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## International Procurement Developments in 2015: Structural Reforms to International Procurement Laws

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**INTERNATIONAL PROCUREMENT DEVELOPMENTS IN 2015:  
STRUCTURAL REFORMS TO INTERNATIONAL PROCUREMENT LAWS**

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**I. INTRODUCTION**

This past year saw major structural changes to international procurement rules -- including important shifts in Canada's laws, European procurement regulations which favor open, multilateral negotiations, and new, more liberal procurement policies at the World Bank -- all of which are likely to help open procurement markets around the world.

**II. CANADA UNDERTAKES IMPORTANT REFORMS**

**A. Transpacific Partnership Agreement -- Canada's Procurement Offer**

On November 5, 2015, the legal text of the Trans-Pacific Partnership (TPP) agreement was released to the public; it is available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/final\\_agreement-accord\\_finale.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/final_agreement-accord_finale.aspx?lang=eng). The TPP is an ambitious trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam. It has a procurement-related chapter, Chapter 15. The TPP must still be ratified by the Parliament of Canada and implemented into Canadian law before it will become effective in Canada.

The Canadian federal and sub-federal procurement market is valued at over C\$150 million per year. The TPP will subject the procurements of sub-federal governments, which have been traditionally exempt from international procurement treaties, to its disciplines.

The TPP Procurement Chapter is based on the disciplines in the World Trade Organization (WTO) *Agreement on Government Procurement*, [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm). This will hopefully help to open procurement in markets that have traditionally been difficult to enter, including Australia, Malaysia and Vietnam.

**1. Procurement Disciplines**

Signatories to the TPP have committed to the core disciplines of national treatment and non-discrimination. The TPP guarantees procedural fairness for suppliers by requiring non-discrimination, transparency, impartiality and accountability in the procurement process. Commitments include provisions to publish relevant information in a timely manner, to allow suppliers to obtain the tender documentation in a timely manner, to treat tenders fairly and impartially, and to maintain confidentiality of tenders. In addition, the Parties agree to use fair and objective technical specifications, to award contracts based solely on the evaluation criteria specified in the tender documentation (without resort to hidden criteria), and to establish due process procedures to question or review complaints about an award, including the provision for debriefings and the establishment of a bid review mechanism.

**2. NAFTA Implications**

The United States, Canada, and Mexico have agreed to harmonize the tendering provisions of Chapter 10 of NAFTA with the TPP procurement discipline. See Letter from Canada to the United States

at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/15-L-01.aspx?lang=eng> and Letter from Canada to the United States and Mexico at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/15-L-02.aspx?lang=eng>. This includes a standardization of the monetary thresholds that will apply to procurement activities covered by NAFTA. This will reduce the administrative burden on the governments by removing a multiplicity of thresholds.

### **3. Anti-Corruption Measures**

Article 15.8 commits each Party to maintain measures to address corruption in its government procurement regime. It provides:

Each Party shall ensure that criminal or administrative measures exist to address corruption in its government procurement. These measures may include procedures to render ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to government procurement in the Party's territory. Each Party shall also ensure that it has in place policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over a procurement.

As part of Canada's commitment under Article 15.8, on July 3, 2015, the Government of Canada implemented a new federal government-wide Integrity Regime for procurement of goods and services, <http://www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-background-eng.html>, and real property transactions to help foster ethical business practices, ensure due process and uphold the public trust. This new regime is discussed below.

#### **B. Government of Canada's Integrity Regime**

On July 3, 2015, Canada implemented a new government-wide "Integrity Regime" for procurement and real property transactions. <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>. The Integrity Regime replaces the previous Integrity Framework implemented in 2012. Significant changes include the elimination of automatic debarment for the conduct of an "affiliate," and the reduction of the debarment period from ten years to five years where suppliers can demonstrate that they have cooperated with law enforcement or undertaken remedial actions. The new Integrity Regime is implemented through Policy Notification 107R1, available at <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R1>.

The Integrity Regime will be administered by Public Works and Government Services Canada (PWGSC) on behalf of the Government of Canada and will be governed by Memoranda of Understanding between PWGSC and other departments and agencies. PWGSC currently has Memoranda of Understanding with 25 federal government departments, agencies, tribunals and commissions.

## **1. Conduct Which Will Debar a Supplier**

Under the new Integrity Regime, a supplier is ineligible to do business with the Government if it, or any members of its board of directors, have been convicted or discharged (either absolutely or conditionally) in the last three (3) years of any of the following offences under Canadian law or a “similar foreign offence”:

- payment of a contingency fee to a person to whom the *Lobbying Act* applies;
- corruption, collusion, bid-rigging or any other anti-competitive activity under the *Competition Act*;
- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official;
- offences in relation to drug trafficking;
- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contracts;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

All suppliers are required to sign a certification when submitting their bids that the company, its directors, and its affiliates have not been charged, convicted, or absolutely/conditionally discharged of the above offences or similar foreign offences in the past three years. The provision of a false or misleading certifications is, in and of itself, cause for debarment.

The Government does maintain an Ineligibility List which contains the names of companies that were determined ineligible by Public Works and Government Services Canada (PWGSC), available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html>.

## **2. Length of Debarment**

The debarment period is 10 years from the date of determination. However, if a debarred supplier addresses the cause of the offense or cooperates with Government authorities fully, it can obtain a reduction of the debarment period. The length of the debarment may be reduced by up to five years, but will also require an administrative agreement which allows the government to monitor the supplier’s ongoing behavior.

The debarment period runs in perpetuity for those suppliers that are convicted of committing frauds against the Government under either the

*Criminal Code* or the *Financial Administration Act*. All such suppliers will be permanently debarred until a record suspension is obtained. Unlike a regular debarred supplier, no public interest exception or administrative agreement is possible for a company subject to permanent debarment.

### **3. Suspension**

The Government of Canada has the option to suspend a supplier for up to 18 months immediately upon that supplier being charged with or admitting guilt to any of the above listed offences, per the Ineligibility and Suspension Policy (available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>). There is no requirement that the supplier or one of its affiliates actually be convicted of the offence in question and, at this stage, there does not appear to be any sort of compensation mechanism if the supplier is ultimately vindicated. The Regime does not explicitly extend this suspension provision to violations by affiliates of the supplier, yet the Regime also requires suppliers to certify that neither they nor any affiliates have been charged with a listed offence or foreign equivalent.

The changes also allow for suppliers that have been charged to request an immediate determination of their debarment status. While this may result in immediate debarment, this will at least “start the clock” on the debarment period. Otherwise, such companies may be subject to a full 18-month suspension pending charges and investigation, and only then begin a 5-10 year debarment at that point.

### **4. Termination of Existing Contracts**

If a supplier is convicted of a listed offense, the Government of Canada is entitled to terminate the contract. Three key issues exist in regards to the termination provision. First, it only applies in situations where there is a conviction, and not simply a charge. Second, termination is permissive but not mandatory – the Government allows suppliers to submit argument as to why the contract should not be terminated. Third, if the Government chooses not to terminate the contract, it must put in place an administrative agreement for the contract. The agreement must include provisions for third party monitoring of the contract.

### **5. Administrative Agreements**

As indicated above, there are certain circumstances where the Government mandates an administrative agreement be put in place with a supplier. (The administrative agreements can be found at <http://www.tpsgc-pwgsc.gc.ca/ci-if/ententes-agreements-eng.html>.) These agreements are meant to cover situations which require caution and additional monitoring. Agreements will generally be conditional and require suppliers to engage in remedial action and take further compliance measures.

There are four instances where such administrative agreements are mandatory:

- an ineligible supplier has had its ineligibility period reduced;
- in lieu of suspending a supplier;

- a public interest exception was invoked with a ineligible supplier; or
- a decision is made to continue with an existing contract with a supplier which has become non-compliant with the regime.

These agreements must have provisions for monitoring by qualified independent third parties paid for and retained by the supplier.

SNC-Lavalin Group Inc. is currently the only company which is registered as having an administrative agreement allowing them to continue to do with the Government of Canada pursuant to the Integrity Regime.

## **6. Affiliate Conduct**

Under the new regime, suppliers will no longer be debarred because an affiliate violated one of the listed offences. Instead, the Integrity Regime requires that the affiliate be assessed by an independent third party retained by the supplier to determine whether the supplier had any participation of involvement in the underlying offence. If the supplier can show that they had no such involvement, they will not be debarred.

This is a major change from the previous Integrity Framework – where a supplier would be debarred for 10 years for actions by an affiliate over which the supplier had no control and for conduct in which the supplier had no participation.

## **7. Subcontractors**

The new Integrity Regime is also binding on the subcontractors of any supplier. *See Application of the Integrity Regime to Subcontractors*, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/bulletins/ari-air-eng.html>. Suppliers are required to refrain from entering into a subcontract with a debarred entity. Knowingly entering into such a subcontract will debar the supplier for five years. This is likely to be assessed on the basis of strict liability, and as such all contractors should implement due diligence procedures specifically directed at the compliance of any potential subcontractor with the Integrity Regime.

## **8. Public Interest Exception**

The Government of Canada has the discretion to issue a Public Interest Exception. Factors that will influence the granting of such an exception include: where no other supplier can perform the contract, there are emergent circumstances or national security concerns, or potential exists for material injury to the financial interests of the Government if the exception is not granted. *See Public Interest Exceptions Guidelines*, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/bulletins/exceptions-eng.html>.

## **C. Canada-European Union Comprehensive Economic and Trade Agreement**

On September 26, 2014, Canada and the European Commission signed the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). Canada's offer under CETA included deep and far-



reaching procurement commitments by the provinces and MASH sector (municipalities, academic, school boards and hospitals) and utilities in Canada. CETA has not been implemented into Canadian law, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng>, and it is likely that full implementation will take a significant amount of time.

### **III. NEW EUROPEAN PROCUREMENT RULES**

In April 2014 the legislative package modernizing EU public procurement law (including Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and the Directive 2014/23/EU on the award of concession contracts (together the EU Procurement Directives)) entered into force. *See generally An American Perspective on the New European Public Procurement Directives*, 2015 Gov't Contracts Year in Review Briefs 3. Member states have to transpose relevant directives into national law by (at the latest) April 18, 2016 – some member states, e.g. the UK and Hungary, have already done so. *E.g.*, United Kingdom, The Public Contracts Regulation 2015, [http://www.legislation.gov.uk/uksi/2015/102/pdfs/ukxi\\_20150102\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/102/pdfs/ukxi_20150102_en.pdf). Other member states are still in the process of finalizing the implementing legislation. In Germany, for example, a part of the new legislation, i.e., the revised Act Against Restraints of Competition (GWB 2016) has already been adopted on 17th December 2015 by the German legislature. Other parts are still in the process of being finalized.

The EU Procurement Directives mainly aim to make the rules simpler and more efficient for public purchasers and companies and furthermore to provide the best value for money for public purchases while respecting the principles of transparency and competition. The key changes to existing EU public procurement law are summarized below.

#### **A. Strategic Objectives in the New Laws**

According to the new legal framework, contracting authorities are allowed to make greater use of public procurement in order to support strategic objectives, including in particular social and environmental aspects. *See, e.g.*, UK Crown Commercial Service, *A Brief Guide to the EU Public Contracts Directive (2014)*, at 5 (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472985/A\\_Brief\\_Guide\\_to\\_the\\_EU\\_Public\\_Contract\\_Directive\\_2014\\_-\\_Oct\\_2015\\_\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472985/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Oct_2015__1_.pdf).

In Germany, for example, Section 97 (3) GWB 2016 states as one of the principles that social and environmental aspects may be taken into account when awarding contracts. In addition the possibility to use environmental and social aspects as award criteria has been extended (see Section 127 GWB 2016).

#### **B. Changes to Procurement Procedures**

The EU legislators also amended the rules on different procurement procedures to be more efficient, more simple and more flexible. Unlike the

existing rules, according to Article 26 (2) of the Directive 2014/24/EU, contracting authorities have a free choice between open procedures – under which any interested economic operator may submit a bid in response to a call for competition – and restricted procedures – under which a selection is made of those who respond to the advertisement and only they are invited to submit a tender for the contract.

According to the EU Procurement Directives, contracting authorities are also given more freedom to negotiate. For example, constraints on using the competitive procedure with negotiation have been relaxed. Art. 26(4) Directive 2014/24/EU defines additional and – unlike the existing rules – more flexible situations that justify the application of a competitive procedure with negotiation. Moreover, the scope of application of the competitive dialogue procedure has been broadened. *See, e.g., Michael Burnett, The New Rules for Competitive Dialogue and the Competitive Procedure with Negotiation in Directive 2014/24-What Might They Mean for PPP?, 10 Pub. Proc. Pub. Priv. Part. L. Rev. 62 (2015).* According to Art. 26 (4) Directive 2014/24/EU member states now have the obligation to ensure that contracting authorities can apply a competitive dialogue in the stated situations.

Furthermore, a new procurement procedure, the innovation partnership procedure, was introduced in Article 31 Directive 2014/24/EU, intending to allow scope for more innovative ideas. *See, e.g., Marta Andrecka, Innovation Partnership in the New Public Procurement Regime - A Shift of Focus from Procedural to Contractual Issues?, 2015 Pub. Proc. L. Rev. 48; Pedro Cerqueira Gomes, The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive, 2014 Pub. Proc. L. Rev. 211.* This specific procedure aims to allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works without the need for a separate procurement procedure for the purchase.

### **C. Electronic Procurement**

In order to simplify procurement procedures and increase their efficiency, the EU Procurement Directives regulate that in principle electronic communication will become mandatory. *See generally* European Commission, *E-Procurement*, [http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/index_en.htm). The respective implementing deadline is October 18, 2018 for public contracts, and April 18, 2017 for central purchasing bodies.

### **D. Cross-Border Joint Procurement**

According to the new EU Procurement Directives, contracting authorities from one member state may acquire services from a central purchasing body in another country. *See, e.g., Piotr Bogdanowicz, Cross-Border Interest and Concession Contracts: A Critical Approach, 10 Eur. Pub. Proc. Pub. Priv. Part. L. Rev. 83 (2015).*

Furthermore, Article 39 (4) Directive 2014/24/EU states that several contracting authorities from different member states may also jointly



award a public contract. Unless the necessary elements have been regulated by an international agreement concluded by the members states concerned, the participating contracting authorities shall conclude an agreement that also determines the relevant applicable national provisions.

In addition, several contracting authorities from different member states may also set up a joint entity in order to jointly award a public contract. Article 39 (5) Directive 2014/24/EU. In this case the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of either the Member State where the joint entity has its registered office or where the joint entity is carrying out its activities.

### **E. Selection Criteria**

As part of the reform, the provisions on selection criteria were amended. The exclusion grounds for various forms of misconduct have been extended and the concept of self-cleaning has been introduced as a defense to exclusion. *See generally Self-Cleaning in Public Procurement Law* (Hermann Pünder, Hans-Joachim Priess, and Sue Arrowsmith, eds., Carl Heymanns 2009). In addition, contracting authorities are generally required to accept a self-declaration (called the European Single Procurement Document) as a means of proof and certificates, extracts from official registers, etc. may only be submitted by the winning bidder.

### **F. Contract Management**

Finally, provisions concerning modifications of contracts during their term and concerning termination of contracts have been included in the EU Procurement Directives.

## **IV. THE WORLD BANK'S PROCUREMENT REFORMS**

The World Bank is finalizing reforms of its procurement policies for borrowers. *See, e.g.,* John Altenburg, Jr. & Aaron Ralph, *Feature Comment: The New World Bank Procurement Framework*, 57 *Gov. Cont.* ¶ 234 (Aug. 5, 2015). Historically, the World Bank's procurement guidelines, available at <http://go.worldbank.org/1KKD1KNT40>, had established baseline requirements which borrower nations had to meet to qualify for World Bank financing. *See, e.g.,* Whitney Debevoise & Christopher Yukins, *Feature Comment: Assessing the World Bank's Proposed Revision of Its Procurement Guidelines*, 52 *GC* ¶ 180 (May 26, 2010). Those requirements were often considered overly restrictive, and there was an abiding concern that the World Bank's procurement requirements were, ironically, themselves constraining development.

The World Bank responded to these criticisms by drafting new procurement policies that leave borrower nations with far greater discretion, and far less World Bank oversight. The Bank launched a broad consultation process in 2013, which led to a proposed new framework for Bank-financed procurement which was published in October 2013. <http://siteresources.worldbank.org/PROCUREMENT/Resources/ProcurementProposedNew->

FrameworkOctober2013Final.pdf. The proposed framework reflected comments from stakeholders, who urged the Bank to:

- Allow for more innovative procurement methods, best suited to the needs of the project.
- Permit borrowers to use their own procurement rules and procedures (“country systems”), “with due caution and management of risk,” in important part so that borrowers can develop their own internal procurement capacities.
- Emphasize capacity-building, especially in lower-income countries.
- Put more focus on quality and performance during contract administration.
- Be open to other means of improved governance and integrity, “including transparency, access to information, monitoring by civil society, internal controls, . . . more effective audits, and dispute resolution.”
- Focus anew on fraud and corruption, including collusion, throughout the procurement cycle.
- Emphasize a “global context” for public procurement, with an eye to harmonization, international standards, assessments of nations’ capacity, procurement reform, and public sector management.

World Bank, *Procurement Policy Review: Feedback from Consultations with External Stakeholders -- Executive Summary*, <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>. The new policy framework was initially endorsed by the Bank’s Executive Directors (the representatives of the major shareholder nations) in November 2013. <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>.

On July 21, 2015, after further consultations and review, the Bank’s Executive Directors approved the new “Procurement Framework,” which is to go into effect in 2016 after World Bank management completes a readiness review. Under the new framework, the Bank will finalize and issue the new Procurement Directive, Procedure and Regulations, to replace the current Procurement Operational Policy (OP 11.00), Procurement Bank Policy (BP 11.00), and -- perhaps most importantly -- the Bank’s Procurement Guidelines, which have helped guide procurement in developing nations for many decades. As the Bank described the new framework:

Value for money, sustainable development and integrity are the vision of the new approach. It will help clients get better development results as it gives the World Bank the space and capacity to significantly increase its support to help countries develop their own procurement systems. For the first time, the World Bank will allow any contract award decisions to be based on criteria other than lowest price, including quality and sustainability.

<http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>.

Because of the prominent role that the World Bank plays in developing nations' procurement markets, the World Bank's reforms are likely to have a profound impact. There are several key aspects worth emphasizing:

**Risk-Based Management:** Under the new approach, the Bank will scrutinize fewer projects more heavily, depending on size and perceived project risk. *See World Bank, Procurement in World Bank Investment Project Financing -- Phase II: The New Procurement Framework 2* (June 11, 2015). The Bank's goal is to conserve its resources, and to focus its limited oversight on the largest projects. Because contractors' risks are not always proportionate to project size -- corruption risks, for example, may even be inversely proportional to project size, as smaller projects may attract more petty corruption -- contractors working in these markets may need to redraw their risk assessments, cognizant that the Bank's oversight over small- and mid-sized Bank-financed projects may well recede.

**Best Value and Competitive Dialogue:** The new approach moves decisively away from the Bank's traditional emphasis on low-price awards using (in U.S. parlance) sealed bidding. The Bank's new approach makes it clear that borrowers (governments) using Bank financing will be able to rely on other, more liberal methods, such as (in U.S. terms) competitive negotiations (often called "competitive dialogues" internationally, and in the Bank's policy documents), in order to identify best value (or "value for money," as it is sometimes known). This has profound importance for exporters from the United States and the European Union, who typically offer high-technology, high-price, high-value equipment and services, and will almost invariably fail in low-price competitions. In their discussions with public acquisition planners, these firms may point out that at the Bank, as elsewhere (see above, regarding the new European Union procurement rules), there is growing consensus that procurements should rely more on competitive multilateral negotiations, and far less on low-price sealed bidding.

**Bid Complaints and Fraud:** Under the new framework, the Bank has promised a new, more transparent system for addressing complaints from prospective contractors. *See Phase II -- The New Procurement Framework, supra*, at 2. The Bank's published documents, however, have not fully defined how that complaints process is to be structured, perhaps because the Bank remains chary of becoming a recognized forum for formalized bid challenges involving Bank-financed projects. Contractors should remain vigilant, as the Bank defines the new complaints process in the near future. Contractors should also recognize that the Bank, and its sanctions system, are likely to shift attention and resources to fraud in contract administration. Many observers have long argued that the Bank has done a poor job of policing fraud in the projects it finances. The Bank therefore is likely to develop strategies to enhance its ability, and the ability of its borrowers, to combat fraud in Bank-financed projects. *See id.* at 4.

**Country Systems and Capacity Development:** Historically, developing nations using Bank financing could be required to use two sets of procurement rules: their own “country systems,” and, on Bank-financed projects, a separate set of rules written to be consistent with the Bank’s Procurement Guidelines. This was inefficient, and slowed development of borrower nations’ own procurement regimes. The new World Bank procurement framework will allow some purchasing agencies in some borrower nations to use their own procurement rules (termed “Alternative Procurement Arrangements”) for Bank-financed procurement, but only if those agencies can meet certain benchmarks. *See World Bank, Draft Guidance: Methodology to Assess Alternative Procurement Arrangements in Borrower Implementing Agencies for Procurements Financed Under IPF* (2015). The benchmarks remain somewhat fluid -- the Bank may, for example, be more liberal in allowing the use of country systems if a borrower nation has joined the World Trade Organization’s Government Procurement Agreement (GPA). *See id.* at 41. Finally, and importantly, because the Bank recognizes that many country procurement systems may still be developing, the Bank has committed to much broader efforts on capacity-building in procurement. *See generally* Christopher Yukins & James Ruairi Macdonald, *Capacity Building in Public Procurement: Burma/Myanmar -- A Case Study*, 44 Pub. Cont. L.J. 749 (2015).

## V. ANTI-CORRUPTION DEVELOPMENTS

As the discussion above reflects, procurement systems around the world are incorporating very common anti-corruption systems, and that pattern only deepened in 2015. This harmonized approach is driven, in part, by trade agreements, which are an increasingly important source of harmonization and consistency.

**Compliance Systems:** The basic requirements for compliance systems, for example, are now largely uniform in both industrialized and developing nations. *See, e.g.*, U.S. Department of Justice & U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 2012), <http://www.justice.gov/criminal-fraud/fcpa-guidance>. As noted, Article 57 of the new European procurement 2014/24/EU recognized that compliance and remedial efforts (“self-cleaning,” in European terms) play an important role for contractors, tainted by corruption, that want to engage again in public procurement markets. The European nations implementing the directives in their own laws (see above) are now giving more definition to what, exactly, those compliance efforts are to entail.

**Bid Challenges:** Driven in part by international trade agreements calling for effective bid challenge (in the United States, “bid protest”) systems, nations around the world are erecting reliable challenge systems. Contractors working in international procurement markets can therefore generally (though not always) assume that a foreign government will have a bid challenge mechanism in place. Having that remedy available can shape contractors’ strategies during the procurement planning phase (vendors can challenge unreasonably restrictive requirements, for example), and serves as an important safety-valve, should corruption emerge during the formation process itself.

## NOTES

**Suspension/Debarment:** As the Canadian developments (see above) demonstrate, suspension and debarment have fast become important, and standard, elements of procurement systems around the world. There is not yet consensus on what those systems should look like -- the European Union procurement directive Article 57, for example, leaves exclusion to the individual contracting entity, while other systems (such as the World Bank) contemplate a centralized, adjudicative process, *see, e.g.*, William A. Roberts, III, Tracye Winfrey Howard, Samantha S. Lee, *Two Systems, Two Types of Risk: How the World Bank Sanctions Regime Differs from U.S. Suspension and Debarment*, Proc. Law. 6 (ABA Fall 2015) -- but there is at least agreement that suspension and debarment are vital tools in the fight against corruption. In fact (as was discussed above), perhaps for the first time, debarment emerged as an explicit, endorsed tool in an international trade agreement, when the text of the proposed Trans-Pacific Partnership was released publicly in late 2015.

**Fraud:** With regard to fraud, however, there is much less consensus. The U.S. experience under the False Claims Act suggests that a successful anti-fraud regime depends on at least three critical elements: severe penalties (which have an important *in terrorem* effect in the contractor community), whistleblower incentives (and perhaps protections), and a loosened scienter standard (because of the difficulties of proving actual intent to defraud, given the many variables in a normal public procurement). While some of those elements are in place in other systems, this area -- how to handle fraud in contract performance -- is likely to be an area of rapid development in the coming years.

## VI. CONCLUSION

This past year saw important developments in procurement systems around the world, in from the World Bank to the European Union, to Canada and the Pacific. These developments reflect emerging common norms, practices and rules systems, as procurement structures slowly bend to reflect one another across borders. Because differences in rules systems pose such an important barrier to international trade in procurement, as those differences erode, procurement markets are likely to grow ever more truly “global” in the coming years.

- 1 Part II of this article, on Canadian developments, was prepared by Ms. Swick, and Part III, on European developments, was authored by Mr. Priess and the procurement law team at Freshfields, with citations to Internet and related resources prepared by Professor Yukins, the author of the balance of this article.