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**Fighting Corruption and Promoting Integrity in
Public Procurement: A comparative study
between Brazil and the United States**

By: **Ricardo Wagner de Araujo**

Email: **ricardow.araujo@gmail.com**

Advisor: **Professor Christopher R. Yukins**

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The George Washington University

Washington, DC

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SUMMARY

The phenomenon of corruption is one of the greatest obstacles to economic and social development. So, once government utilize public procurement - purchasing of goods and services, with the intent to select the most advantageous proposal¹ and best value product or service to the customer² and there is a fraud, abuse or collusion, public policies and citizens are affected immediately. Based on that, one can be sure, corruption increases poverty, misuse of public resources and, also, affects international markets, since we live in a globalized world with global competitors.

In that sense, anti-corruption measures in public procurement play a very sensitive and important role within governments. So once corruption occurs, enforcement is extremely necessary. In this sense, debarment³ measures are powerful administrative remedies that governments use to deter contractors' wrongdoing.

Additionally, promoting integrity within the public and private sectors has a key influence on the process of curbing corruption. On the government side, it is important to have clear rules and codes for these employees who deal in public procurement. On the private side, a fraud either during a bidding process or upon performing a contract can be a reason for debarment. Thus, contractors must have effective compliance and internal controls in place to protect themselves from a sanction that often signifies a 'death penalty'⁴.

¹ 8.666/93 Act. Art. 3.

² FAR 1.102(a).

³ As a reference for this paper the term debarment comprises suspension and debarment.

⁴ Schooner, Steven L. *'The Paper Tiger Stirs: Rethinking Suspension and Debarment'*. 13 Public Procurement Law Review (2004). P. 214.

INTRODUCTION

'No problem does more to alienate citizens from their political leaders and institutions, and to undermine political stability and economic development, than endemic corruption among the government, political party leaders, judges, and bureaucrats.'

- USAID Anti-Corruption Strategy

The intent of this paper is to analyze how Brazil and the U.S. Procurement Systems handles the remedy of debarment as a strong tool to deter corruption with a focus on the rationale of each system, legal framework, enforcement, trends and challenges. Besides that, the paper aims to demonstrate how integrity in the public and private sectors can be helpful in the combat against corruption since the problem must be attacked by all society actors.

Initially, chapter 1, will comment on corruption, its meanings, countries' risk assessments and economic effects. Since corruption can be very broadly defined, the aim is to be very objective and narrowly directed to public procurement. Besides that, the chapter intend to analyze the corrupt on each nation's economic development as illustrated shown in world indices from Transparency International (TI) and World Governance Institute (WGI).

Chapter 2 will discuss the relation between corruption and public procurement, the most sensitive industry sectors from each country, based on the complexity of the goods and services required and on government expenditures such as infrastructure and defense.

In chapter 3, the paper will describe and analyze the legal framework of both countries regarding public procurement, anti-corruption and, finally, international conventions and treaties against corruption. The intent is to demonstrate the compromise from each nation on curbing corruption not only within its territory but also worldwide.

Finally, chapter 4 will compare the Debarment system of Brazil and the United States, the rationale, its trends and differences, including mandatory x discretionary and punitive x responsible, issues. Indeed, the chapter will analyze the procedures to debar a contractor, the offences required for debarment, databases for transparency and checking, and, ultimately, the sanctions scope and effects.

In chapter 5, the emphasis will be analysis of integrity as an important tool in the fight against corruption in public procurement within the private and public sectors must comply with rules and ethic codes, each as an important piece of society. In the government side, there are provisions on the FAR, requiring procurement officials to follow codes of ethics and conflicts of interest. On the Brazilian side, there is the Conflict of Interest Act. Regarding the private sector, strong compliance systems are required by the FAR and by the Clean Company Act. Lastly, an integrity pact and collective action are also helpful instruments to lead a citizenship will against corruption.

In the conclusion the aim is to give a perspective on the anti-corruption scenario nowadays, specifically on the rationale of the Debarment System from each country and make a critical analysis on the pros and cons from each system and propose some improvements. The intention also is to give a perspective on the promotion of integrity within the government and the private sector, analyzing its importance and challenges on the fight against corruption in public procurement.

1. CORRUPTION

1.1. Meaning

Corruption is a problem facing every country around the globe since the beginning of life in societies. Also, the literature about corruption's nature, effects and consequences is vast and extensive. However, literature about its solution is rare and usually helpless. This is because there are different variables and actors such as governments, private sector, politicians, judiciary and taxpayers. Thus, one can say that due to its complexity there is no universal 'medicine' to 'cure' it. Consequently, each nation, sector or area requires a different approach and solution.

In addition, corruption is a theme being studied from an array of different perspectives and areas such as sociology, law, political science and no field alone is sufficient to explain it. However, some aspects are always highlighted when the expression Public Corruption emerges such as a law violation, the breach of prescribed duties, the subversion of the public interest, and the violation of other broad normative standards. Important to note, in some particular cases involves betrayal, secrecy, inequality, and private rent-seeking by public actors.⁵

Depending on the area of study, corruption can have an enormous range of different definitions and meanings. Also, depending on each society values and principles corruption can vary from country to country, from region to region. Nonetheless, the definition of corruption will usually include the public and private sectors and cover activities consisting, mainly, of bribing, extortion or fraud. In this sense, the traditional definition states 'behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence'.⁶ Another broader definition is that corruption is the

⁵ Underkuffler, Laura S. '*Defining Corruption: Implications for Action*'. Corruption, Global Security, and World Order. Brookings Institution Press. 92009). P. 42.

⁶ Nye, Joseph S. '*Corruption and Political Development: A Cost-Benefit Analysis*' (1967) Vol. 61 No. 2 American Political Science Review 419. <http://www.jstor.org/stable/1953254?seq=1>

privatization of public policies, meaning that private sector interests will define when, where and how public assets will be spent.⁷

So, considering these definitions, one can conclude that when corruption in public procurement happens: public interest is undermined by private interest, there is no real competition on the bidding process, there is a poor contractor performance and the taxpayers are the losers.⁸

1.2. Measuring

Another question that usually arises is how to measure corruption. This is not an easy task since there are tons of different variables and methods of data collection does not exist a perfect index. Nevertheless, for the purpose of this paper, it is important to have a benchmark to compare the level of corruption in each country, Brazil and in the U.S.

The first data to be shown is the Transparency International Corruption Perception Index (CPI) that measures the public government level of corruption and that is based on expert opinion, for the year 2012:

⁷ Kauffman, Daniel, '*Corruption within a Governance Framework: Concepts & Worldwide Empirical Perspective*'. Presentation at the International Anti-Corruption Academy, Laxenburg, Austria, jul/12.

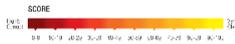
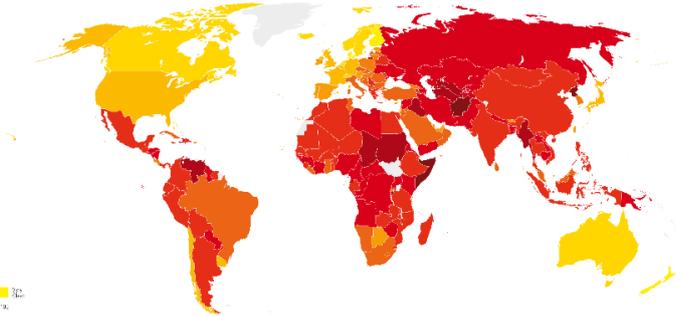
⁸ Williams-Elegbe, Sope, '*Fighting Corruption in Public Procurement: a Comparative Analysis of Disqualification or Debarment Measures*'. Hart Publishing. (2012). p. 8: An inquiry into some definitions of corruption raises six characteristics of corruption: a. Corruption is an activity that occurs when the public interest is subjected to private interests.

- b. Corruption violates local and universal rules, and duties, but includes an element of cultural specificity.
- c. Corruption can be 'trivial or monumental' or as Nye so succinctly puts it, range from 'venality to ideological erosion'.
- d. Corruption covers a wide range of activities which may be defined as embezzlement, fraud, bribery or theft.
- e. Corruption is present in developed and developing countries, but occurs with varying degrees of severity.
- f. the activity labelled corrupt need no to be illegal, it is enough that is considered unethical or immoral.

TRANSPARENCY INTERNATIONAL
 AN EQUITY-GOVERNANCE GROUP

CORRUPTION PERCEPTIONS INDEX 2012

The perceived levels of public sector corruption in 170 countries/territories around the world.



RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90	27	South Korea	71	101	Yemen	10	171	Yemen	10
2	Finland	89	28	Austria	69	102	South Africa	10	172	Equatorial Guinea	9
3	Netherlands	88	29	Indonesia	68	103	Costa Rica	10	173	Republic of the Congo	9
4	Sweden	86	30	Chile	67	104	Guatemala	10	174	Lebanon	9
5	Singapore	87	31	United Arab Emirates	68	105	Peru	10	175	Nepal	9
6	Switzerland	86	32	Cyprus	66	106	Colombia	10	176	Libya	9
7	Australia	85	33	Bahrain	65	107	Denmark	10	177	Maldives	9
8	Norway	86	34	Spain	65	108	France	10	178	Guatemala	9
9	Canada	84	35	Poland	64	109	Chile	10	179	Chad	9
10	Netherlands	81	36	Portugal	63	110	Malaysia	10	180	United Arab Emirates	9
11	Iceland	82	37	France	63	111	Turkey	10	181	Venezuela	9
12	Luxembourg	80	38	Denmark	63	112	China	10	182	Iraq	9
13	Germany	79	39	Spain	62	113	India	10	183	Lithuania	9
14	Hong Kong	77	40	Spain	61	114	South Africa	10	184	Uruguay	9
15	Belgium	78	41	Taiwan	61	115	Denmark	10	185	Morocco	9
16	Denmark	75	42	Chile	60	116	France	10	186	Bahrain	9
17	Japan	74	43	Chile	60	117	France	10	187	Guinea	9
18	United Kingdom	74	44	France	60	118	France	10	188	Paraguay	9
19	United States	73	45	France	60	119	France	10	189	Korea (North)	9
20	Chile	72	46	France	60	120	France	10	190	Somalia	9
21	Uruguay	72	47	France	60	121	France	10			
22	France	71	48	France	60	122	France	10			
23	France	71	49	France	60	123	France	10			
24	France	71	50	France	60	124	France	10			
25	France	71	51	France	60	125	France	10			
26	France	71	52	France	60	126	France	10			
27	France	71	53	France	60	127	France	10			
28	France	71	54	France	60	128	France	10			
29	France	71	55	France	60	129	France	10			
30	France	71	56	France	60	130	France	10			
31	France	71	57	France	60	131	France	10			
32	France	71	58	France	60	132	France	10			
33	France	71	59	France	60	133	France	10			
34	France	71	60	France	60	134	France	10			
35	France	71	61	France	60	135	France	10			
36	France	71	62	France	60	136	France	10			
37	France	71	63	France	60	137	France	10			
38	France	71	64	France	60	138	France	10			
39	France	71	65	France	60	139	France	10			
40	France	71	66	France	60	140	France	10			
41	France	71	67	France	60	141	France	10			
42	France	71	68	France	60	142	France	10			
43	France	71	69	France	60	143	France	10			
44	France	71	70	France	60	144	France	10			
45	France	71	71	France	60	145	France	10			
46	France	71	72	France	60	146	France	10			
47	France	71	73	France	60	147	France	10			
48	France	71	74	France	60	148	France	10			
49	France	71	75	France	60	149	France	10			
50	France	71	76	France	60	150	France	10			
51	France	71	77	France	60	151	France	10			
52	France	71	78	France	60	152	France	10			
53	France	71	79	France	60	153	France	10			
54	France	71	80	France	60	154	France	10			
55	France	71	81	France	60	155	France	10			
56	France	71	82	France	60	156	France	10			
57	France	71	83	France	60	157	France	10			
58	France	71	84	France	60	158	France	10			
59	France	71	85	France	60	159	France	10			
60	France	71	86	France	60	160	France	10			
61	France	71	87	France	60	161	France	10			
62	France	71	88	France	60	162	France	10			
63	France	71	89	France	60	163	France	10			
64	France	71	90	France	60	164	France	10			
65	France	71	91	France	60	165	France	10			
66	France	71	92	France	60	166	France	10			
67	France	71	93	France	60	167	France	10			
68	France	71	94	France	60	168	France	10			
69	France	71	95	France	60	169	France	10			
70	France	71	96	France	60	170	France	10			
71	France	71	97	France	60	171	France	10			
72	France	71	98	France	60	172	France	10			
73	France	71	99	France	60	173	France	10			
74	France	71	100	France	60	174	France	10			
75	France	71	101	France	60	175	France	10			
76	France	71	102	France	60	176	France	10			
77	France	71	103	France	60	177	France	10			
78	France	71	104	France	60	178	France	10			
79	France	71	105	France	60	179	France	10			
80	France	71	106	France	60	180	France	10			
81	France	71	107	France	60	181	France	10			
82	France	71	108	France	60	182	France	10			
83	France	71	109	France	60	183	France	10			
84	France	71	110	France	60	184	France	10			
85	France	71	111	France	60	185	France	10			
86	France	71	112	France	60	186	France	10			
87	France	71	113	France	60	187	France	10			
88	France	71	114	France	60	188	France	10			
89	France	71	115	France	60	189	France	10			
90	France	71	116	France	60	190	France	10			
91	France	71	117	France	60	191	France	10			
92	France	71	118	France	60	192	France	10			
93	France	71	119	France	60	193	France	10			
94	France	71	120	France	60	194	France	10			
95	France	71	121	France	60	195	France	10			
96	France	71	122	France	60	196	France	10			
97	France	71	123	France	60	197	France	10			
98	France	71	124	France	60	198	France	10			
99	France	71	125	France	60	199	France	10			
100	France	71	126	France	60	200	France	10			

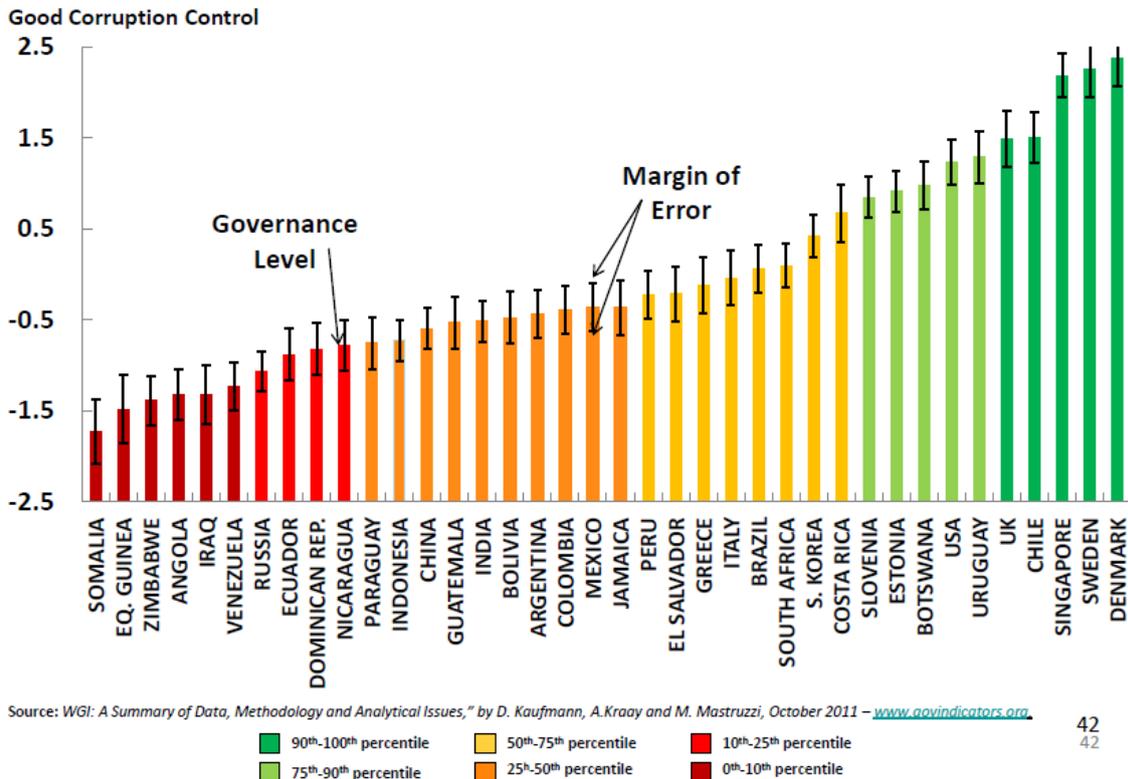
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Source: www.transparency.org.

The CPI index is released annually and reflects the perception of corruption within governments from 174 countries scoring from 0 to 10, where 0 is the highest level of corruption and 10 the lowest level of corruption. According to that, Brazil ranked 67th position, with a score of 4.3 and the U.S. ranked 19th, with a score of 7.3. These data shall be analyzed very carefully since one can conclude, by mistake, that Brazil is not improving. For the Brazilian and the North-American perspectives it reveals sounding improvements while this is the best position and score ever for both countries.

The second important chosen index is the World Governance Indicator that relies on countries capacity on controlling corruption. The advantage towards the CPI is the methodology used and source of data. It is based on thirty five different data sources and includes margins of error. Basically, it divides countries in six different groups and shows the different situations from countries:

Control of Corruption in WGI: Selected Countries, 2010



Source: www.govindicators.org.

The results from 2010 are even better for the Brazilian and the U.S. perspectives and show that even though corruption is a huge concern in both countries, there is a clear sense of government will on curbing corruption, namely if comparing worldwide.

Important to mention, there are lots of criticism on the corruption indices and collecting data methods, especially on the CPI Index⁹. Yet, they are a very helpful instrument to understand the position of Brazil and U.S., since the comparisons utilize the same method and variables. Finally, these two corruption indices, once carefully analyzed, can explain the rationale of the debarment models used in each country as will be seen in the following chapters.

1.3. Effects

⁹ World Bank. 'Building Public Support for Anti-Corruption Efforts'. (2010). p. 18. <http://siteresources.worldbank.org/EXTGOVACC/Resources/CorruptionWhitePaperpub31110screen.pdf>

Corruption has a direct impact on societies when a public policy is not delivered. One of the effects is the expenditure of public funds without improvement of citizens' welfare, another is expenditure based on political or corporation decision solely.¹⁰

So, even with an economic growth, corruption can be understood as a tax that increases costs and distortions and do not result in an increasing in the quality of life in a country. In fact, corporations engaged in illegal activities, such as bribing, fraud or collusion, have lots of benefits from doing business with governments. As a result, a vicious circle of corruption is created generating corruption and so on, imposing doubts and fear once corporations want to compete in the market.¹¹

Moreover, fighting corruption increases the fairness, competitiveness and efficiency in the market. As Rose-Ackerman affirms, 'eliminate corruption is not worthwhile but steps can be taken to limit its reach and reduce the harm it causes'.¹² In this way, it can be seen from the above analysis that corruption is a world concern and it undermines democracy, the rule of law, the consolidation of market economies and is a threat to international economy.

2. PUBLIC PROCUREMENT AND CORRUPTION

2.1. Sensitive Sectors and Impacts

According to the Organization for Economic and Cooperation Development – OECD, Public Procurement represents around 15% of national economies.¹³ Thus, due to variables such as the amount and public-private interests involved and bureaucratic rules it is extremely exposed to corruption attempts.

¹⁰ See the previous definition of Corruption by Daniel Kauffman.

¹¹ Rose-Ackerman, Susan. *Corruption and Government: Causes, Consequences and Reform*. Cambridge (1999). p. 3.

¹² Id. 11. p. 4.

¹³ OECD. *Fighting Corruption and Promoting Integrity in Public Procurement*. (2005) p.9.

These arguments can be supported by the figures of government expenditures in contracts from the year 2009 to the year 2012 and even there is a huge disparity in the amounts spent by each country is possible to conclude that public procurement shall be the main concern when the subject is corruption:

U.S. GOVERNMENT - CONTRACTS EXPENDITURES (US\$ Billion)			
2009	2010	2011	2012
540.1	539.8	539.4	517.6

Source: www.usaspending.gov.

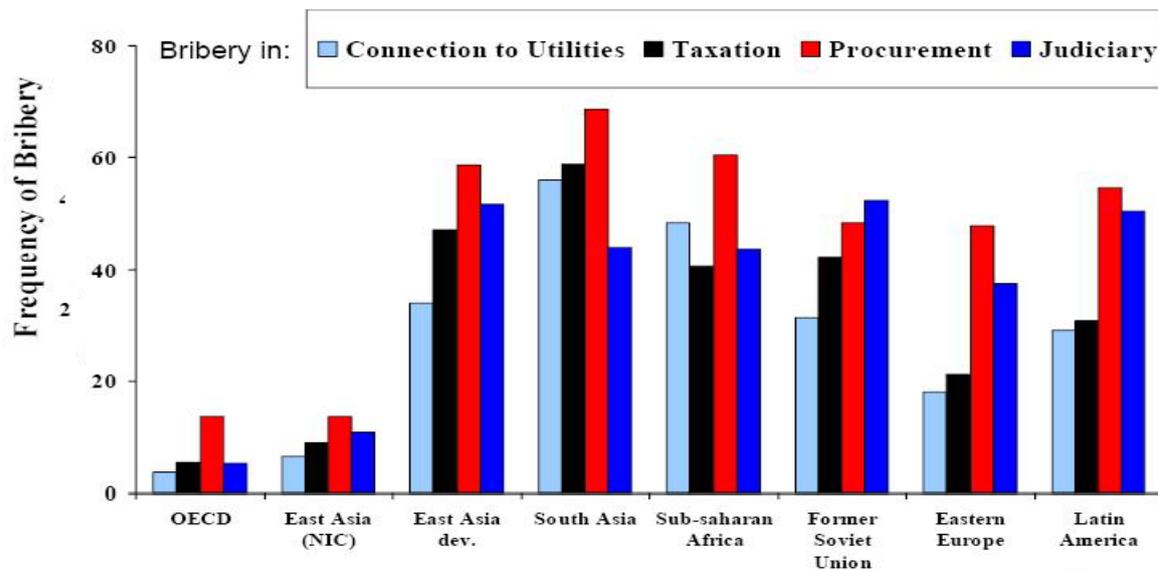
BRAZILIAN GOVERNMENT - CONTRACTS EXPENDITURES (US\$ Billion)			
2009	2010	2011	2012
23.9	28.8	23.5	33.0

Source: www.comprasnet.gov.br.

For this reason, each country shall develop instruments and regulations to guarantee enough fairness and competition in the bidding process and, ultimately, that contractor's performance meet expectations and once a wrongdoing happens there are remedies for deterrence.

Another significant factor, and probably more sensitive, is that public procurement is the most vulnerable government activity comparing to other services provided by governments as for example the judiciary, utilities and taxation, for two main reasons, the amount involved and the interactions between public and private agents as shown in the graphic¹⁴:

¹⁴ OECD. *'Integrity in Public Procurement'*. (2007).



Relating to Brazil, the main issue is within infrastructure contracts. The reason is a sum of different factors, including the Accelerate Growing Plan (PAC), which emphasizes the building of roads, railroads, airports, bridges extremely necessary for the sustainable economic growth.¹⁵ Also, the country is hosting two main events in the next three years – 2014 FIFA World Cup¹⁶ and 2016 Summer Olympic Games¹⁷, which demands huge investments. Finally, due to the complexity of the activity.

In that regard, according to the Transparency Portal from the Federal Government¹⁸, from the top 10 government contractors in the last four years (2009-2012), at least six are civil construction corporations and just one is a defense contractor, EMBRAER S.A.

Moreover, it is important to mention that the biggest contractor for the above mentioned period Delta S.A. (around USD 1.3 billion in contract awards) was debarred by the Office of the Comptroller General – CGU¹⁹, in the year 2012 for wrongdoing.

¹⁵ The Growing Acceleration Program (PAC) began in 2007 and is the biggest infrastructure project in Brazil. The first phase (2007-2011) had a budget of approximately USD 250 billion. www.pac.gov.br

¹⁶ www.fifa.com.

¹⁷ www.olympic.org.

¹⁸ www.portaldatransparencia.gov.br.

¹⁹ www.cgu.gov.br.

Relating to the U.S., all the top 10 government contractors from 2009 to 2012 are related to the Defense industry as shown under:

	2009	2010	2011	2012
1	LOCKHEED MARTIN CORP.	LOCKHEED MARTIN CORP.	LOCKHEED MARTIN CORP.	LOCKHEED MARTIN CORP.
2	THE BOEING COMPANY	THE BOEING COMPANY	THE BOEING COMPANY	THE BOEING COMPANY
3	GENERAL DYNAMICS CORP.	NORTHROP GRUMMAN CORP.	GENERAL DYNAMICS CORP.	RAYTHEON CO.
4	RAYTHEON CO.	GENERAL DYNAMICS CORP.	RAYTHEON CO.	GENERAL DYNAMICS CORP.
5	NORTHROP GRUMMAN CORP.	RAYTHEON CO.	UNITED TECHNOLOGIES CORP.	UNITED TECHNOLOGIES CORP.
6	UNITED TECHNOLOGIES CORP.	UNITED TECHNOLOGIES CORP.	SAIC INC.	SAIC INC.
7	L-3 COMMUNICATIONS INC.	L-3 COMMUNICATIONS INC.	L-3 COMMUNICATIONS INC.	L-3 COMMUNICATIONS INC.
8	BAE SYSTEMS	OSHKOSH CORP.	BAE SYSTEMS	BAE SYSTEMS
9	SAIC INC.	BAE SYSTEMS	OSHKOSH CORP.	MCKESSON CORP.
10	OSHKOSH CORP.	SAIC INC.	MISCELANNEOUS (mostly Defense)	NORTHROP GRUMMAN CORP.

Source: www.usaspending.gov.

This difference in the type of industry can be explained by the level of development of each nation and also by the foreign policy adopted. In Brazil, there is a clear need for infrastructure and since the economic stability and welfare policy plans from the beginning of the 90's, the country production and consumption of goods rapidly increased and so the need for investment in roads, railroads, ports and so on, missed in the previous decades, became urgent. In the US, there are no huge trends or challenges in infrastructure. Conversely, U.S. has a tradition in military power supremacy and world leadership. Thus, huge expenditures in research, development and military products are required.

Given that scenario, even though both countries have such a diverse procurement expenditure focus, in completely different industry sectors, it is possible to conclude that special attention and government efforts shall be directed to infrastructure in Brazil and Defense in the U.S., in order to tackle corruption.

The reason for that is, firstly, based on the most noticeable variable that is the amount involved. This because, the Defense industry in the U.S. and the Construction industry in Brazil represent, by far, the biggest receivers of the amount spent in public procurement.

The second is the sensitiveness of the activity involved and the propensity of these contractors in misconduct. To highlight that, around 70% of the debarred contractors by issued by the CGU in Brazil, since 2007, are from the construction industry.²⁰

On the other side, the number of misconduct (including overcharging, kickbacks, contract fraud, civil and criminal convictions) committed by Defense contractors and fines given to corporations in the U.S., since 1995, according to the Project on Government Oversight (POGO) is impressive and the data shown under just confirms that government must oversees this Industry very carefully:

	CONTRACTOR	NUMBER OF MISCONDUCT	MISCONDUCT \$
1.	LOCKHEED MARTIN CORP.	59	\$ 606.0m
2.	THE BOEING COMPANY	46	\$1054.5m
3.	GENERAL DYNAMICS CORP.	13	\$ 78.5m
4.	NORTHROP GRUMMAN CORP.	35	\$ 850.7m
5.	RAYTHEON CO.	22	\$ 479.2m
6.	UNITED TECHNOLOGIES CORP.	17	\$1123.1m
7.	SAIC INC.	13	\$ 533.3m
8.	L-3 COMMUNICATIONS INC.	9	\$ 48.9m
9.	BAE SYSTEMS	13	\$ 588.2m
10.	OSHKOSH CORP.	0	\$ 0.0m

Source: www.pogo.org.

²⁰ Since 2007 22 contractors were debarred by CGU. From these, 16 from the Construction Industry. www.cgu.gov.br.

Finally, it is important to mention the risky issue of corruption for party funding. Just as an example the biggest campaign donors in Brazil and the U.S. are corporations and economic groups. Usually contractors and once the winner becomes a public official – Congressman, Mayor or Governor, these donors win government contracts. As mentioned by Jorge Hage, the corporate donors in Brazil have almost the absolute weigh in campaign donation making them almost a corporation employer instead of a public official.²¹

3. PUBLIC PROCUREMENT: REGULATION, ANTI-CORRUPTION AND INTERNATATIONAL LEVEL

Initially, regarding regulations, both countries adopt formal binding rules. In spite of that, there is a very sensitive difference between the regulations of Public Procurement in Brazil and the United States. In one side, the Brazilian system is centralized, meaning there is a unique regulation for procurement binding federal, state and local levels. On the other side, in the United States there is a decentralized system and each level has its own regulations. For the purpose of this paper, the focus will be on federal level regulations.

3.1. Public Procurement Regulation in Brazil

Throughout the years the Brazilian public procurement system had different regulations. A huge change has become within the Constitution of 1988. This was the first time in Brazilian history that procurement guidelines were in the constitution text. In that sense, it is important to mention two articles of the Constitution of Brazil.²²

The article 37 item XXI, states *‘with the exception of the cases specified in law, public works, services, purchases and disposals shall be contracted by public bidding*

²¹ Carta Capital Magazine. Interview with the Ministry Head of the Office of the Comptroller General. (Apr/13). <http://www.cartacapital.com.br/politica/financiamento-empresarial-de-campanha-e-incompativel-com-a-democracia-diz-jorge-hage>.

²² Britto, Carlos Ayres. *‘O Perfil Constitucional da Licitação.’* (1997). Znt. P. 9-26.

*proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as the law provides, which shall only allow the requirements of technical and economic qualifications indispensable to guarantee the fulfilling of the obligations.*²³

The first important conclusion here is that bidding proceedings become the rule for all purchases of goods and services. The second one is that the proceeding shall ensure competition among all bidders ensuring better quality and price for government expenditures.

Article 22 item XXVII predicts ‘*the Union has the exclusive power to legislate on general rules for all types of bidding and contracting for governmental entities, associate government agencies, and foundations of the union, the states, the Federal District, and the Municipalities, in accordance with article 37, XXI, and for public enterprises and joint stock companies, under the terms of article 173, paragraph 1, III.*’²⁴

As a result of the above, the Public Procurement Act from 1993, obliges all federative levels - Federal, State and Local – and branches – Executive, Legislative and Judiciary - to comply with it.²⁵

Having the same rule for all government levels and branches has some advantages. On the contractor’s side, it is easier to follow one statute regardless where the bidding will occur, federal, state or local level. So it is always clear which rule to comply with, requirements for bidding and expected performance, instead of different regulations.

On the government’s side, strengthen the relation among branches and government levels – uniformity of bidding proceedings, performance checking and

²³ Constitution of Brazil.

²⁴ Id. 22.

²⁵ 8.666/93 Act.

contracts overseeing. Besides that, allow courts, at local or federal levels, to have a uniform jurisprudence on similar cases and use the same statute.

According to the Public Procurement Act, public procurement is defined as an administrative procedure disciplined by law and by a previous administrative act, which determine the objective criteria to select the most advantageous proposal and the promotion of the national sustainable development, observing the principles of lawfulness, impersonality, morality, equality, publicity and administrative probity.²⁶ Ultimately, the main objective is to select the better proposal for a contract, meaning that government will choose, after a fair competition, the best proposal for a certain good or service.²⁷

Due to lots of criticism over the strict requirements on the Public Procurement Act and the time spent on the whole bidding process, Congress has passed the Reverse Auction Act.²⁸ The rationale was to faster the bidding process and get cheaper purchasing prices. Also, within the same rationale and in order to reach the demands for the 2014 FIFA World Cup and the 2016 Summer Olympic Games the Congress passed the Differential Public Regime Act with the following objectives: increase efficiency and competition in public procurement, promote technology innovation and ensures equal bidder treatment and selection of the most advantageous proposal for the public administration.²⁹

3.2. Public Procurement Regulation in the United States

Historically, public procurement in the U.S. is related to military goods and services and the first formal procurement regulation was issued in the 18th century.

²⁶ Justen Filho, Marçal. '*Curso de Direito Administrativo*'. Ed Fórum. p. 446.

²⁷ 8.666/93 Act. Art. 3.

²⁸ 10.520/00 Act.

²⁹ 12.462/11 Act. Art. 1, para 1.

Important to note, since these days there was a concern on preventing fraud by requiring procurement officials to record information on all purchases and issues.³⁰

Concerning the modern U.S. Procurement, the system is ruled by the Federal Acquisition Regulations – FAR, from 1984 with the aim to be a uniform system of procurement regulations for the government³¹, within the following objectives: 1- to deliver the best services and products to the customers; 2 – maintains the public trust and; 3 – fulfill the public policy.³²

One important detail, that will be analyzed later, is on the part 9.103, that states purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. This means that before contract award, the contracting officer must ensure contractor responsibility based on aspects such as ethics, integrity, ability to perform and compliance with laws.

So, the rationale is that even before sign a contract the companies are being evaluated by a government official. The aim is to assure performance capability and to prevent an award to an incapable company. The idea is that lower prices in the bidding process can be costly if the company cannot deliver good or service. As Schooner mentions ‘*contracting with responsible firms should not expose the Government to risk of eventual default, late delivery, poor quality, cost overruns, etc.*’³³

Additionally, the modern North-American procurement system has some subsidiary acts as the Competition in Contracting Act from 1984³⁴ and the Procurement Integrity Act from 1988 – encapsulated in the FAR.³⁵ The first regulation was created to foster competition and in that sense, ensure that the government obtained best

³⁰ Id. 8. p. 56.

³¹ Id. 8. p. 56 citing W Keyes. ‘*Government Contracts in a Nutshell*’, 4th edn (West. 2004) 2-3.

³² FAR 1.102(a).

³³ Id. 4. p. 213.

³⁴ 41 USC § 3301. (a)(1)(2).

³⁵ 41 USC § 423. FAR 3.104.

value in its purchases. The latter increased the number of punitive measures against the improper disclosure of contract information by persons such as a public official, advisor or employee.³⁶

Lastly, the passing of two new regulations - the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act in 1996 – have given procurement officials more discretion, encouraged the dialogue between the parties to better understand government's needs and make procurement more flexible and innovative.³⁷ These improvements shaped the new thinking of American Procurement for the 21st Century focused in increasing efficiency, avoiding fraud, fostering better relationships between the government and the private sector and increasing competition.³⁸

3.3. Anti-Corruption Regulation in Brazil

Since the arising of the Constitution of 1988 and the return of the democratic regime in Brazil, corruption has been one of the main government concerns. Moreover, government efforts on the deterrence of corruption in public procurement ended in different actions and regulations approval.

Relating to civil sanctions, the most important statute against corruption is the Improbability Act from 1992³⁹ which punishes public officials including, *inter alia*, civil servants, procurement officers and politicians, for illicit enrichment, public assets loss and acts against the public administration principles – lawfulness, impersonality, morality, publicity and efficiency.⁴⁰ The penalties for convicted officials and

³⁶ FAR. 3.104-3(2)(i)(i).

³⁷ Nagle, James F. '*History of Government Contracting*'. The George Washington University. (1999). p. 513.

³⁸ Id. 8. p. 58 citing S Kelman, '*Remaking Federal Procurement*' (2002) 31 Public Contract Law Journal 581, 602-10 and D Conway, '*Emerging Trends in International, Federal and State and Local Government Procurement in an Era of Global Economic Stimulus Funding*' (2010) 32 University of Hawaii Law Review 29.

³⁹ 8.429/92 Act.

⁴⁰ Id. 39. Arts. 9, 10 and 11.

corporations include fines up to three times the illicit gains, and restriction to receive government benefits or contracts and suspension of political rights up to ten years (just natural person).⁴¹

Concerning criminal actions is important to mention that in Brazil, unlike the United States⁴², legal entities are not liable for criminal violations, under the criminal code,⁴³ with exemption for environmental crimes⁴⁴.

The reason is that Brazil uses the civil law system and traditionally, these countries, including Italy⁴⁵, Germany⁴⁶, France and most Western European nations, utilize a very individualistic approach model and adopt the idea that a legal entity cannot be punished criminally for a misconduct of a person.

Nevertheless, some of the civil law countries cited above have recently introduced criminal liability of their criminal codes, such as Italy⁴⁷ in 2001 and France⁴⁸ in 1994. According to Pieth and Ivory 2011⁴⁹ this was because the expansion of the European Union, the boom in the international transactions, globalization and, mostly a myriad of new international treaties, since these instruments usually require national rules to introduce criminal or similar forms of sanctions over legal entities.

⁴¹ 8.429/92 Act. Art. 12, I, II and III.

⁴² Pieth, M. and Ivory, R. '*Corporate Criminal Liability, Ius Gentium: Comparative Perspectives on Law and Justice*', p. 9. Springer, 63 (2011).

⁴³ OECD. 'Brazil: Phase 2 Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Public Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions' (2007). Para. 89, 127, 131 and 135. Brazilian Criminal Code 2.848/40 Act.

⁴⁴ 9.605/98 Act.

⁴⁵ Regio Decreto 1398/30.

⁴⁶ Boese, M. '*Corporate Criminal Liability in Germany*'. *Corporate Criminal Liability, Ius Gentium: Comparative Perspectives on Law and Justice* 9. p. 228. 'Uses the *societas delinquere non potest* model, limiting criminal liability to natural persons'.

⁴⁷ Legislative Decree no. 231/2001.

⁴⁸ French Penal Code. Art. 121-2. Katrin Deckert. '*Corporate Criminal Liability in France*.' P. 150-151. '*Corporate Criminal Liability, Ius Gentium: Comparative Perspectives on Law and Justice* 9. Springer',

⁴⁹ Id. 41. p. 9-10.

Having said that, the criminal code predicts two crimes regarding public procurement. The first, violation of bidding proposal secrecy⁵⁰ can be committed just by a public official and the second, bidding perturbation or fraud, committed by any individual. As one can conclude, there is a lack of enforcement on matters related to corporations' liability on the criminal code what in our opinion must be changed since the Italian criminal code that was the reference for Brazil has already introduced provisions on that as mentioned above.

Then, in August 2013, to comply with the international conventions against corruption, namely the OECD Convention on Combating Bribery of Foreign Public Officials, Congress passed the Clean Company Act⁵¹ that will take into force in January 2014. The new law has extremely important features such as the strict liability of contractors over administrative and civil offences against national and international public administrations.⁵² This means firstly that Corporations are also liable for acts committed by a third party, such as an advisor, whom act in its interests. Other important aspect to observe is that it reaches prejudicial acts against national and international public administration⁵³.

In relation to enforcement, it has administrative and civil sanctions. Regarding to administrative sanctions it allows fines up to 20 percent of the legal entity gross revenues during the previous year or if not possible to measure it, up to USD 30 million. On the other side, with reference civil to sanctions, there are measures such as debarment, dissolution, disgorgement and prohibitions against obtaining incentives, subsidies, grants, donations or loans from public entities.

⁵⁰ 2848/40 Act, Art. 326.

⁵¹ 12.846/13 Act.

⁵² Id. 51. Art. 1.

⁵³ Id. 51. Art. 5.

Ultimately, the statute entitles the possibility of leniency agreements⁵⁴ with contractors, depending on the implementation of compliance programs and full cooperation with the government investigation.⁵⁵ These provisions will be further discussed in chapter 5

3.4. Anti-Corruption Regulation in the United States

The United States has several statutes that can be used for public procurement enforcement. Since the focus of the paper is on debarment, there is no place to analyze all of them. However, two statutes need to be presented as they are a base for statutes worldwide.

The first one is the False Claims Act⁵⁶ passed in the 19th century as response to a concern over suppliers' fraud against the Army during the Civil War.⁵⁷ The rationale is that any person submitting false claims in connection with payment from the United States government is liable for double the government's damages plus a penalty from USD 5.500 to USD 10.000 dollars per claim.⁵⁸ So, as a conclusion, it is possible to be liable under the Act even if the payment is being made to a corporation abroad or to an international organization such as the World Bank. Ultimately, the most important and innovative provision on the statute is to allow a '*qui tam*', the so-called relator (any person), to file a complaint under seal to a court and once the fraudulent money is recovered the '*qui tam*' is entitled to receive from 15 to 25 percent, if the government proceeds the action and from 25 to 30 percent, if not.⁵⁹

⁵⁴ Id. 51. Art. 16.

⁵⁵ Id. 51. Art. 7, VIII.

⁵⁶ 31 U.S.C. §§ 3729-3733.

⁵⁷ Yukins, Christopher R. and Verma, Sandip. '*Anti-Corruption in Public Procurement: A Survey of the U.S. Experience*'. p.7.

⁵⁸ 31 U.S.C. §§ 3730(b)(1).

⁵⁹ 31 U.S.C. §§ 3730 (d)(1)(2).

The second is the Foreign Corrupt Practices Act – FCPA⁶⁰ from 1977, the most cited statute, that rules the conduct of contractors when doing international business and that criminalizes the act of bribing foreign officials⁶¹. The context of its creation was the Watergate scandal and the revelations of a widespread corruption discovered by the Securities and Exchange Commission – SEC, that more than 400 U.S. companies paid millions of dollars to bribe foreign officials abroad.⁶² Thus, the Congress passed the Act as a response to stop corporate corruption, to enhance the image of U.S. companies abroad and to increase competitiveness.

Important to mention, the U.S. common law system through courts decisions allows corporate criminal liability since it adopted the doctrine of *respondeat superior*.⁶³ Also, the U.S. the Supreme Court ruled that a corporation can be held liable for ‘the acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation’.⁶⁴

In relation to enforcement the FCPA has civil and criminal provisions and the Department of Justice – DOJ, has authority to criminal enforcement of ‘issuers’ – a U.S. or foreign company, or an officer, employee, agent or stockholder thereof, that either issues securities (or American Depositary Receipts) or must file reports with the Securities Exchange Commission - SEC⁶⁵, their employees, directors and stockholders, representing the issuer. The DOJ has also criminal and civil authority in matters related to anti-bribery linked to national matters - that includes U.S. citizens, nationals or

⁶⁰ 15 U.S.C. §§ 78dd-1, et seq.

⁶¹ Section 30A(f)(1)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1) (A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

⁶² ‘FCPA A Resource Guide to the U.S. Foreign Corrupt Practices Act’ by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission.

⁶³ Doctrine of *respondeat superior*: ‘an employer or principal liable for the employee’s or agent’s wrongful acts conducted within the scope of the employment or agency; Black’s Law Dictionary 2004.

⁶⁴ Nanda, Ved P. ‘Corporate Criminal Liability in the United States: Is a New Approach Warranted’. Pieth, M. and R Ivory. Corporate Criminal Liability, Ius Gentium: Comparative Perspectives on Law and Justice 9. Springer, p. 68 (2011).

⁶⁵ 15 U.S.C.A. § 78dd-1(a).

residents and U.S. business and their officers, directors, employers, acting in the United States. The SEC has civil enforcement related to books and records. Also, over anti-bribery provisions against issuers.⁶⁶

After years of the FCPA approval, the concern about corruption and the fair competition on international business led the U.S. to raise the issue of fighting corruption internationally. One of the main reasons was the disadvantage, after the FCPA, of the American companies of doing business abroad. Then, in 1999 the OECD Convention on Combating Bribery of Foreign Public Officials entered into force and, in fact, it was modelled by the FCPA.⁶⁷

3.5. Anti-Corruption at the International Level

Brazil and the U.S. have signed the main international conventions against corruption. Pertaining to public procurement, the Inter-American Convention Against Corruption states that countries need to adopt instruments of acquisition of goods and services that ensure openness, equity and efficiency⁶⁸. The United Nations Convention Against Corruption requires that each country shall establish systems of procurement based on transparency, competition, objective, effective, and most important that prevents corruption.⁶⁹ Indeed, the OECD Convention Against the Bribery of Foreign Officials, as mentioned before, requires national governments to sanctioning the illegal actions to obtain or retain business or other harmful advantage once conducting international business. Important to note that after being very much criticized for not approving a legislation to comply with the OECD Convention signed in 1999 the Brazilian Congress passed in July 2013 the Clean Company Act.⁷⁰

⁶⁶ Tillipman, Jessica. *'The Foreign Corrupt Practices Act Fundamentals'*. Thomson Reuters/West. (2008). p. 3-4.

⁶⁷ Henning, Peter. *'Public Corruption: a comparative analysis of International Corruption Conventions and United States Law'*. (2001) Arizona Journal of International and Comparative Law. p. 818-821.

⁶⁸ IACAC. Art. 3, item 5.

⁶⁹ Id. 68. Art. 9.

⁷⁰ Id. 51.

After all, it is possible to notice that both countries pay special attention on binding rules, cost-effective procedures and shortening bureaucracies even though some improvements have to be done. As cited before, the objective is increasing efficiency and fair competition within international business. This conclusion can be sustained by the G20 Summit of 2010 stating on its document item 69 that *corruption is a severe impediment to economic growth and development, we endorse the G20 Anti-Corruption Action Plan (Annex III). Building on previous declarations, and cognizant of our role as leaders of major trading nations, we recognize a special responsibility to prevent and tackle corruption and commit to supporting a common approach to building an effective global anti-corruption regime.*⁷¹

4. Deterrence: Debarment and Suspension in Brazil and in the United States

4.1. Debarment Legal Framework

In order to guarantee that funds from taxpayers are being used to benefit the whole society in their best way, once government decides to purchase goods or services, the legislator made possible to sanction contractors not only with civil and criminal (only in the U.S. as mentioned earlier) enforcement, but also with administrative measures.

In that sense, one of the most powerful tools that a governments have for avoiding corruption in public procurement is debarment. This instrument precludes a corporation or individual to award a contract from government for a certain period of time and once a contractor is sanctioned it is banned for contracting with the government during a certain period.⁷² Thus, debarment measures shows government commitment against corruption and its efforts to maintain public trust in the procurement system.

⁷¹ <http://www.g20.utoronto.ca/2010/g20seoul-doc.html>.

⁷² Cibinic, John; Nash, Ralph C., Yukins, Christopher R. 'Formation of Government Contracts'. Wolters Kluwer & Business. 4th Edition, 2011, p. 457.

The instrument of debarment in Public Procurement in the U.S. has been used since the decade of 20 last century⁷³ and within the federal level it resides nowadays, mostly, in the FAR.⁷⁴ The statute predicts that Debarment is a disqualification from participation in public procurement for up to three years⁷⁵, though there are some exemptions for increasing⁷⁶ or reducing⁷⁷ the period. Regarding suspension, it is a temporary measure, used during the investigation or litigation and removes contractor eligibility for up to 12 (twelve) months⁷⁸ – or 18 (eighteen) months if an Assistant Attorney General requests an extension.⁷⁹

Under the Brazilian regulation, debarment resides in the Public Procurement Act, the Reverse Auction Act and the Differential Public Regime Act.⁸⁰ Conversely the U.S. system, in Brazil suspension has the same effect of debarment and the difference resides in the duration period. The Procurement Act foresees suspension⁸¹ that can last for up to two years and debarment⁸² for at least two years⁸³ or up to five years⁸⁴. The Reverse Auction Act and the Differential Public Regime Act, state that a debarred is precluded to award a contract for up to 5 (five) years.⁸⁵

⁷³ See item 3.2.

⁷⁴ FAR 9.4 et seq.

⁷⁵ FAR 9.406-4.

⁷⁶ FAR 9.406-4 (a)(1)(i)(b).

⁷⁷ FAR 9.406-4 (a)(1)(ii)(c).

⁷⁸ FAR 9.407-4.

⁷⁹ FAR 9.407-1.

⁸⁰ Important to mention the Improbability Act (8.429/92 Act), the Federal Court of Accounts Act (8.773/93 Act) and the Electoral Act (9.504/97 Act) also provide debarment measures.

⁸¹ 8.666/93 Act, Art. 87, III.

⁸² Id. 81. Art. 87 III and IV.

⁸³ Id. 81. Art. 87, IV.

⁸⁴ Act 10.520/02, Art. 7.

⁸⁵ Id. 84. Art. 7 and 12.462/11 Act. Art. 47.

4.2. Discretionary and Non-Punitive System vs. Mandatory and Punitive System

Relating to the U.S., debarment is discretionary and based on contractor's responsibility and performance. This requirement determines that a Contracting Officer (CO) ensures contractor's responsibility before a contract award⁸⁶, based on general and special standards.⁸⁷ These requirements are mainly related to factors such as financial, integrity and technical capabilities, including past performance and are based on the ability of contractor to complete the contract work timely, with good performance and achieving social and economic goals.⁸⁸ Concerning special standards, once a particular or class of acquisition is necessary, a CO shall develop, on its discretion, special standards of responsibility.⁸⁹ Also, if there is no information indicating that the prospective contractor is responsible, the contracting officer shall make a determination of non-responsibility⁹⁰, what is usually known as a *de-facto* debarment, since it may preclude contractor to award future contracts without a due process of debarment.⁹¹ In that sense, the contracting officer plays a very important role on the whole procurement process as the determination of responsibility is on his own broad discretion. Thus, once a contracting officer decides that a company is non-responsible, this could lead to other agency officials deciding in the same direction not enacting a company to award a government contract.

Usually, each agency has a Suspension and Debarment Official (SDO) and regulates its own due procedures. This is a big issue while agencies not only have different procedures but also different decisions on adopting debarment. After all, one

⁸⁶ FAR 9.103(a).

⁸⁷ FAR 9.104-1 and 9.104-2.

⁸⁸ Id. 72. p. 409.

⁸⁹ FAR 9.104-2 (a).

⁹⁰ FAR 9.103 (b).

⁹¹ Kate M. Manuel. 'Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments'. Congressional Research Service Report for Congress (2010).

can say that there is too much discretion for a SDO to debar a contractor.⁹² Due to that, criticism arises on the fact that each agency has a very broad way to decide the future and also, ultimately, the company survival. Regarding to that, in some cases debarment means ‘death penalty’.

In this regard and to give a narrow process through most of the agencies system, it was created the Interagency Suspension and Debarment Committee – ISDC, to monitor, coordinate and the most important to give support to the agencies. These are very challenging activities and according to a General Audit Office – GAO report, some of the issues are absence of some agencies on the ISDC meetings and the lack of debarment and suspension programs.⁹³

So, as stated by Schooner, responsibility play a very important role in protecting the core values of the U.S. procurement system. First, because do not exposes government to a default risk, late delivery or poor quality. Secondly, a responsible contractor is more likely to well perform the terms of the procurement agreement.⁹⁴

Here is a comparison between non-responsibility and debarment:⁹⁵

⁹² FAR 9.406-1(a).

⁹³ Statement of John Neumann, Acting Director Acquisition and Sourcing Management ‘*SUSPENSION AND DEBARMENT Characteristics of Active Agency Programs and Governmentwide Oversight Efforts*’, June 12, 2013.

⁹⁴ Id. 4. p. 214.

⁹⁵ CRS Report for Congress. ‘*Responsibility Determinations Under de Federal Acquisition Regulations: Legal Standards and Procedures*’. (2013). P.4-5.

Table 1. Comparison of Nonresponsibility Determinations and Debarment

	Nonresponsibility	Debarment
Decision maker	Contracting officer	Debarring/suspending official (not the contracting officer)
Criteria	Adequate financial resources	Fraud or criminal offenses in obtaining or performing a public contract or subcontract
	Ability to comply with delivery and performance schedule	Violations of federal or state antitrust laws
	Satisfactory performance record	Embezzlement, theft, forgery, bribery, etc.
	Satisfactory record of integrity and business ethics	Intentionally misusing "Made in America" designation
	Necessary organization and experience	Other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor
	Necessary equipment and facilities Otherwise qualified and eligible	
Duration	Single contract award	Fixed time proportionate to the offense (generally not more than three years)
Application	Applies to companies that have not previously had government contracts, as well as current and prior government contractors	Generally applied to current government contractors, although potentially applicable to prospective or prior contractors
Due Process	Generally not	Yes
Review of Agency Determinations	Responsibility determinations may generally be challenged with GAO only when any special standards are not met or other "serious concerns" are raised	Exclusion determinations are generally not protestable with GAO

Source: Congressional Research Service.

A second rationale, usually very misunderstood and criticized⁹⁶, is that debarment in the U.S. is not punitive. Instead of that, the goal is to protect the government from doing business with non-responsible contractors. This idea of a non-punitive system is fundamental to understand the system.⁹⁷ In support of that is the provision in the FAR stating that even ‘the existence of a cause for debarment, however, does not necessarily require that the contractor be debarred’.⁹⁸ Concerning these criticisms, some authors argue that big corporations are so important for the government interests, usually defense contractors, that even though fraud, abuse or misconduct occurs they will not be debarred.⁹⁹ Another alleged reason is that for some products or services there are only a few or sometimes one supplier, again, mostly in the defense industry and thus government has nothing to do other than give fines (civil and criminal convictions) and arrange administrative agreements for wrongdoing.

⁹⁶ Stevenson, Drury D. and Wagoner, Nicholas J. *FCPA Sanctions: Too Big to Debar?* Vol. 80 Fordham Law Review (2011).

⁹⁷ Tillipman, Jessica. *A House of Cards Falls: Why ‘Too Big to Debar’ is all slogan and little substance*. Fordham Law Review. (2012). p. 50-51.

⁹⁸ FAR 9.406-1.

⁹⁹ Id. 96.

Related to the Brazilian Debarment System, the rationale is to be punitive¹⁰⁰ and give emphasis on reputation, thus is mandatory against corrupt suppliers over past conduct.¹⁰¹ In that sense, once a contractor wrongdoing arises it will be excluded from public procurement system. The aim is to comply with the constitutional principles related to the Public Administration, as mentioned previously, lawfulness, equality, morality, publicity and efficiency and is supported largely by the jurisprudence¹⁰² and demonstrate to society the lack of government tolerance over corruption since the restoration of the democratic regime in the 90's and the new regulations. All that said, a new scenario will be into force in the beginning of the year 2014. This because the Clean Company Act¹⁰³ that enacts government to impose fines and celebrate leniency agreements related acts against national and international governments. Thus, one can say that a new rationale will be in action from 2014 on, since SDO's will deal with a hybrid system.

4.3. Causes for Debarment

Concerning to the FAR, debarment provisions found in the sub-part 9.406-2 and a contractor may be debarred for administrative and judicial convictions (criminal and civil). The causes for debarment include acts such as commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violation Federal criminal tax laws, or receiving stolen property; commission of any offense indicating a lack of business integrity or business honesty.¹⁰⁴ The U.S. Debarment System also

¹⁰⁰ 8.666/92 Act. Art. 87; Art. 88, I, II, II and 10.520/02 Act. Art. 7.

¹⁰¹ Id. 100. Art. 88. Act 10.520/02, Art. 7.

¹⁰² *Gautama v Ministry Head of the Office of the Comptroller General*. MS 13.101-DF STJ.

¹⁰³ 12.846/13 Act.

¹⁰⁴ FAR 9.406-2 (a) and (b).

foresees the possibility of debarment for violations of laws not directly related to public procurement as the Buy American Act, the Drug-Free Workplace Act, the Davis-Bacon Act and the Clean Air/Water Act.¹⁰⁵ Finally, there is a so-called ‘catch-all’ provision that specifies debarment over any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor¹⁰⁶.

In Brazil, the provisions on the Procurement Act are related to poor performance, illicit acts against bidding process or lack of probity to award a government contract.¹⁰⁷ The latter is also a very broad ‘catch-all’ provision that gives a lot of discretion to SDO’s. Finally, likewise in the U.S., there are some possibilities for debarment based on laws or regulations not directly related to public procurement as the Electoral Act¹⁰⁸ and tax fraud.¹⁰⁹

4.4. Investigation

In the U.S., the FAR¹¹⁰ requires agencies to establish ‘procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official’s consideration’. Usually the actions are initiated upon receipt of information from the U.S. Attorney’ offices, Inspector General offices, other investigative agencies, as well as newspapers articles and competitors. Nevertheless any employee of an agency can refer a matter to the debarring official.

In Brazil, there is no procedure predicted in regulations and usually the investigation begins by receipt of information from the Office of the Comptroller General, the Federal Court of Accounts, the Prosecutors Office, the Attorney General

¹⁰⁵ FAR 9.406-2 and Christopher Yukins, ‘*Suspension and Debarment: Rethinking the Process*’ (2004) Public Contract Law Journal.

¹⁰⁶ FAR 9.406-2.

¹⁰⁷ 8.666/92 Act. Art. 87 and 88, II, and III; 10.520/02 Act. Art. 7 and 12.462/11 Act. Art. 47.

¹⁰⁸ 9.504/97 Act.

¹⁰⁹ 8.666/92 Act. Art. 88, I.

¹¹⁰ FAR 9.406-3.

Office, the Federal Police or the Agency's Internal Control, followed by a report addressed to the official consideration. Less usual, there are also investigations under anonymous reports or news.

Also important, is that each agency is responsible to carry out its own debarment process, in U.S. and also in Brazil. Nevertheless, within the Executive Branch, once the Agency affected by a contractor wrongdoing does not take action, acts improperly or the act affects more than one agency, the Office of the Comptroller General linked to the President' Office and created to protect government assets, to prevent and to fight corruption¹¹¹ has authority to intervene and carry the debarment process out via a special unit called Commission of Administrative Processes Against Contractors.¹¹² Lastly, important to mention that most of the investigations under the CGU authority were based on joint investigations within the Federal Police that included authorized telephone taping.

In the U.S. certain due process is required and according to the FAR¹¹³ agencies shall establish procedures governing the debarment and suspension decision-making process that are 'as informal as is practicable, consistent with principles of fundamental fairness'. Even with these requirements there are critics on the lack of a due process within the agencies. This because, usually, each agency adopt its own procedure and contractors are not aware about the investigation.¹¹⁴ Also, since agencies are not required to give a notice on proceedings is not uncommon for contractors to receive the notice that they have been proposed for debarment or are suspended after they have been included in the Excluded Party List System – EPLS.¹¹⁵ In order to change this panorama, some agencies have initiated some improvements and others still show some

¹¹¹ 10.683/03 Act. Art. 17 and 18.

¹¹² Resolutions n. 1.878/07, n. 27/08 and n. 1.996/08.

¹¹³ FAR 9.406-3(b) and 9.407-3(b).

¹¹⁴ Shannon, Brian D. *Debarment and Suspension Revisited: Fewer Eggs in the Basket?* Vol. 44 (1995). Catholic University Law Review. p. 386-387

¹¹⁵ Id. 72. p. 494.

resistance.¹¹⁶ The agencies that inform use the rationale that the respondent is being afforded an opportunity to give information for opposing the suspension or debarment proposal and will have the chance to solve problems via more strict compliance programs or administrative agreements. Since contracts are awarded only to responsible contractors and the debarment process under the FAR is not punitive, this is quite a fair way to conduct the process and at the end to do not disrupt the service or good being delivered.

On the other side, once there is a referral and a proposed suspension and debarment of contractors, agencies are required by the FAR to give notice, including the reasons to do so.¹¹⁷ Additionally, to note that courts have been challenged on that matter and ruled that contractors must be given adequate information regarding the reasons for debarment as to ‘permit adequate preparation for participation in a meaningful way in any forthcoming hearing or equivalent proceeding’.¹¹⁸ Thus, once the contractor is informed of a proposed debarment it has the opportunity to present its defense and, specially, enhances procedural fairness.¹¹⁹ Lastly, the FAR predicts thirty days of receipt of the notice to the contractors’ defense presentation¹²⁰ and states the minimum requirements¹²¹ such as opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed action, present documents and witnesses, and, in some cases, promote hearings.¹²²

In Brazil, as in the investigation and referral process, there is a lack of regulation regarding the debarment process what is often criticized, even by debarment officials. The Procurement Act just states that the highest authority of the Agency has the

¹¹⁶ Id. 72. p. 490.

¹¹⁷ FAR 9.406-3 (c) and 9.407-3(c).

¹¹⁸ *Transco Security v Freeman* 639 F. 2d 318 (1981).

¹¹⁹ Id. 8 citing Galligan, D. ‘*Due Process and Fair Procedures: A Study of Administrative Procedures*’ (Oxford, Clarendon Press, 1997)

¹²⁰ FAR 9.406-3(d) and 8.666/93 Act, Art. 87, § 3.

¹²¹ FAR 9.406-3(b)(1) and FAR 9.407-3(b)-1.

¹²² Id. 72. p. 495.

authority to debar or suspend a contractor and that in case of an investigation, the contractor shall be given ten days to defend itself from the alleged misconduct.¹²³ Notwithstanding, due to the complexity of the facts, often this period is extended in order to guarantee contractor's constitutional due process rights of adversary system and full defense.¹²⁴

4.6. Debarment Effects

According to the FAR, debarment and suspensions¹²⁵ in the U.S. are 'effective throughout the executive branch', unless waived by the procuring agency. Thus, it is clear that these provisions make debarments and suspensions by any executive branch agency binding on all other executive branches agencies. Also includes affiliates of a company, including subcontractors, as well as its officers, employees and companies for which corrupt officers or employers perform work.¹²⁶ Other feature of the system is that debarment has *ex-nunc* effects, meaning that debarment affects just a future contract award.¹²⁷

There are some questions that arisen once a contractor is debarred. The first is whether an entire entity should be debarred. Although the FAR¹²⁸ gives broad discretion, it is uncommon that a debarment reaches just an area or branch of a corporation. Some examples on that were the Enron, the Arthur Andersen and Former Officials cases in 2002.¹²⁹ The second one is the allowance of debarred contractors to award a new contract.¹³⁰ Under the regulation, the agency head or heads designee has the authority

¹²³ 8.666/93 Act. Art. 87, § 3.

¹²⁴ Art. 5: '*LV – litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defense, with the means and resources inherent to it.*'

¹²⁵ FAR 9.406-1(c) and 9.407-1(d).

¹²⁶ Id. 72. p. 473.

¹²⁷ FAR 9.405-1

¹²⁸ FAR 9406-1.

¹²⁹ <http://www.gsa.gov/portal/content/100538>.

¹³⁰ FAR 9.406-1(c) and 9.409(b).

for that based on compelling reasons what is sometimes very broadly and ensures a lot of discretion.

Having said that, some considerations are necessary. Regarding the first, if the system is based on the rationale of responsibility, there is a reason to debar the whole corporation from procurement contracts. Nevertheless, in our opinion since a contractor can demonstrate that the wrongdoing was very specific and committed by a solely area, department or division, and has a reliable ethics and compliance program and solid internal controls, there is a reason for an administrative agreement to minimize the effects of being debarred. Concerning the second, in very specific cases, there is a rationale on contracting with debarred or suspended contractors. Once this happen, there must be 'real' compelling reasons, such as unique supplier or to ensure national defense, to award a contract, otherwise exception will become ordinary and consequently weakening confidence on the Debarment System.

In the Brazilian system the situation is even more severe for contractors since the Procurement Act, the Reverse Auction Act and the Differential Regime Act bind all branches and levels. This rationale is that once a contractor is debarred from a Federal Agency it is debarred for award a contract within all the agencies and entities from the federal, state or local levels and, also from the judiciary, executive and legislative branches.¹³¹

In order to analyze the consequences, some considerations are needed. The first one, the Brazilian Procurement System is based on cross-debarment, similarly to the World Bank System.¹³² Meaning in many cases the corporate death penalty for a contractor. Mostly these modelled to supply government goods and services. This feature has positive and negative effects. As positive, one can mention the autonomy of each government agency or entity and its authorities¹³³ over its own procurement

¹³¹ *Santhe Indústria e Comércio de Móveis Ltda v. Município do Rio de Janeiro*. REsp 151.567-RJ STJ.

¹³² More on the World Bank Sanctions System: Andrés Rigo Sureda, Bernardo Weaver, Pascale Hélène Dubois, Juan Ronderos. '*Sanctions at the World Bank and the Inter-American Development Bank: addressing corruption and fraud in development assistance*'. Compliance & Anticorrupção. Elsevier. (2013). p. 45-54.

¹³³ 8.666/92 Act. Art. 87, IV.

process and the due process of sanctioning. On the opposite, the criticism arises on the lack of uniformity on the sanctioning process. Thus, one such example is that if a misconduct or fraud occurs, a contractor can be debarred for three years by an agency and other for two years from another agency, and even worse, a contractor is debarred and the other is not even considered guilty for the same misconduct. Lastly, since Brazil has a punitive system,¹³⁴ there is no opportunity or allowance for having administrative agreements such as these in U.S. Nevertheless, as mentioned, the Clean Company Act will change the Brazilian Procurement System in the near future into a hybrid system, since it predicts leniency agreements.

4.7. Databases and Blacklist of Debarred Contractors

Once there are thousands of bidding processes through government agencies, it is important to have a database for checking information regarding contractors. In this regard, there are three main systems in the U.S. The first one, predicted in the FAR¹³⁵ is the Excluded Parties List System – EPLS. The system is very useful and has all data regarding disqualified contractors – debarred, suspended, ineligible or proposed for debarment and now is a part of the System of Award Management - SAM.¹³⁶ The SAM is publicly accessible and often is used by state and local government, by banks and other entities to verify information regarding contractors. The third is the Federal Awardee Performance and Integrity Information System – FAPIIS¹³⁷, that also includes information from EPLS and from other databases, also publicly accessible and contains information from contract terminations, Administrative agreements, contractor’ self-reporting of criminal convictions and civil liability.

In Brazil there is the National Database on Debarred and Suspended Contractors (CEIS)¹³⁸, managed by the Office of the Comptroller General and includes information

¹³⁴ 8.666/92 Act. Art. 87 and 88, I, II, II. 10.520/02 Act. Art. 7.

¹³⁵ FAR 9.404.

¹³⁶ www.sam.gov.

¹³⁷ www.fapiis.gov.

¹³⁸ www.portaldatransparencia.gov.br/ceis.

from all branches and all levels regarding debarment, suspension, civil convictions (improbability), electoral convictions, among others. The system is not mandatory but has data from federal, states and local levels. Finally, there is a provision predicting the Sanctioned Contractors National Database (CNEP), a blacklist database mandatory for all government levels and branches.¹³⁹

Lastly, debarment sanctions against contractors has been a very active measure adopted by both countries. Nevertheless the rationale between the systems is different, the intent is the same. Upon the U.S. data released by the Interagency Suspension and Debarment Committee is possible to conclude that agencies are using debarment widely and in a clear signal of no tolerance within contractors' wrongdoings:

TYPE OF SANCTION	NUMBER	PERCENTAGE
SUSPENSIONS	928	15.90
PROPOSED FOR DEBARMENT	2.512	43.03
DEBARMENT	2.398	41.08
TOTAL	5.838	100.00

* Source: ISDC report to the Congress for the year 2011.

In Brazil, most of the debarment sanctions are related to public procurement. Also, important to note that CEIS reunites data from all levels and branches and shows the sanctions that are still active on the researched date:

TYPE OF SANCTION	NUMBER	PERCENTAGE
DEBARMENT (Procurement)*	2.507	26.10
DEBARMENT (Improbability Act)**	3.819	39.76
DEBARMENT (Electoral Act)	122	1.27
DEBARMENT (Federal Court of Accounts)**	189	1.97
SUSPENSION (Procurement)	2.301	23.96
SUSPENSION OR DEBARMENT (Others)***	667	6.94
TOTAL	9.605	100.00

Source: www.portaldatransparencia.gov.br/ceis - Nov/13.

* Public Procurement Act and Reverse Auction Act.

** Mostly natural persons.

*** Includes state laws and other non-procurement related laws.

¹³⁹ 12.846/13 Act. Art. 22.

4.8. Judicial Review

The legal systems from both countries allow contractors to appeal in court over a debarment decision. Concerning the Brazilian Legal System, the Constitution states that no one shall be prohibited to go to a court.¹⁴⁰ Usually the main complaints from contractors on both jurisdictions is related to lack of due process such as denial of a hearing. In that regard, the principle of Due Process of Law and the guarantee of adversary system and full defense are all in the Constitution of Brazil.¹⁴¹ These principles implies a very important message for Brazilian SDO's that once these principles are not followed, the contractor probably can revert the sanction in court. Giving support to that message the Brazilian Supreme Court – STF, overruled that due process of law, adversary system and full defense are essential defendants' guarantees in administrative processes.¹⁴² Furthermore, important to mention that mostly of the debarment cases under the Office of the Comptroller General of Brazil responsibility went to judicial review. Nonetheless, in all of them the Superior Court of Justice – STJ¹⁴³, maintained the sanctions.¹⁴⁴

In the U.S. Legal System, the Court of Federal Claims has the jurisdiction over federal procurement¹⁴⁵ and as mentioned earlier, the lack of due process is also the main alleged reason for bidders' protests. Once in court, it will be analyzed if the debarment was arbitrary, unfair or disproportional. In that sense, there is a huge concern about how clear and fair the process of suspension or debarment shall be. This because, as previously described, is not uncommon that contractors get not know about their sanction once they are in the EPLS. Consequently, the reason for debarment must be

¹⁴⁰ Constitution of Brazil. Art. 5, XXXV.

¹⁴¹ Constitution of Brazil, Art. 5, LIV: 'No one shall be deprived of freedom or of his assets without the due process of law'; Art. 5, LV: 'litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defense, with the means and resources inherent to it'.

¹⁴² *Fortesul v. Ministry Head of the Office of the Comptroller General*. STF RMS 28517-DF.

¹⁴³ www.stj.jus.br.

¹⁴⁴ *Construtora Gautama v. Ministry Head of the Office of the Comptroller General*. MS 13.101-DF, *Expresso 21.com Ltda v. Ministry Head of the Office of the Comptroller General*. MS 13.964-DF, *Fortesul v. Ministry Head of the Office of the Comptroller General*. MS 14.134-DF.

¹⁴⁵ 28 USC §1491 (2006); www.uscfc.uscourts.gov.

very clear and state exactly the reason for being sanctioned. There is also some criticism on the due process stated in the FAR and some authors argue that they are not even constitutional despite courts have not overruled on that.¹⁴⁶

5. Promoting Integrity in Public Procurement

Initially is important to understand the meaning of integrity. According to Cibinic, Nash and Yukins,¹⁴⁷ the term is usually a synonym of probity, honesty, and uprightness and has a connotation that a person or legal entity follows ethical and moral principles. In that sense, integrity in public procurement need to be promoted not only in public sector but also in private sector. Previously, the focus was given on enforcement, mainly describing and analyzing government efforts within enforcement and deterrence against corruption via debarment. There is a general consensus that these efforts are extremely important and necessary. However, governments and private sector shall develop a strategies against corruption that includes the promotion of integrity.

5.1. Integrity in the Government

Integrity in public life is requisite for a government official, specially, for these who work in public procurement. In support to that, the procurement system shall ensure certain guidelines to be followed in order to guarantee ethics and a high standard of conduct in the public service. These usually include regulations, procedural frameworks, training, conflict of interest policies and a code of ethics and conduct.

In support to that policies and to demonstrate the commitment of the U.S. government, the FAR has a Subpart called Safeguards with two main titles: Code of Conduct and Procurement Integrity.¹⁴⁸ Related to the first title, it requires that business

¹⁴⁶ See Norton, Gerald P., *The Questionable Constitutionality of Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*

¹⁴⁷ Id. 72. p. 426.

¹⁴⁸ FAR Subpart 3.1.

shall be conducted with impartiality and without special treatments for a bidder or contractor. The second provision predicts that government expenditures requires high public trust and an impeccable standard of conduct. Thirdly, the statute precludes any conflict of interest, including appearance of a conflict of interest within a government contractor.¹⁴⁹ Also, there are provisions on perception of gratuities, gifts, favor, loan or entertainment from current or prospective contractors.¹⁵⁰ The latter, prohibits the disclosure of a bid or proposal information, requires a procurement official to inform immediately employment contacts for non-government employment and predicts a one year quarantine for former procurement officials in some circumstances.¹⁵¹

In Brazil, there are some rules that prohibits public officials from wrongdoing, abuse, misconduct and fraud. Some are binding for all public officials such as the Civilian Public Officials Statute¹⁵² and others are specifically for procurement officials such as the Procurement Act that precludes procurement officials to commit acts that compromise, restricts or frustrates the competitiveness of the bidding process. The Procurement Act also prohibit special treatment for a bidder.¹⁵³ In addition to these statutes and also to demonstrate a compromise with integrity, the new Conflict of Interest Act from 2013¹⁵⁴ has given light to some gray areas within the government such as acting as an employer, consultant or advisor for a private company in matters related to a present or past activity¹⁵⁵ and including, in certain cases, a six-month mandatory quarantine for former public officials.¹⁵⁶

¹⁴⁹ FAR 3.101-1.

¹⁵⁰ FAR 3.101-2.

¹⁵¹ FAR 3.104-3 and 3.104-4.

¹⁵² 8.112/90 Act.

¹⁵³ 8.666/93 Act. Art. 3. Para 1, I and II.

¹⁵⁴ 12.813/13 Act.

¹⁵⁵ Id. 153. Art. 5, II, III, V and VII.

¹⁵⁶ Id. 153. Art. 6, II.

After showing the broad picture from the main statutes from both countries one can see that both nations have a strong compromise on promoting integrity. So one can argue that, there exists lots of statutes that show procurement officials the right way to be followed. Thus, it is important that procurement officials are aware, even before begin to work, on what is allowed and what is not, what is ethical and what is not and most important, to understand that they represent the taxpayers, ultimately citizens that trust in the government. To comply with that government shall give continuous training, especially, with real examples and cases, and ensures that all doubts will be clarified.

5.2. Integrity within the Private Sector

Beyond business risk, corporations must avoid legal and reputational risk. Likewise, corporations are also responsible for society development, and so must interact with responsibility since have a fundamental importance on the promotion of integrity. Also, managers need to ensure that laws, regulations and internal control are being followed.

Relating to Brazil and as analyzed, there are only regulations predicting mandatory debarment. In that rationale, contractors do not have an incentive to create a strong compliance program if they do not operate internationally.¹⁵⁷ This because, once a fraud or abuse arises the result is cross-debarment as the Brazilian Procurement System is punitive.

However, this panorama is about to change dramatically in the beginning of 2014, while will take into force the Clean Company Act. The statute has civil and administrative provisions that establishes corporate liability on acts against national and foreign governments. Besides that, includes as a criteria to decide the severity of the administrative sanctions, as the U.S. FCPA, the existence of compliance programs and a code of business ethics and conduct.¹⁵⁸ Also foresees under the authority of the Office of the Comptroller General, the possibility of leniency agreements in case of full

¹⁵⁷ Mona Clayton. 'Understanding the challenges of Compliance in Brazil: a foreign view over the Anti-Corruption Compliance in an emerging country'. Temas de Anticorrupção & Compliance'. Elsevier. (2012) p. 149-153.

¹⁵⁸ 12.846/13 Act. Art. 7, VII and VIII.

cooperation, including wrongdoing within the Procurement Act.¹⁵⁹ Finally, it binds all branches and government levels to inform suspended and debarred contractors to CGU (CEIS).¹⁶⁰ In conclusion, there will be incentive for leniency agreements since debarment usually means a corporative death penalty.¹⁶¹

In the U.S. Procurement System, integrity has been required for a long time since the FAR states that a prospective contractor must have a ‘satisfactory record of integrity and business ethics’.¹⁶² There is also a recent amendment from 2008 that predicts contracting obligations and states mitigating factors for contractors’ misconduct. In that regard, a contractor shall issue a code of business ethics and conduct upon thirty days of contract award, exercise due diligence to prevent and detect criminal conduct and shall timely disclose violations to the Office of the Inspector General and to the Contracting Officer, a compliance program and internal control system, full cooperation within the government, among others.¹⁶³ Relating to administrative agreements is an informal measure often utilized by agencies and is not predicted in the FAR. The aim is to promote ethical transformations in corporations instead of imposing debarment as the Procurement System is based on responsibility. In addition to that, the GAO recommends that suspension and debarment officials, when considering taking action with respect to a particular contractor, should know whether another agency had ever used an administrative agreement with that contractor, what the terms of the agreement and whether the contractor had complied with the agreement.¹⁶⁴

Analyzing all this corporate integrity movement, some authors argue that companies should have its compliance programs expanded to ethics and compliance programs. This concept ‘stress that an ethical company aims at more than merely following the rules. It stands for a corporate culture, for a culture of values rather than

¹⁵⁹ Id. 158. Arts. 16 and 17.

¹⁶⁰ Id 158. Act. Art. 23.

¹⁶¹ Idem 4.

¹⁶² FAR 9.104-1(d).

¹⁶³ FAR 52.203-13.

¹⁶⁴ Office of Management and Budget Memoranda M-06-26. (2006).

of fear of the law'.¹⁶⁵ Moreover it is true that corporate culture differs from country to country. Nevertheless, as corporations make business around the world one cannot deny that following ethical principles is more universal than ever in the humankind history.

In conclusion to that, one can say that instead of a plain ethics and compliance program there is need for a tailor-made one for each organization and its needs, particularities and type of business. Even though, there are some basic elements that must be in every ethical and compliance program such as risk assessment, management commitment, clear distinction on what is allowed or not (including grey areas), ensure business partners follow the companies code (risk, red flags, due diligence), implementation (breaking barriers, training, helpline), controls (hotline, sanctions system, whistleblower) and reviews.¹⁶⁶

5.3. Collective Action and Integrity Pact

All that being said, it is possible that government enforcement and corporate compliance systems are not enough to curb corruption. Even though there are several sanctions over corrupt contractors, including the most extreme, debarment, government cannot catch all corporate wrongdoing. On the other side, even corporations have an ethics and compliance system that includes disclosure, hotline, ethics code and internal controls, sometimes they are not sufficient to deter corruption.

Once that situation happens, there is a moment when society and all players must fight back together and that is called collective action. The collective action can be defined as a joint action among companies, clients, trade associations, public sector and taxpayer to prevent corruption and can be organized for an specific sector (e.g. defense, civil construction) or a specific contract (e.g. construction of a new metro station).¹⁶⁷ One such good example of that is the Integrity Pact promoted by TI to fight corruption in public procurement. The rationale is to put together bidders, government and civil

¹⁶⁵ Pieth, M. '*Harmonising Anti-Corruption Compliance*'. (2011). Dike. P. 45.

¹⁶⁶ Id. 165. p. 45.

¹⁶⁷ Id. 165. p. 106.

society and make an agreement (Integrity Pact) on a specific bidding, ruling the whole process, including sanctions and transparency clauses.

Lastly, both countries engaged in a joint strategy in 2011 called Open Government Partnership (OGP) with the compromise to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.¹⁶⁸ This is a clear signal that the fight against corruption is a priority in the agendas of Brazil and the U.S. and due to its impact on national economies public procurement is the main concern. Nevertheless, the resources are scarce and the demands are huge. In such environment the only way for a real success is to bring all society players together.¹⁶⁹

¹⁶⁸ www.opengovpartnership.org.

¹⁶⁹ Video regarding collective action: http://www.youtube.com/watch?v=DqzVf8wzdqo&feature=player_detailpage.

CONCLUSION

The aim of this paper was to present and to compare the Brazilian and the U.S. Debarment Systems, its similarities, differences and challenges. The second intent was to analyze the role of integrity measures in the public and the private sectors as a strong remedy to curb corruption in public procurement.

Initially, defining the broad term corruption within the scope of public procurement and its impact on national economies was a priority. So, as presented, the modern idea of corruption escapes from the simplistic definition of a misconduct from a public official for private gain and enters in a very intriguing definition of privatization of public policies. This is very critic and worried the author very much and still. The reason is that once private actors capture the government, all strategic decisions related to infrastructure, economic policy and even sovereignty can be harmed.

Also measuring the level of corruption, effects and expenditures in public procurement from Brazil and the U.S. was necessary for having a benchmark and understand the reason for the rationale of each system. Firstly, the U.S. government expenditures relies extremely in the Defense industry and this is an effect of the military supremacy power that began after the World War II. That analysis was necessary in order to understand the rationale of the discretionary debarment system and its connection with the U.S. interests. Thus, the conclusion is that since military equipment such as aircrafts, ships and rockets require a very sophisticated and complex industry and there are not many suppliers, if debarment become mandatory the country sovereignty could be in jeopardy. So instead of a debarment, giving fines, having leniency agreements (to improve internal controls and compliance systems) and prosecuting corporations criminally, balances the government will to curb wrongdoing and at the same time protects the nation. In addition, since the U.S. system is non-punitive, government put efforts on contractors' responsibility what gives incentives to have a strong ethics and compliance system and usually results in administrative agreements.

In Brazil, that utilizes a mandatory system, there are no incentives for companies to build a reliable compliance system since it is not possible to have administrative agreements under the public procurement regulation. The rationale is linked to two main points: a new democratic regime after twenty years of dictatorship and exposure to a high level of corruption. Thus, the intention was to design a mandatory Debarment system showing a clear punitive path and the lack of tolerance against corruption. Lastly, since the focus was on curbing corruption, a punitive system was required and still there is no possibility for having administrative agreements. Nonetheless, in order to comply with international agreements and conventions a new era on the Brazilian Debarment System is about to come with the Clean Company Act that predicts corporate liability for acts against national and international governments and leniency agreements. So, one can say, the rationale shall change brutally from a mandatory and punitive system to a hybrid system that will enhance competitiveness in the market since companies will have the incentive to adopt robust ethics and compliance programs and will be allowed to settle leniency agreements.

After all, it is possible to affirm that there is no best or perfect Debarment system, but instead there is a reason for the existence of each of them. The most important thing is to understand the rationale on which each system works, the variables involved and the environment it needs to deal with. Thus, in a country that faced a high level of corruption in the 90's like Brazil, it makes sense to have a punitive system that gives more importance to reputation as to serve as an example to the society. Conversely, in the U.S. that has a low level of corruption, based on corruption indices, the rationale of a discretionary debarment system that take into account reputation seems correct.

Despite that, no system is perfect and some adjustments must occur eventually. In the Brazilian case, the main criticism to be made is the lack of a specific committee on debarment, such as ISDC, as long as there is one statute regulating all branches and all levels. Having said that, in our opinion should be created within the Office of the Comptroller General a Committee to release information on procedures, training and issuing regulations. Secondly, the Clean Company Act is about to be regulated with a presidential decree, so there is a need for narrowing provisions on requirements and guidelines for leniency agreements and for corporate compliance programs. Regarding

the U.S. debarment system, the first suggestion is to strengthen the ISDC allowing them to issue a guideline on due process to be used by all agencies. Secondly, since administrative agreements represent a very important part of the Debarment system, the instrument should be ruled within the FAR.

Also, there is no way to fight corruption without promoting integrity within the main actors on the stage of public procurement. In that sense, government and corporations must be aware that they are a part of the society and any action itself have a direct impact on citizens' life. Furthermore, no country has ever extinguished corruption, but no one can say that will stop to combat it. On the fight against corruption in public procurement the audience must participate and, thus, join the actors in the stage. Thus, more the society is involved, less space for wrongdoing is allowed.

Ultimately, as Nagle says the procurement improvements is a process and so is always being remodeled and need some changes since laws cannot change human nature and so, some contracting office somewhere will make a stupid or corrupt decision. Some contractor somewhere will pounce on the situation to defraud the government. Headlines will blare; Congress will overreact; and the cycle of government contracting reforms will continue.¹⁷⁰

¹⁷⁰ See 37. p. 518.

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