The environmental management cooperation agreement as a co-operative environmental governance tool in a segmented environmental administration

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ABSTRACT

Traditional environmental compliance is a top-down regulation method comprising of mechanisms where adherence to environmental laws is achieved through strict monitoring by authorities. This top-down regulation is the hallmark of the command and control regulation and it is also characterised by segmented environmental administration. The segmented environmental administration is underpinned by a public law relationship which is in turn pigeon-holed by the clothing of one legal subject with authority. Subsequently environmental governance in South Africa is a system in which power relations fluctuate among the players involved in managing and solving environmental problems. These fluctuation of power relations often leads to conflict and lack of cooperation between environmental authorities. The command and control method of environmental regulation is experiencing problems in South Africa. Alternative environmental regulation such as voluntary agreements *vis-à-vis* Environmental Management Cooperation Agreements (EMCAs) may address some of these challenges. Section 35 of the *National Environmental Management Act* 107 of 1998 (NEMA) EMCA is one such agreement. However EMCAs are not applicable all the time and in all situations and nor can they be used at will. The NEMA EMCA have not been used often in practice. This study argues that for the NEMA EMCA to be attractive and effectively used as an instrument of co-operative governance, it should not be mandatory that all three spheres of government must be parties to the EMCA, or else it will not be concluded or used, and the opportunity to achieve environmental compliance through cooperation may be missed.

Key words: command and control environmental regulation, segmented environmental administration, voluntary agreements, EMCAs

ABSTRAK

Tradisionele omgewingsvoldoening is 'n hiërargiese regulasiemetode wat bestaan uit meganismes waar die nakoming van omgewingswette bereik word deur streng monitering deur owerhede. Hierdie hiërargiese regulasie is die waarmerk van die bevel- en beheerregulasie en dit word ook gekenmerk deur gesegmenteerde omgewingsadministrasie. Die gesegmenteerde omgewingsadministrasie word ondersteun deur 'n publieke wetverhouding wat op sy beurt in hokkies weggebêre word deur een gesaghebbende. Gevolglik is omgewingsbestuur in Suid-Afrika 'n sisteem waarin magsverhoudings wissel tussen die deelnemers wat betrokke is by die bestuur en oplos van omgewingsprobleme. Hierdie wisseling van magsverhoudings lei dikwels tot konflik en gebrek aan samewerking tussen omgewingsowerhede. Die bevel- en beheermetode van omgewingsregulasie ondervind probleme in Suid-Afrika. Alternatiewe omgewingsregulasies soos vrywillige ooreenkomste *vis-à-vis* Omgewingsbestuur en Koördinasie-Oreenkoms (OBKO) kan van hierdie uitdagings aanspreek. Die *Nasionale Omgewingsbestuurwet* 107 van 1998 (NOBW). Artikel 35 van die NOBW OBKO is so 'n ooreenkoms. OBKO is egter nie altyd en in alle situasies van toepassing nie en dit kan ook nie na willekeur gebruik word nie. Artikel 35 NOBW OBKO word nie dikwels in die praktyk gebruik nie. Hierdie studie voer aan dat vir die NOBW OBKO om aanloklik te wees en effektief gebruik te word as 'n instrument vir samewerkende bestuur, behoort dit nie verpligtend te wees dat al drie bestuursfere partye te wees by die OBKO nie, anders sal dit nie gesluit of gebruik word nie en die geleentheid om omgewingsvoldoening te bereik deur samewerking, sal verlore wees.

Sleutelwoorde: Beveel en beheer omgewingsregulering, gesegmenteerde omgewingsadministrasie, vrywillige ooreenkomste, OBKO

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To God be the Glory!

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LIST OF ABBREVIATIONS AND ACRONYMS

AJOL – African Journals Online
CAIA – Chemical and Allied Industries Association
CBO – Community Based Organisations
CC – Constitutional Court
CCEC – Command and Control Environmental Compliance
CEG – Co-operative Environmental Governance
CID – City Improvement District
COGTA – Department of Cooperative Governance and Traditional Affairs
CONNEPP – Consultative National Environmental Policy Process
DAFF – Department of Agriculture, Forestry and Fisheries
DEA – Department of Environmental Affairs
DEAT – Department of Environmental Affairs and Tourism
DMR – Department of Mineral Resources
DTI – Department of Trade and Industry
DWAF – Department of Water Affairs and Forestry
DWS – Department of Water and Sanitation
EEI – Econlit Economic Insights: Trends and Challenges
EIAMS – Environmental Impact Assessment and Management Strategy
EIAR – Environmental Impact Assessment Review
EIMP – Environmental Implementation and Management Plan
EIP – Environmental Implementation Plan
EMCA – Environmental Management Cooperation Agreement
EMP – Environmental Management Plan
EMPr – Environmental Management Programme
GDP – Gross Domestic Product
GHG – Green House Gases
GJ – The Geographic Journal
HC – High Court
I&AP – Interested and Affected Parties
ICLQ – International & Comparative Law Quarterly

IDP – Integrated Development Plan

IEM – Integrated Environmental Management

IMFO – Official Journal of the Institute of the Municipal Finance

IP – Implementation Protocols

JDF – Joint Development Forum

JIE – Journal of Industrial Ecology

JPA – Journal of Public Administration

LDD – Law Democracy and Development

LGB – Local Government Bulletin

LP – Law & Policy

MEC – Member of the Executive Council for Provincial Environmental Affairs

MJSS – Mediterranean Journal of Social Science

MOU – Memorandum of Understanding

NERSA – National Energy Regulator of South Africa

NGO – Non-Governmental Organisations

NNRAA – National Nuclear Regulator Authority Agreements

NRF – Natural Resources Forum

OECD – Organisation of Economic Development

PBA – Plastic Bag Agreement

PDCA – Plan-Do-Check-Adjustment

PS – Policy Science

PSJ – Policy Study Journal

RECIEL – Review of European Community & International Environmental Law

SAJEE – Southern African Journal of Environmental Education

SAJELP – South African Journal of Environmental Law

SAJS – South African Journal of Science

SALJ – South African Law Journal

SAPL – Southern African Public Law

SCA – Supreme Court of Appeal

SCLR – Southern California Law Review

SEA – Strategic Environmental Assessment

SELJ – Stanford Environmental Law Journal

SOER – State of the Environment Report

UNFCCC – United Nations Framework Convention on Climate Change

US – Urban Studies

Chapter 1: Introduction

Traditional compliance is usually a top-down process which comprises of mechanisms where authorities ensure strict compliance with environmental laws.[1] The command and control system of environmental compliance is state-centred and largely based on directive-based regulation.[2] The command and control regime consists of a two-pronged process made up of prescribed legal requirements and the enforcement of legal compliance through appropriate means in the event of non-compliance.[3] Command and control environmental regulation is driven by the state. Furthermore, it is characterised by compartmentalisation into different environmental media.[4] The definition of the environment, according to the *National Environmental Management Act,*[5] the framework environmental legislation, is comprehensive, and is thus indicative of the broad, multifarious character of the environment, which gives rise to the segmented environmental governance system.[6] It can therefore be said that environmental administration is characterised by a top-down command and control approach and a complexity comparable with that of the environment itself.

The segmented environmental administration is underpinned by a public law relationship. Public law not only regulates the relationship between organs of state and legal subjects (which is described as a vertical relationship), but also regulates the legal relationship between organs of state themselves.[7] This public law relationship is characterised by one the legal subjects being clothed with authority.[8] Currently environmental governance involves the spread of authority in such a manner that different government departments have their own different mandates, policies and procedures.[9] Alternatively it could be said that environmental governance in South Africa is a system in which power relations fluctuate among the players involved

1 Kidd *Environmental Law* 269.
2 Paterson "Incentive-based Measures" 297.
3 Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 51.
4 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 39.
5 Act 107 of 1998 (hereafter NEMA).
6 Jikijela SML *Co-operative Environmental Governance* 8.
7 Du Plessis "Understanding Legal Context" 17.
8 Bray "Administrative Justice" 160. A legal subject is a human being or an entity or a member of a legal community that is subject to the law, which exists for their benefit (Havenga *et al General Principles of Commercial Law* 20).
9 Kotzé "Towards Sustainable Environmental Governance" 155.

in managing and solving environmental problems.[10] The spread of authority among different departments as well as the fluctuation of the power relations among them can lead to conflict, as will be elaborated upon in the discussion of the challenges that arise from the command and control environmental regulation.

Arguably good administration is key in the quest for sustainable development. It is also essential to good governance.[11] Good environmental governance can be regarded as administration of the environment in accordance with section 33 of the *Constitution of the Republic of South Africa,* 1996 (hereafter the Constitution), which provides for just administration action. The legislation arising from Section 33, which is intended to give effect to it, is the *Promotion of Administrative Justice Act.*[12] Therefore the implementation of section 24 of the Constitution is dependent on the realisation of the administrative right.[13] According to section 24 of the Constitution:

> Everyone has the right
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation, and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It is arguable that the sustainable development policy implementation and governance is reliant *inter alia* on an apt interplay between the command and control regime and alternative environmental compliance and enforcement instruments. Such alternative regulatory instruments include self-regulation, civil-based instruments, voluntarism, education and awareness instruments, economic instruments, and free-market environmentalism.[14] Voluntarism is of interest to this study. As the word suggests, voluntarism means that compliance or non-compliance is a matter of choice.[15] The voluntary compliance measures include amongst others negotiated agreements,

10 Mirumachi and Van Wyk 2010 *GJ* 25.
11 De la Harpe, Rijken and Roos 2008 *PELJ* 9.
12 3 of 2000 (henceforth PAJA).
13 Kotzé 2004 *PELJ* 59.
14 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 38-88.
15 Lehman "Voluntary Compliance Measures" 269.

public voluntary programmes, unilateral agreements and private agreements.[16] Negotiated agreements are relevant here. Section 35 of the NEMA, the framework environmental legislation, provides for an environmental management cooperation agreement (hereafter a EMCA). A EMCA is an administrative contract that can be voluntarily entered into between different role players[17] in order to improve environmental performance and environmental enforcement and compliance,[18] especially in light of difficulties in the implementation of environmental governance.

1.1 Environmental governance challenges

South Africa has its fair share of sustainability challenges, *inter alia* the deterioration of the environment in terms of water, air, land and soil quality, sluggish economic growth, high unemployment and poverty levels,[19] and extensive range of environmental crimes.[20] It is of concern that government departments do not always cooperate[21] and have different approaches to monitoring environmental conditions in authorisations, or that they approach community participation differently.[22] The silo-approach of the administration is seen as a problem, particularly because there are so many silos on the plain.[23] The fragmented governance structures result in disjointed and incremental governance processes that are inefficient, with substantial duplication and overlap of both governance mandates and environmental instruments,

16 Lehman 2009 "Voluntary Compliance Measures" 269.
17 Lehman "Voluntary Compliance Measures" 284.
18 Du Plessis "Understanding Legal Context" 23.
19 Morrison-Saunders and Retief 2012 *EIAR* 37.
20 Craigie, Fourie and Snijman "Environment Compliance and Enforcement Institutions" 95. SA's paradigm of a developmental state is underpinned by the Constitution, the keystone for service delivery (Sing 2012 *PPM* 550). The government must honour a myriad of constitutionally entrenched fundamental rights (Fourie 2008 *JPA* 561). The latter creates a challenge for the state. According to the *Intergovernmental Relations Framework Act* 13 of 2005 (henceforth IGRFA) preamble the most pressing challenge for the SA government as a developmental state is the need to redress poverty, underdevelopment, the ostracising of the people and communities, and many other ills arising from the pre-constitutional era. The National Development Plan (NDP), the service delivery blue-print plan for SA, also enumerates a number of challenges, *inter alia* the high rate of employment, the unsustainable resource-intensive economy, the uneven or poor quality of public service, and the fact that anti-inclusive development is taking place due to spatial divide, the reality being that SA remains a divided society (National Development Plan https://nationalplanningcommission 25. SA's diversity is multifarious, manifested by geographical spread, historical origins, cultural and ethnic diversity (Tshishonga and Mafema 2012 *ED* 255).
21 See Kotzé and Nel "Environmental Management" 23.
22 Neale and Naude 2011 *TD* 112-113.
23 Humby 2013 *SLR* 68.

including environmental authorisations.[24] The Constitution, the NEMA, the IGRFA, the specific environmental management acts (SEMAs) and other related environmental statutes make provision for co-operative environmental governance and intergovernmental relations but do not necessarily spell out how it should be achieved. It is evident that there is challenge of cooperation and coordination in environmental administration.[25]

In *Company Secretary of Ancelormittal South Africa v Vaal Environmental Justice Alliance*[26] the Supreme Court of Appeal enunciated an apparent conflict between competing interests, such as economic development and environmental conservation.[27] The pursuit of integration is at the core of sustainable development.[28] The constitutional environmental right is aligned towards an anthropocentric conceptualisation, which dictates that the environment must take care of human interests, as opposed to the biocentric or ecocentric approach, which views the environment as an intrinsic unit exclusive of human beings.[29] Therefore the implementation of sustainable development brings about conflict. The constant challenging of government decisions in courts and the making of conflicting decisions within government itself point towards the existence of environmental governance challenges,[30] such as those that deter sustainable service-delivery.[31] It is therefore necessary to find solutions to the fragmentation and to address these challenges to

24 Kotzé Legal *Framework for Integrated Environmental Governance* 23-24.

25 See GN No R 530 in GG 39998 19 May 2016 under the Introduction, on the challenges of coordinating procedures for co-operative government. The challenges listed are (a) clarity in operational concepts, (b) integrating strategic planning between and within spheres of government, (c) integrated service delivery, d) integrated and coordinated involvement of local government, and (e) effective processes and procedures for the settlement of intergovernmental disputes (pg 9-10).

26 2015 (1) SA 515 (SCA), hereafter Ancelormittal case.

27 Ancelormittal case paras 3-4.

28 Muller 2004 JPA 399. The integration of environmental considerations into sectoral policies and activities is crucial to the attainment of sustainable development (Nealer and Naude 2011 *TD* 110).

29 Feris 2008 *SAJHR* 30. Central to the economy is the relationship between unlimited wants and scarce resources (Mohr and *Fourie Economics for South African Students* 7). The environment provides the economy with a variety of resources (Tietenberg *Environmental Natural Resource Economics* 14). Often the environment as a resource takes the back seat to economics and finances see *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province Case* 2007 (6) SA 4 (CC) (hereafter Fuel Retailers case) para 44.

30 Feris 2010 PELJ 73. Also see the Maccsand case law series City of Cape Town v Maccsand (Pty) Ltd 2010 6 SA 63, Maccsand (Pty) Ltd & Minister of Minerals Resources v City of Cape Town 2011 6 SA 633 (SCA), Maccsand (Pty) Ltd v City of Cape Town 2012 4 SA 181 (CC).

31 Kotzé Legal *Framework for Integrated Environmental Governance* 25.

ensure sustainable service delivery. It seems that voluntary agreements such as the EMCA may address some of these challenges.

The research question addressed in this dissertation is therefore how and when a EMCA can be effectively utilised as a tool to ensure co-operative environmental governance in order to ensure optimal compliance with environmental legislation in a segmented environmental administration?

1.2 Aims of the study

The aim of this study is to explore the role of the NEMA EMCA as a co-operative environmental governance tool to ensure optimal compliance with environmental legislation in a segmented environmental administration. The study will focus on the command and control environmental regime and its drawbacks. The research will proceed to the investigation of section 35 of the NEMA EMCA as an alternative and co-operative environmental governance tool to ensure environmental compliance.

1.3 Research methodology

This study is based on a review of relevant primary literature such as legislation, policy and case law, supported by secondary literature such as textbooks, chapters in books, journal articles, government documents, newspaper articles and internet material.

Chapter 2 of this study discusses command and control environmental regulation. This is followed by a discussion of the EMCA *vis-à-vis* the NEMA EMCA in Chapter 3. Chapter 4 presents a critical evaluation of the EMCA as a co-operative environmental governance tool in a segmented environmental administration, whereafter the argument comes to a conclusion and recommendations are made.

Chapter 2: Command and control environmental regulation

2.1 Introduction

This chapter aims to provide the background to the command and control environmental regulation as the traditional regulation regime. This discussion provides the foundation for the later discussion on voluntary environmental compliance method of alternative environmental regulation. Chapter 2 aims to make the case that in order for traditional environmental regulation to be effective it needs to be bolstered by voluntary environmental regulation instruments, and specifically EMCAs. Section 2.2 discusses the existing command and control compliance regime and its segmented nature. The specific focus is on the underpinning public law relationship and how the success of this relationship is essential to co-operative environmental governance. Section 2.3 discusses the drawbacks of the traditional environmental regime. Section 2.4 transits to voluntary environmental regulation and collaborative environmental governance in order to pave the way for Chapter 3, which deals with the EMCA.

2.2 Command and control environmental compliance

Traditional environmental compliance is a top-down regulation method comprising of mechanisms where there is strict compliance monitoring by authorities of adherence to environmental laws.[32] The command and control regime consists of a two-pronged process made up of prescribed legal requirements and the enforcement of legal compliance through appropriate means in the event of non-compliance.[33] Achieving compliance translates into conforming with the minimum requirements set by environmental law to set standards and conditions.[34] Environmental compliance infers the existence of an ideal whereby all legal community subjects adhere to set environmental legal standards and requirements,[35] whereas enforcement is made up of actions that the state takes in the event of non-compliance.[36] The command and

32 Kidd *Environmental Law* 269.
33 Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 51.
34 Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 163.
35 Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 41.
36 Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 44.

control system of environmental compliance is state-centred and predominantly based on directives.[37] Command and control may specify standards such as the technologies or conditions a regulatee must comply with (the command aspect) or refer to the issuing of an authorisation (the control aspect).[38] The authority determines whether a regulatee complies with the conditions of the authorisation or the standard. Standards and conditions are often included in permits and licences.[39] The command and control approach includes criminal measures, administrative measures and civil measures.[40] The command and control environmental regulation is the mainstay of environmental regulation whereby compliance and enforcement are state driven.

One of the traditional environmental legal compliance tools applied in South Africa is the environmental impact assessment (EIA) tool. Chapter 5 of the NEMA deals extensively with EIAs.[41] It is important to accentuate that Chapter 5 of the NEMA does not advocate using the EIA tool only. Section 23 of the NEMA is central in that it promotes the usage of a suitable environmental instrument for a particular activity.[42] This is important since the EIA tool is very limited in its application, focusing as it does only on projects as opposed to the wide range of activities defined by the NEMA.[43] There are other environmental compliance instruments which may be used, such as

37 Paterson "Incentive-based Measures" 297.

38 Gunningham and Sinclair *Leaders and Laggards* 9. Command and control takes various forms such as standards and land-use controls (Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 39).

39 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 41; see pollution standards such as those for air and waste.

40 Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 52. Administrative measures, include permits, licences, directives and abatement notices (Bray "Administrative Justice" 186). Administrative measures used in SA range from directives, abatement notices, and compliance notices empowering provisions relating to the withdrawal of authorisations regulating a specific activity (Winstanley "Administrative Measures" 225).

41 Ch 5 on integrated environmental management (IEM) deals with the general objectives of IEM and environmental authorisations of listed activities. See ss 23 and 24 respectively.

42 S 23(1). Also see s 23(*2*)(*f*), which stipulates the election and use of the best practicable environmental management approach for a specific activity, in accordance with NEMA principles.

43 DEA 2016 https://www.environment.gov.za/documents/strategies/eiams. Also see DEA 2014 https://www.environment.gov.za/sites/default/files/docs/eiams_environmentalimpact_managementstrategy.pdf 24. These activities range from policy, organizational co-ordination, IEM systems, and integrated information to monitoring and evaluation systems (Muller 2004 *JPA* 398-399). IEM is the management of impacts arising from institutions' activities, facilities, products or services and includes resource consumption, procurement strategies, fleet management and the use of substances as well as the impacts of unsustainable policies, programmes and legislation (Du Plessis and Nel 2004 *SAPL* 183). Environmental impact assessment and management strategy (EIAMS) is discussed later under mechanisms of co-operative environmental governance.

environmental management frameworks (EMFs),[44] strategic environmental assessments and risk assessments, but they are not the focus of this study.[45] Section 2.4 on voluntary compliance will argue that due to the complex nature of environmental regulation, a single tool is not necessarily appropriate for all activities or in all situations. In order to appreciate environmental regulation, it is important to understand the segmented nature of environmental administration.

2.2.1 Segmented environmental administration

The basic organisational principles of the division of labour and the specialisation of tasks seem to dominate most administrations.[46] The *Public Finance Management Act*[47] requires that government must deliver services in a swift, efficient, simplified and seamless manner. Subsequently fragmented governance is caused among other reasons by the quest to attain greater ease of management and expenditure; control of inputs; accountability for probity; consumer orientation; ways of taking strategic decisions for functional organisation; and democratic pressures for visible commitment to services in input or throughput terms.[48] The quest to simply administration seems to have segmented government administration. Consequently, government administration and institutionalisation is pigeonholed into a variety of units, each with its own tiered sub-units devoted to specific programmes, agencies, boards, councils, committees, and advisory bodies.[49] Compartmentalisation happens both vertically and horizontally.[50] The fragmentation includes disjointed governance along distinct, autonomous organs of state that perform line functions in the national,

44 E.g. See GN R 905 in GG 34719 of 4 November 2011 (Garden Route Area in the Eden District Municipality EMF), GN R 852 in GG 34670 of 14 October 2011 (Olifants-Letaba Catchment Area EMF) and GN 833 in GG R 34651 of 7 October 2011 (Waterberg District Municipality EMF).

45 See Retief, Jones and Jay 2008 *EIAR* 504-514. Also see Retief, Mlangeni and Sandham 2011 *LG* 619-636. Although the NEMA EMCA is an agreement-based tool (Du Plessis and Nel 2004 *SAPL* 185) it is argued for the purpose of this study that section 35 of the NEMA can be used as an alternative form of environmental compliance.

46 Buijs and Edelenbos 2012 *PAQ 6.*

47 1 of 1999 (PFMA).

48 Kotzé Legal *Framework for Integrated Environmental Governance* 24.

49 Muller 2007 *JPA* 17.

50 Kotzé 2009 "Environmental Governance" 110. According to the *Public Service Act* (103 of 1994 (hereafter PSA) a department means a national or a provincial department or administration. It can be argued that the PSA promotes the fragmentation of governance among the three spheres of government.

provincial and local spheres of government.[51] The specialisation of tasks, which aims to simplify administration, has instead inadvertently contributed the existing over segmentation of the administration.

The fragmentation between the government departments involved in environmental administration can also be referred to as segmented environmental administration. Wyborn and Bixler[52] refer to nested governance as governance where decision-making is distributed among a hierarchy of institutions in order to address scalar issues in environmental governance. The command and control environmental regulation system is characterised by its compartmentalisation into different departments dealing with different environmental media.[53] Section 1 of the NEMA defines the "environment" in different segments or compartments.[54] The Constitution empowers the three spheres of government to legislate according to subject matter, a feature which is common in most federal state Constitutions.[55] The environment is an area of concurrent national and provincial competence.[56] The all-encompassing definition of the environment is indicative of the broadness of the environment and seemingly supports the idea that environmental governance could be fragmented.[57]

Incidentally the way in which the constitutional competences of the different spheres of government are allocated makes co-operation, harmonisation, and integration difficult and may actually lead even to conflict.[58] The functional designation of the legislative and executive roles makes co-operative and intergovernmental relations not very easy in practice.[59] As an example, Schedules 4 and 5 competencies read with

51 Kotzé *Legal Framework for Integrated Environmental Governance* 23.
52 Wyborn and Bixler 2013 *JEM* 58.
53 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 39.
54 "The surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or mix of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing."
55 Bronstein 2006 *SAJHR* 83. See the legislative and executive functions of the three spheres of government in Sch 4 and Sch 5 of the Constitution. Sch 4 outlines functional areas that the national and provincial legislature manage concurrently. Sch5 lists the exclusive functional areas of provincial legislative competence. The municipal legislative competencies are delineated in part B of both Sch 4 and Sch 5.
56 See Part A of Sch 4 to the Constitution.
57 Jikijela SML *Co-operative Environmental Governance* 8.
58 Bosman, Kotzé and Du Plessis 2004 *SAPL* 420.
59 Van Wyk 2012 *PELJ* 289.

the definition of "environment" may create overlap and confusion among the three spheres of government.[60] The conflict resulting from the Maccsand matter elucidates how mining creates a *prima facie* tension between the decision-makers of the MPRDA and the *Land Use Planning Ordinance*[61] and the NEMA.[62] It is evident that Schedules 4 and 5 of the Constitution distribute the functions as related to the components of the environment throughout the three spheres of government, and this may prevent proper integration, especially in municipalities where service delivery is key.

The distribution of the environmental mandate across a wide array of government bodies and functionaries adds to some of the complexities of local environmental governance.[63] For instance the delineation of the NEMA's Chapter 3 on co-operative governance into Schedule 1 and Schedule 2 departments within both the national and provincial sphere of government is supposed to assist in this regard but seems not to be helpful.[64] Kidd[65] is of the view that the provisions of Chapter 3 of the NEMA, although reasonable on paper, are dysfunctional in practice, since they are not adhered to. *Inter alia* the Schedules include local government only indirectly. According to this scheme, municipalities are not required to prepare environmental implementation plans (EIPs) or environmental management plans (EMPs).[66] What is prescribed instead for municipalities is that the relevant provincial government must ensure that each municipality complies with the applicable provincial EIP[67] and that municipalities must adhere to the relevant EIMPs.[68] The provisions do not spell out how municipalities must adhere to relevant EIMPs.

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60 Bosman, Kotzé and Du Plessis 2004 *SAPL* 411.

61 15 of 1985 ((hereafter LUPO). The *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA) has since repealed the LUPO (See GN R 239 in GG 38594 of 23 March 2015).

62 Maccsand CC para 43.

63 Oliver "Cooperative Government and the Intergovernmental Division of Environmental Powers" 345.

64 See GN No R152 in GG 37401 28 of February 2014.

65 Kidd *Environmental Law* 41.

66 S 11(1) of the NEMA commands that every national department listed in Sch 1 as exercising functions which may affect the environment and every province must prepare an EIP. S 11(2) of the NEMA obliges every national department listed in Sch 2 as exercising functions involving the management of the environment to prepare an EMP. S 11(3) provides that every national department that is listed in both Sch 1 and Sch2 may prepare a consolidated environmental implementation and management plan (EIMP).

67 The NEMA s 16(4)(a). The relevant provincial government must ensure that the relevant provincial EIP is complied with by each municipality within its province, and for this purpose the provisions of subsections (2) and (3) must apply with the necessary changes.

68 According to s 16(4)(b) of the NEMA, municipalities must adhere to the relevant Environmental Implementation and Management Plans (EIMPs), and the principles contained in s 2 in the

There is a lack of guidance and clarity from the Constitution, local government legislation and the NEMA regarding the exact environmental mandate of municipalities.[69] The *Local Government: Municipal Systems Act*[70] stipulates that among the objects of local government is to ensure that the provision of services must be done in a sustainable manner.[71] The MSA guides that EMPs have to be included in IDPs including other environment related sector plans such as the integrated waste management plans, integrated energy plan, integrated transport plan, water services development plan.[72] However, this has proved not adequate to create binding requirement as there seem to be some dysfunctional environmental governance in some municipalities. Among others, provincial governments find it problematic to accomplish their share of supervisory duties, as they lack any effective financial incentives which they might offer to keep municipalities in line.[73] Du Plessis[74] argues that provincial governments should consider alternative measures in the field of environmental compliance and cooperation at local government level. It is arguable that a EMCA can assist in this regard. The next section discusses the public law relationship that underpins the segmented environmental administration.

2.2.2 Public (administrative) law relationship

The interaction involving the state gives rise to a public law relationship, also referred to as an administrative law relationship. Public law regulates the relationship between organs of state and legal subjects (described as a vertical relationship), and the legal relationship between organs of state themselves.[75] In contrast private law regulates those subjected to the state regulation as well as the relationships between these

preparation of any policy, programme or plan, including the establishment of Integrated Development Plans (IDPs) and land development objectives.

69 Middleton *et al* 2011 *PDG* 6).

70 32 of 2000 (hereafter the MSA).

71 s 152(a) of the MSA. Furthermore the local government must aim to promote safe and healthy environments s 152(d) of MSA..

72 See COGTA htttp://idpnc.cogta.gov.za/Home.aspx.

73 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 479-480.

74 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 480.

75 Du Plessis "Understanding Legal Context" 17.

subjects.[76] An illustration of an administrative law relationship is depicted in Figure 1 whereby AB is the relationship between the state and business and AC represents the relationship between the state and third parties such as community members. BC is the private law relationship between business and the community. The relationship between the state or public actors can be represented by AA, which is not shown in this figure. Of interest to this dissertation is the relationship between public actors in environmental administration.

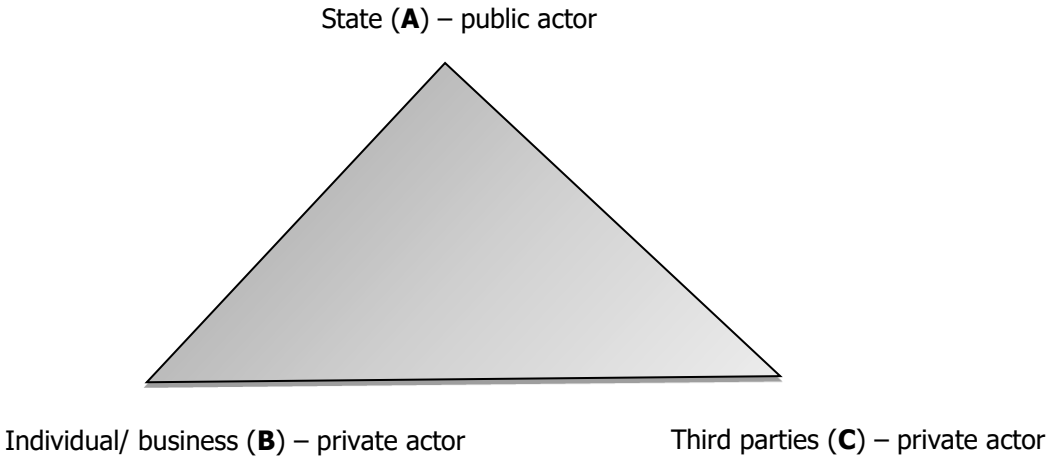

Figure 1: Public-law relationship

The public-law relationship is characterised by the clothing with authority of a legal subject, in this case the public actor.[77] As a result environmental governance is regarded as the output of the fluctuating power relations of the players involved in managing and solving environmental problems.[78] It can be argued that the administrative law relationship confers a *quasi*-authoritative-subordinate identity on the organs of state, since there is an interchange of power among the authorities.[79] For example, freshwater resources are governed by the *National Water Act*[80] while alien invasive plants found alongside the same watercourses are governed by the

76 Sharrock 1996 *Business Transactions Laws* 23. The role of private law in environmental agreements is discussed in CH3. Furthermore it is important to differentiate this vertical legal relationship from the vertical design of government by ch 3 of the Constitution.
77 Bray "Administrative Justice" 160.
78 Mirumachi and Van Wyk 2010 *GJ* 25.
79 Quasi-authoritative-subordinate identity can be used to explain the effect of the dual role of the organ of state as both the regulator and the regulated.
80 36 of 1998 (NWA).

Conservation of Agricultural Resources Act.[81] The authorities governing the implementation of these statutes are the Department of Water and Sanitation (DWS) and the Department of Agriculture, Forestry and Fisheries (DAFF) respectively. However, since segmented environmental governance involves the spreading of environmental law in such a way that various pieces of environmental legislation focus on related environmental issues, each with its own governing department, each of which has its own mandates, policies and procedures, which (importantly) lead to little or no collaboration between departments with overlapping or co-operative mandates,[82] this may promote ill-discipline whereby public authorities undermine one another's authority through the abuse of their own authority such as in the Maccsand case. Therefore good environmental governance is key.

2.2.3 Good environmental governance

Good administration is an important aspect of good governance.[83] The welfare state provides for basic needs through public financing, legislation and administration.[84] It is arguable that good governance is key in the welfare state.[85] According to the PAJA an administrative action is any decision taken, or any failure to take a decision by organs of state when exercising power in terms of any law, or by a natural or juristic person other than an organ of state when executing a public power in terms of an empowering statute, which affects the rights of any person and which has a direct, external legal effect, to the exclusion of those acts listed in section 1(i)(b)(aa)-(ii).[86]

81 43 of 1983 (CARA)

82 Kotzé "Towards Sustainable Environmental Governance" 155.

83 De la Harpe, Rijken and Roos 2008 *PELJ* 9. The Organisation of Economic Development (henceforth OECD) defines of good governance as "the respect of the rule of law, openness, transparency and accountability to democratic institutions; fairness and equity in dealings with citizens including mechanisms of consultation and participation; efficient, effective services; clear transparent and applicable laws and regulations; consistency and coherence in policy formation; and high standards of ethical behaviour." OECD http://www.oecd.org/.

84 Rabie *et al* "Implementation of environmental law"143.

85 Governance is more focused on government, the state and sovereign political power albeit not exclusively publicly oriented (Kotzé *Global Environmental Governance* 92); government is a noun signifying the physical structures and people responsible for governance whereas governance is described as the process of governing (Kotzé *Global Environmental Governance* 84).

86 See s 1 of the PAJA on definitions. Also applicable is S195(1) of the Constitution which obligates that public administration must be run in a manner that ensures impartiality, fairness, equitable and unbiased provision of services, transparency and the accountability. Furthermore ch 2 of *Public Administration Management Act* 11 of 2014 stipulates basic values and principles of public administration.

Administrative law governs the day-to-day activities of government concerning the implementation of policy and laws, and the administrative actions of Cabinet Ministers and all other public officials.[87] The implementation of the section 24 constitutional environmental right relies on the attainment of the administrative right.[88] It can be argued that compliance and enforcement of constitutional environmental right in accordance to PAJA constitutes good environmental governance.

Good governance in relation to environmental decision-making is postulated to be the holistic management process discharged by public and private persons alike with the main aim of regulating human activities and their related impacts on the environment.[89] It can be argued that state authorities' acts of non-compliance with environmental laws are not desirable and constitute bad environmental governance. Acts of state authorities can be controlled through administrative (internal) control and judicial (external) control.[90] Administrative (internal control) takes place daily in government administration through higher ranking officials or bodies such as tribunals.[91] The traditional application of judicial review is always connected to the determination of the validity of administrative action.[92] According to the Fuel Retailers case, failing to act within the mandate of the NEMA qualifies the decision of environmental authorities to be reviewed under section 6(2)(b) of the PAJA, as the

87 Van Heerden 2009 *JPA* 184. See chs 5-7 of the Constitution on the President and National Executive, Provinces and Local Government.

88 Kotzé 2004 *PELJ* 59.

89 Kotzé 2009 "Environmental Compliance" 107-108.

90 Burns 1998 *SAPL* 246.

91 Bray "Administrative Justice" 188.

92 Burns 1998 *SAPL* 245. It has been submitted that holding a state official civilly or criminally accountable at a personal level is an effective means of securing proper delivery of socio-economic rights (De Beer and Vettori 2007 *PELJ* 21). It is arguable that s 48 of the NEMA acts in contradiction to efforts to promote adherence to the law by the authorities since s 48 stipulates that "this Act is binding on the state except in so far as any criminal liability is concerned." S 48 of the NEMA can be seen as promoting complacency, especially for state organs which do not have regard to the laws. However s 49 of the NEMA could be seen as a way of attenuating s 48 in that it stipulates that unlawful, negligent or *mala-fide* action or inaction will attract liability for damage or loss on the authority involved. S 49 on the "Limitation of liability" states that "Neither the State nor any other person is liable for any damage or loss caused by - (a) the exercise of any power or the performance of any duty under this Act or any specific law; or (b) the failure to exercise any power, or perform any duty under this Act or any SEMAs, unless the exercise of or failure to exercise the power, or performance of or failure to perform the duty was unlawful, negligent or in bad faith."

authorities did not comply with the NEMA.[93] The state itself is a threat to the environment when it does not to perform its fiduciary duties.[94]

Furthermore there are several inferences that can be drawn from the attempted encapsulation of good environmental governance above that are of importance to this dissertation. Firstly, the regulation of the actions of public authorities and their incidental impacts on the environment is indicative that good environmental governance is a necessity for the implementation of an environmental policy. Secondly, the adjective "holistic" that prefixes the discharge of a management process by environmental governance actors implies that there is interaction, collaboration and cooperation between governance actors and that the foregoing are key in good environmental governance. Thirdly it can also be argued that the adjective "holistic" further implies that not only the command and control environmental tools but rather an interplay between the command and control on the one hand and alternative environmental tools such as EMCAs on the other is needed for the attainment of good environmental governance.[95] In order to make a case for the deployment of alternative environmental tools such as EMCAs, the next section discusses the challenges to the command and control environmental regulation.

2.3 Challenges to command and control environmental regulation

The command and control method of environmental regulation is experiencing problems in South Africa.[96] This is despite the existence of the constitutionally enforceable environmental right.[97] The next section discusses challenges of the bureaucratic defence of turf, the proliferation of complex and inflexible laws, the mismatch between the environmental laws and the ecological systems, the human

93 Fuel Retailers case (para 89). S 6 of PAJA deals with judicial review of administrative action. S 8 of the PAJA stipulates remedies for judicial review

94 Kidd *Environmental Law* 269.

95 Environmental compliance and enforcement seek to achieve four main objectives: (1) to improve environmental quality; (2) to reinforce the credibility of environmental laws and the environmental administrative institutions; (3) to ensure fairness to those who are willing to comply with legal requirements; and (4) to reduce the costs associated with non-compliance. (Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 44). It can argued that the foregoing denote some form of collaboration between environmental governance actors and the possible utilisation of EMCA as a co-governance tool.

96 Craigie, Fourie and Snijman "Environment Compliance and Enforcement Institutions" 95.

97 Christiansen 2013 *SELJ* 215-281.

factor and the resource intensiveness. These problems are discussed in order to support the suggestion that there is a need for collaboration among the various environmental governance actors in order to overcome the challenges facing the command and control environmental regulation system and secondly to support the notion that EMCA as an instrument is important in this regard. The discussion starts with the challenges caused by the bureaucratic turf defence.

2.3.1 Bureaucratic turf defence

Theoretical models of co-ordination assume that there will be different interests among different groups based either on policy preferences or on bureaucratic defences of turf.[98] Turf-defence, which could also be called "baronial government", is manifested when the achievement of policy goals and expectations for service-delivery are eclipsed by conflict to ensure officials' independence and control over mandates.[99] The abuse of power and the protection of turf, mandates and jurisdictions may lead to further fragmentation in the environmental governance domain, with corresponding unsustainable results.[100] Turf-defence promotes lack of the integration and co-ordination of governance of development and the environment with the aim of the ultimate achievement of sustainable development.[101] Historically South Africa lacks integrated environmental planning and is subject to poor enforcement.[102] The way state duties are discharged lead to the shallow integration of socio-economic and environmental processes and therefore led to the wrong decision-making.[103]

The Maccsand case was an embarrassing outcome of a long-standing dispute concerning EIAs relating to mining and ancillary activities, thus between the NEMA and the MPRDA, and thus between the Department of Environmental Affairs (DEA) and the Department of Mineral Resources (DMR), as well as between the relevant

98 Muller 2004 *JPA* 401.
99 Kotzé Legal *Framework for Integrated Environmental Governance* 30.
100 Kotzé Legal *Framework for Integrated Environmental Governance* 30.
101 Bray 1999 *SAJELP* 12.
102 Fischer *Environmental Management Cooperation Agreements* 70.
103 Fuel Retailers case para 85.

provincial and local governments.[104] This points to the lack of the integration and co-ordination in the sustainable development governance. Fragmented environmental governance, among other failures, arises from the neglect of various tools for governance.[105] Ominously, there is the danger that environmental issues will be side-lined as speedy gains are to be achieved through prioritising politically expedient development.[106] Bureaucratic turf defence may sabotage the policy of sustainable development by among others impeding the exploration and use of alternative environmental compliance tools such as a EMCA.

2.3.2 Complex and inflexible environmental laws

Laws and rules are limited in terms of the extent to which they can match the complexity of the world they govern, in that if they attempt to match that complexity they become too complex for enforcement.[107] The traditional environmental tools are suitable to deal with single medium issues, the control of point-source emissions, waste management, and the protection of endangered species, and also with circumstances where compliance or non-compliance is readily detectable.[108] Traditional environmental regulation is dependable, provided that there is adequate monitoring and enforcement and the behaviour of regulatees is isolatable with clarity, which makes it easy to identify breaches of the legal standard and to enforce the law.[109] Complex enforcement rules create ambiguity.[110] The EIA regime is seen as complex.[111] The constant reforms of the South African EIA regime have been

104 Humby 2013 *SLR* 57. Turf-defense can happen between spheres of government (inter-governmental) or internally between departments of the same sphere of government (intra-governmental).

105 Kotzé Legal *Framework for Integrated Environmental Governance* 25.

106 Bray 1999 *SAJELP* 12. Shortcomings resulting from fragmentation may eventually inhibit the achievement of sustainable service-delivery (Kotzé *Legal Framework for Integrated Environmental Governance* 25).

107 Scholz 1984 *LP* 387.

108 Nel and Wessels 2010 *PELJ* 53.

109 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 41.

110 Scholz 1984 *LP* 387.

111 It is important to highlight that EIAs were not complex initially. Originally they were conducted voluntarily in order to appease the public and foreign investors (Ridl and Couzens 2010 *PELJ* 82) in terms of regulations GN R 1182 in GG 18261 of 5 September 1997 and in terms of the *Environmental Conservation Act* 73 of 1989 (henceforth ECA). Then the EIA regime evolved from its humble beginnings as an *ad hoc* voluntary tool to the formalised environmental assessment tool known today (Kidd and Retief "Environmental Assessment" 973). See the evolution of EIA regulation, GN R 385 in GG 28752 of 21 April 2006, GN R 386 in GG 28752 of 21 April 2006 and Gen No 657 in GG 28854 of 19 May 2006. GN R 543 in GG 33306 of 18 June 2010, GN R 544 in

derided.[112] In this process the constant playing with words such as reform, transform, reengineer and redress has shown over the years that the effort to address fragmentation and EIA inadequacies has not borne fruit.[113] It is arguable that an over emphasis on legal reform has complicated the EIA system. It is for this reason that some want to move away from legal reform towards a more pragmatic approach.[114] The use of EMCAs would be a realistic intervention of that kind.

2.3.3 Mismatch between environmental regulation and ecological systems

Natural resource management and conservation are complicated by the lack of a fit between social institutions and ecological systems[115] and the misalliance of the nature of environmental problems and government's sectoral problem-solving structures.[116] It can be argued that success in natural resource management and conservation and environmental laws must be supported by an understanding of ecological systems.[117] As a result, the traditional command and control bureaucracies cannot cope with rapidly developing and unforeseen environmental problems.[118] It is key to stress that all elements of the environment are linked and interrelated.[119] In support, the court in the *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*[120] case stressed that legislative competencies allocated to different government spheres are not silo-based and thus they are not hermetically sealed compartments.[121] The management of the environment must be considerate of the interrelatedness of the elements of the environment in order to avoid the silo-approach.

GG 33306 18 June 2010 (listed activities requiring basic assessments), GN R 545 in GG 33306 18 June 2010 (scoping report) and GN No R 546 in GG 33306 18 June 2010, Gen Not 733 in GG 37951 of 29 August 2014 and the current GN R 982 in GG 38282 of December 2014.

112 Ridl and Couzens 2010 *PELJ* 80-189.

113 Jikijela SML *Co-operative Environmental Governance* 26.

114 See Morrison-Saunders and Retief 2012 *EIAR* 34-41. The sustainability assessment practice can be performed without even the need to 'tweak the system'. Before the old system is discarded a careful and sober analysis must be made (Rechtschaffen 1998 *SCLR* 1998).

115 Wyborn and Bixler 2013 *JEM* 58-67.

116 Muller 2004 *JPA* 400.

117 Understanding the nature of sources of pollution, their mechanisms of propagations and the effects they have on the receiving ecosystems of the water body can pave the way to providing solutions that prevent and alleviate the negative effects of pollutants on the receiving water body (Seekoe *The Impact of Gabion Weirs on Freshwater Quality* 19).

118 Muller 2004 *JPA* 400.

119 NEMA Ch1 s2(4)(*b*).

120 2010 6 SA 182 (CC) (hereafter the Gauteng Development Tribunal case)

121 Gauteng Development Tribunal case para 55.

The major problems regarding environmental administration occur at the boundaries of mandates, regardless of whether the institutions are states, levels, departments, agencies, departmental divisions.[122] Duplication and overlap occur at the boundaries of different mandates of authorities. However, the existence of redundant and overlapping mandates provides for necessary check and balances either through error suppression or through the triggering of other strategies in order to avert system failure.[123] Therefore redundancy and overlaps have their role, as they do in ecological systems. For instance an estuary, a meeting point between two different ecosystems of the salty sea-water and the freshwater serve as breeding grounds for certain species.[124] Estuaries can thus be seen as areas of overlaps that promote the overall ecosystem health by offering an extra valuable use for the two ecosystems. The boundaries of the institutions, departments, and departmental divisions must also be seen in this light, as areas of governance ehancement as opposed to areas of conflict.

2.3.4 The human factor

Human resources are central to good environmental governance. Among the ills of the public service are human resource challenges, which are marked by a lack of staff capacity, strategic cross-cutting issues, and staff turn-over.[125] The lack of adequate staff leads to inaction and delay.[126] Furthermore it is posited that laws and institutional structures are not always the problem, but that the problem frequently lies in the way in which people administer the system.[127] The way in which personalities operate and co-ordinate their actions may create costly, disruptive, over-prescriptive and ineffectual government structures.[128] Also, environmental laws are extremely technical and erudition and expertise are needed in those who wish to comprehend

122 Muller 2004 *JPA* 399.
123 Du Plessis and Nel 2001 *SAJELP* 17. The existence of such redundancy and overlaps increases the system's reliability and assists in limiting the effect of individual component failures, thereby lessening the risk of complete system failure (Streeter 1992 *SSR* 97-111).
124 Starr and Taggart *Biology – The Unity and Diversity of Life* 785-786.
125 Sing 2012 *PPM* 379-388.
126 Kotzé 2009 "Environmental Governance" 117.
127 Kotzé 2009 "Environmental Governance" 115.
128 Kotzé 2009 "Environmental Governance" 115.

them, due to their dependence on science, engineering, and economics.[129] Additionally, senior state officials are inclined to see EIA requirements as obstacle to development.[130] The correct use of human capital is therefore key.[131]

Furthermore, politicians may also be a barrier to environmental governance.[132] Political factors influence administration, as do economic and social factors.[133] Political factors dictate the agenda of the administration. Du Plessis[134] metaphorically refers to the negative role politics can play in environmental governance as the "politics of pollution".[135] Traditional environmental regulation is vulnerable to political manipulation, or which may include the serving of individual interests at the expense of good administration.[136] The conduct of administrators as well as politicians may impede the effectiveness of environmental regulation. It is therefore important to explore tools such as the EMCA that could limit the extent of the depredations of human behaviour through the promotion of collaboration. The next section refers to resource intensiveness.

2.3.5 Resource intensiveness

129 Rechtschaffen 1998 *SCLR* 1202. There is a paucity of staff with the requisite capacity to implement the enforcement of environmental laws, especially in key areas such as carbon emissions (Odeku 2014 *MJSS* 2710).

130 Couzens and Gumede 2007 *SAJELP* 125.

131 For a description of what is required of adequate environmental managers see Farmer *A Handbook of Environmental Protection and Enforcement* 232-233.

132 Schwella and Muller "Environmental administration" 65. Political decision-making on a local government level, budget allocations, local policy and law developments, prioritisation and planning are dependent on the political agendas of the elected decision-makers (Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 172).

133 Schwella and Muller "Environmental administration" 65-66. Political factors that affect strategic decisions include among others political ideology, political institutions (parties/groupings), pressure and interest groups, political policy, legislation and political and executive authorities (Schwella and Muller "Environmental administration" 65).

134 Du Plessis 2010 *SLR* 291.

135 The impact of politics is more pronounced in the local sphere of government. People encounter government through the quality and quantity of local government service delivery and this colours people's perception of government (Van der Waaldt "Municipal Service Delivery" 319). The "politics of pollution" leads to flawed and erroneous decision making and inhibits sound local environmental governance (Du Plessis 2010 *SLR* 291). There is an enormous distrust of local governments by local communities, which is informed among other things by a lack of understanding of the role of local government and negative reports about local government, including about its inefficiency and allegations of the corruption of its officials (Netswera and Kgalane 2014 *JPA* 265). As a result, service delivery protests ensue. They concern *inter alia* water, electricity, sanitation and housing (Hirsch and Powell 2010 *LGB* 15). Some protest issues relate to the environment.

136 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 46.

Command and control tools are resource intensive, complex and bureaucratic, and may have negative unintended effects on the national economy.[137] The traditional regulatory mechanism assumes a "threatening" posture and relies on the state's capacity to detect and penalise offenders, which is made difficult by the state's lack of resources and capacity.[138] The state is the custodian of public resources and must ensure that resources are shared fairly and equitably.[139] However, budgetary limitations impede the ability of government to honour a host of constitutional fundamental rights.[140] It is argued that there is segmented use of resources within the segmented environmental administration, leading to increased administrative costs and an explosion of laws.[141] Moreover business and development-orientated departments have queried the cost of regulatory compliance.[142] The traditional environmental regime is economically inefficient.[143] Voluntary environmental compliance may be an alternative approach that could complement command and control environmental compliance. The next section discusses voluntary environmental compliance.

2.4 Voluntary environmental compliance

Since there are limitations and problems associated with the use of traditional administrative and criminal measures, public and private policy makers have been conducting experiments with a range of alternative compliance and enforcement measures.[144] The appreciation that regulation is a necessary but insufficient

137 Nel and Wessels 2010 *PELJ* 53.

138 Lehman 2009 "Voluntary Compliance Measures" 269. Regulators must have inclusive and exact knowledge of the workings and capacity of the industry. This requirement drains public resources and leads to an increase in the overall costs of regulation (Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 44). The deterrence-based system is focused on bean counting: counting of the number of inspections carried out, complaints filed and criminal convictions obtained, as well as on the size of penalties collected (Rechtschaffen 1998 *SCLR* 1218).

139 Burns 1998 *SAPL* 246.

140 Fourie 2008 *JPA* 561).

141 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 46.

142 Morrison-Saunders and Retief 2012 *EIAR* 39. An estimated 6.5% of the total Gross Domestic Product (GDP) for 2003 was due to EIAs (Morrison-Saunders and Retief 2012 *EIAR* 39). Compliance related costs contribute significantly to the GDP. Coupled with an absence of incentives, they discourage firms to go beyond compliance (Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 45).

143 Harrison 1998 *JIE* 53. Traditional environmental regulation is costly and difficult to enforce (Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 45).

144 Paterson and Kotzé "Introduction" 7.

environmental protection instrument coupled with the pressure on the firms to be socially responsible actors has inspired the use of voluntary approaches on the part of government and industry.[145] The assortment of alternative regulatory instruments includes self-regulation, civil-based instruments, voluntarism, education and awareness instruments, economic instruments, and free-market environmentalism.[146] Self-regulation involves social control by an industry association.[147] Civil-based instruments include all measures to empower, inform, educate and co-opt civil society to be involved in the enforcement process.[148] Fiscal or economic tools use market-based incentive-directed or disincentive-directed measures to direct the desired behaviour.[149] Incentive-based measures encourage compliance through motivation and offering rewards, contrary to direct regulation.[150] Voluntary environmental compliance is of interest to this discussion.

Voluntary means that compliance or non-compliance is a matter of choice.[151] The past two decades have seen an explosion of the usage of voluntary instruments in the OECD countries.[152] Complying with such measures is not required by law, and so firms embark on them willingly to reduce the harmful impacts of their businesses on the environment.[153] Seemingly their voluntary nature makes these instruments attractive. The family of voluntary measures consists of negotiated agreements, public voluntary programmes, unilateral agreements and private agreements, among others.[154] Public voluntary schemes are established by governmental bodies and define certain

145 Lehman 2009 "Voluntary Compliance Measures" 271.
146 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 38-88.
147 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 56.
148 Nel and Wessels 2010 *PELJ* 50.
149 Nel and Wessels 2010 *PELJ* 50.
150 Paterson "Incentive-based Measures" 298.
151 Lehman "Voluntary Compliance Measures" 269.
152 Lehman 2009 "Voluntary Compliance Measures" 271. The past two decades have seen an escalation of the usage of voluntary instruments in the OECD countries (Lehman 2009 "Voluntary Compliance Measures" 271). Voluntary environmental initiative can be argued to be seen as a result of companies' corporate social responsibility initiatives that among others assist corporations to build good relations with communities as regard to the achievement of environmental sustainability, see Jackson and Jackson 2016 *EEI* 39-50.
153 Lehman "Voluntary Compliance Measures" 269. Participating firms go beyond the command and control baseline, but non-participating firms must still comply with the baseline (Gunningham and Sinclair "Designing Environmental Policy" 433). Industrialised countries' environmental voluntary initiatives objective is normally aimed at encouraging companies to over-comply, whilst the objective in the developing countries is to assist in remedying the widespread environmental non-compliance (Blackman *et al* 2013 *PS* 336). The objectives of the utilisation of voluntary environmental regulation are therefore different in developed and developing countries.
154 Lehman 2009 "Voluntary Compliance Measures" 269.

conditions for membership.[155] Unilateral agreements consist of industry-specified environmental improvement, and offer industry an opportunity to communicate its environmental commitment to the public.[156] Negotiated agreements are much closer to the government end of the government-governance spectrum than the other sub-types.[157] EMCAs fall within various categories of these voluntary instruments.[158]

Other names used for these agreements include voluntary environmental agreements, negotiated environmental agreements, negotiated rulemaking, good neighbour agreements, and environmental covenants.[159] Negotiated agreements are formal contracts between industries and public authorities aimed at addressing particular environmental problems, and may be legally binding.[160] The increasing awareness of the dire state of the environment and the advent of the Stockholm Convention in 1972 resulted in a shift from traditional environmental policies to a policy that was geared towards pollution reduction target-setting at the global level and the usage of environmental agreements for that purpose,[161] hence the importance of EMCAs. The next section focuses on the topic of collaborative environmental governance.

2.4.1 Collaborative environmental governance

155 Jordan, Wurzel and Zito "'New' Instruments of Environmental Governance" 11.
156 Jordan, Wurzel and Zito "'New' Instruments of Environmental Governance" 11.
157 Jordan, Wurzel and Zito "'New' Instruments of Environmental Governance" 11.
158 Self-regulation and internalisation gave birth to voluntary compliance and the rapid growth in the number of environmental agreements or covenants in the 1980s (Zito *et al* "Instruments Innovation in an Environmental Lead State" 169).
159 Fischer *Environmental Management Cooperation Agreements* 14.
160 Jordan, Wurzel and Zito "'New' Instruments of Environmental Governance" 11.
161 Fischer *Environmental Management Cooperation Agreements* 3-20. Environmental problems have transcended both geographic and generational boundaries (Tietenberg *Environmental Natural Resource Economics* 5). E.g. there is the climate change phenomenon. At the core of climate change politics are environmental regulatory instruments. The United Nations Framework Convention for Climate Change (UNFCCC) defines climate change as the change in the atmosphere's configuration which causes global average temperatures to increase, due mainly to anthropogenic greenhouse gas emissions (UNFCCC 1992 Article 1). The Kyoto Protocol is a top-down command and control instrument used to curb green-house gas (GHG) emissions. The Kyoto Protocol's 2° C (relative to pre-industrial levels) target that is required to mitigate GHG has proved impossible to reach. Instead science suggests a future with increases of 4° C or even 6° C (Roberts 2013 *SAJS* 1). So beleaguered is the Kyoto Protocol that some developed countries bowed out when the first commitment period ended in 2011 (Ranjamani 2012 *ICLQ* 504). Other participating countries reverted to the 2009 Copenhagen Accord targets. The 2009 Copenhagen Accord is a political agreement which is seen as flexible and bottom-driven. This evidences that it cannot be left to traditional regulation alone to solve environmental problems, EMCAs also have a role to play in environmental regulation.

A co-regulatory approach encompasses an interactive relationship, typically an agreement or covenant, between the regulator and the regulated.[162] It can be argued that voluntarism is critical to co-regulation. "New" environmental governance is an enterprise that involves collaboration between a diversity of private, public and non-government stakeholders who act together towards commonly agreed (or mutually negotiated) goals with the hope of achieving far more collectively than individually.[163] Achieving sustainable development is dependent on the formation of greater cooperation between government and industry in identifying desired developmental outcomes, and in crafting the most economically efficient and environmentally sustainable development path to achieving those outcomes.[164] Cooperation is defined as partnership between government, business and interested parties on common objectives, and working together to achieve those objectives.[165] Difficult environmental issues can be addressed only through cooperation between a government and its citizens.[166] Hence a co-operative government is necessary for effective environmental compliance and enforcement.[167] The next section focuses on the existing mechanisms of co-operative environmental governance in South Africa.

2.4.1.1 Mechanisms for co-operative environmental compliance

The environmental legal framework in South Africa makes extensive provision for co-operative environmental government through the Constitution, the IGRFA, the NEMA and the SEMAs and other related environmental legislation.[168] The principles of co-

162 Kidd *Environmental Law* 281.

163 Holley, Gunningham and Shearing *The New Environmental Governance* 4. The relationship between society and the state is a relationship of cooperation (Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 236).

164 Lehman 2009 "Voluntary Compliance Measures" 284. The state-society contract is based on the expectations of the society of its government, the capacity of the state to provide services, and the willingness of the elite to direct resources and their capacities to fulfil social needs (Connolly 2013 *AJOL* 90). Joint strategic interventions between government and civil society are key enablers of government (Sing 2012 *PPM* 553).

165 Harrison 1998 *JIE* 54.

166 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 236.

167 Du Plessis "Understanding Legal Context" 33.

168 Kotzé and Nel "Environmental Management" 19. SEMAs include inter alia the *National Environmental Management: the Protected Areas Act* 57 of 2003 (NEMPAA), the *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBAA), the *National Environmental Management Air Quality Act* 39 of 2004 (NEMAQA), the *Mineral and Petroleum Resources Development Act* 28 of 2004 (MPRDA), the *National Environmental Management: Waste Act* 59 of 2008 (NEMWA), and the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (NEMICA). Other important environment-related legislation includes *inter alia* the

operative environmental governance in South Africa are founded on section 41 of the Constitution.[169] The section 2 NEMA principles and in particular section 2(4)(i) govern the intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.[170] Section 24L of the NEMA provides for "Alignment of Environmental Authorisations" which requires co-operation between environmental authorities when making environmental authorisations. The NEMA strongly recognises the fragmented nature of environmental governance in South Africa, and has catered for various mechanisms and forums to achieve aligned environmental governance.[171] The conclusion of a EMCA, the focus of this research is one such mechanism.[172] Other key statutes such as the *Nuclear Regulator Act*[173] and the *National Resources and Heritage Act*[174] also make provision for environmental agreements in support of co-operative governance. There are ample tools that public actors can utilise to foster co-operative environmental governance.[175]

The DEA oversees various arrangements for collaboration, co-operative governance, and intergovernmental relations and collaborations, *inter alia* through its consolidated

Occupational Health and Safety Act 85 of 1993, the *Hazardous Substances Act* 15 of 1973, the *National Forest Act* 84 of 1998, etc.

169 See ch 3 s 40 of the Constitution. These principles direct how organs of state in the three spheres of government must conduct themselves in relation to one another (s 41 of the Constitution). The idea behind the list of principles is to facilitate the proper exercise of assigned power and functions, especially where there are conflicts or overlaps (Van Wyk 2012 *PELJ* 312). One sphere of government may not usurp or arrogate to itself the functions of another sphere unless by intervention, which is permitted in limited circumstances (Maccsand para 12). Importantly, s 3(2) of the MSA stipulates that the national and provincial spheres of government must discharge their authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority. A truly co-operative government strikes an equilibrium between the principles of "self-rule" and "shared-rule" (Bray 1999 *SAJELP* 4).

170 Other important principles include *inter alia* the precautionary principle, the preventative principle, the cradle-to-grave principle, the life-cycle principle, the polluter pays principle, the carrying capacity principle, and the participative governance principle (Kotzé "The regulation of environmental pollution" 259).

171 Plessis and Nel *2004* SAPL 184. See s 2 of the NEMA.

172 Ch 8 s 35 of the NEMA stipulates Conclusion of EMCA. Also see the IGRFA provisions of implementation protocols (IPs), ch 3 s 35 of the IGRFA provides for IPs that can be concluded for purposes of the execution of policy objectives for service delivery (Item 1 of GN 493 in GG 29846 of 26 April 2007).

173 47 of 1999 (hereafter NRA). See s 6(2) of the NRA, which provides for co-operative agreements.

174 25 of 1999 (hereafter NRHA). S 43 of the NRHA provides for Heritage agreement.

175 See Bosman, Kotzé and Du Plessis 2004 *SAPL* 420 argument that the designation of the different roles and responsibilities of the three spheres by the drafters of the Constitution was deliberate, and that the principles on co-operative governance are meant to preclude any confusion, poor regulation, administration, and governance of environmental matters.

EIMP.[176] Furthermore, the DEA oversees the process of EIAMS.[177] Sub-theme 10 of the DEA EIAMS relates to co-operative governance (EIAMs tools).[178] Memoranda of understanding (MOUs) and IPs are among the instruments which are listed as co-operative governance and intergovernmental relations tools.[179] However, EMCAs are not listed as such a tool, although they are referred to in certain parts of the document.[180] It would seem that in practice EMCAs are not instruments of choice.

2.4.2 Advantages of voluntary environmental compliance

Voluntary environmental compliance measures among others offer flexibility, improved efficiency, suitability to prevailing situations and the promotion of innovation, and cost-effectiveness to the state.[181] Flexibility can be defined as regulatory capacity that is adaptable to factual need.[182] However, caution has been

176 See Reg 7 of GN R530 in GG 39998 19 May 2016.

177 See DEA https://www.environment.gov.za/documents/strategies/eiams. The EIAMS process the DEA facilitates a participatory process in order assemble a strategy in order to give effect to the objectives of IEM as espoused by section 23 of the NEMA and within the context of section 2 of the NEMA sustainable development principles (DEA https://www.environment.gov.za/documents/strategies/eiams). The primary purpose of the EIAMS is to enable the utilisation of a range of environmental management tools to achieve various objectives (DEA 2014 https://www.environment.gov.za/sites/default/files/docs/eiams_environmentalimpact_managementstrategy.pdf 19-20).

178 See also the list of commonly used environmental governance in the DEA 2014 https://www.environment.gov.za/sites/default/files/docs/eiams_environmentalimpact_managementstrategy.pdf 75.

179 Also see DEA 2011 htttps://www.environment/gov.za/sites/default/files/docs/eiams subtheme10.pdf 13-14. MOUs are generally used to document a relationship of goodwill between the parties to the MOU and are generally not legally binding. MOU can be legally binding if the parties declare it as such. If the parties to a MOU do not intend for it to be legally binding (i.e. neither party wants to be able to enforce the MOU in a court) then the parties should ensure that it stated to the effect that "The Parties do not intend this MOU to be legally binding"; and does not set out obligations for both parties using language such as "Party A shall do xyz" but instead uses language such as "Party A may do xyz". (Anon Date Unknown http://www.artslaw.com.au/art-law/entry/contracts-and-other-forms-of-agreement/4 April 2016). Also see Du Plessis and Alberts 2014 *SAPL* 441-468.

180 See DEA 2011 htttps://www.environment/gov.za/sites/default/files/docs/eiams subtheme10.pdf 35-36.

181 Nel and Wessels 2010 *PELJ* 53.

182 Quirico 2012 *RECIEL* 99. Flexible enforcement usually involves reduced formal compliance requirements when the firm can show achievements such as having certified environmental management systems. The reductions in formality may include guaranteed discretion for self-audits; a waiver of penalties if there is a willingness to self-correct in the event of non-compliance; waived enforcement actions where there is a commitment by the business to compliance; and the variation of the regulatory requirements in response to innovation (Harrison 1998 *JIE* 55). The self-interest that motivates private sector is seen as a positive force for sustainable development, in that flexible regulation promotes novelty and eco-efficiency (Acutt 2003 *SAJELP* 2).

sounded that extensive use of legislation can frustrate the flexibility of environmental agreements, thereby causing parties not to conclude environmental agreements.[183] The theoretical advantages of voluntary compliance measures are the opposite of the disadvantages of mandatory regulation,[184] as set out in Table 1.

Table 1: Command and control *v* Voluntary environmental compliance[185]

Command and Control	**Weaknesses**	**Strengths**
	Too information intensive	Compliance or non-compliance is readily detectable
	Universal rules do not work	Works well for single-medium issues, the control of point-source emissions, waste management, the protection of endangered species
	Absence of incentives to foster the introduction of new technologies	
	Often results in adversarial legal combat	
	May result in administrative complexities	
	Proliferation of laws	
	Insufficiently flexible to deal with dynamic situations	
	Often medium-specific	
	Difficult to deal with trans-media impact	
	Difficult to deal with regional and global challenges	
	Difficult to perform across all the cycle phases	
Voluntary Compliance	**Weakness**	**Strengths**
	General mistrust of performance potential	Improved flexibility
	Not clearly understood	Improved efficiency, fit for purpose
		Fosters innovation

Voluntary compliance measures are more suited for capacity building than is traditional environmental management.[186] In both developed and developing countries, authorities and industry turn to voluntary agreements to avoid the high costs of directive implementation and compliance.[187] Cost-effective policy achieves benefits at the cheapest possible cost.[188] Furthermore, voluntary regulation offers extra-legal

183 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 238.
184 Lehman 2009 "Voluntary Compliance Measures" 272.
185 Adapted from Nel and Wessels 2010 *PELJ* 53.
186 Blackman *et al* 2013 *PS* 336. Voluntary measures build the regulatory capacity needed for mandatory regulation (Blackman *et al* 2013 *PS* 365). Collaboration can help to secure apt resources, technical help, moral support and civic leadership for issues that pose a major threat (Muller 2007 *JPA* 22).
187 Blackman *et al* 2013 *PS* 365.
188 Tietenberg Environmental Natural Resource Economics 575.

incentives such as subsidies and positive publicity.[189] As regards cost effectiveness though, voluntary agreement do not always assure cost effectiveness.[190] Among other issues, stakeholder collaboration to establish voluntary environmental compliance can be time consuming and resource intensive, and therefore costly.[191] So voluntary environmental regulation methods' benefits differ with circumstances. The next section discussed the disadvantages of voluntary environmental compliance.

2.4.3 Disadvantages of voluntary environmental compliance

Table 1 lists that the drawbacks in so far as voluntary environmental regulation is concerned include general mistrust of performance potential and the fact that these methods are not clearly understood. However there is a paucity of evaluation of the effectiveness of these instruments and little attention seems to be given to them by policy makers.[192] The lack of certainty regarding the legislation itself makes it difficult for a proper comparison to be drawn between the traditional command and control regulation and the use of environmental agreements.[193] In addition, it is impracticable to attempt to determine the effectiveness of voluntary methods due to the vast dissimilarities among the different voluntary approaches and the lack of a rigorous evaluation programme.[194] Voluntary environmental methods therefore provide an ample room for research.

Even developed countries continue to experience challenges with voluntary initiatives, despite their long history of environmental activism, regulation, influential consumer

189 Blackman *et al* 2013 *PS* 336. Incentivisation is based on the philosophy that it is better to reward positive behaviour than sanction non-compliance (Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 58). Voluntary compliance must offer significant incentives. If this is not done, it becomes a form of command and control regulation, especially when penalties are imposed (Farina 2001 *CAJ* 16).

190 Harrison 1998 *JIE* 66.

191 Holley, Gunningham and Shearing *The New Environmental Governance* 67. Achieving collaboration is far from easy (Holley, Gunningham and Shearing *The New Environmental Governance* 66). Collaboration is highly contingent and contextual in that it can be successful in one situation but not others (Holley, Gunningham and Shearing *The New Environmental Governance* 67).

192 Harrison 1998 *JIE* 68. There is limited empirical research that can provide the answer to the question: under what conditions is cooperation possible? (Holley, Gunningham and Shearing *The New Environmental Governance* 38).

193 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239. Voluntary initiatives are unlikely to succeed when they do not include design features fundamental for success, namely quantified baselines and targets, transparency, monitoring and enforcement measures and penalties for non-compliance (Blackman *et al* 2008 *PSJ* 137).

194 Harrison 1998 *JIE* 68.

and environmental lobbies and better-resourced regulators.[195] *Inter alia*, voluntary environmental measures are blamed for regulatory capture, which is defined as the ability of industry to dictate the path of legislation or to predict and stall legislation.[196] Concerns include the fact that when regulators become too cosy and closely identified with the regulated entities, they overlook important violations, become too accepting and dispense lenient treatment.[197] On the other hand the absence of strong legislative and enforcement frameworks in developing countries raises concerns for the implementation of voluntary environmental initiatives in these countries.[198] Another concern is that in developing countries, voluntary regulation can be used to hinder effective traditional regulation by creating an environmental "Potemkin Village" – a false image that authories are making headway regarding environmental problems.[199]

Command and control regulation remains the backbone of regulation and should not be replaced by alternative environmental regulation.[200] It is key that voluntary approaches be used strictly as extra tools and not as a substitute for state regulation, since they are dependent on the existence of an enabling regulatory environment.[201] Notably, it is impossible to argue that only one specific instrument is suitable, as in most cases the need for a combination of instruments may be indicated.[202] However, a mix of instruments put together without adequate thought may lead to unwanted, counter-productive and dysfunctional results.[203] It can be argued that the choice of instruments that promotes positive interactions is crucial in co-operative

195 Lehman 2009 "Voluntary Compliance Measures" 282. See Wurzel, Zito and Jordan *Environmental Governance in Europe* 129 Voluntary agreements are more popular in some member states than in others although their uptake can change over time; only in two out of five jurisdictions was there a high uptake of voluntary uptake.

196 See Glossary of Terms in Fischer *Environmental Management Cooperation Agreements* xii. Self-interest rather than a desire to protect the environment drives voluntarism (Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 58).

197 Rechtschaffen 1998 *SCLR* 1222.

198 Fischer *Environmental Management Cooperation Agreements* 32.

199 Blackman *et al* 2008 *PS* 131.

200 Lehman 2009 "Voluntary Compliance Measures" 269.

201 Lehman 2009 "Voluntary Compliance Measures" 269. Used as a stand-alone, any alternative compliance tool will fall short of attaining environmental compliance and enforcement objectives (Nel and Wessels 2010 *PELJ* 58).

202 Faure "Instruments for Environmental Governance" 17. OECD, an international leader in both monitoring and developing regulatory agenda, supports the view that combinations may be more valuable than instruments working alone (Gunningham "Introduction" 18). A combination of instruments is crucial to the execution of sustainable development (Farina 2001 *CAJ* 16).

203 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 88.

environmental governance.[204] Chiefly an appreciation of strengths and weaknesses of all the types of tools is crucial in designing a successful portfolio that will deliver an improved capability for sustained and reliable environmental enforcement.[205]

2.5 Conclusion

This chapter has discussed command and control environmental regulation. Key focus was placed on segmented environmental administration, the public law relationship, good environmental governance. The chapter reflected on the challenges brought about by the fluctuating power relations in a segmented environmental administration. Given the challenges posed to traditional environmental regulation, an argument for alternative voluntary environmental compliance regulation *vis-à-vis* co-regulation specifically a EMCA was made. The discussion argued that cooperation is important for the effective compliance and enforcement of the section 24 constitutional environmental right. Existing co-operative governance mechanisms in South Africa were discussed. The discussion concluded that despite the positive role of voluntary environmental regulation, no one instrument is best suited for environmental regulation, and that the need for a combination of instruments may be indicated. The next chapter discusses EMCA as an alternative and voluntary tool of co-operative environmental governance.

204 There are three typologies of interactions, namely positive interactions, neutral interactions and negative interactions (Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 126). In positive interactions both instruments or institutions are effective, in neutral interactions instruments or institutions simply co-exist without impacting on one another, and in negative interactions one or more institutions or instruments is diminished or functions in a counter-productive manner.

205 See Nel and Wessels 2010 *PELJ* 54.

Chapter 3: Section 35 of the NEMA EMCA

3.1 Introduction

This chapter explores the role of a EMCA as a voluntary environmental co-operative governance tool to ensure optimum compliance with environmental legislation in a segmented environmental administration. The chapter discusses section 35 of the NEMA EMCA in section 3.2. Section 3.3 discusses a EMCA as a public (administrative) contract. Circumstances under which a EMCA can be used as a co-operative environmental governance tool that can ensure environmental compliance in a segmented environmental administration are discussed in section 3.4. Section 3.5 discusses the dearth of NEMA EMCAs. Section 3.6 discusses co-operative environmental agreements and also makes recommendations on how the NEMA EMCA can be strengthened for effective use as a co-operative environmental governance tool that can ensure environmental compliance.

3.2 Section 35 of the NEMA

Section 35 of the NEMA provides for the conclusion of a EMCA. Section 35 of the NEMA stipulates that:

(1) The Minister and every MEC and municipality, may enter into EMCAs with any person or community for the purpose of promoting compliance with the principles laid down in this Act.
(2) EMCAs must—
  (a) Only be entered into with the agreement of—
    (i) Every organ of state which has jurisdiction over any activity to which such EMCA relates;
    (ii) The Minister and the MEC concerned;
  (b) Only be entered into after compliance with such procedures for public participation as may be prescribed by the Minister: and
  (c) Comply with such regulations as may be prescribed under section 45.
(3) EMCAs may contain—
  (a) An undertaking by the person or community concerned to improve on the standards laid down by law for the protection of the environment which are applicable to the subject matter of the agreement;
  (b) A set of measurable targets for fulfilling the undertaking in (a) including dates for the achievement of such targets: and
  (c) Provision for—
    (i) Periodic monitoring and reporting of performance against targets:
    (ii) Independent verification of reports:

(iii) Regular independent monitoring and inspections:
(iv) Verifiable indicators of compliance with any targets, norms and standards laid down in the agreement as well as any obligations laid down by law;

(d) The measures to be taken in the event of non-compliance with commitments in the agreement, including where appropriate penalties for non-compliance and the provision of incentives to the person or community

The provisions of section 35 of the NEMA are lengthy, and for the purpose of this discourse are divided into three parts, namely (1) the purpose and parties to an EMCA,[206] (2) the procedural provisions,[207] and (3) the contents of the agreement.[208] The next section focuses on the purpose and the parties.

3.2.1 Purpose of and parties to a EMCA

The discussion on the purpose and parties to a EMCA will further be divided into (1) the parties to a EMCA, (2) the voluntary nature of a EMCA and (3) the purpose of a EMCA. First is the discussion on the purpose of a EMCA.

3.2.1.1 Purpose of a EMCA

The purpose of the NEMA EMCA is to "promote compliance with the principles laid down by this Act."[209] From the foregoing it can be said that the purpose of a EMCA is to support compliance with the principles set out in Chapter 2 section 2.4.1.1 of this study which deals with mechanisms for co-operative environmental compliance. These include the principles promoting intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment, the precautionary principle, the preventative principle, the cradle-to-grave principle, the life-cycle principle, the polluter pays principle, the carrying capacity principle and the participative governance principle, as already discussed in Chapter 2.

As regards compliance, it has already been submitted in Chapter 2 section 2.4 that unlike in the industrialised countries where voluntary environmental initiatives are normally aimed at encouraging companies to over-comply, the developing countries'

206 See s 35(1) of the NEMA.
207 See s 35(2) of the NEMA.
208 See s 35(3) of the NEMA.
209 See s 35(1) of the NEMA.

voluntary environmental initiatives aim to assist in alleviating widespread environmental non-compliance. A EMCA can be used to supplement the traditional environmental regulation,[210] or a EMCA can be used where the traditional environmental regulation fails,[211] or it can be used to enhance the efficacy of the environmental policy and to supplement existing regulatory instruments.[212] For instance, EMCAs can be used to set up environmental monitoring committees to monitor adherence to the EMP post EIA authorisation.[213] The Department of Environmental Affairs and Tourism (2005) EMCA Guideline Document (hereafter the EMCA Guideline)[214] confirms that EMCAs are intended to supplement and not to replace existing legal standards.[215] It can be concluded that the NEMA EMCA's primary aim is to support the achievement of minimum compliance and not so much to exceed the standard of legal compliance. The next section discusses the parties to a EMCA.

3.2.1.2 Parties to a EMCA

The Minister, the relevant MEC and the relevant municipality, as well as relevant persons (juristic as well as natural persons) or communities are important in the conclusion of the EMCA.[216]

3.2.1.2.1 State parties

In respect of the state parties, section 35(1) of the NEMA lists the Minister, the MEC and the municipality as important parties in the conclusion of a EMCA.[217] The Minister, MECs and municipal councils are constitutionally derived appointments. It is arguable that the municipality's role in an EMCA would be sanctioned by the municipal council under the stewardship of the Mayor. A Mayor is appointed in terms of section 49 of

210 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239.
211 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239.
212 Fischer *Environmental Management Cooperation Agreements* 1414.
213 Also see DEA 2011 htttps://www.environment/gov.za/sites/default/files/docs/eiams subtheme10.pdf 35.
214 The Department of Environmental Affairs and Tourism will be henceforth referred to as the DEAT.
215 DEAT (2005) EMCA Guideline para 1.
216 See s 35(1) of the NEMA.
217 The Minister and the MEC as per s 1 of the NEMA. MEC means the Member of the Executive Council to whom the Premier has assigned responsibility for environmental affairs; the Minister means the Minster of DEA in relation to all environmental matters.

the *Local Government Municipal Structures* Act.[218] A Mayor's function is *inter alia* to chair executive committee meetings.[219] A councillor means a member of a municipal council.[220] Councillors are elected to represent local people on municipal councils and are accountable to local communities as regards service delivery needs.[221] It can be submitted that environmental issues related to service delivery can be addressed through the use of a EMCA and a Mayor can be party to the EMCA on behalf of the municipal council by virtue of being a presiding officer of a municipal council. The discussion on the merits and demerits of the involvement of politicians in the conclusion of EMCAs takes place in the section on the procedural provisions of the section 35(2) of the NEMA.

3.2.1.2.2 A person

The state can conclude a EMCA with any person or community.[222] A person will include both *persona naturalia* (natural persons) or human beings and *juristic persona* (juristic persons).[223] The latter implies that the Minister, MEC and municipality may conclude a EMCA among themselves and between themselves and private or juristic persons other than themselves. Therefore, EMCAs can take various forms such as public-private, private-private and public-public,[224] and a EMCA can be either bilateral or multilateral.[225] It is arguable that non-governmental organisations (NGOs) and community-based organisations (CBOs) are also included in the definition of persons.

Section 35(1) of the NEMA seems to be silent on the topic of the conclusion of a EMCA between private parties. However, it can be argued that a private-private EMCA would be subsidiary to a public-private EMCA, as in the case of the Dutch model of a EMCA, where a body consisting of an assemblage of sector companies enters into a EMCA with government, followed by the second stage EMCA, where a private company enters into a EMCA with the affected communities, instead of an individual company

218 117 of 1998 (hereafter the Structures Act).
219 *As per* s 49(1) of the Structures Act
220 See s 1 of the Structures Act definitions.
221 Craythorne *Municipal Administration* 98.
222 The NEMA 35(1).
223 According to the s 1 definition of the NEMA "person" includes a juristic person.
224 Lehman 2009 "Voluntary Compliance Measures" 284.
225 Scholtz 2004 *SAJELP* 187.

entering into a EMCA directly with either government or communities.[226] A private-private EMCA is a subset of a public-private EMCA. It seems as if fragmentation of a EMCA into two stages is for simplification purposes. In South Africa the focus of EMCAs is more on public-private agreements.[227] The next section discusses the community as parties to a EMCA.

3.2.1.2.3 Community

The third group with which the state can conclude a EMCA is a community.[228] Although the definition of a community has been deleted by section 1(b) of the *National Environmental Management Laws Amendment Act*[229] it is arguable that the community could be any group of people with common or diverse interests and who regard themselves as a community for the purposes of those interests. Consequently it could be said that members of the community who need to address any environmental issue of concern could use a EMCA for that purpose. For example, local active residents associations and advisory groups that play effective roles in neighbourhood issues such as the Ratepayers and Residents Association could also use EMCAs to address issues related to the environment.[230]

3.2.1.3 Voluntary nature of the NEMA EMCA

It has been argued that the conclusion of section 35 of the NEMA EMCA refers to a discretionary act. Voluntarism is based on individual firms undertaking to do the right thing unilaterally, without coercion.[231] On the other hand, the words voluntary and non-mandatory are fundamental to the extent that they show that EMCAs will need a coercive element such as strong pressure to conclude them.[232] Therefore it can be

226 Farina 2001 *CAJ* 14.
227 Para 2.1 of the DEAT (2005) EMCA Guideline. Also see Fischer *Environmental Management Cooperation Agreements* 70 on the crucial role that industry has played in SA in the introduction of EMCAs during the Consultative National Environmental Policy Process (CONNEPP).
228 According to s 1 of the NEMA "community" means any group of persons or a part of such a group who share common interests, and who regard themselves as a community.
229 25 of 2014 (see GN R 448 in GG 37713 of 2 June 2014),
230 Van Wyk *Planning Law* 233, examples of these associations are the Camps Bay Ratepayers and Residents Association, the Walmer Estate Residents Community Forum, the Hangklip Environmental Action Group and the Waenhuiskrans Arniston Ratepayers Association.
231 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 56.
232 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 56.

said that the voluntary use of a EMCA can be proactive or reactive, which leads to the subject of interaction, cooperation and hence co-operative environmental governance.

3.2.1.4 Co-operative governance

As regards co-operative governance, a *prima facie* deduction can be made that section 35(1) of the NEMA requires the simultaneous participation of relevant parties from the three spheres of government. It is arguable that if section 35(1) of the NEMA provides that all three spheres of government must be party to a EMCA, this would be problematic and frustrate the conclusion of EMCAs. Scholtz[233] submits that the "may" in section 35(1) should be understood to mean "that it is not peremptory for these parties to be part of an agreement," and he argues further that this should be understood to mean that not all relevant parties in the three spheres of government must be party to an EMCA. In support, Bosman, Kotzé and Du Plessis[234] contend that the authority to enter into an EMCA should be delegated to the government actors who have the executive authority over the matters agreed to. Therefore the "may" in the section 35 of the NEMA should be understood to mean that the relevant state parties have the freedom to conclude or not to conclude a EMCA.

3.2.1.5 Recommendations

The study makes recommendations in connection with (1) the language of the section 35 of the NEMA and (2) the identification of the state parties to the EMCA. The study has highlighted that the provisions of section 35(1) of the NEMA are open to criticism as regards the language as well as the lack of clarity on the state parties who must be party to an EMCA. Therefore several amendments to the NEMA EMCA are proposed. Firstly the usage of the word "every". It is contended that the word "every "creates ambiguity, as it may be interpreted to mean that all MECs should be party to a EMCA, and this would lead to an incongruous requirement whereby every MEC has to be party to an EMCA even in situations where the conclusion of the EMCA does not

233 Scholtz 2004 *SAJELP* 185-186.
234 Bosman, Kotzé and Du Plessis 2004 *SAPL* 421.

concern them.[235] Similarly it can further be submitted that since "every" prefixes both the MEC and municipality, this could further misinterpretation that every municipality has to be a party to every EMCA, which is plainly absurd.

Scholtz[236] recommends that section 35(1) of the NEMA should be revised so as to ensure that legal uncertainty pertaining to the state parties' involvement in a EMCA does not frustrate the conclusion of EMCAs.[237] Section 35(1) of the NEMA should rather read "any organ of state may enter into a EMCA" instead of making reference to all three spheres of government.[238] Alternatively, this study recommends that the section could be amended to read "relevant organs of the state may enter into a EMCA." Moreover, it is important to note that section 35(1) of the NEMA must be read in conjunction with section 35(2) of the NEMA since section 35(2) further elaborates on state parties to a EMCA.

3.2.2 Procedural provisions of a EMCA

Section 35(2) of the NEMA relates to the mandatory procedures required to conclude EMCAs. The word "must" demonstrates that the provisions of section 35(2) of the NEMA are mandatory. The procedures refer to specific state parties, public participation requirements and section 45 of the NEMA regulations (only if these regulations are promulgated). The first section of the discussion focuses on the public authorities and goes further to accentuate the importance of the link between the environmental activity and the public authority.

3.2.2.1 Public authorities

According to section 35(2)(a)(i) of the NEMA a EMCA must be concluded with the agreement of the relevant organ of state that has jurisdiction over any activity that such a EMCA relates to. Organs of state may include both the executive as well as the

235 Scholtz 2004 *SAJELP* 185.
236 Scholtz 2004 *SAJELP* 186.
237 Scholtz 2004 *SAJELP* 193.
238 Scholtz 2004 *SAJELP* 193.

administrative arms in all three spheres of government.[239] Furthermore section 35(2)(a)(ii) of the NEMA further mandates that the consent of the executive (the Minister and the MEC) must be sought before a EMCA can be concluded. It could be argued that the relevant municipality(ies), although not mentioned is (or are) by default implicated spatially, since the jurisdiction of an activity or activities occur(s) in a certain geographical jurisdiction of a municipality.

3.2.2.1.1 The link between the environmental activity and authorities

Section 35(2)(a)(i) of the NEMA provides that an environmental activity and corresponding jurisdiction play a crucial role in identifying authorities whose consent must be sought before a EMCA is concluded. The questions that arise are what defines the scope of the activity and what are the parameters that define "with the agreement of"? According to Scholtz "with the agreement of" tacitly implies that the relevant authorities with jurisdiction should be party to the agreement.[240] Alternatively the Chemical and Allied Industries Association (CAIA) submits that according to section 35(2)(a) these entities do not have to be parties to the EMCA but must just give approval to its establishment.[241] Therefore "with the agreement of" is also subject to misinterpretation as to whether the relevant authorities must just give consent or be party to a EMCA.

To demonstrate the nexus between an activity and relevant authority(ies), if a EMCA were to be concluded for the removal of alien invasive plants along a watercourse, the consent of among others the DWS and the DEA would be sought in the conclusion of such a EMCA. However, the removal of the alien invasive plants might trigger other incidental impacts governed by authorities other than the DWS and DEA such as dust or other municipal zoning-related activities. It follows that the authorities governing all incidental activities will also need to be consulted. It can be submitted that a

239 Organs of state means (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

240 Scholtz 2004 *SAJELP* 192.

241 Fischer *Environmental Management Cooperation Agreements* 78.

thorough project plan comprising of all environmental activities and relevant authorities albeit time-consuming, is key in the success of an EMCA.[242] This can avert conflict in the implementation of the EMCA by ensuring that due regard is given to the legal mandates of both the main and incidental activities.

Scholtz[243] rejects the requirement of consent since it accords an organ of state the power to veto the EMCA and submits that this may affect a EMCA negatively and lead to its non-conclusion. Furthermore Scholtz[244] recommends that section 35(2)(a)(ii) of the NEMA should be scrapped to ensure that politicians do not have the power to veto the introduction of EMCAs.[245] However, the foregoing submissions can be countered. An authority need not be party to or able to veto the conclusion of a EMCA for them to frustrate its conclusion. For instance, the executive can still indirectly frustrate a EMCA by virtue of the support it commands as politicians elected by constituencies within communities. The executive may abuse its political influence in a number of ways, such as by influencing communities not to attend public participation meetings, or to form protests against the conclusion of the EMCA. Sections 35(2)(a)(i) and 35(2)(a)(ii) requirements should therefore not be scrapped, instead organs of state must be held to account so that their conduct must be consistent with principles of good governance. Chiefly political will is important in co-operative governance.[246] It therefore becomes evident that EMCAs are complex and must thus be used only in certain situations where the involvement of relevant parties will be a natural act.

3.2.2.2 Public participation

Section 35(2)(b) mandates that public participation according to such procedure as may be prescribed by the Minister must precede the conclusion of the EMCA. The provisions do not prescribe the nature of the public participation process (PPP). The EMCA Guideline however, provides for stakeholder participation in the EMCA process.[247] According to the EMCA Guideline key considerations for the EMCA public

242 It is arguable that strong project management skills are key in the conclusion of an EMCA.
243 Scholtz 2004 *SAJELP* 192.
244 Scholtz 2004 *SAJELP* 192.
245 Scholtz 2004 *SAJELP* 194.
246 See Du Plessis "Understanding Legal Context" 33-34.
247 DEAT (2005) EMCA Guideline para 5.

participation include (1) core considerations guiding the PPP, (2) defining clearly the roles of parties, and (3) public participation during each phase of the EMCA.[248] The guideline does not elaborate on the methods of public participation.

Various methods of public participation are provided for extensively by the legal framework of South Africa. For example the PAJA provides for public participation methods such as a public enquiry method and a notice and comment method.[249] The PAJA further provides latitude for special circumstances in which methods other than those contemplated in sections 4(1)-(3) can be utilised.[250] Similarly the NEMA prescribes public participation.[251] Chapter 6 of the 2014 EIA regulations also provide for public participation.[252] The NEMA public participation methods include the utilisation of notice boards, written notices, newspaper advertisements, publication in the official *Gazette* or any other relevant and alternative method as agreed by the parties.[253] Public participation for a EMCA can follow the NEMA EIA procedures and or the EMCA Guideline or PAJA. It arguable that it is important to understand the EMCA development stages in order for public participation to be carried out correctly.

3.2.2.2.1 EMCA development steps

The five key steps in a EMCA process are the initiation step, the negotiation step, the publication and dissemination of the EMCA, the implementation of the EMCA, and the continual monitoring and review of the EMCA.[254] The initiation step seeks *inter alia* to preliminarily establish if a EMCA is an appropriate instrument; while the negotiation step entails the reaching of an agreement regarding the process and contents of a

248 DEAT (2005) EMCA Guideline paras 5.1-5.3.
249 See ss 4(2) and 4(3) of the PAJA respectively.
250 The PAJA s 4(4).
251 Ch 2 of the NEMA principles and in particular: s 2(4)(f) of the NEMA provides for the participation of all interested and affected parties in environmental governance; and s 2(4)(q) of the NEMA provides for the recognition of the vital role of women and youth in environmental management and development and the promotion of their full participation. Furthermore among the objectives of IEM is to ensure an apt and appropriate opportunity for public participation in decisions that may affect the environment s 23(d). In particular s 24J of the NEMA which provides for the public participation process. The NEMA supports the constitutional basis of the participation of civil society in the governing of environmental affairs (Scholtz 2004 *SAJELP* 184).
252 See GN R 982 in GG 38282 of December 2014 ss 29-44, which replaces Reg 54 of GN R 543 in GG 33306 of 18 June 2010 and GN No R 807 in GG 35769 of 10 October 2012.
253 See GN R 982 in GG 38282 of December 2014 s 49.
254 DEAT (2005) EMCA Guideline para 3.1.

EMCA.[255] It will be demonstrated later that the initiation step is crucial in that it determines whether or not a EMCA must be used. The NEMA does not compel government to publish a EMCA.[256] It is arguable that the EMCA trajectory traverses all the Deming Management Cycle project stages, which consists of the Plan-Do-Check-Adjust (PDCA) stages.[257] The "Plan" stage correlates with the negotiations up to the signing stage; the "Do" stage correlates with the implementation stage; the "Check" stage is comparable with monitoring and evaluation; and the "Adjust" stage correlates with the amendment of the EMCA.

3.2.2.2.2 Public participation challenges

An administrative agreement is a participatory democracy tool.[258] The buy-in from interested and affected parties (I&APs) is without a doubt important for the successful performance a EMCA.[259] It is key that the external stakeholders are involved in decision-making and that their initial views be taken into account in the introduction of a possible EMCA.[260] However, there is a prevailing view that public participation, although a necessary democratic requirement, does not necessarily mean that all will participate.[261] It has been submitted that EMCAs do not give assurance to third-party rights in that the third parties are involved only during the publication of the decision to conclude the agreement, the publication of the concept agreement, and the publication of the information on the implementation of the agreement.[262] Third parties can be said to be parties which are not party to a EMCA but are affected by

255 DEAT (2005) EMCA Guideline para 3.1.

256 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239. This can be enforced through the PAIA; or s 26 of the NEMA can be used to report on EMCA in parliament (Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239).

257 See Nel and Wessels 2010 *PELJ* 55-56 on the PDCA discussion.

258 Burns *Administrative Law* 210. The democratic dispensation of the Republic has provided for community participation in the decisions of government through public participation (Hoexter *Administrative Law in South Africa* 20).

259 Lehman 2009 "Voluntary Compliance Measures" 282.

260 DEAT (2005) EMCA Guideline para 5.3.1.

261 Harrison 1998 *JIE* 66. In support of the assertion that public participation does not guarantee that all will participate, the effectiveness of the participation of communities in popular service delivery processes such as the drafting of IDPs has been questioned (Netswera and Kgalane 2014 *JPA* 263).

262 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 237.

the EMCA. As a result, some NGOs view EMCAs as undemocratic since it may limit the involvement of third parties in the formation of EMCAs.[263]

However, omitting public participation from certain stages of an EMCA could create a problem. For instance, in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*[264] the Supreme Court of Appeal articulated the importance of consulting relevant communities during the preliminary stages of decision-making in order to give the NGO an opportunity to raise its concerns or objections early enough.[265] Furthermore Nhamo[266] demonstrates the negative consequences of the late involvement in a project of relevant stakeholders, emanating from a top-down public participation approach. The implementation of the Plastic Bag Agreement (PBA) was marked by tensions and discrepancies which resulted in some major clothing retailers refusing to charge for the new plastic bags, saying that they had not been party to the agreement.[267] Consequently the *quasi*-stakeholder approach emerged later. This consisted of a combination of a top-down and the bottom-up approach, and it appeared to be welcomed by stakeholders.[268]

The EMCA Guideline also makes allowance for the involvement of stakeholders at each stage of a EMCA development, as opposed to only during the latter stages of EMCA development. It could therefore be argued that the participation of I&APs in the early stages may assist in quelling later challenges to the implementation of a EMCA. It is also arguable that a EMCA as a democratic, participatory tool should be flexible

263 Fischer *Environmental Management Cooperation Agreements* 31.

264 1999 2 SA 709 (SCA) – hereafter *Save the Vaal* case.

265 The SCA reasoned that the s 9(3) application stage of the *Minerals Act* 50 of 1991 (Minerals Act), although preliminary, qualified for subjection to the *audi alteram partem* maxim (*Save the Vaal* case para 15). The Environmental Authority argued that the act of issuing a licence in itself did not pose any threat on the physical environment and that there was no right that was violated. Contrarily, the SCA stressed that preliminary decisions have far-reaching effects within and post project implementation (*Save the Vaal* case para 19). The application of the *audi alteram partem* rule is important by virtue of the colossal damage mining can do to the environment and ecological systems (*Save the Vaal* case para 20). The SCA countered that ss 9 and 39 of the Minerals Act referred to two separate processes; as such giving the community a hearing at the later Minerals Act s 39 stage and not during the s 9 stage would deny the NGO the chance to raise its objections early enough.

266 Nhamo 2003 *SAJEE* 48. The grievance with the PBA emanated from the Minister-driven top-down public participation approach, which led to the failure to consider some of the key actors affected by the agreement, including consumers.

267 Nhamo 2003 *SAJEE* 48.

268 Nhamo 2003 *SAJEE* 48.

enough to be able to adopt a *quasi*-stakeholder approach in order *inter alia* to allow for flexibility regarding the involvement of I&APs, especially in situations where their early participation might assist in circumventing possible EMCA implementation challenges. On the other hand, it is arguable that the purpose of a EMCA and the parties to a EMCA should be allowed to determine the extent of public participation. For instance, if a EMCA is concluded between two organs of state to manage issue(s) related to operations, it cannot be expected that public participation will be as extensive as when a decision will affect third parties directly and significantly. The next discussion refers to the section 45 of the NEMA regulations.

3.2.2.2.3 Section 45 regulations

Section 35(2)(c) of the NEMA provides that a EMCA must adhere to such regulations that may be prescribed under section 45 of the NEMA.[269] Section 45 of the NEMA allows the Minister the discretion to promulgate EMCA regulations.[270] It is argued that EMCA Guideline can be used in the absence of the section 45 of the NEMA regulations.

3.2.3 Contents of the NEMA EMCA

The contents of the NEMA EMCA are discretionary.[271] A EMCA may contain four key aspects, namely (1) an undertaking by parties to improve on the environmental standards in environmental legislation as dictated by the environmental issue(s) identified by the parties; (2) measurable targets to fulfil the undertaking; (3) provision for periodic monitoring and reporting of performance against targets, external verification of reports, external monitoring and inspections, and demonstrable target-linked indicators of compliance; and (4) non-compliance measures, penalties and

269 S 45 of the NEMA stipulates the following: (1) The Minister may make regulations concerning—(a) Procedures for the conclusion of EMCAs, which must include procedures for public participation: (b) The duration of agreements: (c) Requirements relating to the furnishing of information: (d) General conditions and prohibitions: (e) Reporting procedures: (f) Monitoring and inspection. (2) A MEC or municipal council may substitute his or her or its own regulations or bylaws as the case may be, for the regulations issued by the Minister under subsection (1) above: Provided that such provincial regulations or municipal bylaws must cover the matters enumerated in subsection (1), and comply with the principles laid down in this Act.

270 See s 35(2)(c) of the NEMA.

271 See the use of "may" s 35(3).

incentives.[272] Section 35 of the NEMA does not contain provisions for dispute resolution. This can be viewed as a short-coming. However, paragraph 3.6.4 of the EMCA Guideline stipulates a dispute resolution method and how it should be applied. Accordingly, the EMCA dispute resolution method should be implemented on a case-by-case basis and specified within the EMCA and be in line with Chapter 4 of the NEMA.[273] The EMCA Guideline provides that a EMCA must take into consideration measures for alternative dispute resolution procedures in order to address complaints and concerns, and allow suggestions, in a consistent, transparent and objective way.[274] The NEMA is flexible regarding the contents of the EMCA.

All in all, a EMCA must be driven by the inclination to improve environmental performance, needs to be advocated by government, its objectives must be negotiated on a scientific basis, correct emission levels must be determined, negotiated mandates must be agreed in an integrated manner, and other legal requirements must be considered.[275] It is arguable that the objectives of a EMCA must be "smart"[276] and could include policy issues as well as operational issues. In the absence of good faith on the part of all involved, the potential of a EMCA to address environmental problems will remain unrealised.[277] In addition, the contents of the EMCA need to be scrutinised to determine their legal enforceability.[278] It is arguable that legal enforceability is connected to the validity of a EMCA as a contract, hence the next section discourses a EMCA as a public contract.

3.3 EMCA as a public (administrative) contract

The discussion first focuses on the general purposes of public contracts.

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272 See para 4.1 of the DEAT (2005) EMCA Guideline, the generic framework for EMCA contents. It is vital that preliminary discussions regarding the development of the EMCA must include the senior representatives from the environmental affairs department; see DEAT (2005) EMCA Guidelines s 5.3.1. The same is true of industry (Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 237).

273 See para 3.6.4 of the DEAT (2005) EMCA Guideline.

274 See para 3.6.4 of the DEAT (2005) EMCA Guideline.

275 Fischer *Environmental Management Cooperation Agreements* 96-97. The full emission reduction potential must be known for credible target setting (Fischer *Environmental Management Cooperation Agreements* 31). There must be strict monitoring of an EMCA (Fischer *Environmental Management Cooperation Agreements* 96-97).

276 "Smart" meaning specific, measurable, achievable, realistic and time-bound.

277 Lehman 2009 "Voluntary Compliance Measures" 289.

278 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 237.

3.3.1 Purposes of public contracts

The purposes of public contracts range from the procurement of goods and services for the state to the procurement of public service on behalf of the state as well as governmental policy and regulatory mandates.[279] A public contract is a contract in which one of the parties is an organ of state or a state functionary.[280] As a welfare and benefactor state South Africa sometimes resorts to the use of public contracts to promote the development and social upliftment of its citizens.[281] To increase its limited capacity to render services effectively and efficiently, government often enters into service level agreements in the form of public-private partnership contracts with the aim among others of increasing its limited capacity to render services effectively and efficiently.[282] Procurement is a contract type that relates to the provision of goods and services.[283] Thus, the modern demands placed on government have been met with the restructuring of the state's administration to include market-related approaches through methods such as privatisation, contracting out of government services, or outsourcing government services.[284] The escalating deterioration of the environment has led governments to use procurement as an environmental protection tool commonly referred to as green procurement; green purchasing; environmentally friendly purchasing; eco-procurement; sustainable procurement; or environmentally responsible procurement.[285] Public contracts are common tools in South African public administration.

It has already been alluded to under mechanisms for co-operative governance that governmental policy and regulatory mandates require agreements and protocols to be concluded between public authorities where a need arises. Administrative agreement types between public authorities include delegation agreements,

279 Hoexter 2004 *SALJ* 595.
280 Ferreira 2011 *SALJ* 172.
281 Burns *Administrative Law* 208. The foregoing is linked to the concept of the state-society contract discussed in CH 2.
282 Johnson 2005 *LGB* 13-14.
283 Burns *Administrative Law* 213.
284 Burns 1998 *SAPL* 234.
285 Bolton 2008 *NRF* 1. Contractual agreements can be voluntarily entered into to improve environmental performance and environmental enforcement and compliance (Du Plessis "Understanding Legal Context" 38).

geographical area based agreements and co-operative agreements.[286] EMCAs can also be used to entrench cooperation between organs of state.[287] Therefore a EMCA is a co-operative type of administrative agreement.

3.3.2 Contractual nature of public contracts

If a EMCA is to be regarded as an administrative contract it has to be compared to a purely private law contract.[288] This discussion does not focus on purely private law contracts, but it notes that there is an interplay between private and public law rules in administrative contracts,[289] a term coined by Burns to distinguish contracts concluded by organs of state from "purely private contracts." When the public and private bodies of law interact, a distinctive system of rules governing public contracts emerges; a degree of differentiation results from the altering or adapting of private law rules in their application to public contracts.[290] The juncture of public and private law is convoluted, since the contractual agreements that government enters into occasionally require the application of administrative law principles and occasionally they do not.[291] In order to understand the application of administrative law principles, cognisance must be given to the stages involved in the stages involved in public contracts. Administrative law principles are discussed in the next section.

In the *Oudtshoorn Municipality v CShell 271 (Pty) Ltd and Others*[292] case the court held that the awarding of a tender by a public body takes place in two stages: first there is the actual decision to award the tender, and second there is the conclusion

286 Burns *Administrative Law* 217.
287 Scholtz 2004 *SAJELP* 194.
288 Farina 2001 *CAJ* 15.
289 The contractual autonomy of the classical contract law model is largely based on individualism (Bhana *Constitutionalising Contract Law* 63). Individualism rigorously promotes self-interest (See Barnard *A Critical Legal Argument for Contractual Justice* 10.) Contract law consists of a collection of dualities, namely form and substance, individualism and altruism, rules and standards, public and private, and objective and subjective (Barnard *A Critical Legal Argument for Contractual Justice* 10). According to Cockrell the substance axis speaks to political morality, whereas the expression of legal doctrines characterises the form axis. Both axes are polarised in that the latter is strong on legal rules and legal certainty whereas the former is more politically driven. Substance is further categorised into individualism and collectivism; individualism views a contract from an individual perspective whereas collectivism is viewed from a communitarian (cooperation, solidarity, reciprocity) perspective (Cockrell 1992 *SALJ* 41-42).
290 Ferreira 2011 *SALJ* 173.
291 Hoexter *Administrative Law in South Africa* 56.
292 2012 3 All SA 527 WCC (hereafter the Oudtshoorn case).

of the contract. It is arguable that the termination of a contract is also an important stage of the public contract. Similarly stages of a EMCA include the decision to conclude a EMCA, the conclusion of a EMCA, the implementation and the termination of a EMCA, similar to the EMCA development steps discussed under public participation in section 3.2.2.2.1. However, there are contradictory positions that have been decided by the courts on the operation of both public and private law in the stages of public contracts.

The *Cape Metropolitan Council v Metro Inspection Services*[293] supports the purely private law approach, which limits the operation of administrative law to only the conclusion of the contract by a public authority. It was submitted that the relationship between the council and its levy payers was governed by statute, while the relationship between the council and the contractor was regulated by the agreement between them.[294] The court ruled that the cancellation of the contract is not administrative action.[295] Therefore, when cancelling the contract, the rules that apply are the private law rules that govern the relationship between the municipality and the contractor.

The *Logbro Properties CC v Bedderson NO,*[296]on the other hand, favours the public law approach. The court submitted that even under contract law the province was still entitled to provide reasons since the implementation of the contract was done in the public interest,[297] meaning that the administrative justice principles "framed the parties' contractual relationship".[298] This demonstrates that the rules of administrative law may occasionally impede the conventional operation of private law to such an extent that contracts that would usually be binding on private individuals cannot be said to be binding on the government.[299] The next section focuses on the application of administration law principles.

293 2001 (3) SA 1013 (SCA), hereafter the Cape Metro Council case.
294 Cape Metro Council Case para 21.
295 Cape Metro Council Case para 22. Also see the *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) case, which confirms that the cancellation of a public contract is not an administrative act.
296 2003 (2) SA 460 SCA (hereafter the Logbro case).
297 Logbro case para 7.
298 Logbro case para 8.
299 Ferreira 2011 *SALJ* 174.

3.3.2.1 Application of administrative law principles

The principles that govern administrative contracts include statutory authorisation; a public authority may not fetter its future discretionary power; the administrative act must pursue a lawful purpose; and procedural fairness and reasonableness.[300] The statutory requirements dictate that the state may not act *ultra vires*.[301] This means that an administrator may not act beyond its legal power, a requirement that is advocated by the constitutional principle of legality or the rule of law. Therefore environmental administrators may not act outside their legal mandates when concluding and implementing a EMCA.

With regard to the principle prohibiting the fettering of discretion by contract, the public administrator's contractual freedom is restrained by administrative law,[302] meaning that the authority cannot adopt a rigid policy on how it will exercise its discretion in future.[303] This means that the public authority cannot exercise discretionary powers by committing itself in advance, whether overtly or discreetly, especially if this may stop government from acting in the public interest in future.[304] However, inasmuch as many contracts entered into by organs of state do fetter administrative action in some way, this does not mean that public bodies cannot bind themselves contractually or use statutory powers to escape from inconvenient contractual obligations.[305] This means that if the exercise of discretion to conclude a EMCA has a reasonable effect, if the procedure for the decision is fair and the reasons for the discretion are given, the fettering of the discretion by a EMCA can be possible.

It could be submitted that the interchange in the application between private law and public law may complicate a EMCA. Especially that it would seem that co-operative contracts are distasteful to the organs of state. For instance, it has been suggested that it is difficult to control relations between provincial departments through contracts

300 Burns 1998 *SAPL* 252.
301 Floyd 2005 *SAPL* 386.
302 Ferreira 2011 *SALJ* 176.
303 Burns 1998 *SAPL* 248.
304 Bolton 2004 *SAPL* 91.
305 Bolton 2004 *SAPL* 102.

or binding agreements.[306] Spherically related departments which are commonly anticipated to cooperate when discharging their mandates do not in fact cooperate.[307] The use of EMCAs may therefore also meet with resistance. Hence it could be submitted it is important that it should be left up to contracting parties to decide whether the EMCA is enforceable or not, which brings up the topic of the regulatory flexibility of EMCAs.

3.3.3 Regulatory flexibility

It is arguable that the NEMA EMCA must seek to strike the middle ground regarding regulation if it needs to be successful as a co-operative governance tool that promotes environmental compliance. The middle ground will have been occupied if the enforcement strategy is robust enough to deter cheaters and punishes cheating to the extent of withdrawing the privileges extended to those who cooperate.[308] This is sometimes referred to as the tit-for-tat strategy.[309] It has been submitted that only public authorities need to be regulated when concluding EMCAs.[310]It is arguable that the tit-for-tat strategy rewards compliance and punishes non-compliance, while guarding against the regulatory capture discussed in Chapter 2 as one of the possible disadvantages inherent in voluntary compliance measures.

It is can be further argued that a thorough understanding of theories of compliance *vis-à-vis* the rationalist and normative compliance theories is important in the application of the tit-for-tat strategy.[311] According to Rechtschaffen the rationalist theory of compliance is deterrence based, and characterises the regulated community as responsible actors who know the exact result of non-compliance and comply to advance self-interest. Contrarily, normative theory posits that the regulated community has to be assisted to comply rather than punished. The foregoing is more focused on the underlying conditions behind transgressions and not so much on the transgressor and could thus be argued that the normative theory promotes the spirit

306 Woolman 2009 *LLD* 67.
307 Woolman 2009 *LLD* 67
308 Scholz 1984 *LP* 398.
309 See Rechtschaffen 1998 *SCLR* 1188.
310 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 238.
311 Rechtschaffen 1998 *SCLR* 1188.

of co-operation and team-work for compliance purposes. It can be submitted that on a compliance continuum, the optimum conditions for effective cooperation and thus the use of a EMCA could be found in the area where two methods of compliance cross. All things considered, the preceding discussion provides evidence that EMCA cannot be used at will. Conditions must be right for its application and its success, hence the question when and how a EMCA should be used?

3.4 When and how EMCA can be used as an environmental co-operative governance tool in a segmented environmental administration

Theory predicts the effectiveness of EMCAs.[312] The effectiveness of a EMCA could be qualitative, which speaks to its advantages, or quantitative, which speaks to its achievement of targets.[313] Since there have been situations where environmental agreements were moderately successful and some where they have failed miserably,[314] it could be submitted that the characterisation of the advantages and disadvantages of a EMCA is crucial in order to make it possible to determine whether or not to use a EMCA. Table 2 lists the benefits and limitations of a EMCA.

Table 2: Benefits and limitations of a EMCA[315]

Benefits of EMCA	**Limitations of EMCA**
• Can be used proactively • Can be used to included various stakeholders • Can foster cooperation • Can resolve conflict • Can enhance regulatory certainty • Can achieve environmental compliance • Can improve environmental compliance • Can promote the innovation of cleaner technology • Can unearth important information for decision-making	• Cannot act independently by replacing minimum standards • Does not replace existing government duties and obligations • Is not the sole source of information • Is not the device to diminish third-party rights • Does not delay necessary legislation • Is not a permanent carte blanch – (review and revision crucial) • Does not define regulatory emission standards unless specified by relevant departments

312 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239.
313 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 239.
314 Jordan *et al* "Policy Innovation or 'Muddling Through?'" 192.
315 Adopted from DEAT (2005) EMCA Guideline paras 2.2 and 2.3.

3.4.1 Benefits and limitations of a EMCA

3.4.1.1 Achievement and improvement of environmental compliance

Among common and serious shortcomings of command and control environmental regulation is the management of EIAs. Specifically, the NEMA EMCA has been recommended in the management of EIA post-authorisation compliance as a reinforcement of the EMP tool that is used in post-authorisation compliance monitoring since there is no formal mandatory structure that has broad stakeholder representation that can advise government on a lack of compliance.[316] Furthermore, EMCA benefits have been reported especially in the selling of the reduction targets for GHG emissions and waste generation.[317] EMCA can be used to support the efforts of command and control instruments and arguably other alternative environmental compliance tools.

The disadvantages of EMCAs include the possibility of the intentional setting of low targets and the absence of sufficiently strong incentives or sanctions.[318] The true potential of an EMCA can be sabotaged.[319] A EMCA should not be used as a means to replace legal minimum standards nor as a mechanism for setting emission standards, unless so specified by the parties.[320] A EMCA must not replace existing government duties and obligations or be used to weaken third-party rights,[321] nor should EMCAs be used to delay any essential legislation.[322]

3.4.1.2 Fostering of cooperation

Since co-operative governance is regarded as an essential requirement for the development of an effective environmental compliance and enforcement system in South Africa,[323] EMCAs advocate greater collaboration between the public sector and

316 See DEA 2011 htttps://www.environment/gov.za/sites/default/files/docs/eiams subtheme10.pdf 36.
317 Fischer *Environmental Management Cooperation Agreements* 30.
318 Lehman 2009 "Voluntary Compliance Measures" 287.
319 Lehman 2009 "Voluntary Compliance Measures" 287.
320 DEAT (2005) EMCA Guideline para 2.3.
321 DEAT (2005) EMCA Guideline para 2.3.
322 DEAT (2005) EMCA Guideline para 2.3.
323 Du Plessis "Understanding Legal Context" 33.

industry.[324] A EMCA can be a tool that stimulates and defines co-operative governance, largely where the roles of the different spheres of government interrelate to such an extent that the exercise of the determination of roles and responsibilities is complex.[325] The reaction to disputes and environmental crises in the use of EMCAs is discussed later. Furthermore, EMCAs are beneficial when seeking to promote a co-ordinated regulatory approach, especially between relevant organs of state.[326] They can provide a forum for dialogue and public participation.[327] However, it has already been noted that the successful conclusion of EMCAs should not be understood to mean the simultaneous involvement of state parties in the three spheres of government, since this may stymie the conclusion of an EMCA.

3.4.1.3 Cost optimisation

EMCAs can be used when seeking to achieve policy-based environmental standards and objectives with lesser administrative enforcement costs and with greater flexibility than can traditional policy instruments.[328] It could be argued that EMCAs can complement traditional regulation by addressing the characteristic ills of traditional regulation such as the high costs related to command and control environmental regulation, for instance by the sharing of resources instead of the segmented use of resources. EMCAs can be used when those involved want to use resources jointly.

The downside is that the costs of engaging in a EMCA are irrecoverable costs in the event that the effort and time are spent and eventually unsuccessful.[329] It has also been submitted that EMCAs are not cost effective and offer no more advantages than other economic instruments.[330] That said, the lessons learnt from engaging in a EMCA, though unsuccessful, should not be lost, so that EMCAs can continuously be improved. Secondly the argument of cost effectiveness is one-sided since it seems to focus only

324 Lehman 2009 "Voluntary Compliance Measures" 282.
325 Bosman, Kotzé and Du Plessis 2004 *SAPL* 421.
326 Para 2.2 of the DEAT (2005) EMCA Guideline.
327 Para 2.2 of the DEAT (2005) EMCA Guideline.
328 Para 2.2 of the DEAT (2005) EMCA Guideline.
329 Lehman 2009 "Voluntary Compliance Measures" 287.
330 Fischer *Environmental Management Cooperation Agreements* 31.

on the socio-economic cost and ignores the cost to natural resources.[331] Those who assess the effectiveness of EMCAs must not focus only on the tangible monetary and social benefits but also on the welfare of the natural environment. After all, there is a Cree Indian adage that says:

> Only when the last tree has been cut down, the last fish been caught and the last stream poisoned will we realise we cannot eat money[332]

So the costliness of a EMCA may be justifiable in the long term if it aids to achieve sustainable development in accordance with section 24 of the Constitution.

3.4.1.4 Information

Ambitious EMCAs promote technology advancement and information sharing.[333] EMCAs can be used as tools that support the publishing of information on performance measurements and reports.[334] Data generated by tools such as ISO 14001 EMS, as utilised by companies when compiling sustainability reports, can be utilised in conjunction with data generated by EMCAs.[335] However, a EMCA should not be used as the sole source of information generation to inform standard setting.[336]

3.4.1.5 Proactive use and innovation

EMCAs may be used when seeking to adopt a proactive approach that engages a range of I&APs in identifying pioneering solutions to environmental and sustainable development concerns.[337] EMCA might legitimately be regarded as an innovative form of command and control regulation or co-regulation.[338] EMCAs may be utilised when

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331 See Tietenberg *Environmental Natural Resource Economics* 16-17; the economic approach can be either positive or normative. Positive economics concerns what is, what was, and what will be, whereas the normative economic approach involves value judgement by appealing to facts. Normative economic approach tends to be used to disadvantage the environment since the socio-economic factors are favoured over the environment.

332 See www.goodreads.com/qoutes/755798-only-when-the-last-tree-has-been-cut-down-the.

333 Fischer *Environmental Management Cooperation Agreements* 31.

334 Para 2.2 of the DEAT (2005) EMCA Guideline.

335 See *Nel Integrating ISO 14001:2004* 45.

336 DEAT (2005) EMCA Guideline para 2.3.

337 Para 2.2 of the DEAT (2005) EMCA Guideline.

338 Gunningham, Sinclair and Grabosky "Instruments for Environmental Protection" 56.

pursuing an augmentation of possible regulatory certainty, thereby promoting longer-term investment and innovation in the development of cleaner technologies.[339] It could also be argued that EMCAs can play an important role in climate change-related initiatives. It is arguable that an EMCA can be applied to any environmental situation where governance actors have willingly identified the need for an EMCA. A system must look at the underlying causes of non-compliance with environmental laws in order to promote holistic environmental governance.[340] It is arguable that the foregoing is linked to the question of what informs the choice to conclude a EMCA by environmental governance actors. It follows that an understanding of factors behind choices and determinants of different actors to conclude a EMCA must be had.

3.4.2 Choices and determinants of concluding EMCAs

Blackman *et al*[341] supports that entering into a voluntary agreement is informed by an element of choice which is in turn linked to net benefits. Figure 2 shows the choices and determinants of different actors and their linked benefits. The public authority or regulator chooses the policy with lowest costs (implementing costs, the associated social costs, and environmental costs).[342] On the other hand, industry's choice is informed by the cost of complying with both mandatory and regulatory policies, the social costs, and the likely effect on sales.[343] Lastly, civil society's choice is determined by how much pressure must be applied to both the state and industry in order to compel them to improve the quality of the environmental.[344] The different environmental actors have differerent choices and determinants. It is arguable that a EMCA is unlikely to succeed if the interests of parties are polarised and the possible benefits are too diverse.

339 Para 2.2 of the DEAT (2005) EMCA Guideline.
340 Rechtschaffen 1998 *SCLR* 1218. It is important to highlight that the understanding of theories of compliance as discussed beforehand under regulation flexibility in section 3.3.3 is also important in this regard.
341 Blackman *et al* 2013 *PS* 342.
342 Blackman *et al* 2013 *PS* 342.
343 Blackman *et al* 2013 *PS* 342.
344 Blackman *et al* 2013 *PS* 342. For instance, industries affiliated to CAIA were under pressure from civil society to do something about the deteriorating air quality (Fischer *Environmental Management Cooperation Agreements* 1-121). This led to their consideration of entering into a EMCA.

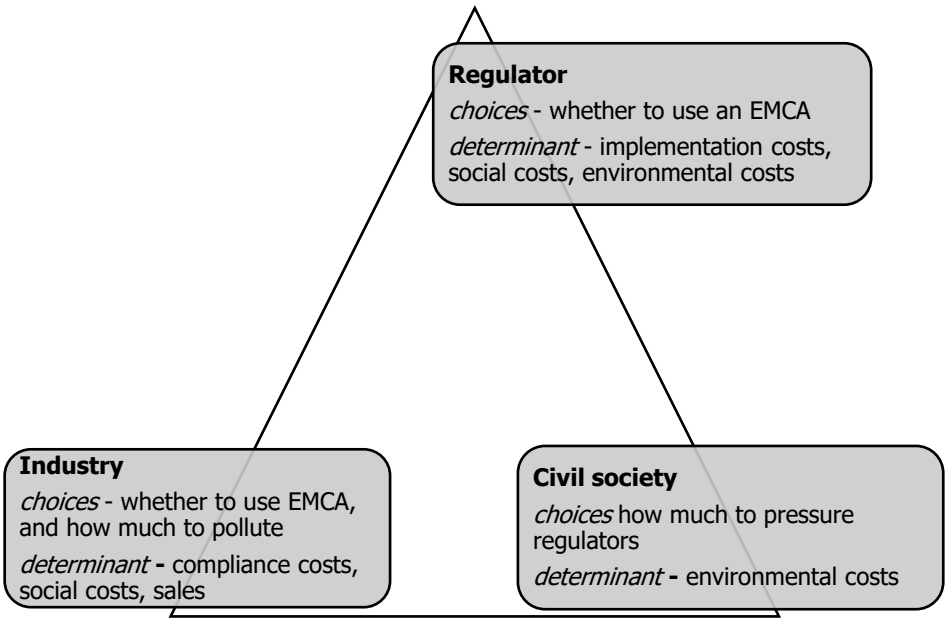

Figure 2: Choices and determinants of participation in a EMCA[345]

It is arguable that the choices and determinants of the participation in a EMCA by different environmental actors is also linked to the relationships between the actors. *Inter alia,* Farmer[346] suggests a checklist that assesses issues pertaining to inter-institutional relations. These issues include firstly what relations between public and private bodies are essential for the authority to undertake its work effectively, and what particular problems affect enforcement.[347] Secondly, what is the existing status of the relationships; are they good or poor or do they not exist all?[348] Thirdly, what are the key relationships needed to ensure effective feedback in the regulatory cycle?[349] Fourthly, where can formal agreements be used which set out exactly how the private actors can collaborate with the environmental enforcement authorities.[350] The fifth issue is to determine if the agreements concluded compromise administrators' duties in any way.[351] The sixth step is to question whether opportunities exist to establish network arrangements for the country as a whole or just for an individual region. The last aspect is to establish whether the staff of the

345 Adapted from a conceptual framework by Blackman *et al* 2013 *PS* 342.
346 Farmer *A Handbook of Environmental Protection and Enforcement* 65.
347 Farmer *A Handbook of Environmental Protection and Enforcement* 65.
348 Farmer *A Handbook of Environmental Protection and Enforcement* 65.
349 Farmer *A Handbook of Environmental Protection and Enforcement* 65.
350 Farmer *A Handbook of Environmental Protection and Enforcement* 65.
351 Farmer *A Handbook of Environmental Protection and Enforcement* 65.

environmental authorities are fully cognisant of the agreements concluded and the inter-institutional relationship, and whether they can they implement the agreement.[352] It is important that the relationships among the environmental actors be properly understood in order to ensure effective cooperation.[353] Existence of good relations provides a fertile ground for the conclusion of a EMCA.

3.4.3 Criteria for the conclusion of a EMCA

Fischer[354] provides guidance as regards the criteria for signing a EMCA in developing countries, as laid out in Table 3.

Table 3: The criteria for signing EMCAs in developing countries[355]

When to use a EMCA	Supportive legal and policy framework
	Complementary to existing command and control regulation
	Procedure for effective information disclosure
Process of developing a EMCA	Provisions for active participation of internal and external stakeholders in all steps of the EMCA
	Institutional structures with allocation of roles and responsibilities
	Involvement of high-ranking government officials
	Baseline information informs negotiations
	Initial sector-based EMCA coupled with uniformity and peer pressure
Content of the Agreement	Promotion of no-regrets options
	Acceptable, quantifiable targets based on detailed assessment; ambitious yet attainable targets
	Timetables, milestones

Furthermore the EMCA Guideline stipulates three considerations need to be taken into account in order to determine if a EMCA is the appropriate tool, namely the state's political commitment, a confirmation of the inadequacy of the traditional policy tool, and whether the environmental issue at hand can be suitably addressed by the

352 Farmer A Handbook of Environmental Protection and Enforcement 65.
353 Rechtschaffen 1998 *SCLR* 1218.
354 Fischer *Environmental Management Cooperation Agreements* 30.
355 Fischer *Environmental Management Cooperation Agreements* 30.

EMCA.[356] Therefore a EMCA will likely succeed when it has been established it is an apt tool to address the environmental problem at hand. The next section focuses on the role of disputes in the utilisation of EMCAs.

3.4.4 The role of disputes and environmental crises in the utilisation of EMCAs

In light of the conflicted nature of the sustainable development ideal and the role that conflicted mandates can play in promoting bad environmental governance, it is arguable that disputes may lead to the conclusion of EMCAs as a practical response to concrete and pressing environmental problems and/or due to a stand-off between the local community and a collection of industries.[357] A EMCA can also be used as a practical response to serious environmental problems and when there is a stand-off between the environmental authorities themselves. The Potchefstroom City Council case (Potchefstroom case) and the Vesuvius South Africa (Pty) case[358] are fitting examples. In the Potchefstroom case, conflict arose between the Potchefstroom municipality and the Department of Water Affairs and Forestry (DWAF) due to serious pollution of the upstream water sources by a gold mining company.[359]

Whereas the Potchefstroom local council initially threatened to take the national department of environment to court, the parties later concluded an EMCA, although not in terms of the NEMA, to resolve the matter.[360] Similarly the Vesuvius agreement was concluded pursuant to a court battle between the DEAT and Vesuvius, whereby Vesuvius successfully won an appeal against a directive issued by DEAT in terms of the ECA.[361] So environmental conflicts or crises have a way of bringing environmental actors together, which may lead to the conclusion of EMCAs. It could be argued that

356 Para 3.2 of the DEAT (2005) EMCA guideline.
357 Holley, Gunningham and Shearing *The New Environmental Governance* 16. Also see Weldemariam 2012 *SAJELP* 109-136.
358 Hereafter the Vesuvius Agreement.
359 Bosman, Kotzé and Du Plessis 2004 *SAPL* 419.
360 Bosman, Kotzé and Du Plessis 2004 *SAPL* 420.
361 Fischer *Environmental Management Cooperation Agreements* 88. The Vesuvius EMCA dealt mainly with ensuring Vesuvius' compliance with the conditions of the registration certificate. The adopted compliance strategy in the EMCA focused on the improvement of kilns and the maintenance programme in order to reduce emissions to the desired levels as per the permit (Fischer *Environmental Management Cooperation Agreements* 88-92).

EMCAs can therefore be used to avoid litigation. The next section looks into the topic of the legal requirement to avoid litigation.

3.4.4.1 The requirement to avoid litigation

In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*[362] the Constitutional Court advised that disputes should be resolved at a political level as opposed to through adversarial litigation. State organs involved in intergovernmental disputes must employ dispute settlement mechanisms outside court.[363] Public organs must observe the principle which prohibits them from instituting legal action against one another.[364] Best practice in conflict management focuses on prevention, containment, political resolution, early intervention, the avoidance of dispute escalation, the de-escalation of disputes, early communication, resource allocation, the isolation of the dispute from other business, good institutional and personal relations, the avoidance of negative publicity, the promotion of the "interests and needs" approach and not a legal rights centred approach, and a systems approach as opposed to an ad-hoc approach.[365] Whereas adversarial litigation is rule-based, politics deal with interests and the accommodation of diverse interests, which is the very purpose of co-operative government.[366] The IGRFA provides extensively for the mechanisms that seek to avoid litigation between organs of state. Litigation must be used as a last option in the event of non-compliance.[367] It can therefore be argued that a EMCA is a tool that can be used to avoid litigation between organs of state.

The next section discusses the possible role of the courts in the usage of EMCA in solving litigation related issues related to the implementation of the section 24 constitutional environmental right.

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362 1996 (4) SA 744 (CC) (para 291).
363 S 41(3) of the Constitution.
364 S 41(1)(*h*)(*vi*) of the Constitution. The CC stated in the *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC) matter that the obligation to settle disputes is at the heart of co-operative government as provided for by ch 3 of the Constitution (para 41).
365 See Part 2 item 3 in Gen Not 491 in GG 29845 of 26 April 2007.
366 Part 1 item 2 in Gen Not 491 in GG 29845 of 26 April 2007.
367 Scholtz *Milieuconvenanten, Oftewel, Omgewingsbestuur* 237.

3.4.4.2 The role of the courts

The Constitution mandates the courts to confirm first that the state departments involved have tried to resolve the dispute.[368] The effectiveness of environmental governance and sustainability is largely dependent on the interpretation and the application of the environmental right by the judiciary.[369] It is arguable that the courts may recommend the use of EMCAs to remedy conflict between authorities, especially in cases of severe environmental problems. For instance, Rycroft and Bellengére[370] supports the position of the court in the case of *S v Mfekezo Zuba and 23 similar Cases*[371] that judicial innovation can be utilised to counter government inaction on the execution of a fundamental right through the utilization remedies such as structural interdicts. A structural interdict is a remedy that the court uses to order the state organ to perform its constitutional onuses and to report to the courts on the progress of their implementation.[372] Equally sustainable development concerns the implementation of the section 24 constitutional fundamental environmental right. Therefore it can be argued that dire environmental situations, especially where the irresolute and recalcitrant conduct of the authorities seriously endangers the environment, qualify the courts to invoke the use of EMCA through *inter alia* structural interdicts, provided that the EMCA is a suitable tool in that specific case.

However, it is important to stress that this argument does not encourage the undermining of the the constitutional doctrine of *trias politica* (the separation of powers), a doctrine that requires formal distinction to be accorded to the legislative, executive and judicial branches of the state.[373] Lenta[374] draws attention to the fact that detractors often urge judges to abstain from overreaching themselves and to exercise of discipline by restricting themselves to the interpretation of rights, instead of interfering with government policy. However, the hallmark of the principle of the

368 S 41(4) of the Constitution.
369 Kotzé 2007 *RECIEL* 311.
370 Rycroft and Bellengére 2004 *SAJHR* 330.
371 2004 4 BCLR 410 CC
372 De Beer and Vettori 2007 *PELJ* 10. A structural interdict is a remedy that is used by the court to order the state to perform its constitutional obligations and report on its progress regularly (Rycroft and Bellengére 2004 *SAJHR* 322).
373 Freedman 2011 *SAJCJ* 232.
374 See Lenta 2004 *SAJHR* 544.

separation of powers entails a constitutional dialogue between the branches of the state.[375] Commitment to anti-formalism is a key component of transformative adjudication.[376] It is arguable that the constitutional dialogue entails according the judiciary room to decide upon matters concerning constitutional rights, especially where it is provable that the executive is failing in that regard. While the observance of the separation of powers principle remains key, it can be argued that only in certain cases can the judiciary recommend or direct the usage of EMCAs.

3.5 Dearth of section 35 of the NEMA EMCAs

Two decades after the start of the NEMA not many EMCAs have been concluded.[377] Fischer[378] discusses six examples of EMCAs that have been initiated in South Africa, as set out in Table 4. These are the Engen Refinery EMCA initiated by the Merebank community; the Caltex Oil Milnerton EMCA initiated by the Milnerton community; the Refinery Industry EMCA initiated by CAIA; the PBA EMCA initiated by the DEAT; the Tyre Industry EMCA initiated by the tyre industry; and The Vesuvius Agreement initiated by the DEAT.[379] The research did not come across any recent study of EMCAs.

Table 4: Proposed environmental agreements in South Africa[380]

Industry Name	**Initiator**	**Date**	**Signed**
Engen Refinery	Merebank community	1998	No
Caltex Oil Milnerton	Milnerton community	1997-1998	No
Refinery Industry	CAIA	2000	No
Tyre Industry	Tyre Industries	2003	No
PBA	DEAT	2004	Yes
Vesuvius Agreement	DEAT	2004	Yes

375 Ngcobo 2011 *SLR* 48.

376 Hoexter 2008 *SAJHR* 299. Also see Deville 2004 *SAJHR* 614 The courts cannot promote just administrative action if it draws strict distinctions between policy and law or between appeal and review. The intrinsic values of openness, justification, participation and accountability that are the foundation of the Constitution are not realised when the courts subscribe to a policy of deference (Klaasen 2015 *PELJ* 1918).

377 Lehman 2009 "Voluntary Compliance Measures" 287.

378 Fischer *Environmental Management Cooperation Agreements* 79.

379 Fischer *Environmental Management Cooperation Agreements* 79.

380 Adapted from Fischer *Environmental Management Cooperation Agreements* 79.

The aim is not to delve into each EMCA. However, several observations can be made. Firstly, most these EMCAs were initiated by non-governmental persons or communities. According to Fischer,[381] the EMCAs that were initiated in the 1990's were led by communities, while those that were initiated in the 2005 were initiated by government. Secondly, of these EMCAs only two were signed, namely the PBA EMCA and the Vesuvius Agreement.[382] Thirdly, the only two EMCAs that were signed were initiated by government and represented by the DEAT. Fourthly, it seems that these environmental agreements were not concluded in terms of section 35 of the NEMA. The Vesuvius agreement was concluded in terms of section 28 of the NEMA, which concerns the duty of care and the remediation of environmental damage.[383] The PBA ECMA, on the other hand, is really a MOU.[384] Therefore not all EMCAs are necessarily concluded in terms of section 35 of the NEMA.

Lastly, from Fischer's study it appears that not all spheres of government were party to the agreements. The PBA MOU was concluded between organised labour and the DEAT. Vesuvius' managing director and the DEAT concluded their agreement.[385] Even during the development of the CAIA EMCA the provincial and local governments were not directly involved in the discussion, which led to the conclusion of a EMCA with the Joint Development Forum (JDF).[386] The public authorities which constituted that JDF consisted of certain national departments, namely the DEAT, the Department of Trade and Industry (DTI) and the DWAF. The discussion demonstrates that the common use of environmental agreements in South African is not marked by the active participation of and conclusion of a EMCA by all three spheres of government. The discussion also shows that the NEMA EMCA is not preferred over other forms of co-operative environmental agreements. The next discussion focuses on environmental co-operative agreements and how they can provide lessons for the strengthening of section 35 of NEMA EMCAs.

381 Fischer *Environmental Management Cooperation Agreements* 79.
382 Fischer *Environmental Management Cooperation Agreements* 79.
383 Fischer *Environmental Management Cooperation Agreements* 79.
384 See DEAT 2002 Plastic Bag MOU between the DEAT and Organised Labour https://www.westerncape.gov.za/text/2005/7/mou_plastic_26092002.pdf.
385 Fischer *Environmental Management Cooperation Agreements* 89.
386 Fischer *Environmental Management Cooperation Agreements* 74.

3.6 Environmental co-operative agreements

Another way to address the situation is to provide in legislation for the conclusion of environmental co-operative agreements by different organs of state, with the purpose of ensuring cooperation for environmental compliance. An example is found in section 6(2) of the NRA, which concerns cooperative governance. Section 6(2) states that the nuclear regulator must conclude a co-operative agreement with every applicable organ of state in order to give effect to section 6(1) of the NRA. Section 6(1) of the NRA aims to give effect to the constitutional provisions of a co-operative government. There are several National Nuclear Regulator Authority Agreements (NNRAAs) that have been concluded between the NNRA and other national departments, and not necessarily among the three spheres of government.[387]

The environmental co-operative agreement between the NNRA and the DEAT for example, which pertains to the monitoring and control of radioactive material or exposure to ionising radiation, consists of the following elements: the scope, time and period for the implementation of this agreement, the co-ordination of functions in respect of the monitoring and control of radioactive material and exposure to ionising radiation, measures to resolve non-compliance with the agreement, the resolution of disputes in respect of the interpretation or application of the agreement, mechanisms and procedures for co-operation between the parties, safety standards and the co-ordination of monitoring and enforcement functions, a record of the delegations, the provision of expert assistance and support, the sharing of relevant information, the co-ordination of responses to incidents or accidents, and amendments to the agreement.[388] The NNRA does not make mention of a public participation procedure. It is arguable that the purpose of a EMCA and related activities will determine the parties to a EMCA, the extent of the public participation and that a public-public co-operative agreement may not include a public participation process, as informed by

387 *Inter alia* GN No R 759 in GG 31232 of 18 July 2008 Co-operative agreement between NNRA and DEAT in respect of the monitoring and control of radioactive material or exposure to ionising radiation and GN No R 712 in GG 37941 of 29 August 2014 between NNRA and the National Energy Regulator of South Africa (NERSA), which is established in terms of the *National Energy Regulator of South Africa Act* 40 of 2004.

388 GN No R 759 in GG 31232 of 18 July 2008 Co-operative agreement between NNRA and DEAT in respect of the monitoring and control of radioactive material or exposure to ionising radiation.

operational requirements. Therefore the NNRA co-operative agreements can provide inputs to the current stipulations of section 35 of the NEMA, especially with respect to parties to a EMCA.[389] Not all parties in the three spheres of government must be party to a EMCA.

It would seem that the main aim of section 35(1) of the NEMA is to elevate the facilitation by a EMCA of co-operative government and intergovernmental relations among all three spheres of government. However section 35(1) of the NEMA seems not to be practical and makes the NEMA EMCA unusable, as not all administrators are willing to be party to EMCAs. This study recommends that section 35(1) of the NEMA be revised to accord flexibility for state parties to determine for themselves if they want to conclude a EMCA or not. The revision should be done in terms of section 35A of the NEMA amendment.

3.7 Conclusion

This chapter focused on the section 35 of the NEMA EMCA as a voluntary environmental co-operative governance tool to ensure optimum compliance with environmental legislation. The provisions of the NEMA EMCA were interogated. Also a the nature of a EMCA as a public contract was discussed. The challenge of the of the interchange between private law and public law rules was highlighted. The difficult the task of controlling relations between departments which are naturally expected to cooperate through contracts or binding agreements indicate that EMCAs also face resistance from government department. Furthermore it was highlighted that the NEMA EMCA is a complex tool consisting of very lengthy provisions and the foregoing can make NEMA EMCAs unattractive. An important finding of this study is that the

389 It could be submitted that lessons may also be drawn from City Improvement Districts (CIDs), since they are legalised partnerships between the business sector and the government, which aim to enhance the quality of the physical and social environment of the area. A CID is a public-private partnership defined as a geographic area within which business or property owners agree to pay services additional to those supplied by municipalities in order prevent inner city decay, address safety and security problems and to enhance and foster economic development (Van Wyk *Planning Law* 401). CIDs are common in Gauteng province and the City of Town. The City of Cape Town uses by-laws for CIDs while Gauteng province has passed the *City Improvement District Act* 12 of 1997 (Van Wyk *Planning Law* 402). Elements of success linked to the use of CIDs that may be applicable to the use of EMCAs could be copied over to the EMCAs.

NEMA EMCA is not preferred over other forms of co-operative environmental agreements, consequently not many NEMA EMCA have been concluded.

It was debated that the provisions and especially the language of section 35(1) of the NEMA are confusing and may discourage the use of EMCAs. For instance if section 35(1) of the NEMA mandates that all three spheres of government be parties to a EMCA, then it is possible that no EMCA will be concluded, since this would be both onerous and frustrating to the potential parties. This study recommends a section 35(1) revision that accords the freedom of parties to conclude a EMCA in terms of a section 35A amendment. This is based on the lessons drawn from the NNRAA and other EMCAs that have been concluded but not in terms of section 35 of the NEMA.

It was highlighted that due to their complex nature, EMCAs are not applicable all the time and in all situations and nor can EMCA be used at will; hence the significance of understanding conditions that warrant sucesseful application of EMCA. In South Africa EMCAs seem to have been used in situation of environmental conflict. The possible role of the courts was also discussed. Arguably EMCAs can be used to support efforts of the command and control environmental regulation as well as efforts of other alternative environmental regulation methods, hence their importance role in climate change-related initiatives in light of the environmental pressures and impacts resulting from this phenomenon.

Chapter 4: Conclusion and recommendations

The main aim of this research has been to explore how and when a EMCA can be effectively utilised as a tool to ensure co-operative environmental governance, in order to ensure optimal compliance with environmental legislation in a segmented environmental administration. The challenge of environmental governace was among others attributed to the existense of a baronial government which is characterised by conflict between environmetal governace actors. The fluctuating power relations was seen as a main problem in a segmented environmental governance. In order to obviate the governance challenges troubling command and control environmental regulation, the support of alternative environmental regulation *vis-à-vis* voluntary EMCAs was indicated, the purpose being to achieve compliance through cooperation betweem environmental administrators.

The statutory provisions of the section 35 of the NEMA were discussed in section 3.2. The discussion interogated the complexity of the NEMA EMCA from two perspectives namely, (1) a co-operative and administrative contract perspective and (2) secondly the language construction. Among others it was submitted that the complex nature of the interchange in the application between private law and public law rules may complicate EMCAs. It was submitted that in light of the difficult task of controlling relations between departments which are naturally expected to cooperate through contracts or binding agreements, this could be the reason why EMCAs also face resistance. Chiefly it was highlighted that the provisions of section 35 of the NEMA make it an unattractive tool due to *inter alia* its complex nature as regards to lengthy provisions and especially the language which render the tool subject to misinterpretation. Consequently an important finding of this study is that the NEMA EMCA is not a preferred instrument for co-operative environmental governance in practice. It was therefore submitted that EMCAs cannot be used at will and must be used only when circumstances render them usable.

The issue of the suitability of an EMCA as an applicable tool was elevated, and it was argued that the characterisation of the advantages and disadvantages of a EMCA is crucial since it enables the determination of whether or not to use a EMCA. It was

further submitted that the initiation step is also crucial in determining whether or not a EMCA must be used. Furthermore the "purpose of" and "parties to a EMCA" as discussed in sections 3.2.1.1 and 3.2.1.2 respectively are important precursors to the conclusion of an EMCA. It was stressed that the nature of the environmental activity(ies) and the legal jurisdiction thereof will determine parties to an EMCA and also which organs of state need to be consulted. The research shows that although important as proactive tools, in South Africa EMCAs seem to have been used reactively in situation of environmental conflict. So it was argued that EMCAs can also be used to avoid litigation, hence the possible role of the courts in the utilisation of EMCAs, especially in situation where the irresolute and recalcitrant conduct of the authorities seriously endangers the section 24 of the Constitution environmental right.

The NEMA EMCA can be used to achieve cooperation if it is not mandatory that all three spheres of government must be parties to the EMCA. EMCA must allow for parties to decide whether or not they want to use it, or else it will not be concluded or used, and the opportunity to achieve environmental compliance through cooperation may be missed. For EMCA to be attractive and effectively used as an instrument of co-operative governance, it is recommended that:

- Section 35(1) of the NEMA should be revised in order to accord parties the freedom to choose whether or not to conclude a EMCA. This amendment must be made in terms of section 35A amendment with the aim to accord the flexibility for willing parties to conclude a EMCA and not only all parties in the three spheres of government. This recommendation is based on the lessons drawn from the NNRAA and other EMCAs, where only the parties concerned with the issues concluded the EMCA. These EMCAs were concluded in terms other than those of section 35 of the NEMA.

- The language of the section 35 of NEMA EMCA must be revised. Section 35(1) of the NEMA provisions need clarity regarding the state parties to a EMCA. For instance the usage of the word "every" creates ambiguity and may be open to misinterpretation.

- EMCAs must be flexible and adopt a tit-for-tat strategy, while at the same time guarding against regulatory capture.

- Due regard must be had beforehand to the situation to be addressed, in order to ascertain if a EMCA is likely to be successful.

- Further research should be conducted on voluntary environmental compliance *vis-à-vis* the EMCA since it has been shown that inasmuch as they promise certain benefits, voluntary instruments are not clearly understoodand that little attention seems to be have been given to them by policy makers.

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