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A comparative view of debarment and suspension of contractors in Brazil and in the USA*

Uma visão comparativa da exclusão e suspensão de licitantes no Brasil e nos EUA

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Abstract: This paper analyzes the main aspects of suspension and procurement debarment in U.S. law (in the federal sphere) and its parallel institutions in Brazilian law, focusing on temporary suspension from participation in tenders and ineligibility to compete for administrative contracts; full debarment; and impediment from participating in tenders and competing for administrative contracts.

Keywords: Government procurement. Debarment. Suspension of contractors. Tenders and administrative contracts. Comparative Law.

Resumo: Este artigo analisa os principais aspectos da suspensão e da exclusão de licitantes nos processos de contratação pública na legislação estadunidense (no âmbito federal) e suas instituições correlatas na legislação brasileira, com ênfase na suspensão temporária da participação em licitações e na inelegibilidade para concorrer em processos de contratação pública; na exclusão total dos licitantes; e no impedimento de participar em licitações e concorrer em seleções de contratação administrativa.

Palavras-chave: Contratação pública. Exclusão. Suspensão de licitantes. Licitações e contratos administrativos. Direito Comparado.

1 Introduction

The main objective of this work is to discuss the most relevant elements of suspension and procurement debarment in U.S. law (in the federal sphere) and its parallel institutions in Brazilian law; that is to say: a) temporary suspension from participation in tenders and ineligibility to compete for administrative contracts *(temporary suspension of the right to bid* or just temporary suspension); b) full debarment *(a declaration of unsuitability)*; and c) impediment from participating in tenders and competing for administrative contracts *(impediment to bid and hire* or just "impediment").

The protection of the public interest is the point of convergence of several legal orders as well as a priority for several international organizations. The goal is to distance entities that may represent risks to the public interest, both with regard to those entities' performance and in relation to ethical concerns. Certainly, the issue is of great importance for public hiring in Brazil and North America. However, there are significant differences between the approaches of the two countries, especially with regard to the scope pursued when these measures are applied.

Alongside this primary objective, *debarment* in its various forms is also related to the fight against corruption. The OECD's Recommendation of the Council for Further

Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Council on the 26th of November, 2009) says:

> Member countries' laws and regulations should permit authorities to suspend, to the appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.[1]

In "Fighting Corruption and Promoting Integrity in Public Procurement", the OECD has said that it has identified a lack of consistency in dealing with the issue of debarment among its members.

The fundamental question is: on what bases are companies to be excluded: convictions or equivalents, such as pre-prosecution pre-agreements? Should firms already be under indictment to be debarred, or is simple suspicion enough?

What are the determining factors for the severity of the sanctions? (i.e., what should be considered aggravating)

What entity is to be debarred: the entire corporation or individual business units, affiliates, subsidiaries, etc.? For what length of time?

Within which public entity (community, state, country) should the exclusion extend?

If debarment is not merely an issue for discussion at a national level but supra-nationally, for example by a multilateral development bank (MDB) (e.g., the World Bank) with all its aid-funded contracting, the issue of debarment definitely becomes a very serious weapon and needs to be applied with great care. One of the main issues is to guarantee fair procedure, especially as we are operating outside the traditional context of constitutional law and controls applicable in a national setting.

In this context it can be concluded that it is impossible to adopt a universally applicable paradigm for the measures analyzed, given that the characterization of these measures will vary according to the legal framework of each country. In spite of these difficulties, however, a general concept of debarment, as proposed by the Organization for Economic Co-operation and Development (OECD), should be noted, with the intention of collecting the various forms of such measures and, according to which, "debarment relates to the additional, non-automatic sanction of provisional exclusion from participation in national public procurement processes for a set period".

[1] OECD's Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Council on the 26th of November, 2009 Available at: <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

Debarment is discussed in a variety of legal texts and even in international agreements. In this context it is even possible to identify cross-debarment actions, such as the agreement for mutual enforcement of debarment decisions signed by the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group and the World Bank Group (a Participating Institution). By this agreement, each Participating Institution presumptively will enforce debarment decisions made by another Participating Institution, following the core principles established through internal mechanisms for addressing and sanctioning violations of each institution's respective anti-corruption policies.

This article will specifically address the purposes of the debarring institutions, their degree of discretion, the temporal scope of exclusions, the possibility of other entities or bodies being affected by debarment decisions. The situation in which public administrators in either Brazil or the United States may encounter companies that show inappropriate ethical behavior, despite outstanding technical performance, will also be considered. We also intend to address a similar situation involving companies operating under a monopoly or oligopoly.

2 Suspension and Debarment in Brazilian and U.S. Laws

In assessing Brazilian and U.S. federal institutions charged with excluding contractors, the main points of comparison involve their legal nature, assumptions of appropriateness, purpose, delimitation of duration, their effects and, finally, the existence of discretion in their application.

To make this comparison, it is necessary to consider, preliminarily, that there is a great difference between the U.S. and Brazilian public contracting rules: while the U.S. system has decentralized normative sources, that is, elaborated by each entity of the federation in a relatively autonomous way, the Brazilian system has a wide range of national rules (applicable to all federal entities) due to the exclusive competence of the Union to enact laws that contain general rules on public bidding and administrative contracts, pursuant to Article 22, XXVII of the Constitution of the Federative Republic of Brazil, 1988.[2]

For this reason, the present study will focus an analysis of the federal public contracting standards of the United States[3] and on the national public procurement rules of Brazil, first in overview and then in comparative assessments.

[2] Article 22. The Union has the exclusive power to legislate on (...) XXVII – 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.

[3] The Federal Acquisition Act from 1984 "aim to be a uniform system of procurement regulations for the government, within the following objectives: 1- to deliver the best services and products to the customers;

2.1 General aspects of the measures in Brazilian law: the punitive nature and the relative discretion

In Brazilian law, the suspension of the right to contract, the declaration of unsuitability and the impediment to bidding and contracting are treated as administrative sanctions, and they are implemented through several pieces of legislation.

The temporary suspension and the declaration of unsuitabilty are set forth in Brazilian Law No. 8,666 from June 21,1993,[4] also known as the General Law on Bids and Administrative Contracts, which is applicable when there are no other specific legal provisions; as well as in Brazilian Law No. 13,303 from July 1st, 2016,[5] called the Law of Responsibility of State Enterprises.

The impediment to bidding and contract is present in Brazilian Law No. 10,520 from July 17, 2002[6] (Auction Act) and Brazilian Law No. 12.462 from August 4, 2011 *(Differentiated Regime of Hiring or just DRH).*

It should be noted that, along with these legal provisions, the Brazilian Clean Company Act (Brazilian Law No. 12,846 from August 1st, 2013[7]) provides for the existence of a unified record for the registration of sanctioned companies, as a way of giving effectiveness and publicity to the sanctions of temporary suspension, declaration of unsuitability and ineligibility.

On the other hand, in addition to the sanctions already mentioned and directly related to the system of public hiring, there are other similar measures in Brazilian law, such as the declaration of unsuitability by the Brazilian Court of Accounts (Article 46 of Brazilian Law 8.443 from July 16, 1992[8]) and the sanction of prohibition of hiring with the Public Administration by virtue of an act of administrative impropriety (Brazilian Law No. 8,429 from June 2,19920.[9] Due to their very specific applications, these modalities will not be explored in the present work.

It can be concluded that the ambits of compliance of these measures vary according to each of the pieces of legislation mentioned above. The legislation is

2 – maintains the public trust and; 3 – fulfill the public policy". ARAÚJO, Ricardo Wagner. *Fighting Corruption and Promoting Integrity in Public Procurement*: a comparative study between Brazil and United States. George Washigton University. Advisor: Christopher R. Yukins. The Minerva Program, fall 2013.

4 BRASIL, Law nº 8,666 of June 21,1993, articles 87 and 88. Available at: <https://www.planalto.gov.br/ccivil_03/Leis/L8666cons.htm>.

5 BRASIL, Law nº 8,666 of June 21,1993, articles 87 and 88. Available at: <https://www.planalto.gov.br/ccivil_03/Leis/L8666cons.htm>.

6 BRASIL, Law nº 10,520 of 2002 Available. Article 7º Available at: <http://www.planalto.gov.br/ccivil_03/leis/2002/L10520.htm>.

7 Article 23. The agencies or entities of the Executive, Legislative and Judiciary Branches of all spheres of the government shallinform and keep updated in the National Registry of Inapt and Suspended Companies (CEIS), established in the sphere of the federal Executive Branch, information related to the sanctions applied by them, in accordance with articles 87 and 88 of Law 8.666 from 1993. BRASIL, Law nº 12,468 of August 4, 2011, article 47. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12462.htm>.

8 BRASIL, Law nº 8,443 of July 16, 1992. Available at: <http://www.planalto.gov.br/ccivil_03/Leis/L8443.htm>.

9 BRASIL, Law nº 8,429 of June 2, 1992. Available at: <http://www.planalto.gov.br/ccivil_03/Leis/L8429.htm>.

quite vague and generally provides that such sanctions apply to the occurrence of illicit acts in the process of bidding, in total or partial non-performance of the contract, as well as in the incapacity to execute a contract for technical or ethical reasons. In this contextit is possible to state that, as a general rule, such sanctions have the purpose of preserving integrity in bids and public contracting, in order to prevent and repress harmful conduct, whether related to deficiencies in the execution of contractual tasks or ethically repudiated behaviors.

Some Brazilian authors criticize the lack of legal clarity in determining the bases for sanctions, arguing that this lack of clarity offends the principle of isonomy and generality. The lack of legal detail, as perceived in Law 8.666 / 93, generates insecurity for bidders and contractors, who do not know when each of the punitive measures may be applied, if there is no provision in the edict or contract that clearly delimits that punitive authority. Celso Antônio Bandeira de Mello, in this sense, affirms that the suspension of the right to contract and the declaration of unsuitabilty "can be applied only in the case of acts characterized in the law as crimes, since such sanctions would not have been admitted in other cases without previous legal description".[10]

As already mentioned, all of the above measures have the legal nature of administrative sanctions, and for that reason their application must be preceded by due administrative process, with the opportunity to present a prior defense and with observance of the rights and guarantees of administrative sanctioning law,[11] whether of a formal nature or of a material nature.

Fábio Medina Osório corroborates this and states that, because of their general and *pro futuro* effects, suspension and a declaration of unsuitability are true administrative sanctions that are subject to the basic legal framework of the Administrative Sanctioning Law, which frames governamental authority to reach the fundamental rights of a recipient.[12]

Despite the guarantee of an administrative process, until recently there was no legislative provision which endorsed administrative agreements with individuals or firms, agreements which waive penalties in special circumstances. The picture recently changed with enactment of the Clean Company Act, Article 17 of which establishes that "the public administration may also enter into a leniency agreement with the legal entity responsible for the practice of wrongs described in Law 8,666 from June 21,

[10] BANDEIRA DE MELLO, Celso Antônio. *Curso de Direito Administrativo*. 31. ed. São Paulo: Malheiros, 2014, p. 654-655.

[11] See: Constitution of the Federative Republic of Brazil, 1988, Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: *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*; See also: Brazilian Law n. 9,784 of January 29, 1999.

[12] OSÓRIO, Fábio Medina. *Direito Administrativo Sancionador*. 5. ed. São Paulo: Revista dos Tribunais, 2015, p.113-114.

1993, with a view to the exemption or mitigation of administrative sanctions set forth in articles 86 to 88 thereof".

Despite the aforementioned legal provision, there is still no clarity as to how such a leniency agreement will be processed.

First, it must be borne in mind that Law No 12.846 / 13 is not dedicated only to containing illegal acts committed in procurement calls and the public procurement environment. It is possible, therefore, to characterize unlawfulness in another environment. Just think about the offering of an undue advantage, along the lines of Part I of Art. 5, during a Public Health inspection or the speeding up of the delivery of the charter.

It is also important to consider that Art. 17 does not make explicit reference to any of the situations described in the subparagraphs of item IV of Art. 5 of the Anti-Corruption Law. It is, conversely, referenced in Articles 86 to 88 of Law 8,666 whose reprimands are not necessarily related to the practice of corruption.

Also, a leniency agreement which excludes the temporary suspension and declaration of unsuitability provided for by Brazilian Law 8,666 of June, 1993 coexists with another kind of leniency agreement, also present in the Clean Company Act. It is still not clear if the leniency may waive any penalty of suspension and declaration of unsuitability or, if, on the other hand, leniency will reach only the penalties for acts also defined as acts of corruption by the Clean Company Act. This second opinion is more logical since is very difficult to defend the total isolation of the leniency agreement in Art. 17: it would be possible to adduce that the leniency agreement, disciplined in Art. 17, would only have scope over the practice of the offenses in the subparagraphs of item IV of Art. 5 of Law No. 12.846 / 13; behavior that could also attract the sanction under Law No 8.666 / 93.[13]

In this sense, the leniency agreement in Art. 17 would be used when, in the face of situations provided for in Art. 5, section IV, one cogitates the penalty disciplined in Law No 12.846 / 13 as well as the incidence of the reprimands of the procurement law. Thus, the leniency agreement to be celebrated would minimize or alienate the incidences of sanctions beyond those which are described in Law No 12.846 / 13.

Thus, as noted, the similarities between temporary suspension, declaration of unsuitability and impediment to contract seem evident. On the other hand, the task of differentiating these legal devices is not easy, given the sparse normative descriptions that have persisted over the years, despite the large number of legal acts of public contracting currently in force in Brazil.

[13] Strangely, the legislature refers only to the sanctions of Law No 8.666 / 93, ignoring the bidding of Art. 7, which addresses the penalty of impediment, unidentified (although with some similarity) to that described in Art. 87, III of the General Law.

The main conflict arises between temporary suspension and a declaration of unsuitability. The impediment to bid and contract appears as a third kind of punishment, although it is very similar in nature to the declaration of unsuitability.

In this way, the main points of contrast between temporary suspension and the declaration of unsuitability must be developed.

Marçal Justen Filho considers that the diferent time limits for suspensions and for declarations of unsuitability, and the competence to impose each of these sanctions, do not offer sufficient criteria to separate one from the other.[14] He points out that the diferences in their application offer a more obvious distinction:[15] suspension applies only to the federative level of the entity, body or contracting entity, and the declaration of unsuitability would apply to all of the Public Administration. The author based this distinction on his interpretation of Art. 87, III and IV in light of the definitions of Administration and Public Administration contained in Law 8,666. A temporary suspension under the terms of Art. 87, III applies to the Administration, which, pursuant to Art. 6, XII is described as the organ, entity or administrative unit by which the Public Administration operates and acts. The declaration of unsuitabilty pursuant to Art. 87, IV applies to the Public Administration, a term used to designate direct and indirect Administration of the various federative entities, under the terms defined in Art. 6, XI of Law 8,666 / 93. It seems clear that the legislator has thus prescribed, considering exactly the concepts provided, despite the fact that it is possible to question (especially in the face of possible unconstitutionality) the extension of the effects of a sentence to reach another federative level, considering that Brazil is a Federal Republic, in which there is no hierarchy (at least formal) among municipalities, states, the Federal District and the Union. Thus, the controversy surrounding the subject is not ignored.

Sirlene Arêdes synthesizes the three main interpretive currents of thought of the extension of these penalties in the following terms:

> Brazilian doctrine is divided into three positions on the subject. Part of the doctrine represented by authors such as Carlos Ari Sundfeld and Hely Lopes Meirelles argues that the sanctions established in Art. 87, III and IV of Law 8666/93 must have their effects limited to the administrative sphere that applied it. The main foundations of this restrictive doctrine are the autonomy of the people of the federation and the offense to the principle of competitiveness, presented in Art. 3, paragraph 1, I of Law 8,666 / 93.

[14] JUSTEN FILHO, Marçal. *Comentários à Lei de Licitações e Contratos Administrativos*. 16. ed. São Paulo: Revista dos Tribunais, 2014, p. 1154-1155.

[15] JUSTEN FILHO, Marçal. *Comentários à Lei de Licitações e Contratos Administrativos*. 16. ed. São Paulo: Revista dos Tribunais, 2014, p. 1154-1155.

> The second current argues that only the sanction of declaration of unsuitability reaches other administrative spheres, but not the suspension of the right to bid and contract. This is the position sustained by Marçal Justen Filho (2010, p. 894 et seq.). The main reason for this diversity regarding the effects of sanctions is that Art. 87, III of Law no. 8.666 / 93, uses the term Administration, defined in its Art. 6, XII as "the organ, entity or administrative unit by which the Public Administration operates and acts concretely." Art. 87, IV refers to the Public Administration, defined in Art. 6, XI as "the direct and indirect Administration of the various federative entities.
>
> The third current, supported by José dos Santos Carvalho Filho (2012, p. 219 et seq.), is that both sanctions go beyond the administrative spheres that apply them. According to this author, the application of both penalties can occur only due to the total or partial non-execution of the contract, so that it does not seem "easy to understand why such an infraction would not also entail risks for the other federative entities in case any of them signed a contract with the punished company.[16]

In any case, polemics aside, the sanctioning powers attributed to the institutions are not discussed. Law 8,666/93, as well as Law 10.520 / 02, to cite the most important legal instruments, remove any sort of doubts about those powers. On the other hand, there seems to be no room for discretionary administrative decisions as to whether or not to apply reprimands. When drafting Law 10.502 / 02, the legislator sought to be more detailed, indicating the situations that would lead to an impediment to contracting, which is the punitive measure provided therein. But still the writing does not eliminate doubts in particular because Art. 7 expressly states that other penalties may be added to the one described there, without, however, indicating whether criminal or civil penalties are contemplated, or whether the correct interpretation would be to penalize the entity using the framework provided for in the General Law of Bidding. The uncertainties are even greater when studying Art. 87 of Law 8,666/93. The legislature did not even prescribe when to apply the four sanctions described there, among which are the declaration of unsuitability and the suspension / impediment. Thus, the decision on which penalty to apply, in principle, falls within discretionary jurisdiction. Although there is no discussion about the greater severity of the declaration of unsuitability when compared to the other reprimands described there, which would mean a severe penalty need not be imposed for less grave behaviors, there is no description of the circumstances which would lead to the application of each one of the sanctions. Thus, one can only speculate as to the relative discretion. However, the allegation that the administrator may choose not

[16] ARÊDES, Sirlene Nunes. Tipicidade e discricionariedade na aplicação de penalidades contratuais. In: BATISTA JÚNIOR, Onofre. ARÊDES, Sirlene Nunes. MATOS, Federico Nunes. *Contratos Administrativos*: estudos em homenagem ao Professor Florivaldo Dutra de Araújo. Belo Horizonte: Fórum, 2014. p. 297-299.

to punish the entity would not square with the language of the law. The curb on the administrator's discretion would come from the principles of supremacy of the public interest over the private interest and the Government's strict abidance by the public interest. Which, it seems to us, would be used to support punishment as a mandatory measure.

Therefore, it is possible to conclude, although not to applaud, that the Brazilian legislators lent a punitive character to declarations of unsuitability and contractor suspensions / impediments, which are contained in Art. 87 of the General Law of Bidding, as well to the impediment referred to in the Law of Trading. It would also be at least necessary to recognize, even if it may be criticized, that it is the public administrator's responsibility to punish companies for unethical behavior, despite their Strong performance. That is to say, in Brazil, the punishment will not result not only from contractual failures, but will affect those whose performance is ethically questionable.

2.2 General aspects of measures in US law: the non-punitive nature and the broad discretion

The concern with hiring "responsible" (qualified) companies is also revealed in several U.S. federal rules and directives,[17] and addresses both performance and ethical issues.. The central objective of the rules is to ensure that public entities have their needs effectively met, by contractors that do not pose unacceptable reputational risk to the federal government (the discussion here adresses the federal government, and not state or local laws). For that reason, Section 9.402 (a) of the Federal Acquisition Regulation (FAR),[18] 48 C.F.R. §9.402 (a), establishes a policy that "agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only", and that "debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy".

Obviously, an intolerance to fraud and corruption equally justify these measures, although there is great disagreement about the role of these measures in relation to the realization of corporate integrity, as will be seen below.

This article will focus only on the main aspects of discretionary debarment and suspension in federal procurement in the United States, and not on statutorily mandated debarment, such as debarments for violations of certain environmental laws.[19]

[17] For example: 10 USC §2305 (c) and 41 USC §253 (b) e 158 FAR 9.103 (a) e (b).

[18] United States of America, Federal Acquisition Regulation. <https://www.acquisition.gov/?q=browsefar>.

[19] For C ibinic *et al* "inducement debarments have a different purpose- to induce contractors to perform government contracts in ways that will further fundamental social and economic goals, such as equal employment opportunity, the payment of prescribed minimum wages, and environmental protection. Debarments based on a

Suspension – a temporary exclusion – is an administrative remedy of lesser impact when compared to debarment. In the same way as debarment is regulated, suspension is provided as a tool for the protection of the public interest, often used pending the conclusion of an investigation or criminal proceedings, given available information (contracts, reports of inspections, correspondence) which indicate that immediate action is required. Under the governing regulations, suspension is a "serious action" to be taken only if there is "adequate evidence." The causes for suspension are described in the FAR Subpart 9.4, 48 C.F.R. Subpart 9.4, and closely resemble those related to debarment. It should be noted, however, that failure to meet contractual requirements is not considered a cause for suspension, although it is a basis for debarment. Another important factor is related to the burden of proof for each of the measures: while suspension demands "adequate evidence", debarment requires "preponderance of evidence".

Once again, the public authority has the discretion to to suspend in light of the circumstances involving the contractor, without, however, necessarily considering the existence of mitigating factors or measures aimed at remediation – factors which must be considered when the suspending and debarring official considers a debarment application.

A suspension typically is to remain in place so long as an investigation and formal legal proceedings are pending against the contractor. If a suspension has been in place for twelve months and legal proceedings have still not begun, the suspension may be extended for six months upon the request of an Assistant Attorney General (a senior Justice Department official), though no suspension is to last longer than eighteen months unless formal legal proceedings have begun against the contractor. It is possible that a company penalized with suspension may suffer debarment later, in which case the time spent under suspension will be considered in assessing the period of debarment.

These main elements and other relevant aspects of U.S. federal debarment and suspension are, as noted, set out in Subpart 9.4 of the Federal Acquisition Regulation (FAR) and can be summarized as follows:

contractor's failure to participate effectively in furtherance of these goals have been refered as "inducement" or "statutory" debarments because they are generally based on statutory provisions. The grounds and procedures for these debarments are set forth in a variety of regulations issued by agencies outside of the procurement process such as Department of Labor (DOL) and Environmental Protection Agency (EPA)".

(Continua)

	Bases for Action	**Competent Authority**	**Duration**
Procurement debarment	** Conviction of or civil judgment for:* (1) Commission of fraud or a criminal offense in connection with obtaining; attempting to obtain; or performing a public contract or subcontract. (2) Violation of Federal or State antitrust statutes concerning the submission of offers; (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property; (4) Intentionally affixing a label bearing "Made in America" (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States Or its outlying areas; or (5) Commission of any other offense indicating the lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor. * *Also applicable to contractors, based upon a preponderance of the evidence, for any of the following:* (i) A violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as a willful failure to perform in accordance with the terms of one or more contracts; or a history of failure to perform, or of unsatisfactory performance of one or more contracts; (ii) Violations of 41 USC chapter 81, Drug-Free Workplace; (iii) Intentionally affixing a label bearing "Made in America" (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas; (Iv) Commission of an unfair trade practice as defined in 9403 (see Section 201 of the Defense Production Act (Pub. L. 102-558) (v) Delinquent Federal taxes in an amount that exceeds $ 3,500; by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract thereunder, credible evidence of violation of Federal Violation of the Civil False Claims Act (31 USC 3729-3733); or Significant overpayment(s) on the contract, other criminal offenses other than overpayments resulting from contract financing payments as defined in 32.001. * A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States that the contractor is not in compliance with the Immigration and Nationality Act employment provisions * A contractor or subcontractor based on any other cause of a so serious or compelling nature that it affects the present responsibility of the contractor or subcontractor	Debarring official (agency heads or designee authorized by the agency head to impose debarment).	*FAR 9.406-4* *3 years,* except that (i) debarment for Violation of the Provisions of the Drug-Free Workplace Act of 1988 (may be for a period not to exceed 5 years); And Debarments for not being in compliance with Immigration and Nationality Act employment provisions (shall be for one year unless extended to protect government's interest). Also, the debarring official may extend the debarment for an additional period, if that official believes it necessary to protect the Government's interest. * If suspension precedes debarment, the suspension period shall be considered in determining the debarment period. * The *official may reduce the period or extent of debarment, upon the contractor's request,* supported by documentation, for reasons such as: (1) Newly discovered evidence (2) Reversal of the civil conviction or judgment upon which the debarment was based; (3) Bona fide change in ownership or management; (4) Elimination of other causes for which the debarment was imposed; (5) Other reasons the debarring official deems appropriate.

(Conclusão)

	Bases for Action	**Competent Authority**	**Duration**
Suspension	*Adequate evidence,* of: (1) Commission of fraud or criminal offense in connection with (i) obtaining; (ii) attempting to obtain; or (iii) performing a public contract or subcontract. (2) Violation of Federal or State antitrust statutes relating to the submission of offers; (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property; (4) Violations of 41 USC chapter 81, Drug-Free Workplace, as indicated by- (i) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or (ii) Such a number of contractor employees convicted of violations of criminal statutes occurring in the workplace to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504); (5) Intentionally affixing a label bearing "Made in America" (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States Or its outlying areas. (6) Commission of unfair trade practice as defined in 9.403; (7) Delinquent Federal taxes in an amount that exceeds $ 3,500. (8) Knowing failure by a principal until 3 years after final payment on any Government contract awarded to the contractor, timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of (i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; (ii) Violation of the Civil False Claims Act (31 USC 3729-3733); Or (iii) Significant overpayment (s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or (9) Commission of any other offense indicating the lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor. (B) Indication for any of the causes in paragraph (a) of this section. (C) The suspending official may also suspend the contractor for any other cause of serious or compelling nature that it affects the present responsibility of a Government contractor or subcontractor.	Suspension official (agency heads or designee authorized by the agency head to impose suspension).	*Temporary period pending the completion of investigation and any ensuing legal proceedings,* unless terminated sooner by the official or by the suspension provided in this subsection. * *If the legal proceedings are not initiated within 12 months* after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. *In any event the suspension may be extended beyond 18 months, unless legal proceedings have been initiated within that period.*

There are several points regarding the U.S. federal suspension/debarment regime that bear special emphasis. First, as the provisions outlined above reflect, in general the causes for debarment and suspension are quite broad and include "catch-all" provisions which can be used to debar in the case of almost any serious performance or integrity failure. Practically speaking, however, this broad of

discretion in suspending and debarring officials is checked, to a certain extent, by the administrative structure, for those officials are typically considered senior members of each agency's procurement leadership, and their actions are subject to review (albeit a deferential review) by a federal court. Suspending and debarring officials' discretion is also channeled by a strong regulatory bias against punishment (discussed below), in favor of allowing contractors, when appropriate, to undertake remedial measures through an administrative agreement, which will call for compliance measures such as those outlined in FAR 52.203-13 and which generally will be published in accordance with FAR 9.406-3(f).In view of the gravity of suspension and debarment, it is necessary to federal agencies' actions. As established by the FAR, "when more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Committee on Debarment and Suspension shall resolve the lead agency issue and coordinate such resolution among all interested agencies".

Once issued, an order of debarment or suspension generally will apply to all federal executive agencies.[20] Suspensions and debarments as rule reach only future contracts.[21] As asserted by Cibinic et al "under this policy, the primary consideration in imposing these sanctions should be the offeror's present and likely future responsibility, rather than the mere fact that a past offense has been committed".[22]

A suspended or debarred entity may be considered for award if an agency makes a special exception, concerning public contracts based upon compelling reasons, which according to Cibinic *et al*, may be:

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[20] Cibinic et al: "FAR 9.406-1 (c) and FAR 9.407-1 (d) provide that debarments and suspensions are "effective throughout the executive branch" unless waived by the procuring agency. It is clear that these provisions make debarments and suspensions by any executive branch agency binding on all other executive branch agencies". CIBINIC John; NASH, Ralph C. *Formation of Government Contracts*. 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998. p. 11.

[21] FAR, 9.405-1 Continuation of current contracts. (a) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.
Yukins states that: "The government suspends or debars contractors if, based on serious past acts, it appears that the contractors lack the ethics, performance record or internal controls required of a government contractor. Although suspension and debarment technically cover only prospective government contracts – not current work – as a practical matter the shock and infamy of suspension or debarment can quickly drive government contractors (especially small contractors) out of business". YUKINS, Christopher R. Suspension and Debarment: reexamining the process. *Public Procurement Law Review*, Vol. 13, 2004. Available at SSRN: <https://ssrn.com/abstract=509004>.

[22] CIBINIC et al: "Under this policy, the primary consideration in imposing these sanctions should be the offeror's "present and likely future responsibility" rather than the mere fact that a past offense has been committed, Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976). While most circuit courts have rejected the contention that debarment is punitive, Bae v. Shalala, 44 F.3d 489 (7th. Cir. 1995); United States v. Bizzell, 921 F.2d 263 (10th Cir. 1990), or that debarment is a form of criminal punishment, United States v. Hatfield, 108 F.3d 67 (4th Cir. 1997), one circuit court has stated that every debarment "is a form of punishment," Fischer v. RTC, 59 F.3d 1344 (D.C. Cir. 1995). CIBINIC John; NASH, Ralph C. *Formation of Government Contracts*. 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998. p. 2.

> (i) Only a debarred or suspended contractor can provide the supplies or services; (ii) urgency requires contracting with a debarred or suspended contractor; (iii) the contractor and the department or agency have an agreement covering the same events that resulted in the debarment or suspension and the agreement includes the department or agency decision not to debar or suspend the contractor; or (iv) the national defense requires continued business dealings with the debarred or suspended contractor.[23]

Much as under Brazilian law, the FAR also provides a list of excluded companies in the so-called System for Award Management (www.sam.gov), an on-line system that is to contain the names and addresses of all contractors debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified under the nonprocurement common rule.

However, the main thing that distinguishes U.S. law from that of Brazil is the fact that debarment and suspension have no punitive purpose in the U.S. system, according to the express wording of Subpart 9.4 of the FAR, which states that:

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

Despite the aforementioned wording, controversy remains regarding the legal nature of debarment and suspension. In "Too Big to Debar?"[24] the authors Drury Stevenson and Nicholas Wagoner questioned why large companies are so seldom debarred, though their corrupt acts are discovered and punished under the Foreign Corrupt Practices Act (FCPA). The FCPA was enacted after international bribery scandals of the Nixon period; the focus of the FCPA is on combating the corruption practiced with agents and foreign organizations, and which had been practiced for the purpose of generating or retaining business. The authors maintained that fines and criminal sentences under the FCPA are not sufficient to deter unwanted behavior, particularly regarding the performance of the corporation, because such entities tend to price and absorb the risk of any financial penalties. The authors also argued that the federal government depends on some larger companies, which needs them to meet its demands, and which considers itself collateral damage in the exclusion that would

[23] CIBINIC John; NASH, Ralph C. *Formation of Government Contracts*. 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998. p. 12-13.

[24] STEVENSON, Drury; WAGONER, Nicholas J. 'FCPA Sanctions: Too Big to Debar?'. *Fordham Law Review*, New York, Vol. 80, issue 2, 2011.

be caused by debarment. According to the authors' evaluation, however, the halting of illegal practices necessarily depends on more effective sanctioning measures, an example of which is debarment.

In response to the article, Dean Jessica Tillipman wrote "The House of Cards Falls: Why "Too Big to Debar" is All Slogan and Little Substance".[25] The text is a direct criticism of the use of "debarment" as a business punishment mechanism. Supported by the FAR, she argued that the instrument is an administrative remedy which causes the exclusion of companies and should be used only to protect the government from imminent harm, if the public authority considers that convenient. She also reminded us that such an application is not mandatory,[26] claiming that the exclusion of companies generates negative effects, such as reducing the market's ability to meet the government's needs, thereby resulting in increased contract costs. She also noted other incentives for companies to adopt standards of integrity, and suggested that policymakers not focus on exclusion as a penalty.

In this respect, as suggested above, the role of *compliance* is recognized in other regulations that govern the U.S. debarment process. For example, the Defense Federal Acquisition Regulation Supplement (DFARS) establishes, in DFARS 209.406-1, the the authority for a Defense Department agency to sign a written administrative agreement with the contractor, if the agency finds a lack of necessity for debarment, and such agreement includes "a requirement for the contractor to establish, if not already established, and to maintain the standards of conduct and internal control systems prescribed by FAR subpart 3.10" Those internal control systems are spelled out in detail in FAR 52.203-13, and are broadly similar to compliance standards used around the world, including Brazil.

Regarding the procedures for enforcement of debarment and suspension, the provisions of FAR 9.406-3 and 9.407 state that agencies must establish decision-making procedures "as informal as practicable, consistent with principles of fundamental fairness," although the the procedural nuances will vary from agency to agency. The issue of advance notification has proven controversial, with no formal guarantee of prior notice. As stated by Cibinic *et al:*

> No notice of contemplated proceedings is required. Although there have been initiatives to require such notice, agencies have resisted. While there may be valid arguments that the lack of advance notice of suspension or proposed debarment violates due process, the courts have not yet reached this conclusion. In Shermco Industries, Inc. v. Secretary

[25] TILLIPMAN, Jessica. A House of Cards Falls: Why 'Too Big to Debar' is all slogan and little substance. *Fordham Law Review Res Gestae*, New York, Vol. 80, No. 49, 2012.

[26] 9.402 Policy.(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

> of the Air Force, 584 F. Supp. 76 (N.D. Tex. 1984), the court observed at 88: Whether notice given a suspended contractor is sufficient depends on several considerations. The first is whether the timing of the notice allowed meaningful opportunity to rebut the charges. Two recent Court of Appeals decisions seem to impose different due process requirements for the timing of notice of a suspension. In Transco Security, Inc. v. Freeman, 639 F.2d 318, 323 (6th Cir.), cert. denied, 454 U.S. 820 whether the notice there involved was constitutionally infirm due to vagueness and the inconsistent explanations given by the agency for its decision to suspend, the court gave no indication that notice, to be constitutionally sufficient, had to be given before suspension.
>
> On the other hand, in Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir.1980), the D.C. Circuit held that a contractor was denied due process when it was not told, before two non-responsibility determinations, that it was under investigation and, after the determinations, was told only that they were based on the lack of a "satisfactory record of integrity."
>
> (…)This same issue arises with the listing of contractors that are proposed for debarment — the notice is received after they are included on the list.
>
> Some agencies have adopted the practice of sending an informal notice, commonly known as a "shock and alarm" letter. This letter informs the recipient that suspension is contemplated but that the respondent is being afforded a presuspension opportunity to submit information in opposition to the proposed suspension.
>
> While agencies reject any notion that a presuspension notice is required, they generally will allow a contractor the opportunity to present matters of present responsibility prior to suspension if the contractor so requests and if a timely meeting can be scheduled. Thus, a contractor that knows an indictment or suspension is imminent is well advised to request an opportunity to present information and argument before any action by the agency is taken. From the agency's perspective, early notice and negotiations increase the chances that the matter will be resolved through compliance efforts, rather than sanctions and potential litigation. The procedures for such preventive communication vary with each agency.[27]

Regarding the existence of discretion in the application of administrative penalties, as noted there is a big difference between Brazilian law and North American law. The U.S. federal model is based on the wide recognition of the power of discretion of the authority responsible for measures in question, as summarized by Kate Manuel:

> First, under the FAR, debarment or suspension of contractors is discretionary. The FAR says that agencies "may debar" or "may suspend" a contractor when grounds for exclusion exist, but it does not require them to do so. Rather, the FAR advises contracting officers to focus upon the

[27] CIBINIC John; NASH, Ralph C. *Formation of Government Contracts*. 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998. p. 22-23.

> public interest in making debarment determinations. The public interest encompasses both (1) safeguarding public funds by excluding contractors who may be non-responsible when contracting with the government and (2) avoiding economic injury to contractors who might technically be excludable but are fundamentally responsible and safe for the government to contract with. Because of this focus on the public interest, agency officials can find that contractors who engaged in exclusion-worthy conduct should not be excluded because they appear unlikely to engage in similar conduct in the future. Any circumstance suggesting that a contractor is unlikely to repeat past misconduct – such as changes in personnel or procedures, restitution, or cooperation in a government investigation – can potentially incline an agency's decision against debarment. Moreover, exclusion can be limited to particular "divisions, organizational elements, or commodities" of a company if agency officials find that only segments of a business engaged in wrongdoing. Other contractors cannot challenge agency decisions not to propose a contractor for debarment or not to exclude a contractor proposed for debarment. They can only contest an agency's certification of a contractor's present responsibility, which is required prior to a contract award.[28]

There is also discretion regarding the scope of a debarment: the rule covers the entire business entity but may, with justification, be extended to affiliates of the punished company or otherwise be restricted to just one of the company's divisions, per FAR 9.406-1 (b).

The broad discretion granted by the FAR cannot, however, be arbitrarily exercised. There is growing concern about the discretionary limits in the application of debarment and suspension in the United States, especially considering that the procedure for the implementation of these measures has weaknesses and that the "catch all" provisions allow for debarment for almost any wrongdoing. This means that even in the U.S. model, which is intensely discretionary, real concerns have arisen about abuse of discretion by suspending and debarring officials. Cibinic *et al* report court decisions in which the judiciary nullified the application of "debarment" due to the disregard of mitigating factors and evidence of no evaluation of the company's present responsibility (such as the disregard of government signed contracts with the accused for six years after the occurrence of the alleged offense that triggered the debarment).[29]

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[28] MANUEL, Kate. Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments. *CRS Report for Congress*. November 19, 2008. Available at: <https://www.fas.org/sgp/crs/misc/RL34753.pdf>.

[29] CIBINIC et al "In Silverman v. Defense Logistics Agency, 817 F. Supp. 846 (S.D. Cal. 1993), the court terminated a debarment based on a plea of guilty to a misdemeanor (with a fine of $250), because the debarring official had failed to consider the mitigating circumstance that the plea had been made to avoid an indictment for an offense of which the plaintiff did not believe he was guilty. The court also doubted if the agency was correct in finding the plaintiff not presently responsible when it had continued to contract with his company for six years after the alleged offense". CIBINIC John; NASH, Ralph C. *Formation of Government Contracts*. 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998. p. 3.

2.3 Comparison of the measures studied

As seen, both U.S. law and the Brazilian present measures to protect the public administration, and give more effectiveness and publicity to the application of such measures with the creation of records of companies excluded from the right to contract, also called "blacklists". The effects of Brazilian and U.S. measures are, as a rule, prospective, that is, they reach only futures contracts. Despite the similarities and symmetry between the institutions in the study, some differences are notable.

Regarding the *causes* that support the implementation of the measures under consideration, there is some disparity between the Brazilian legislative construction and the U.S. rules.. Situations that would justify suspension and debarment as described in the FAR are again distinct when compared to the Brazilian legislative regime, especially regarding the provisions of Brazilian Law 8.666. Art. 87 of this law, as we have seen, specifies penalties, among which is the declaration of unsuitability, without indicating when to make use of each of the sanctions. It is known, thanks to the doctrinal contribution and the supplied judgements, that the declaration of unsuitability has no place except in situations of extreme gravity, given that the silence of the law does not inhibit the perception of the gradual line between the items I to IV of Art.87.

Regarding the *nature and purpose of the measures*, it is observed that under Brazilian law sanctions are essentially punitive, aimed at penalizing conduct that occurred in the past, while in U.S.s law they have a cautionary nature, aimed at preserving the interests of the federal government considering the contractor's present and likely future responsibility.

Regarding the *time limit of application*, the objectives of the FAR are clearer than those in the General Brazilian Administrative Contracts Law. Brazilian Law 8.666 does not signal the period during which the declaration of unsuitability will take effect, but through a combined reading of its Articles 87, sections III and IV, it is clear that the period will not be *less* than two years. However there is no maximum numerical reference. Impediment sactions are clearer as they are set to a maximum period of five years. The FAR, in turn, sets a period for debarment not *exceeding* 3 years, although it admits the possibility of a term extension, depending on the circumstances that are involved, and also the reduction of the duration in cases of cooperation and good faith of the contractor. Situations that recommend a longer term occur "when the causes have been egregious".[30] So in cases where there was

[30] CIBINIC John; NASH, Ralph C. *Formation of Government Contracts*. 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998. p. 17.

payment of bribes to officials or cases in which undue payments were demanded by agencies,[31] the debarment might have a different term.

Regarding the reach of exclusion, we note that debarment and suspension under the FAR are restricted to the federal government (though state and local governments may, for example, reciprocally apply the federal government's debarment), while the effects of the declaration of unsuitability have national reach, according to the majority of Brazilian doctrine. Moreover, it is observed that U,S. federal debarment and suspension may reach only part of a company (one or more divisions of the company), a non-existent provision in Brazilian law.

Regarding *discretion* in implementing the measures, it is observed that U.S law gives great authority to those responsible for imposing suspension and debarment. In Brazilian law, on the other hand, it is impossible not to punish those responsible in the event of any proven occurrence of the conditions for applying the sanctions of suspension, declaration of unsuitability and impediment. The only exception to the delegated power of punishment occurs in cases where the law expressly permits the entering into an agreement with the offending contractor (as in the case of Art. 17 of the Clean Company Act).

Finally, in relation to the *administrative process* of implementing the measures, it is observed that the Brazilian process, in theory, is more concerned with offering an opportunity for the prior defense of the accused, especially considering that in Brazilian law such a measure has the legal nature of a sanction. On the other hand, U.S. law expressly authorizes a competent official, other than the contracting officer, the power to apply debarment and suspension.

3 Conclusion: a path to greater probity in public procurement and a greater respect for the fundamental guarantees of the sanctioning administrative law

Through this comparative study, it is possible to observe the similarities and differences between the measurements of debarment and suspension in the United States and the suspension, declaration of unsuitability and impediment in Brazil.

Although there is an increasing effort to improve the measures being studied, there is still much to do. Transparency International, upon recommendations made

[31] For undue payments, see the False Claim Acts: "The False Claims Act (FCA), 31 U.S.C. §§3729 - 3733 was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army. The FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty of $2,000 for each false claim. (...)The FCA allows private persons to file suit for violations of the FCA on behalf of the government. A suit filed by an individual on behalf of the government is known as a "qui tam" action, and the person bringing the action is referred to as a "relator". Available at: <https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf>.

to the European Union, indicated a series of guidelines for the implementation of debarment that can be used for the improvement of the legislative framework of the study countries:

> 2.1 Develop implementation guidelines that:
>
> • establish due process along the whole debarment procedure,
>
> • establish a single, standard debarment process, which encompasses the process leading to debarment as well as to the lifting of the debarment, and
>
> • provide guidance for the interpretation and application of the rules of the system
>
> Such guidelines should provide clarity, for example, on how to pursue cases of mandatory (*res judicata*) and discretionary debarment (other than *res judicata*), and the quality of evidence needed to start the discretionary debarment process and to debar a company or an individual.[32]

A critical point for improvement involves the control of discretion in the application of sanctions, both to ensure a level competitive playing field between the players in a given market and as a way to guarantee the principles of due process. Alongside these measures, it is necessary to take into account that debarment, applied alone, is not enough to ensure the integrity of the public procurement system. As already stated by the OECD:

> Enhancing integrity in public procurement is not simply about increasing transparency and limiting management discretion in decision-making processes. Measured discretion in procurement decision-making is needed to achieve value for money, often defined as the most economically advantageous tender. Rather, enhancing integrity necessitates recognizing the risks inherent throughout the entire procurement cycle, developing appropriate management responses to these risks and monitoring the impact of risk mitigating actions. Moreover, it requires transforming procurement into a strategic and capable profession rather than a simple administrative process. This transformation necessitates developing knowledge and creating tools to support improved procurement management decision-making and assessment. Enhancing integrity in public procurement must also be placed within the broader management systems and reform of the public administration.[33]

Also, despite of the inexistence of discretion in the application of this sanctions, for OECD, its is important also to focus on the legislation and to consider to "amend the law to reduce discretion with regard to the imposition of administrative

[32] Available at: <http://www.eib.org/attachments/strategies/TI_EU_debarment_recommendations.pdf>.

[33] OECD BRAZIL INTEGRITY REVIEW – OECD. *OECD Integrity Review of Brazil: Managing Risks for a Cleaner Public Service*, Paris: OECD Publishing, 2012. DOI: http://dx.doi.org/10.1787/9789264119321-en.

procurement sanctions. Procurement legislation does not determine how the different administrative sanctions are to be applied in practice (e.g. when will a certain breach of the contract obligations trigger a warning as opposed to a fine) or standardised amounts for administrative fines".[34]

It is expected that the evolution of the procurement systems, both in the United States and Brazil, will generate integrated relationships. This objective cannot be achieved with punitive measures alone; instead, both systems should aim to ensure a fair process for exclusion, taking into account the integrity and performance risks that an individual contractor may pose.

References

ARAÚJO, Ricardo Wagner. *Fighting Corruption and Promoting Integrity in Public Procurement*: a comparative study between Brazil and United States. George Washigton University. Advisor: Christopher R. Yukins. The Minerva Program, fall 2013.

ARÊDES, Sirlene Nunes. Tipicidade e discricionariedade na aplicação de penalidades contratuais. BATISTA JÚNIOR, Onofre. ARÊDES, Sirlene Nunes. MATOS, Federico Nunes. *Contratos Administrativos:* estudos em homenagem ao Professor Florivaldo Dutra de Araújo. Belo Horizonte: Fórum, 2014.

BANDEIRA DE MELLO, Celso Antônio. *Curso de Direito Administrativo.* 31. ed. São Paulo: Malheiros, 2014.

BRASIL, Law nº 10,520 of 2002 Available. Article 7º Available at: <http://www.planalto.gov.br/ccivil_03/leis/2002/L10520.htm>.

BRASIL, Law nº 12,468 of August 4, 2011, article.47. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12462.htm>.

BRASIL, Law nº 8,429 of June 2, 1992. Available at: <http://www.planalto.gov.br/ccivil_03/Leis/L8429.htm>.

BRASIL, Law nº 8,443 of July 16, 1992. Available at: <http://www.planalto.gov.br/ccivil_03/Leis/L8443.htm>.

BRASIL, Law nº 8,666 of June 21,1993, articles 87 and 88. Available at: <https://www.planalto.gov.br/ccivil_03/Leis/L8666cons.htm>.

CIBINIC John; NASH, Ralph C. *Formation of Government Contracts.* 3. ed. Washington D.C.: George Washington University Law School, Government Contracts Program, 1998.

JUSTEN FILHO, Marçal. *Comentários à Lei de Licitações e Contratos Administrativos*. 16. ed. São Paulo: Revista dos Tribunais, 2014.

MANUEL, Kate. Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments. *CRS Report for Congress.* November 19, 2008. Available at: <https://www.fas.org/sgp/crs/misc/RL34753.pdf>.

OECD BRAZIL INTEGRITY REVIEW – OECD. *OECD Integrity Review of Brazil: Managing Risks for a Cleaner Public Service*, Paris: OECD Publishing, 2012. DOI: <http://dx.doi.org/10.1787/9789264119321-en>.

[34] OECD BRAZIL INTEGRITY REVIEW – OECD. *OECD Integrity Review of Brazil: Managing Risks for a Cleaner Public Service*, Paris: OECD Publishing, 2012. DOI: <http://dx.doi.org/10.1787/9789264119321-en>.

OSÓRIO, Fábio Medina. *Direito Administrativo Sancionador*. 5. ed. São Paulo: Revista dos Tribunais, 2015.

STEVENSON, Drury; WAGONER, Nicholas J. 'FCPA Sanctions: Too Big to Debar?' *Fordham Law Review*, New York, Vol. 80, issue 2, 2011.

TILLIPMAN, Jessica. A House of Cards Falls: Why 'Too Big to Debar' is all slogan and little substance. *Fordham Law Review Res Gestae*, New York, Vol. 80, No. 49, 2012.

YUKINS, Christopher R. Suspension and Debarment: reexamining the process. *Public Procurement Law Review*, Vol. 13, 2004. Available at SSRN: <https://ssrn.com/abstract=509004>.

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