A Short Note on Concerns about Procurement Legislation in Some Latin American Anti-corruption Programmes

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To confront corruption in procurement, it is necessary to understand why it is made possible. The answer is simple: corruption in procurement always springs from vulnerabilities affecting the legal framework. These, in turn, always boil down to the possibility of erecting entry barriers to potential participants.

A legislation that eliminates or severely limits the possibility of administrators erecting entry barriers is essential. It is by allowing the amplest possible competition that the public interest is best served, as this is the best way to attain the lowest prices for a given good or service.

This does not mean that good procurement legislation would be enough to end corruption. The condition is necessary but not sufficient. In many countries, the rule of law is not too strong, and, therefore, civil society must keep sharp eyes in order to make sure that the law is indeed being enforced in particular situations. Citizen's participation is crucial for that.

Nevertheless, one must not forget the "necessary" part of the condition: it means that in the absence of at least reasonable procurement regulations, it is impossible to confront corruption. No amount of civil society intervention would be able to make right of an inherently distorted process. A simple example suffices. Suppose that the laying of a road is subjected to procurement. Suppose that the rules allow the administrator to define arbitrarily restrictive conditions on the participants – the usual are exaggerated capital requirements, financial guarantees that far exceeds reasonable levels vis a vis the intended object, and pseudo-technical requirements (such as the firms' previous experience in building roads with shoulders painted red). This sort of restriction closes the market for a few participants, often just one, precluding others to bid.

It is far easier for a corrupt administrator to make deals with three or four participants, whom he carefully "pre-selects" by his own criteria, than to do the same thing with twenty or thirty. In the sort of environment that permits such restrictions, markets and submarkets tend to be partitioned among few, cartelised, relatively big participants. Smaller firms are left out or with crumbles. Now, what can civil watchfulness accomplish in situations like that? Everything is done according to the law, but the outcome was predefined.

In how many countries this type of situation prevails? That is, a situation where bad laws inherently precludes transparent procurement? Notwithstanding the received view, the answer is not straightforward. The received view is that the majority of countries do have sound laws, but they are circumvented or simply not applied. Now, is this a matter of empirical fact? If so, the evidence is not easy to find. Actually, what scant evidence can be found within Latin America is to the contrary.

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Apparently, nobody ever did a thorough comparative examination of a sizable number of national procurement rules, so as to base this sort of opinion on intersubjectively verifiable evidence. After some looking around, this writer could find just one attempt on such a comparison. It is to be found in the Anti-American Development Bank's website – and, although titled as a comparison, not only it is a far cry from actually being it but it is also affected by obvious methodological and even factual problems.

The conclusion is that a serious and thorough examination of procurement laws in the continent should be urgently done, so as to provide analysts and activists alike with a sounder ground upon which base their assessments and planning.

Irrespective of sound laws being in place or not, it seems that the conscience that good procurement laws are critical to the fight against corruption is not widespread. Evidence can be found by examining anti-corruption programs in which some countries are involved. In some of these programs, procurement laws are mentioned, but in many others, they are not. Examples of both cases are given below. The list is not exhaustive, and the intention is not to provide a detailed description of each country's anti-corruption initiatives.

> *Argentina*. In the National Decree nº 102/99, issued by the Presidency to regulate the functioning of the country's Anticorruption Office (where "object, scope, responsibilities, functions, structure and organization" are established), there is no mention of procurement or contracts.
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> *Bolivia*. This country launched in 1998 its National Integrity Plan. It addresses the entirety of Bolivian's institutional structure, going much beyond the control of corruption. The need to reform procurement legislation is briefly pointed out. The plan, however, was never put in motion.
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> *Brazil*. Brazilian procurement law is one of the world's few that almost exhaustively defines all procedures to be followed in a bidding. As it was promulgated (in 1993) after intense debate with significant stakeholders, it tries to cover all potential openings for corrupt practices. Of course, some remain. On the other hand, there is no anti-corruption program in Brazil – which does not mean that there should not be one.
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> *Colombia*. This country has an anti-corruption program led by the Presidency. In what regards procurement, there is a strong emphasis on Transparency International's "Integrity Pacts" methodology, in which participants voluntarily agree not to use corruption to win contracts and public officials agree not to take bribes. The legal framework seems not to be addressed.[2]
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> *Costa Rica*. The Costa Rican Presidency submitted to the Foro Nacional de la Concertación a *Proposal for the fight against corruption*. In a section dedicated to "Preventive legislative policies", procurement legislation receives a passing mention, limited to minor details.
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> *Dominican Republic*. There exists a Strategic National Plan for Corruption Prevention issued in 1997, following a conference on corruption prevention under the auspices of the

[2] However, it may very well be that such mention exists but remained undetected.

country's attorney general office. It is not an official plan, but a set of recommendations. The need to establish "transparent procedures" in public procurement is mentioned in passing.

Ecuador. This country launched an Anti-corruption National Plan, a broad program covering many fields. It is divided in "components", among them "Institutional development – Public contracting". This is entirely dedicated to a reform of the current procurement regulations. Other components expressly regard procurement. However, the Ecuadorian "Ley de la comisión de control civico de la corrupción", promulgated in August 1999, which provides for an independent commission to watch corruption, does not mention procurement and contracts when defining the commission's attributions.

Guatemala. The National Ethical Plan for Guatemala (1999) provides for law reforms, including procurement legislation, in its "Juridical updating and institutional reform program".

Paraguay. This country's recent (2000-2001) Anti-Corruption National Plan defines procurement as one of its three primary areas of concern. However, this plan does not include the legal framework per se.

This bird's-eye view of some of the region's anti-corruption plans (or would-be plans) shows that the formal procurement apparatus is not uniformly recognised as crucial to curb corrupt practices.