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The Role of Special Investigative Techniques in Combating Corruption

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The Role of Special Investigative Techniques in Combating Corruption



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The Importance of Special Investigative Techniques

- Article 50(1) of the UNCAC requires provision for “controlled delivery” to the extent consistent with local law, and adoption of other Special Investigative Techniques as deemed “appropriate.”
- FATF Recommendation #27 includes the provision: “Countries are encouraged to support and develop, as far as possible, special investigative techniques suitable for the investigation of money laundering, such as controlled delivery, undercover operations and other relevant techniques.”
- What is “appropriate” and “as far as possible”?

The Maria Nolasco Case

- In 2002 the US Customs service broke a money laundering operation that was moving money between a bank in New Jersey (USA) and several Brazilian currency exchange firms.
- The operation, managed by bank VP Maria Nolasco, laundered half a billion dollars in the 6 months of the investigation – **3.7 billion dollars** over its 4-year run.
- The scheme was broken by undercover agents; one who was hired as Ms. Nolasco's administrative assistant, another who acted as a drug trafficker seeking to have his money sent out of the U.S.

ABSCAM

- In 1979-1980 the FBI ran an undercover "sting" operation on local, state and federal officials.
- The operation, which had FBI agents portraying Arab oil tycoons who wanted to invest in casinos and titanium mines in the US, ran for 23 months and cost \$800,000.00.
- Eighteen people, including six members of Congress, were eventually convicted (bribery and conspiracy, and some lesser charges).

Special Investigative Tools -- What Are They?

- “Techniques applied . . . for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.” (COE, 2005)
- Surveillance, Controlled Delivery, Undercover Investigation, Communication Intercepts, Simulated Purchases/Bribes, Registration of Simulated Companies, etc.
- Exceptionally valuable in corruption cases.

Special Investigative Tools: More Important & Widespread

- **UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Art. 11)**
- **UN Convention against Transnational and Organized Crime (Art. 20)**
- **UN Convention against Corruption (Art. 50)**
- **FATF Recommendation #27**
- **EU position (directly supports UNCAC’s use of SIT and calls on its Members to adopt common standards for their use)**
- **COE position – Encourages use of SIT (Recommendation No. (2005)10)(provides for proportionality and other constraints)**

Important tools -- that are not in every toolkit

- While more and more economies are making broad use of SIT, many do not.
- The reasons:
 - Prohibitions on some types of surveillance (human rights concerns; historical abuses of privacy rights)
 - Bar on controlled delivery based on rules requiring that crime be stopped when discovered, bar to police complicity, etc.
 - Impediments to simulated transactions and undercover activities: “agent provocateur” prohibited, no deceit permitted by police

These Are Valid Concerns

- Abuse of authorization to engage in surveillance
- Abuses in simulated/undercover operations -- entrapment, “Rampart” scenario, particular issues in vice cases
- Concerns about protecting public trust and the rights of citizens (ideas that police should stop crime when discovered, not engage in deceit, etc.)

Policy Issues

- Weighing the rights of citizens to have a less corrupt government (and issues relating to drug distribution and terrorism) against rights regarding privacy/intrusion.
- Efficacy of “organized crime” interdiction -- combating individuals, or taking on organizations. [Laws that require authorities to act immediately to stop crimes and arrest suspects, play into the hands of criminal syndicates].
- Issues generated by rising international standards.

Core issue: How to protect rights while attacking “wrongs”?

- There are ways to control the use of these tools so that potential harms are averted
 - E.g., Regarding Controlled Delivery, the UNCAC makes specific provision for removing or substituting illicit goods before completing delivery, if necessary to comply with domestic law.
 - Various types of constraints can be placed on these “power tools” – regulating threshold, methodology, and use of results.

Threshold Controls

- Limiting use of SIT to listed offenses or to offenses punishable by imprisonment of specified minimum term.
- Restricting to certain circumstances (e.g., in US, wiretaps limited to circumstances where no other available means of evidence will suffice. Judge decides.)

Controls on Methods

- Restricting the duration of a technique's use (e.g., limited period for wiretaps).
- Restricting the nature of investigative activities (policy manuals generally restrict the kind of behavior that can be engaged in by undercover agents)
- Legal principles pertaining to "entrapment" and "outrageous government conduct."
- Substitution of contraband in controlled deliveries.

Controls on use of results

- Evidentiary rules -
 - Can limit the use of the evidence obtained to the offenses that were the basis for the investigation.
 - Can entirely reject, or exclude, from judicial consideration evidence that was collected improperly or in a manner calling into question the integrity of the investigative procedure.
- Also, if undercover government agent assisted in accomplishing offense, this fact can be considered in mitigating punishment.

“Defending Liberty, Pursuing Justice”

- You can do both.
- It is worth amending laws, and perhaps constitutions, to allow for restricted and accountable use of SIT.
- Global standards are moving in this direction:
 - Citizens will expect their governments to take all reasonable steps to stop corruption.
 - Harmonization across borders increasingly important.

SIT As a Deterrent

- General deterrence (awareness that law enforcement officials may use these methods raises associated risks)
- Specific deterrence:
 - Integrity testing
 - Open surveillance of official activity
- Promotes public trust in the ability of government to constrain corruption.

Fewer Issues in Open Use as a Deterrent

- Official activity does not carry an expectation of privacy – can openly place surveillance cameras in public areas.
- This is an effective tool in stopping some forms of “enforcement” misconduct.
- Re “integrity testing,” put government employees on notice that they are subject to testing through simulated bribery.

Plea Agreements as a SIT

- Not a traditional form of SIT, but an extension of one: the use of an informant.
- Plea Agreements are, like certain types of SIT, repugnant to the values of some legal systems.
- As a means of obtaining witness cooperation, Plea Agreements are, like all SIT, exceptionally valuable in corruption investigations.
- Properly managed, the harm threatened by the use of Plea Agreements can be contained.

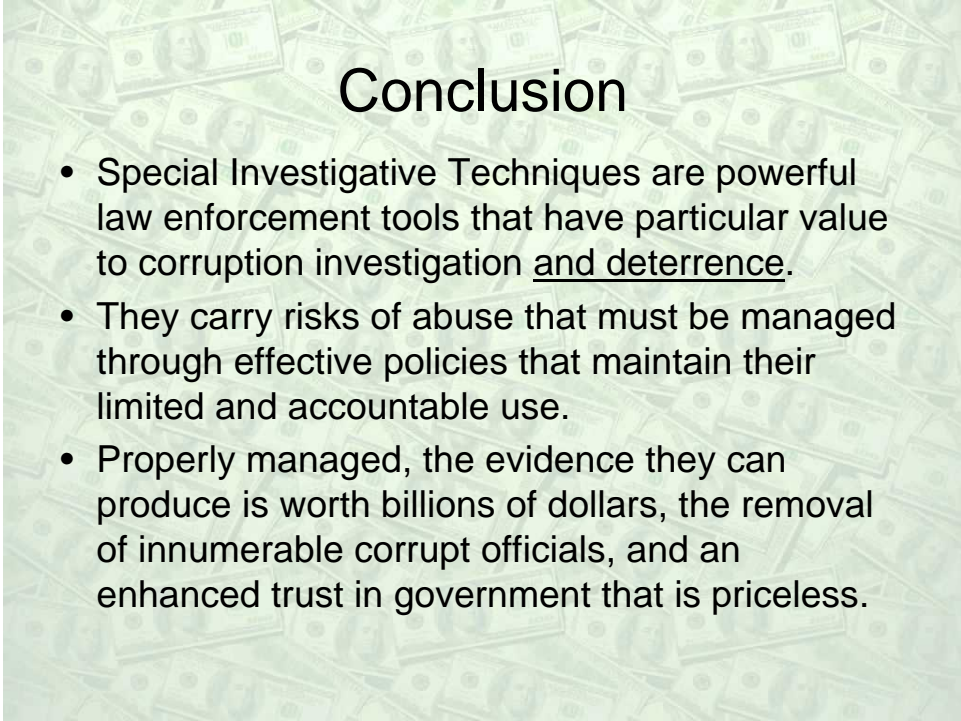
Various levels of disposition authority allowed prosecutor:

- In some jurisdictions, plea agreements only effect which charges will be proceeded upon – the sentence remains entirely the province of the judge.
- In some, the prosecutor agrees to make a sentencing recommendation, but the decision remains the judge's.
- This can also be provided for with the judge reviewing the proposed plea agreement before “accepting it”, if he or she finds it consistent with public policy.

- The value of the Plea Agreement in the fight against organized crime is so great that Italy, having had a traditional civil law system – and substantial concerns about organized crime – adopted a special form of it:
 - In Italy, the “pentiti” (cooperating defendants in organized crime cases) receive shorter sentences, in some cases freedom (and qualify for a witness relocation program).
 - Italy has a separate plea bargain procedure (similar to a procedure used in France and other civil law jurisdictions) for minor offenses.

Plea Agreements can be made:

- Transparent – public officials to disclose all terms and conditions in court.
- Accountable – justification for plea offer subject to review, and ultimately public oversight.
- Fair – within limits, plea agreements can be constrained so that the “big fish” does not get the “sweet deal”, and the rights of all defendants – and the public interest – are protected.



Conclusion

- Special Investigative Techniques are powerful law enforcement tools that have particular value to corruption investigation and deterrence.
- They carry risks of abuse that must be managed through effective policies that maintain their limited and accountable use.
- Properly managed, the evidence they can produce is worth billions of dollars, the removal of innumerable corrupt officials, and an enhanced trust in government that is priceless.