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## **The Power of Procurement in the Fight against Foreign Bribery**

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## **Abstract**

Procurement and debarment policies offer states a potentially important mechanism in the fight against bribery in international business. But how states leverage this mechanism depends on many factors, including not only the national policies and procedures for making a debarment determinations, but also how debarment determinations fit in the state's overall anti-foreign bribery framework. Through a comparison of Canada and the U.S., the paper contrasts the "rules-based" and automatic debarment approach found in Canada with the "discretionary" approach to debarment found in the U.S. that focuses on a contractor's "present responsibility." The distinction deepens when we consider debarment in the context of the wider regimes addressing foreign bribery in these two countries, most notably as impacted by the presence of alternative resolution vehicles in the U.S. and the increasingly strict legal framework that criminalizes foreign bribery in Canada. The key idea that emerges is that assessing the role that the power of procurement can play in the fight against foreign bribery is conditioned by the state's overall anti-foreign bribery legal framework. Echoing calls to move beyond the conceptualization of debarment systems in binary terms as either discretionary or mandatory, the paper extends the relevant time-period of analysis to ask how debarment determinations are relevant to and impacted by the overall response to foreign bribery from the initial investigation through to its resolution.

## **Keywords**

procurement, discretionary and automatic debarment, anti-bribery, international business

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## 1. Introduction

Member states of the OECD have played a critical role in the construction of a global regime to combat corruption in international business. These states have negotiated and ratified the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("Anti-Bribery Convention"), made significant changes to domestic legislation to criminalize foreign bribery, and cooperated with each other to facilitate investigations and prosecutions of transnational bribery through information sharing and legal assistance. But looking beyond these traditional means of state action and international cooperation, states have access to another potentially powerful channel to set standards for integrity in business. Through their procurement policies states determine how the numerous, and often incredibly valuable, contracts to provide goods and services to the state will be awarded. Through their debarment policies states can exclude certain suppliers or contractors from entering into these lucrative contracts. How can states deploy the power of public procurement and debarment when it comes to efforts to eliminate bribery in international business?

This paper investigates the operation of procurement and debarment policies in Canada and the U.S., two of the largest purchasers of goods and services in the world. In both of these countries, a conviction for the bribery of a foreign public official provides grounds for debarment from contracting with the federal government. But as the paper demonstrates, when we look past this general similarity there are important distinctions between the debarment regimes of Canada and the U.S. The paper draws out the contrasts by detailing the key features and goals of each regime and also engaging the contrasting criticisms that each regime has elicited. Canada describes its system as "rules-based," provides for automatic debarment for a conviction for foreign bribery, and uses the regime to pursue the twin goals of protecting government interests and the broader consequentialist aim of promoting ethical business. In the U.S., the central focus of the debarment regime is on the protection of the federal government and an assessment of the "present responsibility" of its contracting partners, which means that a conviction for foreign

bribery need not necessarily result in debarment. Notably, both regimes have been criticized for the role that discretion plays or fails to play in debarment determinations: while critics in Canada call for increasing discretion through a “proportional debarment regime,” critics in the U.S. have called for reforms to reduce discretion and move toward automatic debarment.

In its final section, the paper situates these distinct debarment regimes within the wider enforcement context for foreign bribery. Here the key idea is that assessing the role that the power of procurement can play in the fight against foreign bribery is conditioned by the state’s overall anti-foreign bribery framework. Thus, in Canada, where the country has adopted increasingly strict legal prohibition against foreign bribery that followed international criticisms of weak foreign bribery enforcement, we see an increasingly strict debarment policy. At the same time, there are still relatively low numbers of completed enforcement actions in Canada and little use of Canada’s debarment policy when it comes to foreign bribery. The U.S., on the other hand, has been noted as a leader in the enforcement of foreign bribery laws. Its enforcement actions, however, commonly result in settlements, such as non-prosecution agreements and deferred prosecution agreements, that do not produce a conviction, and minimize, in practice, the importance of the U.S. debarment regime when it comes to foreign bribery.

## **2. Canada’s debarment regime and its critics: introducing automatic debarment**

The current Canadian debarment policy has its origins in the federal government’s 2006 Federal Accountability Act and Action Plan, a wide reaching legislative reform that sought to “turn over a new leaf in the way we do business in Ottawa” (Treasury Board, 2006). As part of the reform, Public Works and Government Services Canada (“PWGSC”), the primary purchaser within the Government of Canada, created its Code of Conduct for Procurement and took the first steps toward Canada’s debarment policy and what we now know as the “Integrity Regime.” In this early formulation of Canada’s debarment policy, the list of offenses that would render a bidder ineligible to contract with the federal government was limited to fraud and wrongful payments to

lobbyists. This was expanded incrementally in the following years, including revisions in July 2012 that added bribery of a foreign public official.

Revisions to PWGSC's debarment policy in November 2012 further strengthened the regime. PWGSC would now require suppliers to certify that neither the supplier nor its affiliates have convictions for any of the listed offences. PWGSC removed a previous exception for participation in the Competition Bureau's leniency program and instead introduced a new public interest exception that allows PWGSC to contract with otherwise ineligible bidders for reasons of national security or emergency, or if there is no other possible supplier (PWGSC, 2012).

Reforms in March 2014 went even further to strengthen the debarment regime. Again, PWGSC expanded the list of activities that would make a bidder ineligible, which now include securities and accounting offense. Notably, PWGSC introduced a mandatory 10-year period of debarment, meaning that a company with a criminal conviction or guilty plea for any of the listed offenses would be automatically ineligible from bidding on contracts with the Government of Canada for 10 years. In addition, this same mandatory debarment could now be triggered by a conviction for "similar offenses" that is, "offences in foreign jurisdictions that are similar to the Canadian offences listed in the provisions" (PWGSC, 2014).

But this version of the debarment regime was not long to last. In the summer of 2015 PWGSC again announced reforms to partially scale-back the 2014 changes. As of June 3, 2015 a supplier would "no longer be automatically ineligible for the actions of affiliates," and ineligible suppliers could receive a reduced debarment period of 5-years, if the supplier cooperated with authorities or had "addressed the misconduct" and an Administrative Agreement with PWGSC was reached (PWGSC, 2015).

Through these many iterations, Canada's debarment policy has come to convey both a concern with protecting government interests and a broader, consequentialist aim of promoting clean business. As PWGSC describes the current regime, in addition to "ensur[ing] that Canada does business with ethical suppliers," its debarment policy seeks to "foster ethical business

practices...[to] uphold the public trust in the procurement process” (PWGSC, 2015). An official of PWGSC made this consequentialist goal of Canadian debarment policy even clearer in 2014 when he defended the policy in the press: “An integrity framework that is rules-based can be seen as tough,” but “[w]hat we are talking about are incentives, and I would suggest that a rules-based system is a pretty big incentive not to engage in criminal activity” (McKenna, 2014a).

### **2.1. The critics: calls for a “proportional debarment regime”**

This “rules-based system” that PWGSC codified in its multiple revisions to its debarment policy evoked strong and vocal criticism from the Canadian business community, particularly following the 2014 revisions. The President of the Canadian Council of Chief Executives (“CCCE”) wrote in a 2015 editorial that he counted himself “among those who believe the so-called ‘integrity framework’ is unfairly harsh and denies due process” (Manley, 2015). Over the next year, both the CCCE and the Canadian Manufacturers and Exporters lobbied the federal government to scale back PWGSC’s strengthened debarment policy (Stewart, 2014).

The crux of the concern with the 2014 changes to Canada’s debarment policy was its inflexibility and mandatory lengthy debarment period that purported to capture a wide range of conduct. An April 2015 letter to PWGSC from the Canadian Bar Association (“CBA”) expressed this, criticizing the “inflexibility of the 10-year ban” and calling for a “proportional debarment regime” to be introduced in its place, where a variety of factors, such as the severity of the offence and whether the corporation had controls in place, would be taken into account in making debarment determinations (CBA, 2015). The CBA also called for clarification of the concept of “similar foreign offences,” which many were concerned had dramatically broadened the grounds for debarment (CBA, 2015).

A specific area of concern was whether certain business had already been rendered ineligible from contracting with the Canadian Government by virtue of the 2014 reforms. For example, in 2014 a Russian subsidiary of Hewlett Packard entered a guilty plea in the U.S. for

violating its Foreign Corrupt Practices Act's ("FCPA") anti-bribery provisions. Given PWGSC's new provisions on "similar foreign offences" and affiliate responsibility, it appeared that Hewlett Packard, who regularly supplied millions of dollars of technology services to the federal government, may no longer have been an eligible supplier (McKenna, 2014b; Robidoux and Doucette-Preville, 2015). Worry as to the impact of the 2014 debarment policy was heightened when the Canadian engineering and construction giant SNC-Lavalin Group, Inc. and two of its affiliates were criminally charged in early 2015 with violations of Canada's anti-foreign bribery law, the Corruption of Foreign Public Officials Act ("CFPOA").

The topic of debarment has since colored much of the conversation surrounding SNC-Lavalin's pending charges of foreign bribery. Even before charges were laid against SNC-Lavalin, its CEO told the press that a corporate charge and conviction would be a grave risk for the company, which could "cease to exist" if it was debarred from contracting with the Canadian government for 10 years (Blackwell, 2014). Shortly after the charges were announced, the Quebec Chamber of Commerce ("FCCQ") issued a statement pointing out that SNC-Lavalin employed close to 5,000 people in Montreal alone and calling on any prosecution to ensure the continued viability of the organization as a whole (FCCQ, 2015). Debarment has reportedly been at the forefront of SNC-Lavalin's decisions to not agree to a guilty plea and the failure of settlement discussions (Les Perreux et al. 2015).

A few months after SNC-Lavalin was charged with foreign bribery, and after a year of pressure from the Canadian business community, PWGSC announced its June 2015 revisions to its debarment policy. An automatic debarment period remained, but the duration could be shortened through an Administrative Agreement and responsibility for the actions of affiliations would no longer be automatic. Criticism, nevertheless, has persisted: "the equivalent of a five-year mandatory minimum sentence is still questionable," a newspaper editorial stated and repeated call for greater discretion in PWGSC's debarment decisions (The Globe and Mail, 2015). In December 2015, SNC-Lavalin became the first corporation to sign an Administrative



Agreement under the new Integrity Regime, which confirmed their eligibility as a supplier to the Canadian government while foreign bribery charges against the corporation are pending.

### **3. The U.S. debarment regime and its critics: debarment as a business decision**

The U.S. is a particularly interesting case to look at following the discussion of Canada's debarment regime, given that the discussion in Canada concerning debarment is often made with an implicit comparison to the U.S. In addition, the U.S. debarment model has provided a source of inspiration for the development of the World Bank's debarment mechanism and features prominently in policymaking and scholarly discussions on debarment (Priess, 2013, p. 271). Notably, when we look to the U.S. we see that, unlike the many changes in Canadian debarment policies in the past decade, the U.S. policy has remained largely consistent.

In the U.S. there is no single agency that makes debarment decisions on behalf of the federal government. Instead, each federal agency make its own decisions as to when a contractor should be precluded – for a period of up to three years – from providing services to that particular agency (GAO, 2014, p. 4). The agencies operate under a common regulatory framework that is set out in the Federal Acquisition Regulation (“FAR,” 48 CFR Part 9). FAR establishes the grounds for debarment, as well as temporary suspensions, and catches a potentially wide-range of conduct, including a conviction or civil judgment for fraud, bribery, or “any other offense indicating a lack of business integrity” as well as the catchall of “any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor”(§ 9.406-2). We should note that while it is the individual agency that makes a determination of suspension or debarment, once an agency has decided to suspend or debar a supplier, that determination generally has a government-wide effect, unless there is a “compelling reason” to use the supplier, for instance, because of a lack of alternative suppliers or needs of national defense (Dubois, 2012, p. 213).

As the U.S. has emphasized in its reporting to the OECD on foreign bribery enforcement, “[a] decision to debar or suspend is discretionary...Each federal department and agency determines the eligibility of contractors with whom it deals” (OECD, 2010, p. 41). FAR explicitly provides that the mere presence of a ground for debarment does not mean that a supplier will be suspended or debarred. As section 9.406-1 states: “The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred.”

A debarment determination by a U.S. federal agency is best conceptualized as a two-step assessment (Dubois, 2012, pp. 207-211). First, the agency determines whether there is cause for debarment. This may be satisfied by a civil judgment or criminal conviction against the contractor for a listed offense or “based on the preponderance of the evidence” that the contractor engaged in other activity that can warrant debarment (FAR §9.406-2). If grounds for debarment are present, the responsibility then shifts to the contractor to demonstrate “present responsibility,” a finding of which would prevent the contractor’s debarment. Here FAR instructs that several factors are relevant, including the seriousness of the act and mitigating factors, such as whether the supplier had effective internal controls in place at the time, self-reported or cooperated with the government, took disciplinary actions against individuals involved in the act, or implemented additional controls and compliance measures (FAR §9.406-1).

U.S. debarment policy is decidedly not punitive, or even consequentialist in seeking to condition future behavior, but instead zeros-in on making a present assessment to protect the interests of the U.S. government as a contracting party. As a U.S. federal government official recently explained, “from the U.S. federal government’s viewpoint, suspension and debarment is a business decision” (World Bank, 2015). The Federal Acquisition Regulations similarly make this point, noting that debarment is “to protect the Government’s interest” and “not for the purposes of punishment” (FAR §9.402). Tillipman argues that the effect of FAR is to “preclude the award of contracts to companies whose misconduct indicates that they are no longer

responsible enough to do business with the U.S. government” (Tillipman, 2013, pp. 236-7). The mere fact that a company had been convicted of foreign bribery, for example, is not dispositive.

### **3.1. Its critics: pushing toward automatic debarment**

While the U.S. debarment policy has proven much more resistant to change than its Canadian counterpart, there have been vocal critiques of the U.S. regime, particularly from within Congress. In recent years, Congress has held multiple hearings on the suspension and debarment system and has made repeated calls for the more frequent use of debarment. For instance, in 2013 hearings before the House Committee on Oversight and Government Reform, Chairman Issa bemoaned the failure to more frequently debar companies from government contracting despite evidence of wrongful behavior. He argued that the U.S. needs to “ensure that the vendors that we use...in fact meet the expectation of the law. And when they don’t, don’t use them again. We need to have a culture of zero-tolerance, for fraud, for criminals, for tax cheats...” (House Committee on Oversight, 2013). The Chairman has co-sponsored H.R. 3345, the Stop Unworthy Spending Act (Suspend Act), which, among other reforms, proposes to centralize suspension and debarment decisions.

There have been efforts to improve the debarment process within the existing U.S. legal and regulatory framework. After a report in 2011 by the Government and Accountability Office (“GAO”) found that some federal agencies had issued no or very few suspension or debarments in the preceding four years, GAO has continued to monitor the practice (GAO, 2011). Recent years have seen an increase in debarment actions across the U.S. federal government, rising from 1,836 suspended or debarred individuals or entities in 2009 to 4,812 in 2013 (GAO, 2014). The GAO attributes this increase to the work of the Office of Management and Budget and the Interagency Suspension and Debarment Committee in developing and sharing best practices for federal agencies in implementing their debarment policies (GAO, 2014).

But for some, these improvements do not go far enough. Fueled by what appear to be examples of wrongdoing by contractors who nonetheless continue their contracting relationship with the U.S. federal government, some members of Congress have called for reduced discretion in debarment decisions and moving closer to automatic debarment. As Stevenson and Wagner (2011, p. 809) point out, “despite [m]any of the U.S. government’s largest contractors hav[ing] been found to have repeatedly broken the law or engaged in misconduct between 1990 and 2002, only one of the top forty-three government contractors was suspended or debarred during this period.” It is in this context that Congress inserted a requirement in the 2012 Consolidated Appropriations Act for federal agencies to “affirmatively consider suspension or debarment” before awarding a contract to a corporation that had been convicted of a federal crime in the past twenty-four months (Tillipman, p. 248).

#### **4. Situating debarment in the national anti-foreign bribery legal framework**

As the foregoing has set out, there is much to distinguish the policies governing debarment from federal government contracting in Canada and the U.S. The legal regimes are notably distinct, as are the pressures placed on the regime by domestic critics. As this section will explore, the distinctions deepen when we consider debarment in the context of the wider regime addressing foreign bribery in these two countries.

##### **4.1. Canada: automatic debarment as a part of a tightened anti-foreign bribery legal regime**

The revisions to the debarment regime in Canada between 2007 and 2014 mirror the strengthening of legal prohibitions against foreign bribery that occurred in Canada around this same time period. In 2013 amendments to its anti-foreign bribery law, the CFPOA, Canada increased the maximum penalty for foreign bribery to 14 years imprisonment – the second strongest criminal penalty available in Canada, behind only a sentence of life. The amendments

also extended the reach of the law to non-profit businesses, introduced a new books and records provision that prohibits accounting or record keeping practices that obscure the payment of a bribe to a foreign public official, and promised to remove the exemption for facilitation payments. It was in this context that we saw the 2012 and 2014 revisions to PWGSC's debarment policy, including the introduction of automatic debarment for a conviction of foreign bribery.

Part of what seems to have propelled this overall tightened legal environment concerning foreign bribery was the international criticism that Canada had received for being weak on foreign bribery enforcement. This criticism reached its peak with an OECD press release that accompanied Canada's 2011 Phase 3 Report that was titled: "Canada's enforcement of the foreign bribery offence still lagging; must urgently boost efforts to prosecute." In Parliamentary debates preceding the 2013 amendments to the CFPOA, the Parliamentary Secretary to the Minister of Foreign Affairs explicitly connected these criticisms to the then-proposed amendments, noting that they "arose out of some criticisms that were made about the current Canadian legislation by the OECD" (House of Commons Debates, 2013b).

Revisions to PWGSC's debarment policy can similarly be connected to the OECD's recommendations, as both Canada's Phase 2 and 3 Reports had expressed concern over the federal government's procurement policies and whether they were "sufficiently effective for the purpose of deterring companies that deal with them from engaging in the bribery of foreign public officials" (OECD, 2004, p. 37; OECD, 2011, p. 61). When Canada did strengthen its procurement and debarment policy, a Member of Parliament of the governing Conservative Party explained:

[The OECD] requested that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with a government or receive any benefits under such a contract....This was assessed to be fully implemented as a result of the changes in policy in 2012 by Public Works and Government Services Canada (House of Commons Debates, 2013a).

The Member of Parliament was referring to Canada's Phase 3 Follow-up Report, published in 2013, where the OECD Working Group recognized that PWGSC's revised debarment policy "fully implemented" its previous recommendations (OECD, 2013, p. 2).

Amending the PWGSC's procurement policy was a tool that was readily available for the federal government to draw on in its efforts to improve its record on foreign bribery enforcement. In doing so, the Canadian Government was able to mirror its tightened legal framework prohibiting foreign bribery in its procurement and debarment policy, which, together, now shape the legal landscape for the Canadian response to foreign bribery allegations. Unlike the U.S., Canada has not created a civil regime for sanctioning foreign bribery and has largely confined its efforts to combat foreign bribery to its criminal law. The alternative resolution vehicles in the U.S. that are discussed below are absent in Canada, and with the CFPOA's 2013 amendments the options for the resolution of allegations of foreign bribery have further narrowed as the 14-year maximum sentence makes some sentencing tools unavailable, including an absolute or conditional discharges (CBA, 2013). The result is that the little flexibility for the response to and resolution of foreign bribery allegations amplifies the strictness of Canada's debarment regime.

#### **4.2. The U.S.: discretion in debarment and in the resolution of foreign bribery allegations**

The U.S. has not received the same kind of international criticisms that Canada has. On the contrary, the U.S. is often noted as a leader in the area, the first state to prohibit foreign bribery and the most active of the OECD states in enforcing its anti-foreign bribery laws (OECD, 2015). The U.S. stands in further contrast to Canada in that the investigation and enforcement of foreign bribery in the U.S. draws on a much broader and varied regulatory regime. The FCPA creates both civil and criminal prohibitions concerning foreign bribery and responsibility for enforcement

is shared between the Securities and Exchange Commission and the Department of Justice (“DOJ”).

Moreover, the anti-foreign bribery regime has evolved in the U.S. in such a way that there is a wide range of outcomes following allegations of foreign bribery: declinations, settlements, such as non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”), or an agreement to a guilty plea. While a trial and a conviction or acquittal is another possible outcome, it is increasingly unlikely, for corporate defendants in particular, to litigate charges of foreign bribery (Pollack and Reisinger, 2014). Koehler (2015) has argued that what he terms “alternative resolution vehicles” – NPAs and DPAs – “have become the dominant way for the DOJ to resolve corporate FCPA scrutiny and serve as an obvious reason for the general increase in FCPA enforcement over the past decade.” As Koehler details, in the years since these alternative resolution vehicles were introduced in 2004, they have been used to resolve 70 allegations of foreign bribery, or 85 percent of DOJ corporate foreign bribery enforcement actions (2014, p. 521).

Add to this the incentives in U.S. sentencing guidelines for self-reporting and cooperation and we see the increasingly important and central role of settlement negotiations in the enforcement of foreign bribery laws in the U.S. Within these negotiations there are a myriad of issues to resolve in constructing an eventual outcome, including which entity will bear responsibility, which specific offense will be included, whether an alternative resolution vehicle will be used, and what sentence will be imposed. As Stevenson and Wagoner (2011) argue, this ability of DOJ to encourage settlement and construct a tailored resolution in each case is threatened by the prospect of mandatory debarment. The authors quote from DOJ testimony before the Senate Committee on the Judiciary in 2010: “If every criminal FCPA resolution were to carry with it mandatory debarment consequences, then prosecutors would lose the necessary flexibility to tailor an appropriate resolution given the facts and circumstances of each individual case” (Stevenson and Wagoner, 2011, p. 810).

In this light, we can see the importance of discretionary debarment to the U.S. regulation and enforcement of foreign bribery more generally. Of course, it is not the DOJ that makes debarment determinations, which instead is a decision that rests with the contracting agency. The U.S. maintains that NPAs or DPAs could conceivably lead a U.S. federal agency to debar a contractor (OECD, 2010, p. 42). Still, in its Phase 3 Report to the OECD, the U.S. could not identify any specific cases where a DPA concerning FCPA violations has resulted in a federal suspension or debarment (OECD, 2010, p. 42). In some cases, settlements have included specific actions by the DOJ to make a debarment determination less likely. For instance, the DOJ's 2010 DPA with Daimler, A.G. explicitly provided that that "the Department agrees to cooperate with Daimler...in bringing facts relating to the nature of the conduct underlying this Agreement and to Daimler's cooperation and remediation to the attention of governmental and other debarment authorities" (US v. Daimler, 2010, p. 14) (OECD, 2010, p. 42). Even without such an explicit agreement, it is easy to imagine how cases resolved through alternative resolution vehicles could influence the debarment assessment. With alternative resolution vehicles the settling party has cooperated with the government and has often agreed in the settlement document to take remediation measures and steps to improve compliance. Given that these are some of the very same considerations that would be weighed in a present responsibility assessment, the importance of the debarment assessment itself may become minimized in practice.

#### **4.3. Comparative and international debarment standards: beyond the binary**

This comparison of Canada and the U.S. has drawn out important distinctions in these two debarment regimes and the distinct role that debarment has come to play in the national anti-foreign bribery regulatory regime of both countries. Even with these differences, both regimes seem to fall comfortably within the wide latitude for debarment envisioned under the OECD's 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009):



Member countries' laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages...enterprises determined to have bribed foreign public officials...and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials (Article XI).

The recent criticisms that have emerged in both Canada and the U.S. have not centered on compliance with international standards, but on concerns with the use of discretion in debarment determinations. Critics in Canada have called for the greater use of discretion in assessing whether the specific situation warrants debarment, while critics in the U.S. have called for moving closer to automatic debarment that would reduce discretion in debarment determinations.

Identifying these opposing criticisms of discretion in debarment determinations does not mean to suggest that there is some optimal level of discretion that would be appropriate in all national procurement and debarment regimes. Instead, what this indicates is that assessing the role of debarment in the fight against foreign bribery requires a broader consideration of how anti-foreign bribery prohibitions operate in practice, from initial investigations, to prosecutorial decisions and resolutions, as well as determinations concerning future contracting with the government. In short, the role that the power of procurement – and debarment – can play in the fight against foreign bribery very much depends on its context.

The comparison of Canadian and American debarment policy illustrates the importance of one of the key conclusions from the World Bank's colloquia on debarment: "that perhaps the correct mode of comparison is not to categorize different suspension and debarment systems in binary terms as either 'discretionary' or 'mandatory'" (World Bank, 2014, p. 20). Rather, the report suggests that we consider several questions, such as who makes a debarment decision? Who does debarment protect? What offenses are grounds for sanctions? To this, we may add

another series of question that pushes out the relevant time-period of analysis to situate debarment determinations within the national legal and regulatory framework to combat foreign bribery. When do debarment considerations arise, and when are they addressed, in the chain of decision-making that occurs in response to an allegation of foreign bribery? What options are there for the possible resolution of foreign bribery allegations and how might these implicate debarment? What other exercises of discretion within this decision-making chain and the resolution of foreign bribery allegations may influence the debarment determination or magnify or reduce its importance?

## **5. Conclusions**

The power of procurement in the fight against foreign bribery is conditioned by the broader regulatory regime in what it operates. Both Canada and the U.S. have policies in place to exclude suppliers who have engaged in foreign bribery from contracting with the federal government. But beyond this general similarity, there are important differences not only in the express debarment policies in Canada and the United States, but also in how these policies operate in the broader context of anti-foreign bribery enforcement in each country. This suggests that simple, cross-national comparisons of debarment policies may fall short in understanding the role of procurement and debarment in ensuring ethical business practices, and instead calls for detailed and contextual future research across OECD countries.

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