

Navigating between non-conviction based confiscation and Mutual Legal Assistance (MLA)

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1 The issue

Over the past two decades, legislative developments in different regions of the world have been diverse when it comes to asset recovery.

In Latin America, for example, a number of laws are being adopted that significantly expand the possibilities of recovering illicit assets for the States that adopt them. Legal tools such as non-traditional (non-criminal) confiscation are producing positive results and greatly facilitating the work of authorities responsible for asset recovery. However, the fact that they are non-traditional forms of confiscation – and by implication not harmonised – has led to some disagreements in the area of international judicial cooperation in criminal matters.

Extinción de dominio and criminal confiscation

	Extinción de dominio	Traditional criminal confiscation
Procedure	<i>In rem</i> Confiscation is directed against illicit assets (<i>in rem</i>). The holder of the asset is essentially a third party.	<i>In personam</i> Confiscation is part of a proceeding directed against an individual (or company) and is usually ordered as part of the sentence.
Standard of proof	Balance of probabilities The civil law standard is applicable (50%+1 certainty). No criminal conviction is required.	Beyond all reasonable doubt The criminal law standard applies (95% certainty). It is an accessory consequence of a criminal conviction.
Geographical extent	Latin America A growing number of Latin American countries are introducing such laws. Similar laws exist in many common law countries and even in some countries with a civil law tradition.	Almost universal Virtually all countries have some form of criminal confiscation.

Let's take the following example to illustrate the problem:

- A Latin American State that is a victim of corruption has a law on **Extinción de dominio**² that allows for the recovery of assets regardless of whether the perpetrator has been convicted.
- In the same scenario, let us imagine that this State carries out the **Extinción de dominio** proceedings, which conclude with a final and enforceable sentence in which it provides for the confiscation (without conviction) of a bank account

¹ The views and opinions expressed in this document are those of the author and do not necessarily reflect the official position of the Basel Institute on Governance or its International Centre for Asset Recovery.

² Latin American model of non-conviction based confiscation.

located in an international financial centre. The law scrupulously respects international standards of due process.

- Finally, let us imagine that the financial centre – converted into a requested State by an MLA request from the victim State – does not have a comparable asset recovery law or has similar laws that are significantly different in procedure and scope.

Based on the territorial principle of international judicial cooperation in criminal matters – according to which the requested State mainly applies its own law in the context of the MLA – the requested State could refuse the request for cooperation.

Is it really possible – in the complex relationship between sovereign States – for one State to tell another that it cannot enforce a judgment because the underlying legal mechanism is unknown in its law?

The simple answer is yes. In fact, it happens over and over again at the international level that the legal actions of victim countries are frustrated because some States reject requests in scenarios similar to the one described above. The principles of sovereignty and territoriality guarantee this inalienable right.

The less simple answer is: it depends. Inter-state relations are composed of a set of obligations arising from various international normative bodies. As a result, there are commitments related to conventions that need to be studied in more detail before a definitive answer can be given on whether or not a request for MLA is carried out in the case described above.

2 Arguments in favour of the execution of non-conviction based confiscation orders

In order not to trivialise a complex legal analysis in relation to various normative bodies, both international and domestic, it is worth mentioning some arguments that support the execution of foreign non-conviction based confiscation orders in states that do not have that particular mechanism, but do know the principle. As a result of applicable regional conventions, the latter should be the case in most European states hosting major financial centres.

- First, there is the *favourability principle* stipulated in Art. 46 (1)(2) of the United Nations Convention against Corruption (UNCAC). According to this principle, States Parties must agree to the widest possible cooperation under the Convention but also with regard to all laws, treaties, agreements and arrangements to which the requested State is bound. In particular, the favourability principle requires the requested State to study the foreign request in detail and to select, among the various legal solutions available, the one that most effectively favours its execution. That is to say, if there are two conflicting solutions resulting from domestic or international law,

the authorities should choose the provision that allows the execution of the MLA in line with the sense of the request from the Requested State.

- In relation to the latter, it should be noted that in the last 20 years, clear international standards have emerged that make non-conviction based confiscation a suitable mechanism to recover the proceeds of corruption.³ The European Court of Human Rights (ECtHR) has repeatedly ruled that these mechanisms are in accordance with human rights. The ECtHR argues that the conditions are emerging in Europe for developing a common policy in this area – a kind of European international standard in favour of non-conviction based confiscation.⁴ In view of this, the States Parties in this region of the world that for justified reasons refuse to execute foreign confiscation orders must, according to the very minimum requirement of the favourability principle, legally state the reason(s) for their refusal.
- Finally, in the field of international criminal policy, we note the emergence of increasingly incisive tools for recovering assets that are not based on a criminal conviction. Likewise, international bodies active in the field of combating financial crime recommend non-conviction based confiscation as an international standard (see for example Recommendation 4 of the Financial Action Task Force). Consequently, in Latin America, several States have adopted, with relative success and much effort, more effective laws against financial crime which may be paralysed for the reasons explained above.

In these circumstances it is vital that the international community treats the issue with the seriousness it deserves. The favourability principle is not a dead letter in the UNCAC; on the contrary, it is a cardinal principle of MLA that provides an effective corrective intended to limit the discretion of the requested States.

Furthermore, as a matter of consistency, it is imperative that the mechanisms that the international community recommends to victim States can lead to international cooperation, both in the investigation phase and in the execution of sentences.

For this to happen, requesting States that are victims of acts of corruption should ensure that their laws and practices respect international standards related to due process. For their part, requested States should make a sincere effort to live up to the spirit of international conventions, particularly the UNCAC, and apply the principles that favour the prosecution of international crimes and the recovery of assets.⁵

3 Peru, Switzerland and Luxembourg

Since 2007, Peru has had a non-conviction based asset recovery law which was not applied in practice due to problems in the design of the law. Since the adoption of a more viable form of non-conviction-based confiscation in 2011,⁶ international asset recovery cases have

³ ECHR, *Gogitidze and others v. Georgia* (2015), 12 May 2015, Appl. No. 36862/05, para. 105, 121.

⁴ See, for example: ECtHR, *Dassa Foundation v. Liechtenstein*, 10 July 2007, Appl.

⁵ See Art. 46 (3)(k).

⁶ Legislative Decree 1104 (law on loss of ownership).

begun to emerge in Peru where initial investigations indicated that a significant number of bank accounts in Switzerland and Luxembourg potentially held illicit assets. These accounts were recovered by the Peruvian State since it could be determined, in a trial with high standards of due process, that they were used to transfer bribes to former senior Peruvian government officials from international arms dealers.

In 2018, Peru adopted the Extinción de dominio law. Since then, there have been at least two international cases with final and enforceable decisions in Peru.

Extinción de dominio, due process and fundamental rights

Extinción de dominio guarantees due process and fundamental rights without restriction. These are - in fact - fundamental principles of this piece of legislation.

- The person claiming to be the owner of the asset has a number of procedural rights, including the right to a fair trial, the right to a second hearing, the right to provide evidence, and the right to a reasoned judgment, among the most important.
- A specialised judicial system with a dual appeal mechanism has been established to ensure compliance with all constitutional and international human rights standards. The prosecution is carried out by a specialised prosecutor from the Public Prosecutor's Office.
- The Extinción de dominio proceedings are autonomous, i.e. not linked to civil or criminal proceedings. However, its basis is essentially civil, as it is based on the principle that unlawful activities cannot give rise to a legitimate claim to a good or object.
- The applicable standard of proof is civil (balance of probabilities). The burden of proof is on the prosecution.
- It is considered a reparative measure different from a criminal sanction.
- The guilt of the offender is not examined in the Extinción de dominio proceedings.
- The causal link between the asset and the crime plays a key role in determining the judgement.

The above cases are currently the subject of requests for enforcement (exequatur) via MLA in both Switzerland and Luxembourg.

Switzerland and Luxembourg both have the principle of non-conviction based confiscation in their domestic laws but only as a possibility under criminal law or criminal procedure, rather than as an autonomous and independent process. In spite of this, in both cases the Peruvian requests for execution of the sentence have been accepted and are in the execution phase.

The determination of the Peruvian authorities and the rapport that the Luxembourg and Swiss authorities have displayed in their actions should be highlighted. Beyond the technical aspects of the cases, it is a personal position to say that what has truly triggered the paradigm shift in these cases is the proactivity and competence of the authorities of both the requested and requesting States.