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CROSS-DEBARMENT: A STAKEHOLDER ANALYSIS

CHRISTOPHER R. YUKINS*

I. INTRODUCTION

As anti-corruption initiatives around the world gain momentum, one device for fighting corruption—debarment, or "blacklisting,"[1] of corrupt or unqualified contractors and individuals[2]—has emerged as an especially noteworthy tool.[3] Governments and international institutions have developed their own debarment systems, to exclude contractors that have committed certain types of wrongs (bribery or fraud, for example) (the World Bank's approach),[4] or, more broadly, to exclude contractors that pose unacceptable performance or reputational risks because of bad

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1. Under the U.S. federal system, for example, an agency may temporarily *suspend* a contractor or may *debar* that firm for a fixed term. *See* FAR 9.406–9.407 (2011) ("Debarment, Suspension, and Ineligibility"). For simplicity, the discussion here will refer to suspension and debarment collectively as "debarment." The term "blacklisting" is not widely used in the U.S. federal system.

2. While debarment systems may exclude both firms and individuals from future contracting, references here generally will be to "contractors."

3. Although the United Nations Convention Against Corruption (UNCAC) does not cite debarment as an anti-corruption tool, the *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* notes that enacting states should implement appropriate measures, such as debarment, to encourage compliance with UNCAC's anti-corruption requirements. U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION ¶ 338 (2006).

4. This Essay focuses on the World Bank's *sanctions* procedures, used for misconduct related to World Bank-financed projects, rather than on the Bank's internal debarment procedures for its own "corporate" purchasing. *See generally* Todd J. Canni, *Debarment Is No Longer Private World Bank Business: An Examination of the Bank's Distinct Debarment Procedures Used for Corporate Procurements and Financed Projects*, 40 PUB. CONT. L.J. 147 (2010) (exploring Bank's debarment procedures and recommending revisions for use in corporate procurement context); Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277 (2007) (analyzing Bank's measures requiring debarment of corrupt suppliers from Bank-financed projects).

acts or broken internal controls (the U.S. federal government approach[5]).[6]

As debarment systems have matured in parallel, a policy question has emerged: should a contractor debarred in one system be automatically cross-debarred in another?[7] For example, under the multilateral development banks' current cross-debarment scheme, when the World Bank debars a contractor, the other institutions automatically debar that contractor.[8] But when the World Bank debars a contractor,[9] should U.S. agencies—many of which sit only a few blocks away from the World Bank's headquarters in Washington—also debar that contractor?

Although proponents argue that this legal device, commonly known as "cross-debarment," would improve anti-corruption efforts

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5. For brevity, references here to the suspension and debarment system used by the federal government in the United States will simply be to the "U.S." system. In the United States, the federal procurement system accounts for approximately $500 billion in purchases each year. *See Turning the Tide on Contract Spending*, Off. Mgmt. & Budget (Feb. 4, 2011), http://www.whitehouse.gov/blog/2011/02/04/turning-tide-contract-spending.

6. *See, e.g.*, Emily Seymour, Note, *Refining the Source of the Risk: Suspension and Debarment in the Post-Enron Era*, 34 Pub. Cont. L.J. 357, 358 (2005). For a comparison of the U.S. and World Bank debarment systems, see Pascale H. Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 U. Chi. Leg. F. 195, 197–98 (2012); *see also* Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment at the World Bank and Regional Development Banks*, 44 Int'l L. 871, 883–84 (2010); Laurence Boisson de Chazournes & Edouard Fromageau, *Balancing the Scales: The World Bank Sanctions Process and Access to Remedies*, 23 Eur. J. Int'l L. 963, 973 (2012). The United Kingdom recently launched a system for identifying "high risk" contractors—not to blacklist them, but to address the higher performance risk posed by these contractors. *See Strategic Supplier Risk Management Policy* (Nov. 7, 2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80222/20121108_Strategic_Supplier_Risk_Management_Policy.pdf.

7. This concept of cross-debarment is sometimes referred to as "reciprocity." *See, e.g.*, Canni, *supra* note 4, at 167. While generally outside the scope of this Essay, a U.S. state agency may reciprocally exclude contractors that have been debarred by other states or by the federal government. *See, e.g.*, Tenn. Comp. R. & Regs. 1680-05-01.01 (2005) ("This chapter adopts a system of debarment and suspension for the [Tennessee] Department [of Transportation]. It also provides for reciprocal exclusion of persons who have been excluded under Federal law or the laws of other states."); Daniel F. Toomey et al., *Debarment & Suspension / Edition III*, Briefing Papers, Mar. 1989, at 1, 11 ("As a general rule, states with even moderately detailed debarment provisions allow for reciprocal debarment based on debarment in another jurisdiction.").

8. *See* African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group & World Bank Group, Agreement for Mutual Enforcement of Debarment Decisions (Apr. 9, 2010) [hereinafter Agreement for Mutual Enforcement], *available at* http://lnadbg4.adb.org/oai001p.nsf/0/F77A326B818A19C548257853000C2B10/$FILE/cross-debarment-agreement.pdf.

9. *See generally* Canni, *supra* note 4 (exploring Bank's debarment procedures).

by multiplying the impact of debarment actions[10]—contractors could potentially face exclusion from many systems, not just one, when confronted with a possible debarment—it would also mark a significant change in current practice. While cross-debarment is legally required among U.S. federal agencies (when one agency debars a contractor, that contractor is barred from doing business with all federal agencies),[11] and cross-debarment is now the norm among the World Bank and the other multilateral development banks,[12] cross-debarment *between* governments and other institutions is not yet common. Although one government may take note, and make informal inquiries, when another government or institution takes action against a contractor,[13] generally governments are not *bound* by other governments' or institutions' debarment decisions.[14] Assessing cross-debarment therefore requires careful consideration of potential costs and benefits.

One way to explore the costs and benefits of cross-debarment is to assess it through the perspectives of various stakeholders[15] in the procurement and anti-corruption communities, from policymakers to contractors. While focusing on stakeholders' likely views will not resolve some of the thornier legal issues buried inside cross-debarment—for example, how evidence should be shared between different governmental proceedings—a stakeholder analysis will allow us to assess some of the more obvious practical and political issues that cross-debarment may present. To put the stakeholder analysis

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10. *See, e.g.*, Bruce Zagaris, *Multilateral Development Banks Agree on Cross Debarment*, 26 INT'L ENFORCEMENT L. REP. 255, 255 (2010).

11. FAR 9.401 (2011).

12. *See supra* note 6 and accompanying text.

13. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-932, SUSPENSION AND DEBARMENT: DOD HAS ACTIVE REFERRAL PROCESSES, BUT ACTION NEEDED TO PROMOTE TRANSPARENCY (Sept. 2012) (discussing cross-referral among U.S. agencies regarding reports of contractor misconduct).

14. For a discussion of the impact of federal agency debarments across the federal government, see KATE M. MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS (Jan. 20, 2011).

15. The U.K. Department of Finance and Personnel offers this definition of "stakeholder": "an individual or group that has an interest in the proposed change and can influence or impact the success of the change." *Stakeholders*, U.K. DEP'T FIN. & PERSONNEL, http://www.dfpni.gov.uk/stakeholders (last visited Mar. 4, 2013). The foundational work for stakeholder analysis is R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984). For an earlier use of stakeholder theory in procurement, see Steven L. Schooner, Daniel I. Gordon & Jessica L. Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (George Washington Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 1133234, May 8, 2008), *available at* http://ssrn.com/abstract=1133234.

into context, Part II of this Essay will offer a very brief overview of the U.S. and World Bank debarment systems. Drawing, in part, on potential cross-debarment between those two systems as an example, Part III of the Essay will assess how each stakeholder group might view this type of aggressive cross-debarment, between the U.S. and World Bank systems. Part IV, the conclusion, will suggest a balance between the most radical solutions (such as automatic cross-debarment) and tamer approaches, such as vigorous publication of the names of blacklisted contractors.

II. Overview of U.S. and World Bank Debarment Systems

Two systems that stand as potential candidates for cross-debarment are the U.S.[16] and World Bank debarment systems. Although, as is discussed below, the two systems are fundamentally different in many ways, they also share, in loose terms, a common structure, in part because the World Bank system was shaped by the U.S. model.[17]

The U.S. federal debarment system[18] is grounded in an assessment of contractor qualification—of "responsibility," to use the U.S. term.[19] By law, debarment is *not* to be used as a form of punishment,[20] but instead is to be used to exclude contractors that have been convicted of certain crimes (such as bribery) or have

16. *See generally* Joseph D. West et al., *Suspension and Debarment*, Briefing Papers, Aug. 2006, at 1; David Robbins, *As Suspension and Debarment Grows the National Discourse, We Should Not Lose Sight of Broader Procurement Fraud Remedies*, Procurement L., Fall 2012, at 1; Kara M. Sacilotto & Craig Smith, *Suspension and Debarment: Trends and Perspectives*, Procurement L., Fall 2012, at 3; David Robbins et al., *Path of an Investigation: How a Major Contractor's Ethics Office and Air Force Procurement Fraud and Suspension/Debarment Apparatus Deal with Allegations of Potential Fraud and Unethical Conduct*, 40 Pub. Cont. L.J. 595 (2011) [hereinafter Robbins et al., *Path of an Investigation*] (describing the U.S. debarment system).

17. *See, e.g.*, Hans-Joachim Priess, *Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks*, 45 Geo. Wash. Int'l L. Rev. (forthcoming 2013).

18. The discussion here focuses on *discretionary* debarment under the U.S. system, per FAR 9.4 (2011)—not the mandatory debarment required for those that have violated certain statutes. *See generally* John Cibinic, Jr. et al., Formation of Government Contracts 457–70 (4th ed. 2011) (comparing the two types of debarment in U.S. law). The vast majority of U.S. federal exclusions are for statutory violations. *See, e.g.*, U.S. Gov't Accountability Office, GAO-11-739, Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved 7 (2011).

19. FAR 9.402(a) (2011) ("[Agencies] shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that . . . are appropriate means to effectuate this policy.").

20. FAR 9.402(b) (2011) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension

been shown to be in serious breach of other requirements (such as contractual obligations), or for "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor."[21] The debarment procedures used in the U.S. system are "as informal as is practicable," by design, "consistent with principles of fundamental fairness," and are generally structured so as to allow a contractor a fair opportunity to be heard.[22] The informal proceedings mean that a contractor facing a potential debarment in the U.S. system should have a meaningful opportunity to discuss the alleged problem in detail with the debarment official, and (if possible) to negotiate an administrative agreement as a form of settlement.[23]

Within the U.S. federal procurement system, cross-debarment is automatic: once a contractor is debarred by one agency, that contractor is listed on the Excluded Parties List System (EPLS) (now part of the consolidated online System for Award Management (SAM)), and no other federal agency may contract with the excluded party.[24] Because debarment actions are, in effect, cross-debarments among all federal agencies,[25] the Interagency Committee on Debarment and Suspension[26] is authorized to resolve which of the interested federal agencies will be the lead agency with responsibility to initiate suspension or debarment proceedings.[27]

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to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.").

21. FAR 9.406-2 (2011).

22. FAR 9.406-3 (2011) (noting that procedures "shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment").

23. *See generally* Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547 (2009) (discussing the fairness, effectiveness, and integrity of suspension and debarment structures under U.S. law).

24. *See, e.g.*, Pub. L. 103-355, tit. II, § 2455, 108 Stat. 3327 (1994) (codified at 31 U.S.C. § 6101 note (2006)) ("No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded . . . that party from participation in a procurement or nonprocurement activity.").

25. *See* Exec. Order No. 12,689, 3 C.F.R. 235 (1989) ("[T]he debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have government-wide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.").

26. *See Interagency Suspension and Debarment Committee*, EPA http://www.epa.gov/isdc/index.htm (last visited Mar. 4, 2013) (committee home page).

27. *See, e.g.*, FAR 9.402(d) (2011).

This "lead agency" system allows the agency with the largest stake to lead the debarment action, and, if appropriate, to enter into an administrative agreement with the contractor, short of debarment.[28]

In the U.S. system, debarment officials have broad discretion to negotiate administrative agreements with contractors that can show that they are presently responsible.[29] The informality of the debarment procedures means, in practice, that contractors' representatives (generally attorneys) have extensive opportunities to discuss a proposed settlement with the debarment official,[30] an administrative agreement that will typically require the contractor to take extensive remedial measures and, perhaps, to agree to long-term monitoring. The U.S. debarring official is also called upon, though, to coordinate the debarment remedy with other civil and criminal penalties being sought by the government,[31] and, as a statistical matter, administrative agreements are used in a relatively small percentage of cases.[32] If the parties cannot resolve the matter, and the contractor is debarred, that decision may be challenged by the debarred contractor in U.S. district court, under the Administrative Procedure Act (APA).[33] The courts, however, will overturn a debarment under the APA only if the debarment was arbitrary, capricious, an abuse of discretion, or in violation of law[34]—a highly deferential standard of review.

The World Bank debarment system is more rigidly structured than the U.S. system and is far more adjudicative in nature.[35] The World Bank system, unlike the U.S. system, is by its terms a "sanctions" system, intended to sanction contractors that commit certain

28. *See, e.g.*, Richard J. Bednar et al., *United States, in* Self-Cleaning in Public Procurement Law, at 175, 175–81 (Hermann Punder et al. eds., 2009).

29. *See generally* Robbins et al., *Path of an Investigation*, *supra* note 16, at 606 (discussing how the U.S. Air Force evaluates suspension and debarment cases); Sacilotto & Smith, *supra* note 16 (discussing trends in enforcement).

30. *See generally* Steven L. Briggerman, Government Contracts Compliance Handbook § 1:55 (4th ed. 2012).

31. *See* Interagency Suspension & Debarment Comm., FY2011 Report to Congress on the Status of the Federal Suspension and Debarment System 4–5 (2012) [hereinafter FY2011 Report].

32. *See id.* at 22, app. 3.

33. *See, e.g.*, Schickler v. United States, 54 Fed. Cl. 264, 272 (Fed. Cl. 2002).

34. *See, e.g.*, Shane Meat Co., Inc. v. U.S. Dep't of Def., 800 F.2d 334, 336 (3d Cir. 1986).

35. *See, e.g.*, H. Lowell Brown, *Bribery in International Commerce* § 7:28 (Westlaw) (Oct. 2012) (summarizing World Bank debarment procedures).

enumerated violations, including fraud and bribery.[36] The World Bank's Integrity Vice Presidency (INT) initiates an investigation and report regarding the alleged violation, and delivers its findings (a "Statement of Accusations and Evidence") to one of the Bank Group's Evaluation and Suspension Officers (EOs).[37] The EO, in turn, reviews the report, and either rejects the INT's conclusion or makes a recommendation to the Sanctions Board for a sanction.[38] If the EO recommendation is for a debarment in excess of six months, the contractor is presumptively suspended pending the Sanctions Board's review, though the contractor may challenge that temporary suspension.[39] The Sanctions Board will reach an independent decision regarding the appropriate sanction, and its decision imposing a sanction will be published.[40] The sanctions decision is *not* subject to judicial review.[41] When the World Bank sanctions a contractor, that decision is generally binding on the other multilateral development banks that have entered into the banks' multilateral agreement to cross-debar.[42] This system of automatic cross-debarment means, in effect, that a contractor facing exclusion by the World Bank also faces a significant risk of cross-debarment by the other multilateral development banks that have joined this agreement.

As the discussion above reflects, the U.S. and the World Bank systems differ in important ways. Those differences appear to stem from the purpose and context of the two systems. The U.S. discretionary debarment system is, by design, an informal extension of the federal contracting process: much as the contracting officer in any given procurement must assess the prospective contractor's

36. World Bank, World Bank Sanctions Procedures § 1.01(a) (Apr. 15, 2012) ("It is the duty of the World Bank, under its Articles of Agreement, to make arrangements to ensure that funds provided by the Bank are used only for their intended purposes. In furtherance of this duty, the World Bank has established a regime for the sanctioning of firms and individuals that are found to have engaged in specified forms of fraud and corruption in connection with Bank-Financed Projects . . . This regime protects Bank funds and serves as a deterrent upon those who might otherwise engage in the misuse of the proceeds of Bank financing.") (footnote omitted).

37. *See, e.g.*, Anne-Marie Leroy & Frank Fariello, The World Bank Group Sanctions Process and Its Recent Reforms 3 (2012).

38. *See* World Bank, *supra* note 36, arts. II–IV.

39. *Id.* § 4.02.

40. *See id.* §§ 8.01–8.03, 10.01. The World Bank's sanctions decisions published since 2011 are available at http://go.worldbank.org/58RC7DVWW0.

41. *See, e.g.*, Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 Mich. J. Int'l L. 1159, 1177 n.119 (2004).

42. *See* Agreement for Mutual Enforcement, *supra* note 8, para. 4.

present responsibility before making a contract award, the U.S. debarring official must assess the contractor's broader qualifications to work on *all* federal contracts.[43] The core inquiry in the U.S. system is, therefore, on the *performance risk* posed by the contractor; *reputational risk* plays a relatively small role, and the system is *expressly* not intended to punish contractors' misdeeds—or, presumably, to deter misconduct in other contractors. The World Bank system, in contrast, appears to be much more strictly structured, so that the Bank's many stakeholders can be assured that the system is objective and accountable. The World Bank's system narrowly defines sanctionable acts and leaves much less discretion to officials to settle with contractors through administrative agreements. The Bank's sanctions regime seems to focus not on the *performance risk* that unqualified and corrupt contractors pose (hardly surprising, because the Bank does not actually administer contracts during performance), but rather on mitigating the risks that corruption will divert development resources and cause the Bank reputational harm.[44]

Given the broad differences between the U.S. and World Bank systems, the question, then, is whether there could be an effective system of cross-debarment between these two systems. The discussion below reviews this issue, taking into account the highly divergent perspectives that the various stakeholders may bring to the issue.

III. Potential Stakeholders

While the U.S. and World Bank systems are perhaps the most likely candidates for cross-debarment, many systems around the world could, in principle, use debarment decisions from other systems for investigation and, potentially, exclusion. The analysis below assesses how prominent stakeholders might approach this prospect of cross-debarment.

A. *Policymakers and Their Options*

For policymakers—members of Congress, for example—the key question surrounding cross-debarment is what solution, if any, to

43. *See* FAR 9.402(b) (2011).

44. *See, e.g.*, World Bank, Indep. Evaluation Grp., World Bank Country-Level Engagement on Governance and Anticorruption: An Evaluation of the 2007 Strategy and Implementation Plan xviii (2011) ("[The World Bank's] governance and anti-corruption [efforts have] sought to limit exposure to fraud and corruption risks and also manage reputational risks to the Bank and borrower governments.").

apply. There appear to be at least four options for consideration, ranging from maintaining the status quo to giving other systems' debarment decisions presumptive effect.

1. Do Nothing

For the reasons set forth below, stakeholders (including, especially, the contractors themselves) may urge policymakers to do nothing, and simply allow the debarment systems to operate in parallel, without cross-debarment.

2. Call for Officials to Consult Other Systems' Adverse Information

Alternatively, policymakers could call upon debarring officials to consider investigative materials and other adverse information produced in other debarment systems.[45] Here, the problems are practical. For example, not all debarment systems generate investigative reports that can be shared readily with others. While the World Bank generates and distributes its investigative reports (with sensitive information redacted) as a regular matter,[46] U.S. debarment officials do not generate similar investigative reports for distribution. Where those reports are available, however, they would offer a useful starting point for investigation by other debarring officials, in other countries.

A second practical problem is how a legislature might *compel* debarring officials to consider information from other systems.[47] If debarring officials are to retain discretion, logically adverse contractor information from other systems could be swallowed by that discretion—a debarring official could simply decide, in the exercise of discretion, not to follow up on adverse information delivered from another debarring system. Because of the sensitive nature of debarment, and the discretion often involved in debarment decisions, legislators are unlikely to narrow that band of discretion. Thus, legislators are unlikely to *require* debarring officials to take action on adverse information, or to make debarring offi-

45. *See, e.g.*, Williams, *supra* note 4, at 285 (discussing initiatives to share information between debarment systems).

46. World Bank, *supra* note 36, art. 10; *see* World Bank, World Bank Group Sanctions Regime: An Overview 5 (2010).

47. *But cf.* Courtney Hostetler, Note, *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231, 260–61 (2011) (recommending that borrower nations agree, by contract, that a World Bank corruption investigation will trigger an automatic, reciprocal investigation in the borrower nation).

cials' decisions subject to challenge by third parties, such as competing contractors or members of civil society.

Another practical problem is the sheer volume of adverse information likely to flow between systems, as the concept of cross-debarment begins to take hold. Legislators, for example, might require debarring officials to establish databases of adverse information, which could be accessed by officials in other systems and could perhaps (though this would be difficult, because of the sensitive nature of investigative information) be reviewed and challenged by the affected contractors.[48]

Even with a readier means of sharing information, however, there would remain the practical problem of which adverse information debarring officials should be accountable for reviewing. If the city of Paris debars a contractor, for example, should a debarring official in Washington, D.C., be expected to review that information? What if the debarred company is a multinational corporation, and bribed a number of Indian officials? When would the debarring official reasonably be expected to recognize the *materiality* of the adverse information?

One approach to resolve these practical problems may be to use the contract award process as the catalyst for review. If adverse information from investigations undertaken in other debarment systems were available, in some form, to contracting officials as they considered an award to an affected contractor, the contracting official could take that information into account when considering the qualifications of the contractor and could consult with his or her debarring official if the adverse information seemed to warrant possible debarment. This would square with those procurement regimes that already require contracting officials to take reasonable account of this sort of adverse information before award.[49] This approach—using the award process and the contracting official as a gateway to possibly broader review by the debarring official—would focus resources, and inquiry, upon those firms that

48. This is the approach currently used for past performance information in the U.S. federal procurement system. Contracting officers compile information on contractors' performance, and information regarding a specific contractor can be accessed, and challenged, by that affected contractor. *See, e.g.*, FAR 42.15 (2011).

49. *See, e.g.*, Directive 2004/18/EC, art. 45, of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L 134) 114, 120–21 (providing that those convicted of certain crimes, of which the contracting authority is aware, must be excluded from participation in a public contract); FAR 52.209-5 (2011) (contractor must certify to its present responsibility, including no convictions, debarments, etc.).

were actually prospective contractors. This flexible approach would also allow contracting and debarring officials to focus their efforts on those firms that posed the most material risks, based on local norms and practices—a topic that is discussed in further detail below.

The preceding discussion reviewed one possible means of making cross-debarment work: sharing adverse information, such as investigative information, between countries and systems, and allowing contracting officers, as part of the contract award process, to review that information and potentially to bring it to the attention of debarring officials. There are at least two obvious problems with that approach, however: (1) there is a significant risk that contracting officials will misunderstand or mishandle sensitive investigative information, and (2) it is not clear how prospective contractors could respond to adverse information, if they could not (as is almost always the case) be given access to investigative files. The following section suggests an alternative, narrower approach to address these concerns, at least in part.

3. Call for Contracting and Debarring Officials to Take Other Systems' Debarment Decisions into Account

Another approach legislators might consider is having contracting officials (in the period preceding contract award) and debarring officials review *debarment actions* taken in other systems. Those debarment actions could be memorialized in central, online databases, much as there is a central resource on U.S. federal debarments. As databases proliferated, they could be linked electronically, relatively simply, or their review could be made a mandatory part of contract award procedures. Because debarment actions are relatively straightforward and public acts, they would offer clearer points of reference, without forcing disclosure of sensitive, underlying investigative information. The databases could, however, still give contact information for those officials that led an investigation or debarment action, so that they could be contacted for background information, if appropriate. An affected contractor, moreover, could respond to the prior debarment, perhaps by offering an excuse or explanation, or (more likely) by describing the remedial measures taken to resolve the problems that caused the debarment. These stakeholders' concerns are discussed in greater detail below.

4. Adopting Other Systems' Debarment Decisions

Another, more radical approach would simply be to adopt other systems' debarment decisions, so that a contractor debarred in one system would be cross-debarred, automatically, in another, "receiving" system. Under this approach, the "receiving" system would not need any details regarding the original debarment—the debarment itself would trigger the legal bar in the "receiving" system. The "receiving" system could, of course, allow exceptions to the automatic debarment, if for example a contracting entity in the "receiving" procurement system had an urgent need for the goods or services offered by the debarred contractor.

This type of automatic cross-debarment probably would raise a number of potential issues for stakeholders, discussed further below, such as due process concerns for the affected contractors. In addition, automatic cross-debarment would raise additional issues for policymakers, as discussed below.

a. Disproportionate Debarment

As noted, different debarment systems focus on different risks. The U.S. debarment system takes an open-ended approach to address performance risk and will, under appropriate circumstances, tolerate wayward contractors so long as those contractors have undertaken strong remedial measures. The World Bank system, in contrast, excludes contractors that have violated a defined set of offenses and focuses less on general performance risk. If each of these two systems automatically cross-debarred those debarred by the other, each system would likely debar "too many" contractors. The World Bank would automatically debar contractors excluded by the U.S. system for contract performance risks that the World Bank (which is the lender, not the contracting entity) might otherwise tolerate. The U.S. system, in contrast, might automatically debar contractors excluded by the World Bank, even if those contractors had undertaken remedial measures—measures that might otherwise render the contractors qualified for federal procurement.

b. Indirect Challenges

Cross-debarment could create new and unforeseen lines of challenge. For example, although the World Bank's debarment decisions are normally (under principles of sovereign immunity) immune from judicial review, if U.S. agencies automatically cross-

debarred those excluded by the Bank, those excluded contractors might use the U.S. courts to challenge the exclusion—in other words, to bring a judicial challenge to a debarment decision that would otherwise be immune from review.[50]

Because costs like these are not obvious or intuitive, policymakers would need careful input from other stakeholders before proceeding with cross-debarment. The discussion below reviews other stakeholders' likely views in the ongoing policy debate.

B. *Civil Society Will Likely Support Cross-Debarment*

Members of civil society[51] consistently press for broader debarment of corrupt contractors, and they are likely to support cross-debarment as well.[52] Civil society groups favor broader blacklisting for a wide variety of reasons, of course, but one may be that civil society lacks the resources to monitor contracting on a day-to-day basis or to assess the success of contractors' remedial efforts. Where a contractor poses a risk of corruption, therefore, civil society is likely to press hard for debarment.

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50. This scenario already exists for the Millennium Challenge Corporation, an independent U.S. agency tasked with foreign aid. *See* MILLENNIUM CHALLENGE CORP., GUIDANCE ON EXCLUDED PARTIES VERIFICATION PROCEDURES IN MCA ENTITY PROGRAM PROCUREMENTS 1 (2008) ("A firm declared ineligible by The World Bank for any reasons including in accordance with The World Bank Group anti-corruption policies, shall be ineligible to be awarded an MCC-funded contract during the period of time that the firm is sanctioned by The World Bank.").

51. The World Bank offers the following definition of "civil society":

> The World Bank has adopted a definition of civil society developed by a number of leading research centers: "the term civil society to refer to the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide of array of organizations: community groups, non-governmental organizations (NGOs), labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations."

Defining Civil Society, WORLD BANK, http://go.worldbank.org/4CE7W046K0 (last updated Feb. 8, 2013).

52. *See, e.g.*, Transparency Int'l Secretariat, *TI Welcomes Multilateral Development Banks' Commitment to Fight Corruption Together*, TRANSPARENCY INT'L (Apr. 9, 2010), http://www.transparency.org/news/pressrelease/ti_welcomes_multilateral_development_banks_commitment_to_fight_corruption_t (endorsing MDBs' cross-debarment initiative); Press Release, Democratic Alliance (Cape Town), South Africa: Blacklist Contractors Responsible for R50 Billion RDP Housing Failure (Aug. 5, 2012), *available at* http://allafrica.com/stories/201208050536.html (South African political party urging debarment of contractors); *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, PROJECT ON GOV'T OVERSIGHT (May 10, 2002), http://pogoarchive.pub30.convio.net/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html.

As a logical extension of their support for stricter debarment rules, these same civil society groups are likely to press for cross-debarment. Among the options for cross-debarment reviewed above, the strictest—automatic cross-debarment—may prove the most attractive for civil society, because members of civil society also have difficulty assessing or challenging officials' decisions *not* to debar under the more flexible options. On balance, therefore, members of civil society are the most likely to press for automatic cross-debarment.

C. *Anti-Corruption Authorities*

Officials charged with assessing contractors for suspension and debarment are less likely, however, to support automatic cross-debarment. While automatic debarment would reduce administrative costs, it would also rob suspension and debarment officials of discretion—the discretion, for example, to accept the risks posed by a wayward contractor, if the contractor offers unique business benefits or promises to correct its past mistakes.[53] Automatic cross-debarment would likely put suspension and debarment authorities in a cross-fire, potentially criticized both by government customers (who might want more discretion to deal with essential contractors) and by contractors (who would likely claim that automatic debarment stripped them of normal due process protections).

For many of the same reasons, investigators and prosecutors might resist automatic debarment. Discretionary debarment leaves officials with leeway and leverage to pressure contractors with debarment, and so to convince them to cooperate in any investigation and compensate the government for any damage caused.[54] Anti-corruption officials are less likely to squeeze restitution and other remedies from contractors if debarment is automatic and not a flexible negotiating tool. Moreover, automatic cross-debarment would bypass any system of agency coordination, which might otherwise allow the agency with the greatest interest to "lead" the debarment discussions. On balance, therefore, while anti-corruption officials are likely to support increased publicity about debarment—an enhanced blacklist, in other words—those officials are unlikely to press hard for automatic cross-debarment.

53. *See, e.g.*, Jennifer S. Zucker & Joseph Fratarcangeli, *Administrative Compliance Agreements: An Effective Tool in the Suspension and Debarment Process*, 2005 Army L. 19, 19.

54. For an interesting discussion of a U.S. agency's coordination of debarment with other remedies, see Robbins et al., *Path of an Investigation*, *supra* note 16 (discussing debarment in the U.S. Air Force).

D. *Contracting Agencies*

For the reasons touched on above, contracting agencies are likely to take a dim view of transnational, automatic debarment. While they would likely welcome information on contractors debarred elsewhere, especially if the bases for debarment are plain and accessible, automatic cross-debarment could cut off agencies' access to important suppliers and contractors. Buying agencies would likely insist on retaining discretion to bypass debarment and to continue to buy, with appropriate safeguards, from especially important or repentant contractors.

E. *Contractors*

The last, vital stakeholders in this debate are the contractors themselves. They are likely to oppose cross-debarment quite fiercely, arguing that automatic cross-debarment—which could result in worldwide debarment, as cross-debarments took effect like falling dominos across the globe—would deprive them of critical due process protections.[55] Contractors are likely to point out the obvious differences between debarment systems around the world and to argue that different systems, with very different standards, diverge too widely to warrant automatic cross-debarment. At the same time, however, contractors are less likely to oppose the next-lesser option of publishing more information on debarment so that officials in other jurisdictions can weigh the risk posed by contractors that have been debarred elsewhere. Contractors are more likely simply to insist that, when blacklists are published, they fully explain the bases for debarment so that other authorities can fairly weigh that information.

IV. CONCLUSION

As the discussion above reflects, while automatic cross-debarment might enhance anti-corruption efforts, cross-debarment is likely to raise real—and, in most cases, legitimate—concerns in the affected stakeholder communities. Stakeholders would more likely coalesce around a more moderate approach, which ensured that

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55. *See, e.g.*, Ralph C. Nash, *Suspension and Debarment: Protecting the Government by Denying Due Process to Contractors*, 23 NASH & CIBINIC REP. 102, 103–05, ¶ 36 (2009) (discussing due process concerns in debarment); Pascale H. Dubois & Aileen E. Nowlan, *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 YALE J. INT'L L. ONLINE 15 (2010) (discussing protections built into World Bank procedures).

debarments are fully publicized, and that officials in other nations had due notice of debarments, but which left those officials with flexibility and discretion in addressing a foreign blacklist.