ARTICLES

Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana

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ABSTRACT

In recent years multi-national enterprises (“MNEs”) have shown a renewed interest in the mineral resources of sub-Saharan Africa, providing governments in the region with opportunities to secure new sources of revenue with which to further promote economic growth and development. Mining activities, however, can have serious adverse environmental and health effects on local communities, which, in this instance, are often poor and rural. This raises issues of environmental justice, since these communities are least able to bear the burdens of harmful practices, given their already marginal position. The current paper evaluates the statutory and regulatory regimes of three sub-Saharan countries—Nigeria, Ghana, and Uganda—to determine how vulnerable groups are protected, and how existing measures may be improved through strengthening mechanisms for public participation.

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A large number of African countries south of the Sahara depend on the export of primary commodities, especially minerals, to generate foreign exchange and drive economic development. Few other options are available to them, given


2. There are many ways in which the term development is understood. This paper uses it in a “conventional” manner, referring to economic growth. For a good discussion of the benefits of this, see JAMES CYPER & JAMES DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 30-63 (2009).
that they often lack both an industrial base and a technically skilled workforce. In order to break out of this cycle, governments use revenues from the extraction and export of these commodities to invest in basic infrastructure and promote export-led manufacturing. It is assumed that this will generate higher and more sustainable levels of economic growth which will in turn provide governments with the means to satisfy the basic needs of their populations. However, because most developing sub-Saharan African countries lack the requisite technical skills and access to investment capital, they are often dependent upon multi-national enterprises (“MNEs”) to facilitate the exploitation of their own natural resources.3

These exploitative arrangements often have a negative impact on the poorest, usually rural, communities, despite the earnest assurances given by the governments and MNEs involved, and standing statutory and regulatory regimes. Common problems from such large extractive projects include water and air pollution, eviction from and denial of access to traditional lands, destruction of property, loss of livelihood, loss of biodiversity, and deforestation.4 These issues have both environmental and social elements, raising serious environmental justice concerns. This was also true—and to some extent still is—for poorer, often African-American communities in the United States,5 which suffered adverse health and social effects because industrial sites, incinerators, and landfills were located with disproportionate frequency near these groups as a result of their limited political significance and influence. The difference in the case of the rural poor in developing countries is that extractive industry practices can threaten the viability of communities. In this way, the threat posed by adverse environmental effects in developing countries is often qualitatively different

3. There are at least two reasons for this. First, from “the late 1980s, the inauguration of extensive liberalizing reforms of regulatory and legal frameworks, on the basis of World Bank prescriptions, drew a line under the nationalist reform efforts. Over the past two decades, the favorable environment the reforms created aided the revival of foreign investment in Africa’s mining industry.” The Economic Commission for Africa also recognizes a second reason, putting it succinctly: “Africa faces numerous entry barriers and a dearth of capacity.” Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regimes, ECONOMIC COMMISSION FOR AFRICA at xiii, 1 (Nov. 2011) [hereinafter Minerals and Africa’s Development], http://www.africaminingvision.org/amv_resources/AMV/ISG%20Report_eng.pdf (last visited Sept. 3, 2014). More expansively, this second reason is that “scale economies and high sunk costs, as well as technological demands, have created high barriers to entry in the mining sector and integrated value chains under TNC [transnational corporation] governance.” Economic Development in Africa: Rethinking the Role of Foreign Direct Investment, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT at 38 (2005), http://unctad.org/en/docs/gdsafrica20051_en.pdf (last visited Sept. 3, 2014).

4. “Mining is also invariably associated with deforestation, soil erosion, land degradation, air pollution and ecosystem disruption, particularly so for open-cast mines in which large areas of vegetation and soil are removed. Tailings dumps and other mining waste add to environmental problems often due to a general lack of waste management. Such dumps, as well as mining sites, also limits available land use options.” Minerals and Africa’s Development, supra note 3, at 46.

from that faced by poor communities in the industrialized West—there is a
distinguishing existential element. Addressing the issue of environmental justice
in this context is therefore of the utmost importance, especially since many
sub-Saharan countries have espoused their intention to expand mineral extrac-
tion. Establishing effective measures before widespread expansion is realized
will help to protect otherwise vulnerable groups. Beyond protecting communi-
ties, such measures will also provide MNEs with a stable investment environ-
ment: clear regulations that provide for early and adequate public participation
should result in reduced opposition by local communities.

Despite the different effects on marginal communities in sub-Saharan Africa
and the United States, there are valuable lessons to be learned from the policies
and laws enacted in the latter regarding how best to protect such groups and
address their concerns. With this in mind, this paper evaluates how existing laws
and regulations in developing countries confront the issue of environmental
justice, using the United States’ framework to assess their adequacy and provide
direction on how they may be reformed.

6. See Minerals and Africa’s Development, supra note 3, at 46 (quoting Kuhndt et al., Global Value Chain
Governance for Resource Efficiency Building Sustainable Consumption and Production Bridges across the
Global Sustainability Divides, 45 ENVTL. RES., ENG’G & MGMT. 33 (2008)) (“Africa retains the environmental
burden of mining, whose effects also reduces whatever it receives from the benefits of its minerals. Kuhndt et al.
(2008) note a ‘significant shift in European resource requirements from domestic sources towards the use of
imports from developing countries.’ They observe that this is accompanied by ‘a shift of environmental burden
of resource use . . . [and] while the resource productivity in EU countries is increasing, developing countries
struggle to cope with the environmental impacts of rising extraction rates: huge amounts of waste, wastewater
and dissipative losses.’ The legacy of mining in Africa is generally that of large unfilled holes and abandoned
artisanal mining sites.”).

7. There continue to be cases where entire communities have to be relocated as a result of past industrial
action. See Dan Frosch, Amid Toxic Waste, a Navajo Village Could Lose Its Land, N.Y. TIMES, Feb. 19, 2014,
forever.html.

8. See Ncube, supra note 1 (The Africa Mining Vision “was adopted by the African Union in 2008 [and] has
an ultimate goal of using Africa’s mining potential to meet the Millennium Development Goals by achieving
rapid and inclusive socio-economic development.”).

9. Local communities can cause serious problems and delays for companies if they feel their interests have
not been adequately considered. For example, the “Conga” gold mine in Peru was initially authorized in 2010,
but operations were soon suspended “due to social pressure from residents of the Cajamarca, leading the
government of Peru to declare a state of emergency for the region.” The mine has yet to reopen, though it
appears it may occur sometime this year. Sophia Guida, Peru’s Conga Mine could reopen this year, PERU THIS

The project has generated a great deal of opposition, resulting in violence. As reported by the Associated
Press in 2012, “[r]esistance to the project has been fierce, with five people killed early last month when police
and troops opened fire on anti-mining protesters. The government called a state of emergency after the violence,
suspending civil liberties.” Franklin Briceno, Peru’s Conga Gold Mine Project Opposed By Local Farmers,
HUFFINGTON POST (Aug. 29, 2012), http://www.huffingtonpost.com/2012/08/29/peru-conga-gold-mine-
project_n_1840329.html. See also STEVE COLL, PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER (2012) for
an account of how ExxonMobil was adversely affected by their failure to adequately engage with local
communities, and choosing instead to work more closely with the national government.

10. This is not to imply that the United States’ system is perfect, but it was the first to address the issue of
structure of the article. First, how do sub-Saharan African countries currently regulate the mining sector to protect poor, rural communities, and their environment? And second, considering the inherent resource constraints faced by these governments, how can existing procedures be improved to ensure that environmental justice is achieved?

Rather than engage in a general discussion of environmental regulatory regimes across the sub-continent, this paper will look at Ghana, which is heavily dependent upon mineral extraction, and Nigeria and Uganda, which expect mineral extraction to play an immediate role in economic growth and development. The countries’ respective regimes for licensing, environmental protection, monitoring, and reclamation will be compared and evaluated in relation to what are considered to be best practices, in order to determine how they might be improved. Special consideration will be given to the particular constraints, challenges, and incentives that governments and agencies face in developing countries. In line with United States and international best practices, the paper will advocate for greater and more effective use of public participation.

First, the socio-economic situation in African countries south of the Sahara will be presented, with specific attention paid to Nigeria, Uganda, and Ghana. It will highlight the incentives that propel these countries to focus on mineral extraction as a means to address poverty through economic growth, and will demonstrate that all three countries are either dependent upon, or in the process of expanding, mineral production.

The second section will provide an overview of the environmental justice concerns in the aforementioned countries in relation to mining. A summary of the dangers of mining in Nigeria, Uganda, and Ghana will first be presented, proceeded by an explanation of how these threats pose specific environmental justice concerns. This will be followed by an explanation of how the situation in developing countries is qualitatively different from that in the industrialized West, and why environmental threats are so existentially significant for poor, rural communities, thereby demonstrating the need for more effective environmental regulation.

The third section will explore the challenges to regulation in these countries and the sub-continent, as they pertain to the statutory structure and the administrative agencies responsible for overseeing mineral extraction. An overview of United States and international best practices will then be presented, based upon the principle of public participation, thus providing a framework with which to evaluate and compare the regulatory regimes of the three countries.

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11. These countries have been selected because they all contain significant mineral resources, are intending to use these resources for purposes of development, and have similar legal systems, based on the British common law system.
Section four will look at how, and to what extent, Nigeria, Uganda, and Ghana incorporates public participation. Attention will be placed on the various stages of the process: licensing, notice, comment, public hearings and final decision-making, monitoring and enforcement, and judicial review. The strengths and weaknesses of each country’s system will be compared and analyzed.

Finally, specific recommendations will be made as to how public participation can be increased and improved at the procedural level in these countries, as a means to address inherent deficiencies and promote environmental justice. Some of the proposed measures are based upon best practices developed in the United States and by international organizations, which assume a particular judicial and administrative system. Although there are limits to what can be achieved through procedural reform when such assumed background conditions are not present, the endeavor—it is argued—remains worthwhile, since public participation will be better facilitated and the issue of environmental justice will be more adequately addressed than it is currently.

I. THE ECONOMIC CONTEXT—MINING & GROWTH

Poverty remains the most pressing problem facing the developing world. The World Health Organization notes “[p]overty creates ill-health because it forces people to live in environments that make them sick, without decent shelter, clean water or adequate sanitation.” However, it also operates on a more fundamental level, as it can adversely affect individuals’ long-term mental and physical development and consequently their future prospects. In this sense poverty has serious short- and long-term health effects, as well as broader social and economic implications. Fortunately, large, poor populations—or segments thereof—can be lifted out of poverty with appropriate economic and industrial policies, as the rise of China amply demonstrates. In many sub-Saharan African countries, mining is viewed as one of the most strategically important industries for the purpose of such development. Paul Collier, Director of the Centre for the Study of African Economies at the University of Oxford, and author of The Bottom Billion, “believes that, for countries like Guinea, the extraction of natural resources, rather than foreign aid, offers the greatest chance of economic progress.” On the subject of Simandou, a huge deposit of high-quality iron ore in the south of the country, Collier predicts that “the money involved will dwarf

13. This applies to numerous other countries, most notably the “Asian Tigers”: Hong Kong, Singapore, South Korea and Taiwan. See CYPHER AND DIETZ, supra note 2, at 308-34.
everything else.”15 This project “alone could potentially generate a hundred and forty billion dollars in revenue over the next quarter century, more than doubling Guinea’s gross domestic product.”16 Although not all countries on the sub-continent have equivalently valuable resources, many have some kind of mineral asset—including diamonds, gold, and platinum17—and have made clear their intention to ensure it is used to foster economic development.

Nigeria, although heavily reliant upon offshore oil extraction, was once closely associated with mining, being “at one time the largest exporter of columbite and number eight in tin production in the world.”18 The Nigerian Ministry of Mines and Steel Development sees huge potential for the mining sector and is pushing to “spur the rapid and beneficial development of the country’s solid mineral resources . . . [in order] to unlock the economic potentials of the solid minerals sub-sector.”19 It has identified “thirty-four minerals of economic importance in Nigeria across the six regional mining zones. Every state, apart from Bayelsa is said to contain areas of mineral wealth.”20 Mining is thus poised to expand rapidly, if the ministry is able to realize its objectives.

In Uganda, mining contributed up to thirty-five percent of foreign exchange earnings between the 1950s and 1970s,21 and the country has seen growth in medium-scale, mechanized operations since the 1980s. According to the United Nations Environment Program (“UNEP”), artisanal and small-scale mining involves upwards of 200,000 people, both men and women.22 The Ugandan government has high hopes for mining, believing it “can advance development at community, regional, and national levels.”23 It is an integral part of the country’s Poverty Reduction Strategy.24 This belief is supported by UNEP, which observes “potential for larger developments over the next decade,”25 and it appears this is
being realized: A recently published Human Rights Watch report argues that Karamoja, a region in Uganda, is “on the verge of a mining boom [and] the Ugandan government has massively accelerated licensing of companies to carry out exploration and mining operations—a more than seven hundred percent increase between 2003 and 2011.”

Mining in Ghana has a long history, but contributes significantly more to the country’s revenue base than in either Nigeria or Uganda; overall the mining sector has been “a major contributor to the national economic development effort.” Since the 1990s the mining industry has expanded rapidly. The International Growth Centre reported that “in the period 1988-1997, annual production was 32.1 metric tons,” whereas “between 1998 and 2004, annual production increased to 65.2 metric tons due to the expansion of existing operations and opening of new mines.” In 2005, it was the second largest producer of gold on the sub-continent, with only South Africa ahead. Due to mining’s past contributions to the Ghanaian economy, and based upon its current trajectory, the sector will more likely than not see continued growth in the near-to-medium future.

Various academics detect a new “scramble for Africa”—the scramble now, as in the past, being largely for the continent’s resources. Despite the colonial overtones of this phenomenon, some scholars recognize that increased foreign investment in sub-Saharan Africa’s natural resources sector brings with it benefits, including increased revenue streams for governments, jobs, and concomitant skills training for employees. But even if these benefits do not materialize and foreign investment in the mining sector fails to provide the means with which to reduce poverty levels, Nigeria, Ghana, and Uganda are likely to


30. Id. at 5-6.


32. See Aryee, supra note 28, at 75 (“It is however hoped that with the recent re-direction of government policy to ensure that investments that are made to attain the maximum possible beneficial impact on the country’s economy as a whole, the sector would contribute even more to the national economy.”).

attract substantial foreign investment and see a significant increase in large-scale, mechanized mining activity.

II. ENVIRONMENTAL JUSTICE

A. LESSONS NOT LEARNED—THE ADVERSE ENVIRONMENTAL EFFECTS OF MINING

It is unquestionable that mining has played an important economic role in all three countries, and that it is poised to do so again; however, there are often significant environmental consequences to the practice. Open pit mining, the method used by the “majority of large-scale mines today,” is harmful to human health and the environment in a variety of ways, including “the disturbance of land surface, which may affect the natural vegetation as well as caus[e] pollution of rivers and underground waters. It may also involve atmospheric pollution resulting from dust emissions and radioactive substances.” The effects of under- and un-regulated industries on the environment and communities’ health in developing countries are clear, and often tragic. The history of unregulated tin mining in the Jos Plateau in Nigeria provides a valuable lesson.

Commercial mining began in the region in 1905, led by the Royal Niger Company, which had acquired exclusive rights to the area. Until 1946, there was no regulation of mining activities in the country. As a result, “the environment became the worst victim, as evident, for example, from the extensive devastation of land.” Even after the Mining Act of 1946 was passed, little changed: The Minister of Mines had discretion as to whether regulations should even be promulgated, let alone enforced. Writing in 1959, B. W. Hodder observed that the “rate of destruction of land by mining is some 800 acres a year. Many dams have been built and rivers diverted for mining purposes.” At the time he claimed, “mined rivers often [contain] suspended solids reaching to over 5000 parts per million as against 100 parts per million in unmined rivers. In Malaya, the maximum pollution allowed in discharged waters is 800 parts a million [sic].” The 1946 legislation was also supposed to address the problem of

34. See Mritunjoy Sengupta, Environmental Impacts of Mining: Monitoring, Restoration, and Control 4 (1993) (“No matter how beneficial for our own desired purposes the principal intended results of our activities may be, our actions are bound to cause effects additional to the principal effects we have in mind.”).
35. Human Rights Watch, supra note 26, at 73 n.244 (citing James Hendrix, Gold Mining and the Use, Quality and Availability of Water, at 1-2).
37. Id. at 235.
38. Id.
39. Id. at 235-36.
41. Malaysia.
42. Hodder, supra note 40, at 119.
derelict, mined land through compulsory reclamation, though due to a combination of government neglect and warped economic incentives, this was rarely done.43 A study completed forty years after the initial passage of the 1946 Mining Act found that “less than one per cent [sic] of the area damaged by mining has been reclaimed.”44 The author attributed this to “a combination of poor legislation, adverse economic circumstances and political influences.”45 More recent studies have documented the inglorious legacy of unregulated mining in the area, including soil erosion, land degradation, loss of productive agricultural land, and abandoned pits and shafts.46 In turn, these have resulted “in low productivity in crop farming, land fragmentation, land disputes and conflicts, and unemployment in the area.”47 Additionally, certain questions remain about the water quality, especially concerning bioaccumulation of certain compounds in both livestock and humans.48 On top of all of this, there is the simple matter of the aesthetic damage done to the region.49

Similar adverse environmental effects from large-scale mining operations can be seen in Ghana.50 A recently-produced International Growth Centre working paper found that large-scale mechanized mining directly impacted local agricultural productivity. Between 1998 and 2005 the rate of reduced agricultural production averaged forty percent.51 Mining activities in Ghana therefore have actually led to an increase in rural poverty, rather than ameliorating it, because rural communities are dependent upon agriculture. As reported by the authors of the center’s working paper, “[d]uring the analyzed period, measures of living

43. Usman explains that the government in these instances was not overly concerned about reclamation but also that leaseholders wanted to retain the right to continue to mine, believing valuable minerals may still remain in the ground. A second economic factor was that for a long period of time the marginal profits on tin were nominal; expensive reclamation projects would thus make extraction even less profitable. Usman, supra note 36, at 236.

44. Michael J. Alexander, Reclamation after Tin Mining on the Jos Plateau Nigeria, 156 THE GEOGRAPHICAL J. 44, 49 (1990). It should be noted that others have put it closer to ten percent; whatever the case, the overall amount is small. See Kevin D. Phillips-Howard, Indirect Mineland Reclamation on the Jos Plateau, Nigeria: The Basis for a Viable Policy, 10 LAND USE POLICY 2, 5 (1993).

45. Id. at 49.


47. Id.


49. “This legacy of landscape dereliction and waste led in 1982 to the State Government declaring much of the central area of the plateau to be a ‘disaster area.” Alexander, supra note 44, at 45.

50. “Deforestation, land degradation, changes in the topography and drainage patterns, accelerated erosion and soil degradation, pollution, increased sedimentation and toxicity of water resources are just a few of the environmental effects’ on the Ghanaian environment.” E. Abotsi, Chapter 7—Ghana’s Environmental Framework Law and the Balancing of Interests in THE BALANCING OF INTERESTS IN ENVIRONMENTAL LAW IN AFRICA 142 (Michael Faure & Willemien du Plessis eds., 2011).

51. Aragón & Rud, supra note 29, at 38.
standards have improved all across Ghana. However, households engaged in agricultural activities (whether as producers or workers) in areas closer to mining sites have been excluded from this process. As a consequence, their household poverty indicators have deteriorated.\textsuperscript{52}

In contrast to Ghana, Uganda currently has few large-scale operations, but the negative effects of small- to medium-scale mining activities are already being felt. UNEP points out that “in some localities, the situation of several hundred miners working within a given watershed has been observed to impact cumulatively downstream water users via siltation and to create health and safety hazards... as well as impeding post-mining agricultural use.”\textsuperscript{53} These issues will only become more pronounced when operations are expanded and intensified. Considering the emphasis placed on the mining sector by the government, and the interests shown by various MNEs, there is a real danger that many of the negative effects that have been documented in Nigeria and Ghana will soon be replicated in Uganda.

B. ENVIRONMENTAL JUSTICE IN DEVELOPING COUNTRIES

Poor communities’ relationship with their immediate environment in sub-Saharan Africa is, in many respects, qualitatively different from that of their counterparts in the West. Expectations of such communities often include the wide availability of land for purposes of agriculture; the opportunity to hunt and trap game; free and easy access to naturally occurring sources of clean water for drinking, bathing, and washing; availability of plants and herbs for traditional medicinal practices; and access to culturally significant sites, such as burial grounds, meeting places and shrines.\textsuperscript{54} Immediate and direct access to resources tied to the natural environment is essential: there “is a combination of physical, chemical, biological, political, social, economic, and cultural factors that relate to how people experience the environment around them.”\textsuperscript{55} Environmental justice in sub-Saharan Africa, when viewed in this light, could be seen as distinct from the concept as understood in the West. Some African commentators, such as L. Amede Obiora, see the greatest obstacles to the environmental justice movement in “the equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature, and the

\textsuperscript{52} Id. at 38.

\textsuperscript{53} Also, “there is some concern about the cumulative effects of ASGM on these ecosystems.” The same UNEP report notes a potential increase in the use of mercury, which would have further detrimental effects. UNITED NATIONS ENVIRONMENT PROGRAMME, supra note 21, at 8.

\textsuperscript{54} As Shailaja Fennel observes, “[t]he power that is manifest in resources goes beyond their market value, taking on a set of ascribed meanings and communal values that mask the purely economic contribution that they make to the lives of the individuals within the community.” SHAILAJA FENNEL, RULES, RUBRICS AND RICHES, THE INTERRELATIONS BETWEEN LEGAL REFORM AND INTERNATIONAL DEVELOPMENT 59 (2012).

\textsuperscript{55} Yelpaala & Ali, supra note 31, at 151.
fair exchange of resources.”56 In other words, it extends beyond narrow issues, such as preventing exposure to toxins and racial discrimination—the original focus of the environmental justice movement.57

It seems that the key distinction between communities in sub-Saharan Africa and the West that are adversely affected by industrial activity is not conceptual, at least as far as what environmental justice broadly intends to address. Rather, the difference seems to be in scope and scale. Poor, minority communities in the United States, for example, might be exposed to higher levels of air pollutants as a result of a waste incinerator having been sited in, or close to, their community, an unfortunately common occurrence.58 This obviously raises serious public health and welfare concerns, as pollutants emitted from such facilities can have chronic and sometimes fatal consequences.59 Peoples’ behavior and lifestyles can be significantly impinged as they attempt to reduce their exposure to long-term health effects by spending less time outdoors. Yet they usually retain access to clean water, food, basic services, and are able to take part in social and cultural activities they value.

In contrast, poor rural communities in sub-Saharan Africa are far more likely to be subject to government and/or corporate actions that have destructive effects on many, if not all, aspects of their lives. As demonstrated already, large-scale mining can have significant effects on agriculture, upon which rural populations are highly dependent, sometimes leading to increased poverty. Mining operations can also have more immediate detrimental effects: They can pollute water sources, causing sickness or worse,60 forcing community members to go much

58. Madigan, supra note 5.
59. “Low-income populations and people of color have disproportionately high rates of cancers and are more likely to die or be diagnosed at advanced stages of disease. For example the African-American population has the highest overall rate of cancer and lowest 5-year survival rate cancers. Moreover, African-American men have the highest rate of prostate cancer, and African-American women have the highest mortality rate for breast cancer. In the United States, people of color and racial and ethnic minorities disproportionately live near toxic waste sites. They are also more likely to live in areas of high industrialization, air and water pollution, and work in environments that expose them to cancer causing toxicants. Moreover, this same group of people has a higher rate of exposure and usage of insecticides and pesticides through agriculture work or use in the home. This results in a higher cancer risks then [sic] other segments of the population.” Robin E. Johnson, Cancer Disparities: An Environmental Justice Issue for Policy Makers, PHYSICIANS FOR SOCIAL RESPONSIBILITY, http://www.psr.org/environment-and-health/environmental-health-policy-institute/responses/cancer-disparities-an-environmental-justice-issue-for-policy-makers.html (last visited Sept. 2, 2014).
60. As a result of gold mining operations, “[s]ince 2010 ongoing, widespread, acute lead poisoning in Zamfara state has killed at least 400 children. Considered the worst outbreak of lead poisoning in modern history, more than 3,500 affected children require urgent, life-saving treatment. Less than half are receiving it. Among adults there are high rates of infertility and miscarriage.” HUMAN RIGHTS WATCH, A Heavy Price: Lead Poisoning and Gold Mining in Nigeria’s Zamfara State, HUMAN RIGHTS WATCH, 3 (2011), http://www.hrw.org/features/a-heavy-price (follow “Brochure (PDF)” flash link).
farther afield to retrieve their supplies or move entirely. Similarly, when mining concessions are granted swathes of customary land, community members are often deprived of areas and resources upon which they were previously reliant. In Uganda, for example, Human Rights Watch has documented some of the recent mining practices of larger companies and their effects on the local Karamoja people. In one case a “company [ ] erected a compound for its workers, installed a large gravel sifter on the hill side[.] [ ] commenced mining, pumped water out of a nearby perennial stream, and fenced off the land, blocking community grazing areas.” Actions such as these have stoked real concerns in the Karamoja community, who are fearful of “land grabs, loss of access to mineral deposits, water contamination and erosion, forced evictions, and failure to pay royalties to traditional land owners.”

In the most extreme circumstances such actions can lead to severe social dislocation, not only endangering the health and wellbeing of community members, but sometimes its viability as a community per se: the collective ties to the natural resources and environment are essentially severed, leaving the community adrift. Ultimately, the problem is that the costs of such operations are often borne by those least capable of shouldering them. For this reason, the respective governments have a responsibility to ensure that effective measures are enacted to protect these vulnerable groups. The question is how best to achieve this goal.

III. REGULATION AND PUBLIC PARTICIPATION

A. REGULATION AND RESOURCE CONSTRAINTS

Environmental and mining regulation is usually based on the principle of command and control, a relatively self-explanatory concept: the command, usually a law or regulation imposing some kind of positive or negative obligation, is overseen and enforced by a government agency—the control. In order to address a specific regulatory target, comprehensive laws and regulations need to be drafted and combined with a strong, effective enforcement component. This approach has been very effective in achieving pollution abatement in the

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62. HUMAN RIGHTS WATCH, supra note 26, at 13.

63. Id. at 8-9.

64. This also happens in the context of conservation. Local, indigenous groups have, in the past, been evicted from newly created wildlife and wilderness reserves, resulting in the affected community’s extreme dislocation. See generally Mark Dowie, CONSERVATION REFUGEES: THE HUNDRED-YEAR CONFLICT BETWEEN GLOBAL CONSERVATION AND NATIVE PEOPLES (The MIT Press ed., 2009).
United States. It is usually characterized by the delegation of authority to an administrative agency to promulgate regulations and oversee enforcement. In this sense, the "system presupposes the existence of a solid and reliable administrative body that is active, capable, honest, and sufficiently authoritative to be able to rein in powerful industrial interests." This implies adequately resourced, technically proficient administrative agencies, an issue that remains a perennial challenge. Carolyn Abbot, commenting on the situation in the United Kingdom, summarizes the problem well: "[O]ne of the key problems faced by contemporary environmental agencies is how to achieve credible enforcement when the number of regulatory officials is far outweighed by the number of firms . . . that need regulating, especially in an atmosphere of continuing budgetary and staffing constraints." In developing countries, this challenge is even more pronounced.

An illustrative and sadly common example is lack of transportation. In some cases only senior officials have immediate access to vehicles, which imposes a serious constraint on agencies tasked with ensuring that environmental requirements are being met at remote sites. Without their own vehicles, agency officials will sometimes request that the companies transport them. Apart from providing notice to operators who might otherwise be caught unaware and off-guard, such collaboration provides opportunities for both direct and indirect bribery. It is even worse if agency officials are unable to visit the relevant sites, which can occur when transportation is unavailable or the companies are uncooperative. The situation looks even bleaker when one begins to evaluate

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65. "After the Clean Air Act’s first 20 years, in 1990, it prevented more than 200,000 premature deaths, and almost 700,000 cases of chronic bronchitis were avoided. Over the last 20 years, total emissions of the six principal air pollutants have decreased by more than 41 percent, while the Gross Domestic Product has increased by more than 64 percent." 40th Anniversary of the Clean Air Act, U.S. ENVIRONMENTAL PROTECTION AGENCY (Sept. 14, 2010), http://www.epa.gov/air/caa/40th.html.


68. The author was made aware of this whilst working in the Ministry of Internal Affairs in Liberia. Not only were senior officials the only ones with immediate access to vehicles, but even they were constrained in their movements due to fuel coupon rationing.

69. For example, the Environmental Protection Agency of Liberia, located in Monrovia, Montserrado County, is tasked with overseeing environmental enforcement for the entire country. Concessions located in Sino, Grand Gedeh, Maryland, and Grand Kru counties take days to reach even when a reliable off-road vehicle is used. Firestone and Sime Darby’s plantations—rubber and palm oil, respectively—are located closest to Monrovia and take over an hour to reach using motorized transport.

70. This very thing happened in Liberia. A group of government officials, including an official from the environmental protection agency, was transported to the Golden Veroleum palm oil plantation for an inspection of the site. The company housed and fed the officials, and provided them with free alcoholic drinks. Whether or not actual bribery took place is unimportant; the government officials placed themselves in a position where there was a clear conflict of interest. Interview with a staff member accompanying the group, in Monrovia, Liberia (Oct. 21, 2011).
agencies’ access to other relevant resources, such as testing equipment, laboratories, and technically-qualified staff.71

B. THE LIMITS OF COMMAND AND CONTROL

The main problem with the system of command and control is that its effectiveness is correlative to the investment in resources and capacity by the government. Resources are seldom sufficient for such a system to be completely effective. Enforcement gaps invariably emerge, even when countries, like the United States, can devote billions of dollars to environmental protection.72 This partially explains the emergence of the environmental justice movement in the late 1970s and early 1980s, which ironically followed the passage of a slew of progressive environmental protection laws.73 At the time, it was assumed that low-income and minority communities would be subject to equal protection; there was no reason for “governmental officials and environmentalists . . . to suspect that the implementation of such laws might perversely leave those communities in worse circumstances.”74 However, pollution from industry, rather than being contained—as was assumed—took the path of “least regulatory resistance.”75 Industry placed facilities that would likely have adverse health and environmental effects in communities that were politically and economically marginalized.

To address this problem, President Clinton took a cue from the “Principles of Environmental Justice”76 and signed Executive Order 12,898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.77 The central theme was that communities should be able to participate in

71. Resource constraints should also be viewed relationally. For instance, there may be no laboratory for the testing of carcinogenic compounds in local water sources because all of the available funds are being diverted to maintain a publicly funded hospital. In some cases there may not even be enough funds available to adequately maintain such a facility, in which case there is no real “choice” between what services to provide—when finances permit, basic needs must first be met. Sadly, many poor countries are forced to “balance” or trade one type of protective health measure (medical care) with another (prevention of medical conditions arising from pollution).
74. Id. at 138.
75. Id. at 170.
77. § 1-101 provides the rationale of the EO: “[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and
and influence decisions that would ultimately affect them—in other words, public participation. This, in effect, was supposed to provide a regulatory backstop beyond which agencies could not act without first thoroughly consulting local groups.

C. UNITED STATES AND INTERNATIONAL BEST PRACTICES

Environmental justice, as it is now understood, rests upon three pillars: access to information, public participation, and access to justice. This foundation was first officially established in EO 12,898, which required federal agencies to achieve certain minimum standards:

1. promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;
2. ensure greater public participation;
3. improve research and data collection relating to the health of and environment of minority populations and low-income populations; and
4. identify differential patterns of consumption of natural resources among minority populations and low-income populations.

These goals presaged how the concept came to be understood both nationally and internationally: (1) improved statutory and regulatory enforcement, including access to judicial review (access to justice); (2) increased public participation at the various stages of decision making; (3) better access to information for affected communities so that they may substantively contribute to the decision-making process; and finally (4) an emphasis on consideration of marginal groups and how they may be specifically impacted by proposed actions. This inclusive, procedural approach forms the basis of the United States Environmental Protection Agency’s policy towards addressing environmental justice: It “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decisionmaking process to have a healthy environment in which to live, learn, and work.” In the United States, there are now rigorous procedural requirements that local communities be given


78. “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, at 5 princ. 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).


notice about proposed actions that will affect their immediate environment, allow
them to participate in the decisionmaking process, and provide them with some
kind of judicial review if these procedures are not followed. These three elements
of the participatory approach are now enshrined in what is considered to be the
most authoritative document on environmental justice internationally: the 1998
Convention on Access to Information, Public Participation in Decision-Making
and Access to Justice in Environmental Matters, also known as the Aarhus
Convention. The underpinning principle is that environmental justice “requires
looking not just to participation in a process but to whether the process is
designed in a way to lead to a fair outcome.” In other words, substantive public
participation is not simply a principle to be achieved, but is something that can be
used to achieve environmental justice.

D. ACCESS TO INFORMATION

If citizens are to play a meaningful role in the decisionmaking process, they
must have adequate access to information. Without full disclosure, potentially
affected communities will be unable to effectively represent themselves or their
interests because they will be unable to adequately evaluate a project’s impact.
Such disparity in knowledge between communities and developers/operators is
symptomatic of environmental injustice, as it represents an imbalance in power
between the parties. In the United States, access to adequate information is
important in a variety of ways. First, it plays an essential function in informing
the public of prospective projects that may affect them and their environment.
This provides communities with the means to engage in the decisionmaking
process, since they are then able to evaluate and respond to information provided.
Relatedly, access to comprehensive information allows the public to contribute to
the process of rulemaking, the outcome of which may ultimately affect them.

81. See, e.g., George (Rock) Pring & Susan Y. Noé, The Emerging International Law of Public
Participation Affecting Global Mining, Energy, and Resources Development, in Human Rights in Natural
Resource Development: Public Participation in the Sustainable Development of Mining and Energy
Resources 36 (Zillman & George Pring eds. 2002) (“[I]t would be hard to overstate the importance of this
treaty. It is the first devoted exclusively to public participation. It is the most comprehensive expression to date
of the ‘three pillars’ of a complete public participation policy. It is the first treaty to explicitly link public
participation and environmental protection with government accountability, transparency, and responsiveness.
It creates more public rights in relation to mining, energy, resources, and other forms of economic development
than all previous international law put together.”).

82. Clifford Rechtschaffen, Eileen Gauna & Catherine O’Neill, Environmental Justice: Law,
Policy & Regulation 10 (2009).

83. See Sheila Foster, Chapter 7—Public Participation, in The Law of Environmental Justice: Theories
and Procedures to Address Disproportionate Risks 226 (Michael B. Gerrard & Sheila Foster eds., 2d ed.
2008) (“[L]ow income communities and communities of color often enter the decision-making process with
fewer resources than do communities that are less disadvantaged. These communities and communities of color
have less information and less specialized knowledge concerning the legal, technical, and economic issues
involved.”).
the government agency does not accurately represent its position or approach, the public cannot adequately respond to contentious issues. Environmental agencies in the United States are also heavily reliant upon “citizen enforcement to supplement underfunded government agencies. For this reason, effective enforcement could not occur without public access to information regarding the industry, sector, regulated entity, or other enforcement circumstances in question.”

E. PUBLIC PARTICIPATION

For the purposes of looking at best practices, public participation means the process through which the public—individuals, communities, civil society groups, and non-governmental organizations—are able to influence the decisionmaking process. This can relate to single actions, such as individual projects, permitting, or licensing, but can also apply to broader programmatic or policy decisions. The purpose of the process is to provide a mechanism of some kind through which the public can express their views, and to which the government must formally respond. In this way, the government demonstrates that it has actually considered the issues raised, how it has done so, and provides a rationale for its decision based upon the information provided. This makes the government more responsive and accountable and fosters trust in the process of governance.

One of the most important tools in this respect is the environmental impact statement (“EIS”), as required by the National Environmental Policy Act (“NEPA”) in the United States. Under NEPA, major federal actions that may significantly affect the human environment usually require an EIS. If it is determined that an EIS is required, the public will be given an opportunity to frame the issues for consideration through an initial scoping process. Once completed, the EIS is then made available for public comment; more often than not this is restricted to written submissions, though public hearings can be held if the agency deems them appropriate. Finally, after the agency has considered and incorporated the comments from the public, a final EIS is released and circulated, followed by a record of decision, laying out the agency’s ultimate rationale. This process illustrates how the public is substantively included in the decisionmaking process: they are to be adequately informed, with plenty of notice, and provided with an opportunity to raise specific concerns which the government must then respond to directly in any final decision.

This same process is mirrored in Article 6 of the Aarhus Convention, which makes clear the need for information to be made available “early in an environ-

85. Although the term “public participation” has been used broadly to describe a principle around which a certain type of process should be ordered, it is also used to indicate a more discrete element within that process.
mental decisionmaking procedure, and in an adequate, timely and effective manner.” 87 Similar to the EIS requirements under NEPA, the Convention establishes the need to clearly lay out the proposed activity, the nature of possible decisions, the authority responsible for authorization and oversight, the envisaged procedures (e.g. commencement dates, opportunities for public participation, details for submission of comments, details of where more information can be accessed, etc.), as well as the “reasonable time-frames . . . for the public to prepare and participate effectively during the environmental decisionmaking.” 88 Ultimately, it demands a comprehensive, inclusive, and rigorous participatory process, which ensures that “due account is taken of the outcome of the public participation.” 89

F. ACCESS TO JUSTICE

The most important pillar of environmental justice is citizen access to independent judicial review because, without the threat of some kind of officially-enforceable sanction, government agencies and private parties will be far less likely to comply with a rule or requirement—especially if it runs counter to their interests. When seen in relation to access to information and public participation, access to justice is even more plainly important because without it neither can be regularly enforced, largely undermining both. Governments should therefore “ensure that members of the public concerned . . . have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission.” 90

In the United States, the process of judicial review is well established. Under the Administrative Procedure Act, interested parties are able to hold agencies accountable for their failure to abide by established procedural requirements. 91 The United States is highly progressive in this manner, providing the public with the means to scrutinize and hold accountable the agencies tasked with governing specific statutory subjects. It is also progressive in another way: Its use of citizen suits for enforcement allows members of the public to, under certain circumstances, bring enforcement actions against private parties and agencies that fail to comply with relevant statutory requirements. Such measures would be of no use without immediate access to the courts.

88. Id. art. 6(3).
89. Id. art. 6(8).
90. Id. art. 9(2).
IV. COMPARATIVE CASE STUDIES

A. THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

Nigeria, Uganda, and Ghana approach the ownership of minerals similarly: all such rights are owned by the state, as provided for in the constitution. In Ghana, Article 257(6) of the constitution establishes that “[e]very mineral in its natural state . . . is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.”92 This is similar to Nigeria, though the rights vest in the “Government of the Federation” and are to be managed by the national assembly rather than the president (Article 44(3)).93 Uganda adopts the same approach, with the national constitution establishing that “the entire property in, and the control of, all minerals and petroleum in, or under, any land or waters in Uganda are vested in the government.”94

Mineral extraction is then governed on two statutory levels, the primary one being legislation that governs mineral extraction and directly related activities. The relevant statutes are the Minerals And Mining Act (2007) of Nigeria, the Mining Act (2003) of Uganda (“UMA”), and the Minerals and Mining Act (2006) of Ghana. All three address a combination of exploration, prospecting, permitting, licensing, some elements of environmental protection and reclamation, and in the case of Nigeria, community development agreements. Each of the three statutes also delegates authority over the regulation and oversight of mineral extraction to a ministry or one of its sub-departments: the Federal Ministry of Mines & Steel Development in Nigeria; the Geological Survey and Mines Department (“GSMD”), of the Ministry of Energy and Mineral Development, in Uganda; and the Ministry of Mines and Natural Resources in Ghana. Each of these bodies is responsible for promulgating and enforcing its own set of mining regulations.

The second statutory layer governing mineral extraction is the legislation that aims to minimize adverse environmental effects generally, which includes requirements for environmental impact statements. As with mining legislation, each relevant act delegates authority to what is essentially an agency: In Nigeria the Environmental Standards and Regulations Enforcement Agency (“NESREA”) was statutorily created to enforce environmental laws which, for the paper’s purposes, can be found in the Environmental Impact Assessment Decree (No. 86)

93. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, May 29, 1999, art. 44(3) (“Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”).
of 1992. In Uganda the National Environment Act (1995) ("UNEA") empowers the National Environment Management Authority (NEMA) to oversee and enforce environmental protection, whilst in Ghana the 1994 Environmental Protection Agency Act established the Ghanaian Environmental Protection Agency ("GEPA") to do so. In each case the agency mandated to oversee environmental protection is responsible for the further development of relevant regulations and their enforcement. The most important aspects of this regulatory regime, for the purposes of the current discussion, are the requirements for a national variation of the EIS and the monitoring and enforcement of pollution controls. The questions are now how well these statutory and regulatory systems are structured, how well they work in practice, and to what extent they effectively incorporate public participation.

B. ENVIRONMENTAL REQUIREMENTS FOR LICENSING

Although all three of the statutes governing mining contain some environmental requirements, they mainly focus on the process of prospecting, licensing, and reclamation. Because the governments own the mineral rights, and because of the way the various mining statutes are written, there is little room for public participation at these initial stages. This is a cause for concern because it implies a certain trajectory to the process, even before the public has had a chance to comment on a project. It is, however, understandable, given the governments’ concern with promoting economic growth. Environmental protection, on the other hand, is largely incorporated by reference to the relevant national environmental statutes.

In Nigeria, for example, the law dictates that mining leaseholders, “prior to the commencement” of operations, shall submit to the Mines Environmental Compliance Department an “environmental impact assessment statement approved by the Federal Ministry of the Environment.” This process is mirrored in both


97. There are obviously questions about how land is acquired for such purposes and communities are resettled, but due to the restrictions of the paper these issues cannot be addressed here.

Uganda and Ghana. The Nigerian mining legislation refers, in turn, to the Environmental Impact Assessment Decree, which sets out the requirements for an EIS. These are remarkably similar to the requirements in the United States established under NEPA: they include a description of the proposed activities, “an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and long-term effects”; mitigation measures, together with an assessment of those measures; “an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information”; and an “indication” of whether other parties outside of Nigeria will be adversely affected. Similar provisions are found in the Environmental Impact Assessment Regulations (1998) of Uganda and in the Environmental Assessment Regulations (1999) (“GEAR”) of Ghana, with numerous variations. In all three cases, the process of developing an EIS is supposed to provide for public participation.

99. Section 108(1) of the Mining Act (2003) of Uganda states: “Every holder of an exploration licence or a mining lease shall carry out an environmental impact assessment of his or her proposed operations in accordance with the provisions of the National Environment Statute.” Mining Act (2003), § 108(1) (Uganda).

100. Section 18(1) of the Minerals and Mining Act (2006) Ghana states that “the holder of the mineral right shall obtain the necessary approvals and permits required from the Forestry Commission and the Environmental Protection Agency for the protection of natural resources, public health and the environment.” Minerals and Mining Act (Act No. 703/2006), § 18(1) (Ghana). Section 1(2) of Ghana’s Environmental Assessment Regulations of 1999 requires a permit for mining, which in turn requires an environmental impact assessment, as per section 1(3). Environmental Assessment of Regulations (1999), § 1(2)-(3) (Ghana).


102. Id. § 4(d).

103. Id. § 4(e).

104. Id. § 4(f).

105. Id. § 4(g).


107. See Environmental Assessment Regulations (1999), §§ 12, 14 (Ghana).

108. For example the Environmental Impact Assessment Regulations (1998), § 14(e) (Uganda) requires “an economic analysis of the project,” whilst § 12(g) of the Environmental Assessment Regulations (1999) (Ghana) requires the EIA to include “the potential impact on the health of people.”

109. National Environment Act (1995), § 2(2) (Uganda), provides a good example. It establishes the governing principles which are supposed to guide the drafting of the EIS: “The principles of environment management referred to in subsection (1) are—(a) to assure all people living in the country the fundamental right to an environment adequate for their health and well-being; (b) to encourage the maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment” and (c) sustainability. In Nigeria, § 7 of the Environmental Impact Assessment Decree (No. 86) of 1992 states that “the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity.”

The process in each case begins with notifying communities that are likely to be affected by the proposed project. In Nigeria, mining projects require a “mandatory study,” meaning a full EIS. After receiving a mandatory study report from an applicant, the NESREA is required to provide notice as to when the report will be available, where the report can be obtained, and the deadline for filing comments on the “conclusions and recommendations of the report.” Initial reports are made available in at least five locations—usually government managed facilities—and must be made available for a period of twenty-one working days. An initial problem with these requirements is that they do not prevent certain exclusionary practices. First, the notices are in written form, which excludes those who cannot read or write: Adult literacy in Nigeria was measured at 51.1% between 2008 and 2012. Second, the official language is English, which means that whether an EIS is published in a local idiom is discretionary. In a resource-constrained agency, the likelihood of translations being made on a regular basis is low, especially considering the large number of dialects spoken in Nigeria. A third related issue is whether those who are given notice are able to adequately engage with the material.

The Ghanaian process is much like Nigeria’s except that the requirements are slightly more specific: The agency must “publish for 21 days a notice...”

110. Section 16 of the Nigerian Environmental Impact Assessment Decree of 1992 states that “Whenever the Agency decides, that there is the need for an environmental assessment on a project before the commencement of the project the environmental assessment process may include—(a) a screening or mandatory study and the preparation of a screening report.” Environmental Impact Assessment Decree No. (86) (1992), § 16 (Nigeria), available at http://www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%2086%201992.htm.

111. Id. § 25(1)(c).


113. Id.


115. These problems are well summarized by a Nigerian commentator: “The public is largely indifferent and poorly informed about the potential negative environmental effects, and especially the long-term impact. The training of personnel, the guidelines, the discussions on EIA are usually in English. Quite often, the affected public is not adequately informed of the issues at hand or able to interpret the EIA reports.” Chris. O. Nwoko, Evaluation of Environmental Impact Assessment System in Nigeria, 2 GREENER J. ENVTL. MGMT. PUB. SAFETY 22, 28 (2013), available at http://www.gjournals.org/GJEMPS/GJEMPS%20PDF/2013/January/Nwoko.pdf.

116. “[A]ctual practice of EIA has not yet evolved into substantial public participation, particularly in rural areas, where most of the populace are not educated (and are therefore unaware of EIA provisions). Even in the urban areas, most of the populace are [sic] unaware of their rights of objection to environmentally unfriendly prospective projects in the 21-day public displays of draft EIAs. This is probably due to the way EIA legislations were jump-started in 1992, without a concurrent educative build-up of the populace as was probably the case in Canada. Presently, it appears that much needs to be done to empower the public through educating them on their rights and stimulating their participation.” Olusegun A. Ogunba, EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings, 24 ENVTL. IMPACT ASSESSMENT REV. 643, 652 (2004).
environmental impact statement in the mass media and also post at appropriate places such parts of the environmental impact statement as it considers necessary.”117 The criticisms leveled at the Nigerian system are similarly applicable: “[T]he extent of public participation has been average at best, partly due to low levels of [public] knowledge regarding proposed projects and upcoming hearings regarding projects.”118 Commentators have suggested that “[p]art of the problem could arise from the lack of specification regarding the mode or medium of publication regarding an upcoming EIA.”119

Some of the defects identified in the Nigerian and Ghanaian systems could be addressed by adopting measures similar to those in Uganda. These require the agency to both invite the “general public” to comment on the proposed project,120 and to invite “comments from persons specifically affected by the project.”121 The latter demands that the invitation for comment “shall be made in a newspaper having local circulation in the area where the project shall be located and on other mass media . . . and shall be in languages understood by the majority of the affected persons.”122 The agency has less discretion in how it notifies local communities, and provides more safeguards to ensure that they are not excluded from the process. Regardless, many of the same issues as those present in Nigeria and Ghana have emerged: “With a literacy rate of 69 per cent [sic] . . . many Ugandans cannot access environment information because of language . . . A study carried out in Masindi and Mbale districts discerned that many users feel that the information contained in the Resource Centres is for those of higher literacy levels.”123 In summary, the main concerns are that agencies are not providing notice in a language that can be understood by the majority of the local population, and even when it is translated, it is usually only provided in writing.

D. COMMENT

Linked to the issue of notice is the opportunity for affected communities to comment. In all three countries, the period in which the public is given an opportunity to submit comments is limited to twenty-one working days,124 which

117. Environmental Assessment Regulations (1999), § 16(1) (Ghana).
118. Abotsi, supra note 50, at 153.
119. Id.
121. Id. § 20(1).
122. Id. § 20(2).
124. The Environmental Assessment Regulations (1998) of Ghana, § 16(1), and the Environmental Impact Assessment Regulations (1998) of Uganda § 20(4) are clear about this. The Nigerian Environmental Impact Assessment Decree of 1992 potentially provides more time. Section 8 provides that the “Agency shall not give a decision as to whether a proposed activity should be authorised or undertaken until appropriate period has
seems insufficient for affected communities to draft and file a comprehensive set of responses to the issued reports. If an adequate EIS is provided, a great deal of technical and scientific data will be presented, which—in the case of Nigeria and Uganda—should be accompanied by a summary.\footnote{125} If communities are to be given an opportunity to adequately review and respond to this data, they will likely need more time.\footnote{126}

Related to some of the problems mentioned at the notice stage, the manner in which comments are to be submitted may again cause problems due to the low level of education and weak capacity of local communities. This is because the comments that are to be filed with the respective agencies are limited to written form. This makes sense in the United States where literacy rates are extremely high and means of communication are easily accessible. However, in many developing countries, including those covered here, literacy rates remain relatively low,\footnote{127} and those in rural areas who are literate tend to read and write at lower levels.\footnote{128}

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elapsed to consider comments pursuant to sections 7 and 12 of this Decree.” Environmental Impact Assessment Decree No. (86) (1992), § 8 (Nigeria), available at http://www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%201992.htm. However, according to Adomokai and Sheate, once notices have been posted the public has “21 working days before the public review is held.” Adomokai & Sheate, \textit{supra} note 112, at 499.


\footnote{126} Adomokai and Sheate say that this is partly addressed by experts/technicians who came from the affected communities. \textit{See} Adomokai & Sheate, \textit{supra} note 112, at 501. However, arrangements such as these are irregular and depend upon the goodwill of qualified indigenees. They in no way provide a systemic solution.

\footnote{127} The total adult literacy rate between 2008 and 2012 in Ghana was calculated to be 71.5\%. \textit{At a Glance: Ghana, United Nations Children’s Fund}, http://www.unicef.org/infobycountry/ghanat_statistics.html (last updated Dec. 26, 2013). In Uganda, the rate was 73.2\% \textit{At a Glance: Uganda, United Nations Children’s Fund}, http://www.unicef.org/infobycountry/uganda_statistics.html (last visited Sept. 3, 2014).

\footnote{128} “Rural residents have lower literacy levels than urban residents, whether measured from census data or from household data. The disparities between urban and rural populations tend to be greater in those poorer countries in which overall literacy rates are comparatively low. In large measure, the influence of urbanization on literacy acquisition and retention reflects differences in access to formal schooling, higher-quality education and non-formal education programmes. Urban residents, in contrast to rural residents, tend also to reside in more literate environments, which are more demanding of literacy skills in written languages, and which offer greater rewards to those who possess them.” \textit{Education for All Global Monitoring Report: Literacy for Life, United Nations Educ., ScI. Cultur. Org.,} 16, 171 (2006), available at http://unesdoc.unesco.org/images/0014/001416/141639e.pdf (last visited Sept. 3, 2014). The World Bank’s research is similar in its assessment: “In 2007, only 57 percent of rural compared to 75 percent of urban grade 6 students achieved competency in reading. Only 18 percent of rural relative to 24 percent of the urban children achieved competency in mathematics. Urban-rural literacy differentials were as high as 40 percent.” \textit{Global Monitoring Report 2013: Sub-Saharan Africa, Rural-Urban Dynamics and the Millennium Development Goals, The World Bank Grp.} 1, 1 (2013), http://sitesources.worldbank.org/INTPROSPECTS/Resources/334934-1327948020811/8401693-135575354515/8980448-136612085455/SSA_RegionalBrief_GMR2013_En.pdf (last visited Sept. 3, 2014).}
E. PUBLIC HEARINGS AND FINAL DECISIONS

Once they have been submitted, the agencies consider comments and make a determination about the EIS. In Nigeria, after comments have been considered, the agency has three options: (1) authorize the project (with or without conditions), or if “the project is likely to cause significant adverse environmental effects that may not be mitigable; or public concerns respecting the environmental effects of the project warrant”;129 it may (2) require further review by an internal panel; or (3) recommend mediation between the parties. The agency seemingly has a great deal of discretion, since there are no objective standards to which it is required to refer for guidance. This makes review of the decision more difficult, since there are no specific criteria with which to evaluate it—only the broad goals of the organic act and environmental regulations.

In terms of opportunity for public participation, the most important mechanism is the review panel, which shall: “(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public; [and] (b) hold [a] hearing in a manner that offers the public an opportunity to participate in the assessment.”130 The panel provides an opportunity for the public to attend hearings and give oral testimony, which may be very important for communities with illiterate or semi-literate members. It also has significant authority to call witnesses and demand information, much like the powers of a court. The comments and testimony collected during this review process are used to inform a final report, which is then submitted to the agency for an ultimate decision. Although it is likely that the panel’s recommendations are usually followed, the agency seemingly has significant discretion, as it is the “opinion of the Agency”131 that is determinative. Although there are opportunities for the public to participate and raise their concerns, the final decision as to whether a project proceeds will be up to the Environmental Standards and Regulations Enforcement Agency. This is not necessarily a problem, as agencies are—at least in theory—well positioned to determine the appropriate balance between economic development and environmental protection. However, it seems that too much discretion is given to the NESREA in this instance,132 since there are no objective factors to guide decision-makers.

In Ghana, the discretion of the Agency as to when a public hearing should be held is slightly more circumscribed. Prior to final authorization a public hearing should be convened if: (1) there “appears to be great adverse public reaction;”

130. Id. § 37.
131. Id. § 40(1)(a) (emphasis added).
132. Other criticisms of the EIAD are that too much discretion is granted to the President, as s/he can waive the need for an EIS if s/he “is of the opinion that the environmental effects of the project is likely to be minimal.” Environmental Impact Assessment Decree No. (86) (1992), § 15(1)(a) (Nigeria), available at http://www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%2086%201992.htm.
(2) it results in the displacement of a community; or (3) the agency considers it necessary.\(^{133}\) Although (1) and (3) still provide the agency with discretion, (2) is an objective factor, and one that is directly relevant to mining, since operations often implicate a large geographic area. An important aspect of the public hearing requirement in Ghana is that the panel appointed to oversee the hearings and write the final report should include members of the local area: “At least a third of the panel members shall be residents of the geographical area of the proposed undertaking and shall reflect representation of varying opinions, if any, on the subject of the hearing.”\(^{134}\) However, because the panel is entirely appointed by the head of the Environmental Protection Agency,\(^ {135}\) there is still a great deal of opportunity for the process to be controlled and directed. Furthermore, this otherwise participatory process is undermined by the requirement that all “recommendations [be made] in writing to the Agency within a period of not less than fifteen days from the date it starts hearing representations.”\(^ {136}\) It is questionable whether this is sufficient time for all interested persons to adequately air their views, or for the panel to evaluate those views and issue a set of recommendations on which a considered final decision can be made. The agency appears to have a great deal of discretion to authorize an EIS, whether or not significant adverse environmental effects are likely to result from the action.\(^ {137}\) However, the Ghanaian system does provide for a procedural challenge. Under Section 27(1) of the environmental regulations, a “person aggrieved by a decision or action of the Agency may submit a complaint in writing to the Minister,” which has the effect of triggering an internal review. Although this is not an independent judicial tribunal, it is still a limited procedural safeguard within the EIS procedure. However, even though the review panel would seem to be independent—it is comprised of a range of senior political, civil service, and legal representatives who are supposed to check one another\(^ {138}\)—it is unlikely such meetings would be convened very often. Coordinating the schedules of the aforementioned actors and officials would be difficult, considering their positions

\(^{133}\) Environmental Assessment Regulations (1999), § 17(1) (Ghana): “The Agency shall hold a public hearing in respect of an application where: (a) upon a notice issued under regulation 16 there appears to be great adverse public reaction to the commencement of the proposed undertaking; (b) the undertaking will involve the dislocation, relocation or resettlement of communities; or (c) the Agency considers that the undertaking could have extensive and far reaching effect on the environment.”

\(^{134}\) Id. § 17(4).

\(^{135}\) Id. § 17(2).

\(^{136}\) Id.

\(^{137}\) Id. § 1(2) (“No person shall commence activities in respect of any undertaking which in the opinion of the Agency has or is likely to have adverse effect on the environment or public health unless, prior to the commencement, the undertaking has been registered by the Agency in respect of the undertaking.”).

\(^{138}\) Section 27(2) of the Environmental Assessment Regulations 1999 (Ghana) establishes that the “Minister shall within 14 days of receipt of a complaint appoint a panel composed of a representative of each of the following: i) the Ministry of the Environment not below the rank of a Director; ii) the Attorney-General’s Department not below the rank of a Senior State Attorney; iii) the Ministry with responsibility for the undertaking; iv) and two persons with specialization in the relevant field of the undertaking concerned.”
and responsibilities. An issue would have to be of sufficient importance for the selected members to meet, meaning that complaints they consider to be minor or trivial, but which may very well have merit, could be ignored.

Just as with the subject of notice, the Ugandan regime seems to address many of the deficiencies that exist in Nigeria and Ghana. First, before a final decision is made, the executive director of the agency “shall consider” the EIS and all of the comments submitted\(^\text{139}\) and, “where there is a controversy or where the project may have transboundary impacts,” they “shall call for a public hearing.”\(^\text{140}\) The language is more imperative and provides for less agency discretion than in the other two regimes, though there is no categorical requirement for a hearing when people are displaced, as there is in the Ghanaian system. Secondly, other procedural safeguards ensure the public is fully informed of the upcoming hearing. A convenient location must be selected in order to provide an opportunity for those who are most likely to be adversely affected to attend,\(^\text{141}\) and sufficient notice of the event must be provided—similar to that in the EIS notice requirements.\(^\text{142}\) Third, the presiding officer has a full thirty days following the completion of the hearing to submit a report,\(^\text{143}\) which is far better than Ghana’s fifteen days. It is also potentially superior to Nigeria’s system: Since the Nigerian environmental regulations are silent on the procedural requirements of when an agency must submit a final report, an agency could choose to provide more or less time for submission.\(^\text{144}\) Also, as in Nigeria and Ghana, the executive director in Uganda has substantial discretion when appointing a “presiding officer,”\(^\text{145}\) though in Uganda, they must at least be “suitably qualified.”\(^\text{146}\) There are no such requirements in Nigeria or Ghana. One of the most distinguishing and important aspect of the Ugandan regime is that it provides a set of factors on which the basis of a final decision is to be made, including the “validity of the predictions” of the EIS,\(^\text{147}\) submitted comments,\(^\text{148}\) the report of the presiding officer (if relevant),\(^\text{149}\) and the “analysis of the economic and social cultural impacts of the project.”\(^\text{150}\) The act governing the Ugandan National Environment Management Authority does provide for the possibility of internal review of a decision,\(^\text{151}\) but the

\(^{139}\) Environmental Impact Assessment Regulations (1998), § 21(1) (Uganda).
\(^{140}\) Id. § 21(2).
\(^{141}\) Id. § 22(6).
\(^{142}\) See id. § 22(7).
\(^{143}\) Id. § 22(8).
\(^{145}\) See Environmental Impact Assessment Regulations (1998), § 22(3) (Uganda).
\(^{146}\) Id. § 22(3).
\(^{147}\) Id. § 24(1)(a).
\(^{148}\) Id. § 24(1)(b).
\(^{149}\) Id. § 24(1)(c).
\(^{150}\) Id. § 24(1)(d).
\(^{151}\) National Environment Act (1995), § 104(a) (Uganda) “[W]here this Act empowers the authority or any
environmental regulations are silent on the matter. The most concerning issue, then, is that agencies are provided with too much discretion when deciding whether or not to hold a public hearing or authorize an EIS.

F. MONITORING AND ENFORCEMENT

As briefly noted above, in Nigeria, NESREA can require mitigation measures. If NESREA finds that they are required, it “shall ensure that any mitigation measures that the Agency considers appropriate are implemented.”152 The agency thus has a positive obligation to actually follow up and monitor the actions of leaseholders, which the organic law makes clear: the agency “shall . . . enforce compliance with laws, guidelines, policies and standards on environmental matters.”153 These same requirements apply to an authorized EIS. NESREA is facilitated in this through its authority to pursue civil and criminal penalties for regulatory breaches.154 In practice, however, monitoring and enforcement by the agency appears to be quite poor. One Nigerian commentator who surveyed government officials responsible for monitoring and oversight found that the “implementation of an environmental management plan, mitigation measures and post-decision monitoring are some of the weakest facets of Nigeria’s EIA system.”155 Moreover, there is no mention of a community’s right to play a role in the monitoring, or to bring a complaint in the case of non-compliance in the environmental impact assessment regulations.

However, under Nigerian mining legislation the leaseholder is required to negotiate a community development agreement (“CDA”) with local residents. The CDA “shall specify appropriate consultative and monitoring frameworks between the mineral titleholder and the host community, and the means by which the community may participate in the planning, implementation, management and monitoring of activities carried out under the Agreement.”156 If properly negotiated and applied, this mechanism could be highly effective in supplementing agency enforcement, since the Nigerian Mines Environmental Compliance Department (“NMECD”) is obliged to “enforce compliance by holders of mineral title with all environmental requirements and obligations established pursuant to this Act.”157 An additional safeguard is provided under Section 121 of


154. Id. §§ 20-22.


157. Id. § 18(b).
the Minerals and Mining Act. It establishes an Environmental Protection and Rehabilitation Fund (“EPRF”), which the mining leaseholder is required to pay into in order to guarantee that the environmental obligations it undertakes are ultimately satisfied. However, once again the affected communities are not involved in determining the scope of the fund, or how the monies are to be spent. This is left to the Minister, who establishes the fund and appoints a trustee.

In Ghana, a leaseholder must provide an “environmental management plan,” which sets out steps that “are intended to be taken to manage any significant environmental impact that may result from the operation of the undertaking.” To demonstrate compliance, the leaseholder must submit annual environmental reports, which can then be compared with the established plans. Because one of the core functions of GEPA is “to ensure compliance with the laid down environmental impact assessment procedures in the planning and execution of development projects, including compliance in respect of existing projects,” the responsibility of enforcement falls on the agency. In pursuance of this, it can use its authority to issue “enforcement notices,” which can lead to “fines and imprisonment” for leaseholders if they fail to comply. In addition to the monitoring of mining operations, it appears that the agency is also responsible for overseeing the eventual reclamation of the mined area. This is not explicit in the environmental regulations, but since there is no mention of any such requirements in the national mining legislation, it remains the default regime, and monitoring and reclamation arrangements are thus determined at the EIS stage. Overall, there seems to be relatively little room for public participation in the enforcement process, meaning that the usual problems arise: government agen-

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158. Id. § 121(4) (“Every holder of a mineral title shall commence contributions to the Environmental Protection and Rehabilitation Fund in accordance with the amounts specified in the approved Environmental Protection and Rehabilitation Program not later than one year from such approval.”).

159. Id. § 121(3) (“The trustees appointed pursuant to subsection (2) of this section shall operate the fund in accordance with the provisions of the Trustees Investments Act, Cap. T22 Laws of the Federation of Nigeria, 2004 or amendments thereof.”).

160. Id. § 121(1) (“The Minister shall establish an Environmental Protection and Rehabilitation Fund for the purpose of guaranteeing the environmental obligations of holders of mineral titles as provided under this Act.”).

161. Environmental Assessment Regulations (1999), § 24(4) (Ghana). Fines and imprisonment may also be applied under § 29.


163. Id. § 13.

164. It should be noted that the Ghanaian government has recently issued a set of mining regulations, as per § 110 Minerals and Mining Act (2006) of Ghana. These regulations are apparently currently unavailable to the public, though it seems that they would not be immediately relevant: A 2012 report from PriceWaterhouseCoopers describes the subjects of the new regulation as, “the recruitment of expatriates and promotion of local workforce; the procurement of locally produced goods and services; and additional liscensing and [financial] reporting requirements.” Local Content Requirements for the Mining Sector—Introduction of L.I. 2173, PRICEWATERHOUSECOOPERS (PriceWaterhouseCoopers, Ghana) July 2012, at 1.
cies’ inability to effectively monitor and oversee operations due to “inadequate personnel and logistics and budgetary constraints.” The only mechanism through which the public may have an opportunity to petition the agency is Section 27(1) of the GEAR, which provides that a “person aggrieved by a decision or action of the Agency may submit a complaint in writing to the Minister.” This is of limited value in enforcement because it is only an action or decision that can be objected to, not an omission.

In Uganda, under the environmental regulations NEMA is required to perform an environmental audit of authorized projects on an annual basis. This requirement is supported by Section 23 of Uganda’s National Environment Act, which requires the agency to monitor environmental impacts, including “the operation of any industry, project or activity with a view to determining its immediate and long-term effects on the environment.” This language covers large-scale mining operations. The threat of fines and imprisonment are used for purposes of enforcement, though for larger companies the amounts involved are insignificant: the largest fine is thirty-six million Ugandan shillings, or roughly $14,250 USD, for “[o]ffences relating to hazardous waste, materials, chemicals and radioactive substances.” Enforcement of relevant environmental regulations is largely done through the central authority in Entebbe, supported by three regional offices. However, these offices lack the requisite resources to be effective. Among the challenges are “insufficient capacity of law enforcers, both in terms of environmental law and management expertise[,] and equipment and facilitation.” In addition to the National Environment Act, the Mining Act contains provisions with important positive obligations for mining leaseholders, such as the requirement that they submit to NEMA an “environmental management plan indicating the type and quality of wastes to be generated from any exploration or mining operations under this Act and the method of its final disposal.” Leaseholders are also required to “carry out an annual environmental audit [and] keep records describing how far the operations conform to the approved environmental impact assessment.” For reclamation of mined land,

166. Environmental Assessment Regulations (1999), § 27(1) (Ghana).
168. Id. § 22(3).
169. Id. § 23(1)(b).
170. Id. § 99.
174. Id. § 108(3).
the leaseholder is similarly required to submit a plan for the area’s restoration, to include the “reinstatement, levelling, re-vegetation, reforesting and contouring of the affected land;” the filling of shafts and tunnels; and “the use to which the land is proposed to be put” following operations. To ensure that these obligations are met, the Commissioner of the Geological Survey and Mines Department "may require . . . an environmental performance bond." Unlike in Nigeria, this is not compulsory, as indicated by the use of the term “may.” This could substantially weaken the value of the mechanism, but it remains a potential tool, which GSMD could use to ensure that environmental obligations are met. Unsurprisingly, the various environmental protection agencies are considered relatively ineffective enforcers of environmental regulations, mainly because they lack the requisite resources. Including communities in the process could mitigate this problem, but there is very little room for them to take part, either officially or unofficially.

G. JUDICIAL REVIEW OF AGENCY ACTION

In their organic statues, provisions exist for the various environmental protection agencies, as corporate bodies, to sue and be sued. This would seem to suggest that agency action—or inaction, in the face of a statutory obligation—could be challenged, yet in practice this does not appear to be the case. There is a dearth of litigation wherein individuals or communities have brought suits against any of the environmental agencies for their failure to comply with, or enforce, applicable regulations or laws. In Uganda this may be because the National Environmental Act purports to exclude judicial review of agency decisionmaking; however, the way the statute is worded suggests that this applies only to final agency decisions—in other words, the outcome of the process. It would not seem to exclude review of the agency if it fails to follow statutorily-mandated procedural requirements. One explanation for the lack of

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175. Id. § 110(1).
176. Id. § 110(2)(b)(i).
177. Id. § 110(2)(b)(ii).
178. Id. § 110(2)(c).
179. Id. § 112(1).
180. National Environment Act (1995), § 4(3) (Uganda) is representative of all of the organic acts: “The authority shall, in its own name, be capable of suing and being sued and doing and suffering all acts and things as bodies corporate may lawfully do or suffer.”
181. In all of the literature surveyed, there was not a single case in which one of the environmental agencies was challenged on procedural grounds.
182. National Environment Act (1995), § 104(a) (Uganda) (“[W]here this Act empowers the authority or any of its organs to make a decision, the decision may be subject to appeal within the structure of the authority in accordance with such administrative procedures as may be established for the purpose, and the decision shall not be called into question by any court.”).
183. Id. § 104(b) (“[N]othing provided for in this section impairs the High Court in the exercise of its supervisory jurisdiction.”).
judicial support for such complaints is that the organic statute limits the right to sue for environmental damage and enforcement to the agency.\textsuperscript{184} As one commentator says, NEMA “leaves out the right of individuals and groups of individuals within the community to enforce their rights through access to courts and only vests this right in the institutions that are established in the... statute.”\textsuperscript{185} This would similarly apply to the environmental protection statutes in Nigeria and Ghana, which both delegate authority to promulgate and enforce environmental regulations to their respective environmental protection agencies. Such an explanation makes more sense when one looks at the reluctance with which courts provide standing to plaintiffs in private and public nuisance claims in the countries covered.\textsuperscript{186} An additional reason is provided by Faure and Pessis who, commenting on the Ghanaian system, observe that “[b]esides the problem of the lack of accessibility, which has resulted in very few environmental-protection based suits, the courts have also not exhibited a pro-environment stance as against socio-economic development.”\textsuperscript{187} Ultimately, it seems that because none of the relevant statutes explicitly provide for review of agency action—at least as they relate to the various requirements of the EIS procedure, monitoring, or enforcement—the courts prefer not to interfere with the agencies’ operations.\textsuperscript{188} This argument is supported by the fact that judicial review is expressly authorized in some of the other statutes.

In contrast to the broader environmental statutes, both Ghanaian and Ugandan mining legislation contain provisions permitting a form of judicial review, but the Nigerian Minerals and Mining Act does not. In Ghana, a property owner\textsuperscript{189} can claim compensation under Section 74 of the Minerals and Mining Act of Ghana for a wide variety of reasons. If a claimant is dissatisfied with the compensation offered, he or she “may apply to the High Court for a review of” the initial determination.\textsuperscript{190} This is of course unsatisfactory for individuals and communities seeking to enjoin a specific action until disputed environmental issues have been satisfactorily resolved, but it provides a second-best option which allows

\begin{itemize}
\item \textsuperscript{184} Id. § 3(3) ("In furtherance of the right to a healthy environment and enforcement of the duty to maintain and enhance the environment, the authority or the local environment committee so informed under subsection (2) is entitled to bring an action against any other person whose activities or omissions have or are likely to have a significant impact on the environment to . . . ").
\item \textsuperscript{185} Rose Mwebaza, \textit{Improving Environmental Procedural Rights in Uganda, in 43 IUCN ENVTL. LAW & POL’Y, ENVIRONMENTAL LAW IN DEVELOPING COUNTRIES SELECTED VOL. II 17, 47 (Francoise Burhenne-Guilmin ed., 2004).}
\item \textsuperscript{186} See ADAMU KYUKA USMAN, ENVIRONMENTAL PROTECTION LAW AND PRACTICE 220-30 (Abada Press Ltd., 2011); PROMISE ADEWUSI, THE ENVIRONMENT: LAW AND MANAGEMENT IN NIGERIA 81-85 (Hybrid Consult, 2006).
\item \textsuperscript{187} Abotsi, \textit{supra} note 50, at 155.
\item \textsuperscript{188} They may be a concerned about opening a Pandora’s Box of litigation, since agencies regularly fail to comply with procedural requirements. In other words, there may be policy considerations involved in the courts’ reluctance to address agencies’ procedural failings.
\item \textsuperscript{189} This could include a holder of customary title.
\item \textsuperscript{190} Minerals and Mining Act (Act No. 703/2006), § 75(2) (Ghana).
\end{itemize}
communities to claim compensation for their losses. A somewhat better approach may be found in Section 119(1) of Uganda’s Mining Act, which provides that “any person aggrieved by the Minister’s rejection of a request for judicial review,” or their “decision or order,” “or any other act or omission,” may “apply to the High Court for judicial review.”

It also applies to acts or omissions by the GSMD Commissioner, who has broad authority to oversee much of the act. This means that environmental monitoring and enforcement provisions under the UMA could be open to judicial review, which would include review of the “environmental management plan,” the “environmental restoration plan,” specific reclamation actions, and the “environmental performance bond.”

The problem with this system is that it provides an opportunity for communities to participate in only part of the process—EIS procedures and NEMA monitoring and enforcement remain outside of the scope of judicial review. Overall, none of the regimes provide sufficient opportunity for communities to challenge agencies’ action or inaction, which is arguably the biggest obstacle to effective public participation.

V. CONCLUSIONS AND RECOMMENDATIONS

A. SUMMARIZING THE CHALLENGE

As the preceding analysis demonstrates, all three systems are flawed in some way, with insufficient opportunities for the public to meaningfully contribute to the outcome of a decision. This usually results in too much discretion being granted to agencies, providing little opportunity for members of the public to challenge outcomes, even when statutorily established procedural requirements are not followed. The problem is further compounded by the fact that enforcement of environmental standards is so poor, though this is understandable when one considers the resource constraints faced by the various agencies. Governments in Nigeria, Ghana, and Uganda have far more obligations than resources, and environmental protection is less imperative than health care, education, infrastructure, or industry. But as has been established, and implicitly recognized in the various systems, there is no need to depend solely upon a system of command and control. The challenge is to find a way to strengthen existing procedures, especially those that provide for public participation, as a means to protect both the environment and communities. Ultimately, appropriate measures

192. Id.
193. Id. § 109(3).
194. Id. § 110.
195. Id. § 111.
196. Id. § 112.
and mechanisms must be guaranteed at each stage, and they must be complementary and amount to a comprehensive system. The first set of recommendations will be procedural and focused upon addressing the deficiencies in the systems as they stand, whereas the second will focus upon some of the broader societal issues that must be addressed.

B. PROCEDURAL RECOMMENDATIONS

1. Notice

To address the deficiencies in the Nigerian and Ghanaian systems, similar measures to those in Uganda should be adopted. Ugandan law has clear requirements for information to be provided in an open and inclusive manner, and explicitly recognizes the need for local languages and dialects to be used in communications (including radio) with the affected communities. Ultimately, the purpose should be to provide notice in a manner that is likely to effectively reach the greatest number of people in the affected community. Therefore, in addition to requiring similar measures to those in Uganda, some form of public presentation, akin to a “town hall meeting,” could be implemented, especially for isolated rural populations that may not otherwise be able to access the relevant information. Such arrangements are not uncommon in Sub-Saharan Africa and can be highly effective in terms of informing, and engaging with, communities.

2. Adequate Information

The environmental protection agencies must ensure that draft environmental impact statements are released in their entirety to allow for full review of the various issues by the local communities. To make this information more accessible, a non-technical summary also must be provided.197 This will require improved scrutiny by the respective agencies, as staff will have to ensure that EIS’s submitted by developers meet all of the requirements. The dividends in terms of community participation and buy-in are more than worth the additional diligence, as communities will be far less likely to oppose a project down the line if they have initially been given a real opportunity to engage in the process.

3. Comment

To ensure that communities are able to effectively communicate and register their concerns with the agencies tasked with environmental protection, a proce-

dural safeguard that provides for oral submissions from community members should be introduced. Agency officials could do this by canvassing local communities and recording their concerns for later consideration. This will help facilitate the comment process by ensuring that illiterate and under-educated communities are able to meaningfully contribute. Relatedly, the period in which comments are accepted should be extended. Currently, all three regimes require comments to be submitted within twenty-one working days if they are to be considered in the final EIS, which is far too short a period of time for comments to be drafted and submitted.\(^{198}\)

4. Public Hearings

To cabin the Nigerian and Ghanaian agencies’ discretion regarding when to hold a public hearing—an important safeguard to provide for full review of contentious projects—wording more in line with the Ugandan regulations should be adopted. The Ugandan system provides a better safeguard because the trigger for a hearing is the existence of a controversy, whereas in Nigeria and Ghana a controversy must first reach a certain threshold,\(^{199}\) determined by the agency, before a public hearing is required. Of course the term “controversy” is itself open to interpretation and manipulation, but it is a more objective standard, which is important if the goal is to ensure that public concerns and grievances are adequately considered. If a controversy is to reach a certain threshold before a hearing is held, there should be a set of objective standards for its trigger. An example of such would be a requirement that the agency receive a certain number of objections to the project before holding a compulsory public hearing. Agencies could still retain discretion to hold hearings where objective factors were not met if they felt the situation warranted it.\(^{200}\)

\(^{198}\) In the United States, a minimum of forty-five days is given to those who might want to comment on a project and its effects. James Rasband et al., Natural Resources Law & Policy 264 (Robert C. Clark et al. eds., 2d ed. 2009).

\(^{199}\) Section 17(1) of the Environmental Assessment Regulations (1999) of Ghana states that the “Agency shall hold a public hearing in respect of an application where . . . upon a notice issued under regulation 16 there appears to be great adverse public reaction to the commencement of the proposed undertaking.” In Nigeria, Section 26(a)(i)(ii) of the Environmental Impact Assessment Decree of 1992 establishes that “After taking into consideration the mandatory study report and any comments filed pursuant to section 19(2), the Council shall . . . refer the project to mediation or a review panel in accordance with section 25 of this Decree where, in the opinion of the Council . . . public concerns respecting the environmental effects of the project warrant it.” Environmental Impact Assessment Decree (No. 86) (1992), § 26(a)(i)(ii) (Nigeria), available at http://www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%2086%201992.htm (emphasis added).

\(^{200}\) In the United States, the notice and comment requirements are important because they provide a public record, which can potentially be used in judicial proceedings to challenge agency decisions. They also help to inform members of the public more broadly who, in turn, can exert political pressure on federal and state representatives to influence the final decision.
5. Final Decision

To address the potential problem of agencies exercising too much discretion when making a final determination regarding whether to authorize an EIS, they should first be required to actually consider certain factors, including the scientific data, comments, and testimony. This means agencies should also be required to justify their decision in relation to specific factors in a formal document so as to guard against arbitrary decisionmaking. The second measure that should be introduced in Nigeria and Uganda is the mechanism for submitting and reviewing complaints, as provided for in the Ghanaian system. As previously mentioned, this is not an independent judicial tribunal, but it could provide a limited procedural safeguard if implemented correctly. When combined with the above recommendation that justifications based upon a set of objective criteria be provided for a decision, this mechanism could be relatively effective as a means to ensure regulatory requirements—including the consideration of public comments—are complied with. Although it will be difficult to entirely insulate a reviewing body from political influence in any of the countries covered, efforts should be made to ensure that decisions are based upon a review of the record in relation to the agency’s written justification. This could be partially achieved by ensuring that independent civil servants, uninvolved in the initial evaluation of environmental impact assessments, be responsible for any such review, similar to the system in the United States where administrative judges are responsible for initially overseeing such complaints. Such a system would also address the logistical issue of otherwise having to coordinate officials external to the agency, who may not have the time or inclination to review what they consider to be unimportant or trifling matters. To further strengthen this process, the countries could permit appeals to an independent judicial tribunal.

6. Monitoring and Enforcement

One of the most effective ways of ensuring that a project is properly monitored and environmental regulations enforced is for local communities to play an active role in the oversight of mining operations. A system similar to that of Nigeria’s wherein the mining companies and local communities negotiate a community development agreement should be adopted. To prevent companies from

201. Environmental Impact Assessment Regulations (1998), § 24(1) (Uganda) does provide for this, but it is the only regime that does.
203. Section 117 of the Nigerian Minerals and Mining Act mandates a CDA that “shall specify appropriate consultative and monitoring frameworks between the mineral title holder and the host community.” Nigerian Minerals and Mining Act (2007), § 117 (Nigeria).
204. Because the relevant provisions are located in the Minerals and Mining Act (2007) of Nigeria, the community monitoring arrangements are only applicable to mining operations. For the purposes of this paper this is not an issue; however, the mechanism could be easily incorporated into the general requirements of the
dominating negotiations—a potential danger, due to their assumed superior technical and legal knowledge—agencies should be responsible for overseeing the process and ensuring that equitable arrangements are made. Requiring the agency to step in may not seem to fit with the advocated principle of public participation, but this is an instance where such intervention would be beneficial. A way to further improve monitoring would be to require mining leaseholders to provide communities with the requisite skills and equipment to monitor pollution levels. Agencies would still be statutorily required to ensure operators are in compliance, but they would be assisted in their task by local communities. Because communities are the most likely to be adversely affected by pollution, they are also likely to be the most vigilant. This may go some way towards addressing the “absence of EIA follow-up monitoring.”

To further bolster this system there should be a mechanism through which communities can register complaints and violations, as none of the above regimes provide for complaints to be submitted by individuals. A process similar to that found in the Surface Mining Control and Reclamation Act, which requires the agency to investigate a complaint, should be considered. Such a mechanism would allow the complainant—here a representative of a local community—to accompany the agency representative on their inspection or, if they prefer, to remain anonymous.

7. Judicial Review

To address the most glaring lacunae in the various regimes, individuals need to be given the opportunity to challenge an agency’s procedural missteps or failures before an independent tribunal. Such a measure can already be found in the Ugandan Mining Act, although in a more restrictive form. It would be relatively easy to include provisions in the organic statutes of the environmental

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Environmental Impact Assessment Decree (No. 86) of 1992, which would improve public participation and help protect communities more broadly.

205. Section 116(1) of the Nigerian Minerals and Mining Act states that mining leaseholders are supposed to “conclude [agreements] with the host community.” Nigerian Minerals and Mining Act (2007), § 116(1) (Nigeria). A problem with the regime as it stands may be that CDA’s appear to be unmediated by members of the Mines Environmental Compliance Department or the NESREA. This again raises the issue of the relative bargaining power between mining leaseholders and host communities, since there is usually a large disparity in knowledge and resources between the two.


207. One would assume that such complaints would be looked into, but this would be left to the discretion of the agency, since there is no formal positive obligation for such an investigation in these circumstances. Besides, this is hardly an effective procedural safeguard.

208. RASBAND, supra note 198, at 1187.

protection agencies to provide for independent judicial oversight. This would, at least procedurally, provide for a check on the agencies’ otherwise largely unreviewable power and strengthen public participation, as adversely affected groups could hold agencies to their statutory obligations. Concerns of “opening the floodgates” of litigation would be unwarranted; since access to the courts in Nigeria, Ghana, and Uganda is, for most people, limited by their social and financial situation, frivolous cases would be unlikely. Such concerns could also be addressed by narrowing the scope of review available.

C. THE BROADER CHALLENGE

1. Harmonizing Statutory Regimes

As was implicit throughout the analysis of the various regimes, there is a significant amount of overlap between the statutes governing environmental protection and those governing mining. In some cases it makes more sense to pursue environmental enforcement under the mining law, as in the case of judicial review of agency action under the Ugandan Mining Act, than through the relevant environmental statute. Making the environmental and mining regimes clearer and more coherent makes them easier to navigate and therefore easier to access, which facilitates public participation. More importantly, at least for purposes of agency enforcement, harmonizing the overlapping statutory regimes would help to clarify responsibilities. In Nigeria and Uganda, oversight of environmental standards is performed by both the national environmental protection agency and by sub-departments within the national mining ministries.210 Such divisions can lead to competition between agencies, rather than coordination. Olusegun Ogunba, a Nigerian commentator, describes this well: “[a]n official of a State Environmental Protection Agency who was interviewed complained that his agency is rendered superfluous as permit seekers go to obtain approval from the ministry of lands and housing.”211 Worse than this, “[s]ometimes, permit seekers simply ignore one of the agencies,”212 another sign of poor coordination and enforcement. Harmonization of the national regimes will not solve all of the problems, but it will go some way towards simplifying and rationalizing the system, which may prevent competition and duplication of work. The Ghanaian system is better in this sense as it vests all authority over environmental monitoring and enforcement in the environmental protection

210. In Nigeria the Environmental Standards and Regulations Enforcement Agency and the Mines Environmental Compliance Department, of the Mines Environmental Compliance Department, have overlapping remits; whilst in Uganda it is the National Environment Management Authority and the Geological Survey and Mines Department (GSMD), of the Ministry of Energy and Mineral Development, which have similar responsibilities.
211. Ogunba, supra note 116, at 653.
212. Id.
agency. Despite other flaws, obligations and powers of the authorities involved in the mining sector are clearly demarcated.

2. Education and Political Engagement

Requiring MNEs and agencies to provide sufficient information to local communities to ensure their ability to effectively respond and defend their interests is straightforward. But despite the relative ease with which such measures may be implemented, doing so may be of limited value if affected communities remain disengaged from the process—a problem in all three cases. Unfortunately there is no quick fix or discrete program that may address this issue. Broader socio-economic policies with long timelines will be determinative in promoting meaningful public participation, probably through improvements in the educational system.

Relatedly, there is the issue of the political culture of the countries in question. A more engaged approach to the political and administrative process must be fostered to ensure that communities are able—and feel that they are able—to actively participate in the decisionmaking process. Measures to promote political engagement could include rights awareness campaigns, but ultimately governments need to reach out to communities and actively seek their input. In doing so they will promote public engagement, and demonstrate that they are governing in the interests of ordinary citizens. Also, smaller, specific programs may be of some use. There have been some interesting proposals, such as teaching environmental justice together with environmental science, with the purpose of “providing students with sufficient knowledge about all aspects of environmental issues and the skills to use this knowledge to solve problems in their communities.”213 Graduates from such programs will likely go on to work in the field of environmental science and analysis and take with them their understanding of environmental justice, making them more aware and responsive to community needs; or simply more effective as community advocates. And they, in turn, would educate those around them.

3. Capacity Building and Resources

Agencies, no matter where they are located, face resource constraints. Developing countries, in this respect, are more restricted than their counterparts in the industrialized West. Much like the challenges with education and political engagement, the issues of capacity and resources can only be addressed through broader social and economic policies. With regards to Nigeria, Uganda, Ghana, and other countries in similar situations, the best approach would be to identify

where, and how, the agencies tasked with overseeing environmental regulations will be able to achieve the greatest level of enforcement with the limited resources available. This is a basic step, but from the preceding analysis there appears to be many opportunities for efficiency gains using public participation, the most obvious one being incorporating communities into the system of pollution monitoring.

4. Judicial and Legal Reform

Agency decisions are largely unreviewable, significantly weakening the system of public participation.\footnote{214. Although it is not dealt with in the paper, there is also an issue of how the courts deal with the common law actions of public and private nuisance. It seems that in all three jurisdictions it can be quite difficult for individuals to bring such claims, partly for the reasons provided above, but also because courts are reluctant to provide standing—as mentioned previously. This has, and will continue to have, a detrimental effect on individual and community efforts to protect the environment upon which they often rely: “There is lack of public litigation of violation of environmental statutes and no provision of private law remedies for victims of environmental pollution in the form of common law remedies of damages and injunction. This has been one of the major causes of the indiscriminate mining activities in the country.” Yusuf, supra note 206, at 81.} This problem could, however, be remedied by amending agencies’ organic statutes to allow for judicial review—though the governments in question may want to retain control over the process of authorizing specific projects with larger economic benefits. The problem is that, even if this were achieved, there is no guarantee that environmental protection would improve or that communities would be much better off due to the basic logistical and economic barriers to accessing the court system. Most of the communities that would be adversely affected by the practices discussed in this paper are rural and poor, which means they will have difficulty in both reaching legal services—attorneys and courts—and paying for them.\footnote{215. The Uganda Law Society opines, “[A] significant proportion of the Ugandan population lives in abject poverty. This leads to limited access to justice as they cannot pursue the same due to the high related costs. According to the National Development Plan, the Justice, Law and Order Sector (JLOS) notes that the key barriers to access to justice include: growing caseload, physical distance to service institutions, technical barriers, poverty, and lack of access by women and marginalized groups.” The Pro Bono Project of ULS, UGANDA LAW SOCIETY (Apr. 1, 2014), http://www.uls.or.ug/details.php?load=uls&id=110&Uganda%20Law%20Society.} This would be the case even if challenges were permitted at the lower level; however, any challenge to government action would likely have to originate in the “high courts”\footnote{216. As would be the case for bringing judicial review under Mining Act (2003), § 119(1) (Uganda), available at http://faolex.fao.org/docs/pdf/uga85047.pdf (last visited Sept. 2, 2014).}—as they do now—which are even more difficult and expensive to access. So even if members of a community are, in theory, able to challenge an agency’s authorization of an EIS, they may be effectively prohibited from doing so by their geographic and economic circumstances. Once again, it is the economic situation, paired with appropriate social policies, that will determine whether, and how, some of these specific problems are addressed.
CONCLUSION

Each of the regulatory regimes implicitly invokes themes of environmental justice, with public participation playing a central role, including, to some extent, affected communities being involved in the decisionmaking process. The problem is that the measures in existence are insufficient to make up for the systemic deficiencies that persist in Nigeria, Uganda, and Ghana. All three suffer from serious resource constraints, reflected in the various environmental protection agencies’ respective inability to effectively monitor and enforce standards and regulations. Although providing agencies with more resources will go some way towards addressing this issue, it will likely never be enough to ensure complete control. As the emergence of the environmental justice movement in the United States demonstrated, even with comprehensive legislation and well-funded, technically proficient agencies, marginal communities remain vulnerable. Introducing public participation into the regulatory regime was considered to address this issue by providing affected communities with an opportunity to raise issues and intervene throughout the process, including in monitoring and enforcement. By so doing, they not only addressed the concerns of the communities, but also strengthened the system of environmental protection. The same approach adopted in the United States could, with certain variations, be used to address environmental justice issues and compensate for the deficiencies of conventional command and control regulation. This is not a radical concept, and the procedural changes recommended here will certainly not address all of the problems identified within the existing regimes, but enacting them would go some way towards better protecting marginalized groups.

Governments of developing countries—like those of Nigeria, Ghana, and Uganda—are focused on satisfying basic needs and encouraging investment and economic growth. Environmental protection, some argue, diverts valuable resources away from essential services and, more importantly, delays projects or deters investment and inhibits economic growth. Projects may potentially be held up for indeterminate periods of time if the public is given an opportunity to raise concerns, or so the argument goes. The counter to this is that people will always find a way to participate; the question is when, and how. Do governments

217. Domfeh, supra note 165, at 163 (“If regulatory agencies are well resourced to collaborate and cooperate with local leaders and other informal groups, most environmental problems created in the name of development and progress could perhaps be effectively and efficiently managed.”).

218. “There was and still is a basic perception on the part of project proponents that involving communities in the environmental decision-making process opens companies to increased problems and demands from communities, which would in turn lead to increased costs, a prolonged project cycle and extension of delay before commencement of projects.” Adomokai & Sheate, supra note 112, at 499-500 (citing DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987)); Baruch Fischhoff et al., The Public vs. the Experts: Perceived vs. Actual Disagreements About the Risks of Nuclear Power, in THE ANALYSIS OF ACTUAL VERSUS PERCEIVED RISKS (VT. Covello et al. ed., 1981); Anne Shepherd & Christi Bowler, Beyond the Requirements: Improving Public Participation in EIA, 40 J. ENVTL. PLAN. & MGMT. 725 (1997)).
and companies want it to be at the beginning of the process, through established mechanisms that provide stability and certainty? Or do they want to risk fomenting a more disruptive, even violent response to developments and projects, as has been the case in other parts of the world?\footnote{219. See discussion, supra note 9.}