Public Tools, Private Integrity: Shaping Exclusion Regimes to Motivate Business Integrity and Inclusive Growth

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In the fight against corporate corruption, exclusion is one of the most potent tools available to governments and international financial institutions. Exclusion takes two forms: suspension temporarily disqualifies a corporation from government contracts, while debarment lasts years. This paper addresses exclusion through the OECD’s three pillars for building public integrity, which call for (1) a system of anti-corruption tools, (2) effective accountability, and (3) building the culture of integrity. First, this paper compares policy goals and exclusion rules across five major regimes: the World Bank, European Union, United Kingdom, Canada, and United States. Second, the paper explores each regime’s accountability effectiveness by comparing its rules, and the resulting corporate behaviors, against its policy goals. Third, the paper proposes a toolbox for regimes and businesses to use in fostering the culture of integrity. Altogether, these three pillars provide a metric for understanding both where anti-corruption efforts stand now and how regimes can consider strengthening their exclusion rules, as they work toward optimizing their anti-corruption efforts.

Key words: exclusion, debarment, suspension, anti-corruption, effective accountability
The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the OECD or of its member countries.

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1. Introduction

Exclusion is among the most potent anti-corruption tools that governments and international financial institutions wield against businesses. It takes two forms. Suspension is often a temporary disqualification from government contracts, pending a regime’s investigation into corporate conduct. Debarment, which is disqualification from government contracts based on corporate misconduct, can last years. Corporations pay attention when they face debarment— but different exclusion regimes motivate different behaviors. A higher standard of proof can leave companies less concerned about debarment, for example, while a regime that defaults to debarment may overlook other anti-corruption tools.

This paper compares five major exclusion regimes: the World Bank, European Union, United Kingdom, Canada, and United States. It applies behavioral theory to explore how these exclusion regimes motivate different types of corporate and human conduct, while discussing a range of tools available for governments and business to use in fostering integrity. Through both scholarly and practice-based lenses, this paper aids the interdisciplinary dialogue between three characters on the exclusion stage. These are (1) governments, which are public stakeholders that create and enforce exclusion rules; (2) corporations, which are private stakeholders that abide by, negotiate with, and sometimes pay a price under exclusion rules; and (3) legal practitioners, who often serve as translators between public and private stakeholders. This discussion is structured around the OECD’s three pillars for building public integrity: the system of anti-corruption tools, effective accountability, and the culture of integrity.

2. Policy Goals and Exclusion Rules: A Survey of Five Regimes

This paper begins by comparing debarment and suspension policies from the World Bank, European Union, United Kingdom, Canada, and the United States. To understand what drives a regime’s conduct, observers must understand not only what rules exist, but also what policy goals shape those rules. The World Bank applies exclusion as a sanction, used to protect bank resources and promote cultures of integrity. The United States prohibits using exclusion as a punitive measure; its policy goal is to safeguard public funds by contracting solely with presently responsible businesses. And in the European Union, corrupt public officials can “face equal consequences” for engaging in corrupt behavior. This paper therefore systematically compares policy goals across five regimes, along with a defined set of exclusion rules.

2.1 Policy goals and exclusion rules: World Bank

When it considers exclusion, the World Bank is operating within the context of two policy goals (World Bank Office 2015). First, it has a fiduciary obligation to protect bank funds. Second, it also aims to reduce poverty by promoting cultures of integrity. As World Bank president Jim Yong Kim recognizes, every dollar used for corrupt purposes is a dollar that could have gone to healthcare, education, or infrastructure (World Bank Office 2015). Perhaps as a result, the World Bank’s
debarment standard of proof is not high: it requires a preponderance of the evidence to support a sanction. In other words, the World Bank requires sufficient evidence to support a reasonable belief that, when all relevant factors and circumstances are considered, the contractor more likely than not engaged in sanctionable conduct (World Bank Office 2015).

Five sanctionable practices qualify for exclusion: corrupt, fraudulent, collusive, coercive, and obstructive practices (World Bank Office 2015). A corrupt practice, for example, includes offering, giving, soliciting, or receiving anything valuable to improperly influence another’s actions. Fraud is any act or omission, including misrepresentation, that knowingly or recklessly misleads another to obtain a benefit or avoid an obligation. Obstruction can include deliberate tampering with evidence or materially impeding the World Bank’s audit or information access rights.

Under the World Bank Sanctioning Guidelines, there is no limit on the length of an exclusion (World Bank Group). Exclusion depends heavily on officials’ discretion and often results in a negotiated settlement known as a Negotiated Resolution Agreement. World Bank officials can initially impose a temporary suspension, pending their debarment decision, and then choose among three types of debarment. First, a conventional debarment can be temporary or permanent. Second, conditional non-debarment is designed to cover a specified time period (generally one or two years) in which the contractor is allowed to satisfy conditions for avoiding exclusion. Third, the World Bank can also impose a debarment with conditional release. This sets a minimum timeline on the actual debarment, with an option for ending the exclusion once the World Bank’s requirements for release are satisfied.

2.2 Policy goals and exclusion rules: European Union

In the European Union, exclusion exists to promote public trust in public procurement procedures, while seeking to punish corruption. This is called “the ultimate sanction” (EUR-Lex 2016). Debarment’s heavy impact is reflected in the EU’s willingness to exclude, but also in its restraint when deciding whether to exclude. The EU’s exclusion rules are distinct among the five regimes this paper discusses because, here, government officials are to “face equal consequences” for their role in corruption (EUR-Lex 2016).

Two types of exclusion exist under EU rules. First, mandatory exclusion is required when a government contractor is convicted in court for one of six offenses: participation in a criminal organization or conspiracy, certain forms of corruption, fraud, terrorist-related offenses, money laundering, and human trafficking including child labor (European Parliament 2014). Likewise, contractors can be mandatorily excluded for being delinquent on tax or social-security payments (European Parliament 2014). Second, discretionary exclusion casts a wider net, by including nine types of behaviors that create questions about the corporation’s integrity or ability to function in a responsible manner. These include failure to cooperate with EU procurement principles, efforts to
unduly influence agency decision making, bankruptcy, and significant or persistent deficiencies in prior contract performance.

When a contractor can demonstrate sufficient evidence that it is presently responsible, the EU will generally not impose debarment. The EU’s emphasis is on proportionate debarment, with consequences that are consistent with the gravity of the offense. Further, exceptional public-health and environmental needs may be grounds for avoiding exclusion. EU exclusion is generally capped at five years for mandatory debarment and three years for discretionary debarment, unless a court judgment requires more time.

2.3 Policy goals and exclusion rules: United Kingdom

The United Kingdom, like the other regimes discussed here, uses debarment to protect the public treasury. Under its Public Contracts Regulations, the UK recognizes both mandatory and discretionary exclusions (National Archives 2015). Mandatory exclusion can be triggered by dozens of distinct court convictions: criminal conspiracy, common-law bribery, fraud, money laundering, human trafficking, and more. While a corporation can be excluded, an individual’s exclusion will also affect an entire corporation when that individual holds a management position. Discretionary exclusion can be imposed for violating particular laws, sufficiently plausible indications of competition-distorting agreements, or other significant evidence that causes government authorities to question corporate integrity.

In the UK Bribery Act and the accompanying Guidance to Commercial Organisations, the UK further adopted the OECD-recommended policy to ban facilitation payments (UK Ministry of Justice 2010). These payments are made to public officials in exchange for the performance of non-discretionary services. These services include basic services like issuing work permits or delivering mail—and the official may entirely refuse to do his duty unless he receives some payment. Yet the facilitation payment violates both local law, which proscribes facilitation payments in most every jurisdiction, and UK law.

The Public Contracts Regulations provide government contractors with an opportunity to avoid debarment through self-cleaning. First, corporations can show that they have undertaken restitution to compensate all criminal misconduct. Second, they may actively cooperate with government investigators. Third, the corporation must implement effective measures to prevent new misconduct. Government officials consider these factors, and weigh them against the gravity of past misconduct, in deciding whether to waive exclusion. Informal self-cleaning is allowed for late tax payments, where exclusion would be clearly disproportionate to the conduct, particularly when a corporation learns the exact amount due only post-deadline. In addition, the UK can override even mandatory exclusion for exceptional public-interest reasons, which include public-health and environmental needs.
Through recent reforms, the UK has allowed more self-cleaning options and increased the grounds for debarment, while simultaneously tightening the rules that limit the length of an exclusion period. Mandatory exclusions in the UK are now capped at five years, while discretionary exclusion is limited to three years. For tax-based offenses, exclusion is limited to five years.

2.4 Policy goals and exclusion rules: Canada

Canada’s Integrity Regime, which handles all matters related to federal Canadian procurements, takes seriously its obligation to protect the fisc (Government of Canada 2016). Like most regimes discussed here, Canada divides its exclusions into automatic and discretionary debarment, which it terms *ineligibility*. In both cases, the standard of proof is rigorous, requiring an actual conviction for an eligible offense. Automatic ineligibility is required when a company commits any one of 32 offenses, which include accounting offenses under the Corruption of Foreign Public Officials Act, certain financial arrangements or bid rigging under the Competition Act, bribery, extortion, fraud, and misrepresentation. Discretionary ineligibility is reached through the same offenses, when the conviction occurs in a jurisdiction outside Canada. In addition, Integrity Regime officials have the authority to impose temporary suspension while they await a final court determination on any charge that could ultimately lead to ineligibility.

Given the mandatory nature of many Canadian exclusions, the Integrity Regime’s ability to shape exclusion comes through administrative agreements, where government and corporate officials negotiate how a particular exclusion will function. Regime officials may reduce an ineligibility period, replace or stay suspensions, and authorize existing contracts to continue. Except in cases of criminal ineligibility, the Integrity Regime may use a public-interest exception to avoid ineligibility. Four public-interest safety valves can apply: (1) emergency situations, (2) sole suppliers, (3) emergency stocks, or (4) public needs including health, safety, national security, and administrative function.

Another recognized exception—and perhaps not an intuitive exception for an Integrity Regime to enforce—comes into play when Canadian contractors make facilitation payments. These payments secure a foreign official’s performance of any routine act “that is part of the foreign public official’s duties or functions” (Canadian Minister of Justice 2017). As noted above, facilitation payments can be made to secure routine services, such as permits, visas, mail delivery, police protection, and inspection of goods. Only a small number of nations (including the US) permit facilitation payments, which are otherwise illegal in every country where they are paid. The reasoning behind this rule appears to be that, while Canada strongly discourages bribery, it recognizes that it is nearly impossible to conduct ordinary business in some countries absent facilitation payments.

Exclusion can be permanent in Canada, unless the corporation secures a pardon, and even existing contracts can be impacted by ineligibility or suspension. Further, contractor affiliates may be
subject to the exclusion. In the face of these strict policies, which apply even when a corporation is eager to undertake self-cleaning, Canada allows contractors to seek limited review from Public Works and Government Services Canada. This provides the business with an opportunity to show cause for keeping its contracts, and enter an administrative agreement, if all parties reach consensus.

2.5 Policy goals and exclusion rules: United States

The United States also uses exclusion to steward the fisc, by protecting the government from contractors that are not presently responsible. As a matter of law, exclusion cannot be used punitively; criminal measures are designed to serve the punitive role. Yet in practice, exclusion tools often have a punitive effect. When establishing exclusion, American law has two standards of proof. For debarment, the government must show cause by a preponderance of the evidence, unless debarment is based on particular underlying criminal convictions or civil judgments. If the government can establish cause, the burden of proof shifts to the contractor. For suspension, the government must establish adequate evidence of cause for suspension, which is a lower standard.

The Federal Acquisition Regulations (“FAR”) provide long lists of conduct that can lead to exclusion.¹ These include fraud or criminal offenses, antitrust violations, bribery, embezzlement, forgery, falsifying or destroying records, and certain tax violations. With its catchall language, the FAR neatly summarizes the unifying concern behind all US exclusions: a contractor can be excluded for “any” offense that “indicat[es] a lack of business integrity or business honesty” (48 C.F.R. § 9.4). Whatever a contractor is suspected of, US exclusion centers on concerns about present responsibility. Thus, US officials are required to consider 10 mitigating and aggravating factors when negotiating a potential exclusion. These factors include whether the contractor had effective conduct standards and internal controls, preferably when the conduct at issue occurred, or at least before the government investigation commenced. Timely disclosure and cooperation with government authorities, appropriate disciplinary action against responsible actors, and new compliance programs must all be weighed.

Like Canada, the US permits facilitation payments for routine government action that are “ordinarily and commonly performed by a foreign official,” such as approving a business license, issuing visas and work permits, or providing basic services (15 U.S.C. §§ 78dd-1(b), (f)(3)(A); 15 U.S.C. §§ 78dd-2(b), dd-2(h)(4)(A); 15 U.S.C. §§ 78dd-3(b), (f)(4)(A)). This statute has come under increasing fire, from authorities responsible for enforcing the US Foreign Corrupt Practices Act

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¹ Other statutes—including the Buy America Act, Clean Air and Clean Water Acts, Contract Work Hours and Safety Standards Act, Drug-Free Workplace Act, Francis-Bacon Act, Medicare provider exclusions, and Service Contract Act—may also apply to US contractors. In addition, while this paper focuses on overarching exclusion regulations, government contractors should know the regulations specific to agencies with which they work. The federal Interagency Suspension and Debarment Committee provides a full listing of agency-focused regulations. At the time of this writing, the ISDC website can be found at www.isdc.sites.usa.gov.
(“FCPA”), as inconsistent with the aim of US policy. The debate centers around the slippery-slope effect of facilitation payments, as well as the inability to properly monitor and control this type of payment. As a result, US authorities have made multiple public pronouncements discouraging companies from allowing facilitation payments. Nevertheless, this provision allowing facilitating payments remains an express exception under the FCPA.

The US does not offer many public-interest exceptions to exclusion, but agency heads can waive exclusion for compelling reasons (10 U.S.C. § 2393(a)(2)). Once an exclusion determination is finalized, the contractor can appeal to the courts (5 U.S.C. § 704). Yet the law only permits judges to overturn exclusion decisions that are arbitrary, capricious, or represent an abuse of discretion. In that context, contractors almost never appeal, but focus on negotiating with government agencies. Because agencies understand that exclusion can represent the equivalent of a corporate death penalty which can quickly put a company out of business, serious consideration is given to this public-interest exception.

3. Accountability Effectiveness: Policy Goals, Regime Rules, and Resulting Behaviors

Next, this paper explores each regime’s accountability effectiveness by comparing its rules, and the resulting corporate behaviors, against its policy goals. This section applies the OECD’s second pillar for building public integrity—effectiveness in accountability—to the five regimes’ exclusion rules.

3.1 Accountability effectiveness: World Bank

The World Bank’s two-fold policy goals are to protect bank resources and to reduce poverty by promoting cultures of integrity. While the World Bank is effective in monitoring its funds, its approach may have some unintended consequences. Its preponderance standard of proof, which is low, allows the regime to routinely debar contractors. By implementing three levels of debarment for progressively more egregious violations, the World Bank regulators enjoy significant discretion to customize each debarment. And as officials respond in a tailored way, their discretion aids effective accountability. The World Bank must, however, be mindful of the impact of a lower standard of proof. Debarment is often referred to as “the corporate death penalty” for a reason. When debarment is too readily imposed for conduct that is not particularly severe, disproportionate and unintended results can occur. For example, over-deterrence may lead contractors to cease legitimate and productive behaviour (including bidding on World Bank projects altogether) in their effort to avoid exclusion risk. Over time, an arbitrarily applied standard of proof may also undermine the underlying effectiveness.

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2 Defense regulations detail four compelling situations: when a sole provider would be debarred, when there is an urgent need to work with the excluded entity, when the agency and contract have an agreement not to exclude based on the events that led to debarment or suspension, and when “national defense requires.” 10 C.F.R. § 209.405(a)(i)–(iv).
policy goal of sanctions, if corporations do not trust that the exclusion status actually reflects serious misconduct.

In addition, the World Bank authorizes five grounds for exclusion, including obstruction. The World Bank will debar businesses for obstructionist acts intended to materially impede the World Bank’s audit or information-access rights. This is a difficult dynamic for corporations to navigate: the World Bank assumes the “auditor” role to fulfill its fiduciary obligation, while at the same time serving as an “investigator” of potentially sanctionable conduct. This dual role carries significant due-process implications, as World Bank auditors are permitted to share their findings with national authorities that may be simultaneously investigating the same conduct. Thus, information shared in an audit (which would typically be kept confidential from government investigators) can turn up in a government investigation (where the corporation would have otherwise operated within privilege and due-process protections, such as safeguards against self-incrimination) (International Federation of Accountants 2016; American Institution of Certified Public Accountants 2013). In a regime where accountability effectiveness depends in large part on contractors trusting regime officials who possess significant discretion, these competing rules create a challenging environment.

3.2 Accountability effectiveness: European Union

The EU’s exclusion regime also has two-fold policy goals: it seeks to legitimize public trust in public procurements and punish corruption. Exclusion is generally more difficult to impose here, given the regime’s standards of proof, and this can prevent the EU from excluding a contractor who is rightly suspected of corrupt conduct. When choosing any standard of proof, the tension is always to identify actual misconduct, without casting the net too wide and catching innocent parties. EU debarment is largely responsive to convictions that are proven and entered in the regular justice system, as the EU chooses to proactively uphold national authorities’ anti-corruption judgments. As a result, corporations are doubly warned against corruption. In terms of effective accountability, the EU’s exclusion regime operates as a large exclusion-reciprocity network: it provides a uniform sense of anti-corruption measures that must be observed across its 28 member nations. And because it operates across nation-states with their own exclusion rules, the EU has the luxury of serving as a culture builder and reinforcer, without needing to police every possible reason for exclusion.

The EU’s stated policy of enforcing equal consequences, whether corruption is found in a government contractor or government official, stands out among the exclusion regimes. To protect integrity, a regime must act with integrity. There is an inescapable irony when a government’s officials receive (and likely even solicit) bribes from a corporation—only to have other officials, within the same government, discover this misconduct and therefore extract further monies from the corporation. This in no way excuses corporate misconduct. Anti-corruption fines can be fitting. At the same time, when a corporation is paying the same government both bribes and anti-bribery fines in its attempt to stay operational—and when that government takes no action against the corruption in
its own ranks—this incongruity cannot be lost on business observers. By calling for equal sanctions
against payers and payees, the EU strengthens its credibility. It further addresses a core need for
effective accountability: addressing both supply and demand for corrupt payments.

3.3 Accountability effectiveness: United Kingdom

The UK’s exclusion rules operate to protect government funds. Observers were previously
concerned that exclusion rules could make companies reluctant to self-report misconduct. Under
these old rules, strict mandatory debarments made it harder for companies to recover from
cooperating with the government, even when companies conscientiously sought to root out
corruption. In a regime that was designed to encourage contractors to seek government
accountability, this approach was arguably counterproductive. Through its policy reforms, the UK
now recognizes time limits on debarment and places greater weight on corporate reform. Although
the UK has expanded its grounds for mandatory debarment, its new rules equip public and corporate
officials to tailor their responses, when a government contractor discloses potential misconduct to the
government. This represents a tighter alignment between the UK’s policy goals and its rules, which
enables more effective accountability.

It bears emphasis that, under this improved regime, the UK enforces mandatory debarment for
more reasons than before. Yet companies prefer this approach. This is because a severe rule,
consistently applied, will likely have a smaller negative impact. In contrast, a lenient rule,
unpredictably enforced, can have a larger negative impact. Uncertainty is perhaps the biggest
deterrent to corporations’ willingness to act in conformity with a particular regime. By applying
debarment rules in a consistent, transparent manner, with room for corporations to self-correct, the
UK is motivating companies to self-report misconduct. Further, it is incentivizing businesses to take
ownership of internal reform, by demonstrating how well they can both root out past corruption and
deter future misconduct. This represents effective accountability.

3.4 Accountability effectiveness: Canada

Canada’s policy goal, in enforcing its ineligibility rules, is to protect public funds. Canada’s
Integrity Regime has cycled between tighter and looser rules for some years now, as it seeks an ideal
middle ground. With its present laws, Canada imposes automatic ineligibility upon conviction of
certain offenses, with permanent consequences unless a corporation qualifies for a safety valve or
secures a pardon. Canada’s serious and predictable approach to corruption is commendable. These
exclusion rules, however, make it challenging for corporations to self-disclose any conduct that would
result in automatic ineligibility. The absence of robust self-cleaning and restitution measures—which
could soften automatic-debarment rules—is keenly felt. If the Integrity Regime were inclined, it
could maintain all 32 grounds for mandatory exclusion, while enacting laws that reward companies
for taking ownership of disclosing and resolving corruption. In this way, the regime could partner
with government contractors to not only sanction already-committed conduct, but also to shape how corporations build internal cultures of integrity as they move forward.

When shaping these rules, Canada might also consider technology’s role. A long-term debarment can particularly harm the government when prosecutors are debarring a technology company. A 10-year debarment in more traditional industries is not equivalent to a 10-year debarment for a strong technology company, which can make historic innovations every few years. Further, at some point, the increase in exclusion years has a diminishing deterrent value. Corporations will either close or focus their energies elsewhere, making government business an irrelevant consideration. Thus, as Canada adjusts its exclusion rules, it might particularly consider technology and longevity concerns.

3.5 Accountability effectiveness: United States

Exclusion in the United States exists to protect public funds, not to punish. US agencies enforce anti-corruption rules by raising the possibility of exclusion, negotiating hard with corporations, and then often agreeing to settlements. This enforcement approach thus motivates corporations to demonstrate their internal reforms. There is no strong review system, however, to ensure due process. In part, this has a positive result: contractors must consider, during every stage of corporate settlements, how they can satisfy prosecutors by remedying past misconduct and demonstrate good-faith compliance. In part, this is concerning, because an unchecked prosecutorial arm can move out of alignment with its purpose for existence. In the US, the law plainly states that exclusion may not be used as a punitive measure. Yet in practice, exclusion often has a greater punitive effect than a financial penalty or other sanctions. In this way, the US is not unlike the World Bank, which vests significant prosecutorial and debarment discretion in its officials.

When enforcing US anti-corruption laws, prosecutors discourage the use of facilitation payments, despite the plain statutory language that permits their use. This is understandable as the FAR, the FCPA, and indeed the overarching scope of American law discourage bribery in all forms. Yet with the facilitation-payment laws, government contractors are afforded an exception, which is often perceived as necessary to basic functions in foreign countries. This may be an area the US legislature needs to revisit. In the meantime, a more robust appellate system might encourage prosecutors to enforce the law as it now stands. Criticism of this law is understandable, but if the government wishes to enforce laws, it cannot pick and choose among its own enacted pronouncements. Integrity in enforcement requires consistency.

4. Cultures of Integrity: Motivating the Internal Moral Compass

Beyond incentivizing external behaviors, the third OECD pillar focuses on the culture of integrity. This pillar aims to shape internal values. And while debarment is arguably the most severe sanctioning implement in the anti-corruption toolbox, exclusion regimes expressly contemplate alternative tools. All five regimes have some methods for negotiating non-debarment when a
contractor self-cleans and proves its renewed reliability. Exclusion is thus positioned to foster corporate leaders’ drive toward integrity. This paper therefore closes with specific internal-reform tools for regimes and corporations to consider, as these stakeholders negotiate potential debarments.

4.1 Cultures of integrity: exclusion-regime tools

When seeking an anti-corruption dialogue with corporations, the government’s most basic tool is to motivate self-reporting. This requires providing some level of certainty, as corporations weigh options for handling potential or actual misconduct. Clear standards of proof and safe havens are among the factors that can provide certainty. Because every factual situation is different, however, no exclusion regime can provide perfect certainty. As a result, regimes should also be thoughtful about both mitigating and aggravating factors, and this framework should be publicly accessible.

Next, self-cleaning is a vital tool for multilateral banks and governments. As an overarching strategy, this not only gives regimes and corporations a way to negotiate, but it is the core tool for eliminating actual corruption. Without internal reform, cultures of integrity will not take root. A variety of tools fit this purview. Monetary fines are often appropriate, if a corporation engaged in systematic and knowing corruption. Fault must often be assigned: it is important to identify which people and corporate entities were the bad actors, as this permits the regime to consider how it can best target its individual and corporate exclusions. In addition, regimes should also encourage anti-corruption programs within companies. Certainly, these measures should be in place moving forward, as corporations emerge from exclusion negotiations. When regimes take existing compliance programs into consideration, this also broadly incentivizes public contractors to implement compliance programs as a matter of course—not only to prevent corruption, but also as a form of legitimate insurance, should unforeseen misconduct emerge and eventually lead to exclusion talks.

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Related to self-cleaning, governments should consider whether they give sufficient attention to the recipients of bribe money. It is just as important to catch payers as payees. And on the enforcement side, anti-corruption efforts have become strongly multinational. The International Foreign Bribery Taskforce, or IFBT, illustrates this type of collaboration. The IFBT is a coordinated project between the American FBI, Royal Canadian Mounted Police, City of London Police Overseas Anti-Corruption Unit, and Australian Federal Police. In addition to their annual meetings, IFBT members routinely share information and coordinate cross-border investigations, and often assign a case to the jurisdiction that can impose the largest possible penalty on a corporation. With this type of international coordination against corporate misconduct, surely there can also be international cooperation against government misconduct.

While mandatory exclusion is an important tool, regimes also understand the importance of settlement negotiations, and they should leave themselves enough room to make these negotiations meaningful. In part, this means permitting a variety of negotiation structures: regimes should be free to weigh factors like how long exclusion lasts, whether a parent or subsidiary corporation takes the responsibility for misconduct, and the most appropriate laws for pursuing anti-corruption charges. If a contractor works for the US military, as one example, it can be debarred for FCPA bribery violations. This debarment can issue under the International Traffic in Arms Regulations and Arms Export Control Act. Due to an EU reciprocity directive, the 28 EU member countries will then exclude this contractor, while Canada will impose a mandatory 10-year debarment on the same contractor. Based on one nation’s finding of bribery violations, then, at least 30 nations will be automatically blocked from doing business with this company. The company may go out of business, while these nations may be deprived of important national-defense services on which they significantly depended. Yet in the alternative, US officials have the option of charging the same misconduct under the FCPA’s internal controls or books-and-records provisions, which will not cause the same exclusion results either in the US or around the world. This kind of flexibility lends meaning to the negotiation process, while enhancing regimes’ credibility in tailoring solutions.

Regimes should also consider implementing meaningful appellate processes. At first glance, an appellate procedure may look like an escape hatch, or a way for contractors to avert legitimate exclusion sanctions. This assumes, however, that the appellate review is untrustworthy. When a meaningful appellate process is available, this legitimizes a regime’s debarment determinations: it reaffirms that the facts were carefully reviewed, the law was properly applied, and the outcome was proportionate to the offense. On occasion, appellate review may change an exclusion outcome. Yet this serves to reinforce the government’s integrity, not undermine it. In a global environment where distrust in public institutions is growing, and as citizens increasingly voice their sense of alienation, a meaningful appellate process signals that governments are dedicated to fair play. It is a poor story indeed if, in government efforts to protect public funds and halt corruption, the government process is
distrusted. Appellate review, done right, tells a compelling story: this government not only corrects its contractors’ payment of bribes, but it is also willing to self-correct.

4.2 Cultures of integrity: corporate tools

This brings the conversation to corporate tools for fostering the culture of integrity. For the exclusion process to work well—and for corporations to navigate that process in a way that best meets business needs—corporations should begin by examining the details of how they cooperate with exclusion regimes. In short, corporations should begin by self-reporting sanctionable conduct, which affords them the opportunity to receive cooperation credit. As corporations self-report, they must be aware of how privilege rules vary between jurisdictions, particularly because they must now assume that governments are sharing even confidential information behind the scenes. What is unprotected in one jurisdiction may be privileged in another; the way information is shared can have implications for whether it remains protected elsewhere. This should not, however, prevent good-faith cooperation.

As contractors cooperate with the World Bank or government, it is never enough to stop with a bad self-report, even when the report only raises potential misconduct. Bribe payments are symptomatic; they are not the root cause, and the root cause must be identified. Ultimately, of course, bribery and other forms of corruption are caused by the lack of integrity in individual persons. And even the best compliance program cannot control for how individuals, with unreported cash in their hands and influence available for the buying, will choose to act. Yet every anti-corruption response should include some fundamental components: it should identify the bad actors and replace them with reliable employees; it should include anti-corruption programs, so that employees know what to avoid and how to spot misconduct; and it should provide restitution, as far as possible, for the misconduct that occurred. With this mindset, corporations are equipped not just to report problems within the business, but also to affirmatively show an exclusion regime how they are changing their cultures.

Because exclusion negotiations are a mutual process, the tools available to corporations are largely the tools available to governments. The difference is primarily one of position: corporations effect change within themselves, in an effort to keep government business, while regimes enforce the rules that protect taxpayer dollars. When these interests align, even some would-be bad actors can be motivated to act with integrity, while willingly good actors are pushed along in their work. The result is to strengthen cultures of integrity, where, as the World Bank’s Jim Yong Kim suggested, every dollar that could have gone to corruption instead goes to healthcare or education or infrastructure.

5. Conclusion

When governments raise the dark shadow of exclusion, corporations are quick to consider what authorities have to say. Exclusion is therefore a potent anti-corruption tool. An exclusion regime is not at its strongest, however, when it shuts down a government contractor. It is necessary to fully debar some corporations from access to taxpayer-funded contracts. At times, corporate misconduct is systematic and wilful, and this kind of corruption deserves no reward. Yet in pursuing
integrity, exclusion regimes are at their strongest when they equip corporations to do business with ongoing responsibility. Exclusion regimes inherently create a dialogue—about policy goals, the behavioral effect of exclusion rules, and tools for addressing corruption—that is necessary to stopping corruption around the world. As these regimes motivate increased integrity, both within multinational corporations and within government ranks, they are fostering the international drive toward integrity.
References

10 C.F.R. § 209.405.
48 C.F.R. § 9.4.


Interagency Suspension and Debarment Committee, available at www.isdc.sites.usa.gov.


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