OURS IS TO REASON WHY: EXPLORING MOTIVATING PRINCIPLES FOR DEBARMENT SYSTEMS

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ABSTRACT

Debarments and exclusions are often discussed essential anti-corruption elements of procurement systems. Yet why debarment or exclusion is incorporated in a procurement system is rarely explored. Motivating principles are important because they establish the metric upon which the success and functionality of the system can be measured. This article asserts that there are three potential motivating principles for debarment or exclusionary systems: punishment, business decisions, and rehabilitation. A punishment based system uses the criminal and civil legal process to establish the basis for the contractor's exclusion. A business decision based system seeks to act in the best business interest of the government in its commercial capacity. A rehabilitation based system looks to reform contractors that have failed to meet the government's standards. Most importantly, there is no one "right" why and countries can have multiple systems with different "whys." Each "why" has a purpose and a rationale that may be appropriate given the needs and evolutionary stage of a particular government, the procurement system, and the public policy that is being enacted. This article explores the benefits and the drawbacks for each "why" in order to guide a reasoned discussion to determine the best underlying principle for a debarment or exclusionary system.

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I. INTRODUCTION

A debarment or exclusion mechanism is a critical element of a sophisticated procurement system. Existing systems, however, differ greatly in the reasons they apply to determine which contractors should be debarred or excluded. There is no single "why" for debarment. Debarment can function in many ways, including as a punishment mechanism, as a prophylactic business decision to protect the government, or as a rehabilitation process.

With the proliferation of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Public Procurement and the World Bank procurement system, many developing countries are adopting debarment systems without understanding "why" these systems were developed in the first place.[1] The UNCITRAL Model Law Guide to Enactment merely states that the exclusion system is intended to provide transparency and objectivity to reduce corruption.[2] Reducing corruption and increasing transparency is the UNCITRAL debarment process's end goal, but it is not clear what the motivation for the UNCITRAL debarment system, or other debarment systems, may be. Is it punishment to make an example of contractors? Is debarment a business decision about who is ethically responsible enough to contract with? Or is it a rehabilitation process where contractors can work their way back into the government's good graces? While the differences between these motivations are nuanced, these nuances are critical. They guide a Suspension and Debarment Official's ("SDO") or Contracting

1. United Nations Commission on International Trade Law, *UNCITRAL Model Law Guide to Enactment*, 16–17 (June 28, 2012) [hereinafter *UNCITRAL Guide to Enactment*].
2. *See id*. at 19.

Authority's decision-making process and establish a baseline expectation for contractors and the government alike.[3] Thus, establishing the "why" motivating a debarment system enhances transparency for the process which itself is designed to improve transparency of the overarching procurement system.

Identifying motivations for debarment is particularly important for procurement regimes attempting to improve the perception of corruption within their procurement systems for aid projects. Both the Paris Declaration Commitments and the Accra Agenda for Action prioritized using country systems, with the Accra Agenda stating "[d]onors agree to use country systems as the first option for aid programmes in support of activities managed by the public sector."[4] In theory, therefore, if a given country has an effective debarment system, donors will be less concerned about the misappropriation of funds invested in that country.

Historically, however, aid programs intending to use country systems have failed.[5]

This article reviews the different motivating principles behind debarment regimes, the benefits and drawbacks of each principle, and how those motivating principles have been enacted in various forms of legislation. There is no right answer or one-size-fits-all debarment system. Each country has its own public culture and its own unique challenges. For some procurement systems where the country's judicial system is weak, it may be appropriate to use debarment as a punishment mechanism. Yet in countries with strong judicial systems, it may be constitutionally impossible to have debarment act as a punishment mechanism. Further, there can be multiple debarment and exclusionary systems within a single overarching procurement system, with each system motivated by different principles. For this reason, this article does not advocate for one motivating principle over another. This article aims to encourage public policymakers to think critically about the purpose of debarment or exclusionary systems when enacting them.

II. DEBARMENT IN THEORY AND IN PRACTICE

Excluding a contractor from public procurement serves to mitigate three potential risks: (1) fiduciary risk of fraud, waste, and abuse; (2) reputational risk of increasing the perception of corruption in the procurement system; and (3) performance risk of-failing to complete, or inadequately completing, the project.[6] Different debarment systems manage these risks in different ways. A

3. *See id.* at 110.

4. OECD, *Paris Declaration on Aid Effectiveness*, OECD Publishing 17 https://www.oecd.org/dac/effectiveness/34428351.pdf [https://perma.cc/S4YV-W2T2] (last visited May 21, 2021); *see also* OECD, *The Accra Agenda for Action*, OECD Publishing 2 https://www.oecd.org/dac/effectiveness/45827311.pdf [https://perma.cc/DL8D-P9EJ] (last visited May 21, 2021).

5. *See* Annamaria La Chimia & Peter Trepte, Public Procurement and Aid Effectiveness: A Roadmap Under Construction 13–14 (Hart Publishing 2019).

6. Nathaniel E. Castellano, *Suspensions, Debarments, and Sanctions: Comparative Guide to United States and World Bank Exclusion Mechanisms*, 45 Pub. Cont. L.J. 403, 409 (2016); Christopher

punishment-based system focuses on punishing contractors for wrongdoing and mitigating reputational and fiduciary risk.[7] A business-decision based system focuses on eliminating contractors that are unable to operate as responsible business partners with the government in addition to mitigating all three types of risk.[8] A reform-based system focuses both on improving the responsibility of a current contractor that may have performance problems and on mitigating fiduciary and performance risk while accepting the potential for an increased reputational risk.[9] Tolerances for these various risks influence how a government or development bank chooses to organize their debarment or exclusion program.

It is critical to understand one key theoretical difference between the United States' system and the European Union's model, the two primary "debarment" models,[10] before discussing the technical differences between various systems. In the United States, contractors are debarred, while in the European Union, contractors are excluded.[11] Debarment connotes a contemporaneous review of the contractor's present responsibility, which includes the contractor's ongoing remedial measures and mitigating factors impacting the event in question.[12] Exclusion, on the other hand, is a retrospective approach in which the Contracting Authority reviews the questioned event and eliminates the contractor based on that event.[13]

Prior to the publication of the 2014 Public Procurement Directives, the European Union equivalent of the Federal Acquisition Regulation ("FAR"), there was a bright line between the European Union's exclusion regime and the United States' debarment regime. The European Union required the Contracting Authority to exclude contractors without consideration of a contractor's remediation through self-cleaning.[14] The United States, in contrast, focused on the contractor's present responsibility and the remedial measures the contractor put in place to mitigate the government's concerns.[15] With the introduction of the 2014 Public Procurement Directive, the European Union's system has become less exclusionary and more debarment-based. It

Yukins & Michal Kania, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, GW Legal Studies Research Paper No. 2019-39, 52 (2019) [hereinafter Suspension and Debarment].

7. *See Ineligibility and Suspension Policy*, Government of Canada, (4)(b) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021) [hereinafter Canadian Integrity Regime].

8. *See A Global View of Debarment: Understanding Exclusion Systems Around the World*, World Bank 1 (Apr. 2019), https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/SD_Survey_Results_(April_2019).pdf [https://perma.cc/JB6H-2M79 [hereinafter *World Bank Survey*].

9. *See* Suspension and Debarment, *supra* note 6, at 71.

10. *See id.* at 65.

11. *See id.* at 48.

12. *See id.* at 65–66.

13. *See id.*

14. Directive 2004/18, art. 45(1), 2004, O.J. (L134) 1, 31 (EC).

15. *See* FAR 9.406-02.

now allows for a contractor to continue to be eligible for contracts as long as the contractor can demonstrate self-cleaning.[16]

A. The United States

The United States' debarment process originated with the Act of July 5, 1884, Ch. 217, 23 Stat.109, which required the government to award contracts only to "responsible" bidders.[17] The first statutory express debarment requirement was passed in 1933 with the Buy America Act, which required construction contractors to be debarred for a three-year period if the contractor used foreign building materials on federally funded projects.[18] In 1947, the Armed Services Procurement Regulation ("ASPR") (applying to military agencies) was issued and in 1949, the Federal Procurement Regulation ("FPR") (applying to civilian agencies) followed, each a comprehensive procurement system.[19] These two systems contained the beginnings of the United States' current debarment regime. Later, in 1962, the Administrative Conference of the United States recommended substantial reforms to the debarment system.[20] Finally, in 1983, those reforms were substantially adopted, and the current FAR 9.4 rules were promulgated.[21]

FAR 9.4 describes the discretionary debarment system that allows the SDO to review the factual circumstances of the contractor's misdeeds to determine if the contractor is presently responsible according to a prescribed list of remedial measures and mitigating factors.[22] Per FAR 9.402(b), "[t]he serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and *not for purposes of punishment*."[23] Based on his or her evaluation, the SDO can debar a contractor as long as it is "necessary to protect the Government's interests" and "for a period commensurate with the seriousness of the cause(s)."[24] The SDO's decision can be challenged in court but may only be overturned if the contractor can establish that the debarment decision was "arbitrary and capricious, and hence an abuse of discretion."[25]

Multiple exclusionary processes exist outside of the FAR 9.4 policies and procedures, including processes for violations of labor and environmental

16. Directive 2014/24, art. 57(6), 2014, O.J. (L94) 1, 4 (EU).

17. *A Brief History of Debarment*, U.S. Dep't of Interior, 1, https://www.doi.gov/sites/doi.gov/files/migrated/pam/programs/acquisition/upload/Brief-History-of-Debarment-Remedy_Final-3_2_15.pdf [https://perma.cc/552D-UXUV] (last visited May 21, 2021).

18. *Id.*

19. *Id.* at 2.

20. *Id.*

21. *Id.* at 3.

22. FAR 9.406-1(a).

23. *Id.* at 9.402(b) (emphasis added).

24. *Id.* at 9.406-4(a)(1), (b).

25. Gonzales v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) ("Thus to say that there is no 'right' to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.").

laws.[26] 29 C.F.R. § 5.12(b) prohibits contractors that have been found to have committed aggravated or willful violations of the laws governing wages on construction contracts from receiving government contracts for a three-year period. Likewise, 29 C.F.R. § 4.188 requires a three-year debarment for contractors that have willfully or negligently disregarded the wage requirements for Service Contract Act contracts. 42 U.S.C. § 7606 requires the Environmental Protection Agency to debar contractors if they are convicted of negligently releasing hazardous air pollutants into the ambient air, among other related actions, until the condition is corrected. These are circumstances where Congress has determined violations of a statute to be significant enough that no discretion is appropriate when debarring the offending entity.[27]

In a "halfway" measure between a discretionary and exclusionary debarment system, FAR 52.209-11 and FAR 52.212-3(q) require offerors for commercial item contracts to certify whether they have unpaid federal tax liability or have been convicted of a felony within the prior two years. However, the government may still do business with the contractor *if* the SDO has considered debarring the contractor and determined that debarment is not in the government's best interest.[28]

While such a mechanism is not explicitly outlined in the FAR, SDOs may also enter into administrative agreements, which allow contractors to participate in public procurement despite their lack of present responsibility.[29] If the SDO believes that a contractor can successfully remediate and mitigate the government's concerns about its continued participation under closely monitored conditions, then that contractor can qualify for an administrative agreement. These administrative agreements generally last through the period of time for which the SDO would have debarred the contractor,

26. In addition to FAR debarment procedures, there is also a debarment system for the Nonprocurement Common Rule ("NCR") which governs assistance, loans, benefits, and grants. Debarments under the NCR are recognized government-wide in the same manner that debarments under the FAR are recognized. Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, 1994 § 2455(a), (108 Stat.) 3243, 3327. This means a contractor debarred under the NCR cannot be awarded a contract under a FAR procurement and a contractor debarred under the FAR cannot be awarded a grant. The bases for suspension or debarment are essentially the same between the FAR and the NCR; however, the NCR requires violations of the terms of a public agreement or transaction while the FAR requires violations of the terms of a public contract. 2 C.F.R. § 180.800(b); FAR 9.406-2. One of the critical differences between the FAR and the NCR is that a proposed debarment under the NCR does not have an immediate exclusive effect. 2 C.F.R. § 180.810; FAR 9.405(a). A contractor is only excluded under the NCR system once the SDO has issued a debarment. 2 C.F.R. § 180.810. However, both systems recognize that the guiding principle for that system is present responsibility. 2 C.F.R. § 180.800(d); FAR 9.406-2(c).

27. 29 C.F.R § 4.1; 29 C.F.R. § 5.12(a)(1); 42 U.S.C. § 4606(a). (Debarment officials do have discretion in determining how narrowly to define the entity; however, the ban on the offending entities is not itself discretionary).

28. FAR 52.209-11(a)(2).

29. Robert F. Meunier & Trevor B.A. Nelson, *Is It Time for a Single Federal Suspension and Debarment Rule?*, 46 Pub. Cont. L.J. 553, 585 (2017).

thereby protecting the government for the period of time that the regulatory system deems the contractor to be a risk.[30]

B. The European Union

In 2004, the revised European Union Public Procurement Directives included an exclusion regime that automatically excluded firms if they had been convicted of participation in organized crime, corruption, fraud, or money laundering.[31] Article 45 of the Public Procurement Directives also gave Member States permissive authority to exclude contractors if they were in the process of, or were subject to a declaration of, bankruptcy; if they had been convicted of a crime related to professional misconduct; if they failed to make proper social security or tax payments; or if they seriously misrepresented the contractor's status regarding any of these items to the Contracting Authority.[32] In 2014, the European Union Member States again updated the Procurement Directives by adding further discretionary powers for the Contracting Authority to the exclusion regime.[33] These included the power to exclude a contractor who attempts to obtain other contractors' proprietary information, repeatedly fails to perform its contracts leading to a termination for default, has a conflict of interest in the procurement that cannot be remedied, or may have engaged in bid rigging.[34]

The European Union notably includes conflicts of interest in its exclusion regime.[35] This is possible because the Contracting Authority evaluates the contractor's exclusion eligibility with each procurement, taking into account whether the contractor's bad acts qualify for exclusion and whether the contractor's self-cleaning is sufficient to satisfy the Contracting Authority.[36] In contrast, the United States' procurement system delegates determinations of the contractor's holistic present responsibility to SDOs, while Contracting Officers determine potential conflicts of interest.[37] Contracting Officers make responsibility determinations; however in the context of a present responsibility or debarment determination, the Contracting Officer's authority is limited to determining whether the contractor is excluded in the System for Award Management ("SAM").[38] This is in part because contractors possess inherent due process rights that the United States has determined should be examined by a single authority;[39] this is to avoid the potential for inconsistent determinations among Contracting Officers or the slowing of the procure-

30. *See id.* at 585–86.
31. Directive 2004/18, art. 45(1), 2004, O.J. (L134) (EC).
32. *Id.* art. 45(2).
33. Directive 2014/24, art. 57(4), 2014, O.J. (L94) (EU).
34. *Id.*
35. *Id.* art. 57(4)(e).
36. *Id.* art. 56(2).
37. *See generally* FAR 9.406-2; FAR 9.504(e).
38. *See* Related Indus. v. United States, 2 Cl. Ct. 517, 520 (Fed. Cir. 1983); *see also* Stapp Towing Inc. v. United States, 34 Fed. Cl. 300, 312 (1995).
39. *See Related Indus.*, 2 Cl. Ct. at 526.

ment process through potentially lengthy due process hearings.[40] Therefore, an exclusion under the European Union's regime can be simply an administrative issue relative to the particular procurement rather than a reflection of the contractor's overall ethics. However, some grounds for exclusion are based on the contractor's compliance with the procurement system.[41]

One major change from the 2004 to the 2014 EU Public Procurement Directives is the clarification of when a contractor's self-cleaning process may permit a contractor to continue with the procurement procedure.[42] Article 57(6) of the 2014 Public Procurement Directives provides:

> [T]he economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.
>
> The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.[43]

This Article creates flexibility within the 2014 Public Procurement Directives as it allows a contractor to take remedial action to fix the circumstances that led to the misconduct while still participating in procurements generally. This Article also allows the Contracting Authority to evaluate if the contractor has sufficiently mitigated the government's concerns about the contractor's ability to operate ethically in the future.

C. Canada

Canada's exclusion regime, known as Canada's Integrity Regime, was established contemporaneously with the debarment of several Canadian companies from World Bank projects for corruption.[44] Although not necessarily related to these debarments, Canada's Integrity Regime provides for strict penalties for noncompliance and restricts the Public Works and Government Services Canada's ("PWGSC") ability to consider a contractor's present responsibility.[45] The Integrity Regime has approximately thirty different crimes; if a

40. *See id.* ("Even apart from the procurement regulations on debarment, the due process clauses of the Fifth and Fourteen amendments require that a determination by governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of property or the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response.").

41. Directive 2014/24, art. 57(1), (2), (4), 2014, O.J. (L94) (EU).

42. *Id.* art. 57(6).

43. *Id.*

44. Armina Ligaya, *Canada Now Dominates World Bank Corruption List Thanks to SNC Lavalin*, Fin. Post (Sept. 18, 2013), https://business.financialpost.com/executive/canada-now-dominates-world-bank-corruption-list-thanks-to-snc-lavalin [https://perma.cc/52G3-GYAZ].

45. Canadian Integrity Regime, *supra* note 7, at (6)–(7).

contractor is convicted of any of these crimes, it will be automatically excluded from the procurement system for ten years.[46] In some cases, a contractor may qualify for a reduction of the exclusion period to five years if it enters into an administrative agreement with the PWGSC.[47] Further, if a contractor has been indicted, the contractor may be suspended for an eighteen month period.[48] In this way, Canada's regime is both retrospective and prospective, but it does not conduct a contemporaneous review of the contractor's present responsibility.

One unique feature of Canada's Integrity Regime is that the Canadian government can terminate contracts for default based on the contractor's conviction.[49] Neither the FAR nor the Public Procurement Directives allow for termination for default upon conviction of a non-debarring offense.[50] Canada's decision to give Contracting Authorities the option to terminate contracts for default allows the government to immediately and permanently remove a bad actor from the procurement regime.[51]

D. The World Bank

The World Bank has been a leader among the development banks in practicing debarment as part of its "sanctions system."[52] The World Bank has a defined set of motivating principles, which state that:

> First, debarment is intended to protect the Bank's funds in accordance with the prescripts of its Articles of Agreement by ensuring that Bank funds are not lost to fraud and corruption. Second, debarment supports the Bank's anti-corruption policy by indicating its willingness to sanction corruption. Third, debarment acts as a deterrent against breaches of anti-corruption norms by increasing the economic costs of corruption, as the excluded or debarred supplier loses the potential to compete for future Bank-financed contracts.[53]

These motivating principles guide the Bank's decision-making process and influence the structure of its exclusionary system.

Because of its unique position as a multinational development bank, the World Bank does not have judicial enforcement mechanisms available to enforce the proper use of its funds.[54] Nathan Castellano notes "[t]he inability of the World Bank to rely on traditional national legal enforcement and judicial systems to protect its resources partially explains why the Bank's sanctions regime is less forgiving of past misconduct than the U.S. suspension and

46. *Id.* at (6).
47. *Id.*
48. *Id.* at (7).
49. *See id.* at (13).
50. Directive 2014/24, art. 57, 2014, O.J. (L94) (EU); FAR 9.405(b).
51. Canadian Integrity Regime, *supra* note 7, at (13).
52. *The World Bank Group's Sanctions System: Tackling Corruption Through a Two-Tier Administrative Sanctions Process*, World Bank, https://www.worldbank.org/en/about/unit/sanctions-system#2 [https://perma.cc/3WMV-ZNJD] (last visited May 10, 2021).
53. Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 Pub.Cont. L.J. 277, 285–86 (2007).
54. Castellano, *supra* note 6, at 444.

debarment system."[55] In this sense, the World Bank operates as an exclusionary system rather than a debarment system.

In the World Bank system, the World Bank *must* sanction an entity that engaged in fraud or corruption in connection with a World Bank financed project or a World Bank Group corporate procurement.[56] This reflects all three of the World Bank's motivating principles—protection of funds, willingness to sanction corruption, and deterrence.[57] However, the World Bank recognizes multiple types of sanctions, of which debarment (either permanent or temporary) is only one. The World Bank may debar a contractor with a conditional release, agree to a conditional non-debarment, agree to restitution, or issue a reprimand.[58] Debarment with a conditional release, the standard remedy for the World Bank, allows for a contractor or individual to return to participating in World Bank procurements if they satisfy certain requirements.[59] A conditional non-debarment is similar to an administrative agreement in the United States' system in the sense that a contractor or individual agrees to comply with certain requirements and is then allowed to continue to participate in World Bank procurements without being excluded.[60] Restitution allows the Bank to recover funds lost through fraud or corruption and return those funds to the project or the Bank as appropriate.[61] Finally, the World Bank Sentencing Guidelines limit the use of a Letter of Reprimand "to sanction an affiliate of the Respondent that was only guilty of an isolated incident of lack of oversight."[62] This broad range of sanctions allows the World Bank to craft appropriate remedies for different forms of misconduct.

One unique feature of the World Bank debarment system is that the multilateral development banks have agreed to recognize the debarment actions taken by other banks.[63] This means that if the Asian Development Bank were to debar a contractor, then the World Bank would also treat that contractor as

55. *Id.* at 408.

56. *Id.* at 433.

57. *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants*, World Bank (July 1, 2016) https://documents1.worldbank.org/curated/en/551241468161367060/pdf/611090BR0SecM21Disclosed04113120111.pdf [https://perma.cc/4DVG-75L4].

58. *WBG Policy: Sanctions for Fraud and Corruption*, World Bank (Jan. 13, 2016), https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBG%20Policy%20-%20Sanctions%20for%20Fraud%20and%20Corruption%20(June%2013,%202016).pdf [https://perma.cc/DU4E-LBAU].

59. *World Bank Sanctioning Guidelines*, World Bank, II.A, https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/World%20Bank%20Group%20Sanctioning%20Guidelines%20January%202011.pdf [https://perma.cc/N39D-Q3BD] (last visited May 21, 2021).

60. *Id.* at II.C.

61. *Id.* at II.F.

62. *Id.* at II.D.

63. *Agreement for Mutual Enforcement of Debarment Decisions among Multilateral Development Banks 2010*, The Asian Development Bank_(Apr. 9, 2010), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Agreement_for_Mutual_Enforcement_of_Debarment_Decisions-1.pdf [https://perma.cc/LQ5D-Q9NK].

debarred under its procurement system.[64] Contractors therefore face a higher risk when one of the development banks starts an investigation because the collateral consequences of being debarred from the multilateral banks could eliminate multiple sources of income. To date, countries have not started recognizing each other's exclusions in this manner.[65] For example, an exclusion under the European Union system does not *automatically* result in a debarment under the American system; however, a contractor could still be debarred in the American system on the same grounds for which the contractor was excluded in the European Union system. The closest concept to the multilateral development banks cross-debarment can be found within the United States' system. Here, when one federal agency debars a contractor, that contractor is debarred across the entire federal government.[66] Still, it is different from cross-debarment as the United States' system is a single system and an act of the SDO is a singular act of the federal government, rather than a foreign government accepting the act of a different government or multilateral contractor.[67]

E. UNCITRAL Model Law

In the 2011 UNCITRAL Model Law on Public Procurement ("UNCITRAL Model Law"), the exclusion regime is simple and limited. The procuring agency is to exclude a contractor if the contractor attempts to bribe the procuring agency or anyone related to the procuring agency on *the subject procurement* or if the contractor has a conflict of interest or unfair competitive advantage in a given procurement.[68] The procuring agency must then document in detail why the contractor is being excluded and communicate those reasons to the contractor.[69] In addition, in the qualification stage, contractors must certify that they have not (1) been convicted of a crime that reflects poorly on their professional conduct or involves making false statements or misrepresentations within a determined period of time; or (2) been subject to administrative suspension or debarment.[70]

The UNCITRAL Model Law has a different purpose than the other procurement regimes previously detailed. It is intended to be a base procurement system that a government could build upon and tailor to the government's particular needs and priorities.[71] Therefore, it is not surprising that some ancillary social policies such as those related to environmental or labor law violations were not included in the UNCITRAL Model Law's bases for exclusion.

64. *Id*.
65. *See* Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int'l L. Rev. 219, 221 (2013).
66. *See id*.
67. FAR 9.406-1(c).
68. United Nations Commission on International Trade Law, *UNCITRAL Model Law on Public Procurement*, art. 21(1) (July 1, 2011) [hereinafter *UNCITRAL Model Law*].
69. *Id.* art. 21(2).
70. *Id.* art. 9(f).
71. *See UNCITRAL Guide to Enactment*, *supra* note 1, at A(1)(6).

III. SUBSTANTIVE DEBARMENT

As demonstrated earlier, different governmental and non-governmental entities have taken different approaches to establishing debarment regimes. However, while the academic research on this topic clearly identifies "how" to execute debarment, "why" to execute debarment is rarely discussed in depth. Between the various debarment regimes, three primary motivating factors appear to be present: (1) punishment; (2) business decisions; and (3) reform efforts. While interconnected, these are separate from the fiduciary, reputational, and performance risks identified earlier. Each of these motivating factors address these three risks in separate and distinct ways. Further, it is important to determine if debarment is a means to an end or an end in itself. Does debarment act alone or does it act as part of a coordinated fraud remedies program? An entity's response to this question can impact its choice of motivating principle.

Where debarment acts as part of a coordinated fraud remedies system, there are four types of remedies: (1) criminal; (2) civil; (3) contractual; or (4) administrative.[72] Criminal remedies allow the government to prosecute the firm for potential criminal activity.[73] Civil remedies allow the government to prosecute the firm for potential civil remedies (i.e., seek financial damages).[74] Contractual remedies allow the government to recover for the damages on the particular contract where the fraud occurred.[75] Finally, administrative decisions (i.e., debarment) allow the government to preserve the integrity of the procurement regime.[76]

A. Debarment Regime Motivating Principles: Punishment, Business Decisions and Reform

Why does "why" matter? According to the UNCITRAL Guide to Enactment, debarment is intended to reduce corruption within the procurement system and to increase transparency.[77] One way to reduce corruption is to remove discretion, as discretion combined with opportunity creates an increased risk of corrupt decision-making.[78] Most well-developed debarment systems, however, include an element of discretion.[79] How, therefore can developing

72. David Robbins et al., *Path of an Investigation: How a Major Contractor's Ethics Office and Air Force Procurement Fraud and Suspension/Debarment Apparatus Deal with Allegations of Potential Fraud and Unethical Conduct*, 40 Pub. Cont. L.J. 595, 606 (2011).

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *UNCITRAL Model Law*, *supra* note 68, art. 21(3).

78. *See* Peter Trepte, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations*, 5–6 (2005) (paper to OECD Expert Group Meeting on Integrity in Public Procurement) ("[T]he *crime of runaway bureaucracy requires opportunity as well as motive*. . . . The possibility for the agent to extract personal gain from the procurement process arises from the position he is given within the bureaucracy to exercise discretionary authority.").

79. *See* Suspension and Debarment, *supra* note 6, at 58.

procurement systems incorporate increased discretion in states where corruption poses a major societal challenge? Peter Trepte theorizes that "[t]he ability of procurement regulation to combat corruption depends on the ability of the regulator to identify the opportunities created by the procurement function and to close off that opportunity by applying a disincentive."[80] Establishing the motivating principle for the debarment system can close off the opportunity for corruption because it allows regulators to apply a principle by which discretionary decisions are evaluated. For example, in the United States' debarment system, the SDO is required to write a publicly available decision that establishes the factual and legal basis upon which the contractor is being proposed for debarment.[81] The SDO is then required to write a second publicly available decision that accounts for the contractor's defenses if the SDO determines that a debarment is still necessary.[82] Regulators and the general public can then review the SDO's decision to determine if the SDO's discretion was exercised appropriately and constituted an appropriate business decision within the United States' system.[83] An understanding of why debarment should be exercised, when combined with appropriate procedural safeguards, allows regulators to close off opportunities for corruption. This article evaluates the first step in that process: determining what motivating principle best applies to. a given country's particular needs.

Recognizing a motivating principle also sets expectations for contractors. Criminal and civil penalties are intended to delineate the societal boundaries of acceptable behavior. Yet, the criminal and civil codes are generally written in ways intended to modify individual behaviors, as opposed to corporate behaviors. In contrast, debarment codes are written specifically to modify corporate behaviors.[84] Further, debarment is an effective tool to moderate corporate behavior because it directly (and often severely) impacts the ability of the contractor to operate.

Additionally, understanding the motivating principle for a given procurement system allows contractors to evaluate their risk. In a system that prioritizes punishment, the consequences of a violation may be more severe. For example, in the United States, a failure to comply with wage laws can lead to a mandatory three-year debarment.[85] Therefore, contractors must be hypervigilant about complying with these and other regulations. In a system built on business decisions, the contractor's currency is its present responsibility. One way to demonstrate present responsibility is for a contractor to ensure

80. Trepte, *supra* note 78, at 5.
81. FAR 9.406-3(c).
82. *Id.* at 9.406-3(d).
83. *Id.* at 9.404(b).
84. *See* FAR 9.406-1; Directive 2014/24, art. 57(4), 2014, O.J. (L 94) (EC); *Ineligibility and Suspension Policy*, Government of Canada, (6) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021)
85. *See* 29 C.F.R. § 4.188 (2018).

it has well-defined and well-maintained ethics and compliance programs.[86] However, expecting every contractor to strictly comply with all of the applicable laws, rules, and regulations is unrealistic.[87] Accordingly, the U.S. system emphasizes how the contractor reacts to and handles compliance failures.[88] With a business-decision based system, the contractor can focus on what it can control – the corporate culture and its internal compliance systems. It does not need to focus as strictly on monitoring each of its employees every day. In a reform-based debarment system, contractors must demonstrate their ongoing responsibility over time. Failing to maintain present responsibility is a risk, as there is no guarantee that the SDO will allow the contractor to continue to participate in public procurements if the contractor willfully neglects its responsibilities.[89] In addition, a contractor who does not maintain appropriate safeguards may be required to invest in its compliance systems, and to hire a compliance monitor, at an SDO's insistence.[90] As illustrated, the motivating principle of a debarment system can influence corporate behavior in various ways.

Contractors themselves are part of the extended compliance system. In some instances, contractors can be more aware of the actions of their competitors than the enforcement agencies. When a debarment system has a defined set of motivating principles, contractors may be able to evaluate whether corruption exists within the debarment system based on how competing contractors are being treated. For example, if a contractor is convicted of bribery in a punishment-based system but is not debarred, that contractor's competitors might raise the alarm. In a system with sufficient protections for whistleblowers, contractors can also identify procuring officials that request or require bribes, thereby allowing the government to remove procuring officials that create a reputational risk for the government.

B. Punishment

Given the large sums of money involved in public procurement, governments must establish protections against corruption. Governments have developed various methods, including debarment and exclusion, to combat corruption.[91]

86. *See* Thomas Fox, *Suspension and Debarment-Part II: the Convergence of Suspension & Debarment and Compliance*, JDSUPRA (June 5, 2018), https://www.jdsupra.com/legalnews/suspension-and-debarment-part-ii-the-79884 [https://perma.cc/V9SN-CYYK].

87. *See* Jessica Tillipman, *A House of Cards Falls: Why "Too Big to Debar" is All Slogan and Little Substance*, *Res Gestae*, 80 Fordham L. Rev. 49, 49 (2012).

88. *See* Todd. J. Canni & Steven A. Shaw, *Comments on the Wartime Contracting Commission's Recommendations on Suspension and Debarment*, Service Contractor, 5 (Sept. 2011) https://www.pillsburylaw.com/images/content/1/0/v2/106244/Comments-on-the-Wartime-Contracting-Commissions-Recommendations.pdf [https://perma.cc/S7GD-SY3R] ("If exclusion is automatic, the contractor has no incentive to improve by setting up ethics and compliance programs that mitigate the risk of employee violations.")

89. *See* FAR 9.406-2(a)(5).

90. *See* Fox, *supra* note 86.

91. *See* 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*, 10 Univ. of Chicago Legal Forum, 195, 195 (2012).

In a punishment-based debarment system, the government excludes a contractor from future procurements based on the contractor's conviction of a particular civil or criminal offense. Debarment can be used as a tool to punish contractors, similar to criminal and civil penalties, as stated in *Wharton's Criminal Law*:

> Punishment seeks ultimately to protect the community by preventing crime. The principal theories of punishment are retribution, deterrence, and reformation. Although the theory of retribution would impose punishment for its own sake, the utilitarian theories of deterrence and reformation would use punishment as a means to an end – the end being community protection by the prevention of crime.[92]

Debarment in the punishment context arguably seeks to achieve all three principal goals of retribution, deterrence, and reformation. When applying the concept of punishment to debarment:

> [D]ebarment or suspension may be deemed "punitive" if imposed simply because of the contractor's past conduct, without consideration of the contractor's present responsibility. Both debarment and suspension are unconditional—they are imposed for a period of time that does not vary with the contractor's efforts to improve (or success in improving) its control systems.[93]

"Punishment" debarment is imposed specifically because of the contractor's past conduct without reference to the contractor's present circuumstances—no matter the length of time between the contractor's past conduct and the imposition of the debarment.[94] Further, the contractor's subsequent attempts at demonstrating present responsibility will not be considered.[95]

In a punishment-based debarment system, such as the European Union's system, contractors convicted of certain offenses in the judicial system or found liable under an administrative process are debarred for a set period of time.[96] In the 2014 Public Procurement Directives, Member States may impose an automatic debarment for a maximum period of five years if a term is not set by final judgment, although the Directive includes a reform-based debarment element and allows for self-cleaning.[97] Likewise, Canada's Integrity Regime imposes an automatic ten-year debarment for contractors convicted of crimes such as bribery, fraud, or drug trafficking.[98] For punishment-based systems, exclusion is an ancillary outcome of the judicial process rather than an independent action taken within the acquisition system.

The consequences for debarment in a punishment-based system are perhaps the most dramatic of consequences across the three systems. If a

92. 1 Charles E. Torcia, Wharton's Criminal Law § 1 (15th ed. 1993).

93. Edwin J. Tomko et al., *After the Fall: Conviction, Debarment and Double Jeopardy*, 21 Pub. Cont. L.J. 355, 365 (1992).

94. *Id.*

95. Suspension and Debarment, *supra* note 6, at 48.

96. Lauren O. Youngman, Note, *Deterring Compliance: The Effect of Mandatory Debarment Under the European Union Procurement Directives on Domestic Foreign Corrupt Practices Act Prosecutions*, 42 Pub. Cont. L.J. 411, 413 (2013).

97. Directive 2014/24, art. 57(7), 2014, O.J. (L 94) (EU).

98. Canadian Integrity Regime, *supra* note 7, at (6).

contractor is debarred in a punishment-based debarment system, the contractor is restricted from participating in any procurement with that government (and potentially others due to cross-debarment) for the length of time of the debarment.[99] Many contractors are dependent on their public procurement contracts for their economic survival.[100] Exclusion from public procurement for any length of time, therefore, is often a death sentence for the contractor.[101] This is particularly true in systems such as Canada's where a contractor's current contracts with the government can be terminated upon entry of the exclusion decision.[102] Thus, automatic exclusions in punishment-based systems frequently result in the permanent removal of contractors even if the exclusion is prescribed for a set period of time.

1. Benefits of a Punishment-Based Debarment System

Using debarment as punishment can have several benefits. As previously discussed, criminal and civil penalties are frequently insufficient to moderate corporate behavior. However, debarment can supplement criminal and civil penalties by transposing the deterrent effect of criminal and civil penalties for individuals to apply to corporations in the debarment context. Contractors can create a reserve to pay criminal and civil penalties or work out a payment plan with the governmental entity.[103] Many, if not most, contractors cannot create a reserve large enough to survive the total loss of their revenue source for three years or more.[104]

i. Using Punishment to Improve the Perception of Corruption

In a similar vein, a state's use of debarment as punishment may enhance the perception that the state acts ethically and will not tolerate corruption. It can be politically beneficial to debar a contractor and declare to the public that a contractor abusing public money will not be the recipient of any additional government funds. The recent Canadian scandal with SNC Lavalin[105] demonstrates the power of a punishment-based exclusion system.

99. *See* Directive 2014/24, art. 57(7), 2014, O.J. (L 94) (EU); *Ineligibility and Suspension Policy*, Government of Canada, (3) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021);

WBG Policy: Sanctions for Fraud and Corruption, World Bank, II.B (Jan. 13, 2016), https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBG%20Policy%20-%20Sanctions%20for%20Fraud%20and%20Corruption%20(June%2013,%202016).pdf [https://perma.cc/N9JP-UTDE]. *World Bank Sanctioning Guidelines*, *supra* note 59.

100. Frederic M. Levy & Michael T. Wagner, The Practitioner's Guide to Suspension and Debarment, 2 (ABA 4th ed. 2018).

101. *Id.*

102. Canadian Integrity Regime, *supra* note 7, at (13)(e).

103. *See* Tillipman, *supra* note 87 at 55.

104. *Id*.

105. *See A Closer Look at SNC-Lavalin's Sometimes Murky Past*, CBC News (Feb. 8, 2019), https://www.cbc.ca/news/canada/snc-lavalin-corruption-fraud-bribery-libya-muhc-1.5010865 [https://perma.cc/WAY3-VZSE].

SNC Lavalin, an engineering and construction firm, had been under investigation in Canada for corruption since February 2015.[106] In 2019, it was exposed that the Canadian Prime Minister Justin Trudeau had pressured the Attorney General Wilson-Raybould to enter into a remediation agreement with SNC Lavalin so the government could continue to do business with the contractor.[107] The ensuing public outcry nearly collapsed the Canadian government.[108] In this case, the Canadian government faced a problematic business outcome when they chose to enter into a remediation agreement with SNC Lavalin. Had they not done so, the government would have lost the potential to work with a large and respected Canadian engineering company for a decade; however, the Canadian public likely saw this outcome as less problematic than un-punished corruption, demonstrated by the sense of injustice that surged at the suggestion that SNC Lavalin would not be excluded.[109]

Turning to another procurement regime, the UNCITRAL Model Law identifies increased transparency and reduction of corruption as purposes of its debarment system.[110] Using debarment as a punishment tool can help meet those goals. This Model Law, however, is different from internal debarment regimes, in which structures such as constitutions or criminal law systems may require a higher level of proof to punish—via fine, imprisonment, or other means—a person or contractor. In the United States, debarment officials are careful to couch their actions as business decisions rather than punishment because punishment could trigger double jeopardy under the Constitution.[111] If using debarment as punishment requires more procedural safeguards and checks and balances, it can help increase transparency of the process, mitigate reputational risk to the agency, and build trust with contractors and the public that debarment will be applied fairly.

ii. Streamlining the Administrative Process

One of the benefits of the punishment-based system is that it ensures the "guilty" are removed from the procurement system. This process is more streamlined because the administrative debarment is automatic rather than based on a separate discretionary finding. In evaluating changes to the United States' procurement system, the Committee on Adjudication of Claims for the Administrative Conference of the United States received comments from federal agencies who expressed the opinion that:

106. *Id.*

107. Rebecca Joseph, *Charges Against SNC-Lavalin Explained—and How the PMO Allegedly Got Involved*, Global News (Feb.18, 2019), https://globalnews.ca/news/4953015/snc-lavalin-explained [https://perma.cc/CCA8-TQ9J].

108. Borzou Daraghi, *How a Tangled and Deadly Web of Global Corruption Spreading Out from Gaddafi's Libya Threatens to Topple Justin Trudeau*, Independent (Mar. 17, 2019), https://www.independent.co.uk/news/world/middle-east/canada-libya-snc-lavalin-scandal-corruption-gaddafi-trudeau-explained-a8821221.html [https://perma.cc/7UUJ-JT25].

109. *Id.*

110. *UNCITRAL Guide to Enactment*, *supra* note 1, art. 21(3).

111. *See generally* Tomko et al., *supra* note 93, at 356.

> The few believers in present debarment procedures appear to conceive that it is neither a governmental duty nor wise policy to offer a trial-type hearing in contested debarment cases since, in their opinion, government contracting is merely a privilege, and view any such procedure as burdensome and possibly dangerous in that it might impair exclusion of the dishonest from government contracting.[112]

While the Committee's comments about the United States' system at the time were not addressing a punishment-based system specifically, the expressed sentiments nonetheless apply to punishment-based systems. In a punishment-based system, a contractor accused of improper behavior first proceeds through the judicial process, which evaluates the contractor's innocence or guilt.[113] Once convicted, a second review of the contractor's ability to act responsibly within the procurement regime creates additional administrative burden.[114] It is also potentially dangerous to allow a contractor found in judicial proceedings to lack sufficient ethical standards or safeguards to enter the public marketplace again. Therefore, a punishment-based debarment system creates a streamlined administrative debarment process and provides certainty that those who have been judged to be non-responsible or ethically deficient are excluded from the procurement regime.

2. Drawbacks to a Punishment-Based Debarment System

While there are benefits to using debarment as punishment, there are also drawbacks. A punishment-based debarment system creates a culture of fear because exclusion is near-certain once a compliance failure has occurred.[115] In addition, in a punishment-based system, the decision about whether to debar a contractor is taken outside of the acquisition community and away from the government agency who will feel the loss of the business partner the most directly.[116] This has been identified as a particular concern within the World Bank's system:

> [A]lthough the Bank does not conduct the procurement process, and despite the absence of a formal relationship with the supplier, the Bank is able to influence the outcome of the procurement process and thus should "take responsibility for the fate of procurements" since it is in fact substantially involved in decision making.[117]

Punishment-based debarments also take considerably longer to complete because they are tied to the civil and criminal justice system.[118] Finally, the civil and criminal nature of the punishment-based debarment system limits the government's ability to debar contractors for lapses in ethics, compliance, or contract performance that might not form cognizable claims in a judicial context.

112. Administrative Conference of the United States, *Committee Report on Debarment and Suspension of Persons from Government Contracting and Federally Assisted Construction Work*, 13–14 (Oct. 1, 1962) [hereinafter ACUS Committee Report].
113. *World Bank Survey*, *supra* note 8, at 2.
114. *Id.* at 6.
115. *See* Youngman, *supra* note 96 at 422.
116. *See* Tillipman, *supra* note 87 at 55.
117. Williams, *supra* note 53, at 304.
118. *See World Bank Survey*, *supra* note 8, at 2.

i. Creating a Culture of Fear Through Pre-Determined Outcomes

Punishment-based debarment systems encourage contractors to hide misconduct. As Steven A. Shaw, the Air Force's former SDO, testified to the United States Congress regarding mandatory debarments:

> If debarments become mandatory (rather than permissive and subject to the Debarring Official's discretion), contractors would no longer have an incentive to work with me in proactive, creative ways to benefit the entire Government. Instead, they would have every incentive to stonewall, deny problems exist, and not make changes for fear of potential liability that would result in a mandatory debarment regardless of their willingness to change.[119]

Punishment has several of the same drawbacks as the mandatory debarments Shaw describes. If the purpose of the debarment system is to punish contractors, then the contractors are incentivized to hide wrongdoing rather than to correct it.[120] It is in the government's best interest that mistakes and wrongdoing be exposed early rather than concealed and allowed to continue.[121] Exposing issues allows the contractor and government to work together proactively to remediate the circumstances causing the issues in the first place. This is particularly important in the context of corruption and bribery issues where both the contractor and one or more government officials are perpetrators of misconduct.[122] When a contractor is exposed to punishment for the revelation of misdeeds, it is in the contractor's best interests toconceal the wrongdoing indefinitely and hope that it is never caught. Such a system creates a culture of fear rather than encouraging dialogue through which contractors can seek help to solve problems.

ii. Placing Debarment Decisions Outside of the Acquisition Chain

Another drawback of the punishment-based debarment system is that it requires the criminal and civil justice systems to make business decisions for the government. The government relies on certain contractors to operate and an even greater number of contractors would go out of business if the government were to debar them.[123] Ignoring these realities creates a hollowness in the meaning of the debarment system. When the government uses debarment as punishment, it shifts the relationship between the parties from business partners to enforcer and wrong-doer. This hollowness has become apparent in the enforcement of the Foreign Corrupt Practices Act ("FCPA"), particularly in the case of Siemens Aktiengesellschaft ("Siemens").

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119. *Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions? Before the H. Comm. on Oversight and Gov't Reform, Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform*, 112th Cong. 37 (2011) (Statement of Mr. Steven A. Shaw, Deputy General Counsel (Contractor Responsibility) Department of the Air Force).

120. *See* Youngman, *supra* note 96, at 422.

121. *See* Suspension and Debarment, *supra* note 6, at 52.

122. *See* Youngman, *supra* note 96, at 421.

123. *See id.* at 413.

Siemens' corporate culture encouraged and embraced bribery of public officials, including Saddam Hussein's Iraqi Government.[124] Siemens was not a presently responsible company. The Department of Justice's Sentencing Memorandum stated:

> The scope of Siemens' internal investigation was unprecedented and included virtually all aspects of its worldwide operations, including headquarters components, subsidiaries, and regional operating companies. Compliance, legal, internal audit, and corporate finance departments were a significant focus of the investigation and were discovered to be areas of the company that played a significant role in the violations.[125]

The Siemens case was the definition of a case suitable to a coordinated procurement fraud remedies approach for civil, criminal, administrative, and contractual actions. However, the punitive nature of the European Union's Procurement Directives impacted the civil and criminal approach taken in the United States.

Siemens had participated in criminal activities, including bribery, but the United States Department of Justice did not charge Siemens with bribery and instead only charged Siemens with FCPA books and records violations.[126] In justifying its plea agreement with Siemens, the Sentencing Memorandum states that "the Department considered a number of factors in its decisions regarding the overall disposition. . . . The Department's analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts."[127] Had the Department of Justice convicted Siemens of bribery, Siemens would have been automatically debarred under the European Union's Procurement Directives that were in place at the time.[128] Not only would the automatic debarment have substantially harmed Siemens' ability to operate, but it also would have impacted the ability of the European Union Member States to procure critical goods and services.[129]

The Siemens story seems to illustrate a situation in which a large business evaded justice because the civil and criminal apparatus had to take a business decision into consideration when making its sentencing determination. Prosecutors, judges, and juries are not well equipped to make business decisions for the government.[130] Their jobs are not within the acquisition workforce and their training is, properly, within the field of civil and criminal law or as members of the laity. There is no way for the government as a whole to "win" in circumstances similar to those in the Siemens context. Depending on civil or criminal outcomes, a bad contractor is either "let off" despite its acts, or the government is deprived of the ability to obtain necessary goods and

124. Sentencing Memorandum at 3, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL.
125. *Id.* at 2.
126. *Id.*
127. *Id.* at 11.
128. *See* Directive 2014/24, art. 57(1), 2014, O.J. (L 94) (EU).
129. *See* Youngman, *supra* note 96, at 424.
130. *See id.* at 417–18.

services. In enacting a debarment system based on punishment, governments must decide if prosecutors, judges, and juries are the parties best suited to decide with whom the government does business, even (and especially) if they are presented with no evidence regarding the consequence of the conviction on the government or contractor's ability to function.

To mitigate the harshness of the punishment-based system, in 2018, Canada announced a Deferred Prosecution Regime, which includes remediation agreements.[131] The remediation agreements are intended to "require the organization to put measures in place to correct the problem and to prevent similar problems in the future."[132] Through the remediation agreement, any criminal prosecution is deferred, and the contractor is not subject to Canada's Integrity Regime exclusions.[133] However, this process still takes a decision about the contractor's ability to function within the procurement space outside of the acquisition chain and places it with the judicial branch. While ultimately the taxpayer, as the principal, suffers harm from a contractor's misdeeds, that harm is felt most acutely in the acquisition chain because the contractor's misdeeds prevent it from achieving its mission.

The United States has also struggled with separating debarment from the purview of the acquisition chain. In 1962, the Committee on Adjudication of Claims for the Administrative Conference of the United States reviewed the United States' debarment policies in issuing the *Committee Report on Debarment and Suspension of Persons from Government Contracting and Federally Assisted Construction Work* ("the Report").[134] One change the Report considered making was creating a single debarment board for making debarment decisions.[135] Several agencies vigorously objected to this change, including the Air Force, which stated that "giving any such board responsibility for fixing the period of debarment, 'would be completely unacceptable since debarment is essentially a 'procurement management tool' and the period of debarment should properly be fixed by procurement officials."[136] Taking the decision to exclude or determine the necessary remediation steps away from the acquisition chain can be beneficial in that it acts as a check on the executive branch. The "outsourcing" of debarment decisions, however, can hinder the acquisition chain's ability to fashion creative solutions that ensure the government does business with responsible contractors while simultaneously maintaining access to critical supplies and services. While prosecutors, no doubt, can and should coordinate with acquisition officials, the prosecutor does not have to live with the consequences of debarments in the same way as a contracting agency.

131. *Remediation Agreements and Orders to Address Corporate Crime*, Dep't of Just. Can. (Sept. 11, 2018), https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html [https://perma.cc/9XKT-9YH4].

132. *Id.*

133. *Id.*

134. ACUS Committee Report, *supra* note 112.

135. *See id.* at 7.

136. *Id.* at 17.

iii. Extended Delays Between Identification of Compliance Failure and Debarment

Perhaps the most significant practical drawback to a punishment-based system is the length of time it takes to effect the debarment. For example, SNC Lavalin, discussed previously, is a well-publicized case of a Canadian contractor that was indicted on fraud charges in February 2015 for bribery offenses that took place between 2001 and 2012.[137] If convicted, SNC Lavalin could be excluded from the Canadian procurement system for a period of ten years for events that occurred almost twenty years ago in some cases.[138] As it stands today, SNC Lavalin can participate in procurements even though it is facing a ten year exclusion upon the conclusion of the legal proceedings. Yet, if found guilty upon the conclusion of criminal proceedings, it will be excluded again.

In a punishment-based system, the focus is on the contractor's misdeeds.[139] As demonstrated in the SNC Lavalin case, the acts of the contractor nearly two decades previously may prevent the contractor from participating in procurements for the next decade without regard to the contractor's present responsibility.[140] Eventually, the contractor's misdeeds become stale from a corporate ethics perspective. If one of the goals of a procurement system is to obtain the best value for the goods and services and the widest possible competition,[141] then eliminating presently responsible contractors for extended periods of time based on actions that took place long ago seems counterintuitive.

iv. Limited Scope and Breadth of Possible Debarments

One final drawback of a punishment-based debarment system is that it limits the scope and breadth of possible exclusions.[142] In a punishment-based debarment system, the specific offenses for which a contractor may be debarred must be listed. For example, Canada's Integrity Regime lists approximately thirty different offenses that will automatically result in the contractor's exclusion from future procurements.[143] The Directives list approximately eight offenses that result in automatic exclusion.[144] It is impossible to list every circumstance under which a contractor should be debarred. The United States' debarment policies and the EU Directives both contain "catch-all" provisions that allow the SDO or the Contracting Authority to determine if there is a circumstance so compelling that the contractor should be debarred, requiring the Contracting Authority or SDO to exercise discretion.[145] Because punishment-based

137. Joseph, *supra* note 107.
138. Canadian Integrity Regime, *supra* note 7, at (6).
139. *World Bank Survey*, *supra* note 8, at 2.
140. Robb M. Stewart, *SNC-Lavalin Says World Bank Lifts Sanctions Imposed in 2013*, Wall St. J. (Apr. 21, 2021), https://www.wsj.com/articles/snc-lavalin-says-world-bank-lifts-sanctions-imposed-in-2013-11618942254 [https://perma.cc/D5NK-B4XD].
141. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law* 2 (Pub. Procurement L. Rev., Working Paper No. 37, 2002).
142. *See, e.g.*, Canadian Integrity Regime, *supra* note 7, at (6).
143. *Id.* at (4).
144. Directive 2014/24, art. 57(1), 2014, O.J. (L 94) (EU).
145. Directive 2014/24, art. 57(4)(c); FAR 9.406-2(c).

systems rely on the judicial process to establish a basis for debarment, if the exclusion is not identified as either part of the sentencing requirements or as a consequence in administrative regulations, then the Contracting Authority may have no basis to exclude the contractor from future procurements.

C. Business Decisions

In public procurement, the government enters the private sphere and accumulates some of the rights and obligations that it would otherwise have been exempted from as a sovereign.[146] However, the government does not shed all of its sovereign duties when it enters the private market.[147] The government is still expected to be a good steward of public funds and not to discriminate unlawfully,[148] while in the private sector, a contractor can unilaterally decide not to continue a business relationship with a partner for any reason.[149] Additionally, one of the goals of a public procurement system is often transparency.[150] Although the United States does not identify transparency as a specific goal of its system, the Federal Acquisition Regulation (FAR) states that "[t]ransactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct."[151] This emphasis on transparency means that the government cannot randomly decide to exclude a contractor from doing business with the government. In legal systems based on English common law, the concept of due process protects contractors' rights.[152] In other legal systems, transparency in the public procurement system can act as a substitute for due process protections.[153] One appropriate way for a government to end a business relationship is through debarment.

In some respects, debarment is always a business decision. Sometimes, however, the business decision is made at the legislative level, while other times it is made at the SDO level. The legislature has the authority to determine whether debarment should be mandatory or discretionary (i.e., within

146. *See* Steven Schooner & Nathan Castellano, *Eyes on the Prize, Head in the Sand: Filling the Due Process Vacuum in Federally Administered Contests*, 24 Fed. Cir. Bar J. 391, 407 (2015).

147. Jennifer Jo Snider Smith, *Competition and Transparency: What Works for Public Procurement Reform*, 38 Pub. Con. L.J. 85, 125 (2008).

148. *Id.*

149. *Id.*

150. United Nations Commission on International Trade Law, *UNCITRAL Model Law Guide to Enactment*, A(2)(f) (June 28, 2012); Directive 2014/24 (1), (3), 2014, O.J. (L 94) (EU); *Procurement in IPF and Other Operational Procurement Matters*, World Bank Grp., III.C(6) (Nov. 7, 2017), https://ppfdocuments.azureedge.net/a3656cb7-8847-417b-886f-11fa0235216e.pdf [https://perma.cc/NU8W-CTUT].

151. FAR 3.101-1.

152. Zachary D. Krug, Note, *Due Process and the Problem of Public Contracts: A Critical Look at Current Doctrine*, 89 Cornell L. Rev. 1044, 1044 (2004).

153. Christopher Bovis, *The Effects of the Principles of Transparency and Accountability on Public Procurement and Public Private Partnerships Regulation*, 3 Euro. Public Private Partnership L. Rev. 17, 18 (2008).

the SDO's purview).[154] If the debarment is mandatory, the business decision regarding who the government will do business with has been made at the legislative level. If the debarment is discretionary, the business decision has been delegated to the executive branch.

In the U.S. debarment system, an agency may decide to continue a contractual relationship with a contractor accused of misconduct where doing so is in the government's best interest and the contractor is "presently responsible."[155] Present responsibility originates in FAR 9.402(a), which states that "[a]gencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only."[156] To effectuate that policy, FAR 9.406-2(a)(5) states that "[t]he debarring official may debar [a contractor for] . . . Commission of any . . . offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[157] However, "present responsibility" is undefined.

In *Silverman v. United States Department of Defense*, the U.S. District Court for the Southern District of California held that the government must "carefully consider any favorable evidence of responsibility to ensure that all findings of responsibility are based on the presence of a realistic and articulable threat of harm to the government's proprietary interest."[158] The U.S. District Court for the District of Columbia similarly held that "[t]o sustain a debarment, there must be found some threat to Government interests arising from contracting with the debarred contractor."[159] In their joint article, *Path of an Investigation*, the Air Force General Counsel's Office, Contractor Responsibility Division and Lockheed Martin stated:

> 'Present responsibility' is a term of art. To simplify, the analysis of present responsibility is the mechanism for government agencies and departments to make business judgments about contractors and to determine whether these are the types of contractors with which the Air Force (and, by extension, the Government) conduct business.[160]

Notably, both U.S. District Court decisions require the government to find a *present* threat to the Government's interest—not a past threat based on prior behavior.

154. *See* Kate M. Manuel, Cong. Rsrch. Srv., RL34753, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments 1 (2012).

155. FAR 9.406-2(a)(5).

156. *Id.* at 9.402(a).

157. *Id.* at 9.406-2(a)(5).

158. Silverman v. United States Department of Defense, 817 F. Supp. 846, 849 (S.D. Cal. 1993).

159. *See* Peter Kewit Sons' Co. v. United States Army Corps of Engineers, 534 F. Supp. 1139, 1148 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983).

160. Robbins et al., *supra* note 72, at 607.

1. Benefits to a Business-Decision Based Debarment System

A business-decision based debarment system recognizes that when a government procures goods and services it acts more like a consumer than a sovereign.[161] Such a system allows the government flexibility to act quickly and decisively when issues arise.[162] It also allows the acquisition chain to make a business decision about a contractor while understanding the full scope of the impact that the business decision may have.[163] A business-decision based debarment system broadens the scope of potential bases for debarment, allowing SDOs to act even when a contractor's wrongdoing is not significant enough to justify a full criminal trial.[164] Instead, the SDO can determine whether they believe the contractor is a risk to the government and whether the contractor can remediate that risk.[165] Perhaps most importantly, business-decision based debarment systems focus on the present responsibility, rather than the past conduct, of the contractor and allow the SDO to exercise discretion regarding what action is in the government's best interest.[166]

i. Greater Flexibility and Speed in Acting on Compliance Failures

One of the hallmarks of the business-decision based system is that it allows the government flexibility to act when issues arise.[167] David Sims, the head of the Interagency Suspension and Debarment Committee, testified to Congress regarding FAR 9.4 debarments:

> [D]ebarment is a discretionary decision by the government as a consumer of goods and services, [and] serves the purpose of protection, not punishment. The action is forward-looking. It is prospective in application and really serves best to head off participation of problem actors in new Federal awards. It is a potent remedy for the government as a consumer, perhaps one of the most important remedies.[168]

In a punishment-based debarment system, a prosecutor must convince a judge or jury that the contractor has acted in such a way that it should be convicted of a crime.[169] In a business-decision based system, to propose a contractor for debarment, the SDO must only be convinced by a preponderance of the evidence that the contractor poses a present risk to the government.[170] This allows the government the flexibility to act quickly and decisively where

161. FAR 9.402.
162. *Id.* at 9.407-3(b)(1).
163. *Id.* at 9.406-3(c)(5)–(7).
164. *Id.* at 9.402(a).
165. *Id.* at 9.406-1(a).
166. *Id.* at 9.406-1(a)(10).
167. *Id.* at. 9.407-3(b).
168. *Weeding Out Bad Contractors: Does the Government Have the Right Tools?*, *Before the S. Committee on Homeland Security and Governmental Affairs*, 112th Cong. 10 (2011) (testimony of Mr. David Sims, Chairman, Interagency Suspension and Debarment Committee, and Mr. Steven Shaw, Deputy General Counsel for Contractor Responsibility, U.S. Air Force) [hereinafter *Weeding Out Bad Contractors Testimony*].
169. *World Bank Survey*, *supra* note 8, at 2.
170. FAR 9.406-2(b)(1).

necessary (although this does increase the potential for corruption through the exercise of discretion).

The length of time between a contractor's wrong-doing and the government's response is shorter in the business-decision based system than in the punishment-based system. Steven Shaw, the Air Force's former SDO, testified:

> Prosecutions generally take years to complete. In that time, countless new awards and millions in funds can go to non-responsible contractors. Debarring officials have the ability to shut off the flow of dollars to these contractors well before final conviction, and we should do so whenever the facts require such an action.[171]

In situations like those Shaw describes, fiduciary, reputational, and performance risks are all high.[172] The government has identified a potential bad actor; however, in a punishment-based system, nothing can be done until the bad actor is either indicted or convicted.[173] This increases the fiduciary risk to the government because funds can be improperly diverted through corruption and fraud.[174] It increases the reputational risk to the government because the government is continuing to do business with an actor suspected of wrong-doing.[175] Finally, performance risks are increased because, if the contractor was awarded based on corruption, the contractor may not be fully capable of doing the work at the price offered.[176] The government is at risk of either receiving shoddy work or being faced with a request for equitable adjustment to increase the contract price.

In a business-decision based system, the SDO does not need to wait for completion of an investigation or proceeding.[177] Instead, if an SDO determines by a preponderance of the evidence that improper activities have taken place, the SDO can act to suspend business with the contractor.[178] This reduces fiduciary, reputational, and performance risk to the government by promptly restricting the suspected bad actor's access to the procurement regime until that contractor can demonstrate its present responsibility.

ii. Debarment Decisions Are Made Within the Acquisition Chain

A business-decision based debarment system keeps debarment decisions within the acquisition chain, in which an SDO can, in many respects, evaluate performance risks to the government with greater insight than a judge, jury or prosecutor making decisions in a punishment-based system. Steven Shaw's testimony to Congress exemplifies this idea:

171. *Weeding Out Bad Contractors Testimony*, *supra* note 168, at 72.

172. *See* Sati Harutyunyan, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, 45 Pub. Cont. L.J. 449, 469 (2016).

173. Canadian Integrity Regime, *supra* note 7, at (6).

174. *Weeding Out Bad Contractors Testimony*, *supra* note 168, at 15.

175. *See* Suspension and Debarment, *supra* note 6, at 73.

176. *See id.*

177. FAR 9.406-2(b)(1).

178. *Id.*

> When there is a preponderance of evidence we take action. By doing that, we protect further losses to the government as well as flight safety issues. And frankly, it gets beyond the point of present responsibility determination if we wait 5 years for the Justice Department to determine at the point of the running of the statute of limitations that they are not going to take any action.[179]

Shaw's testimony demonstrates a concern for both the fiduciary and performance risk to the government. As the Air Force's SDO, Shaw places paramount importance on addressing flight safety issues to support the Air Force's mission. While there is no doubt that prosecutors would take flight safety issues seriously, the Air Force's acquisition chain is much closer to overall mission accomplishment through the safe operation of aircraft. Acquisition professionals will be much more aware of flight safety issues and the severity of those concerns. Further, it is within the scope of their mission to address such issues.[180] A prosecutor's mission, on the other hand, is primarily to punish wrongdoers—not to prevent aircraft mishaps or degraded equipment capabilities. A business-decision based debarment system allows the SDO to determine that the contractor presents a clear and present danger to the government and to exclude them as appropriate.[181]

iii. Broader Scope for Potential Debarments

A business-decision based system also allows for a broader scope of potential bases for debarment than a punishment-based debarment system. A business-decision based system allows the government to act on concerns that do not warrant prosecution but are still business concerns to the government. For example, one of the outcomes of the FAR's mandatory disclosure rule was an increased debarment of individuals.[182] One common basis for debarring an individual is if he or she mischarges time.[183] Mischarging time can potentially constitute. a false claim against the government;[184] however, a prosecutor is unlikely to charge an individual for mischarging 160 hours of time (or one month's work) over the course of a year where the damage to the government in question would be approximately $5,600. Repeated mischarging of time is nonetheless a concern for the government from both a fiduciary and reputational risk perspective. A business-decision based debarment system would allow the government to pursue action against an individual mischarging time and mitigate systematic loss to the government, despite a prosecutor's lack of interest in pursuing charges for the same misconduct.[185]

179. *Weeding Out Bad Contractors Testimony*, *supra* note 168, at 15.

180. *See* Secretary of the Air Force, *Air Force Instruction 63-138*, U.S. Dep't of the Air Force 22 (Sept. 30, 2019), https://static.e-publishing.af.mil/production/1/saf_aq/publication/afi63-138/afi63-138.pdf [https://perma.cc/QT3J-KHLC].

181. FAR 9.406-1(a).

182. Levy & Wagner, *supra* note 100, at 9.

183. Todd J. Canni & Matt Carter, *Developments in Suspension & Debarment and Ethics and Compliance Practices Impacting the Supply Chain*, 36 (Apr. 17, 2019), https://www.pillsburylaw.com/images/content/1/2/122689.pdf [https://perma.cc/ZBA4-2MLE].

184. FAR 9.406-2(b)(1)(vi)(C).

185. Levy & Wagner, *supra* note 100, at 43.

Further, a business-decision based system allows the government to take action for circumstances not specifically addressed by regulation or law. In contrast, the Canadian regime only allows for exclusion of contractors if they have been convicted of a crime under Canadian law.[186] Incidents can arise in foreign procurements involving multinational contractors where the debarring government may not have jurisdiction to pursue a civil or criminal charges against a particular contractor.[187] In the SNC Lavalin situation discussed above, Canada had jurisdiction to pursue a corruption charge against SNC Lavalin because it is a Canadian company,[188] but the United States may not have had jurisdiction to pursue a similar charge, despite SNC Lavalin's lack of present responsibility.

Steven Shaw testified to Congress reagarding an incident in which a contractor was alleged to have acted corruptly in the sale of military equipment to foreign governments.[189] He argued that the United States' system worked, stating:

> I want to highlight for the Subcommittee that we are not limited to taking action for misconduct only for conduct relating to U.S. Government contracts. None of us in this room would welcome a contractor into our home to do work for us when, on another project, they did shoddy work or engaged in unethical or illegal behavior. We should be, and the Air Force is, similarly concerned with misconduct committed by Air Force contractors—even if that misconduct is unrelated to an Air Force or any U.S. Government contract.[190]

This freedom to look beyond the criminal or civil code allows SDOs the opportunity to investigate any problematic circumstance—no matter how small or large—and determine the appropriate action to protect the government's business interest.

iv. Contemporaneous Rather Than Retrospective Review

The primary benefit of a business-decision based debarment system is that it allows the SDO to consider the contractor's present responsibility rather than its past conduct. Ultimately, governments want to contract with ethical contractors that provide high quality, best-value goods and services to the government. Reviewing present responsibility rather than past conduct can give the government leverage to inspire ethical transformations within the contractor. As Shaw testified to Congress:

> First, I want to make clear how important freedom to do the right thing is for Suspending and Debarring Officials. The Air Force's approach . . . [in taking action against an allegedly corrupt contractor] is unconventional when compared with many other programs in the Government that might wait for a final conviction or a final contract action like a termination before acting—or not acting at all, because the misconduct did not relate to a US government contract. But, the freedom I

186. Canadian Integrity Regime, *supra* note 7, at (6).
187. *See* Yukins, *supra* note 65, at 221.
188. Joseph, *supra* note 107.
189. *Weeding Out Bad Contractors*, *supra* note 168, at 70.
190. *Id.* at 70–71.

> have to do the right thing not only enabled me to engage early [with the allegedly corrupt contractor], but also to facilitate further ethical transformation throughout [the contractor's organization] that will benefit all U.S. Government contracts with the company in the future.[191]

A business-decision based system encourages contractors to become presently responsible as soon as practicable because only by doing so can they re-enter the procurement system and recapture government business. Such a system therefore has the opposite effect of a punishment-based system, which encourages contractors to hide misconduct.

2. Drawbacks to a Business-Decision Based Debarment System

While a business-decision based debarment system has many benefits, it may not be ideal for every procurement system. It requires a developed acquisition workforce and contractor base, sufficient government resources to support a suspension and debarment organization, and public trust in the administrative state. The outcomes of business-decision based debarments can be more nuanced and offend the public sense of justice when a "guilty" contractor is not debarred. Finally, administrative decisions apply due process protections less rigorously,[192] which provides the government the flexibility to act against bad contractors quickly but simultaneously increases the risk of corruption.

i. Increased Opportunity for Corruption Through the Exercise of Discretion

A business-decision based debarment system requires a government official to exercise discretion over whether a given contractor poses a risk to the government as a business partner.[193] If discretion and opportunity create the potential for corruption as Trepte suggests,[194] then governments struggling with the perception of corruption may not have the risk tolerance for a business decision *not* to debar a contractor exhibiting compliance failures. The decision not to debar may be entirely legitimate; however, the perception of corruption, and desire for punishment, may be so high that no decision other than debarment will satisfy the public.

Jessica Tillipman's article "*A House of Cards Falls: Why 'Too Big to Debar' Is All Slogan and Little Substance*" attempts to address this very issue.[195] In responding to an article claiming that large government contractors should be debarred rather than face criminal penalties, Tillipman states:

> While it is reasonable to expect ethical conduct from companies that receive taxpayer dollars (as the seemingly limitless Federal Acquisition Regulations (FAR) already do), it is not only self-defeating but also unreasonable to demand debarment, simply because it is "far more crippling to a company's bottom line." . . . Experts understand that there is a surefire method for ensuring that there will be

191. *Id.* at 70.
192. FAR 9.406-3, 9.407-3.
193. *See* Levy & Wagner, *supra* note 100, at 63.
194. Trepte, *supra* note 78, at 5.
195. Tillipman, *supra* note 87.

> no fraud in government contracting: simply stop awarding contracts. Then governments can place their trust directly in politicians and public officials who, as history has proven time and time again, are insulated from temptation, immune to missteps, and endlessly toil with the public's best interest at heart. If that solution does not set your mind at ease, maybe it is time to return to a more thoughtful, reasoned analysis of this complex, challenging issue.[196]

There are ways to mitigate concerns regarding the exercise of discretion. Rather than the United States' relatively informal FAR 9.4 process, states could follow an administrative adjudicatory process similar to formal court proceedings where testimony and evidence is received and the debarment decision is ultimately published as a publicly available document. Instead of applying criminal or civil laws, the administrative court would make a "business" decision for the government about the contractor's present responsibility, looking to a predetermined list of mitigating factors and remedial measures for consideration. With a published decision and regulations clarifying present responsibility, an administrative court could build jurisprudence regarding debarment of contractors, which would help increase transparency and reduce the appearance of corruption.

ii. A Developed Acquisition Workforce and Contractor Base Are Required for Business-Decision Based Debarments

In a business-decision based debarment system, both the acquisition workforce and the contractor base need to be well-developed.[197] In a procurement system with a limited contractor base, it may never be in the government's business interest to debar a contractor because debarment reduces competition, particularly in a situation where multiple contractors are found guilty of bid rigging.[198] In developed procurement systems, typically a sufficient contractor base exists such that the elimination of a contractor that is not presently responsible does not dramatically impact competition to obtain government contracts. However, in states with a smaller contractor base, debarment may disproportionately impact the ability of the government to obtain competition and therefore represent a poor business decision.

Most systems have a necessary and "compelling" circumstances exception to debarment when the government's needs cannot be satisfied by any other source.[199] This rule has two outcomes: first, it allows the SDO to make a debarment decision without regard to the overall impact to the government;[200] and second, it allows the government to obtain the goods and services it needs, even if the only supplier of those goods or services is a contractor that

196. *Id.* at 49–50, 58.

197. *See* Suspension and Debarment, *supra* note 6, at 68.

198. *See* Emmanuelle Auriol & Tina Søreide, *An Economic Analysis of Debarment*, 50 Int. Rev. L. & Econ. 36, 37 (2017).

199. *Ineligibility and Suspension Policy*, Government of Canada, (15) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021); Directive 2014/24, art. 57(3), 2014, O.J. (L 94) (EU); (c) FAR 9.405(a).

200. *See Weeding Out Bad Contractors*, *supra* note 168, at 70.

is not presently responsible.[201] However, this rule assumes that decisions are made in a vacuum. It is highly improbable that a high-ranking official is going to decide to debar a contractor if the loss of that contractor would severely impact the government's ability to function, if only because the debarment would be overridden through a necessary and compelling circumstances exception. Thus, a business-decision based debarment system may be less effective in states with smaller contractor bases.

Likewise, the acquisition workforce must be well-developed in order to support a business-decision based system. A business decision to debar a contractor has a different connotation than the exclusion of a contractor who has been convicted of a crime. In the ethics and compliance world, it is common to say that "tone from the top" is important.[202] In this case, a strong "tone from the top" (i.e., the head of the acquisition workforce) is critical to ensure that debarment decisions are respected.[203] In its early stages, the United States' system suffered from agencies refusing to acknowledge each other's debarments.[204] Eventually, Congress passed a law requiring the military agencies to honor the debarments of other military agencies.[205] Failing to recognize the debarments of other agencies exposed the government to preventable harm from contractors already determined to not be presently responsible.[206] For a business-decision based system to succeed in a given country, its acquisition workforce would need to be trained regarding the importance of such a system and the consequences for failing to abide by the SDO's decisions.

iii. Greater Resources Are Required to Enact Debarments Based on Business-Decisions

A business-decision based debarment system also requires more resources than a punishment-based debarment system.[207] A business-decision based system by definition requires an individual in the administrative state to make a decision regarding the ability of contractors to continue to participate in the procurement system.[208] That individual requires a support staff to assist in evaluating the state of investigations into contractors, facilitating debarments, and managing contractors' responses to debarment actions.[209] The support staff might also reasonably include the SDO's own investigators to support potential debarment cases. While a debarment system is critical to the

201. FAR 9.405(a).

202. *See* Mark S. Schwartz et al., *Tone at the Top: An Ethics Code for Directors?*, 58 J. Bus. Ethics 79, 87 (2005).

203. *Id.* at 86.

204. Levy & Wagner, *supra* note 100, at 29.

205. *Id.*

206. *See* U.S. Gov't Accountability Office, GAO-11-739, Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved 6 (2011).

207. *See* Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs?*, 44 Cath. U. L. Rev. 363, 405 (1995).

208. FAR 9.403.

209. Off. of Mgmt. & Budget, Exec. Office of the President, M-12-02, Suspension and Debarment of Federal Contractors and Grantees (2011).

functioning of a procurement system, in states where government resources are scarce, a business-decision based debarment system may be considered an unnecessary duplication of the prosecutor's office's function.

D. Reform Efforts

Debarment can also be used as a tool to reform contractors. Many systems have a "reform" aspect to their debarment system.[210] It seems unlikely that an entire contractor organization would be so thoroughly corrupt that the contractor is beyond redemption. Given this reality, debarment can sometimes be a harsh and unnecessarily penalizing method of protecting the government's interests. To mitigate this issue, debarment systems can focus on reforming contractors rather than excluding them.

In a reform-based debarment system, the government is focused on establishing the ethical requirements for contractors in the procurement regime.[211] In the United States, these requirements are called "remedial measures."[212] In the European Union, similar concepts are codified in the Directives as "self-cleaning."[213] In Canada, the Integrity Regime incorporates remedial measures into its administrative agreement policy.[214] Each of these systems contain common themes. The steps contractors can take to establish their ethical credibility include cooperating with investigations, paying criminal, civil or administrative penalties, taking disciplinary action against individuals involved in misconduct, and improving compliance systems.[215] In addition, the Canadian and United States' systems expect contractors to hire compliance monitors, outside consultants that act as third-party evaluators of the effectiveness of the contractor's remedial measures.[216]

The purpose of remedial measures or "self-cleaning" is to allow contractors and the government a baseline of elements that a presently responsible company would meet.[217] From this baseline, the government and the contractor can tailor the contractor's remedial actions to mitigate the government's concerns about the contractor's ability to act ethically. In some cases, it is appropriate to remove the "bad actors" from the company. However, in other situations, such as where the bad actor is the CEO, it may not be possible.

210. FAR 9.406-1(a).

211. FAR 9.406-1(a).

212. *Id*.

213. Hans-Joachim Priess et al., *Self-cleaning as a Defense to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?*, 6 P.P.L.R. 257, 258 (2009).

214. Canadian Integrity Regime, *supra* note 7, at (14)(c).

215. FAR 9.406-1; *see Ineligibility and Suspension Policy*, Government of Canada, (14)(c) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021).

216. Interagency Suspension and Debarment Committee, *Section 873 of Public Law 110-417 Report for FY 2014*, 3, 5 (2014); *Ineligibility and Suspension Policy*, Government of Canada, (14) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021).

217. Amanda Lee Wetzel, *How Companies Can "Self-Clean" Corruption, Thanks to EU Reforms*, Debevoise & Plimpton (2015), https://www.lexology.com/library/detail.aspx?g=0ba25229-29b4-47f4-a4f4-305283bf921a [https://perma.cc/8NK5-HYX4].

With a reform-based system, the inability to remove the CEO from the company is not a death knell to the contractor's ability to continue within the procurement regime. Instead, the government must find a way to work with the contractor to develop their present responsibility.[218] This may require the government and contractor to find creative solutions to difficult compliance problems.

In the United States' and Canada's systems, remedial measures can be implemented through an administrative agreement.[219] In an administrative agreement, the contractor identifies specific steps it will take to become presently responsible, often including revisions of its corporate code of conduct, removal of bad actors, and the hiring of a third-party compliance monitor.[220] During the term of an administrative agreement, the contractor and the independent monitor report the contractor's progress in implementing the remedial measures and changing the corporate culture to the SDO or equivalent Canadian official (PWGSC).[221] The SDO or the PWGSC then reviews the reports from both the contractor and the compliance monitor to ensure that the contractor is in. compliance with the terms of the administrative agreement.[222] Failure to comply with the terms of the administrative agreement can lead to implementation of a debarment for a period of time determined by the SDO or PWGSC.[223]

In the European Union, contractors self-certify that they have self-cleaned.[224] Prior to the 2014 Public Procurement Directive, self-cleaning was a recognized concept in Germany and Austria, but not well-established throughout the remainder of the European Union.[225] Prior to 2014, legal scholars Priess, Arrowsmith, and Friton argued that "the self-cleaning concept supports [the] public interest objective of eradicating fraud and corruption by providing an incentive to firms to eliminate this kind of conduct through the prospect of being allowed to take part in public procurement procedures if they do so."[226] In the 2014 Public Procurement Directive, self-cleaning was formally recognized as a remedial measure potentially allowing contractors to return to participating in public procurement once self-cleaning has been completed.[227]

218. Yukins, *supra* note 65, at 224.

219. Interagency Suspension and Debarment Committee, *Section 873 of Public Law 110-417 Report for FY 2014*, 5 (2014); *Ineligibility and Suspension Policy*, Government of Canada, (14) https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/7EA5-HFSK] (last visited May 14, 2021).

220. Interagency Suspension and Debarment Committee, *supra* note 219, at 5.

221. *Id*.

222. Canadian Integrity Regime, *supra* note 7, at (13)(f).

223. *Id.* at (14).

224. Directive 2014/24, art. 57(6), 2014, O.J. (L 94) (EU).

225. Hans-Joachim Prieß et al., *Self-cleaning as a Defense to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?*, 18 P.P.L.R. 257, 257–58 (2009).

226. *Id.* at 263.

227. Directive 2014/24, art. 57(7).

Hans-Joachim Priess argues that self-cleaning measures improve the procurement regime:

> Requiring strenuous and costly self-cleaning measures ensures that misconduct will not recur in the future. Allowing companies to rehabilitate themselves on such a basis under strict conditions and thereby enhancing competition must be regarded as a very positive aspect of the reform and a great step towards harmonisation of the public procurement legislation in the EU.[228]

Self-cleaning measures then serve a dual purpose: they both improve the state of the subject contractor's ethics and compliance system and simultaneously functioni as a cautionary tale to other contractors about the potential impact of failing to maintain appropriate ethics and compliance systems.

1. Benefits of a Reform-Based Debarment System

A reform-based debarment system provides the government with greater flexibility in managing its contractors.[229] It allows the government to maintain its relationship with a contractor that is not presently responsible while also developing that contractor's present responsibility. In addition, most government action in a reformed-based system is administrative in nature, meaning that it involves less stringent due process standards than those applied to judicial proceedings.[230] This allows the government and the contractor to resolve problems more quickly than would be possible through the judicial system.[231]

i. A Reform-Based Debarment System Allows for the Preservation of the Contractor Base

In a reform-based system, exclusion is not the only outcome for a contractor with compliance failures.[232] The government can work with the contractor to create safeguards sufficient to give the government confidence in the contractor's ability to continue to participate in the procurement regime.[233] In a business-decision based or a punishment-based system, the scope of the inquiry ends at the contractor's either present or past responsibility.[234] If the contractor does not meet either standard, the contractor cannot participate in the procurement regime.[235] In a reform-based system, the focus shifts to considering future responsibility.[236] Because of that, the government can maintain its business relationship with the contractor as long as the contractor complies with the terms of the administrative agreement.

228. Hans-Joachim Prieß et al., *The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive*, 121. P.P.L.R. 112, 121 (2014).
229. FAR 9.402(b)–(e).
230. *See* Suspension and Debarment, *supra* note 6, at 71.
231. *See id.*
232. *Id.* at 64.
233. *Id.*
234. *See World Bank Survey*, *supra* note 8, at 2.
235. *Id.*
236. *See* Suspension and Debarment, *supra* note 6, at 64.

ii. Quicker Resolution of the Compliance Failure and Potential Return of the Contractor to the Available Contractor Base

In a reform-based system, the decision to enter into an administrative agreement falls within the authority of the executive branch.[237] Because it is not a judicial process, the administrative agreement process moves more quickly to address the government's concerns regarding the contractor's ability to comply with rules and regulations.[238] An administrative agreement is essentially a contract between the government and the contractor whereby the government agrees not to exercise its right to debar the contractor in exchange for the contractor agreeing to take certain steps to regain its present responsibility.[239] Because such an agreement is voluntary, there are no due process requirements with regard to the contractor's rights, so the agreement can be negotiated as quickly or as slowly as the parties find appropriate.[240]

2. Drawbacks of a Reform-Based Debarment System

While there are substantial benefits to a reform-based debarment system, there are significant drawbacks to consider. Reform-based debarment systems can require contractors to institute expensive programs, potentially eliminating the very contractors that a reform-based debarment system was designed to preserve.[241] Reform-based debarment systems also require significant trust on the part of the government, as it is possible for a contractor to pay lip service to its required reforms without following them.[242] A reform-based debarment system also requires exercise of substantial discretion, increasing the opportunity for corruption.[243] Such a system should also address repeat offenders and determine when no further leniency can be given to the contractor.[244]

i. Expensive for Contractors

Reform-based systems are perhaps the most expensive form of debarment system for contractors. In a reform-based system, a contractor must invest in new codes of conduct, new processes and procedures, and a new way of

237. *See id.* at 71; *see also* FAR 9.406-3(f).

238. *See* Suspension and Debarment, *supra* note 6, at 71.

239. *See id.* at 64.

240. *See id.*; *cf.* Related Indus. v. United States, 2 Cl. Ct. 517, 525 (1983).

241. *See* Philip Inglima, *Corporate Monitors: Peace, at What Cost?*, Crowell & Moring (Jan. 2018), https://www.crowell.com/NewsEvents/Publications/Articles/White-Collar-Corporate-Monitors-Peace-at-What-Cost [https://perma.cc/5SK6-PDMW] ("The expenses associated with monitors have crept up to the point where they now can have a significant impact on a company's bottom line. It's becoming the new normal for the costs to run well north of $30 million to $50 million over the course of three years." (quotations omitted)).

242. *See* Suspension and Debarment, *supra* note 6, at 64; *see also* Kate M. Manuel, Cong. Rsrch. Serv., RL34753 Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments 10 (2012).

243. *See* Suspension and Debarment, *supra* note 6, at 59.

244. *See* Steven D. Gordon, *United States: It's Time to Rethink the Suspension and Debarment Process*, Holland & Knight (July 3, 2013), https://www.mondaq.com/unitedstates/government-contracts-procurement-ppp/248174/its-time-to-rethink-the-suspension-and-debarment-process [https://perma.cc/HN8K-KE8F].

doing business.[245] While these are necessary steps, there is no doubt that they are expensive ones. Further expense is introduced by the potential requirement that a contractor hire an independent monitor. For small and medium size enterprises (SME), investment in these compliance measures, on top of the expense of defending itself from potential debarment, may overwhelm an SME's resources.[246]

ii. Requires Government Trust of a Contractor That Is Not Presently Responsible

A reform-based system requires that the government trust a contractor that has already demonstrated it is not worthy of the government's trust. Administrative agreements are intended to mitigate this concern; however, a contractor that refuses to change its corporate culture and intends to continue improper practices may not be forthright in upholding such an agreement. Ideally, a compliance monitor would have sufficient access to a contractor to evaluate whether problematic practices continue; however, dedicated criminals can always find new ways to avoid enforcement officers. The introduction of the compliance monitor, nonetheless, creates another official to whom the contractor must report. A government will always take some continued reputational, fiduciary, and performance risk when it enters into an administrative agreement with a contractor it knows is not presently responsible.

iii. Increased Opportunity for Corruption Through the Exercise of Substantial Discretion with Limited Oversight

A reform-based system requires the exercise of substantial discretion on the part of the SDO. The SDO must evaluate the contractor's current state of present responsibility, its likelihood of eventually reaching present responsibility, and the steps that will be necessary for the contractor to meet that goal.[247] As is the case with a business-decision based system, in a reform-based system, the contractor's continued existence may be in jeopardy if the SDO does not grant the contractor permission to continue participating in the procurement regime.[248] Challenging an SDO's decision not to debar a contractor in a reform-based system is nearly impossible.[249] There is no single person that would likely succeed in a challenge to the decision.[250] The contractor proposed for debarment has standing to challenge the SDO's decision *to* debar because it directly and immediately harms to the contractor.[251] However, a

245. *See* Eric Whytsell, *Suspension & Debarment: Administrative Agreements as Road Maps to Compliance*, Government Contracts Monitor (Mar. 23, 2015), https://www.jacksonkelly.com/government-contracts-blog/suspension-debarment-administrative-agreements-as-road-maps-for-compliance [https://perma.cc/JMC6-SGZ3].

246. *See* Kevin Connelly & Steven L. Schooner, Recovery of Costs for Defense Against the Government's Charge of Illegality, 16 Pub. Cont. L.J. 94, 95–96 (1986).

247. FAR 9.406-1(a).

248. *Id.*

249. *See*, *e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985).

250. *See id.*

251. *See id.*

competitor challenging the SDO's decision *not* to debar another contractor would have a difficult time convincing a judge that the SDO's decision causes that competitor direct and immediate harm. Therefore, the government risks reputational harm in a reform-based system where the SDO may be corrupted through its broad discretion and frequent opportunity to diverge from the SDO's mandate to protect the government.

iv. Potential for Reputational Harm Through the Failure of Administrative Agreements

Finally, the reputational risk in a reform-based system is higher than the risk in a punishment-based or business-decision based system because administrative agreements may fail and contractors may relapse into misconduct.[252] If the purpose of the reform-based system is to rehabilitate contractors, there is an argument to be made that there should be a tolerance for error. However, it may be difficult to establish via regulation or statute a permissible number of errors a given contractor may commit without. serious consequence, as such a determination must inherently involve discretion to consider. the severity of the errors in question. A "one and done" policy expressing zero-tolerance for errors would seem to align more with the punishment-based system rather than the intent to reform contractors. Yet a "three strikes" policy may allow more contractor failures than a government's reputational risk can tolerate. Here, there is no correct answer. A government considering its debarment regime must make an independent evaluation of its risk tolerance.

E. Debarment in the Greater Fraud Remedies Context

Debarment can either be an independent remedy or can work in conjunction with the broader judicial system.[253] The motivating principle of a debarment system can influence how it is integrated within the broad fraud remedies context. Debarment systems that focus on punishment and include automatic debarments have little compatibility with a coordinated fraud remedies approach.[254] Debarment systems focused on business decisions have more flexibility to act with regard to the best interests of the government, which may include coordination with any civil or criminal justice actions.[255] Understanding the impact that the choice of motivating principle can have on the interaction of the debarment system with the broader procurement system, as well as the civil and criminal justice system more generally, can assist states in identifying the appropriate motivating principles for their procurement systems.

1. Debarment as an Independent Remedy

In a business-decision or reform-based system, debarment can work as an independent remedy to address the potential harm to the government. One

252. *See* Manuel, *supra* note 154, at 10.
253. *See id.* at 5.
254. *See Weeding Out Bad Contractors Testimony*, *supra* note 168, at 69.
255. *See id.*

benefit of debarment as an independent remedy is that procurement officials can address compliance failures as they see fit without interference from outside interests.[256] This may be the only practical solution in systems where the Contracting Authority acts as the exclusion authority.[257] However, when debarment operates independently, it may interfere with other investigatory processes.[258]

i. Benefits of Debarment as an Independent Remedy

Debarment as an independent remedy allows acquisition officials to focus primarily on the best outcome for the acquisition chain specifically, rather than the government as a whole. As former Air Force SDO Shaw's testimony indicates, it is critical for the government to protect its interests, particularly when it comes to the safe use of the products that the government purchases.[259]

Debarment as an independent remedy may also be the only practical solution in systems where the Contracting Authority evaluates a contractor for debarment at the outset of each individual procurement. It would be impracticable for law enforcement to coordinate with hundreds of Contracting Authorities about the status of investigations for each and every one of those Contracting Authorities' procedures where a contractor is suspected of fraud or corruption.

ii. Drawbacks of Debarment as an Independent Remedy

When debarment functions as an independent remedy, investigations can be jeopardized and the opportunity for a greater recovery for the government can be missed. For example, in cases where bid rigging or cartelization is suspected, the exclusion of contractors in one procedure may notify other members of the cartel and cause them to change their behavior, thereby causing the cartel to adapt and avoid prosecution.[260] In a coordinated fraud remedies approach, the SDO works with law enforcement to ensure that acting against all of the cartelized contractors at that particular time is in the government's long term best interest rather than simply the acquisition chain's immediate best interest.[261]

2. Debarment as Part of a Coordinated Fraud Remedies System

A fraud remedies system evaluates the four fraud remedies (civil, criminal, contractual, and administrative) for potential recovery in each individual case and seeks to maximize the government's recovery.[262] A coordinated fraud remedies system can be a great benefit to a procurement system because it

256. *See id.*
257. *See id.*
258. *See, e.g.*, Youngman, *supra* note 96, at 423–24.
259. *See Weeding Out Bad Contractors Testimony*, *supra* note 168, at 15.
260. *See* Albert Sanchez Graells, *Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement*, Integrity and Efficiency in Sustainable Public Contracts 194 (2014).
261. *See id.*
262. *See* Robbins et al., *supra* note 72, at 606.

consciously seeks a more complete recovery for the government by allowing debarment, an administrative remedy, to support the three other types of remedies. However, a coordinated fraud remedies system does not always work in harmony and can slow the debarment process, introduce competing interests, and require a developed acquisition and law enforcement workforce.[263]

A coordinated fraud remedies program can exist in any of the three systems discussed herein. While it would seem from the outset that a punishment-based system would not lend itself to coordination because it generally lacks an administrative decision maker, a punishment-based system could comprise a part of a coordinated fraud remedies program because civil and criminal proceedings would nonetheless directly impact the acquisition chain. Likewise, business-decision and reform-based systems can equally participate in a coordinated fraud remedies program. With these two types of systems, the introduction of a third stakeholder, an administrative decision maker, requires greater coordination among government actors.

i. Benefits of Debarment as Part of a Coordinated Fraud Remedies System

Debarment that acts as a part of a coordinated fraud remedies system allows for a conscious effort toward a fuller recovery for the government. While not directly responsible for prosecuting civil or criminal cases, the SDO can act as the point person for monitoring fraud remedies, supporting recovery of misspent funding, developing civil and criminal cases, and protecting the government's interests through debarment.[264] A coordinated fraud remedies approach allows the government to ensure that it receives the maximum recovery when compliance failures occur.

The debarment process itself can also benefit the other remedies. An SDO can condition an administrative agreement on the contractor making restitution to the government for the harm caused.[265] The debarment process can also serve as a discovery tool for investigators during the criminal and civil investigation because the SDO is not constrained by civil or criminal procedure when requesting information from contractors.[266] the contractors' submissions, however, are public record and can be shared with investigators.[267] Therefore, investigators can gain substantive knowledge about the alleged incidents in a consolidated and expedited manner.

ii. Drawbacks of Debarment as Part of a Coordinated Fraud Remedies System

At times, the actors in a coordinated fraud remedies system may not work in harmony. According to the Air Force,

263. *See id.* at 608–09.

264. *See id.* at 607.

265. *See, e.g.*, *NCUA Suspension and Debarment Procedures*, 83 Fed. Reg. 154, 39465 (Aug. 9, 2018).

266. *See* Suspension and Debarment, *supra* note 6, at 60.

267. *See, e.g.*, *Privacy Act of 1974; Notice of a New System of Records*, 76 Fed. Reg. 162, 52341-44 (Aug. 22, 2011).

> Government agencies (including the Air Force) avoid taking action that may prejudice pending or potential fraud litigation. However, the Air Force could be compelled by independent administrative or contracting program concerns to take actions that could go against the wishes of an assistant U.S. attorney or DoJ that the Air Force await the outcome of the prosecution. With DoJ coordination, reasonable remedial action to address administrative or contracting program concerns are within the corporate Air Force's authority.[268]

The SDO's mandate is to ensure that the government is adequately protected from fiduciary, reputational, and performance risk. If the coordinated approach between the Department of Justice, the Contracting Authority, and the SDO would prevent the SDO from fulfilling that mandate, the SDO must pursue the debarment process.[269]

A coordinated fraud remedies approach can slow and introduce competing interests into the debarment process. One of the benefits of a business-decision or reform-based system is that the debarment process is purely administrative and does not require the same level of due process as the justice system.[270] However, when the fraud remedies are coordinated, and as the Air Force suggests above, it may be appropriate for the SDO to wait to act against a contractor so that a civil or criminal investigation is not jeopardized.[271] There may be certain instances in which law enforcement has generated sufficient credible evidence that a contractor has committed fraud but has not yet completed its investigation into other potential targets, wherein action by the SDO could potentially put other targets on notice to change their behavior, thereby risking the investigation.[272] At this stage, the SDO must weigh the immediate risk to the government with the long-term potential risk to the government.[273] Ultimately, the ability of the government to enhance its recoveries in all four remedy areas may be a greater benefit than the speed at which the government can enact a debarment; however, that position is a tradeoff for individual governments to consider.

A coordinated fraud remedies program increases bureaucracy and may not be suited to states with developing acquisition corps or underdeveloped law enforcement programs. A coordinated fraud remedies program requires acquisition and law enforcement professionals to work together to obtain the greatest recovery for the government. [274] In situations where these two branches are siloed away from each other, coordination may prove difficult, if not impossible. In addition, in circumstances where the Contracting Authority also acts as the exclusionary authority, a coordinated fraud remedies program may overwhelm a developing acquisition corps still learning how to

268. Robbins et al., *supra* note 72, at 609.
269. *Id.*
270. Eric Michael Liddick, *The Use of Withdrawn Factual Stipulations in Debarment Proceedings: A Study in Parallel Processes*, 45 Pub. Cont. L.J. 1, 17 (2015).
271. Robbins et al., *supra* note 72, at 609.
272. *Id.*
273. *Id.*
274. *Id.* at 608.

complete procurement procedures and exclude contractors from the tender process appropriately. An underdeveloped law enforcement program may also not recognize the value of the coordinated fraud remedies program and its ability to enhance their investigations. Proper training of both acquisition and law enforcement officials is critical to the success of a coordinated fraud remedies program. In cases where governments have limited resources to devote to personnel, both in terms of time for training and funding, a coordinated fraud remedies program may be a luxury that goes beyond the necessary.

IV. CONCLUSION

When spending taxpayer dollars, governments must guard carefully against the perception of corruption. The implementation of a debarment or exclusion system is one mechanism governments can use to mitigate the perception of corruption.[275] However, merely instituting a debarment system will not address corruption without further action. If the purpose of a debarment system is to provide transparency, it must be clear about what contractors and officials must disclose. A functioning civil and criminal justice system is empowered to expose procurement fraud and corruption. The benefit of a debarment system will be shaped by its motivating principles; punishment-based, business-decision based, and reform-based systems are all based on different motivating principles.

Punishment-based debarment systems are designed to eliminate contractors who fail to meet the government's ethical standards. This type of system is simple to administer and perhaps the most predictable of the three system types in terms of outcomes. If a contractor is guilty of any one of a list of crimes, the contractor is excluded from the procurement system for a prescribed period—no exceptions.[276] Yet the same inflexibility that makes such a system predictable and easy to administer can lead to harsh or unjust outcomes that could cause "good" contractors to fail and the government to permanently lose a contractor contributing valuable competition.

Business-decision based debarment systems focus on making debarment decisions that are in the best business interest of the government, focusing on the government's role as a consumer and steward of public funds. This type of system allows an SDO to investigate the circumstances of alleged wrong-doing and conduct a cost-benefit analysis to determine whether to exclude the contractor from procurement.[277] The SDO will weigh factors such as the likelihood that the contractor will re-offend or the harm the government would suffer, either if the contractor were excluded, or if the contractor re-committed the offense in question.[278] A business-decision based debarment system requires officials to exercise significant discretion, which increases the

275. *UNCITRAL Guide to Enactment*, *supra* note 1, at 110.
276. EU 22014/24 Directive art. 57(1), 2014, O.J. (L 94) (EU).
277. FAR 9.406-1(a); *see* Suspension and Debarment, *supra* note 6, at 60.
278. FAR 9.406-1(a).

opportunity for corruption.[279] In procurement systems that are concerned with a perception of corruption, instituting an anti-corruption regime in which debarment permits the exercise of discretion may increase the perception of corruption rather than decreasing it. Business-decision based debarment systems are also more expensive for the government to pursue than punishment-based debarment systems, assuming that all debarment cases also go through a civil or criminal proceeding.[280] They likely will require an independent officer to evaluate a contractor's present responsibility, given the investigation into a contractor's present responsibility necessary for an adequate cost-benefit analysis.[281] Therefore, the necessary investment and potential for an increased perception of corruption may make a business-decision based debarment system less appealing for a government to incorporate within its procurement regime.

Reform-based debarment systems are a close cousin of business-decision based debarment systems. Reform-based debarment systems are prospective in nature and evaluate the likelihood of the contractor to act ethically in the future.[282] The government can protect itself from further compliance failures by dictating the terms of the contractor's corrective actions. In this way the Government can maintain, and hopefully improve, its contractor base. However, a reform-based debarment system is expensive for both the government and contractors.[283] Just as in the business-decision based debarment system, the government needs a dedicated staff to evaluate a contractor's proposed remedial measures and monitor administrative agreements.[284] Unlike in the business-decision based debarment system, however, the contractor must also invest in its compliance systems and potentially in third-party monitoring. This can be a significant expense for small and medium sized enterprises (SME) that could lead to the bankruptcy of the SME, resulting in the very outcome that reform-based debarment systems were designed to avoid. Perhaps the most substantial drawback of the reform-based debarment system is that it requires the government to trust a contractor that has already demonstrated it is not entirely trustworthy. It may be too politically sensitive to allow a contractor to continue to participate in the procurement regime based solely on promises from the contractor, even when they are being monitored by a third-party. Therefore, the investment and potential for continued corruption

279. Suspension and Debarment, *supra* note 6, at 59.

280. *See* Shannon, *supra* note 207, at 405.

281. *See* Related Indus. v. United States, 2 Cl. Ct. 517, 520 (Fed. Cir. 1983); Stapp Towing Inc. v. United States, 34 Fed. Cl. 300, 312 (1995).

282. FAR 9.406-1; *Weeding Out Bad Contractors: Does the Government Have the Right Tools? Before the S. Committee on Homeland Security and Governmental Affairs*, 112th Cong. 10 (2011) (testimony of Mr. David Sims, Chairman, Interagency Suspension and Debarment Committee).

283. Suspension and Debarment, *supra* note 6, at 60; *see* Philip Inglima, *Corporate Monitors: Peace, at What Cost?*, Crowell & Moring (Jan. 2018), https://www.crowell.com/NewsEvents/Publications/Articles/White-Collar-Corporate-Monitors-Peace-at-What-Cost [https://perma.cc/5SK6-PDMW].

284. Suspension and Debarment, *supra* note 6, at 64–65.

on the part of the contractor may be too great a risk for a government to include a reform-based debarment system within its procurement regime.

There is no right answer or correct motivating principle in crafting a debarment or exclusion system. Just as every constitution is slightly different, so is the functioning of every government. For states that are in the beginning stages of developing an acquisition workforce, adding discretionary debarment principles may be a distraction rather than a benefit as it would require procurement professionals to focus on ancillary job functions while still learning primary procurement functions. For states that have developed acquisition workforces, proscriptive outcomes may be too confining as they do not allow for consideration of remedial measures and mitigating factors. Therefore, critical analysis of the state of a given procurement regime and the capabilities of the acquisition workforce is necessary to determine the appropriate debarment system for a particular government at a particular time.