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Report

Workshop on Human Rights and Public Procurement with members of the Inter-American Network on Government Procurement

Santiago, 6th of October 2017

Content

A. Background	3
B. Public procurement and human rights	3
C. Objectives of the workshop	5
D. Main conclusions of the workshop.....	6
1. Looking beyond the law to examine economic and commercial benefits of integrating human rights into public procurement cycle	6
2. Main challenges to integrate human rights into government procurement cycle	6
3. Strategies to overcome challenges and integrate human rights into government procurement.....	7
E. Next steps to integrate human rights in procurement process within INGP (results of the group discussions among INGP participants).....	10
ANNEX No. 1 -About the organizers of the workshop	11
ANNEX No. 2 - About the Inter-American Network on Government Procurement (INGP)	12
ANNEX No. 3 - General program of the workshop	14
Annex No. 4 - Presentations of the experts for each session	16

A. Background

The current report, presents the results of the workshop on Human Rights and Public Procurement carried out for the Inter-American Network of Government Procurement (INGP) in Santiago de Chile the 6th October 2017, in order to explore the state duty to protect human rights through their commercial transactions with business enterprises.

The workshop was organized by the Organization of American States as the Technical Secretariat of the INGP, Centro Vincular of the Catholic University of Valparaíso, The Danish Institute for Human Rights, The International Corporate Accountability Roundtable (ICAR) and the International Learning Lab on Public Procurement and Human Rights, with the support of the United Nations Working Group on Business and Human Rights and the Swedish Embassy in Chile (see Annex No. 1 to know more about the organizers).

The starting point for the present discussion is the UN Guiding Principles on Business and Human Rights (UNGPs), adopted unanimously by the UN Human Rights Council in 2011, which are the authoritative global reference for preventing and addressing adverse human rights impacts arising from business-related activity.

The present report has two objectives: first, to present the conclusions of the concept frameworks and experiences exposed by the experts and practitioners regarding human rights and government procurement; and second, to describe the potential steps to be taken by the INGP in order to integrate human rights into the procurement cycle, as a result of the group discussions among INGP members, that took place during the workshop.

The organizers of the workshop would like to thank the INGP authorities, members and partners (See Annex 2 – list of participants) that attended and actively participated during the workshop, and contributed with their experiences and ideas to recognize the progress and gaps of the governments and public authorities to promote respect for human rights in their supply chains and to suggest next steps to fully to integrate the topic in procurement process within INGP.

See Annex 3 to know the program of the workshop.

B. Public procurement and human rights

Public Procurement

Public procurement can be understood as a broad term encompassing almost all purchasing by the state; which includes government departments and other public authorities such as district councils. It embraces a wide spectrum, from tenders for multi-million dollar infrastructure and urban development, to the commissioning of essential public services from private providers in the areas of health and social care, to the purchase of items such as uniforms, stationery and foodstuffs.

Public procurement is a major component of the global economy, accounting for €1000 billion per year and on average 12% of GDP in OECD countries.¹ Public procurement can be the single most important source of revenue in some sectors, including health and research-related industries, construction and transportation. In recent years, as the concern of policy-makers to promote the transition to sustainable economies has increased, interest in the role of integrating social as well as environmental sustainability considerations into public procurement policy and practice has grown.

While efficiency and cost effectiveness are amongst the primary objectives of public procurement, the realization of human rights through public procurement should also be a primary objective to policy makers. Such objectives can include promoting sustainable green growth; the development of small and medium-sized enterprises; innovation; standards for responsible business conduct and broader industrial policy objectives.²

Public Procurement and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) affirm the duty of central governments and other public authorities to promote respect for human rights in their supply chains. Guiding Principle 6 states that:

‘States should promote respect for human rights by business enterprises with which they conduct commercial transactions.’

The Commentary to Principle 6 elaborates:

‘States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.’

Contracting out of public services is also specifically addressed by the UNGPs. Guiding Principle 5 provides:

‘States should exercise adequate oversight in order to meet their international human rights obligations when they contract with or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.’

The Commentary on Principle 5 provides that:

‘States do not relinquish their international human rights obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by a State to ensure that business enterprises performing such services operate in a manner consistent with the State’s human rights obligations may entail... legal consequences for the state itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State’s expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms.’

¹ OECD iLibrary, Government at a Glance 2015

² <http://www.oecd-ilibrary.org/docserver/download/4215081e.pdf?expires=1478724794&id=id&acname=guest&checksum=CC112B13866F207D68E5E8A22466117F>

Taken together, these principles mean that public authorities must look beyond the impact of public procurement on the human rights of people in their home jurisdiction. In purchasing goods and services from suppliers in other countries, public authorities are under a duty to take reasonable measures to ensure they are not implicated in human rights abuses across the supply chain. Further, the government and public authorities must require and support businesses themselves to achieve respect for human rights in practice.

In 2015, the G7 Leaders' Declaration called for tools to support public procurers in meeting social and environmental commitments. Likewise, the 2030 Sustainable Development Agenda highlights the role of government procurement as key to the transition to sustainable production and consumption, decent work, and more inclusive economies: Sustainable Development Goal 12.7 calls on all countries to implement sustainable public procurement policies and action plans. The ISO's 20400 Guidance on sustainable procurement, to be launched in 2017, moreover addresses the integration of human rights into procurement policy and practice by both private and public buyers.

In addition, governments and international organizations are introducing measures to extend private companies' responsible supply chain and disclosure obligations, including in relation to human rights. Legislative measures, for example in the United States, the United Kingdom, and at EU level, have recently imposed new supply chain reporting obligations on businesses including relating to human rights concerns.

In 2011, the OECD revised its Guidelines for Multinational Enterprises to incorporate the concept and requirement of "human rights due diligence" as expressed in the UNGPs. In addition, the OECD has published sector-specific guidance on due diligence. In 2016, the 105th session of the International Labor Conference (ILC) focused on how to promote decent working conditions in global supply chains, while a revision of the ILO Declaration on Multinational Enterprises is now being undertaken in that light.

C. Objectives of the workshop

- Introduce the legal foundations of human rights law and how these apply to states, focusing on the context of public procurement and in relation to legal principles around public procurement
- Look beyond the law and examine experiences relating to the economic and commercial benefits of integrating human rights into public procurement exercises
- Share experiences on inserting social, human rights, and environmental protections into public procurement exercises
- Discuss how INGP could support further integration of human rights in public procurement in the INGP and define further steps and commitments

D. Main conclusions of the workshop

1. Looking beyond the law to examine economic and commercial benefits of integrating human rights into public procurement cycle

Beyond the obligation of states to promote protect human rights and promote respect for human rights by business enterprises with which they conduct commercial transactions through their procurement activities and through the provision of public services, as stated in chapter B, integrating human rights issues within the government procurement cycle has other benefits for the state and for the government institutions that conduct procurement activities.

Public procurement represents an opportunity for states to lead by example. If states are committed to promote responsible business conduct and respect of human rights by the enterprises that operate within their jurisdiction, there is a unique opportunity to influence the market and create demand for responsible and sustainable products and services, given the huge state's purchasing power and leverage. Creating a demand for responsible and sustainable products and services will create competition that will drive prices down for this kind of products and services and increase the size of the market around such good and services.

Avoiding reputational risks for states and its representatives. It is embarrassing for the state and its representatives to have to admit that their purchasing activities are directly or indirectly affecting human rights, without having mechanisms in place that safeguard people's rights from being negatively affected by state's commercial partners. This can undermine the credibility of the government with respect to its commitments in protecting and respecting human rights in the framework of business activities, affecting the confidence of society towards a state's institutions

Gaining efficiencies and avoiding operational risks within procurement procedures. Having commercial and sourcing partners in value chains where human right risks exist is itself a risk to those undertaking the procurement exercise. If human rights violations and abuses occur it can cause sourcing interruptions and delays, it can waste time and capacity in addressing contractual and legal issues, it can cost to address the violations and abuses with the company, and if the contract ultimately cannot be fulfilled or is cancelled, and can cost to undertake a new procurement exercise. These all entail costs which impacts upon the efficiency and effectiveness of government procurement.

As a matter of policy coherence, it is important to make sure that citizens' taxes used by the state to purchase services and goods won't negatively impact its own citizens or others in different parts of the globe, just for the sake of prioritizing the cheapest procurement option. Public purchasing policies should be aligned to state's commitments towards human rights

Government procurement can be a very effective tool to reach sustainable development and the Agenda 2030

2. Main challenges to integrate human rights into government procurement cycle

International and national procurement laws and policies do not clearly and explicitly define the human rights responsibilities of public bodies in connection with their purchasing activities. At the same time, existing procurement laws and policies appear to have a 'chilling effect' on human

rights and sustainability efforts by public buyers due to fear of litigation to contest procurement processes or decisions that include human rights-related conditions, for instance, in selection or award criteria.

In the small minority of cases where public procurement rules do explicitly address human rights issues, they generally single out specific issues (e.g. child labor) or focus on promotion of some specific rights (e.g. gender) rather than addressing the full range of human rights risks relevant to the supply chain in question.

In general, there is lack of analysis on the impacts on economic growth improved by economic equality, as a result of increased compliance with law and regulations by government suppliers. Improving working conditions across the value chains of state contractors and suppliers or reducing territorial conflict associated with increased recognition and respect for the rights of vulnerable populations across state supply chains, can improve economic equality. A DIHR study reveals a positive correlation between economic equality and economic growth.

Government procurement is a vehicle to advance public policy objectives according to national priorities in each country, but there is a challenge in defining which objectives to prioritize and how to have a right balance between primary procurement objective and secondary policy objectives such as complying with standards for responsible business conduct and respect of human rights

Public servants in procurement entities that have to put into practice this principles and standards to integrate human rights in their processes, are not familiarized with them and have no technical capacities to take into account human rights risks into their decision-making processes

Monitoring and enforcement of public requirements are recognized as weakest part of the government procurement cycle and crucial to get right in terms of incorporating human rights within the procurement process

3. Strategies to overcome challenges and integrate human rights into government procurement

Defining expectations

Make a public commitment by the directors of contracting authorities in order to send a clear message to the market about the social values and standards that suppliers and contractors will have to consider when they enter in a commercial relationship with the state. Linking the human rights issues to other existing policies within the contracting authorities/institutions (e.g. sustainable procurement, labor standards, among others), will facilitate the directors' decision to make public commitments with respect to human rights.

A code of conduct for suppliers and contractors may help to complement a public commitment by clearly announcing to business the state's expectations on how to respect human rights. Businesses should not be surprised with measures, but kept informed of what is on the horizon so they can prepare and adapt. The expectations and requirements for businesses should be aligned to international principles and standards that the state has recognized as legitimate (UNGP, OECD, ILO, among others). In some situations it can be possible to talk to business to see what they can easily deliver in terms of human rights, and inform them of what may come in the future.

A due diligence process is needed to identify, understand, assess and address the adverse effects of public purchasing on the human rights enjoyment of workers, communities, consumers or other rights-holders along the state's value chains. Segmenting the different value chains of public procurement (e.g. by sector or purchasing areas) and identifying specific human rights risks related to those different value chains (e.g. child labor, forced labor) can facilitate the work of public procurers to prioritize areas, set the right requirements and ensure their implementation and compliance by suppliers and contractors.

Establishing a multi-stakeholder forum to bring together different actors within society (e.g. business, government, civil society organizations, trade unions, national human rights institutions) to talk about human rights can show the government and procurement authorities that there is interest in the topic from business and demonstrate how society expects businesses to be held accountable for their activities that can affect human rights, both positively and negatively.

It is important to measure the impact of integrating human rights requirements in to the cost of public procurement to compare it with the additional benefit and social value that is generated. Certain techniques can be used to evaluate cost, like a request for information to the market for a specific product or service with and without human rights attributes or doing benchmark against other experiences (e.g. in South Africa integrating human rights considerations into public purchasing raise costs in about 8 – 12%).

Integrate human rights into procurement systems

Integrate into the current procurement system the new considerations related to human rights so that they are treated with the same rigorousness as other issues already existing in the system (transparency, integrity, efficiency). This will help the public procurers to integrate these considerations into their daily work.

Design a simple public purchasing system that allows flexibility for those responsible for making purchases and hiring, to choose the scheme that best suits their purchase requirements and the reality of the sector and suppliers and contractors. Each contracting organization must undertake its own analysis and define the human rights criteria that best fit this analysis.

A step-by-step approach is important when designing the system. It is not expected that the first system will be perfect, but it is important to start taking steps; practical examples and lessons learnt can help guide future developments in such a system. The rules should be simple and clear at first and can be complemented and strengthened as the system matures.

Build capacities and strengthen management for those responsible for public procurement to make sure that there are good skills and resources available to really integrate human rights into the whole procurement cycle.

The importance of dialogue

Dialogue and engagement with suppliers and contractors is key in the different stages of the public procurement cycle.

Preliminary risk identification in different value chains is more accurate if done in collaboration with suppliers involved in each of these chains. It also generates a buy-in effect and helps suppliers clarify the reason for the requirements and in then managing them.

Dialogue also serves to identify the strengths and progress of contractors and to build paths to address supply chain gaps and challenges. Just asking supplier what they are capable of delivering sometimes works, which can identify solutions and ways to address human rights challenges.

Transparency and accountability in suppliers' management performance is key to identifying and communicating impacts. It also requires continuous collaboration in monitoring and verifying compliance and implementing corrective actions

Verification

Setting expectations and including human rights elements in procurement contracts is an important step but is not an end in and of itself. A monitoring and enforcement process is needed to really integrate the human rights into the whole procurement cycle to avoid and mitigate risks in value chains.

A monitoring system should be based on facts and data regarding the policies and processes that the suppliers are implementing which integrate human rights into their management systems. It should look at the effectiveness of the systems to address and mitigate identified human rights risks.

Metrics should be used to track the implementation of policies and practices and their results. The metrics should be reasonable, effective, regular and simple to report on. Qualitative measurement can have a role too (e.g. testimonials from apprentices and recipients)

Audits can be done at the operations site of suppliers to oversee compliance with requirements. Where abuses and violations are found through audits, they should be addressed with the supplier. Measures can be included in the contract to establish formal processes to address human rights abuses where they arise. The very last resort is to cancel the contract, but focus should be placed on working with supplier to address human rights abuses. This integrates the vision of continuous improvement throughout contracts

Leverage

Even if some public entities are small buyers on a global scale, there is an opportunity to increase their leverage by cooperating with other public buyers within the country or with other public buyers in the region.

The state has other means to exert pressure to suppliers to engage and comply with the human rights requirements. Being public institutions, issues regarding human rights breaches in their supply chains might capture the attention of the society and increase reputational risk of suppliers that are involved in these issues and don't want to collaborate with government efforts.

There is a need to have good cooperation with the different industries that are already working in identifying sector-based risks with respect to human rights and are working with their members to integrate these risks. This cooperation can help in many ways, from the initial stage of identifying risks to undertake joint audits to check for compliance along the value chains.

For more information see Annex No. 4 - Presentations of the experts for each session of the workshop

E. Next steps to integrate human rights in procurement process within INGP (results of the group discussions among INGP participants)

- Identify the responsible entity within the state that leads the business and human rights agenda to articulate the value of public procurement and human rights in the national agenda and strengthen a common position on this topic;
- Create a common narrative that describes the reasons why government procurement should integrate human rights issues across the procurement cycle;
- Carry out a baseline study about the progress made by INGP members in integrating human rights issues into procurement cycle and build case studies to foster peer learning and share this information among INGP members;
- Build capacities of public procurers integrating practical case studies and e-learning tools that facilitate their learning process. Developing a toolkit based on existing information and tools (e.g. Risk checker from the Netherlands) can help and guide buyers in implementing these standards and principles;
- Develop a study to identify the economic and commercial benefits of integrating human rights into public procurement;
- A declaration could be adopted that reflects the commitment of the INGP on public procurement and human rights;
- Integrate the human rights theme within the annual meeting of the INGP to share good practices, to form working groups on the subject and generate a race to the top among the members of the network;
- Develop and share standardized methods and contract clauses across the region to facilitate the incorporation of human rights into procurement processes;
- Develop verification mechanisms (within the INGP or by a third-party) to follow up progress in the incorporation of human rights within procurement and evaluate the level of implementation of requirements by contractors.

Special focus should be given to SMEs and to states with small economies.

ANNEX No. 1 -About the organizers of the workshop

Centro Vincular was established in 2001 at the Catholic University of Valparaíso as the first university center in Chile specialized in developing methodologies and integrating sustainability in the management of public and private organizations. With a broad network of international and regional partners, the Center focuses its activities in doing applied research, implementing knowledge transfer projects, delivering capacity building programs and working closely to public institutions and decision makers to assist in the development of smart and coherent policies to promote responsible business conduct and respect for human rights in the region.

The **Danish Institute for Human Rights** is a state institution, independent of government with a national and international mandate by law. Globally, the Institute is in a unique position since it is the only national human rights institution that in addition to the national mandate has substantial international capacity. This combination, together with a solid experience, gives the Institute access to operate in the nexus between government institutions, business and NGOs.

The **International Corporate Accountability Roundtable (ICAR)** harnesses the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality. To further this mission, ICAR has worked extensively on public procurement and human rights, beginning with the publication of our seminal report "Turning a Blind Eye? Respecting Human Rights in Government Purchasing." Building on this report, ICAR partnered with the Danish Institute for Human Rights and the Harrison Institute at Georgetown University Law Center to create the International Learning Lab on Public Procurement and Human Rights (Learning Lab).

The **International Learning Lab on Public Procurement and Human Rights** aims to be a network of central and local government procurement agencies and purchasing officers; representatives of other relevant government bodies, such as ministries; procurement professional associations; regional and international organizations; non-governmental organizations (NGOs); national human rights institutions (NHRIs); and relevant academics.

The **United Nations Working Group on Business and Human Rights is supporting this workshop**, as a "Regional Consultation" for the purpose of an addendum report for next Human Rights Council on this topic.

ANNEX No. 2 - About the Inter-American Network on Government Procurement (INGP)

The INGP is an initiative constituted as a regional technical cooperation mechanism. It is composed of governmental institutions, and headed by the national directors of procurement in the 32 participating countries of Latin America and the Caribbean, each of whom has the highest national responsibility regarding the regulation, management and modernization of government procurement and who consequently handle 10-20% of their respective countries' GDP.

The INGP aims to: strengthen government procurement capacity in each country in order to increase efficiency and transparency; to generate and maintain spaces for reflection, mutual knowledge, supportive technical cooperation, training and exchange of experiences between the institutions that integrate the Network; and hence to contribute to the enhancement of the government procurement practices of the Region, as well as to strengthen ties between governments, the organization of society related to public procurement and international organizations.

List of the INGP members and partners that participated in the workshop

Nro.	Country	Name	Post	Institution
1	Barbados	Janice Worrell	Jefe	Departamento central de Adquisiciones
2	Colombia	Juan David Duque	Director	Colombia Compra Eficiente
3	El Salvador	Edelmira de Molina	Jefe	Unidad Normativa de Adquisiciones y Contrataciones de la Administración Pública (UNAC)
4	Canadá	Lorna Prosper	Directora	Departamento General de Servicios Públicos y Adquisiciones
5	Chile	Trinidad Inostroza	Directora	Dirección ChileCompra
6		Elena Mora	Coordinadora de Redes	
7		Karina Vanoosterwyk		
8		Aurora Lara	Jefa del área de proveedores	Comité de sostenibilidad - RICG
9		Esteban Huentenao	Profesional área de proveedores	
10		Lorna Harrington	Profesional área de comunicaciones	
11		Dora Ruiz	Jefa de la división de convenio marco	
12		Karol Guajardo	Profesional área de planificación estratégica	
13		Javier Valladares	Abogado de la Fiscalía	
14		Honduras	Sofía Romero	
15	Marcia Dinora López		Asesora	Dirección Presidencial de Transparencia, Modernización y Reforma del Estado

Nro.	Country	Name	Post	Institution
16	Jamaica	Cecile Maragh	Directora	Unidad de Política y Adquisiciones
17	Panamá	Eduardo Corro	Director	Dirección General de Contrataciones Públicas
18		Tania Martinez	Coordinadora General	
19		Marianela Montenegro	Directora Jurídica	
20	Uruguay	Daniel García	Coordinador General	Agencia de Compras y contrataciones del Estado
21	Nicaragua	Bruno Gallardo	Director General de Contrataciones	Contrataciones del Estado, Ministerio de Hacienda y Crédito Público
22	USA	Helena Fonseca	Especialista	OEA
23	USA	Hugo Inga	Consultor	OEA
24	Costa Rica	Ana Sofía Ruiz	Representante	HIVOS
25	Uruguay	Fabrizio Scrollini	Representante	ILDA
26	USA	Adriana Salazar	Especialista en Adquisiciones	Banco Interamericano de Desarrollo-BID

ANNEX No. 3 - General program of the workshop

No.	Description of the session	Leading organisation
<p>Welcome and introductions 10:00 – 10:20</p>		<p><i>President of the INGP Ambassador of Sweden</i></p>
<p>Session 1 10:20 – 12:00</p>	<p>Introductions to human rights and public procurement</p> <ul style="list-style-type: none"> • Round of Introductions and overview of meeting objectives and agenda • Human rights law overview and an introduction to the UN Guiding Principles on Business and Human Rights and its connection to the Sustainable Development Agenda • Introduction to Human Rights and Public Procurement: risks and responsibilities in government supply chain <p><u>Keynote Address</u></p> <ul style="list-style-type: none"> • Background on public procurement and relevant legal frameworks and principles • The state as an economic actor and utilizing public procurement for human rights realization and policy aims • Relationship between human rights duty and other legal principles and policy objectives of procurement (e.g. The search for the best value for money and its relationship with the promotion of RBC and respect for human rights along the value chain of public purchases) <p>Questions and answers</p>	<p><i>Dante Pesce – Catholic University of Valparaíso, Member of the UNWG on Business and Human Rights</i></p> <p><i>Nicole Van der Meulen, ICAR</i></p> <p><i>Professor Geo Quinot from Stellenbosch</i></p>
<p>Session 2 12:00 – 12:45</p>	<p>Opportunities and challenges - INGP</p> <ul style="list-style-type: none"> • Examples from the INGP on human rights and relevant policy objectives (environmental, sustainable, social etc.) achieved through procurement to date. • Opportunities for integrating environmental, social and human rights concerns into public procurement, and potential hurdles to overcome (e.g. legal framework, capacities, culture) 	<p><i>Trinidad Inostroza, Presidenta RICG y Directora de Chilecompra</i></p> <p><i>Input from other INGP members</i></p>
<p>Lunch 12:45 – 13:45</p>		
<p>Session 3 13:45– 15:15</p>	<p>Overview of initiatives worldwide to integrate HR into public procurement</p> <p>Current state of play, including the 20 jurisdictions overview and highlighting existing tools and material on human rights and public procurement</p>	<p><i>Daniel Morris, DIHR</i></p>

	<p>Presentation of 3 case studies – examples of successes, obstacles faced, and how to overcome obstacles</p> <ul style="list-style-type: none"> • Natalie Evans, London • Pauline Gothberg, Stockholm • Geo Quinot, South Africa <p>Questions and answers</p>	<p><i>Experts and practitioners</i></p>
<p>Coffee break (organization for group discussions) 15:15 – 15:30</p>		
<p>Session 4 15:30– 17:15</p>	<p>Group discussions around the following topics</p> <ul style="list-style-type: none"> • Variables that may support or restrict steps to integrate human rights criteria into the public procurement cycle • Needs (guidelines, tools, expert support, capacity building) to integrate human rights into public procurement • Feedback to the group 	<p><i>Daniel Morris, DIHR Nicole Vander Meulen, ICAR</i></p>
<p>Closing Session 17:15 – 17:30</p>	<p>Conclusions and next steps</p> <ul style="list-style-type: none"> • Look to the implementation of a project to “integrate human rights into the procurement cycle: Supporting members of the Inter-American Network of Government Procurement (INGP) 	<p><i>President of the INGP Dante Pesce & Andres Hernández – Catholic University of Valparaíso</i></p>

Annex No. 4 - Presentations of the experts for each session

1. Session 1 - Introduction to human rights and public procurement.pdf
2. Session 1 - Keynote Address - Prof. Quinot.pdf
3. Session 2 - Opportunities and challenges – INGP.pdf
4. Session 3 - Overview of initiatives worldwide - 20 Jurisdictions.pdf
5. Session 3 - Overview of initiatives worldwide – London.pdf
6. Session 3 - Overview of initiatives worldwide - South Africa.pdf
7. Session 3 - Overview of initiatives worldwide – Sweden.pdf