008, Peru filed suit against Yale in the United States District Court for the District of Columbia seeking the return of the artifacts. The trial is still in its early stages and an outcome is far from clear. This Article is not designed to address the specific details of the recently-filed case, but rather to look at the dispute between Yale and Peru more broadly from a legal perspective. Complaint, Republic of Peru v. Yale University, No. 1:08cv02109 (D.D.C. filed Dec. 5, 2008), available at <http://news.justia.com/cases/featured/district-of-columbia/dcdce/1:2008cv02109/134251/>.

4. See, e.g., Hiram Bingham, *In the Wonderland of Peru: The Work Accomplished by the Peruvian Expedition of 1912, under the Auspices of Yale University and the National Geographic Society*, NAT'L GEOGRAPHIC MAG., Apr. 1913.

5. See, e.g., David Montgomery, *Peru Tries to Recover Gold from Yale's Ivory Tower*, WASH. POST, Mar. 9, 2006, at C1 (quoting Peruvian Ambassador Eduardo Ferrero, "I say 'rediscoverer' not 'discoverer' because Machu Picchu was already known by people"); MARIANA MOULD DE PEASE, *MACHU PICCHU Y EL CÓDIGO DE ÉTICA DE LA SOCIEDAD DE ARQUEOLOGÍA AMERICANA* (2003).

6. LUIS E. VALCARCEL, MEMORIAS, 185 (José Matos Mar, José Deustua C. & José Luis Rénique eds., 1981).

7. New Seven Wonders, <http://www.new7wonders.com> (last visited Jan. 25, 2009).

8. This number of artifacts held by Yale is currently under dispute, but somewhere around 4,000 has been the generally accepted number until quite recently. Paul Needham, *Discrepancy Clouds Count of Inca Items*, YALE DAILY NEWS, Apr. 14, 2008, available at

which are currently in the possession of Yale University.<sup>9</sup> Looking at these three expeditions in turn not only provides critical information about the legal status of the artifacts, but also provides an equally important historical context from which to analyze their controversial acquisition.

*A. 1911: First Yale Peruvian Expedition and the  
Re-Discovery of Machu Picchu*

The original discovery of Machu Picchu took place as but one element of the Yale Peruvian Expedition (YPE) in 1911. With the broad-ranging goal of expanding the field of human knowledge through an exploration of Latin America, Bingham decided to travel to Peru to search for Incan ruins, conduct a geographic survey of a large swath of the Andes, and to reach the “apex of America” by climbing the unexplored mountain Coropuna.<sup>10</sup> Despite later accounts, it appears that Bingham attributed little significance to his original discovery of the site and quickly moved on to search for other, seemingly more important, ruins. In subsequent re-tellings of the discovery, however, Machu Picchu grew significantly in importance.<sup>11</sup> Near the end of their time in Peru, Bingham sent one of the other members of the Expedition to learn more about the site, creating a detailed map of the area, but few, if any, objects were excavated.<sup>12</sup>

The first YPE should be viewed in a variety of interrelated historical contexts. On a political level, Bingham’s travels to Peru took place after the 1904 Roosevelt Corollary to the Monroe Doctrine, which asserted U.S. economic and military influence over the region.<sup>13</sup> In conjunction with this political assertion of influence, the American business community was also extensively involved in developing its own interests in the

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<http://www.yaledailynews.com/articles/view/24407>.

9. *Peru Prepared to Sue Yale Over Inca Artifacts*, CBC ARTS, Dec. 5, 2005, [http://www.cbc.ca/arts/story/2005/12/05/peru\\_051205.html](http://www.cbc.ca/arts/story/2005/12/05/peru_051205.html).

10. See ALFRED M. BINGHAM, *PORTRAIT OF AN EXPLORER: HIRAM BINGHAM, DISCOVER OF MACHU PICCHU* 124 (1989).

11. *Id.* at 171.

12. *Id.* at 226.

13. President Theodore Roosevelt, *Fourth Annual Message to Congress*, Dec. 6, 1904, in 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790–1966, 2105, 2134 (Fred L. Israel ed. 1966), available at <http://www.latinamericanstudies.org/us-relations/roosevelt-corollary.htm> (stating that “[c]hronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society [however], may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power”); see also Christopher Heaney, *Did Yale Plunder Peru?: Bonesmen*, THE NEW REPUBLIC, Oct. 23, 2006, at 16 (arguing that Bingham’s own views of these policies varied widely over the years. After his first visit to the region, he began to view the doctrines as impinging upon South American sovereignty, but his time in Peru eventually lead him to reverse his position).

area.<sup>14</sup> Finally, the YPE was but one example of university-sponsored academic exploration in the region: “[c]ompetition for primacy and prestige among Harvard, Yale, Stanford, and other U.S. and European universities sent scientific adventurers to the Amazon basin, Lake Titicaca, the Apurimac valley, and other sites of suspected archaeological interest.”<sup>15</sup> Yale in particular was in the process of transforming itself from an undergraduate college to a research university. To this end, the University was expanding its fields of research and graduate programs, focusing on overseas research.<sup>16</sup>

Given this confluence of interests in Latin America, Bingham’s initial expedition received significant support from both the U.S. and Peruvian governments. Assistance from the U.S. government included a waiver of customs payments by the U.S. Treasury Department<sup>17</sup> and, more importantly, letters of introduction to Peruvian officials provided by the U.S. State Department.<sup>18</sup> United Fruit shipping lines provided discounted passage to Peru.<sup>19</sup> From the Peruvian government, the Expedition received free use of the state telegraph system,<sup>20</sup> duty free entry into Peru as a scientific expedition,<sup>21</sup> and a Peruvian military escort throughout the majority of the expedition.<sup>22</sup> Upon arrival in Peru, Bingham was even granted an audience with President Augusto Leguía.<sup>23</sup>

It appears that Bingham did not initially travel to Peru with plans to export thousands of artifacts. In March of 1911, he told the New York Sun, “[o]f . . . course we are not going with any idea of hunting buried treasures. Should anything be found in that line it would become the

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14. Ricardo D. Salvatore, *Local versus Imperial Knowledge: Reflections on Hiram Bingham and the Yale Peruvian Expedition*, 4 NEPANTLA: VIEWS FROM SOUTH 67, 68 (2003).

15. *Id.*

16. *Id.*

17. See Letter from Lee McClung, U.S. Treasurer, to Hiram Bingham (Jan. 21, 1911) (on file with Yale Sterling Memorial Library).

18. Letter from Hiram Bingham to William Howard Taft, U.S. President (May 29, 1911) (on file with Yale Sterling Memorial Library); Letter from the Sec’y to U.S. President Taft to Hiram Bingham (June 1, 1911) (on file with Yale Sterling Memorial Library).

19. BINGHAM, *supra* note 10, at 130.

20. Letter from the assistant to Gen. Dir. to Ry. Telegraph Operators (Jan. 16, 1909) (on file with Yale Sterling Memorial Library).

21. Letter from Peruvian Legation, Chargé d’Affaires of Peru, to Hiram Bingham (June 23, 1911) (on file with Yale Sterling Memorial Library).

22. Bingham, *supra* note 4, at 403.

23. BINGHAM, *supra* note 10, at 138.

property of the Peruvian government.”<sup>24</sup> Despite such statements, however, there was opposition to the expedition from certain segments of Peruvian society, particularly from intellectuals and those living closer to the original Incan capital of Cuzco. To these Peruvians, even basic excavations were controversial, let alone the exportation of any objects found in the course of such excavations. The Society to Protect Historical Monuments was formed by a group of concerned Peruvians, who lobbied President Leguía to issue a decree under which excavated objects would belong to the state and the exportation of antiquities, “whatever their class or condition,” would be prohibited.<sup>25</sup> Given this controversy, President Leguía modified an 1893 executive decree regarding cultural patrimony, declaring all Incan monuments to be “national property;” only duplicates of objects could be taken out of the country.<sup>26</sup> In the end, very few artifacts were exported to the U.S., primarily suspected prehistoric bones from an archaeological site closer to Cuzco. At Machu Picchu itself, the Expedition’s activities consisted primarily of mapping and photography.<sup>27</sup>

#### *B. 1912: Second Yale Peruvian Expedition and Excavations at Machu Picchu*

Although the 1911 expedition did not explicitly focus on the excavation of archaeological artifacts, the 1912 expedition leaders had this goal in mind. This expedition was the first financed by the National Geographic Society, which called for Bingham to “excavate and bring back a shipload of antiquities for your museum at Yale.”<sup>28</sup> Because of President Leguía’s 1911 decree prohibiting the export of objects, Bingham deemed it necessary to gain a broad-based concession for excavations from the Peruvian government.<sup>29</sup> He set out the problem clearly in a letter to U.S. President William Howard Taft, a fellow Yale graduate:

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24. Christopher Heaney, Op-Ed., *Stealing From the Incas*, N.Y. TIMES, Oct. 7, 2007, at CT19 (quoting THE NEW YORK SUN, Mar., 1911).

25. Heaney, *supra* note 13, at 15. Bingham, meanwhile, viewed these protections as simply “local jealousy and intellectual posturing.”

26. Executive Decree, Sept. 2, 1911 (Peru), *reprinted in* MARIANA MOULD DE PEASE, *supra* note 3, at 141; *see also* BINGHAM, *supra* note 10, at 279.

27. BINGHAM, *supra* note 10, at 279.

28. Christopher Heaney, *Finders Keepers?*, LEGAL AFFAIRS, Mar. 2006, at 6, 7.

29. BINGHAM, *supra* note 10, at 279.

The Peruvian government, in order to protect its ancient monuments from devastation, chiefly by local treasure hunters, has passed a law decreeing that all ruins and ancient cities are the property of the Peruvian government, and must not be excavated by private persons. A law has also been passed forbidding the exportation from the country of Peruvian antiquities. . . . If satisfactory comprehensive archaeological exploration is to be carried on in Peru it will be necessary to secure from the Peruvian government either a concession or some other form of legal permission which would enable plans to be made for an undertaking to last fifteen or twenty years. This concession ought to grant the right freely to excavate and explore the remains of ancient sites. It ought also to make possible the deportation from Peru of a certain amount of the material found in the work of excavation.<sup>30</sup>

Bingham spent a great deal of time and energy conducting similar correspondence with the President, as well as with the State Department, the Peruvian ambassador to the United States, the Peruvian president, and lawyers in the United States and Lima.<sup>31</sup>

Bingham, with the assistance of New Haven law firm Bristol, Stoddard, Beach and Fisher, drafted a proposed concession that he hoped would be presented to the Peruvian Parliament prior to the end of President Leguía's term. Bingham and the law firm proposed various drafts of a concession agreement. There were even preliminary discussions of a formal treaty between the two nations since Bingham had close ties to both the American and Peruvian governments.<sup>32</sup> One of the later versions of the concession agreement, drafted in August 1912, provided that the objects would be divided between Peru and Yale, setting out a specific process for each party to choose the items it desired.<sup>33</sup> Because Yale's president, Arthur Twining Hadley, thought the University's prestige

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30. Letter from Hiram Bingham to William Howard Taft, U.S. President, (Feb. 12, 1912) (on file with Yale Sterling Memorial Library).

31. Letter from Hiram Bingham to H.C. Ballén, Esq., Lima (Feb. 15, 1912) (on file with Yale Sterling Memorial Library); Letter from Huntington Wilson, Acting Sec'y of State, U.S. Government, to Hiram Bingham (April 8, 1912) (on file with Yale Sterling Memorial Library).

32. Letter from Hiram Bingham to Louis Schaefer (Apr. 29, 1912) (on file with Yale Sterling Memorial Library).

33. Preliminary Agreement, Agustin G. Ganoza, Hiram Bingham and H. Clay Howard, Aug. 19, 1912 (on file with Yale Sterling Memorial Library). It is interesting to note that this preliminary agreement also included an arbitration provision. Additionally, Bingham agreed

to place at the disposal of the Consul General of Peru in New York within two years of the date of their arrival from Peru examples of all the kinds of archeological or geological specimens that have been exported from Peru and agrees further to place at his disposition all articles of gold that may be found whether duplicates or not, except as herein noted.



would be significantly “enhanced by having [the university’s] name permanently associated with scientific exploration,” Yale gave substantial support to Bingham<sup>34</sup> and allowed him to act as an agent of the University in the concession negotiations.<sup>35</sup> It is interesting to note that Leguía favored Yale as the sole beneficiary of an exclusive concession: “[i]n broadly acquiescing, [Leguía] said that he would rather have such rights placed in the United States than in Europe; and granted to such a university as Yale, rather than be the subject of indiscriminate concessions of conflicting rights, and perhaps to irresponsible concessionaires.”<sup>36</sup>

Bingham’s efforts to receive a concession were stymied by Peruvian elections overthrowing his ally, President Leguía. Although Leguía signed a concession to Yale immediately prior to leaving office in 1912, the requisite congressional approval was never obtained. Negotiations were further complicated by a formal protest from Harvard University that Yale was monopolizing archaeological exploration in Peru.<sup>37</sup>

An initial meeting between Bingham and the newly-elected president, Guillermo Billinghurst, ended poorly.<sup>38</sup> According to Bingham’s account of the meeting,

Mr. Billinghurst is a very wealthy man whose chief interest all his life has been fighting for money. . . . He has been remarkably successful and has acquired a profound respect for his own opinions. His interest in science is limited to the value of nitrates; but he wishes to stand in with the U.S.A. and he says he will not oppose our project although he considers it a ‘disgrace’ to Peru. He knows the country ought to do this kind of work itself, but is far too poor.<sup>39</sup>

According to Bingham, the entire YPE had come under suspicion due to its close relationship to both the deposed Leguía and the unpopular U.S. ambassador, as well as suspicions of cultural property theft by a prominent German archaeologist.<sup>40</sup> Bingham spoke bitterly of the significant

34. BINGHAM, *supra* note 10, at 277.

35. Letter from Hiram Bingham to Arthur Twining Hadley, President, Yale University (Apr. 26, 1912) (on file with Yale Sterling Memorial Library).

36. Letter from H. Clay Howard, U.S. Ambassador to Peru, to William Taft, U.S. President (Apr. 11, 1912) (on file with Yale Sterling Memorial Library).

37. Hugh Eakin, *Inca Show Pits Yale Against Peru*, N.Y. TIMES, Feb. 1, 2006, at E1.

38. BINGHAM, *supra* note 10, at 284.

39. Letter from Hiram Bingham to Arthur Twining Hadley, President, Yale University (Oct. 4, 1912) (on file with Yale Sterling Memorial Library).

40. *Id.* (“The whole trouble seems to be that we are under suspicion; for the following reasons: (1) Mr. Leguía got accustomed to pushing his pet measure through without regard to the letter of the law. Ours was one of his pets. . . . He is supposed to have been moved by very base motives. Hence we must be crooked. And as we offer them no bribes they are balky. (2) Mr. Howard, the American Minister is also under suspicion. He has congregated with every concession carpetbagger that has arrived from the U.S.A. . . . (3) Dr. Max Uhle, the late director of the National Museum, worked in a most plausible fashion pretending to increase the Government’s collections in Archeology,

difficulties of doing business in Peru, saying, "Peru is like all the rest. The only difference was that the former president smiled on our scientific work—and so all the government officials smiled. The present president yawns (or would if he dared) and the Peruvians copy his manners."<sup>41</sup>

Eventually, Bingham decided to drop the idea of a concession which would unequivocally give Yale extensive excavation rights, and attempted to obtain a more limited but still beneficial executive decree.<sup>42</sup> At one point immediately preceding the decree's enactment, Bingham wrote that the Peruvian Minister of Justice had suggested the YPE be allowed to take only half of the artifacts it had collected, giving the Peruvian government "everything they thought nice."<sup>43</sup> However, one influential member of Bingham's party "quietly reminded [the Minister] how unpleasant it would be for Peru to have us return to the States and say we had been robbed of half our collections on a technicality. This finished them, for fear is the ruling passion here."<sup>44</sup>

Despite these setbacks, the former president retained a great deal of political power and provided Bingham with assistance, particularly after Bingham agreed to take Leguía's son back to the United States to attend boarding school.<sup>45</sup> Due, in part, to Leguía's backing, as well as Bingham's threats, President Billinghurst finally issued an executive decree on October 31, 1912.<sup>46</sup> After noting that Bingham's past excavations had failed to comply with the 1893 Supreme Decree controlling cultural property, the 1912 decree stated that "international etiquette and deference to [official scientific expeditions] induces the Government to accede *as an exception and just this once*" to the demands of the YPE.<sup>47</sup> It also cited an executive decree from the time of Bingham's first

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and is believed by many of the best men in the Geographical Society to have smuggled out of the country nine tenths of his discoveries. Hence all foreign archeologists are in bad odor and we are probably no exception.").

41. Letter from Hiram Bingham to Arthur Twining Hadley, President, Yale University (Oct. 21, 1912) (on file with Yale Sterling Memorial Library).

42. Letter from Hiram Bingham to Arthur Twining Hadley, President, Yale University (Oct. 7, 1912) (on file with Yale Sterling Memorial Library).

43. Letter from Hiram Bingham to Arthur Twining Hadley, President, Yale University (Oct. 26, 1912) (on file with Yale Sterling Memorial Library).

44. *Id.*

45. Letter from Augusto Leguía, former President, Peru, to Hiram Bingham (Nov. 30, 1912) (on file with Yale Sterling Memorial Library); BINGHAM, *supra* note 10, at 286–87.

46. Resolución Suprema (Oct. 31, 1912, No. 17848) (Peru).

47. *Id.* (emphasis added).

expedition under which “the Supreme Government may concede duplicate objects extracted from excavations as long as the concession is made to official scientific corporations.”<sup>48</sup>

Most importantly, under the 1912 decree, Peru “reserve[d] its right to request” return of artifacts. This critical caveat in its entirety reads as follows: “[t]he Peruvian Government reserves to itself the right to exact from Yale University and the National Geographic Society of the United States of America the return of the unique specimens and duplicates.”<sup>49</sup> One of Bingham’s key contacts in Lima attributed little importance to this section of the decree in a November letter, stating: “[o]f course, that part of their Decree in which they state they will have a right to call on the Museum for any of these things which they may take a fancy to in the future is merely put in to truckle to public opinion here.”<sup>50</sup> Under the new law, excavations were only allowed to continue until December 1912.<sup>51</sup>

At the same time, public outcry erupted over the exportation of the artifacts. For example, a November 4, 1912 letter to a Cuzco newspaper declared that “anyone who wanted to study the riches of Peru ought to come to the country itself and leave their dollars there, for it would be the ultimate insult if Peruvians ever had to go to North America to study what used to be in Peru.”<sup>52</sup> Nonetheless, Bingham was able to export the artifacts he had excavated from Machu Picchu.

### *C. 1914–1916 Expedition: Third Yale Peruvian Expedition and Further Excavations*

Almost as soon as he returned from Peru in 1912, Bingham eagerly began planning a third archaeological expedition to the country. Despite prior setbacks in obtaining authorization to excavate and export objects, Bingham set out to obtain “[a]n assurance from the Peruvian government that [the expedition would] . . . be accorded the privileges of free entry, permission to excavate, and all the facilities usually accorded to scientific exploring expeditions” prior to his arrival in Peru in 1914.<sup>53</sup>

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48. *Id.*

49. Resolución Suprema, *supra* note 46, quoted in Andrew Mangino, *Peru Dispute Has Long, Murky Past*, YALE DAILY NEWS, Apr. 14, 2006, available at <http://www.yaledailynews.com/articles/view/17407>.

50. Letter from W.L. Morkill, Dir., Peruvian Corp., to Hiram Bingham (Nov. 12, 1912) (on file with Yale Sterling Memorial Library).

51. See Resolución Suprema, *supra* note 46.

52. Heaney, *supra* note 11, at 16.

53. Letter from Hiram Bingham to Louis Schaefer, W.R. Grace & Co. (Mar. 10, 1914) (on file with Yale Sterling Memorial Library).

He also requested that former President Taft contact President Woodrow Wilson on his behalf.<sup>54</sup>

Hostilities toward the YPE had increased by the time Bingham returned to Peru with the third and final expedition. Originally receptive local institutions and academics “began to challenge the legitimacy and propriety of the Yale Peruvian Expedition work . . . using both legal and cultural arguments.”<sup>55</sup> Rumors surrounding the expedition’s activities increased significantly in the Peruvian press, which published claims that Bingham was stealing Peruvian gold and smuggling it through neighboring Bolivia. Upon investigation, however, no evidence of such activities was found.<sup>56</sup>

Another rumor claimed that the YPE had gone so far as to bring in cranes from the Panama Canal project to more quickly excavate the archaeological sites.<sup>57</sup> Attempts were made to discredit the YPE, “presenting it as a band of modern pillagers in league with corrupt government officials.”<sup>58</sup> There were also claims that Bingham had failed to obtain the requisite government permit for his excavation.<sup>59</sup>

Even when a permit was obtained, complaints about the excavations continued. Intellectuals argued that the ruins were being damaged and nothing was being left for Peruvians to learn about their own antiquity. The opposition reached its peak in 1915–1916, at which time members of the local intelligentsia formed a coalition in order to defend Peruvian cultural patrimony.<sup>60</sup> Bingham, however, generally dismissed these challenges to legitimacy, calling the rumors “silly” and continually referring to them in mocking tones.<sup>61</sup> More specifically, he attributed the public outcry and rumor-mongering to parties with ulterior motives, such as

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54. Letter from Hiram Bingham to William Howard Taft, former U.S. President (Mar. 11, 1914) (on file with Yale Sterling Memorial Library).

55. See Salvatore, *supra* note 14, at 70.

56. VALCÁRCEL, *supra* note 6, at 186; Letter from Hiram Bingham to Gilbert Grosvenor, Dir., Nat’l Geographic Soc’y (Jun. 22, 1915) (on file with Yale Sterling Memorial Library).

57. Letter from Hiram Bingham to Gilbert Grosvenor, Dir., Nat’l Geographic Soc’y (Jun. 22, 1915) (on file with Yale Sterling Memorial Library); Salvatore, *supra* note 12, at 71.

58. Salvatore, *supra* note 14, at 70.

59. *Id.*

60. *Id.*

61. Letter from Hiram Bingham to Dr. Isaiah Bowman, Dir., Am. Geographical Soc’y (Sep. 21, 1915) (on file with Yale Sterling Memorial Library); Letter from Hiram Bingham to L.H. Blaisdell, Esq. (Oct. 1, 1915) (on file with Yale Sterling Memorial Library).

professors seeking government appointments and funding, parties seeking to embarrass the Peruvian president, and uneducated anti-foreign sentiment.<sup>62</sup>

During this final expedition, Bingham failed to receive permission to excavate at Machu Picchu; he was only allowed access to more limited nearby sites. On May 25, 1915, the Prefect of Cuzco ordered that all excavations cease.<sup>63</sup> Conflict continued over the course of the summer, including intensive review of the artifacts by members of the Cuzco Historical Institute.<sup>64</sup> By the time Bingham arrived in Lima towards the end of the expedition, it was unclear whether he would be able to obtain an exit visa for himself, let alone for the excavated objects. It was allegedly only after British intervention that Bingham's departure from the country was allowed.<sup>65</sup>

The exit of the archaeological artifacts, however, was another issue in itself. In order to secure their export, Bingham "agreed 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."<sup>66</sup> Under this more stringent agreement, "Yale University and the National Geographic Society pledge[d] to return, in the term of 18 months from today, the artifacts whose export had been authorized."<sup>67</sup>

The YPE experienced significant difficulties in obtaining even this relatively narrow agreement; Elwood Erdis, one of the members of the group, was forced to remain in Peru for several months following Bingham's departure in September 1915.<sup>68</sup> Negative press increased throughout the nation, while the Director of the National Museum issued a report calling for the President to keep the objects in Peru.<sup>69</sup> Repeated meetings with the Minister of Justice, the President, and other key government officials were necessary to obtain the requisite approval. At one point, the YPE forcefully insinuated to the Peruvian government that

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62. Letter from Hiram Bingham to Gilbert Grosvenor, Dir., Nat'l Geographic Soc'y (Jun. 22, 1915) (on file with Yale Sterling Memorial Library).

63. BINGHAM, *supra* note 10, at 305.

64. *Id.* at 309.

65. *Id.* at 310.

66. *Id.*

67. Resolution (Jan. 27, 1916) (Peru) (on file with Yale Sterling Memorial Library), *cited in* Andrew Mangino, *Elections Could Avert Peru's Lawsuit*, YALE DAILY NEWS, Apr. 12, 2006, available at <http://www.yaledailynews.com/articles/view/17366>.

68. Letter from Elwood Erdis to Hiram Bingham (Oct. 20, 1915) (on file with Yale Sterling Memorial Library); Letter from Elwood Erdis to Hiram Bingham (Dec. 25, 1915) (on file with Yale Sterling Memorial Library); Letter from Elwood Erdis to Hiram Bingham (Jan. 30, 1916) (on file with Yale Sterling Memorial Library).

69. Letter from W.L. Morkill, Dir., Peruvian Corp., to Hiram Bingham (Jan. 14, 1916) (on file with Yale Sterling Memorial Library).

the National Geographic Society, with over 400,000 subscribers, would look with extreme disfavor upon any government refusal to allow the export of the artifacts.<sup>70</sup> Notably, the final decree was, according to the Minister of Justice, actually contrary to the law and special wording was required "so as to evade the law."<sup>71</sup>

By February of 1916, regardless of having finally obtained permission to export the artifacts, Bingham was quite discouraged:

The delay in shipping the bones, shards, etc. out of the country is costing us very dear. I wish we had never tried to bring them out. They are not worth one-quarter what we have had to pay for Erdis' salary and expenses which he has been waiting to fetch them out.<sup>72</sup>

In a subsequent letter, he repeated this sentiment, writing "I cannot help wishing . . . that we had never attempted to bring this stuff out, but had contented ourselves with leaving it peacefully in the mountains."<sup>73</sup>

#### *D. Legal Claims from a Historical Perspective*

This historical examination of the three expeditions demonstrates that Peru's current legal claims over the objects are well-founded, although the country would face significant procedural difficulties in pursuing its claims in U.S. court. However, despite these possible stumbling blocks, the broader historical and political context of Yale's expeditions ensures that the best resolution of the competing claims involves the return of the objects to Peru.

First, it is clear that Peru's claims to the objects vary based on the time period in which they were excavated. Bingham's first expedition to Peru in 1911 yielded few, if any, archaeological artifacts, although the publicized concerns over the legality of the excavations are relevant to understanding the contemporary debate over cultural patrimony. Additionally, at that time, authorities continually referenced the 1893 executive decree<sup>74</sup> as the controlling law regarding cultural property, rather than the earlier

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70. Letter from Elwood Erdis to Hiram Bingham (Jan. 25, 1916) (on file with Yale Sterling Memorial Library).

71. Letter from Elwood Erdis to Hiram Bingham (Jan. 30, 1916) (on file with Yale Sterling Memorial Library).

72. Letter from Hiram Bingham to W.L. Morkill, Dir., Peruvian Corp. (Feb. 1, 1916) (on file with Yale Sterling Memorial Library).

73. Letter from Hiram Bingham to W.L. Morkill, Dir., Peruvian Corp. (Feb. 4, 1916) (on file with Yale Sterling Memorial Library).

74. See MOULD DE PEASE, *supra* note 5, at 141.

1852 Civil Code as currently contended by Yale.<sup>75</sup> President Leguía's 1911 executive decree did not give permission to export any archaeological artifacts.<sup>76</sup>

The executive decree obtained in 1912 allowed the legal export of the artifacts, but there was no time limit set for Peru's right to request the return of "unique specimens or duplicates." Yale maintains that it has no obligation to return these materials.<sup>77</sup> However, this conclusion is far from self-evident given that the decree specifically contains a provision allowing Peru to request the return of the exported artifacts. Significantly, there is no language in the 1912 decree explicitly granting legal title over the objects to Yale. However, the University could claim the objects based on adverse possession, which would include five elements: (1) the owner had been ousted from possession; (2) kept out for fifteen years; (3) under a claim of right; (4) "by an open, visible and exclusive possession;" and (5) without the consent of the owner.<sup>78</sup> The most problematic issue for Peru is Connecticut's fifteen-year statute of limitations, particularly since "the record owner's mere expression of displeasure with the adverse possessor's use will not serve to interrupt that use."<sup>79</sup>

Additionally, the decree grants excavation and export rights to scientific organizations in an attempt to "avoid commercial speculation" regarding the objects. Yale, however, has since utilized the objects commercially in its highly successful traveling exhibition.<sup>80</sup> Although museum exhibitions are generally considered as a typical part of museum nonprofit educational activities, it would seem that this activity, at a minimum, violates the spirit of the 1912 decree.

The artifacts exported to Yale from the 1914–15 expedition more clearly fall into the category of a loan, given that the agreement arranged for their return to Peru within eighteen months.<sup>81</sup> It is not clear whether any of these objects have been returned to Peru. In 1916, Peruvian president Óscar R. Benavides requested the return of the objects from Yale.<sup>82</sup> Additionally, a Peruvian consulate invoked the contract in 1921, requesting the return of all the artifacts.<sup>83</sup> According to Peru, the only

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75. See Heaney, *supra* note 13, at 18.

76. MOULD DE PEASE, *supra* note 5, at 141.

77. Eakin, *supra* note 37, at E7.

78. CONN. GEN. STAT. § 52-575; see also JOEL M. KAYE & WAYNE D. EFFRON, CONNECTICUT PRACTICE SERIES, Form 705.1 (4th ed., 2007). Yale would have to prove all of these elements by clear and convincing evidence.

79. *Id.*

80. Resolución Suprema, *supra* note 46.

81. See BINGHAM, *supra* note 10, at 310.

82. *Yale Devuelve Piezas Sacadas de Machu Picchu*, EL COMERCIO (Lima, Peru), Sep. 15, 2007, at A18.

83. Mangino, *supra* note 49.

objects returned were valueless and were not even from the Yale expedition.<sup>84</sup> Yale claims, however, that all relevant objects were repatriated in the 1920s.<sup>85</sup> Meanwhile, records from the National Geographic Society show that approximately half of these materials were returned to Peru in 1921.<sup>86</sup> Connecticut's six-year statute of limitations for breach of contract has long since run, so it would seem that Peru's opportunities to sue for the return of the rest of these objects in U.S. court are limited.<sup>87</sup>

Yale argues that neither the 1911 nor the 1912 decrees allowing excavations were valid because they were based on an earlier law, presumably the 1893 supreme decree, that had been previously voided. Therefore, the excavations were covered by the 1852 civil code, which was modeled after the Napoleonic code.<sup>88</sup> Since Yale fails to specify when or how this earlier law was voided, it is unclear how the University knows that the 1911 and 1912 decrees were invalid.

As for the provision in the 1852 civil code, the University is most likely referring to the sections governing property rights over found objects. Under these provisions, all treasure and other buried objects that are found on vacant or public property belong to the person who found them.<sup>89</sup> If the area from which the artifacts were excavated was vacant at the time, or was part of state property at that moment, then Bingham and Yale would be the owners of the objects. However, the subsequent section of the decree prohibits treasure-seekers from excavations on private property unless the consent of the owner is obtained.<sup>90</sup> Furthermore, in cases in which consent is obtained, any treasure must be divided equally between the finder and the property owner except in the case of special agreements.<sup>91</sup> These provisions raise the question: Was Machu Picchu abandoned land at the time of Bingham's "discovery" or was there an owner with whom the objects should have been split? Additionally, not all of the objects were found at Machu Picchu, broadening the land in question to numerous areas throughout the region surrounding Cuzco. Even if the Civil Code is the governing law, which is not readily apparent, there is an issue of fact

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84. Heaney, *supra* note 28.

85. Arthur Lubow, *The Possessed*, N.Y. TIMES, Jun. 24, 2007, at 47.

86. Eakin, *supra* note 37, at E7.

87. CONN. GEN. STAT. § 52-576.

88. Heaney, *supra* note 13, at 18.

89. Código Civil, art. 522, 1852 (Peru).

90. *Id.* art. 523.

91. *Id.* art. 524.



regarding whether the objects were excavated from private or vacant property. It is interesting to note that Bingham considered that “most of the ruins of any value and importance are on private lands.”<sup>92</sup>

It is unclear why Yale rests its claims on the 1852 Civil Code, given that an 1893 presidential decree supercedes the earlier law. An examination of Bingham’s correspondence from the first two trips to Peru demonstrates that the Peruvian government considered this decree to be the controlling law on the subject of cultural patrimony. Any concession for Bingham’s expedition was considered an exception to that law.<sup>93</sup> Under the 1893 law, exploration and excavation of a broad range of archaeological sites found on vacant or public lands are prohibited unless “a special license in the prescribed form of a presidential decree” is obtained.<sup>94</sup> This prohibition returns to the question of whether or not the land was private property at the time of Bingham’s “discovery.” Excavations on private property were to be governed by a later, seemingly never-enacted legislative decree.<sup>95</sup> Most significantly, although all of the objects would belong to the person who sought the license, that person also would have the obligation to turn in a duplicate of each of the excavated objects; if no duplicate was available, a photograph accompanied by a detailed description was required.<sup>96</sup> There is no information available to indicate that the YPE met these requirements.

Overall, Peru has a valid legal claim to title over the objects currently housed at the Peabody Museum at Yale, but litigation in U.S. courts would likely encounter problems due to the statute of limitations in Connecticut, a variety of other procedural issues and the uncertainty inherent in interpreting foreign laws in a U.S. court. Given the legal ambiguities of the situation, some sort of negotiated compromise, such as the one outlined below, is necessary. Throughout any series of negotiations, however, it will be important to keep in mind not just the legal basis for claims over the artifacts, but also the historical and political context in which they were originally taken from Peru. Historical accounts of the three expeditions and primary sources from the time period demonstrate the high degree of influence that Bingham and the YPE (along with the backing of the U.S. government and key business interests) were able to exert over the Peruvian government. Despite the public outcry over the excavation and exportation of the

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92. Letter from Hiram Bingham to Huntington Wilson, Acting Sec’y of State, U.S. Gov’t (Apr. 29, 1912) (on file with Yale Sterling Memorial Library).

93. *Id.*

94. Decreto Supremo, Adoptando Medidas Para Conservar los Materiales de la Historia Primitiva del Pais, art. 1, 27 de Abril de 1893 (Peru).

95. *Id.* art. 10.

96. *Id.* art. 6.

artifacts from the country, the Peruvian government continued to issue decrees in support of Yale's actions. One of Bingham's letters from the time even seems to intimate that President Billingham was threatened with the consequences of U.S. displeasure if he did not issue a favorable decree.<sup>97</sup> Bingham's personal connections with U.S. government officials, including President Taft, as well as his official status as an agent of Yale University gave him significant opportunities for exploration and influence in Peru, which was at that time a nation still growing into its independence from colonial rule.

### III. FAILED NEGOTIATIONS BETWEEN YALE AND PERU

The objects have languished in storage at Yale since their original discovery. It was not until 1981 that the idea to have a touring exhibition of the artifacts was brought forth by Yale professors Richard Burger and Lucy Salazar. By that time, the entire collection was clearly in need of conservation efforts.<sup>98</sup> "The irony is that for years the collection was just left in cardboard boxes. It's only when they rather conscientiously dusted it off and launched this rather impressive exhibition that the whole issue has surfaced again," said Hugh Thomson, a British author and explorer who has extensively studied and explored Incan ruins.<sup>99</sup> Tensions between Peru and the University escalated in part due to Yale's extremely popular 2003 exhibit "Machu Picchu: Unveiling the Mystery of the Incas." Peru and Yale were engaged in negotiations for the return of the artifacts from 2003 until late 2008, when Peru filed its complaint.<sup>100</sup> After initial negotiations, Peru began to discuss withdrawal from the talks, proposing an alternative strategy of litigation.<sup>101</sup>

In 2005, a Yale spokesman stated that Yale would agree to return at least part of the collection to Peru.<sup>102</sup> However, a key stumbling block remained over whether Yale would recognize Peru's legal title to the

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97. Letter from Hiram Bingham to Arthur Twining Hadley, President, Yale University (Oct. 26, 1912) (on file with Yale Sterling Memorial Library).

98. Lubow, *supra* note 85, at 45 ("Their notion was to create an exhibition in cooperation with the government of Peru, a prospect that the Peruvian tourist authority greeted with enthusiasm but no financing.").

99. Eakin, *supra* note 37, at E7.

100. Jeremy Kutner, *Peru Seeks Return of Peabody Artifacts*, YALE DAILY NEWS, Mar. 6, 2003, available at <http://www.yaledailynews.com/articles/view/7247>.

101. See *Peru Prepared to Sue Yale over Inca Artifacts*, *supra* note 7; Jane Gordon, *A Dispute Over Peruvian Artifacts at Yale*, N.Y. TIMES, Dec. 18, 2005, at 14CN2.

102. *Id.*

objects in question.<sup>103</sup> The Peruvian reaction to Yale's ultimate refusal was summed up by Luis Guillermo Lumbreras, former director of Peru's National Institute of Culture: "Yale is assuming that it owns the collection and can negotiate with us which objects it wants to return and which it wants to keep."<sup>104</sup>

Yale was not, of course, the only American entity with an interest in these objects. As a key financial sponsor of the expeditions, the National Geographic Society has also played an integral role in this history. After thoroughly reviewing National Geographic's records, however, Terry Garcia, the Executive Vice President for Mission Programs, concluded that the objects should be returned to Peru: "[t]here's no question on the face of it that the law called for these objects to be returned if the Peruvians asked for them . . . It was an easy conclusion to come to."<sup>105</sup>

On February 28, 2006, Peru formally withdrew from negotiations, stating its intention to sue in Connecticut state court for the return of the Machu Picchu artifacts.<sup>106</sup> But with the election of current president Alan García in July 2006, the official Peruvian stance toward the repatriation of the objects abruptly changed, leading the government to drop the lawsuit and return to the negotiation table.

The general Peruvian population almost unanimously supports the return of the objects, although outrage is most concentrated in the area immediately surrounding Machu Picchu and Cuzco. For example, in May of 2006, the local government of Aguascalientes (the town next to Machu Picchu) began distributing postcards to the tourists visiting the site, calling for the return of the objects to Peru from Yale.<sup>107</sup> Around the same time, protests erupted in Cuzco; 3,000 people marched through the city to demand the return of the objects.<sup>108</sup> The mayor of Machu Picchu, Édgar Mirando, calls the objects "the patrimony of Machu Picchu," saying that they should be returned to their original site.<sup>109</sup>

#### IV. PRELIMINARY SETTLEMENT AGREEMENT BETWEEN PERU AND YALE

On September 14, 2007, Peru and Yale reached a preliminary settlement agreement. Although the settlement agreement was never

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103. Eakin, *supra* note 37, at E7.

104. *Id.*

105. Montgomery, *supra* note 5.

106. Judy Wang, *Peru Ends Talks, Will Sue University*, YALE DAILY NEWS, Mar. 2, 2006, available at <http://www.yaledailynews.com/articles/view/16866/>.

107. *Postales para la Campaña*, EL COMERCIO (Lima, Peru), May 10, 2006.

108. *Protesters Demand Yale Return Machu Picchu Artifacts to Peru*, ASSOCIATED PRESS, May 9, 2006.

109. *El Vocero de un Santuario*, EL COMERCIO (Lima, Peru), Jul. 13, 2007, at A14.

finalized and clearly failed to bring about the return of the objects to Peru, it is still important to examine it for the purpose of evaluating the merits of the legal claims involved and to understanding the nature of the dispute. According to a joint statement released by the two parties, "[t]his understanding represents a new model of international cooperation providing for the collaborative stewardship of cultural and national treasures."<sup>110</sup> "We aim to create a new model for resolving competing interests in cultural property," stated University president Richard Levin, adding that "the key breakthrough, of course, is that we can at once recognize that the Peruvians are the owners of this material."<sup>111</sup>

Beyond these broad statements of cooperation and good will, however, was the actual text of the agreement, or Memorandum of Understanding ("MoU"). Many of the MoU provisions have engendered significant controversy. According to Eliane Karp-Toledo, former first lady of Peru during the Toledo administration, "[t]he agreement reflects a colonial way of thinking not expected from a modern academic institution."<sup>112</sup> Although this assessment may be overblown, the proposed settlement agreement failed to recognize the arguably colonial manner through which the artifacts were originally acquired and contains several problematic provisions.

The introduction to the MoU set the one-sided tone of the entire document. First, the two parties "acknowledge that the Materials are treasured by humanity, and that the monuments of Machu Picchu were properly declared Cultural Patrimony of the World by UNESCO."<sup>113</sup> However, there was no equivalent acknowledgement that the Materials were equally part of the cultural patrimony and national heritage of Peru. The agreement adhered from the beginning to a solely internationalist perspective of cultural property.

Furthermore, a great deal of space was dedicated to thanking Yale for its stewardship of the artifacts; the MoU acknowledged that Yale "has

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110. Rachel Boyd, *Yale, Peru Reach Agreement*, YALE DAILY NEWS, Sep. 15, 2007, available at <http://www.yaledailynews.com/articles/view/21336>.

111. *Yale Returns Peruvian Antiquities* (National Public Radio broadcast Sep. 18, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=14495762>; Randy Kennedy, *Yale and Peruvian Officials Agree on Return of Artifacts*, N.Y. TIMES, Sep. 17, 2007, at E3.

112. Eliane Karp-Toledo, *The Lost Treasure of Machu Picchu*, N.Y. TIMES, Feb. 23, 2008.

113. Memorandum of Understanding pmbl. (Sep. 14, 2007) [hereinafter MoU], available at <http://opa.yale.edu/opa/mpi/Machu-Picchu-MOU.pdf>.

conserved, preserved, researched and made available to the public and international scholarly community for viewing and study this historically recognized cultural patrimony.”<sup>114</sup> Additionally, “Peru expresses its gratitude for the stewardship, conservation and intellectual contribution of Yale in connection with these Materials for over nine decades, and for the groundbreaking scholarship and exhibition of the Materials that has occurred under Yale’s sponsorship.”<sup>115</sup> Meanwhile, Yale thanked only “the Peruvian people, whose ancestors created the historical materials that scientists and curators at Yale have conserved, displayed and studied in those nine decades.”<sup>116</sup> In these various expressions of gratitude, there was no acknowledgment of or gratitude for Peru’s actions in originally allowing Yale to excavate and export the objects.

Most importantly, there was no mention anywhere in the agreement of the ambiguity surrounding the various legal claims to the objects. The introduction made it clear that Yale wished to brush over the historical context in which the disputed artifacts were acquired. Moreover, Yale’s neocolonial activities in Peru, mirroring U.S. diplomatic and economic policy at the time, were simply ignored. Coming from a world-renowned academic institution which should more actively engage in constructive dialogue about the past, this lack of acknowledgement is particularly disappointing. Part of the subtext of Yale’s arguments highlighting its admirable stewardship of the artifacts implied that Peru would be an irresponsible steward, simply repeating Bingham’s arguments from 100 years earlier. Finally, although the MoU would have granted legal title over the Materials to Peru, it contained a variety of other unusual provisions which, taken together, would be quite problematic.

#### *A. Disposition of the Materials*

Most significantly, the MoU acknowledged Peru’s title to the Materials.<sup>117</sup> However, the agreement did not provide for a simple transfer of those Materials to Peruvian guardianship. Physical possession of the Materials instead turned on their definition as museum quality pieces and an unusual grant of usufructuary rights to certain Materials, as discussed more extensively below. In fact, Peru’s title to the objects

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* § 3(d)(i). The MoU defines the “Materials” as the “artifacts and related materials excavated by Hiram Bingham in Machu Picchu.” *Id.* at pmbl. It is therefore unclear whether the materials from the 1914–1915 expedition are included in the agreement since none of those artifacts were excavated from Machu Picchu.

would only be effected once the series of conditions enumerated below had been met.<sup>118</sup>

### 1. *Museum versus Non-Museum Quality Pieces*

The MoU defined “Museum Quality Pieces” as those “suitable for and capable of being displayed in a museum exhibition.”<sup>119</sup> “Non-Museum Quality Pieces” were correspondingly defined as those “not suitable for and capable of being displayed in a museum exhibition.”<sup>120</sup> Approximately 350 objects out of the 4,000 qualify as “Museum Quality Pieces.” Yale professor Richard Burger completed an inventory of the artifacts and decided which objects qualified as “Museum Quality Pieces.”<sup>121</sup> Since the original inventory, representatives of Peru have also had the opportunity to review the artifacts, but it appears that they have not been as intimately involved in the objects’ classification.<sup>122</sup> This failure to create a truly collaborative inventory belies the assertions of cooperation made at the time the MoU was signed. Recent disagreements have surfaced over the actual number of objects in Yale’s inventory, with Peruvian representatives counting 46,000 rather than 4,000 objects.<sup>123</sup>

### 2. *Usufructuary Rights*

Portions of the research collection would have remained at Yale, which would have “usufructuary rights” over the objects for a term of 99 years.<sup>124</sup> The term “usufructuary rights” was defined to include:

[T]he rights to possess, use and enjoy for academic, scientific, curatorial or museological purposes, including but not limited to these explicit rights: the rights to study, restore, assemble, date through chemical or physical means, exhibit, lend for traveling exhibits, publish research related to, and publish depictions or make reproductions or copies in any media or format; no monetary payment shall be required for such rights.<sup>125</sup>

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118. *Id.* § 3(d)(v).

119. *Id.* § 2.

120. *Id.*

121. Paul Needham, *Sept. Memo Reveals Peru Concession*, YALE DAILY NEWS, Feb. 14, 2008, available at <http://www.yaledailynews.com/articles/view/23510>.

122. Paul Needham, *Inca Inventory Review Underway*, YALE DAILY NEWS, Mar. 3, 2008, available at <http://www.yaledailynews.com/articles/view/23848>.

123. Needham, *supra* note 6.

124. MoU, *supra* note 113, § 3.

125. *Id.* § 2.

This definition is critical since Yale would have maintained usufructuary rights over *all* of the objects with certain limited exceptions:

Upon Peru's fulfillment of its obligations relating to the Traveling Exhibit and completion of the Machu Picchu Museum and Research Center and its readiness for operation, Yale's Usufructuary Rights in the Museum Quality Pieces, except for certain pieces which as agreed by both parties shall be exhibited by the Yale Peabody Museum, and in a portion of the Non-Museum Quality Pieces which shall be pieces as to which Yale has no research plans in contemplation and which shall be designated in the Agreement, shall terminate. The pieces as to which Yale's Usufructuary Rights so terminate will be returned to Peru at that time.<sup>126</sup>

Although reciprocal research rights were included, it is cause for concern that Yale would have retained such extensive rights over the objects. There was a great deal of Peruvian outcry over this provision in particular. Many argued that since Yale has already had the objects for almost 100 years, it did not need them for another 99. Furthermore, Peru's right to the Museum Quality Pieces hinged on the completion of a suitable museum to house the objects so it is conceivable that the construction of such an expensive museum would prove both difficult and time-consuming, causing several years to pass before Peru saw the return of any of the objects.<sup>127</sup>

### *B. Collaborative Activities*

The agreement contained provisions for extensive collaborative activities between Peru and Yale, focusing primarily on a traveling exhibit and a Machu Picchu museum and research center.<sup>128</sup> The traveling exhibit was designed to raise funds for a museum to house many of the artifacts in Cuzco. The exhibit would essentially have been a reprise of Yale's earlier traveling exhibit that served as a catalyst for negotiations.<sup>129</sup> The final stop on the tour would be the new museum in Cuzco, but if it had not yet been completed then the materials would be displayed at the Yale Peabody Museum. Both Yale and Peru would loan additional artifacts for the purposes of the exhibit.<sup>130</sup>

In the meantime, Peru would begin construction on a museum in Cuzco to house the Museum Quality Pieces. The facility would need to "meet standards of security, and other technical specifications agreed

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126. *Id.* § 3.

127. Currently there is only one museum in Peru which meets such rigorous standards. Interview with José Ignacio Mariátegui, Head of Pub. Diplomacy, Embassy of Peru (Apr. 15, 2008).

128. MoU, *supra* note 113, § 3(a)–(b).

129. *Id.*

130. *Id.*

upon by the parties.”<sup>131</sup> Once these standards had been met and the international traveling exhibit had been completed, the Museum Quality Pieces would be transferred to the new facility in Peru.<sup>132</sup> An equal number of representatives from each party would serve on the advisory board for the planned institution.<sup>133</sup> The goal was to have the museum up and running by 2011, in time for the 100th anniversary of Bingham’s Machu Picchu “discovery.”<sup>134</sup>

### C. Choice of Forum and Jurisdiction Provisions

The MoU contained a choice of law provision stating that Connecticut state law will govern the Agreement.<sup>135</sup> All disputes would be adjudicated in United States District Court in that state with both parties acknowledging that the court would have personal jurisdiction.<sup>136</sup> The memorandum also dictated that the Peruvian government “shall release Yale from any legal claims to the Materials resulting from prior circumstances.”<sup>137</sup>

## V. CONCLUSION: NEXT STEPS IN THE PROCESS OF REPATRIATION

After the sixty day timetable had long-since passed, Peru and Yale had yet to finalize the agreement.<sup>138</sup> According to Dan Martinez, attaché to the American ambassador to Peru, “once [lead negotiator Hernán Garrido-Lecca] returned [to Peru] and announced that this had been agreed to and the terms became public knowledge, some in the local community had questions and concerns about some of those provisions.”<sup>139</sup> The primary sticking point seemed to be the provision of usufructuary rights to Yale. Officials in Peru appeared to have come to the main conclusion that the MoU was unfavorable to the country and its cultural

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131. *Id.* § 3(b).

132. *Id.*

133. *Id.*

134. Eliane Karp-Toledo, Op-Ed., *The Lost Treasure of Machu Picchu*, N.Y. TIMES, Feb. 23, 2008, at A17 (Yale would get to select which pieces the museum would get to have and Peru’s sovereign right to the entire collection is not acknowledged).

135. MoU, *supra* note 113, § 4(b).

136. *Id.* § 4(a).

137. Needham, *supra* note 121; MoU, *supra* note 113, § 5(b).

138. Thomas Kaplan & Paul Needham, *Talks with Peru Extend Past Deadline*, YALE DAILY NEWS, Dec. 3, 2007, available at <http://www.yaledailynews.com/articles/view/22661>.

139. *Id.*



patrimony. For this reason, such officials began to seek “the prompt return of all the Inca artifacts currently housed at Yale.”<sup>140</sup>

Although it seems clear that further negotiations are unlikely in the short term, it is evident that a better understanding and recognition of the historical context in which the objects were originally exported from Peru is necessary. The MoU failed to recognize or even begin to address the legal claims Peru asserts over the artifacts in question. The questionable manner in which the objects of Peru’s cultural patrimony were originally taken out of the country should become a central point in the current debate, rather than being pushed to the side. As previously discussed, Peru’s claims to title over the objects are not spurious. The artifacts were all essentially loaned to Yale without an accompanying transfer of title. Furthermore, these loans were only reluctantly agreed to after significant pressure from Yale, the United States government and powerful economic players. Although Peru will doubtless encounter procedural difficulties in the course of litigation due to the statute of limitations and adverse possession, this should not invalidate the claims in the eyes of Yale.

Even though current laws regarding cultural property are not retroactive, it is important to recognize how views about cultural patrimony have changed in the century following the objects’ original export. More recent laws, both domestic and international, have given much greater weight to the demands of source nations. In Peru, domestic law dictates that objects such as those in question are part of the national cultural patrimony and are therefore property of the state.<sup>141</sup> Additionally, there is recently enacted legislation requiring the repatriation of all of the objects taken by Bingham.<sup>142</sup>

The international debate over cultural patrimony has resulted in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”).<sup>143</sup> According to the Convention’s preamble, “cultural property constitutes one of the basic elements of civilization and national culture, and . . . its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”<sup>144</sup> As can be seen from the preamble, the

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140. Paul Needham, *Peru Calls For Return of Artifacts*, YALE DAILY NEWS, Apr. 17, 2008, available at <http://www.yaledailynews.com/articles/view/24510>.

141. Ley General del Patrimonio Cultural de la Nación (2004, No. 28296)(Peru).

142. *Yale Devuelve Piezas Sacadas de Machu Picchu*, EL COMERCIO (Lima, Peru), Sep. 15, 2007, at A18.

143. UNESCO Convention the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

144. *Id.*

UNESCO Convention generally tends to be favorable to the state of origin, particularly in the way it addresses the value of historical settings. States that are parties to the Convention also “recognize the indefeasible right of each . . . to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”<sup>145</sup> As a means of implementing the UNESCO Convention, the United States and Peru have also entered into a bilateral agreement which recognizes the problem of looting by setting up a series of import restrictions on Peruvian artifacts.<sup>146</sup> According to the agreement, “[b]oth Governments will seek to encourage academic institutions, non-governmental institutions and other private organizations to cooperate in the interchange of knowledge and information about the cultural patrimony of Peru, and to collaborate in the preservation and protection of such cultural patrimony.”<sup>147</sup> Although this bilateral agreement is certainly not retroactive, it conveys an important message of cooperation and good will between the United States and Peru that Yale would be well served to heed.

Beyond the narrow legal framework pursued by Yale, overarching moral and ethical considerations point in favor of repatriating the Machu Picchu artifacts. On a basic level, museums all subscribe to codes of ethics, many of which speak to the best ways to address claims of competing ownership over artifacts. As a museum associated with a world-renowned university, it could be argued that the Peabody Museum has an even greater ethical responsibility to negotiate for the equitable return of the objects in good faith and to engage in an open and honest dialogue regarding their original acquisition. The American Association of Museums (“AAM”) has developed a Code of Ethics for Museums that includes the following provision: “competing claims of ownership that may be asserted in connection with objects in its custody should be handled openly, seriously, responsively and with respect for the dignity of all

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145. *Id.* at art. 13.

146. Memorandum of Understanding between the Government of the United States of America and the Government of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru (1997, amended 2002), at art. 1, *available at* <http://culturalheritage.state.gov/pe97agr.html>.

147. *Id.* at art. 2(c).

parties involved.”<sup>148</sup> Furthermore, in the context of Nazi-looted art, the AAM “acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.”<sup>149</sup> Here, primarily procedural defenses related to the statute of limitations and adverse possession could preclude a judicial decision to return the objects to Peru. However, given that such defenses do not establish that Yale had valid title to the objects in the first place, a decision to waive them for the purposes of negotiation would be a valuable starting point for more meaningful dialogue and a more equitable solution.

An overly legalistic approach to the ownership of these objects only serves to obscure the broader issues of cultural patrimony which are at stake. A final settlement between Peru and Yale should more clearly address the historical origins of Yale’s possession of the artifacts, providing an arena for an open debate regarding the merits of Bingham’s expedition in an arguable neocolonial era of U.S. supremacy over the Latin American region. The original excavation and exportation of the artifacts only occurred as a result of the vehement demands by Bingham and his allies in the U.S. government to change Peruvian cultural patrimony law in their favor. Rather than repeat the mistakes of that earlier era, Yale should recognize the value of increased dialogue and true collaboration. Utilizing narrow legal arguments to draw out and sidetrack the discussion does not set valuable precedent and does little in the way of public relations for the University. While Yale may be able to successfully defend its claim to the artifacts in a United States federal court, it risks a concurrent loss in the court of public opinion, especially considering that Peru’s position is buttressed by that of the National Geographic Society, one of the Expedition’s original stakeholders. Peru needs to begin pushing back against Yale with some strong rhetoric of its own in order to rally public opinion in support of a more equitable resolution to the conflict. Such a resolution should fully address the manner in which Yale originally acquired the artifacts and clearly craft a solution that does not repeat the errors of an earlier era.

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148. AMERICAN ASSOCIATION OF MUSEUMS, CODE OF ETHICS FOR AMERICAN MUSEUMS (2000), <http://www.aam-us.org/museumresources/ethics/upload/Code-of-Ethics-for-Museums.pdf>.

149. AMERICAN ASSOCIATION OF MUSEUMS, GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA (2001), [http://www.aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm). Additionally, “[w]ith due regard to legal requirements and UNESCO recommendations and conventions, the museum which has reason to doubt the licit quality of a previously acquired object should contact the museum or other professional organization in the country of origin with a view to examining, in each particular case, the steps which should be taken to best preserve the interests of both parties.” INT’L COUNCIL OF MUSEUMS, ETHICS FOR ACQUISITION § 16 (2006), <http://icom.museum/acquisition.html>.