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# THE GAP BETWEEN PROMISE AND PERFORMANCE IN STATE-COMMERCIAL CONTRACTS

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### Abstract

States are increasingly embedding climate considerations in their contracts with private parties in pursuit of their domestic and international targets and commitments. Such contracts, referred to as public contracts, constitute a form of "soft power" for governments seeking to advance environmental protection and climate regulation. While contractors willingly make promises to engage in good practices, the actual performance of sustainability obligations is questionable, as little impact measurement is conducted. Recognizing the gap between the mere introduction of climate goals and their enforcement, this paper aims to explore why this gap occurs and examine ways to bridge it.

**Keywords:** Public contracts; sustainable public procurement; sustainability clauses; enforcement.

### I. Introduction

Corporate social responsibility (CSR) appeared in the sphere of business as scientists and stakeholders considered that corporations should fulfil social and

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environmental responsibilities aside from making a profit.<sup>1</sup> Starting from being merely a voluntary trend among businesses, it has now evolved to become a determining factor in drafting business contracts.<sup>2</sup>

Multinational corporations now routinely impose codes of conduct regarding environmental standards on their suppliers. Failure to comply with such duties may result in breach of obligations and lead to contract termination. In order to gain a positive image and reputation in front of consumers and investors, companies demand that their contracting partners include ethical commitments in areas such as environmental impact, human rights, and good corporate governance.<sup>3</sup> Furthermore, the rise of Environmental, Social, and Governance (ESG) investing means that investors demand that companies manage their risks throughout their supply chains. Concrete obligations related to sustainability have especially gained popularity.

Inclusion of such provisions in state-commercial contracts is of particular interest, since governance has been traditionally perceived to be the concern of the public sphere, rather than the private sphere. States are more interested in promoting environmental commitments of businesses in the context of the modern call of the world to carbon emissions reduction and the responsible use of natural resources. This interest is driven not just by domestic policy goals, but by binding international treaty obligations, such as those under the Paris Agreement. States are accountable for their Nationally Determined Contributions (NDCs) and aligning their policy with these targets. Sustainability considerations are now formally incorporated in public procurement within the umbrella of sustainable public procurement. While states execute their governance over businesses'

<sup>1</sup> Latapí Agudelo, M. A., Jóhannsdóttir, L., & Davídsdóttir, B. (2019). A literature review of the history and evolution of corporate social responsibility. *International journal of corporate social responsibility*, 4(1), 1-23. <https://doi.org/10.1186/s40991-018-0039-y>.

<sup>2</sup> Torró, S. (2025). Sustainability and corporate social responsibility in contract law. *ILP Abogados*. Retrieved from <https://www.ilpabogados.com/en/sustainability-and-corporate-social-responsibility-in-contract-law/>.

<sup>3</sup> Uysal, E. (2024). Sustainability clauses in 'public' contracts. *European Review of Contract Law*, 20(1), 105-127. <https://doi.org/10.1515/ercl-2024-2004>.

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behavior through supply chain agreements, the enforcement of such soft power might be a problem as it requires constant monitoring, auditing, and often proving intent or negligence.

This paper analyses the rise of climate commitments in state-commercial contracts and the primary drivers behind them. It then examines the enforcement gap between contractual commitments and actual performance. Finally, the paper puts forward suggestions to bridge this gap and ensure climate commitments translate into measurable environmental impact.

### II. The Necessity of Climate Commitments by Businesses

While businesses have the potential for positive impact on society, such as improving basic services, creating employment opportunities, and generating revenue, they also carry the potential for negative impact on people and the environment.<sup>4</sup> Examples of environmental harm include carbon emissions, disruption of water supplies and other natural resources, and destruction of green areas and wildlife. Consequently, the pursuit of investment and revenue can impose unforeseen costs on a government and generate public concern. To avoid political instability and ensure corporate accountability, states must regulate the conduct of private parties in the course of their operations.

Furthermore, the environmental domestic policies implemented by states may be motivated by international binding commitments of governments in compliance with treaty obligations. For example, the Paris Agreement has significantly influenced domestic policies by prompting states to adopt binding, national-level climate laws and targets. Clear examples are the UK's Climate Change Act,<sup>5</sup> the EU's European Climate Law, enshrining net-zero by 2050,<sup>6</sup> and various national

<sup>4</sup> United Nations Human Rights Office of the High Commissioner. (2015). *Principles for responsible contracts: Integrating the management of human rights risks into state-investor contract negotiations: Guidance for negotiators*. United Nations. [https://www.ohchr.org/sites/default/files/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf).

<sup>5</sup> Climate Change Committee. (2020, October). *CCC Insights Briefing 1: The UK Climate Change Act*. <https://www.theccc.org.uk/wp-content/uploads/2020/10/CCC-Insights-Briefing-1-The-UK-Climate-Change-Act.pdf>.

<sup>6</sup> European Parliament and Council of the European Union. (2021, June 30). \*Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending

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carbon neutrality laws passed since 2015. The successful implementation of the Agreement and meeting Nationally Determined Contributions (NDCs) relies on transparency, regular monitoring, and reporting.<sup>7</sup>

### III. The Constraints of National Laws and the Rise of Public Contracts

States adopt laws directed at environmental regulation, but these laws have inherent limitations that make them insufficient for regulating global business activity. For example, a country's laws are applicable within its territory and to entities under its jurisdiction.<sup>8</sup> This creates a regulatory gap for multinational corporations that operate across dozens of countries. Lax public governance motivates private entities to regulate themselves.<sup>9</sup> Witnessing different levels of regulation in different jurisdictions, businesses treat legal regimes as products to be shopped for. That is, they locate their operations where laws are the weakest to comply with.<sup>10</sup> Consequently, national laws alone have proved insufficient at comprehensively regulating the global conduct of multinational corporations. One effective solution to the governance problem from the public law perspective is the promotion of green and environmentally-friendly practices through public procurement. This approach is often referred to as "Sustainable Public Procurement" (SPP). SPP represents immense potential for sustainability and is explicitly used to achieve climate targets, meet NDCs, and drive market transformation. Contractualization of the regulation helps incorporate

Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')\*. Official Journal of the European Union, L 243, 1-17. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1119>.

<sup>7</sup> OECD. (2025). *Overview and policy highlights*. In *The Paris Agreement at ten years: Expert views on progress and challenges for climate change mitigation*. OECD Publishing. Retrieved February 28, 2026, from [https://www.oecd.org/en/publications/the-paris-agreement-at-ten-years\\_c5f214dc-en/full-report/overview-and-policy-highlights\\_9ab38155.html](https://www.oecd.org/en/publications/the-paris-agreement-at-ten-years_c5f214dc-en/full-report/overview-and-policy-highlights_9ab38155.html)

<sup>8</sup> K. Peterková Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) *Nordic Journal of Commercial Law* 2.

<sup>9</sup> L. Vytopil, *Contractual Control in the Supply Chain On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Hague: Eleven International Publishing, 2015) 27.

<sup>10</sup> L. Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) *14 ILSA Journal of International & Comparative Law* 499.

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requirements in an instrument with transnational character, and which incentivizes monitoring, enforcement and dispute resolution.

### IV. Model Clauses in Practice

For instance, all the Organization for Economic Co-operation and Development (OECD) countries responding to the 2024 survey on the OECD Recommendation on Public Procurement reported incorporating environmental objectives into their procurement-specific policy documents.<sup>11</sup> It was reported that by embedding the requirements into contracts, countries translate green objectives into clear obligations and facilitate effective monitoring, reporting, and evaluation.<sup>12</sup> Meanwhile, the World Bank requires its borrowers to apply the Environmental and Social Framework (ESF), a set of mandatory standards designed to support environmental and social risk management, to all Bank-financed projects.<sup>13</sup> These substantive obligations must then be passed to contractors via procurement, creating binding commitments. To support this, the Bank has developed Sustainable Procurement Guidance documents tailored to help countries translate ESF requirements into enforceable contract provisions and achieve sustainable development. The ESF places a strong focus on transparency and stakeholder engagement through responsive grievance mechanisms and timely information disclosure throughout the project's lifecycle.<sup>14</sup>

In view of the freedom of contract and the influence of the contractual terms on the good practices of businesses, initiatives developing and promoting model clauses for sustainable contracting have proliferated in recent years. This trend is

<sup>11</sup> OECD. (2025). Green public procurement. In *Government at a Glance 2025*. OECD Publishing. Retrieved from [https://www.oecd.org/en/publications/government-at-a-glance-2025\\_0efd0bcd-en/full-report/green-public-procurement\\_5dbf73a9.html](https://www.oecd.org/en/publications/government-at-a-glance-2025_0efd0bcd-en/full-report/green-public-procurement_5dbf73a9.html).

<sup>12</sup> OECD. (2024). *Harnessing Public Procurement for the Green Transition: Good Practices in OECD Countries*. OECD Publishing. <https://doi.org/10.1787/e381553f-en>.

<sup>13</sup> World Bank. (2025, April 25). *Implementing sustainable procurement: E&S procurement joint guidance*. <https://www.worldbank.org/en/projects-operations/products-and-services/brief/e-s-procurement-joint-guidance-on-sustainable-procurement.print>.

<sup>14</sup> World Bank. (2023). Strengthening the organization. In *Annual Report 2023*. <https://www.worldbank.org/en/about/annual-report-2023/strengthening-the-organization>.

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clearly evident across multiple jurisdictions and organizations. The initiatives are explicitly created for use by state entities in public procurement.

The most prominent example includes the Social Public Works Clauses by the Welsh Government. These clauses are designed to bring about improvements to economic, social, environmental and cultural well-being. The model clauses relating to the environment require sustainable management of natural resources, use of sustainable materials, resilience to the impact of climate change, reduction of greenhouse gas emissions, and enhancement of natural environment and biodiversity. Contractors undertake an obligation to minimize carbon emissions, reduce the global ecological footprint, increase the use of re-used and recycled materials, and reduce the amount of waste.<sup>15</sup>

Another example is the Environmentally Sustainable Procurement Policy (ESP Policy) developed by the Australian Government, which is mandatory for use in procurements by non-corporate Commonwealth entities and prescribed corporate Commonwealth entities listed in section 30 of the Public Governance, Performance and Accountability Rule 2014.<sup>16</sup> The ESP Policy focuses on environmentally sustainable procurement to support the Commonwealth Procurement Rule's value for money considerations as well as Australia's transition to a net-zero and circular economy.<sup>17</sup> In accordance with the ESP Policy, tenderers make sustainability commitments across three focus areas – climate, the environment, and circularity.<sup>18</sup>

Model Contract Language for Federal Sustainable Purchasing was developed by the US Environmental Protection Agency (EPA) specifically for US federal government procurement professionals to satisfy federal sustainable purchasing

<sup>15</sup> Welsh Government. (2025, November 24). *Draft Social Public Works Clauses: explanatory notes*. <https://www.gov.wales/draft-social-public-works-clauses-explanatory-notes-html>.

<sup>16</sup> Department of Climate Change, Energy, the Environment and Water, *Model Clauses: Environmentally Sustainable Procurement Policy* (Australian Government, 2025) 2  
<https://www.dceew.gov.au/sites/default/files/documents/model-clauses.pdf>.

<sup>17</sup> *Ibid* 1.

<sup>18</sup> *Ibid* 4.

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requirements. This language is intended to facilitate the sale of sustainable products by businesses to the federal government. 19

### V. The Performance Gap

As can be seen from the examples, many states have mandatory requirements supporting green transition and sustainable development. The WTO's 2024 catalogue shows that numerous countries have established green procurement policies and legal frameworks.<sup>20</sup> However, the real problem is ensuring compliance. The impact of sustainability commitments of the successful tenderer during public procurements depends heavily on their realization during the contract performance. Current literature on the phenomenon of SPP, as well as the language of model clauses, predominantly focus on the categories of obligations which shall be incorporated into contracts. Although the actual realization of promises largely depends on what happens after the contract is awarded, the perspective of public contracts as contracts and their enforcement from the standpoint of SPP lacks adequate attention. 21

There are several reasons why the actual environmental impact is low and the compliance is questionable:

First, despite widespread recognition of the potential of public procurement to contribute to sustainability goals, there is very limited impact measurement. This highlights that countries are missing an opportunity to assess and promote the concrete impact of public procurement on environmental factors. As of 2024, of the 29 OECD countries that have key performance indicators for their public

<sup>19</sup> U.S. Environmental Protection Agency. (2024). *Model contract language for federal sustainable purchasing*. <https://www.epa.gov/greenerproducts/model-contract-language-federal-sustainable-purchasing>.

<sup>20</sup> Manak, I., & Kopans-Johnson, H. (2025, August 20). *Trade tools for climate action: Green procurement*. Council on Foreign Relations. <https://www.cfr.org/articles/trade-tools-climate-action-green-procurement>.

<sup>21</sup> Uysal, E. (2024). *Enforcing sustainability in contract performance under the Public Sector Directive* [Doctoral thesis, University of Torino]. Università degli Studi di Torino Institutional Repository. <https://iris.unito.it/handle/2318/2043014>.

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procurement system, only 3 – Finland, New Zealand and Norway (10%) – reported measuring their impact on the environment.<sup>22</sup>

Second, most of the public contracts still lack environmental criteria. For instance, over 75% of public contracts in the EU still do not contain environmental clauses. To promote decarbonization and sustainability, they have to become a requirement in public tenders, not optional provisions. It has been stated that while many public buyers are trying to incorporate green criteria, the current legal framework remains too fragmented and unclear to facilitate climate-driven procurement.<sup>23</sup> There needs to be alignment between industrial, climate, and procurement policies to ensure a shift towards robust standards across the market.

Another significant challenge is the insufficient capacity among public buyers. According to the Fédération Nationale des Travaux Publics (FNTP), the national professional federation for the public works sector in France, over 30% of French public buyers have not incorporated environmental criteria into their contracts as of 2025.<sup>24</sup> This demonstrates the need for continuous efforts to raise awareness and train public works companies and public buyers.

As a result, while concluding a contract, private parties may submit generous promises that they later find difficult or costly to fulfil. Once the contract is awarded, they may rely on future contract changes to dilute their obligations, or hope that their failure to abide by their pledges goes unnoticed by under-resourced public authorities. Uysal E. argues that in such instances SPP merely

<sup>22</sup> OECD. (2025, June 19). Green public procurement. In *Government at a Glance 2025*. OECD Publishing. Retrieved, from [https://www.oecd.org/en/publications/government-at-a-glance-2025\\_0efd0bcd-en/full-report/green-public-procurement\\_5dbf73a9.html](https://www.oecd.org/en/publications/government-at-a-glance-2025_0efd0bcd-en/full-report/green-public-procurement_5dbf73a9.html).

<sup>23</sup> Casier, L., Campanella, P., & Termeer, G. (2025, December 5). *Europe must stop squandering the power of its purse*. Project Syndicate. <https://www.project-syndicate.org/commentary/eu-public-procurement-reform-needed-for-climate-industrial-goals-by-liesbeth-casier-et-al-2025-11>.

<sup>24</sup> Fédération Nationale des Travaux Publics. (2025, July 16). *The FNTP publishes a study on the integration of the environment in public works contracts*. BatInfo. [https://batinfo.com/en/actualite/la-fntp-publique-une-etude-sur-lintegration-de-lenvironnement-dans-les-marches-publics-de-travaux\\_32917](https://batinfo.com/en/actualite/la-fntp-publique-une-etude-sur-lintegration-de-lenvironnement-dans-les-marches-publics-de-travaux_32917).

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becomes “an enabler of greenwashing and social washing”.<sup>25</sup> The failure of contracting authorities to enforce sustainability standards in contract performance not only fails to deliver sustainability goals, but may also leave them vulnerable to litigation from interested parties.<sup>26</sup>

### VI. A Framework for Effective Enforcement

To enhance the effectiveness of CSR clauses, particularly regarding climate commitments, it is essential to provide clearly defined benchmarks that would help contractors understand what is expected and help states verify compliance against evolving environmental standards. Once climate clauses become part of the contract, it is important to monitor performance. Monitoring provides an opportunity for parties to adjust and expand on their commitments to tackling climate issues in future transactions.

Uysal argues that procurement contracts shall be coupled with three-step enforcement tools, such as monitoring, relational/informal enforcement, and contract termination as a last resort. As she states, monitoring alone is not a sufficient mechanism for the assurance of performance, so it needs to go in line with informal enforcement tools. Along with those enforcement tools, there are both incentivizing tools and penalty tools.<sup>27</sup>

Beyond the proposed three-step enforcement model, public procurement accountability may also be built on a foundational three-pillar framework of verification, reporting, and auditing, as reflected in the EU Public Procurement Directive and the work of Supreme Audit Institutions.<sup>28</sup>

<sup>25</sup> Ezgi Uysal, 'Enforcing Sustainability in Public Procurement through Effective Contract Management' (SAPIENS Network Policy Brief, July 2024) 3 <https://sapiensnetwork.eu/wp-content/uploads/2024/07/ESR-7-Policy-Brief.pdf>.

<sup>26</sup> Ezgi Uysal, 'Contract Compliance for Sustainable Public Procurement – To Monitor or Not to Monitor' (SAPIENS Network Working Paper, April 2024) <https://sapiensnetwork.eu/contract-compliance-for-spp-to-monitor-or-not-to-monitor-working-paper-series/>.

<sup>27</sup> Uysal (n 25) 4.

<sup>28</sup> See European Parliament and Council, Directive 2014/24/EU of 26 February 2014 on Public Procurement, arts 83-84 (establishing monitoring, reporting, and enforcement obligations); UN Department of Economic and Social Affairs, 'Beyond Promises: The Critical Role of Supreme Audit Institutions in Strengthening Climate Accountability' (UN DESA Policy Brief No. 185, 22 December 2025) (discussing verification, reporting, and auditing as core SAI functions).

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Verification involves reviewing, inspecting, and certifying that a contractor has met the specific environmental or climate requirements set out in the contract. This can include on-site inspections of works, verification of energy consumption data, or certification of materials. It is essential for ensuring the veracity of reported data and increasing confidence in the reported progress.

During reporting, contractors are required to track and submit regular data on their performance against established key performance indicators (KPIs) or climate targets. This process involves measuring emissions or sustainability metrics throughout the contract lifecycle. Effective reporting systems, often using standardized tools, provide visibility into compliance and allow for adjustments in real-time.

Regular, independent, or internal audits are crucial to hold suppliers accountable to their contractual obligations. These audits, which can be part of an annual compliance cycle, ensure that reported data is accurate, consistent, and in line with contractual requirements. Supreme audit institutions and internal audit committees play a key role in this process, ensuring that climate commitments are not "window dressing".<sup>29</sup>

In sum, effective enforcement of CSR clauses in public-private contracts requires a multi-layered approach that operates at both the procedural and operational levels. At the procedural level, Uysal's three-step framework – monitoring, relational enforcement and termination – provides a structural pathway for contracting authorities to respond to non-compliance, moving from preventive transparency to corrective collaboration and, only as a last resort, disengagement. At the operational level, this framework is given concrete effect through the interconnected pillars of verification, reporting and auditing, which ensure the sustainability commitments are measurable, visible and subject to independent scrutiny. Together, these mechanisms transform aspirational CSR clauses from

<sup>29</sup> Breidenich, C., & Bodansky, D. (2009, April). \*Measurement, reporting and verification in a post-2012 climate agreement\*. Prepared for the Pew Center on Global Climate Change. University of Georgia School of Law. <https://www.c2es.org/wp-content/uploads/2009/04/mrv-post-2012-climate-agreement.pdf>.

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mere contractual ornaments into enforceable obligations. However, the mere existence of these tools is insufficient. Their effectiveness ultimately depends on the political will, institutional capacity, and legal empowerment of public authorities to deploy them consistently. Without these enabling conditions, even the most sophisticated enforcement framework risks becoming what Uysal warns against: an enabler of greenwashing rather than a guarantor of genuine sustainability performance.

### VII. Conclusion

In today's world, as nearly all nations transition towards a green economy and sustainable development, there is an urgent need for consistent and sustainable business practices. While national laws can mandate private entities to adopt environmentally-friendly practices, these regulations are often broad and fail to address the nuances of individual transactions. On the other hand, the principle of freedom of contract allows parties to customize clauses to suit specific markets and transactions. As a result, the integration of climate objectives into public contracts, particularly in public procurement projects, has become increasingly prevalent. Through such contracts, governments obligate private contractors to commit to sustainability initiatives.

However, once the contract enters into force, the main problem arises: the actual performance of contractual obligations. The evidence presented in this paper reveals a persistent and significant gap between contractual promise and environmental performance. Only 10% of OECD countries measure the actual environmental impact of their procurement, over 75% of EU public contracts still lack environmental clauses, and 30% of French public buyers have not incorporated environmental criteria into their contracts. These figures demonstrate that the mere inclusion of climate commitments is insufficient to guarantee their realization.

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The reasons for this performance gap are multifaceted. Vague contractual language, lack of clear benchmarks, insufficient capacity among public buyers, and the absence of robust monitoring mechanisms all contribute to the enforcement problem. Even where model clauses have proliferated, as evidenced by initiatives in Wales, Australia, the United States, and beyond, the translation of policy ambition into on-the-ground impact remains elusive.

To bridge this gap, this paper has proposed a three-pillar framework of verification, reporting, and auditing. Clear, measurable benchmarks must form the foundation of every climate clause. Robust verification mechanisms, including on-site inspections and third-party certification, ensure that reported data is credible. Regular reporting against key performance indicators provides transparency and enables timely adjustments. Independent audits, conducted by supreme audit institutions or external bodies, hold contractors accountable and ensure that climate commitments are not merely "window dressing."

Ultimately, the effectiveness of climate commitments in state-commercial contracts depends not on their inclusion but on their implementation. As states continue to leverage public procurement as a tool for achieving climate goals, meeting Nationally Determined Contributions under the Paris Agreement, and driving market transformation, the focus must shift from drafting to enforcement. The promise of sustainable public procurement can only be realized when robust mechanisms for verification, reporting, and auditing are embedded throughout the contract lifecycle. Only then will the gap between promise and performance begin to close.

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