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Claudio Mascotto: Panama Papers, Beny Steinmetz and returning assets stolen by dictators

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Geneva

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Claudio Mascotto, a senior prosecutor at the Office of the Geneva Attorney General, talks to GIR about his office's investigation into billionaire mining magnate Beny Steinmetz, the difficulty of conducting cross-border investigations and a controversial Swiss Supreme Court decision in October 2016 that stripped external counsel of privilege protections during bank investigations.

Tell us a bit about yourself

Like many people in Geneva I am the son of immigrants: my mother came from the Netherlands and my father from Italy. Like many of my friends I obtained Swiss citizenship when I was younger and I believe all this made us quite open. Geneva can be compared to London and New York for its social and cultural mix. I studied with people from various backgrounds and some of my best friends were from different countries. As a young law student I never thought that I would one day work for the Office of the Geneva Attorney General, doing paperwork and accounting – I hated this when I was younger.

What made you want to become a prosecutor?

It was purely accidental. I started my career as a lawyer and then I spent a couple of years doing research. I returned to the practice of law and then became a substitute magistrate in the administrative court for about eight years, which was very interesting. While there, I was asked whether I wanted to enter the judiciary as a full time magistrate, which I did. As soon as I was elected – prosecutors, like judges, are elected in Geneva – I was told I had to handle financial cases because one of the two specialised prosecutor seats suddenly became vacant. I said no because I'm bad with mathematics. Nevertheless, I did it, and that's how I got into financial crime prosecution and now I like it. It's amazing, incredible and so immense and vast that you

never stop learning. I didn't have an economic, accountancy or financial background – actually I don't think you need it as long as you agree that you have to learn. I think willingness to search is most important, and accepting that you have to learn at any age. After all, it's what makes life interesting.

How is your office's budget allocated?

In the canton of Geneva, the budget is allocated by parliament upon a proposal of government. The proposal itself is the result of negotiations between different departments. For the last decade the judiciary has issued its own proposal, and the prosecutor general can support that proposal before parliament.

How many are in your team?

We have nine prosecutors, eight financial analysts, five paralegals, and a dozen clerks in our team.

Describe the role of the Office of the Geneva Attorney General

We decide to start cases, then we investigate and decide whether to send a case to the court or to dismiss the charges. We can appeal against decisions and answer appeals, up to the Swiss federal Supreme Court (*Tribunal Fédéral*). We also execute foreign requests for mutual legal assistance and fight appeals in the Criminal Federal

Court (*Tribunal Pénal Fédéral*). Our job is quite similar to that of the police and law enforcement agencies more generally, because we're constantly on the move, searching for evidence. We can issue search, arrest or wiretap warrants, or decide to provide assistance. Most of our work consists of going after crime and after evidence. This makes you quite pragmatic, efficient and solution oriented.

What case has your office worked on that you are most proud of?

In June 2015, our office reached a deal with HSBC in which the bank agreed to pay approximately US\$40 million dollars to settle a money-laundering investigation. The deal that was made in the end was symbolically very important, because it showed our ability to lay down dissuasive financial sanctions – even if the penalty was far lower than it may have been in the US. It also shows that we have a strong, independent and very supportive prosecutor general, Olivier Jornot, who was re-elected because of his tough stance on financial crime.

What kind of cases does the Office of the Geneva Attorney General handle and how are matters divided between your office and the Office of the

Attorney General of Switzerland? Lawyers have told GIR that at times the way the cases are divided between the two authorities can seem random.

I wouldn't say so. Certain cases, such as counterfeiting investigations and crimes committed against federal authorities or foreign states or diplomatic representations, are typically and exclusively within federal jurisdiction. In money-laundering, organised crime or bribery cases, the jurisdiction depends on where the wrongdoing occurred. Federal authorities can also delegate prosecution to cantons. And where jurisdiction is shared, it usually depends on who first initiated the prosecution.

That said, our section handles hundreds of complex cases every year, ranging from Ponzi schemes and boiler-room frauds to human trafficking cases.

How are conflicts of jurisdiction resolved?

Mostly through dialogue, but if we can't solve it we have to go to the court. There is a special division within the Federal Criminal Court in Bellinzona which decides on the jurisdiction of cases.

How often does such a dispute go to court?

Not often at all. I have seen very few cases resolved in this way. So it's not contentious as we have good relationships with our federal and cantonal colleagues.

What cases is the Office of the Geneva Attorney Geneva currently working on?

Our section, which specialises in complex and financial crime, has recently been working on the emblematic case against Guatemala's former police chief, Erwin Sperisen, whose appeal is currently pending in the Swiss Supreme Court in Lausanne. Sperisen, who has Swiss and Guatemalan citizenship, was accused of committing human rights abuses in Guatemala (the killing of several prisoners in a planned operation). He subsequently fled the country and hid in Geneva, where he was arrested. It was a very difficult investigation, conducted by prosecutor Yves Bertossa. In the end, Sperisen was sentenced to life in prison. Some people in Switzerland questioned the opportunity to prosecute crimes committed in South America just because the perpetrator was also Swiss. To us, it is a very good example of how justice can be achieved when you can't expect another country to prosecute a case themselves.

We also have had a couple of investigations linked to the Panama Papers, the leak of corporate documents from Panamanian law firm Mossack Fonseca. The corporate documents, which were made public as you know, don't

always show the real beneficial owner and hardly ever a bank account number. I wouldn't say the documents leaked were uninteresting, but they did show us something we often already knew – that many people were using offshore corporations to conduct business – and above all lacked the information we deem fundamental for our investigations, namely bank documents of bank accounts held by international companies around the world.

Did the press coverage of the Panama Papers put pressure on the office to start an investigation?

Yes of course. Media coverage always comes with some kind of pressure. That's the media's role in a democratic society, to highlight such issues. We're used to working and remaining independent, even under pressure. When we read in the press that the Panama Papers allegedly revealed that a £18 million Modigliani painting, suspected of having been looted by Nazis, was currently held in Geneva by a warehouse keeper on behalf of an offshore corporation, in order to conceal its real beneficial owners, we didn't have a choice but to go seize the painting and at least conduct verifications – which we did.

Are there any other cases your office is working on?

We're currently investigating Beny Steinmetz, the owner of mining company Beny Steinmetz Group Resources (BSGR), as well as two other suspects, for potential corruption in Guinea. With my colleague Johan Droz, we're also investigating the vice president of Equatorial Guinea Teodorin Obiang and other people for alleged money laundering and corruption. This was made public, and it's hard to say anything further about these cases, as we're bound to public office secrecy rules.

In the case of BSGR, there are several criminal proceedings and civil lawsuits or arbitrations involving Guinea as well as other mining companies. So we're keeping a low profile on this case. What we can say is that it's ongoing and moving at quite a rapid pace given the circumstances. As you can imagine, the investigation is very difficult. We've had to serve lots of mutual legal assistance requests to different countries.

For a number of years now, Switzerland has had a policy of recovering assets stolen by corrupt foreign leaders. However, there are tensions around returning stolen assets to countries where the money could be used to further corruption. How does Switzerland navigate this problem?

The concern is ancient and threatens Switzerland's reputation. Switzerland doesn't want to be seen as unable, or worse, unwilling to hand over stolen assets. At

the same time, Switzerland doesn't want to just give the money back to thieves. Over a decade ago, in a case involving an Asian country, we seized US\$20 million of stolen assets held in a Swiss bank account, but we still had a problem because we suspected that there was a high-ranking official within the country's national bank that was corrupt. Instead of handing the funds over to the country, we handed the money to the Bank of International Settlements in Basel, which determined how to spend the money. Switzerland has faced similar issues with assets tied to former Haiti President Jean-Claude Duvalier; former president of the Democratic Republic of the Congo, Mobutu Sese Seko; Ferdinand Marcos, the former president of the Philippines; and former Nigerian president Sani Abacha. We're still grappling with cases linked to Tunisia, Egypt and some other countries. Of course it could be seen as neo-colonialist to ask countries to spend the money for specific purposes such as schools or health. A country could ask "why can't we buy helicopters or missiles with our returned assets if we wish to", but actually we're rather proud that Switzerland returns so many assets to looted countries that benefit their populations.

What is your office's stance on legal privilege?

We always keep to legal privilege, which is a key principle of due process. However, legal privilege only covers what we call "typical lawyer activity", that is counselling and

defending in courts; once a lawyer provides nutshells, manages offshore corporations, signs contracts, passes instructions to suppliers or customers, opens or manages or gives instructions on bank accounts, then he acts as a financial intermediary or a fiduciary, not as a lawyer, so he or she cannot claim legal privilege anymore. The line between those activities is sometimes blurred, and it can be hard to sort out what is covered and not. In the end, a court can be asked to decide. Needless to say this is time consuming. We must keep in mind that drug kingpins, corrupted officials or kleptocrats sometimes hire lawyers, solely to take advantage of legal privilege protections, or at least save time. Of course another exception to legal privilege is when a lawyer himself becomes a suspect or a co-conspirator in a kleptocracy or money-laundering scheme along with his client.

Recently, the Swiss Federal Supreme Court ruled that if a financial institution decides to delegate its investigation and reporting obligations under the Swiss Anti-Money Laundering Act (AMLA) to external counsel, it should not expect the work to be covered by privilege. What do you make of this ruling?

We believe it's the right decision because financial institutions have duties to find out who the real beneficial owner is and to report when a suspicious transaction was made. If you delegate this task to a

lawyer, you also delegate the duties to the lawyer and so the lawyer is obligated to make the information available to law enforcement authorities and the prosecution authorities. This is exactly the aim and the spirit of the law on money laundering. You have to collect relevant information and do it properly otherwise you expose yourself to prosecution and administrative sanctions. It's clearly against the law when you delegate this task to a lawyer and then say "sorry this is covered by legal privilege". That's what makes this decision right. Suspicious transaction reports are one of the major investigating means we have because financial institutions are compelled to fill out forms – the so-called A-Form – stating who the beneficiary owners are. Under Swiss law, if the A-Form doesn't state the truth, it is considered forgery, which is a serious crime with a statute of limitations of 15 years.

Some perpetrators or wrongdoers now seem to try to hire lawyers only to benefit from legal privilege. In some cases, lawyers are not acting as lawyers, but are obviously hired to obstruct investigations. It takes us more time, but sooner or later we get the evidence – and lawyers can face prosecution and disbarment.

What is your office's stance on internal investigations?

Internal investigations are crucial for companies to determine whether to terminate an employment contract or to file a civil lawsuit or criminal complaint. As for internal investigations into criminal matters, any evidence brought by a plaintiff is welcome, and we often receive full reports with attached evidence. Yet there is a risk, mainly with interviews and especially with confessions obtained during the internal investigations, that the evidence is undermined by a violation of due process rules. There is another risk, with electronic records, that they are improperly collected.

Do companies and individuals receive cooperation credit in Switzerland if they self-report misconduct to your office?

Any perpetrator who self-reports wrongdoing to the police or district attorney voluntarily or cooperates in any other way deserves a milder sentence, and in some cases even a complete waiver, as provided by the criminal code. The Swiss criminal procedure code now explicitly allows plea bargains, which the courts almost always ratify, and it also happens that we drop charges in some specific cases where corporations for instance voluntarily compensate for the damages in its entirety. But take into account that this is not the expression of a judiciary policy on corporate crime. Furthermore, though a company won't find detailed rules in the Swiss law or guidelines such as those found in the US Department of

Justice's Attorneys' Manual, it is always possible to informally approach the prosecution service to discuss under which circumstances cooperation credit could be granted. As I understand it, the same principles apply to the Swiss Financial Market Supervisory Authority.

Do you think deferred prosecution agreements should be introduced in Switzerland?

Article 5 of the Swiss Criminal Procedure Code requires that we investigate swiftly, because evidence and the public interest to prosecute a case can disappear over time. However, companies can reach a resolution under Swiss law.

Countries around the world are currently emphasising the importance of prosecuting individuals and holding them accountable for wrongdoing. What's your office's position on this?

This has been the philosophy of the Swiss criminal code since its origins in 1937. It is only in 2003 that criminal liability was extended to corporations. The problem we sometimes face with individuals is that subordinates refer to or rely on guidelines or instructions or practices, and managers or executives claim that such individual wrongdoing couldn't be monitored or even detected. In some recent cases involving Swiss banks, people wondered how top managers could escape criminal

prosecution. I would say the right question to ask is whether we should accept that some individuals might be less exposed than others to liability.

In the past you've warned that free ports – warehouses that specialise in storing art work and other luxury items – can be used for money laundering and tax evasion purposes. Has Switzerland done enough to combat this?

Switzerland has done a lot to combat this. The action has come mainly from Switzerland's coordinator for cultural goods, the federal police in Bern, customs and our prosecutor's office in Geneva. But this is only a start and is part of a dynamic process that involves awareness, a change of culture and update of regulations. It is also a matter of political will to prosecute such cases and to improve legislation to make this easier to do. The same thing happened with the financial sector three or four decades ago and now banks have improved their compliance practices dramatically.

When a bank receives a disclosure order from a prosecutor, it has the obligation to fully comply and to provide all the information and records identified in the order, regardless of the fact that the disclosure might affect the clients of the bank who are not the targets of the criminal proceedings. What steps should prosecutors in Switzerland take to

ensure data privacy and confidentiality are preserved, bearing in mind that the parties to the proceedings, including the person under investigation and the plaintiff in the criminal action, usually have unfettered access to the criminal file?

As a principle, bank secrecy can't be opposed to a criminal investigation. That said, if a clear danger for a trade or business secret is made plausible, articles 102 and 108 of the Swiss criminal procedure allow us to take any reasonable measure to protect such an interest, like partially blacking out documents, or prohibiting the circulation of any copies. Such restrictions to providing equal access to evidence are acceptable as long as they are justified. However, in most cases, third parties have to accept that their data will be made available. The same applies to mutual legal assistance proceedings.

On what grounds will your office decide to open criminal proceedings after receiving a mutual legal assistance request from a foreign country?

We are compelled to start domestic proceedings as soon as there is enough suspicion. Most foreign requests bring us that required degree of suspicion. We of course also need justification and in the end we can drop charges if there has been a sentence abroad.

Lawyers have expressed concern about the rights foreign countries have to access files of Swiss criminal cases when that state is a plaintiff in the matter or the originator of a request for mutual assistance. How do you respond to these concerns?

The concern is that a foreign country could obtain evidence more easily as a plaintiff, and then use it, without being bound by the principle of specialty, which states that the evidence obtained through mutual legal assistance in criminal matters can only be used for the purpose of its criminal investigation as described in the request. Those concerns were raised in some famous recent bribery or kleptocracy proceedings.

Currently under Swiss case law, a foreign state will not be able to access the file pending full resolution of the request for mutual assistance. This case law has created a number of issues and is perceived as being unduly restrictive. In practical terms, it compels a foreign state to choose between the avenue of mutual assistance in criminal matters and the filing of a criminal complaint in Switzerland where the foreign state would be admitted as a plaintiff in the criminal action.

My personal opinion is that once a country meets the requirements to be admitted as a plaintiff, there is no reason to treat it differently than any other usual plaintiff. Suppose there are two plaintiffs in a fraud case,

a corporation and a country. The corporation could easily use the evidence obtained through the (low cost) criminal proceedings as a civil party to file any civil lawsuit elsewhere to go after the money – but you would prohibit the state to do the same?

When we ask for mutual legal assistance, most countries provide it very quickly, while it sometimes takes us months or years to fulfil their requests, because individuals and companies have the right to appeal against MLATs under Swiss law. Almost all appeals are lost, but precious time is wasted. We should consider making international cooperation faster and easier, especially with reliable countries. This, in my opinion, requires the federal legislature to improve the laws, and to start with rescinding the right to appeal when a request comes from a state that Switzerland deems reliable.

Interviews