



SUSPENSION & DEBARMENT

Strengthening integrity in
international defence contracting

Acknowledgements

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Suspension and Debarment

Strengthening integrity in international defence contracting

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Foreword

All nations and companies are blighted when corruption occurs in a public procurement of defence articles and services. Defence Ministries recognise the damage and waste that can result from just one corrupt procurement. At the same time, defence contractors are well aware of the financial, legal, and reputational consequences of corruption in the industry. Whilst the vast majority of people working in this space, both in the public and private sectors, conduct themselves and these transactions with integrity, defence contracting still is stigmatized by corruption.

I lead Transparency International's Defence and Security Programme, which is one of TI's global sector initiatives, operational since 2004. My team and I work with governments and defence companies worldwide on constructive ways to reduce and eliminate corruption in the defence and security sectors. I am repeatedly asked by Defence Ministers and by Defence Procurement Chiefs: "We have any number of control systems and processes in place in our defence procurement, but they still don't stop the bribery and corruption. What else can we consider doing?" It is a heartfelt plea: the defence sector has always been particularly vulnerable to corruption, with its large, technically complex projects; limited supplier base; and secrecy- and security-related constraints.

To be sure, there is no single solution. One part of the answer is for leaders in the public and private sectors to honestly assess the quality of independent oversight of defence procurement contracts. Such oversight has been internal (e.g., internal audits); external and official (e.g., public audit offices); and/or external and unofficial (e.g., media and civil society). But oversight alone, like other measures that are not sufficiently preventative, has not staunched the problem. Oversight mechanisms exist in most countries, but with varying degrees of success. Their primary disadvantage is that, as ways to monitor corruption only "after the fact," they are unable to forestall corruption from happening in the first place.

As this report affirms, however, there is another tool for combatting corruption: the use of suspension and debarment. These mechanisms also offer oversight of defence procurement transactions. But they add significant preventative advantages lacking in other forms of oversight: they have immediate effects; they happen quickly; they require a low burden of proof; and they are easier for procurement agencies to do, as they can do it themselves, without the need for a separate prosecuting agency, courts or judges.

Suspension and debarment systems are typically administrative mechanisms that regulate contractor behavior while operating within or by connection to a defence establishment, but still independent of it. These systems have the power to discipline corrupt contractors and even to debar them in the case of major wrongdoing. But, more to the point, these systems also have the power to require improved behaviour from companies without debarring them, thus initiating an

upwards cycle of improvement without the actual imposition of debarment, except when necessary.

The United States has one of the most developed, tested systems of suspension and debarment. Within the United States, it is the U.S. Department of Defense that has most productively and usefully employed these sanctions. This brings me to the purpose of this analysis and this report, and to its authors. The senior author of this report, Steven Shaw, was formerly Deputy General Counsel (Contractor Responsibility), U.S. Department of the Air Force, where he served as the Air Force debarment and suspension official and managed the Air Force's Coordination of Fraud Remedies Program. He had great success in raising standards of integrity across all U.S. defense procurement activities, and in encouraging a positive ethic of integrity and anti-corruption within the defense industry.

The report illuminates how and why suspension and debarment systems actually function. This analysis will allow those in other countries to better understand suspension and debarment, and to get a feel for how their procurement systems and industries could benefit from the use of a suspension and debarment system. The authors analyse four national systems (Brazil, Kenya, India, and the United States) and one international system (the World Bank). They look into what works well and what does not, with a view towards identifying the best practices currently in use. This analysis can be passed on to a government legal team to serve as the basis for a consideration of how a suspension and debarment system might be established.

A suspension and debarment system is not, in itself, a panacea. Such systems can in fact pose corruption risks, because they allow for the concentration of decision-making power in one individual or institution's hands. This may render such system unsuitable for some nations. Protective mechanisms must be in place to ensure that the individuals in control of suspension and debarment systems act with propriety, and that their work is carefully overseen.

I hope that readers of this report will emerge with a good understanding of how suspension and debarment systems work in practice, and how such a system might be beneficial for their own countries and their own defence needs.

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January 2015

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Executive summary

This report evaluates and advocates a tool for combatting corruption in defense procurement: the use of suspension and debarment. As a common start point, it defines suspension and debarment as sanctions imposed by a public entity against businesses and individuals to bar them from participating in public procurements. Typically, systems of suspension and debarment are administrative mechanisms that regulate contractor behavior while operating within or by connection to a national defense establishment, but still at least partially independent of it. The systems can be implemented by a nation for all of its departments and ministries; in the alternative, they can be implemented by a single ministry, for example the Ministry of Defense, to protect its own procurements. This report discusses some of the significant benefits of a well-functioning suspension and debarment system. With these benefits in mind, it explains how suspension and debarment systems function, both in theory and practice, and it identifies certain “best practices” that characterize a well-functioning suspension and debarment system.

TI-UK recognizes that, as much as some jurisdictions might employ some form of suspension and debarment, these systems are not universally used. Using this report, TI-UK aims to give governments around the world—Ministries of Defense, in particular—an understanding of how these systems might be beneficial for their countries and defense needs.

This report begins by describing the basic functions and structural features of a suspension and debarment system. As discussed below, these systems deter corruption, fraud, waste, and abuse—problems that threaten all stages of the procurement process, from when an agency just begins to determine its procurement requirements, to when contracts are awarded, performed, and closed-out. Further, they deter these problems in both “specific” and “general” ways. Specific deterrence occurs when a misbehaving contractor is individually stopped and removed from the procurement process, thus barring ongoing or future misconduct by that contractor. General deterrence occurs because of the broader salutary impact that suspension and debarment can have on contractor conduct throughout the defense industry—in effect, the promotion of a broader culture of business ethics.¹

A culture of business ethics is inculcated in several ways. For one thing, it is in a contractor’s financial interest to remain eligible to receive and perform public contracts; to that end, a suspension and debarment system institutionalizes and ratifies a procurement process that rewards ethical behavior, not unethical behavior. A contractor is incentivized to act ethically when a suspension and debarment system ensures that there are significant consequences for specified deviations from certain ethical norms, to include ineligibility for public contracts, and also benefits for complying with such norms. Indeed, to avoid sanction, a contractor must adopt internal compliance systems that are robust enough to prevent, identify, mitigate, and eliminate unethical or illegal behavior.² In turn, a broader, industry-wide culture and climate of ethical conduct and good corporate governance takes root.³

Next, after discussing these functions and features, this report considers in some detail the suspension and debarment systems of five different jurisdictions: (1) the United States; (2) the World Bank; (3) Brazil; (4) India; and (5) Kenya. These case studies illustrate how, in practice, a

suspension and debarment system prioritizes one or another functions or features. For instance, the U.S. system has discretionary elements that allow an appropriate sanction to be tailored to the specific misconduct; this, combined with a focus on present responsibility, allows suspension and debarment in the United States to promote real, utilitarian goals. Meanwhile, the World Bank system incorporates not only a range of sanctions, but also a cross-debarment practice that allows the World Bank to ensure that corruption on one contract, in one jurisdiction, does not transfer to another. Brazil's stern anti-corruption posture and its recent initiatives under the Brazil Clean Company Act not only punish corruption, but also attempt to promote ethical behavior. In India, the practice of suspension and debarment by both government ministries and state enterprises reflects, to some extent, a pan-government experiment in how sanctions can be tailored by different procuring entities in fair, rational, and effective ways. Lastly, Kenya authorizes private citizens to recommend investigations into potential misconduct, thus giving the public itself a direct role in battling corruption.

Of course, it is no simple matter to implement or administer a suspension and debarment system. As discussed below, there are obstacles that each system must continuously reckon with—e.g., the risk that suspension and debarment will be used to perpetuate corruption, not to combat it, and also the complexity of administering a suspension and debarment system, which can undermine a system's effectiveness. Yet there are, at the same time, certain “best practices” of suspension and debarment that should have universal appeal. And these best practices are what should appeal to both procuring governments and defense contractors. After all, neither constituency is well-served by the lack of a well-functioning suspension and debarment system. As discussed below, a suspension and debarment system that models these best practices will:

- (1) have appropriate goals and standards;
- (2) afford necessary due process to defense contractors;
- (3) coordinate on both intra-government and inter-government bases;
- (4) ensure transparent decision-making and processes; and
- (5) sanction contractors only as necessary and commensurate with reasonable, fair goals.

1. Introduction

This report has the ambitious task of conducting a multi-jurisdictional analysis of suspension and debarment systems affecting defense contractors in order to identify—and to prescribe, if possible—key features and “best practices” that any suspension and debarment system might emulate.

To begin, suspension and debarment are defined here as sanctions that are imposed by a public entity that procures goods and services from the private sector (or that oversees such procurements) on a private entity (such as a business or individual) in order to bar or limit (in accordance with the terms of the sanction) that entity’s participation in such procurements. Although this definition of suspension and debarment might be quarreled with or modified, it reflects how suspension and debarment are commonly viewed and practiced—and so it is, therefore, an appropriate starting point for this report.

As should be clear from the discussion below, this report’s breadth and depth are circumscribed in several important ways. For one thing, this report evaluates suspension and debarment only as they are used for procurement transactions, not for non-procurement transactions (e.g., grants, loans). Although common,⁴ non-procurement systems are beyond the scope of this report; that said, even audiences interested in non-procurement suspension and debarment may find merit and utility in this report. A nation or defense ministry could also expand the scope of a procurement debarment by making the sanctioned business or individual ineligible for grants, loans and subsidies, in addition to making it ineligible for government contracting. This would further protect the public fisc, while also increasing the deterrent impact of a debarment, as will be discussed later.

This report also evaluates suspension and debarment systems only with respect to how they affect the defense industry. Even though many jurisdictions empower non-defense, civilian agencies to impose these sanctions, it is defense contractors that are, rightly or wrongly, often in the crosshairs. Also, in selecting and evaluating the five case studies below—the United States, World Bank, Brazil, India, Kenya—this report uses only publicly available sources and literature, though it strives to make the best use possible of these resources. By selecting these case studies we are not making a normative judgment about the integrity of the public officials and institutions that administer these suspension and debarment systems, nor about the quality of their respective defense procurement practices; we intend, rather, to only highlight the nuances of these suspension and debarment systems in order to identify, where possible, their most effective features. Finally, we are not suggesting that suspension and debarment systems can be effective only if implemented in every department, agency or ministry of a nation. Because of the high incidence of corruption in certain defense procurement systems, we see no reason why a ministry of defense could not effectively address corruption risk by implementing a debarment system of its own, regardless of the approach taken by other ministries.

As a general matter, though, even a casual survey of the landscape of international defense procurement can lead to the conclusion that the public and private sector have more work to do with respect to combatting corruption. For one thing, although some countries have legal frameworks for using suspension and debarment, these systems have remained relatively static

while defense markets, industries, and contractors have evolved. Markets, industries, and contractors are internationalizing rapidly, with new business opportunities and new competitors regularly appearing.⁵ For defense contractors and their customers, this is a dynamic, fluid, and rewarding environment—but a risky one, too. Risks and challenges that once were faced only domestically or in a limited number of markets are becoming cross-border nuisances.⁶ In many jurisdictions, suspension and debarment systems have not kept pace with these developments; in turn, these systems continue to vary significantly in intent, purpose, and efficacy.

To be sure, these divergences and deficiencies harm both the public and private sectors. Corruption, waste, fraud, and abuse can mar any procurement, with the impact of such misconduct and concomitant sanctions (when imposed) rippling through domestic and international markets.⁷ For a government that has no suspension and debarment system, or one that is ill-equipped to handle these threats, the harm is very real; among other things, financial resources are wasted and contract awards lose their legitimacy. Meanwhile, defense contractors and the defense industry also suffer. Corrupt and ethically acting contractors alike are trapped in an inefficient market that unreasonably or unfairly rewards or punishes their behavior. Further, contractors must incur unnecessary risks and costs as they navigate unnecessarily different and unpredictable standards, procedures, and sanctions.

Accordingly, this report outlines how suspension and debarment systems work, but also how they might be made more functional and effective, in ways that should appeal to both public officials and defense contractors. **First**, it discusses the common features of a suspension and debarment system—*i.e.*, the functions and structures that characterize or distinguish these systems. **Second**, it evaluates the distinguishing characteristics of five suspension and debarment systems. **Third**, it identifies several ways, or “best practices,” to implement and administer more functional and effective suspension and debarment systems. **Fourth**, it discusses obstacles that might inhibit these best practices from taking root.

2. Typical functions and structures of suspension and debarment systems

Although some countries and international organizations practice suspension and debarment, these systems can be a patchwork of incongruous rules, practices, and sanctions. Generally, their differences can be described and categorized based on the systems' intended functions and how, as a practical matter, they are structured.

A. The important functions of a suspension and debarment system

As a threshold matter, a suspension and debarment system should ensure that public funds are appropriately, safely, and reliably spent for lawful, intended purposes, and that the public has confidence in the integrity of its procurements. The public fisc is finite. As such, a well-functioning suspension and debarment system should appeal to public officials, who must steward public resources wisely and receive good returns on investments. It also should appeal to defense contractors, as they benefit when contracts are lawfully and fairly competed, won, and performed.

Of course, there are other important and complementary functions of a suspension and debarment system as well. Specifically, these systems can be used to: (1) deter corruption, fraud, waste, and abuse; (2) enhance the legitimacy of contract actions and public entities; and (3) promote ethical business practices.

1. Deterring corruption, fraud, waste, and abuse

A suspension and debarment system can deter corruption, fraud, waste, and abuse from occurring in the public procurement process in both "specific" and "general" ways.⁸ These problems threaten all stages of the procurement process, from when an agency just begins to determine its procurement requirements, to when contracts are awarded, performed, and closed-out. Nevertheless, specific deterrence occurs when a misbehaving contractor is individually stopped and removed from the procurement process, thus barring ongoing or future misconduct by that contractor. Meanwhile, general deterrence happens because all contractors, recognizing these specific legal and financial risks, are warned away from such misconduct.⁹

These deterrent effects manifest in several ways throughout the procurement process.¹⁰ For instance, when the bidding process begins, the threat of suspension and debarment can prompt a contractor to turn away from corruption, fraud, waste, or abuse. The contractor might even decline to bid —if, for example, it is prone to such misbehavior and cannot safely and ethically bid for and perform the contract. Alternatively, if a contractor already performing on a contract has engaged in corruption, fraud, waste, or abuse, then a suspension or debarment sanction can excise that contractor (and the threat of future misconduct) from the procurement process for a

specified period of time. Some suspension and debarment systems go so far as to sanction a contractor's affiliated entities—including entities with no part in the contractor's misconduct—in order to prevent these affiliates from also engaging in corruption, fraud, waste, or abuse.

2. Enhancing the legitimacy of public officials and contract actions

A suspension and debarment system is a mechanism that can enhance the legitimacy of public officials and contract actions. For the purpose of this report, this is a working definition of "legitimacy": a belief or affirmation that an official or institution has a right to govern, and that any such official conduct is lawful and controlling, and thus must be respected. Where corruption, fraud, waste, and abuse affect how public funds are spent, they erode the legitimacy of the officials and institutions spending these funds, and of the contracts that they award. Neither the public officials nor their contract awards are trusted to serve the public interest. Yet a well-functioning suspension and debarment system can counter such perceptions of illegitimacy. These systems reinforce the belief that contract actions are lawful, honest, and appropriately administered. In that way, they legitimize public officials and contracting agencies.¹¹ They promote the perception that the government is scrupulously stewarding its resources,¹² and that contracts are not being mishandled.¹³

3. Promoting ethical business practices

A well-functioning suspension and debarment system can impact the defense industry even more broadly than through general deterrence alone: specifically, it can inculcate a business environment in which ethical, lawful behavior is the standardized norm, with standards of behavior that are clear, consistent, and rational. For contractors' customers, this environment and these standards are assurances that they will receive the full and anticipated value of the supplies and services that have been procured. For third parties, including the broader public, this environment and these standards are protections against collateral consequences of unethical behavior. And even for the contractors themselves, this environment and these standards ensure that contracts are fairly bid, won, and performed, and that ethical behavior is rewarded.

A suspension and debarment system can be used to promote this culture of business ethics. It is in a contractor's financial interest to remain eligible to receive and perform public contracts; to that end, a suspension and debarment system institutionalizes and ratifies a procurement process that rewards ethical behavior, not unethical behavior. A contractor is incentivized to act ethically when a suspension and debarment system ensures that there are significant consequences for specified deviations from certain ethical norms, to include ineligibility for public contracts, and also benefits for complying with such norms. For example, to avoid sanction, a contractor might adopt internal compliance systems that are robust enough to prevent, identify, mitigate, and eliminate unethical or illegal behavior.¹⁴ In turn, a broader, industry-wide culture and climate of ethical conduct and good corporate governance takes root.¹⁵

B. The structure of a suspension and debarment system

Suspension and debarment systems can also be evaluated and loosely categorized based upon how they are structured. As a general matter, any suspension and debarment system typically excludes, by a suspension or debarment sanction, certain persons and/or companies from public contracts, subcontracts, grants, and/or other publicly-funded programs.¹⁶ Typically, a suspension is a shorter and/or temporary period of exclusion, while a debarment is an exclusion of a longer (or even permanent) term. In practice, though, suspension and debarment systems can have significant structural differences, and these differences can be barometers for recognizing the specific goals and functions (as discussed above) that these systems are intended to serve, and also the efficacy of these systems. Some of these structural differences are: (1) jurisdictional limits, such as the nature and type of the misconduct and transactions that are subject to sanction; (2) whether the sanctions model is “discretionary” or “mandatory,” or even “automatic”; and (3) whether a system is inherently “punitive” or “prophylactic/remedial.”

1. Jurisdictional limits

Whether it is set by law, charter, or agreement, a suspension and debarment system will have a specified scope, or jurisdiction. Three ways to assess this jurisdiction are to consider (a) the types of misconduct that are sanctioned; (b) the types of transactions that are subject to review; and (c) who can be sanctioned.

First, suspension and debarment systems are used to sanction certain identified types of misconduct. Such misconduct might include, by way of example, violations of law and/or regulations, whether domestic and/or international, alleged and/or proven, civil and/or criminal. Often such misconduct includes—though not always, as some suspension and debarment systems are more limited, while others are broader—contract fraud, false statements to the government, poor contract performance (or non-performance), and/or failure to meet other legal requirements, such as obligations concerning business integrity, the environment, and employment practices.

Second, suspension and debarment systems typically govern only specified types of transactions, such as procurement contracts executed by certain government agencies or entities. These sanctions are not used to police every type of business transaction, such as business transactions between private parties. For instance, a suspension and debarment system might or might not apply to misconduct that occurs on certain subcontracts that are under government prime contracts. Likewise, it might or might not apply to misconduct that occurs on a government’s non-procurement transactions, such as grants or loans.

Third, suspension and debarment systems can vary based upon which private parties are subject to sanction. For instance, a suspension and debarment system might expressly apply only to business entities, not to individuals (or to both). It might expressly apply to domestically incorporated or organized business entities, not to foreign firms (or to both). Or, a suspension or debarment might be imposed only upon a defense contractor that directly participates in a public procurement transaction, or it might also extend to that contractor’s directors and officers, or even to that contractor’s business affiliates.

2. A discretionary or mandatory, or even automatic, model

Most suspension and debarment systems are either “discretionary” or “mandatory” (or some combination of the two).¹⁷ Under a “discretionary” model, a public official or body has the discretion to levy a suspension or debarment based upon an evaluation of facts that might warrant (or mitigate against) the sanction. Some discretionary systems issue notices, letters, or warnings to contractors, requesting that they provide reasons why they should not be suspended or debarred. These systems might also permit agreements by which a contractor might avoid or lessen a sanction by complying with certain conditions of ethical behavior, to include certain standards of conduct, restitution, reporting requirements, ongoing monitoring, and/or regular audits.

By contrast, under a “mandatory” model, a public official or body sits in an adjudicative role (akin to a judge presiding over formal litigation) and issues formal factual and legal findings concerning whether certain conduct is, in fact, prohibited.¹⁸ Then, subject to these findings, a suspension or a debarment is imposed, and the official or body has limited (though perhaps some) discretion to waive or lessen the sanction. Hence, by comparison to a discretionary model, a mandatory model might provide greater predictability as to how and when a suspension or debarment will occur. However, it might discourage conduct often seen as beneficial to procurement systems, such as maintaining effective governance programs, contractor self-reporting, and/or contractor cooperation with official investigations.¹⁹

At the far end of the spectrum, though, there is an “automatic” model, which strips a suspension and debarment system of any exercise of discretion. At its most extreme form, an automatic model could even be designed to eliminate the need to have a public body or official dedicated to evaluating and levying these sanctions. In effect, a sanction is to be automatically assessed upon the occurrence of any specified type of misconduct—or even, potentially, on only a charge or suspicion. In response, a sanctioned contractor must prove that the sanction is factually or legally incorrect. But while such automatic sanctions can have popular or political appeal, as they seem a surefire way of deterring, stopping, and punishing misconduct, they typically are based on bad policy. Such a zero-tolerance system can make misconduct harder to detect, as it does not credit a contractor for efforts to self-report, self-improve, and/or cooperate with the government. Likewise, it robs the government of the ability to tailor sanctions that appropriately address the underlying circumstances of a contractor’s misconduct, that incentivize a contractor to rehabilitate itself, and/or that serve other political and economic goals.

Finally, there also are permutations that combine the features of multiple or all models of suspension and debarment. For instance, a suspension and debarment system could institute a minimum range of measures that are a mandatory floor for sanction, but that still can be discretionarily chosen and applied.

3. A punitive or prophylactic/remedial ethos

Lastly, suspension and debarment systems tend to be either “punitive” or “prophylactic/remedial” (or some combination of the two). On the one hand, a punitive system uses suspension and debarment to punish misconduct or unlawful behavior. This ethos often aligns with a mandatory model of suspension and debarment, in which sanctions are to be assessed as punishment, without the consideration of mitigating factors. On the other hand, a prophylactic/remedial system aims to protect the integrity of the procurement process. Suspension and debarment are used to address the underlying bases or causes for misconduct, in order to prevent misconduct from occurring in the future. As such, a prophylactic/remedial ethos often aligns with a discretionary system of suspension and debarment, which permits a consideration of mitigating circumstances, including efforts to remediate past misconduct and/or to prevent future instances of wrongdoing.²⁰

3. Case studies: five suspension and debarment systems

The distinguishing features discussed above can be seen in the different suspension and debarment systems that already have been implemented. Set forth below are five case studies: (1) the United States²¹; (2) the World Bank; (3) Brazil; (4) India; and (5) Kenya. These five jurisdictions do not represent the complete universe of suspension and debarment systems now in practice, nor were they chosen in order to make an editorial or normative judgment regarding the integrity of any public officials and institutions, or the quality of any defense procurement processes. Rather, we selected these jurisdictions based upon a review of the publicly available resources and literature on jurisdictions with varying geographic, cultural, and political histories and structures, and with varying degrees of experience and sophistication with public procurement.²²

A. United States

Suspension and debarment in the United States is based upon authority granted by a variety of statutes and regulations.²³ Given these different sources of authority, the U.S. system can occasionally seem schizophrenic, with features that are discretionary, mandatory, and automatic, as well as punitive and remedial. These contrasting features often result from the competing policy and political concerns that motivate these sanctions.²⁴ For instance, with respect to sanctions that veer towards being automatic and/or mandatory and punitive, one U.S. statute aims to preserve contracting priorities and advantages for veteran-owned small businesses.²⁵ It requires the U.S. Secretary of Veterans Affairs to sanction contractors that “willfully and intentionally misrepresent” their size and ownership status with debarments that last at least five years—essentially, a mandatory debarment.²⁶

Recent efforts of U.S. lawmakers have tended to turn debarment into an automatic sanction as well. Annual appropriations acts prohibit several U.S. agencies, including the U.S. Department of Defense, from using funds to award a contract to any corporation that has been convicted of a felony within two years prior to award—in effect, an automatic debarment.²⁷ This automatic debarment may be set aside by the discretionary finding of a suspending and debarring official (“SDO”) that suspension or debarment is not necessary. Still, in the absence of such a finding, the debarment is automatic. Furthermore, automatic debarments have been increasingly popular politically, as evidenced by frequent legislative proposals designed to punish contractors for contracting-related crimes or fraud—even, in some circumstances, tax delinquencies—even in the absence of a conviction.²⁸

Still, the primary authority for the U.S. system of suspension and debarment continues to be the Federal Acquisition Regulation (“FAR”), which can be seen to impose a hybrid system with both automatic and discretionary features. FAR Subpart 9.4 itemizes certain “causes” for suspension or debarment, and these causes (as discussed below) generally include violations of criminal and civil law, the commission of integrity-related offenses, and violations of other procurement-related

laws. So in that sense, the U.S. system—at least with respect to the finding of a basis for suspension or debarment—could be viewed as automatic. But at the same time, the power to sanction still belongs to an SDO, who must determine whether a suspension or debarment is in the public interest.²⁹ FAR Subpart 9.4 states that these sanctions should not be imposed “for purposes of punishment.”³⁰ The SDO “may” suspend or debar, not “must”³¹; typically, when a sanction is proposed or imposed, the affected contractor can oppose the sanction and/or present evidence that mitigates against severe punishment. In these ways, the United States has a discretionary system. These discretionary features draw from the U.S. system’s emphasis on “present responsibility,” which is the touchstone for a U.S. contractor’s eligibility to participate in public procurements.³² Indeed, this principle of “present responsibility” is enshrined by the FAR: “Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.”³³

Under the FAR, one of the primary differences between a suspension and a debarment—as is often (but not always) the case for other suspension and debarment systems—is the duration of the sanction.³⁴ A suspension typically is a shorter, temporary period of exclusion. It is an “action taken by a suspending official under [FAR] 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting[.]”³⁵ Absent a legal proceeding, it may not exceed one year unless the U.S. Department of Justice (“DOJ”) requests a six-month extension for the purposes of a related DOJ investigation. If a legal proceeding related to the cause of the suspension is not initiated within the required period, the suspension must be terminated³⁶; if a proceeding is initiated, the suspension may continue, pending the resolution of that proceeding. By contrast, a debarment is an “action taken by a debarring official under [FAR] 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period[.]”³⁷ The term of a debarment must be “commensurate with the seriousness” of the cause, though it “generally” cannot exceed three years.³⁸

There are other differences between FAR-based suspensions and debarments, including the bases and standards for imposing such sanctions. FAR 9.407-2 states that a suspension is appropriate if based upon any one of a number of “causes”—causes that, to a great extent, reflect the diverse policy and political concerns that have motivated such sanctions. A suspension can be imposed when a “contractor [is] suspected, upon adequate evidence of”³⁹:

- ◆ committing fraud or another criminal offense in connection with a public contract or subcontract;
- ◆ violating antitrust laws related to an offer to perform a public contract;
- ◆ committing embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;
- ◆ violating drug-free workplace laws;
- ◆ intentionally violating “Made in America” product labelling regulations;
- ◆ committing certain unfair trade practices;
- ◆ having delinquent federal taxes exceeding \$3,000;

- ◆ knowing failure by a principal to disclose certain types of misconduct; and/or
- ◆ committing “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”⁴⁰

There also is a broad “catch-all” cause for suspension: “The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.”⁴¹

Meanwhile, FAR 9.406-2 identifies similar “causes” for debarment, starting with a “conviction [...] or civil judgment” based on any one of the following:

- ◆ fraud or a criminal offense in connection with a public contract or subcontract;
- ◆ violating antitrust laws relating to an offer to perform a public contract;
- ◆ embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;
- ◆ intentionally violating “Made in America” product labelling regulations; and/or
- ◆ committing “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”⁴²

Also, even without a conviction or civil judgment, a debarment can be “based upon a preponderance of the evidence”⁴³ of any of the following:

- ◆ willfully violating contract terms;
- ◆ a history of poor contract performance;
- ◆ violating drug-free workplace laws;
- ◆ intentionally violating “Made in America” product labelling regulations;
- ◆ committing certain unfair trade practices;
- ◆ having delinquent federal taxes exceeding \$3,000; and/or
- ◆ knowing failure by a principal to disclose certain types of misconduct.⁴⁴

And there is a “catch-all” cause for debarment, where the “preponderance of the evidence” shows “any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”⁴⁵

As noted, the authority to suspend or debar typically belongs to an SDO. The mere existence of a cause to suspend or debar “does not necessarily require” that the sanction be imposed.⁴⁶ Rather, the SDO evaluates the present responsibility of a contractor by weighing the existence of a cause for suspension or debarment against the presence of factors mitigating against the sanction.

Before imposing a suspension, an SDO “should consider” the adequacy and credibility of the evidence, as well as the seriousness of the contractor’s acts or omissions; relatedly, the SDO “may consider” the presence of certain “remedial measures or mitigating factors.”⁴⁷ Before imposing a debarment, an SDO “should consider” the seriousness of the contractor’s acts or omissions and the presence of certain remedial measures or mitigating factors.⁴⁸ FAR 9.406-1(a) identifies 10 unique types of remedial measures or mitigating factors that should be considered.⁴⁹

Under the U.S. system, a contractor has certain “due process” protections.⁵⁰ A suspension can be imposed without prior notice or a hearing only if the agency (a) determines that it has adequate evidence of a cause for suspension (e.g., fraud or a criminal offense in connection with a contract); and (b) determines that “immediate action” is necessary to protect the government’s interest pending the completion of an investigation or legal proceeding.⁵¹ But even then, the agency still must provide an immediate notice of suspension to the contractor, and it must allow the contractor to submit information in opposition.⁵² As for a debarment, an agency must provide a contractor with a notice of proposed debarment.⁵³ In response, the contractor can submit factual information and legal arguments in opposition.⁵⁴ At that point, if the debarment would be based on a conviction or civil judgment, the SDO can make a decision based on the existing factual record and opposition; however, for any other cause for debarment, if there is a genuine disputed issue of material fact, the contractor is entitled to additional fact-finding proceedings.⁵⁵ In the end, after exhausting these agency procedures, a contractor still can challenge a suspension or debarment by filing a lawsuit in a U.S. court. If the court concludes that the sanction was improperly punitive, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court can reverse the sanction, or it can remand the matter to the agency for further consideration.⁵⁶

Once imposed, however, suspensions and debarments have a broad, government-wide impact. A suspension or debarment typically bars any type of procurement or non-procurement (e.g., grants, cooperative agreements, loans, leases) business with the U.S. government.⁵⁷ A suspended or debarred contractor is to be identified on the List of Parties Excluded from Federal Procurement and Non-procurement Programs, a public database of “all contractors debarred, suspended, proposed for debarment, or declared ineligible.”⁵⁸ In addition, a suspension or debarment can extend to affiliated entities of the contractor that could, conceivably, threaten the procurement process. Where there is fraudulent, criminal, or other seriously improper conduct, such conduct can even be imputed to the contractor’s officers, directors, shareholders, partners, employees, or other associates (and *vice versa*), where such parties participated in, knew of (or had reason to know of), approved of, or acquiesced to the conduct, thus making these entities and individuals subject to sanction as well.⁵⁹

B. World Bank

An effective suspension and debarment system is essential to The World Bank Group (“World Bank”), which every year issues billions of dollars in financial assistance (e.g., loans, guarantees, interest-free credit, equity investments, grants) to developing countries and private entities in order to reduce poverty and promote economic development.⁶⁰ This system is meant to curb fraud and corruption in connection with World Bank-financed projects, and to dissuade contractors from misusing World Bank funds.⁶¹ The World Bank reports that, through June 30, 2013, the World Bank has publicly debarred or sanctioned more than 650 firms or individuals.⁶² A

debarment, the most frequently imposed World Bank sanction, is a declaration that a firm or individual is ineligible to receive World Bank-financed contracts.⁶³

The purpose of the World Bank sanctions system is to serve what the World Bank defines as its “fiduciary duty”—that is, to “ensure that funds provided by the [World] Bank are used only for their intended purposes.”⁶⁴ The World Bank looks to whether a contractor has in fact committed fraud, corruption, coercion, collusion, or obstructive practices (collectively defined as “Sanctionable Practices”) in connection with a World Bank project or program.⁶⁵ During its investigation the World Bank can issue an “early temporary suspension”—a suspension pending the completion of the proceedings.⁶⁶ Later, at the completion of the proceedings, the World Bank can issue one of the following sanctions:

- ◆ a formal letter of reprimand;
- ◆ debarment for a fixed period without the opportunity of a conditional release;
- ◆ debarment with the opportunity of a conditional release, in which debarment is lifted if the debarred party complies with certain remedial, preventative, or other conditions (e.g., improving corporate governance, adopting and implementing an integrity compliance program, paying restitution, disciplining employees who participated in sanctionable activity);
- ◆ conditional non-debarment, in which the sanctioned party must comply with certain remedial, preventative, or other measures in order to avoid debarment; and
- ◆ restitution or other action to remedy the harm caused by the misconduct.⁶⁷

The World Bank system gives “due process” to contractors suspected of committing a Sanctionable Practice. This process begins with investigative and administrative proceedings.⁶⁸ The World Bank’s Integrity Vice President (“INT”) opens an investigation into whether a contractor (“Respondent”) engaged in a Sanctionable Practice.⁶⁹ As noted, during this period, an early temporary suspension might be imposed if the INT has not yet completed its investigation but nonetheless believes that there is “sufficient evidence” to support a finding that the Respondent engaged in a Sanctionable Practice. A request for an early temporary suspension is submitted by the INT to the World Bank’s “Chief Suspension and Debarment Officer,” or SDO.⁷⁰ “Sufficient evidence” is defined as “evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that it is more likely than not that the Respondent has engaged in a Sanctionable Practice.”⁷¹

The sufficiency and bases of a request for an early temporary suspension will be scrutinized by the SDO.⁷² The request must include a description of (a) the progress of the INT’s investigation; (b) any evidence that remains to be gathered; and (c) an estimate of the time required to complete the investigation (which cannot exceed one year).⁷³ If the SDO finds sufficient evidence that the Respondent engaged in a Sanctionable Practice, the SDO will issue a Notice of Temporary Suspension.⁷⁴ The Respondent then has 30 days to submit a written response in opposition. The SDO may withdraw the Notice after considering the Respondent’s opposition.⁷⁵

After concluding its investigation, the INT may submit the case to a quasi-judicial administrative process called a “Sanctions Proceeding.” This process starts when the INT submits a Statement of Accusations and Evidence (“SAE”) to the SDO, identifying (a) the Sanctionable Practice(s)

allegedly committed by the Respondent; (b) the Respondent(s) that allegedly engaged in the Sanctionable Practice(s); (c) a summary of the facts comprising the Sanctionable Practice(s); (d) evidence that supports the accusations; and (e) any mitigating or exculpatory evidence.⁷⁶ If the SDO concludes that any allegation is not supported by sufficient evidence, the SDO can reject any allegation and refer the case back to the INT.⁷⁷ If, however, the SDO determines that there is sufficient evidence, the SDO will issue a Notice of Sanctions Proceedings (“Notice”) to the Respondent, recommending sanctions and the method by which the Respondent can dispute the accusations and/or recommended sanctions.⁷⁸

Upon receiving this Notice, a Respondent can (a) within 30 days, submit an “Explanation” to the SDO, explaining why the Respondent believes that the Sanctions Proceedings should be withdrawn or revised; and (b) within 90 days, submit a written response in opposition (“Response”) as an appeal to the World Bank Sanctions Board.⁷⁹ If the Respondent does not submit a Response, the SDO imposes the sanction recommended in the Notice and posts a Notice of Uncontested Sanctions Proceedings on the World Bank’s website. If the Respondent does appeal, its Response can oppose or admit all or part of the accusations, and it can present evidence and arguments of mitigating circumstances or other facts relevant to the recommended sanctions.⁸⁰ The INT has 30 days to provide the Sanctions Board with a “Reply” to the Response.⁸¹ If the SDO recommends a debarment of more than six months, the Respondent is suspended pending the final outcome of the proceedings.⁸²

The Sanctions Board’s review is *de novo*.⁸³ It can, by the request of either party or of its own accord, convene a hearing to consider arguments and evidence.⁸⁴ To begin, the INT has the burden to present evidence “sufficient to establish that it is more likely than not that the Respondent engaged in a Sanctionable Practice”; at that point, the burden shifts to the Respondent “to demonstrate that it is more likely than not that the Respondent’s conduct did not amount to a Sanctionable Practice.”⁸⁵ This “more likely than not” standard “means that, upon consideration of all the relevant evidence, a preponderance of the evidence supports a finding that” the Respondent did or did not commit a Sanctionable Practice.⁸⁶ The Sanctions Board will make a decision based on the record,⁸⁷ and its decision will be written, publicly-available,⁸⁸ effective immediately, and final.⁸⁹

Since 2010, the World Bank has allowed for “negotiated resolution agreements”—in effect, an agreement that preemptively settles a suspension or debarment proceeding by promising remedial behavior and good conduct in exchange for a lessened sanction. But like a suspension or debarment under the U.S. system, a sanction by the World Bank can have severe and broad implications. The World Bank has a cross-debarment agreement with other multilateral banks, which provides that a contractor debarred by the World Bank will also be ineligible to bid on a project financed by a multilateral bank that is party to the cross-debarment agreement.⁹⁰ Accordingly, a debarment issued by one multilateral bank is, in most cases, immediately adopted by the others.⁹¹

C. Brazil

Although there have been corruption scandals, Brazil generally is seen as having a strong legal anti-corruption framework.⁹² Most public procurements occur under the Public Procurement Act, Brazilian Law No. 8.666/93, which generally provides for transparency in procurement actions.⁹³ The Public Procurement Act is also the primary legal instrument for Brazil’s system of suspension

and debarment (subject now, however, to changes by recent legislation, as discussed below).⁹⁴ Historically, this system of suspension and debarment has been administered by the Commission of Administrative Procedure Against Bidders, and thus it has been “centralized”⁹⁵—a jurisdictional feature that effectively enshrines a practice of “cross-debarment” across all branches and levels of Brazilian government, including national, state, and local.⁹⁶ Although state and local governments can enact their own specific procurement laws, these laws cannot conflict with federal regulations. Some have praised the uniformity, clarity, and predictability of this centralized system, while others criticize its inflexibility.⁹⁷

According to Brazil’s constitution, suspension and debarment must promote certain overarching principles: lawfulness, equality, morality, publicity, and efficiency.⁹⁸ To these ends, however, the system has generally been punitive, oriented towards showing an absolute intolerance of corruption. In fact, but for the recent legislation discussed below, Brazil historically has mandated suspension and debarment sanctions in the event of misconduct, thus precluding the use of “administrative agreements” or “deferral agreements” comparable to what can be used in the United States or with the World Bank.⁹⁹ The Public Procurement Act identifies several bases for these sanctions, including:

- ◆ a partial or total failure to perform a contract according to its terms;
- ◆ a conviction for intentional fraud on a tax payment;
- ◆ an intentional, illegal act that frustrates public procurement goals; and/or
- ◆ an intentional, illegal act that demonstrates a “lack of probity” to contract with the Brazilian government.¹⁰⁰

The difference between debarment and suspension in Brazil is largely one of duration. A debarment under the Public Procurement Act can last between two and five years,¹⁰¹ while a suspension can be imposed for up to two years.¹⁰² But for this shorter duration, a suspension in Brazil is generally seen as having “the same effect as debarment.”¹⁰³ In effect, it can be imposed for the same causes, and it has the same practical impact, excluding the contractor from the procurement process in a coterminous manner.

In Brazil the sanction process begins with an accusation of misconduct, at which point a contractor has 10 days to respond.¹⁰⁴ The Public Procurement Act requires that the affected government agency investigate and prove most bases for sanction (but for a tax fraud conviction, which requires a court declaration); that said, if the relevant agency does not act, or if the misconduct affects more than one agency, an investigation can be led by the General Commission of Administrative Procedure, an entity within the Office of the Comptroller General. If a sanction is to be imposed, it must be effected by the “highest authority”—e.g., the Minister of State, Secretary of State, or City Secretary.¹⁰⁵ But even then, for up to two years after a sanction is imposed, the sanctioned contractor can ask the relevant agency to review the sanction in light of new or changed material facts. Sanctions can also be challenged in court. Suspension and debarment actions are publicized in the “Official Gazette of the Union”—the government’s publication of its official acts¹⁰⁶—and on the internet.¹⁰⁷

For all of that, however, recent legislation—the Brazil Clean Company Act, Law No. 12,846/2013, effective January 29, 2014—has added to Brazil’s suspension and debarment system. Bases for suspension and debarment now include new integrity-based offenses, including the bribery of

domestic and foreign officials, bid-rigging, and other fraudulent conduct in connection with the procurement process. The Clean Company Act also prohibits efforts meant to hinder investigations being conducted by government agencies. In addition, contractors accused of misconduct under the Clean Company Act can pursue a “leniency agreement”—something similar in some respects, at least, to an “administrative agreement” in the U.S. system or a “deferral agreement” with the World Bank. To be eligible for a leniency agreement, a contractor must self-report its misconduct, and it must cease its illegal activity and cooperate with investigators. By entering into the agreement and satisfying its conditions, a contractor may be able to reduce its fines, and even be exempted from certain judicial and administrative sanctions. Lastly, state and local governments are now able to develop more disparate rules for suspension and debarment, which might complicate the historically “centralized” landscape.

D. India

For decades there has been a debate in India as to how to curb corruption, and in recent years the Indian public and prominent politicians have pushed for more stringent anti-corruption measures.¹⁰⁸ India has a robust variety of anti-corruption laws, including mechanisms for suspension and debarment; in the same way, it is said to have a “wide and rich variety” of implementing guidance for its suspension and debarment system.¹⁰⁹ For these reasons, however, India’s system of suspension and debarment resists easy characterization or summary. By comparison to the systems practiced by the United States, World Bank, and Brazil, the Indian system features an array of rules, practices, and consequences.¹¹⁰ Much of what can be known must be gleaned from implementing guidance issued by Indian government agencies.¹¹¹

Suspension and debarment in India are referred to by various euphemisms—e.g., “banning of business dealings” and “suspension of business dealings,” but also “blacklisting” and “sending suppliers on holiday.”¹¹² Indian law does not always identify the particular objectives or goals of these various sanctions, and how these sanctions differ is often, in practice, unclear; thus, for the purpose of this report, these practices in India will be referred to as “sanctions.”¹¹³ In general, executive guidance from the Indian government suggests that sanctions should be used to promote the public interest, and/or to ensure that unreliable sources are not awarded government business.¹¹⁴ Sources of this executive guidance include: (a) memoranda issued by the Department of Supply (“DOS Memos”); (b) the Manual on Policies and Procedures for Purchase of Goods, issued by the Ministry of Finance; (c) instructions issued by the Central Vigilance Commission of India (“CVC”); and (d) guidelines issued by state-owned Central Public Sector Enterprises (“CPSEs”).¹¹⁵

India’s different government entities and enterprises have different powers to sanction contractors. For example, the Ministry of Commerce can sanction a contractor’s business dealings across the entire Indian government for, among other things, “suspected doubtful loyalty to India.”¹¹⁶ Other Indian government ministries can issue sanctions for other reasons, but these may only be effective within the ministry that issues the order.¹¹⁷ Meanwhile, depending on the level of a CPSE’s ordering authority, a CPSE can sanction a contractor from business with the entire CPSE, or from business with certain business units or divisions of the CPSE.¹¹⁸ Lastly, all sanctions are to apply both to the contractor that committed the misconduct and to the contractor’s “allied firms”—i.e., “all concerns which come within the sphere of effective influence of the banned/suspended firm.”¹¹⁹

In India, many types of misconduct can be cause for sanction. As noted, the Ministry of Commerce can sanction based on suspected disloyalty to the Indian government.¹²⁰ In addition, sanctions can be imposed where there is “moral turpitude in relation to business dealings such as bribery, corruption, and bid-rigging.”¹²¹ A contractor also can be sanctioned for any of the following:

- ◆ security considerations with respect to the State of India;
- ◆ if an officer, employee, or agent of the contractor is convicted of an offense involving moral turpitude in relation to the contractor’s business dealings;
- ◆ if there is “strong justification” for believing that an officer, employee, or agent of the contractor has been guilty of integrity-related misconduct like bribery, corruption, or fraud, or even habitual tax evasion;
- ◆ if the contractor “contemptuously refuses to return Government dues without showing adequate cause”; and/or
- ◆ if the contractor employs a government official that has been removed from office due to corruption, or employs a non-official previously convicted for a corruption offense in a position where the non-official could corrupt a government official.¹²²

Notably, though, regulations issued by the CVC also contemplate imposing sanctions “wherever necessary,” and some CPSEs will sanction a contractor based only on poor contract performance.¹²³

“Integrity Pacts”, a tool developed by Transparency International, are used by government ministries and CPSEs, adding more complexity to the sanctions process in India. An “Integrity Pact” is an agreement that becomes part of a procurement contract, prescribing certain punishments in the event of an integrity-related violation.¹²⁴ The consequences for an Integrity Pact violation can be severe, and can include the cancellation of the instant contract, the cancellation of all other contracts, and debarment.¹²⁵ An Integrity Pact-based sanction can be triggered by, among other things:

- ◆ a “failure to take all measures necessary to prevent corrupt practices, unfair means and illegal activities at any stage of a bid/contract”;
- ◆ a bribery-related offense;
- ◆ a “failure to disclose names of agents and their foreign principals or associates”;
- ◆ “collusion to impair transparency, fairness and progress of the bidding/contracting process”; and/or
- ◆ “complaining without full and verifiable facts.”¹²⁶

Publicly available sources do not provide a clear or consistent description of the due process standards used by India when sanctions are imposed. As a threshold matter, government ministries and CPSEs must implement sanctions “fairly and rationally,” for a “legitimate purpose.”¹²⁷ Still, proceedings initiated for Integrity Pact violations do not have preordained procedural requirements.¹²⁸ A “show cause notice” appears to be required for some CPSE

actions, but not for all sanctions.¹²⁹ Actions by government ministries or CPSEs can be challenged before a “competent authority” within that entity, and actions for Integrity Pact violations can be appealed to an “Independent External Monitor”; otherwise, though, the availability of external judicial review is unclear.¹³⁰ And even though sanctions typically apply prospectively, barring a contractor only from future contracts,¹³¹ some CPSEs will also cancel existing contracts.¹³²

Although there are entities in India that have been debarred for an indefinite period, government ministries and CPSEs typically require that the term of any sanction be limited to a specified period.¹³³ The period of a suspension can be as short as six months.¹³⁴ By contrast, a debarment can be imposed for periods of longer than five years, and an Integrity Pact violation can result in a debarment term of at least five years.¹³⁵ Most sanctions are revoked immediately upon the expiration of their prescribed term.¹³⁶ Nevertheless, sanctions that are instituted for loyalty or security considerations will remain in place unless expressly terminated.¹³⁷ Lastly, although some ministries do not allow the publication of sanctions orders, other ministries and CPSEs now publish details of such orders on the internet.

E. Kenya

In recent years the Kenyan government has taken a variety of steps in order to tackle corruption and redress a perception that corruption in Kenya is pervasive and entrenched.¹³⁸ For instance, the Public Procurement and Disposal Act of 2005 (the “Procurement Act”) created Kenya’s Public Procurement Oversight Authority (“Oversight Authority”), which is responsible for administering Kenya’s system of debarment (Kenyan law allows for debarment, but not suspension).¹³⁹ A debarment can be ordered by the Director General of the Oversight Authority (“Director General”). Debarment is meant to be a prophylactic and remedial tool that “protect[s] the integrity of procurement proceedings in public entities by ensuring that only honest, ethical, and responsible persons and companies participate in tenders.”¹⁴⁰ A debarment in Kenya is to last “not less than” five years.¹⁴¹

The bases for debarment in Kenya are broad. A “supplier, person, or company” can be debarred upon “sufficient grounds” of the following:

- ◆ committing an offense under the Procurement Act,¹⁴² which itemizes offenses that include fraud, corruption, collusion, and inappropriate influence on a contract award;
- ◆ committing an offense that relates to a procurement under the Procurement Act;
- ◆ breaching a public procurement contract;
- ◆ giving false information about qualifications in a procurement proceeding;
- ◆ refusing to enter into a contract after a successful bid, or tender; and/or
- ◆ breaching any ground stated in regulations promulgated under the Procurement Act.¹⁴³

Additionally, Kenya permits the Director General to consider a recommendation from “any investigative agency” that a contractor should be debarred.¹⁴⁴ Kenya also allows “any member of

the public who becomes aware of any conduct that may lead to debarment [to] lodge a request for a debarment”; in turn, the Director General may appoint an “investigative agency” to investigate the matter.¹⁴⁵ It is unclear, however, whether such investigative agency recommendations allow for substantively new bases for debarment.

Kenya prescribes a certain process for debarment. Typically this process begins when the Director General receives a request to debar, which must “clearly indicate the reasons why the supplier should be debarred.”¹⁴⁶ As noted, requests to debar can be submitted by procuring agencies, members of the public, or investigative bodies appointed by the Director General. The Director General must provide “an opportunity to make representations” with respect to a requested debarment; thus, upon receipt of a notice from the Director General, the contractor must respond in writing to the alleged grounds for debarment.¹⁴⁷ The contractor also might be required to appear before the Director General with documents and evidence in opposition to the requested debarment.¹⁴⁸ If a debarment is administered, the debarred contractor may, within 21 days, appeal the decision by requesting a review from the Public Procurement Administrative Review Board (“Review Board”). The Review Board can confirm, vary, or overturn the debarment.¹⁴⁹ As a final layer of review, either the contractor or the Director General can appeal to the Kenya High Court within 14 days of the Review Board’s decision.¹⁵⁰

As noted, a debarment in Kenya can be imposed on a “supplier, person, or company.”¹⁵¹ If a debarment is imposed on a “person,” the debarment can also be applied to “any firm in which the debarred person has a controlling interest.”¹⁵² The debarred entity is barred from participating in any public procurement for the entire period debarment.¹⁵³ Upon request, the Oversight Authority will provide detailed information to any Kenyan government agencies regarding an administered debarment, to include a list of debarred entities.¹⁵⁴ The Oversight Authority also maintains a list of debarred firms on the internet.¹⁵⁵

4. Best practices for suspension and debarment systems

The decision to implement and administer a suspension and debarment system necessarily entails important tradeoffs, each involving certain political, economic, and social costs.¹⁵⁶ One system might prioritize certain normative goals at the expense of others. Another system might have unique structural and procedural features that are necessary because of the political or legal structure of the country or organization. For these reasons, there is no ideal or flawless system of suspension and debarment; indeed, none of the suspension and debarment systems profiled above is perfect, nor can they be.

In different ways, however, these suspension and debarment regimes also suggest that there are some “best practices.” For instance, the U.S. system has discretionary elements that allow an appropriate sanction to be tailored to the specific misconduct; this, combined with a focus on present responsibility, allows suspension and debarment in the United States to promote real, utilitarian goals. Meanwhile, the World Bank system incorporates not only a range of sanctions, but also a cross-debarment practice that allows the World Bank to ensure that corruption on one contract, in one jurisdiction, does not transfer to another. Brazil’s stern anti-corruption posture and its recent initiatives under the Brazil Clean Company Act not only punish corruption, but attempt to promote ethical behavior. In India, the practice of suspension and debarment by both government ministries and state enterprises reflects, to some extent, a pan-government experiment in how sanctions can be tailored by different procuring entities in fair, rational, and effective ways. Lastly, Kenya authorizes private citizens to recommend investigations into potential misconduct, thus giving the public itself a direct role in battling corruption.

By building on “best practices” such as these, a suspension and debarment system can be implemented and administered in ways that are more functional and effective. Indeed, it has been said that there is an “urgent need for a strategic approach and effort to coordinate public procurement and anti-corruption initiatives”—to include suspension and debarment systems—“towards more sustainable, integrated, results-based and effective regulations that will, in the long term, benefit both governments and the private sector.”¹⁵⁷ So as discussed below, and as gleaned from the case studies in this report, some best practices are: (1) to establish appropriate goals and standards for suspension and debarment; (2) to implement necessary and guaranteed due process; (3) to ensure that sanctions receive both *intra*-government and *inter*-government recognition; (4) to promote transparent decision-making and processes; and (5) to alleviate disproportionately harsh sanctions.

A. The appropriate goals and standards for suspension and debarment

It is hardly controversial to say that suspension and debarment systems require “clear standards of conduct and procedural protections.”¹⁵⁸ Whether they are intended to punish, protect, or rehabilitate, suspensions and debarments are meant to be severe sanctions. As discussed, debarments in some jurisdictions can last for five years, or longer. And, in nearly all jurisdictions, suspensions and debarments prohibit a contractor from participating in any new public procurements for the entire term of the order; some jurisdictions even extend this proscription to cover non-procurement transactions like grants, leases, and loans, or to cancel existing contracts or bids. Losing these business opportunities can gravely impact any contractor—particularly smaller contractors and individuals that are less capable of absorbing the blow.

Suspension and debarment systems appear to be most useful when prophylactically/remedially applied, not punitively.¹⁵⁹ In this regard, it must be noted that these harsh sanctions typically are meted out by administrative bodies, not by judicial entities. These administrative bodies usually have a prospective, positive mandate—to ensure that public procurement systems operate with integrity and without corruption. They are not judicial bodies that have been created, structured, and equipped to gather and weigh evidence, or that are trained to appropriately calibrate punishments according to the severity of an offense and its attenuating circumstances. Hence, these administrative bodies are better equipped to impose suspension and debarment in accordance with what aligns with their core mandate: to promote and maintain an honest, ethical, and efficient procurement system.¹⁶⁰ Plus, even when used prophylactically/remedially, these sanctions still can have complementary effects of deterring corruption, fraud, waste, and abuse; enhancing public legitimacy; and promoting a climate of business ethics.

Additionally, even while allowing that a system can combine discretionary, mandatory, and automatic sanctions, suspension and debarment sanctions are often most useful when implemented discretionarily. Of course, this recommendation assumes that public officials and entities will exercise discretion with integrity and honesty; hence, for countries in which public corruption is endemic, a mandatory model of suspension and debarment may be necessary. But as a general matter, a discretionary system can vest administrative bodies with the ability to best calibrate a suspension or debarment order to the procurement system’s subjective needs. Discretionary systems allow for a meaningful assessment of the public interest, to include the public interest in an efficient, cost-effective procurement system—considerations that might mitigate against long-term, iron-clad exclusions of certain contractors.¹⁶¹ Indeed, they allow for the imposition of reasonable, practical, and “less drastic” sanctions that account for what the government requires and for what a contractor is able to bear.¹⁶² Or even, if necessary, they might be used to suspend or debar a contractor on a broader, more restrictive term. But a suspension and debarment system that cannot account at all for these considerations—as happens with automatic suspension and debarment—typically is bad policy, as it robs a government of the ability to implement such effective, pragmatic, and economically sensible solutions.

B. Requisite and guaranteed due process

Suspension and debarment systems must also provide guaranteed, consistent, and orderly due process to the contractors that face these sanctions.¹⁶³ As noted, these sanctions are intended to be harsh, and due process is necessary to protect against their excessive or inappropriate use. Likewise, attenuating circumstances might warrant a more or less severe suspension or debarment order.

All things considered, the following have been identified as “key due process elements”: (a) an internal investigative authority and a distinct decision-making authority; (b) written and publicly available procedures that require notice to be provided to accused parties and an opportunity to respond to and oppose accusations; (c) the equivalent of, at minimum, a “more likely than not” standard of proof; and (d) a range of sanctions that take into account aggravating and mitigating factors.¹⁶⁴ In addition, once the suspending or debarring agency has made a final decision, there should also be a right to appeal the final suspension or debarment order. This appellate level of review might be a single individual or a multi-member panel. It might be an administrative or judicial body. It might even be a body dedicated exclusively to resolving appeals of suspension and debarment orders, or a body with broader jurisdiction. Whatever form it takes, this appellate body must be knowledgeable and skilled enough to render informed, reliable, and impartial judgments on the complex factual and legal disputes that arise with suspension and debarment sanctions.

In the same way, in order to promote predictability, reliability, and even legitimacy, due process requirements should be uniformly and consistently applied. A jurisdiction might conclude that it is appropriate to establish a single government entity for all suspension and debarment proceedings and orders, government-wide, as happens in Kenya. By comparison, in a jurisdiction like the United States or India, it seems impossible to charge a single official or agency with making all suspension and debarment decisions government-wide; the volume and diversity of the procurement activity are too great. But whether there is a single suspension and debarment authority or several, there still must be common, uniformly applied due process standards—case-by-case, authority-by-authority. Such a standardization of due process ensures that there is a clear, consistent, and orderly system.

Due process redounds to the benefit of all stakeholders in the suspension and debarment system, both private and public. For the reasons discussed above, contractors appreciate due process protections; at its core, due process can mitigate against the inappropriate or irrational use of suspension and debarment power. But due process also promotes the interests of governments and suspension and debarment authorities. Due process legitimizes suspension and debarment actions by guaranteeing elements of procedural fairness, transparency, and legality.¹⁶⁵ Indeed, the private parties that are participating in the process and the private citizens that rely on it can have greater confidence in the system.¹⁶⁶ In that way, due process also encourages a more vibrant, participatory procurement system; certainly a procurement can be a more attractive business opportunity in a jurisdiction where due process protects against an arbitrary or inappropriate action. Contract awardees, as well, have reason to take their ethical responsibilities seriously.¹⁶⁷

C. Intra-government and inter-government recognition

Although we recognize that individual jurisdictions have unique procurement and compliance challenges, and that not all suspension and debarment sanctions can or should be given coterminous enforcement by every procuring agency of every jurisdiction, it still seems to be the case that a more reasoned method of publicizing, recognizing, and enforcing suspension and debarment sanctions on *intra*-government and *inter*-government levels would contribute to more harmonious and effective suspension and debarment practices.

With respect to *intra*-government publication, recognition, and enforcement, separate agencies of the very same government too often are ignorant of what one agency already has recognized: that an unethical or unscrupulous contractor presents a risk to the public fisc, and should not be allowed to participate in a public procurement. In this regard, however, the case studies above suggest three best practices. **First**, the identities of all suspended and debarred entities and information regarding their sanctions should be distributed and available to all procuring agencies. If not, an agency might unwittingly award a contract to an irresponsible contractor that threatens the integrity of the procurement system. Such a scenario seems to be possible in India, and also in the United States, where some contractors have appeared on secretive “blacklists,” unbeknownst to the contractors and even to some other agencies.¹⁶⁸ **Second**, where certain misconduct seriously implicates a contractor’s integrity and would threaten the entire, government-wide procurement system, a suspension or debarment by one agency might be given government-wide effect. Of course, such automatic, government-wide enforcement seems ill-suited for all offenses; in Brazil, for example, an indiscriminate, inflexible “centralization” of all suspension and debarment decisions does not allow for considering the countervailing concerns of other agencies or the attenuating circumstances surrounding a suspension or debarment.¹⁶⁹ **Third**, even if a contractor’s suspension or debarment is not effective on a government-wide basis, an agency that seeks to award a contract to a contractor that has been suspended or debarred by any other agency might first be required to explain its consideration of the pending suspension and debarment and the countervailing bases for making the contract award.

Additionally, though perhaps more controversially, there may be occasions for *inter*-government publication, recognition, and enforcement—*i.e.*, instances where a suspension or debarment decision of one jurisdiction might be recognized and even, if reasonable and practicable, enforced by another. To be clear, we do not advocate a forfeiture of sovereignty, or a mindless, “one size fits all” practice for each and every suspension and debarment sanction by any jurisdiction. But some form of reasonable and practicable inter-government comity seems wise and possible, particularly where (a) a threat to the integrity of the procurement system of one country or organization is fungible and applicable to another, and (b) the official actions (including suspension and debarment decisions) of the country that first implements the sanction are entitled to respect. And there is, of course, some precedent for such cross-jurisdictional enforcement—specifically, the World Bank’s cross-debarment agreement with other multilateral banks.¹⁷⁰ Accordingly, jurisdictions might contemplate whether and how they can better protect the integrity of their procurement processes by acknowledging the suspension and debarment actions of others. For instance, it may at least be the case that the suspension or debarment action of one jurisdiction could, in some circumstances, prompt a fact-finding investigation or even a temporary suspension in another.¹⁷¹

D. Transparent decision-making and processes

For at least three reasons, suspension and debarment processes, decisions, and bases should be openly publicized to the maximum extent allowed under the applicable laws covering the disclosure of confidential, proprietary, or otherwise controlled information. **First**, the transparency of these processes and decisions can improve the suspension and debarment process by allowing all parties, public and private, to evaluate a decision, its merits, and its flaws.¹⁷² Interestingly, this is not the case in the United States, where suspension and debarment decisions—and, for that matter, administrative agreements—are made publicly available only in the few instances where the acting agency chooses to make them public. **Second**, such transparent accessibility to all parties, public and private, can improve the credibility and predictability of the suspension and debarment system.¹⁷³ **Third**, such transparent accessibility may also allow for greater consistency from one suspension and debarment action to another, as all procuring agencies and private parties could study past suspension and debarment actions and, as appropriate, utilize analogies, lessons learned, and best practices for future actions.

E. Appropriately proportionate sanctions

Suspension and debarment are meant to be severe sanctions, as they are intended to protect the public fisc and the integrity of the procurement process from improper or unlawful conduct. All the same, these sanctions should not impose undue penalties on contractors, which undermine the effectiveness and efficiency of the public procurement system. When ordered, a suspension or debarment should be calibrated—in the scope and duration of its exclusions—to the goals that it is meant to achieve. Mandating an automatic, government-wide exclusion for any suspension or debarment, as can occur in Brazil and also on occasion the United States, can be both excessive and detrimental. In the same way, for jurisdictions like India, Kenya, and the United States to mandate that a debarment be effective for no less than five years, without exception, can discount important countervailing considerations that make a shorter debarment period far more sensible. Further, the scope of the suspension and debarment action should also be rational, in the sense that it should be limited to the business unit responsible for the misconduct, and not necessarily the entire enterprise.

5. Obstacles to effective suspension and debarment systems

For all that, implementing and administering an effective suspension and debarment system also entails overcoming certain obstacles. As discussed below, these obstacles include both (1) the risk that suspension and debarment will be used to perpetuate corruption, not to combat it; and (2) the complexity of administering a suspension and debarment system, which can undermine a system's effectiveness.

A. Maintaining the integrity of a suspension and debarment system

Sadly, no matter how well-intentioned it is, even a suspension and debarment system can be corrupted. A sophisticated but corrupt contractor might still manipulate the system, deflecting or diverting sanctions to undermine the integrity of the procurement process and/or harm competitors.¹⁷⁴ Or the public officials responsible for administering the system might target a contractor for improper personal gain, not for lawful purposes.¹⁷⁵ Loopholes or discretionary exceptions might be exploited.¹⁷⁶ And, perhaps inevitably, a suspension and debarment system tends to put significant power in the hands of an individual or institution, which brings with it the risk of corruption.

In the end, though, these risks can be mitigated. For one thing, strong protective mechanisms must be instituted in order to ensure that these individuals and institutions act with propriety. Some examples of such protective mechanisms include regularly appointing new individuals to these positions, thus rotating these individuals; requiring a “cooling-off” period to reduce the risk of a revolving door between the public and private sector; imposing external oversight and audits of the suspension and debarment system; publicizing suspension and debarment decisions; and ensuring that contractors have the opportunity to challenge and appeal suspension and debarment sanctions. All in all, there must be accountability for the public sector as well. Government auditors and inspectors must scrutinize suspension and debarment orders and proceedings for irregularities and improprieties. In the end, corruption by public actors must be sanctioned just as it is for contractors.

B. Ensuring the effectiveness of a suspension and debarment system

A suspension and debarment system could be ineffective for any number of reasons. For example, if it is overly complex, the system might be incorrectly used or underutilized.¹⁷⁷ In that sense, the burden of excess complexity can be even greater on a jurisdiction without a sophisticated, well-developed procurement process or legal system, or that lacks a record of transparent, accountable governance. Plus, an overly complex, legalistic system can confuse

contractors, and it can inhibit private participation in the procurement process for fear of sanction.¹⁷⁸ Alternatively, if the suspension and debarment standards and procedures administered by one jurisdiction are too general or imprecise, they can fail to reflect the context and nuances of that jurisdiction's specific procurement system, political structure, and culture. In addition, a more specific challenge to efficacy is where a sanction is not applied in a manner to adequately address the responsibility of affiliates for a contractor's misconduct.

Still, even these risks can be mitigated. For instance, a more harmonious network of effective suspension and debarment systems built on certain "best practices" might better operate to check and to balance inefficiencies that might be built into one particular suspension and debarment system. Of course, this prescription to implement certain best practices of suspension and debarment is still not to be followed blindly, without good sense. Any jurisdiction that would administer a suspension and debarment system must create a system that conforms to its respective environment, giving due consideration and respect to its peculiar procurement, political, and legal standards and procedures, and to any context-specific threats to the integrity of its procurement system. These considerations might demand that one aspect of a suspension and debarment system be more complex or strict; conversely, they might require greater flexibility, freedom, and discretion. In addition, when any such sanction is imposed in accordance with required due process standards, it may be the case that a suspension or debarment should also be applied to an affiliate or parent company of a contractor that has itself acted unethically, or failed in some serious way to manage its affiliates.

6. Afterword

This report should appeal to both procuring governments and defense contractors. As discussed above, neither constituency is well-served by irrational, inefficient, or even nonexistent systems of suspension and debarment. In the end, it benefits all parties to have a system of suspension and debarment that (1) has appropriate goals and standards; (2) affords necessary due process; (3) coordinates on intra-government and inter-government bases; (4) ensures transparent decision-making and processes; and (5) sanctions contractors only where necessary and commensurate with the sanctioning entity's goals.

References

- ¹ The World Bank, “Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks”, at 7 (Mar. 3, 2010).
- ² Id. at 280 (“As debarments can have severe impacts, the risk of such a sanction creates an incentive for companies and individuals to be compliant.”).
- ³ Jessica Tillipman, The Congressional War on Contractors, 45 GEO. WASH. INT’L L. REV. 235, 239, 242 (2012). Related to this discussion, the Ethics Resource Center published a June 14, 2013 report based on the premise that “corporate self-policing and strong ethics cultures [are] the foundation for successfully deterring misconduct,” and that there should be incentives for private entities to adopt effective compliance and ethics programs. See Ethics Resource Center, Improving Corporate Conduct through Pro-Compliance Enforcement Practices (2013), available at <http://www.ethics.org/files/u5/summitSummaryWeb.pdf>.
- ⁴ The United States, for example, employs a government-wide system of suspension and debarment for non-procurement transactions, which is codified in 2 C.F.R. Parts 180 and 215.
- ⁵ See Jorge Claro & Nikos Passas, Discussion Paper on the Effects of the Anti-Corruption Agenda on Government Procurement, at 1 (July 2013); see also “Transparency in Armaments Acquisition,” Presentation to Czech Defense Industry by Transparency International (June 12, 2008).
- ⁶ See Ricardo Wagner de Araujo, Fighting Corruption and Promoting Integrity in Public Procurement: A Comparative Study Between Brazil and the United States, Minerva Program—Fall 2013, at 11; Jorge Claro & Nikos Passas, Discussion Paper on the Effects of the Anti-Corruption Agenda on Government Procurement, at 1 (July 2013).
- ⁷ See Jorge Claro & Nikos Passas, Discussion Paper on the Effects of the Anti-Corruption Agenda on Government Procurement, at 1 (July 2013).
- ⁸ Steven Ramonas, USAID-OIG, Memorandum: Follow-Up Review of USAID’s Process of Suspension and Debarment, at 1 (Nov. 19, 2012).
- ⁹ The World Bank, “Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks”, at 7 (Mar. 3, 2010).
- ¹⁰ U.N. Office on Drugs & Crime, Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption, U.N. Sales No. V.13-85946—Sept. 2013, at 25 (2013).
- ¹¹ Kate M. Manuel, CONG. RESEARCH SERV., RL34753, “Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments,” at 9 (2012). The United States, for example, allows for contract awards only to private parties that are “presently responsible”—a necessary judgment by a procuring agency that a private entity or individual possesses the integrity to receive public funds and perform a public contract.
- ¹² Todd Canini, Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory

Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments, 38 PUB. CON. L. J. 547, 548-49 (2009).

- ¹³ Hans-Joachim Priess, Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks, 45 GEO. WASH. INT'L L. REV. 271, 279 (2012).
- ¹⁴ *Id.* at 280 (“As debarments can have severe impacts, the risk of such a sanction creates an incentive for companies and individuals to be compliant.”).
- ¹⁵ Jessica Tillipman, The Congressional War on Contractors, 45 GEO. WASH. INT'L L. REV. 235, 239, 242 (2012). Related to this discussion, the Ethics Resource Center published a June 14, 2013 report based on the premise that “corporate self-policing and strong ethics cultures [are] the foundation for successfully deterring misconduct,” and that there should be incentives for private entities to adopt effective compliance and ethics programs. See Ethics Resource Center, Improving Corporate Conduct through Pro-Compliance Enforcement Practices (2013), available at <http://www.ethics.org/files/u5/summitSummaryWeb.pdf>.
- ¹⁶ U.N. Office on Drugs & Crime, A Resource Guide on State Measures for Strengthening Corporate Integrity, U.N. Sales No. V.131-8631188—Sept. 2013, at 22 (2013).
- ¹⁷ U.N. Office on Drugs & Crime, Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption, U.N. Sales No. V.13-85946—Sept. 2013, at 25 (2013).
- ¹⁸ *Id.*
- ¹⁹ U.N. Office on Drugs & Crime, A Resource Guide on State Measures for Strengthening Corporate Integrity, U.N. Sales No. V.131-8631188—Sept. 2013, at 22 (2013).
- ²⁰ *Id.*
- ²¹ We discuss herein the suspension and debarment system of the United States federal government, not the individual systems of the states themselves. These states also exercise suspension and debarment, yet the variations and nuances of these systems, though worthy of study, are beyond the scope of this report. Hence, unless otherwise specified, references in this report to the United States should be seen as a references to the United States federal government, and to its model of suspension and debarment.
- ²² To be fair, as well, the relative paucity of publicly available information about some jurisdictions mitigated against the inclusion of these suspension and debarment systems, while it also allowed discussion of some jurisdictions, such as the United States, to be comparably more robust.
- ²³ Kate M. Manuel, CONG. RESEARCH SERV., RL34753, “Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments,” at 1 (2012).
- ²⁴ *Id.*
- ²⁵ See 38 U.S.C. § 8127(g).
- ²⁶ *Id.*
- ²⁷ E.g., H.R. 933 at § 8113, 113th Cong. (1st Sess. 2013) (enacted by the President on March 26, 2013) (“None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony

criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.”).

- 28 E.g., Steven A. Shaw, Don’t Go Overboard Banning Military Contractors,
<http://blogs.reuters.com/great-debate/2012/08/08/dont-go-overboard-banning-military-contractors/> (Aug. 8, 2012); see also Dietrich Knauth, Calls for Contractor Debarment Carry Political Appeal,
<http://www.law360.com/articles/440772/calls-for-contractor-debarment-carry-political-appeal> (May 13, 2013).
- 29 48 C.F.R. § 9.406-1(a) (“It is the debarring official’s responsibility to determine whether debarment is in the Government’s interest.”); 48 C.F.R. § 9.407-1(a) (“The suspending official may, in the public interest, suspend a contractor . . .”).
- 30 48 C.F.R. § 9.402(b).
- 31 48 C.F.R. § 9.406-2 (“The debarring official may debar . . .”); 48 C.F.R. § 9.407-2(a) (“The suspending official may suspend a contractor . . .”).
- 32 48 C.F.R. § 9.402(a).
- 33 Id.
- 34 See 48 C.F.R. § 9.407-5 (“The scope of a suspension shall be the same as that for debarment . . . , except that the procedures of 9.407-3 shall be used in imposing suspension.”).
- 35 48 C.F.R. § 2.101.
- 36 48 C.F.R. § 9.407-4(a), (b). “Legal proceedings” is defined as “any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.” Id. § 9.403.
- 37 Id.
- 38 48 C.F.R. § 9.406-4(a)(1). Note that federal statutes establish a debarment period of more than three years for certain types of actions or omissions by contractors.
- 39 Notably, an indictment for any of these causes “constitutes adequate evidence for suspension.” 48 C.F.R. § 9.407-2(b).
- 40 48 C.F.R. § 9.407-2(a).
- 41 48 C.F.R. § 9.407-2(c).
- 42 48 C.F.R. § 9.406-2(a); see also Kate M. Manuel, CONG. RESEARCH SERV., RL34753, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments, at 6 (2012) (citing 48 C.F.R. § 9.406-2(c)).
- 43 The “preponderance of the evidence” standard requires “proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. 48 C.F.R. § 2.101. The preponderance of the evidence standard does not apply if the debarment would be based upon a conviction or civil judgment. 48 C.F.R. § 9.406-3(d)(3).
- 44 48 C.F.R. § 9.406(b).
- 45 48 C.F.R. § 9.406(c).
- 46 See 48 C.F.R. §§ 9.406-1(a), 9.407-1(b)(2).

47 48 C.F.R. § 9.407-1(b)(1)-(2).

48 48 C.F.R. § 9.406-1(a).

49 48 C.F.R. § 9.406-1(a). An SDO also has the discretion to enter into an “administrative agreement” with a contractor that faces a suspension or a debarment, which can resolve the proceedings. See 48 C.F.R. §§ 9.406-3(f)(1), 9.407-3(e)(1). In these circumstances, the contractor generally admits to wrongful conduct and agrees to certain types of restitution and remedial conduct; in exchange, the severity of the immediate sanction may be lessened, while the agency reserves the right to impose additional sanctions for a failure to abide by the agreement or the occurrence of any additional misconduct. As discussed later in this report, whether an administrative agreement exists is required to be made public, but the agreement itself is not. The responsible agency can choose to make an administrative agreement public.

50 3 Kate M. Manuel, CONG. RESEARCH SERV., R40633, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures, at 4 (2013). To be clear, we use the term “due process” not to refer to a requirement or standard under the U.S. Constitution, but rather to denote a general principle of fair treatment and application of law throughout a government’s legal and administrative systems.

51 48 C.F.R. § 9.407-1(b)(1).

52 48 C.F.R. § 9.407-3.

53 48 C.F.R. § 9.406-3(c).

54 48 C.F.R. § 9.406-3(c)(4).

55 48 C.F.R. § 9.406-3(b)(2). A “civil judgment” is defined as “a judgment or finding of a civil offense by any court of competent jurisdiction.” Id. § 9.403. An “indictment” includes an “indictment for a criminal offense,” as well as an “information or other filing by [a] competent authority charging a criminal offense.” Id.

56 Kate M. Manuel, CONG. RESEARCH SERV., R40633, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures, at 4 (2013); Administrative Procedure Act (“APA”), 5 USC §§ 701-706.

57 Id.; 48 C.F.R. § 9.405(a) (“Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head or a designee determines that there is a compelling reason for such action.*** Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.”).

58 48 C.F.R. §§ 9.404, 9.405. This database can be accessed through the U.S. government’s “System for Award Management” website, www.sam.gov.

59 Kate M. Manuel, CONG. RESEARCH SERV., RL34753, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments, at 7 (2012); 48 C.F.R. §§ 9.406-5, 9.407-5. “Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contract or that was debarred,

suspended, or proposed for debarment.” 48 C.F.R. § 9.403.

- ⁶⁰ World Bank, “What We Do,” <http://www.worldbank.org/en/about/what-we-do> (last accessed May 5, 2014); World Bank, Annual Report 2013, <https://openknowledge.worldbank.org/bitstream/handle/10986/16091/9780821399378.pdf?sequence=1>
- ⁶¹ World Bank Sanctions Procedures §§ 1.01(c), 1.02(a) (Apr. 15, 2012). The World Bank’s Sanctions Procedures also apply to Sanctionable Practices “on the basis of which the Director, General Service Department (GSD) has determined, in accordance with the World Bank Vendor Eligibility Policy, that the Respondent is non-responsible,” “arising from the violation of a Material Term of the Terms & Conditions of the Voluntary Disclosure Program (VDP),” and “arising from violations of Section 13.06 [‘Confidentiality’] of these Procedures.” *Id.* §§ 1.01(c)(ii)-(iv), 13.06.
- ⁶² The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf> (last accessed Oct. 27, 2014).
- ⁶³ *Id.*
- ⁶⁴ World Bank Sanctions Procedures § 1.01(a) (Apr. 15, 2012); Pascale Helene Dubois, Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System, 2012 U. CHI. LEGAL F. 195, 217 (2012).
- ⁶⁵ World Bank Sanctions Procedures § 9.01, “Range of Possible Sanctions” (Apr. 15, 2012); Pascale Helene Dubois, Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System, 2012 U. CHI. LEGAL F. 195, 217 (2012); see also The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 12 (last accessed Oct. 27, 2014).
- ⁶⁶ As noted, this type of a suspension is referred to as an “early temporary suspension,” or “ETS.” An ETS is, in all practical respects, the same as a temporary suspension, just imposed by a different procedure. The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 15 (last accessed Oct. 27, 2014).
- ⁶⁷ World Bank Sanctions Procedures § 9.01, “Range of Possible Sanctions” (Apr. 15, 2012).
- ⁶⁸ Pascale Helene Dubois, Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System, 2012 U. CHI. LEGAL F. 195, 217 (2012).
- ⁶⁹ World Bank Sanctions Procedures § 2.01 (Apr. 15, 2012); Christopher R. Yukins, Cross-Debarment: A Stakeholder Analysis, 45 GEO. WASH. INT’L L. REV. 219, 225 (2013); see also The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf> (last accessed Oct. 27, 2014).
- ⁷⁰ World Bank Sanctions Procedures § 2.01(a) (Apr. 15, 2012); see also The World Bank

- Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013,
<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 11
 (last accessed Oct. 27, 2014).
- ⁷¹ World Bank Sanctions Procedures § 1.02(a) (Apr. 15, 2012).
- ⁷² The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013,
<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 11-12
 (last accessed Oct. 27, 2014).
- ⁷³ World Bank Sanctions Procedures § 2.01(a) (Apr. 15, 2012).
- ⁷⁴ World Bank Sanctions Procedures § 2.01(c) (Apr. 15, 2012).
- ⁷⁵ World Bank Sanctions Procedures § 2.03 (Apr. 15, 2012).
- ⁷⁶ World Bank Sanctions Procedures §§ 3.01, 3.02 (Apr. 15, 2012).
- ⁷⁷ The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013,
<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 10-12
 (last accessed Oct. 27, 2014).
- ⁷⁸ World Bank Sanctions Procedures § 4.01 (Apr. 15, 2012).
- ⁷⁹ See The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013,
<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 10-12
 (last accessed Oct. 27, 2014); see also World Bank Sanctions Procedures § 4.04 (Apr. 15, 2012). If a Response is not filed within 90 days, the sanctions automatically take effect.
- ⁸⁰ World Bank Sanctions Procedures § 5.03 (Apr. 15, 2012).
- ⁸¹ The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013,
<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 16
 (last accessed Oct. 27, 2014).
- ⁸² Christopher R. Yukins, Cross-Debarment: A Stakeholder Analysis, 45 GEO. WASH. INT'L L. REV. 219, 225 (2013).
- ⁸³ The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013,
<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 16-17
 (last accessed Oct. 27, 2014); see also Christopher R. Yukins, Cross-Debarment: A Stakeholder Analysis, 45 GEO. WASH. INT'L L. REV. 219, 225 (2013).
- ⁸⁴ World Bank Sanctions Procedures §§ 6.01-6.03 (Apr. 15, 2012).
- ⁸⁵ World Bank Sanctions Procedures §§ 8.02(b)(ii) (Apr. 15, 2012).
- ⁸⁶ World Bank Sanctions Procedures §§ 8.02(b)(i) (Apr. 15, 2012).
- ⁸⁷ World Bank Sanctions Procedures §§ 8.01, 10.01 (Apr. 15, 2012).
- ⁸⁸ The World Bank's list of debarred entities can be found on the World Bank website, at <http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266> (last accessed Oct. 27, 2014). Notably, a temporary suspension is not announced

publicly, though it is posted on the World Bank's intranet system and a "Client Connection" site that can be accessed by borrowing countries. See The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 15 (last accessed Oct. 27, 2014).

- ⁸⁹ World Bank Sanctions Procedures § 8.03 (Apr. 15, 2012); Christopher R. Yukins, Cross-Debarment: A Stakeholder Analysis, 45 GEO. WASH. INT'L L. REV. 219, 225 (2013). Notably, the Integrity Compliance Office decides whether conditions for release from debarment (or in the case of conditional non-debarment, the conditions for continued non-debarment) have been satisfied. The Integrity Compliance Office is housed within INT.
- ⁹⁰ World Bank, Annual Report 2013, at 22. Notably, though, there is no "cross-suspension" agreement, so a temporary suspension by the World Bank is not also enforced by other multilateral banks. See The World Bank Office of Suspension and Debarment, Report on Functions, Data and Lessons Learned, 2007-2013, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>, at 15 (last accessed Oct. 27, 2014).
- ⁹¹ Christopher R. Yukins, Cross-Debarment: A Stakeholder Analysis, 45 GEO. WASH. INT'L L. REV. 219, 225 (2013).
- ⁹² See GAN Integrity Solutions, Business Anti-Corruption Portal, Brazilian Public Anti-Corruption Initiatives: Public Anti-Corruption Initiatives, available at <http://www.business-anti-corruption.com/country-profiles/the-americas/brazil/initiatives/public-anti-corruption-initiatives.aspx>; see also U.S. Department of State, 2013 Investment Climate Sheet - Brazil, available at <http://www.state.gov/e/eb/rls/othr/ics/2013/204608.htm> (Feb. 2013) (discussing corruption scandals but also "laws, regulations and penalties to combat corruption").
- ⁹³ Law 8.666/1993 is available here: http://www.planalto.gov.br/ccivil_03/Leis/L8666cons.htm.
- ⁹⁴ See Law 8.666/1993.; see also Ricardo Wagner de Araujo, Fighting Corruption and Promoting Integrity in Public Procurement: A Comparative Study Between Brazil and the United States, Minerva Program—Fall 2013, at 26. Notably, debarment is also permitted under Brazil's Reverse Auction Act and Differential Public Regime Act. *Id.*
- ⁹⁵ *Id.* at 15. The Commission is nestled within the executive branch of the Brazilian government. It is a division of the National Disciplinary Board, which is a unit inside the Office of the Comptroller General ("CGU"). The CGU is tasked by the President with public procurement auditing and anti-corruption measures.
- ⁹⁶ *Id.* at 35.
- ⁹⁷ *Id.* at 15-17.
- ⁹⁸ *Id.* at 30.
- ⁹⁹ *Id.* ("[T]he rationale [of the Brazilian system] is to be punitive and give emphasis on reputation, [and] thus is mandatory against corrupt suppliers over past conduct. In that sense, once a contractor wrongdoing arises it will be excluded from [the] public procurement system.").
- ¹⁰⁰ *Id.* at 31; see also Articles 87-88 of Brazil Federal Law n. 8.666/1993. "Lack of probity" is so loosely defined that it is often used by the Brazilian government as a basis for debarment.

- 101 Id. at 26. Under the Reverse Auction Act and Differential Public Regime Act, a debarment can last for up to 5 years. Id.
- 102 Id.
- 103 Id.
- 104 Id. at 33-34.
- 105 Id.
- 106 The Official Gazette of the Union, or *Diário Oficial da União*, can be found at <http://portal.in.gov.br/> (last accessed Oct. 27, 2014). It contains the full text of laws, amendments to the Constitution, legislative decrees, and other acts resulting from the legislative process; treaties, agreements, covenants, and other international acts approved by the National Congress; decrees, provisional measures, and other normative acts issued by the President; normative acts issued by Ministers of State, of a general interest; opinions issued by the Federal Solicitor-General and the respective President's decisions; judgments and decisions by the Federal Court of Audit; Judicial Branch matters of a normative nature; acts concerning the appointment to or the vacancy of offices and jobs, or the designation of employees and military to functions in the federal government.
- 107 Such information has been publicized on the Brazilian Transparency Portal, which can be found at <http://www.portaltransparencia.gov.br/> (last accessed Oct. 27, 2014).
- 108 For example, on January 1, 2014, the Lokpal and Lokayuktas Bill was signed into law, effectively paving the way for the creation of an anti-corruption agency to investigate corruption by Indian public officials. Although this law does not directly aim at companies doing business in India, it does signal a strong commitment to tackling corruption. If these initiatives are successful, there undoubtedly will be more severe and certain repercussions in India for companies and individuals that engage in corruption. The text of the Lokpal and Lokayuktas Bill is available here: http://www.prsindia.org/uploads/media/Lok%20Pal%20Bill%202011/Lokpal_Bill_as_passed_by_both_Houses.pdf.
- 109 See, e.g., Sandeep Verma, *Debarment and Suspension in Public Procurement: A Quick Survey of Associated Government Regulations and Practice in India*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185219 (Dec. 2012).
- 110 See id. at 1.
- 111 See id.
- 112 Id. Apparently, “sending suppliers on holiday” is a euphemism for “removal of a registered supplier from suppliers’ lists maintained by the procuring entity because of poor contract performance, rather than debarment or suspension as such.” Id. The consequences of being “removed” from a suppliers’ list are less severe than being “banned from business dealings,” as it still leaves the “removed” entity with the option of pursuing other business opportunities that do not depend on being listed on the suppliers’ list. Id. at 1-2.
- 113 Id. at 17.
- 114 Id.
- 115 The DOS Memos have been cited within India as the principal authority on suspension and debarment. See id. at 2. They are cited by the “Vigilance Manual” issued by the Indian Railways, which is “one of the oldest and largest procuring entities in India,” and they are incorporated within other Indian state procurement regulations. Id.
- 116 19 Id. at 4. There appears to be some questions with respect to whether the Ministry of

Commerce's order is also effective on CPSEs and state governments. *Id.* at 8.

117 *Id.* at 4.

118 *Id.* at 3, 5. In some circumstances, CPSEs will consider suspension or debarment actions by other CPSEs during the bidding process, or will enforce the suspension or debarment actions taken by other CPSEs or government ministries. *Id.* at 8.

119 *Id.* at 9. The relevant ministry or CPSE will consider evidence regarding common management, majority interests in management, and the ownership of substantial or majority shares. *Id.*

120 See *supra*; see also *id.* at 10.

121 *Id.* at 10. Notably, it seems that such misconduct need not be investigated or adjudicated in India. See *id.* at 11 (noting orders of suspension issued due to legal proceedings in the United States).

122 *Id.* at 10-11.

123 *Id.* at 11.

124 *Id.* at 4, 6-7.

125 *Id.* at 7. There appears to be some confusion with respect to whether an Integrity Pact violation could trigger mandatory cross-ministry enforcement. *Id.* at 8. Additionally, there also appears to be some confusion as to whether a debarment or suspension triggered by an Integrity Pact violation should extend to "allied firms." *Id.* at 10.

126 *Id.* at 12.

127 *Id.* at 13.

128 *Id.*

129 *Id.*

130 *Id.* at 15.

131 *Id.* at 5.

132 *Id.* at 6 ("[S]ome CPSEs treat cancellation of ongoing contracts as the default position . . .").

133 *Id.* at 14.

134 *Id.*

135 *Id.* at 14-15.

136 *Id.* at 15.

137 *Id.*

138 Recent data regarding instances and the perception of corruption in Kenya is available through TI, and can be accessed here: <http://www.transparency.org/country/#KEN>. In addition, the text of Kenya's Public Procurement and Disposal Act, which was passed in 2005 to establish a commission to oversee procurement matters, can be accessed here: http://www.ppoa.go.ke/downloads/The%20Act/public_procurement_and_disposal_act_2005.pdf.

139 See Public Procurement Oversight Authority (Transforming Procurement): Understanding the Debarment Process in Public Procurement, available at www.ppoa.go.ke.

140 *Id.*

141 Procurement Act, Part IX, § 123.

142 See Procurement Act, Part IX, available at <http://www.ppoa.go.ke>.

143 Id.

144 Id.; see also Procurement Act, Part IX, § 115(2) (“The Director General, with the approval of the Advisory Board, may also debar a person from participating in procurement proceedings on a prescribed ground.”); see Public Procurement Oversight Authority (Transforming Procurement): Understanding the Debarment Process in Public Procurement, available at www.ppoa.go.ke.

145 Procurement Act, Part IX; see also Public Procurement Oversight Authority (Transforming Procurement): Understanding the Debarment Process in Public Procurement, available at www.ppoa.go.ke. Notably, as may be particularly relevant to such public requests, the Procurement Act states that “[t]he Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious.” Procurement Act, Part IX, § 118. Interestingly, the Kenyan government has further enabled private citizens to report corruption by creating a website for reporting such events, which is available here: <http://ipaidabribe.or.ke/>.

146 Procurement Act, Part IX.

147 Id.

148 Id.

149 Id.

150 See Procurement Act, Part IX, § 123.

151 See Public Procurement Oversight Authority (Transforming Procurement): Understanding the Debarment Process in Public Procurement, available at www.ppoa.go.ke.

152 Procurement Act, Part IX, § 123.

153 Id.

154 Id.; see also Procurement Act, Part IX, § 125.

155 See Oversight Authority, “List of Debarred Firms,” http://www.ppoa.go.ke/index.php?option=com_content&view=article&id=307&Itemid=190.

156 See Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. LAW REV. 103 (2011).

157 Jorge Claro & Nikos Passas, Discussion Paper on the Effects of the Anti-Corruption Agenda on Government Procurement, at 54 (July 2013).

158 U.N. OFFICE ON DRUGS & CRIME, A RESOURCE GUIDE ON STATE MEASURES FOR STRENGTHENING CORPORATE INTEGRITY, U.N. Sales No. V.131-8631188—Sept. 2013, at 23 (2013).

159 We recognize, of course, that the World Bank does not have the power to impose criminal or civil penalties. In that regard, the World Bank system might result in the use of suspensions and debarments that are based in part, at least, on punitive motivations, as the World Bank has no other mechanism for levying such punishment.

160 See Donna Morris Duvall, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors*, 36 AM. U. L. REV. 693, 702 (1987).

161 Id. at 702-06.

162 Id. at 703-04.

163 E.g., Laurence Boisson de Chazournes & Edouard Fromageau, *Balancing the Scales: The World Bank Sanctions Process and Access to Remedies*, 23 EUR. J. INT'L L. 963, 975 (2012).

164 Id. at 989 (citing Agreement for Mutual Enforcement of Debarment Decisions (Apr. 9, 2010)).

165 Id. at 985.

166 Id.

167 U.N. OFFICE ON DRUGS & CRIME, A RESOURCE GUIDE ON STATE MEASURES FOR STRENGTHENING CORPORATE INTEGRITY, U.N. Sales No. V.131-8631188—Sept. 2013, at 21 (2013).

168 See *MG Altus Apache Co. v. United States*, No. 11-538C, 2013 WL 3120120 (2013).

169 Id. at 23 (“While law enforcement agencies are ordinarily responsible for investigating allegations and determining guilt, debarment determinations will often be made independently by other agencies of the government. These agencies may not always appreciate a broader law enforcement perspective, or may be guided by countervailing concerns about the possible disruption of operations resulting from debarment determinations. Such differences are best resolved through an appropriate mechanism for inter-agency coordination.”).

170 World Bank, *Annual Report 2013*, at 22.

171 U.N. OFFICE ON DRUGS & CRIME, *GUIDE FOR ANTI-CORRUPTION POLICIES*, at 12 (Nov. 2003) (discussing international cooperation against corruption); see also Jorge Claro & Nikos Passos, *Discussion Paper on the Effects of the Anti-Corruption Agenda on Government Procurement*, at 1 (discussing limitations where there is not an integrated approach to fighting corruption).

172 Laurence Boisson de Chazournes & Edouard Fromageau, *Balancing the Scales: The World Bank Sanctions Process and Access to Remedies*, 23 EUR. J. INT'L L. 963, 979 (2012).

173 Id.

174 Jorge Claro & Nikos Passas, *Discussion Paper on the Effects of the Anti-Corruption Agenda on Government Procurement*, at 42 (July 2013).

175 Id.

176 Id.

177 Id. at 53.

178 Id.

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