

Beefing up Asset Confiscation for 21st-Century Challenges: Non-conviction based Confiscation in Latin America

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Abstract

In recent years, Latin America has been rocked by political corruption scandals of unprecedented magnitude. While symbioses between delinquent corporations and corrupt political classes have posed threats to society's well-being for decades, their methodologies have evolved over the course of time. Macro forces such as globalization and the digital revolution continue to enable criminals to reach new levels of sophistication in hiding their illicit dealings.

Meanwhile, the confiscation and recovery of looted assets is a major criminal justice concern. The approach of law enforcement – particularly in Latin America – has traditionally been to confiscate assets only as part of the criminal conviction of the perpetrator (i.e. criminal confiscation). However, criminal confiscation is arguably outdated, as convictions are often difficult if not impossible to obtain. In OECD countries, for example, criminal confiscation accounts for no more than 13 percent of assets returned to victim countries.

Consequently, we are seeing an increasingly widespread introduction of non-conviction based confiscation (NCB confiscation) in Latin American countries. However, many of these new norms are untested. The procedures they stipulate are at times different from those in requested countries and difficulties may arise where the asset recovery strategy implies the execution of confiscation orders in another country, particularly a financial centre. In a vacuum, the available international legal instruments do not provide answers to many of the obstacles at the enforcement stage.

This paper identifies successful legal solutions for enforcement issues in light of international procedural rights and the criminal policy framework. The study focuses on ambiguities and controversial norms in confiscation and mutual legal assistance laws at the national and international level. Through a review of case law and pertinent literature, as well as expert interviews, the new Latin American laws are analysed from a practical point of view, while also including key academic observations. In this sense, I hope to contribute to current asset recovery efforts and future improvements in NCB confiscation laws.

About the applicant:

Stefan Mbiyavanga, born in 1992, is a graduate student of international economic law at the University of Basel, Switzerland. In February 2019, he will reallocate to Lima, to work at the Peru country office of the Basel Institute on Governance, while also writing his Ph.D. under the supervision of Prof. Mark Pieth.

The Basel Institute on Governance's Peru country office offers a unique set up to conduct such a study, as it is a leading practitioner in the recovery of corruption-tainted assets to Peru and bridges the gap between practice and academia.