

DEVELOPMENTS IN THE FIELD

## Is Latin America Missing the Links Between Procurement, Sustainability and Human Rights?

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### I. Introduction

Public procurement is a process whereby the public sector buys from private suppliers the goods, services and works it needs to accomplish its functions. It aims to obtain the best ‘value for money’, ‘in a timely, economical and efficient manner’.<sup>1</sup> This traditional role for procurement goal was re-defined by scholars and policymakers to give space to non-economic objectives through the so-called ‘sustainable public procurement’ (SPP).<sup>2</sup> SPP pursues economic, environmental and social objectives within the purchasing process.<sup>3</sup> Therefore, ‘social’ is one of the three dimensions that makes sustainability possible, and human rights are the backbone of social sustainability.

Latin American countries spend on average 6% of their GDP and 17.4% of their total public funds in public procurement.<sup>4</sup> Like regional averages, public procurement represents 5.2% of Chile’s GDP and 20.7% of its total public expenditure.<sup>5</sup> These figures increase significantly in Peru and Colombia, where public procurement signifies 9.9% of their GDP.<sup>6</sup> The former allocates to public procurement almost half (46.4%), and the latter one-third (33.9%) of its public spending.<sup>7</sup>

The significant economic weight of public procurement gives states leverage to choose from whom and what to buy to achieve sustainable objectives. Colombia, Chile and Peru have embraced this purchasing power and included SPP in their Sustainable Consumption and Production Plans (SCP) and National Action Plans on Business and Human Rights (NAPs).

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<sup>1</sup> Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009).

<sup>2</sup> Stephen Brammer and Helen Walker, ‘Sustainable Procurement in the Public Sector: An International Comparative Study’ (2011) 31 *International Journal of Operations and Production Management* 452.

<sup>3</sup> Thomas Johnsen et al, ‘Sustainable Procurement: Past, Present and Future’ (2012) 18 *Purchasing and Supply Management* 201.

<sup>4</sup> OECD, *Government at a Glance: Latin America and the Caribbean 2020* (2020) 156–157, <https://www.oecd.org/gov/government-at-a-glance-latin-america-and-the-caribbean-2020-13130fbb-en.htm> (accessed 11 April 2022).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

They are the only countries in the region that have adopted the latter. However, these policies have failed to connect sustainability with human rights.

## II. SPP: A Means to Deliver on SDG12 Commitments and Meet Human Rights Obligations

SPP is acknowledged as a core dimension of Sustainable Development Goal 12 (SDG12) on sustainable consumption and production in the 2030 Agenda adopted in 2015.<sup>8</sup> States participate as mega-consumers of goods, services and works, whilst businesses have a production role as suppliers of the state. However, SPP was considered within sustainable development concerns before 2015. ‘Changing unsustainable patterns of production and consumption’ was set as an over-arching objective of the *Plan of Implementation of the World Summit on Sustainable Development* in 2002.<sup>9</sup> It included encouraging sustainable development objectives into decision-making processes of public procurement. However, actions were narrowed to solely environmental aims to ‘promote public procurement policies that encourage development and diffusion of environmentally sound goods and services’.<sup>10</sup>

The Plan also called to develop a *10-Year Framework of Programmes on Sustainable Consumption and Production Patterns* (10YFP).<sup>11</sup> The 10YFP, covering the period 2012–2022, included public procurement as one of its six key programmes. To implement the 10YFP regionally, Latin American countries adopted the *Regional Strategy on Sustainable Consumption and Production for the 10YFP implementation in Latin America and the Caribbean 2015–2022*. These international and regional frameworks pushed states to develop national programmes on SCP as tools to deliver on their political commitments to procure in sustainable ways.<sup>12</sup>

Despite SPP being recognized to consist of economic, social and environmental dimensions, the sustainable aspect of procurement has been narrowed to environmental criteria for green-only purchases. Yet, sustainability includes a social dimension with human rights at its core, which have to be respected, protected and fulfilled by states in all their activities, including public procurement.<sup>13</sup> Therefore, SPP entails fulfilling human rights through facilitating their enjoyment whilst protecting them through prevention and redress of abuse.<sup>14</sup> Only the latter is addressed in the UNGPs by establishing that a state should take additional steps to protect human rights from abuses by businesses with whom it has a contractual relationship.<sup>15</sup> While procuring, states as duty-bearers can leverage their purchasing power over companies to reshape unsustainable and human rights-blind

<sup>8</sup> General Assembly, ‘*Transforming our World: The 2030 Agenda for Sustainable Development*’ (21 October 2015), A/RES/70/1.

<sup>9</sup> General Assembly, ‘*Plan of Implementation of the World Summit on Sustainable Development*’ (4 September 2002), A/CONF.199/L.7, para 2.

<sup>10</sup> *Ibid*, para 19.

<sup>11</sup> General Assembly, ‘*Report of the UN Conference on Sustainable Development*’, A/CONF.216/16 (22 June 2012), p 74; General Assembly, ‘*Letter Dated 18 June 2012*’ (19 June 2012), A/CONF.216/5.

<sup>12</sup> UNEP, ‘*Regional Strategy on Sustainable Consumption and Production (SCP) for the 10YFP Implementation in Latin America and the Caribbean*’ (2015–2022) (2015), [http://www.pnuma.org/forodeministros/20-reunion-intersesional/documentos/Regional\\_SCP\\_Strategy\\_Final\\_May2015.pdf](http://www.pnuma.org/forodeministros/20-reunion-intersesional/documentos/Regional_SCP_Strategy_Final_May2015.pdf) (accessed 21 June 2021).

<sup>13</sup> Olga Martin-Ortega, ‘Public Procurement as a Tool for the Protection and Promotion of Human Rights’ (2018) 3 *Business and Human Rights Journal* 75.

<sup>14</sup> Laura Treviño-Lozano, ‘Framing Social Sustainability in Infrastructure Theory and Practice’ (2022) 14 *Sustainability* 2369; Laura Treviño-Lozano, ‘Sustainable Public Procurement and Human Rights’ (2021) 13 *Sustainability* 9505.

<sup>15</sup> Olga Martin-Ortega and Claire Methven O’Brien, ‘Public procurement and human rights: interrogating the role of the state as buyer’ in Olga Martin-Ortega and Claire Methven O’Brien (eds.), *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as a Buyer* (Cheltenham: Edward Elgar Publishing, 2019), 2.

markets. The UNGPs have been implemented domestically through national action plans on business and human rights (NAPS), which frequently include procurement requirements within their strategies and objectives.<sup>16</sup>

### III. The Missing Link Between SDG 12 and NAP Policies

Colombia, Chile and Peru have developed plans on SCP and NAPs, and all include public procurement considerations with relevant aspects of sustainability throughout one or both policies. Nonetheless, the linkage between sustainability and human rights has been neglected.

#### *Sustainable Production and Consumption Policies*

Colombia adopted in 2010 a *National Policy on Production and Consumption*,<sup>17</sup> Chile adopted in 2017 its *National Action Plan on Sustainable Consumption and Production 2017–2022*,<sup>18,19</sup> and Peru the *National Agreement 2002–2021* in 2014.<sup>20</sup> They all include SPP as a tool to achieve SCP and share two missing links as a common pattern.

Firstly, SCP plans dissociate infrastructure from public procurement of goods and services. In its SCP plan, Colombia divides strategy 1 on ‘Sustainable infrastructure’ and strategy 3 on ‘SPP of goods and services’. Yet, strategy 3 includes as part of its actions to develop internal regulation for acquisitions committees that intervene in ‘large construction tenders’ to ‘drive environmental enhancement of large infrastructure works’. Likewise, Chile’s SCP separates its line of action for ‘sustainable construction’ from ‘sustainability in the public sector’, although it considers as working areas both sustainable infrastructure and SPP. In contrast, the Peruvian plan sets ‘Sustainable Development and Environmental Management’ as its nineteenth ‘state policy’, but with no explicit mention to SPP as a means to achieve SCP.

Sustainable criteria for goods and services will be certainly different from those used for infrastructure. Yet, exclusion of infrastructure from SPP as a pattern in the region could lead public procurement practitioners to consider these criteria only when procuring daily goods and services. Segregation becomes problematic because infrastructure projects frequently involve complex supply chains with multiple human rights risks and long-term contracts with big investments. These conditions give states greater leverage over infrastructure developers than with most goods and services, particularly those that are not purchased on a regular basis. Conversely, existing SPP measures in certain goods like construction materials (bricks and natural stones) or services like solid waste management could be harnessed to be replicated in the construction and operation of infrastructure.

Secondly, core actions, strategies, objectives and actions of SCP plans contain no social or human rights considerations. On the contrary, they have environmental approaches or vague references to ‘sustainability’ without determining what product or service qualifies as

<sup>16</sup> Humberto Cantu-Rivera, ‘National Action Plans on Business and Human Rights: Progress or Mirage?’ (2019) 4:2 *Business and Human Rights Journal* 213.

<sup>17</sup> Ministry of Environment, Household and Territorial Development, *National Policy on Production and Consumption* (2010), <https://www.icesi.edu.co/blogs/pycs/files/2011/09/Pol%C3%ADtica-de-PyCS-FINAL.pdf> (accessed 26 January 2022).

<sup>18</sup> Ministry of Environment, *National Action Plan on SCP 2017–2022* (2017), <https://mma.gob.cl/wp-content/uploads/2017/11/PLAN-NACIONAL-DE-ACCION-CPS-2017-2020.pdf> (accessed 24 June 2021). See further at: <https://biblioteca.digital.gob.cl/handle/123456789/144> (accessed 24 June 2021).

<sup>19</sup> Ministry of Environment, *Sectorial Programme of Environment and Natural Resources 2020–2024* (2020), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5596232&fecha=07/07/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5596232&fecha=07/07/2020) (accessed 21 June 2021).

<sup>20</sup> Government of Peru, *National Agreement 2002–2021* (2014), <http://www.acuerdonacional.pe/politicas-del-estado-del-acuerdo-nacional/definicion/> (accessed 21 June 2021).

'sustainable'. In most cases, Ministries of Environment are the designers and implementers of SCP policies, which explains why SPP is focused on green-only aims. While clarification of such a key notion should be given in over-arching SCP policies, sometimes it is detailed in subordinate levels of guidance. For example, Colombia's SPP Conceptual and Methodological Guideline (Guide for SPP) of 2013 and its updated version of 2017<sup>21</sup> establish the definition of 'sustainable', but no explicit reference is given to human rights. Human rights are segregated from what is considered sustainable and rather included in the definition of 'ethical production'. This concept is labour rights-oriented that aims to secure 'the products are sourced from suppliers that respect the international standards (rights) related to the job post issued by entities like the ILO'.<sup>22</sup> Although meeting international labour standards is a step forward, framing human rights into the moral behaviour of what is 'ethical' obscures their foundation in international legal and non-voluntary obligations for states.

Moreover, Colombia's SCP establishes that SPP of goods and services will be attained through strengthening economic instruments that pursue SCP; promoting use of 'self-declarations and environmental certifications' like the Colombian Environmental Stamp; adapting technical specification guides for the characteristics of 'sustainable' goods and services; articulating inter-institutional and 'intersectoral National Environmental Education Program to sustainable production and consumption'; developing an SPP plan based on a 'system of information on the environmental quality of sustainable goods and services'; promoting 'sustainable business'; and developing a public platform of 'sustainable products, services and suppliers'.<sup>23</sup> The environmental-only approach is further seen in measurement indicators. For example, one indicator of accomplishment is based on the percentage of the total investment in public acquisitions considered 'sustainable' and the number of goods or services with 'environmental criteria' incorporated to the System of Information for Monitoring Public Procurement (SICE). These markers are concerning because a purchased good that is made of recycled materials by workers under forced labour fits into the Guide for SPPs' definition of 'sustainable', which perpetuates the green shadow on human rights and leaves little incentive to further include the latter.

Likewise, the Chilean SCP establishes several actions to meet SPP. Amongst them, it sets out to create a Directive on Sustainable Acquisitions, embed 'sustainable criteria' in public procurement schemes, develop a Programme of Enhancement of Sustainable Public Procurement Management and a System of Monitoring 'Sustainable Purchases' and train public servants in SPP matters.<sup>24</sup> However, no clarity is given on what characteristics criteria should meet to be claimed as 'sustainable' or whether such a 'sustainable' tag includes both environmental and social considerations. Particularly, there is no certainty on whether any social consideration encompasses both states' obligations to protect and to fulfil human rights.

### **National Action Plans on Business and Human Rights**

Colombia, Chile and Peru have included public procurement in their NAPs. Human rights considerations in the procurement process are included in the selection of suppliers, awarding criteria and contractual obligations, as well as in capacity building.

<sup>21</sup> Ministry of Environment, *SPP: Conceptual and Methodological Guideline* (2017), p 67, <https://www.oneplanetnet.org/sites/default/files/from-crm/guiacps.pdf> (accessed 28 January 2022).

<sup>22</sup> Ministry of Environment, *SPP: Conceptual and Methodological Guideline* (2013), p 97, [https://www.uniagraria.edu.co/wp-content/uploads/2015/12/Guia\\_Compras\\_Publicas\\_Sostenibles.pdf](https://www.uniagraria.edu.co/wp-content/uploads/2015/12/Guia_Compras_Publicas_Sostenibles.pdf) (accessed 28 January 2022).

<sup>23</sup> Ministry of Environment, note 17, p 40.

<sup>24</sup> Ministry of Environment, note 18.

Colombia and Peru's NAPs focus on procurement selection and awarding criteria. Colombia adopted a first NAP in 2015 and a second in 2020. The first NAP calls for listing and including criteria in 'selection and awarding public procurement processes'.<sup>25</sup> Likewise, Peru's recent NAP of 2021 includes undertaking an assessment of public procurement schemes with relation to the UNGPs and responsible business conduct to determine the ways in which the system can prevent human rights abuses.<sup>26</sup> The Peruvian NAP further establishes to adopt appropriate measures to promote formalization of procurement; to prevent public contracting with businesses that commit severe human rights abuses, particularly child and forced labour directly or through its supply chain; and to incentivize human rights respect in business suppliers and their supply chains.<sup>27</sup>

Moreover, Colombia's NAP of 2015 and Chile's NAP of 2017 call to include human rights obligations for state's suppliers in the procurement systems. The Colombian NAP further establishes public buyers should incorporate measures to ensure that suppliers undertake human rights due diligence, particularly those with highest procurement volumes.<sup>28</sup> Similarly, Chile's NAP integrates an 'integrity agreement clause' through which the private supplier commits to respect human rights in alignment with the UNGPs.<sup>29</sup> However, suppliers' commitments in such contractual clauses are directed towards acting 'with transparency, probity and truthfulness regarding the information and details submitted in the tender papers', which are not inherently human rights-based.

Furthermore, both NAPs in Colombia and Chile consider capacity-building through tools like procurement and human rights guidelines and training. One of the major SPP achievements in the implementation of Colombia's first NAP of 2015 was the development of the *Guideline of Socially Responsible Public Procurement* (Guide for SRPP) of 2018.<sup>30</sup> This guideline aims to align the Colombian procurement scheme to the UNGPs.<sup>31</sup> Indeed, Colombia's second NAP of 2020 includes implementation and enforcement of Guide for SRPP and dissemination of the due diligence framework.<sup>32</sup> Equally, Chile's NAP establishes that the procurement agency *ChileCompra* 'will train suppliers in its content, including issues of business and human rights'.<sup>33</sup>

The region has progressed through valuable efforts towards sustainability and human rights in the field of procurement, notably, because they all address public procurement in both SCPs and NAPs policymaking. Yet, there are three points to highlight regarding human rights in procurement policies within NAPs. First, they tend to be focused on labour-related

<sup>25</sup> Government of Colombia, *National Action Plan on Human Rights and Business 2015–2018* (2015), p 12, <https://globalnaps.org/wp-content/uploads/2018/04/pna-colombia-english.pdf> (accessed 21 June 2021).

<sup>26</sup> Government of Peru, *Executive Decree 009-2021-JUS that approves the National Action Plan on Business and Human Rights 2021–2025* (2021), p 79, <https://globalnaps.org/wp-content/uploads/2021/06/plan-nacional-de-accion-sobre-empresas-y-derechos-humanos-2021-2025pdf.pdf> (accessed 21 June 2021).

<sup>27</sup> *Ibid.*

<sup>28</sup> Government of Colombia, *note 25*.

<sup>29</sup> Ministry of Foreign Affairs, *National Action Plan on Business and Human Rights Chile* (2017), p 42, [https://globalnaps.org/wp-content/uploads/2017/11/national-action-plan-on-business-and-human-rights\\_pdf](https://globalnaps.org/wp-content/uploads/2017/11/national-action-plan-on-business-and-human-rights_pdf) (accessed 24 June 2021).

<sup>30</sup> *CompraEficiente, Guideline of Socially Responsible Public Procurement* (2018), <https://colombiacompra.gov.co/manuales-guias-y-pliegos-tipo/manuales-y-guias/guia-de-compras-publicas-socialmente-responsables> (accessed 24 January 2022).

<sup>31</sup> Government of Colombia, *Second Report on Advancements in Implementation of the National Action Plan on Business and Human Rights 2017–2018* (2018), pp 20–21, <https://globalnaps.org/wp-content/uploads/2018/08/colombia-annual-report-on-nap-implementation-2017-18-espaol.pdf> (accessed 20 June 2021).

<sup>32</sup> Government of Colombia, *National Action Plan on Business and Human Rights 2020–2022* (2020), p 54, <http://www.derechoshumanos.gov.co/Prensa/2020/Documents/Plan-Nacional-de-Accion-de-Empresa-y-Derechos-Humanos.pdf> (accessed 21 June 2021).

<sup>33</sup> Ministry of Foreign Affairs, *note 29*.

human rights, rather than considering all human rights that could be at risk within supply chains of each good, service or works that governments acquire, for example the right to food and health when procuring meals for schools and hospitals. Besides, all NAPs overlook redress of human rights abuses that may be committed by private suppliers or their subcontractors in the execution of the contract.

Secondly, NAPs tend to focus on the inclusion of human rights criteria within the first two stages of procurement, especially in selection and awarding criteria, rather than comprehensively through the entire procurement cycle. Particularly, more attention needs to be placed in enforcing measures within the third stage of procurement related to contract management. Human rights criteria embedded in design will have little impact if they lack compliance in the execution of contracts. In relation to contract management, measurement of implementation is of paramount importance. In the context of the development of a second NAP in Chile, a study recommended to assess the impact of integrating human rights criteria in the cost of public purchases to gauge the resulting additional benefits and social value.<sup>34</sup>

Thirdly, all NAPS have statements about their contribution to achieving the 2030 Agenda's SDGs. Yet there are still loose and weak connections between them, with considerable gaps that ultimately undermine human rights. The UN Working Group on Business and Human Rights expressed Latin America has both the challenge and need of policy coherence at regional and country level between human rights and sustainable development by making explicit the concrete references of the linkages between them, particularly in policies.<sup>35</sup> Some countries, like Chile, pay attention to the 2030 Agenda by highlighting in its NAP the 'connection' both frameworks have in a general way. Others like Colombia have made considerable progress in the integration of environmental and social sustainability in procurement technical and operational guidelines like the Guide for SPP in 2013 deriving from the SCP plan,<sup>36</sup> and the Guide for SRPP in 2018 resulting from the NAP.<sup>37</sup> Yet, these guidelines lack a linkage between each other; replicating the SCP's disconnection with human rights, and NAP's missing link with SDGs.

#### IV. Concluding Remarks

Latin American countries have progressed on both environmental and social dimensions of sustainability through their SCP and NAPs, particularly because they have attached public procurement to their goals. However, appropriate linkages within SCPs and NAPs and between them have been missing. SCPs lack connection between infrastructure and goods/services and between environmental and social sustainability, mainly regarding human rights. SCP's socially blind approaches through environmental-only actions are driving efforts towards just green procurement.

In parallel, the pursuit of human rights protection in state supply chains is being developed through NAPs. Yet, NAPs have missed the link between all recognized human

<sup>34</sup> Pontifical Catholic University of Chile, *Report Compilation: Update Study, Assessment of the NAP, and Proposal to the Elaboration of its Second Version for the Under-Secretary of Human Rights* (2020), p 24, <https://globalnaps.org/wp-content/uploads/2021/03/estudio-de-actualizacion-evaluacion-del-plan-de-accion-nacional-de-derechos-humanos-y-empresas-y-propuesta-para-la-elaboracion-de-su-segunda-version.pdf> (accessed 24 June 2021).

<sup>35</sup> General Assembly, 'Third Consultation for Latin America and the Caribbean on the Implementation of the UNGPs in the framework of the Agenda 2030' (4 June 2018), A/HRC/38/48/Add.3.

<sup>36</sup> Ministry of Environment, note 22.

<sup>37</sup> *CompraEficiente*, note 30.

rights and the entire procurement lifecycle by focusing only on labour-related rights and the first stages of the process. Notably, redress of supplier-related human rights abuse is non-existent. Moreover, the lack of articulation between NAPs and SCPs is leading to overlapping efforts and human rights subsumption by environmental sustainability, which ultimately undermines both SDGs and human rights.

Forthcoming NAPs in Honduras, Mexico, Argentina and Ecuador and the termination of the Regional Strategy on SCP in 2022 are staging valuable opportunities for Latin America to link sustainability with human rights. To that end, sustainability needs to be understood as a notion that goes beyond green, and that becomes meaningful when it also covers the protection and fulfilment of human rights.

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