

The background of the entire page is a photograph of ancient stone carvings on a tree trunk. The carvings are intricate, featuring a large face with a prominent nose and a smaller face to its left. The stone is weathered and greenish-brown. The tree trunk is on the right side, and the carvings are on the left side.

POLICY BRIEF



Can the Cultural Property Market Ever
Be a Legitimate Market?
With Multilateral Export Control
Regimes, It Can.

By Sam Greene

December 2020 | No. 8



ABOUT THE AUTHOR



Samuel Greene is a strategic consultant, earning his expertise in international affairs, immigration, security, and trade after over a decade of working at the United States Department of Homeland Security (DHS). Mr. Greene has worked on top priority programs focused on counter, nuclear proliferation, to high stakes international trade crime investigations – topping \$1M in value, to managing an Ebola Crisis response team, to coordinating international, joint operations. In addition, as one of the few experts at the Department of Homeland security with an academic background in archaeology, his portfolio also included the development of targeting indicators to intercept illicitly trafficked cultural property, resolve civil cases where cultural property had been seized and/or forfeited, as well as aid in the development of international standards with the World Customs Organization (WCO).

Mr. Greene served as the main representative to WCO Operation Athena which heightened enforcement action and attention to cultural property trafficking, and analyzed the resulting data for the purposes of identifying trends, targeting indication development and training.

ABOUT THE THINK TANK

The Antiquities Coalition unites a diverse group of experts in the global fight against cultural racketeering: the illicit trade in art and antiquities. This plunder for profit funds crime, armed conflict, and violent extremist organizations around the world—erasing our past and threatening our future. Through innovative and practical solutions, we tackle this challenge head on, empowering communities and countries in crisis.

In 2016, as part of this mission, we launched the Antiquities Coalition Think Tank, joining forces with international experts, including leaders in the fields of preservation, business, law, security, and technology. Together, we are bringing high-quality and results-oriented research to the world's decision makers, especially those in the government and private sectors. Our goal is to strengthen policymakers' understanding of the challenges facing our shared heritage and more importantly, help them develop better solutions to protect it. However, the views expressed in these policy briefs are the author's own, and do not necessarily reflect those of the Antiquities Coalition.

We invite you to learn more at thinktank.theantiquitiescoalition.org.

Cover image depicts a carved stone from a Maya site in Guatemala.



Latin American countries, many of which already have existing export licensing programs for cultural property, should create a MECR to regulate the existing cultural property market. Library of Congress, Geography and Map Division.

Executive Summary

The success of the current illicit cultural property market model lies in its claim to plausible deniability. Everyone—from the buyer, to the market country arts dealer, to the freight forwarder, to the importer, and even the person who verified the item in the source or transiting country—can deny involvement of the sale of stolen cultural property because it is incredibly difficult to prove that individuals involved knew of the illicit nature of their product.

The best way to prevent the illicit trade is by fortifying the legitimate trade.

This policy brief advocates that the best way to prevent the illicit trade is by fortifying the legitimate trade. By utilizing a Multilateral Export Control Regime (MECR) model, importers from a *market* country must make direct contact with appropriate authorities in the *supplier* countries, justifying the end use of the intended import prior to receiving an export license from the *supplier* countries. Utilizing current multilateral organizations to support this model could facilitate the needed negotiations to draft the appropriate legal frameworks and enforcement standards. It could also generate recognition of the export license by market country authorities, aiding both official enforcement and societal pressure as legitimacy of any/all products in question can be determined instantly from the *supplier* countries (source).



Introduction

While negotiated import controls are excellent in developing positive international relations, and are a needed layer to preventing the illicit flow of cultural property, they can only be fully realized if met by an equally enforced and informative export control.

Export licenses are typically issued any time a government wishes to monitor the exportation of dangerous, prohibited, or strategic materials, sensitive technologies, or goods in short supply in the home market. Cultural property potentially qualifies as a prohibited material, and certainly as a good in short supply in the home market, given that each antiquity or piece of art is one of a kind, thus lending to its desire in the marketplace.

Analysis of the legislation and policies regarding cultural property protection suggests that many countries depend heavily on agreements with other countries, such as the United States, to enforce import restrictions. These are often carried out with bilateral agreements between the market country and the supplier country to restrict designated cultural property from entering the market country and increase responsible cultural exchange.^[1] While this is one means of combating the flow of illicitly trafficked cultural property, it is not an export control, but a negotiated import control. While these negotiated import controls are excellent in developing positive international relations, and are a needed layer to preventing the illicit flow of cultural property, they can only be fully realized if met by an equally enforced, or perhaps more importantly, an informative export control.

For example, an import control in the United States against Peruvian artifacts is currently in place, meaning that should U.S. authorities encounter suspicious Peruvian artifacts at a port of entry, auction, or even after auction, U.S. authorities can investigate, attempt to determine legitimacy, and upon the facts found, can seize and repatriate the cultural property back to Peru. The problem? U.S. authorities have to be able to determine if it is stolen and/or looted, and there are very few bilateral agreements in place with strict definitions regarding what items it can be applied to.

Proving cultural property is stolen and/or looted is incredibly difficult, especially if cultural property is illegally excavated, or originated in a private collection abroad. Museum inventories are also often unreliable due to the lack of resources to catalogue all of their items. Additionally, most imported cultural property, from an importation standard, is appropriately manifested on customs declarations and import documents.

There are a total of twenty-three bilateral agreements between the U.S. and partner countries of the 195 countries in existence. The benefit of export controls, particularly internationally standard and recognized controls, is that they strengthen active bilateral agreements by creating an indicator at the point of export that can help import authorities determine what may or may not be stolen – thus giving the supporting evidence for import authorities to take their obligatory import action in accordance with the bilateral agreement. These export controls also fill a gap in that they apply to all countries that use that export control, even those that do not have an active bilateral agreement with the United States.

This is where an export license meets the already existing enforcement capability of an import restriction. If cultural property is being imported, importation and investigative authorities in the market country know an export license from the supplier country should accompany the required import documents, or, at the very least, they should be able to produce the license upon request. If there is no export



license, especially an export license that is backed by the increased leverage of an MECR, then authorities instantly *prove* that the cultural property was exported illegally. This does not necessarily crack the case for investigators, but it does create clearer cases and allows for faster enforcement action. The export controls help import and investigative authorities determine what may or may not be stolen and/or looted, empowering them to take appropriate action with or without a bilateral agreement in place. The export control is an investigative tool to better enforce U.S. agreements, and its own internal regulations.

Multilateral Export Control Regimes

MECRs do not focus on preventing trafficking, but rather on the legitimate trade of an item.

MECRs do not focus on preventing trafficking, but rather on the legitimate trade of an item. These regimes are specifically designed for supplier countries to prevent the proliferation of a specific commodity or commodities, their delivery means, their equipment, and their technology through the creation of international guidelines, best practices, and policies as they relate to export controls. They do this primarily by ensuring that materials and technologies that could have a dual-use purpose of, for example, developing a nuclear energy program or a nuclear weapons program, are only used for legal and ethical means.

MECRs accomplish this by placing the burden on the potential importer to prove the intended use of the goods desired to be imported. For example; if a nuclear program in a country of concern wants a potential dual-use item, the importer from that country must make contact with the appropriate authorities in the supplier country and demonstrate the intended end use of the items. If approved, the supplier country issues an export license. These export licenses are reported (with respect to sovereign data privacy laws) to the MECR, which uses the information to track trends and identify importers of questionable repute, such as those who may be shopping around for potential vulnerabilities in source countries. This information collection is useful as time passes for individual MECR members' export control enforcement, policies, practices, and even in highly sensitive situations, the ability to carry out joint operations to interrupt illicit and damaging activities.^[2]

The purpose of the MECR is to complement already existing tools in the multilateral sphere.

The purpose of the MECR is to complement already existing tools in the multilateral sphere. There are several multilateral organizations that do incredible work to prevent the degradation and trafficking of cultural property and sites. For example, the United Nations Educational, Scientific, and Cultural Organization (UNESCO)'s 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property ('1970 Convention') outlines what exactly cultural property is, commits State Parties to take measures to prevent the sale of illicitly trafficked cultural property, and calls upon State Parties to prevent the destruction of cultural heritage sites. However, while the 1970 Convention authorizes and encourages countries to enter into bilateral agreements to enforce import restrictions on behalf of other countries, most of the aspects are related to site preservation, and still leave addressing the actual trafficking of cultural objects to the sovereignty of each state. Efforts to control the trafficking are encouraged, however, through coordination in other multilaterals such as the World Customs Organization (WCO), the World Trade Organization (WTO), and other, more regionally focused multilaterals.



The WCO has attempted to collect seized property data trends from its members to aid in the creation of shipment targeting practices. It has also held trainings, particularly in the Middle East and North Africa region, to educate customs officers on how to handle and properly care for identified illicitly trafficked cultural property, should they encounter it. However, the flaw between these methodologies is that, as previously discussed, enforcement in market countries is still significantly hindered due to the legitimate appearance of what is, in fact, illicitly trafficked cultural property. Second, by the time necessary training takes place in high risk areas, the damage usually has already been done.

A lack of an export license, when widely known due to the standards set by an MECR, raises eyebrows, and allows customs officers and investigators to perform risk analysis on inquiring further, or even investigating at a faster rate.

A MECR enables supplier countries—or in the case of cultural property, countries of *high-risk for the loss of cultural property*—to define what their collective cultural property is. An MECR also allows these countries to universally strengthen their export laws by agreeing to impose export licensing on cultural property, thereby requiring contact with market country importers prior to any amount of cultural property leaving the country.

While customs officers in a market country are not necessarily obliged to enforce another country's export licenses, customs officials *are* obliged to prevent smuggled goods from entering their countries. The practice of unified export licensing distinguishes the legitimate commodity from the stolen and *smuggled* piece of cultural property. A lack of an export license, when widely known due to the standards set by an MECR, raises eyebrows, and allows customs officers and investigators to perform risk analysis on inquiring further, or even investigating at a faster rate.

Unified export control standards and licenses from supplier countries also enable market country investigators to press charges against antiquities dealers and auction houses under their own jurisdictions when they sell an item without an MECR-authorized export license, as the sellers' plausible deniability is gone. The importer can also be charged for smuggling stolen cultural property. In the supplier countries, in order to obtain export licenses for illegally removed property, smugglers will have to risk soliciting paperwork from corrupt officials who may be willing to provide such a license, but still face the reality of reporting to a central and tracked, multilateral database. Furthermore, if a market country art dealer presents a falsified export license that has no record at the MECR data holdings, the market country and supplier country are both able to trace the fraudulent document back to a source, shutting it down.

MECRs are often created by supplier countries with a similar interest in controlling a specific type of commodity—in this case, cultural property. Given that the commodity in question is cultural property, it is far easier to create this type of MECR (as with any multilateral agreement) among countries that have 1) similar cultural backgrounds, 2) similar linguistic characteristics, and 3) regional relativity. In the case of, though not limited to, Latin America, all three boxes are checked, and they all share the commonality that they are *supplier* countries of cultural property.

Latin America, generally speaking, has strong cultural, and linguistic ties, which should aid in potentially creating an MECR. Furthermore, several international agreements have already laid down some groundwork toward a potential MECR, such as the Convention of the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations ("Convention of San Salvador 1976"). It declares in its first Article its goal to "prevent illegal exportation" and "promote



cooperation among the American states.” Additionally, the Andean Community to Combat Illicit Trafficking in Cultural Property (founded in 2004), agreed in March 2013 to take further steps in defining cultural property, and to better identify parties, organizations, and practices to ensure increased adherence to the 1970 Convention.

Other regionally specific agreements, such as the 1995 Central American Convention for the Protection of Cultural Heritage and the Organization of American States (OAS) and the Framework Treaty on Democratic Security in Central America, cite and call for regional activity to better safeguard and share information regarding cultural property. These activities are specified as establishing “rapid” means of communication among the agencies, organizations, and importation and exportation authorities who have direct and indirect impact of safeguarding cultural property. It even goes so far as to promote harsher punitive measures for cultural heritage and property crimes, as well as suggest that cultural heritage preservation is essential for the sustainable development of human rights in the region. Signatories to this agreement include Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

While many countries have begun to develop export controls, the next, and perhaps better method, is a regional MECR.

Export controls as they relate to Latin America are already in place, from a policy perspective, in some countries. One thing is certain: there is clearly an appetite in Latin America for preventing the illicit trafficking of cultural property, and an already existing multilateral framework to expand these interests. While many countries have begun to develop export controls, the next, and perhaps better method, is a regional MECR.

How MECRs Would Work

Latin American countries would designate representatives to participate in the proposed Cultural Property MECR, and meet with the objective of harmonizing export controls, licensing, and information sharing coordination.

Step 1: Define restriction lists for cultural property. Typically, MECRs include “trigger lists,” or lists of items that are automatically denied licensing, and “dual-use” lists, which are commodities that require further justification prior to a license being provided. In the context of cultural property, “Red Lists,” or inventoried, known cultural property could act as the “trigger list.” A “dual-use” list equivalent could include art/artifact profiles, identifying, for example, compositions and stylistic features commonly associated with a particular type of cultural property. If licensing of such items was requested, this would require further investigation into their origin and final use prior to issuing an export permit.

Step 2: Create stipulations outlining what use or uses for cultural property justify an export license, requiring the importer and end user of the market country to protect the cultural property in adherence to the 1970 Convention. For example, the export license could require that further exportation could not take place without express permission from the country of origin. It could also express that the license authorizes sale to private collections, or solely for cultural exchange, etc.

Step 3: Share accurate information expediently with related authorities and maintain continual analysis. As the U.S. Government Accountability Office



reported in November 2002, MECRs are only as good as they are quick to share license denial and issuance data, including information related to the market country importer and end user, and how quickly they can implement regime decisions.^[3] Legal terminology in multilateral settings has already been laid out to quickly share export data regarding cultural property in the Central American Convention for the Protection of Cultural Heritage.^[4] The convention notes that each country is free to designate its own recording and reporting entity; however, it falls short in identifying how the data should be collectively analyzed, disseminated, or advocated in larger multilaterals or international courts. A sensible scenario would be for the data to be gathered and analyzed by a partnering multilateral organization with experience in trade and/or law enforcement, such as INTERPOL, the WCO, and/or the WTO. Alternatively, given the geographic and linguistic nature of the suggested MECR, this task could fall to law enforcement focused policy areas of the OAS. Ultimately, it would be the MECR's decision which entity to partner with, but they would absolutely have to identify an entity which their findings are reported, and consequences of analysis pursued.

Step 4: Commit to timely implementation of regime decisions. This signifies that an MECR, like any policy, is only as good as it is practiced. Administrations will have to allocate resources to ensure that policies developed are enforced. There are some natural alleviations to what could be inherent problems, as all countries involved have common language, as well as many overlapping cultural aspects (relatively) pertaining to drafting cultural property profiles, and an MECR allows them to share information and expertise subject matter experts in the field.

Step 5: Consider socioeconomic dimensions and build on previous Conventions. Given the MECR is entirely made up of developing countries, member countries will likely need to partner with larger multilateral organizations for assistance, whether monetary and/or technical. In fact, the OAS has already begun brokering the conversation in this area under the 1976 Convention of San Salvador, which acknowledged the risks faced by Latin American countries in relation to cultural property loss. The Convention called on them to make efforts to conserve, protect, and prevent the illicit flow of cultural property, and was signed by thirteen states: Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, and Peru. A well-funded multilateral that is already dedicated to the American states, including Latin America, could expand on this already existing convention to identify and define cultural property within their region, and to identify shared export requirements and export licensing. Language would hardly be a barrier in this multilateral, and the requirements could be taken to the WCO and WTO for further development into trade practice and for customs enforcement. Furthermore, the OAS could facilitate the collection and exchange of information to address the aforementioned concerns.

It is also important to note that for cost effective management, MECRs can be ad hoc. For example, while some MECRs, such the Australia Group, meet annually, the Nuclear Suppliers Group (NSG) initially met in 1974 in the wake of India's nuclear tests, created its legal framework between 1975 and 1978, and did not meet again until 1991, as a result of Iraq's weapons development program. The information that the group collects is conveyed annually. MECRs only have to meet as necessary, so their upkeep is already less of an economic burden than more formal multilateral groups.



Conclusion

Creating a MECR would move supplier countries from a position of depending on market countries to actively prevent the importation of their cultural patrimony, to deciding if and how to share it, and strengthen the legitimate market.

Latin American countries, many of which already have existing export licensing programs for cultural property, should create an MECR to regulate the existing cultural property market. Doing so would move supplier countries from a position of depending on market countries to actively prevent the importation of their cultural patrimony, to deciding if and how to share it, and strengthen the legitimate market.

A regulated market additionally aids existing customs and investigatory regimes by helping identify legitimate items in the marketplace, as opposed to illegitimate ones. The multilateral export control regime, furthermore, creates an international legal precedent, holding more weight when cases are presented in international courts and to the WTO, and increasing overall international adherence to existing standards set in place by the 1970 Convention. Finally, a Latin American MECR could be a model for other future regional MECRs pertaining to protecting cultural property.

Latin American countries should therefore:

- Appoint the necessary representatives, including legislators, and subject matter experts to represent their interests in the proposed MECR.
- Seek monetary and technical expertise to draft the necessary legal requirements and enforcement practices, utilizing a multilateral such as the OAS, which has already laid down work specific to cultural property among its Latin American members and building on the expertise of INTERPOL, UNESCO, WCO, and WTO.
- Define restriction lists for cultural property. Develop the necessary language to create “Red List” items that under no circumstances can receive an export license, as well as “Dual-Use” items.
- Create stipulations outlining what use or uses for cultural property justify an export license, requiring the importer and end user of the market country to protect the cultural property in adherence to the 1970 Convention.
- Designate the appropriate authorities to enforce these standards for each MECR member.
- Commit to timely implementation of regime decisions. Maintain political pressure to push enforcement of the designated policies.
- Share accurate information expediently with related authorities and maintain continual analysis so designated authorities can identify trends, and potential “bad” as well as “good” actors across the region. “Good actors” are potential private partners in the future for advocacy and developing best practices.
- Encourage other regional bodies, such as the Arab League, to create similar regional Cultural Property MECRs



End Notes

[1] These agreements are carried out under the Convention on Cultural Property Implementation Act (CCPIA).

[2] There are currently four principle MECRs: the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group (NSG), and the Wassenaar Arrangement. Several smaller MECRs also exist: the Zangger Committee, the Chemical Weapons Committee, the International Atomic Energy Agency (IAEA), and the Proliferation Security Initiative. As many of the names suggest, most of these regimes focus on counter-proliferation of weapons, their delivery systems, and technology used to develop those weapons, whether they be conventional, biological, chemical, or nuclear in nature, including dual-use items.

[3] U.S. Government Accounting Office, “Strategy Need to Strengthen Multilateral Export Control Regimes,” October 2002, <https://www.gao.gov/assets/240/236191.pdf>.

[4] Chapter II, Article 10, calls on Central American nations to ensure that “those responsible for the cultural property records shall maintain close communication to exchange information about their registered goods, as well as those that have been removed or illegally exported from Central American countries.” See Central American Convention for the Protection of Cultural Heritage, August 26, 1995, http://www.internationaldemocracywatch.org/attachments/246_Central%20American%20Convention%20for%20the%20Protection%20of%20Cultural%20Heritage.pdf.