



Traditional and innovative mechanisms for grounding civil liability for environmental damage from mining activities in Ghana

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Abstract

Mining in Ghana, especially illegal mining, has caused varying degrees of damage to the environment over the years. Despite statutory regulation of the way mining should be carried out to avoid irreparable harm to the environment, the problem continues unabated. The criminal ramifications provided by statute for non-compliance have played no significant role in bringing a stop to environmentally unfriendly mining practices. This paper discusses the issue of civil liability for environmental damage caused by illegal mining activities. While highlighting the severe environmental harm occasioned by mining activities, the central theme of this paper is to explore the various legal frameworks and mechanisms available to hold individuals, organizations, and even governments accountable for environmental damage caused by mining activities. The paper concludes by stressing the importance of enforcing liability for perpetrators of bad practices as it is critical for environmental protection and preservation.

Keywords: Ghana, mining, environmental damage, civil liability, legal frameworks, accountability

Introduction

The existence of the human society depends on the viability of the environment, without which human existence would not be possible. The rate at which the environment is being destroyed constitutes one of the most urgent issues threatening modern Ghanaian life. In recent years, several human activities have surfaced which cause grave, and sometimes irreparable, damage to the environment, and these activities have increased significantly over time. Although there are several underlying sources of environmental destruction in Ghana, mining is one of the leading causes.

Ghana is home to several mineral resources, particularly gold; an endowment that earned it the colonial name of “Gold Coast”. Undoubtedly, the mining industry plays a significant role in boosting Ghana’s economic growth. However, along with the benefits of mining activities, environmental concerns regarding their impact have remained a subject of debate among scholars, policymakers, and mining communities. Greater concerns arise in respect of illegal mining activities as they pose significant environmental risks, leading to widespread degradation of the natural environment. In effect, civil liability for environmental damage arising from mining has emerged as a critical area of concern for researchers and policymakers alike.

This paper aims to evaluate the extent of civil liability for environmental damage arising from mining activities. Given the effect of mining activities on the Ghanaian environment, coupled with the conspicuous failure of the State to arrest this debilitating canker by means of the criminal law, the time is ripe to consider some innovative mechanisms for the maintenance of civil actions for environmental damage. The paper therefore examines the Constitution, various environmental legislation, regulations, and judicial decisions to identify mechanisms for grounding civil liability for environmental damage arising from mining.

Negative Externalities of Mining Activities

The protection of the environment is a fundamental duty of the State. It is precisely why the Constitution in article 36(9), mandates the State to take appropriate measures to “protect and safeguard the national environment for posterity” and to co-operate with other States and bodies to protect the wider international environment for mankind. In furtherance of this objective, many State institutions have been established and have been tasked to perform certain duties incidental to the protection of the environment. Notable among these bodies are the Environmental Protection Agency (EPA), the Forestry Commission, the Water Resources Commission, the Minerals Commission, among others.

So, before a mineral right is granted by the Minister responsible for mines—which is a prerequisite to all mining activities in Ghana^[1]—all necessary environmental permits must be issued by the Environmental Protection Agency (EPA), the Forestry Commission, the Water Resources Commission, and any other relevant body that must grant approval or no-objection before mining operations can commence.^[2] The Environmental Assessment Regulations^[3] mandate an environmental impact assessment to be conducted and an environmental impact statement made upon that assessment, which must be submitted to the EPA for consideration before an environmental permit would be issued to commence mining activities.

The environmental permit issued by the EPA contains activities that are permitted to be carried out by the mineral right holder, and those activities that are forbidden in the course of the mining operations^[4]. The EPA, the Minerals Commission, the Forestry Commission, and the Water Resources Commission are all mandated to ensure that such mining activities are carried out according to the terms and conditions of the various environmental permits issued to the mineral right holder^[5].

Despite the well-designed statutory framework that seeks to strike a fair balance between the economic gains derived

from mineral deposits and the effects of extracting such minerals on the environment, there are some mining activities that significantly harm the environment. There are also many mining activities going on without the requisite licenses, and any form of mining operation carried out without the requisite license is an illegal venture and has been locally termed “galamsey” in Ghana.

Broadly speaking, there are two forms of mining in Ghana: licensed (legal) and unlicensed (illegal) mining. Licensed mining is sub-divided into large scale and small-scale mining, although we have illegal small-scale mining in Ghana. Small-scale mining is reserved for only Ghanaian citizens who have attained the age of eighteen and have been registered by the Minerals Commission to carry out small-scale mining^[6]. Notwithstanding the benevolence of the Minerals and Mining Act in reserving small-scale mining for Ghanaians only, research conducted by Richard Kumah in 2022 revealed that about 85% of small-scale mining operations are made up of illegal operators (galamsey operators)^[7].

There is no gainsaying that mining activities constitute a threat to our well-being as a people due to the havoc they wreak on the environment. The failure of mineral rights holders to comply with environmental regulations, standards and norms has damaging effects on the environment^[8]. The activities of unlicensed miners cause even more harm. Because their activities are illegal, they use every means, reasonable or otherwise, to conduct their operations. Once they succeed in their exploits, they run off with the extracted minerals, leaving the environment in very dangerous conditions^[9]. No attempt is made at reclaiming the lands. At a typical galamsey site, several pits are left uncovered, which makes it difficult for the soil to regenerate. No regard whatsoever is paid to protecting the environment against environmental damages resulting from the operations.

The many damaging effects of (illegal) mining on the environment include physical deterioration of land and forests, pollution of water bodies, and air pollution.

Mining activities, especially illegal mining (galamsey), have very grave negative externalities on the lands and forests (or trees) in the places where these activities take place. At a typical mining site, land degradation, soil erosion, bush fires, deforestation, destruction of the vegetative cover become the order of the day^[10]. Excavations of varying depths create small and large pits; almost every tree is cut down; and heaps of soil are piled haphazardly everywhere. Bushes are burnt, farmlands and crops are destroyed, top soil is washed away by rain or water used in mining activities resulting in severe soil erosion, and animals which live in these habitats are forced into extinction.

Worse still, as digging creates various sizes of pits, water usually accumulates in them and they become suitable breeding places for mosquitoes and other insects, leading to the spread of terrible diseases such as malaria^[11]. The flora and fauna required to balance the ecosystem are destroyed. The trees which aid in conserving moisture in the environment, assist in producing rain, and act as wind breaks are destroyed. The deep grooves in the lands render them unsuitable for farm activities, and such lands literally turn into deserts.

In 2022, the National Food Buffer Stock Company Limited (NAFCO), the state-owned company responsible for managing the government’s emergency food security reserves, reported that galamsey activities had affected or

destroyed more than 19,000 hectares (46,950 acres) of cocoa plantations (2% of orchards according to similar sources), leading to loss of income for farmers and less investment for the company and Ghana in general^[12]. This sombre picture painted by NAFCO illustrates the significant environmental deterioration caused by mining.

The second type of environmental pollution resulting from mining activities is water pollution. Mining activities require the use of large quantities of water to wash away large amounts of soil in attempts to obtain the minerals being mined. Chemicals such as mercury, lead and cyanide, which are very dangerous to plant and animal life, are used in mining activities. The resulting contaminated water is not treated properly, but is discharged into the environment and sometimes into water bodies, causing massive pollution^[13]. Additionally, some of these water bodies dry up over time, and those that remain become so polluted that they can no longer support other domestic and farming activities^[14]. Wild animals can no longer depend on such waters and are forced to migrate elsewhere for survival.

The last type of pollution worth highlighting is atmospheric pollution or air pollution, resulting from fumes, dusts, and poisonous gases diffused into the air from mining activities. Noise pollution resulting from drilling and the operations of machines is yet another example of atmospheric pollution from mining activities. The use of mercury, cyanide, and other chemicals releases poisonous gases into the atmosphere, causing air pollution. Exhaust from the machines used for the operations also cause air pollution^[15]. These gases are so poisonous that they pose serious health hazards. For example, a pathologist, Professor Paul Poku Sampene Ossei, revealed that a number of babies are born with deformities in mining communities^[16]. He pointed out that when metals such as mercury, cyanide, and lead used in (illegal) mining are inhaled or ingested by pregnant women, which is common in mining communities, the babies may be born with deformities. Some babies in these areas have been born with their legs forming around the chest, neck, and stomach while some are born with one eye or without genitalia.

The Failure of the State Institutions and Criminal Law

The laws of Ghana require that every mineral rights holder conducts their activities in a manner that does not significantly damage the environment^[17]. State institutions whose roles centre on the protection and the preservation of the environment are required to ensure compliance by all mineral rights holders with all relevant environmental legislation^[18]. These institutions have woefully failed to execute this mandate satisfactorily. Hence, even holders of mineral rights engage in environmentally unfriendly operations causing irreparable damage to the environment^[19].

Unlicensed mining is an abhorrent phenomenon in Ghanaian legislation. Under Ghanaian law, there are sufficient criminal prohibitions accompanied by stiff punishments which, if enforced, could potentially end the menace of illegal mining. Among them, mining without a license is a criminal offence punishable by a minimum fine of ten thousand penalty units or a maximum fine of fifteen thousand penalty units or a term of imprisonment of not less than fifteen years and not more than twenty-five years^[20]. In the same vein, any person who acts or instigates, commands, counsels, procures, solicits, or in any manner

purposely aids, facilitates, encourages, or promotes illegal mining or anything that has been proscribed under the Minerals and Mining Act is punishable in like manner if found guilty^[21].

Again, a non-Ghanaian who undertakes a mining operation or otherwise facilitates the participation of any person in a mining operation contrary to the provisions of the Minerals and Mining Act (which requires a license for any form of mining operation) is liable to suffer an even stiffer punishment. Such a person is liable on conviction to a fine of not less than one hundred thousand penalty units and not more than three hundred and fifty thousand penalty units; or to a term of imprisonment of not less than twenty years and not more than twenty-five years; or to both the fine and the imprisonment^[22].

Also, any Ghanaian who permits a non-Ghanaian or facilitates a non-Ghanaian to participate in mining contrary to the Minerals and Mining Act commits an offence punishable by a fine of at least thirty thousand penalty units but not exceeding hundred thousand penalty units or to a term of imprisonment ranging from fifteen to twenty-five years^[23].

Persons who provide excavators and other mining equipment for illegal mining are equally not spared. If found guilty, they are liable to a term of imprisonment ranging from fifteen to twenty-five years or to a fine not exceeding hundred thousand penalty units and not less than fifty thousand penalty units or to both the imprisonment and the fine^[24].

Where a person fabricates, manufactures or uses a floating platform or any equipment for mining to obtain minerals in or along certain prohibited areas, such person is liable to a term of imprisonment ranging from fifteen to twenty-five years or to a fine not exceeding hundred thousand penalty units and not less than fifty thousand penalty units^[25]. These prohibited areas include banks of natural water bodies such as rivers, streams, water courses, the exclusive economic zone, and any area covered by the exclusive economic zone.

Notwithstanding the potency of the criminal law to help abate the menace of illegal mining, no success has been made in that regard. Environmental damage caused by mining activities still constitutes one of the most urgent topics of discussion in Ghana. State institutions which also have the mandate of protecting the environment have failed to live up to expectation. This is particularly so in view of the fact that government officials and politically exposed persons are sometimes complicit in these illegal mining activities^[26].

The failure of the State to use the criminal law and agencies of the State to combat the menace of illegal mining and its attendant environmental consequences tells us something striking—we cannot rely exclusively on the State to protect our environment from the negative externalities associated with mining. Consequently, the negative impact of mining on the environment continues unabated. Habitats are shrinking, leaving countless species without a home. Biodiversity's resilience is being weakened, putting the very foundation of our ecosystems at risk. Climates are changing, with devastating consequences for our planet. Alien invasive species are increasing, putting even more pressure on already struggling natural resources.

Mechanisms for Redressing Environmental Damages Arising from Mining Activities

It has become apparent that merely having legislation is an insufficient mechanism for abating environmentally unfriendly mining activities and their effects on the environment. In fact, even in legal systems where the enforcement of the criminal law as a countermeasure against activities that cause harm to the environment is effective, the criminal law alone has proven to be utterly inadequate.^[27] We cannot afford to continue down this destructive path any longer, given the monumental failure of the State and the force of criminal law. This therefore calls for the consideration of some traditional and innovative mechanisms that would augment the criminal legislation in the fight against environmentally unfriendly mining activities.

1. Human Rights Actions Under the Constitution

One civil action that may be taken in defence of the environment is to mount an action for the enforcement of the fundamental human right to a clean and healthy environment. That the right to a clean and healthy environment is an enforceable one needs no emphasis. The 1992 Constitution of Ghana guarantees the right to a healthy environment in article 36(9), which falls within Chapter Six of the Constitution on the Directive Principles of State Policy (DPSP)^[28]. The Supreme Court has held that the rights guaranteed under the DPSP are *prima facie* justiciable rights^[29].

Meanwhile, article 33(1) of the Constitution allows every person to bring an action to the High Court in respect of claims of violation or likely violation of their fundamental human rights, provided the alleged violation or threatened violation is in relation to that person. Indeed, article 140(2) of the Constitution confers jurisdiction on the High Court to enforce the rights guaranteed by the Constitution. The Supreme Court in the case of Federation of Youth Association of Ghana (FEDYAG) v Public Universities of Ghana and Others^[30] subtly endorsed the enforcement of fundamental human rights by third parties as a matter of public interest under article 140(2) of the Constitution, even though such parties may not be personally affected.

The enforcement of the right to a clean and healthy environment under Ghanaian law is not unprecedented. A crucial example is the case of Center for Public Interest Law (CEPIL) and Another v Tema Oil Refinery^[31]. In this case, the defendant oil company had discharged large quantities of oil into the Chemu II lagoon in Tema causing serious pollution of the water in the lagoon, damaging the flora and fauna of the Chemu II lagoon, and rendering fishing activities impossible to carry on. The first plaintiff was a not-for-profit non-governmental organisation duly incorporated as a company limited by guarantee in Ghana, and was primarily engaged in the promotion of human rights and public interest litigation. The second plaintiff was a resident of Tema Manhean in the Tema Municipality. The plaintiffs sued the defendants for, *inter alia*, a declaration that the defendant was negligent in spilling oil into the Chemu lagoon, which oil spillage constituted a violation of the right of the inhabitants to a clean and healthy environment.

The defendant raised an objection to the capacity of the plaintiffs to institute the action on the grounds, among others, that the plaintiffs did not personally suffer any

injuries resulting from that oil spillage, and thus had no legal capacity to institute the action. In contrast, the plaintiffs argued quite strenuously that the damage to the lagoon was a matter of public interest, and as provided in article 295 of the 1992 Constitution, 'public interest' consists of rights and privileges that inure to the people of Ghana as a whole.

The Court impressively held that a clean environment inures to the benefits of Ghanaians as a whole, and it therefore comes under the purview of public interest as defined in article 295 of the 1992 Constitution. Indeed, the Court concluded that environmental issues cannot just be the concern of the specific people who are close to the area of degradation or pollution, and that the environment is unlike any other thing; it cannot be put into compartments because an occurrence in one place can have far reaching effects on another place quite distant in location. Therefore, since environmental issues are matters of public interest, the plaintiffs had capacity to institute the action.

Similarly, in the case of Center for Public Interest Law (CEPIL) and Another v Environmental Protection Agency (EPA) and Others^[32], the High Court affirmed the capacity of the plaintiffs to institute the action in the public interest. In that case, the third defendant (Bonte Gold Mines) conducted its mining activities irregularly, leaving large tracks of lands opened and filled with polluted water, in violation of the environmental standards that accompanied the mining lease. The Court observed that the right to a safe environment is a constitutional right which imposes a duty on the state to take appropriate measures needed to protect and safeguard the national environment for posterity and to seek co-operation with other states and bodies for purposes of protecting the wider international environment for mankind. Accordingly, the right of every Ghanaian, including the plaintiffs, to ensure compliance with the duties imposed on bodies duly appointed to protect the environment enables the plaintiffs to maintain the action.

This remarkably progressive position taken by the Ghanaian courts in these cases opens new vistas for the enforcement by any natural or juridical person of the right to a healthy environment. Citizens are therefore enjoined under article 41 of the 1992 Constitution, in compliance with the duty of every citizen to protect the environment, to regularly exercise this option to protect and safeguard the environment.

2. Complaints to the Commission on Human Rights and Administrative Justice

Environmental issues, as noted early on, are matters of human rights. In that connection, a complaint may be made to the Commission on Human Rights and Administrative Justice (CHRAJ) which has the constitutional mandate of investigating complaints of fundamental human rights.

Section 7 of Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) obligates CHRAJ to, among others, investigate complaints concerning practices and actions of persons, private enterprises, or any institution where the complaints allege violations of fundamental human rights guaranteed by the Constitution, and to take appropriate remedial action. Given that the right to a healthy and clean environment is constitutionally guaranteed, CHRAJ has the mandate to investigate allegations that a person's mining activities cause some harm to the environment.

It is, however, regrettable that the mandate of CHRAJ to investigate such matters cannot be activated unless there is a complaint, in writing or otherwise recorded in writing, filed by an identifiable person^[33]. Accordingly, this power of CHRAJ can only be activated by a person, natural or juridical. Thus, it is necessary for persons to rise up to the occasion and set in motion the investigative power of CHRAJ as one means of ensuring that the environment is protected.

3. Actions in Tort

Another civil action which may be instituted in respect of environmental damage is the tort of nuisance. The tort of nuisance is of two categories: public nuisance and private nuisance.

Public nuisance was succinctly explained in the English case of Attorney-General v P.Y.A Quarries Ltd^[34]. Here, the defendant quarry owners so conducted their operations that neighbouring householders were negatively impacted by vibrations from explosions and by the dust which emanated from the quarry. The Court held that the vibrations and dust were a public nuisance, and an injunction properly laid to restrain the defendants from carrying on the quarry in the manner which occasioned the nuisance. In explaining what constituted public nuisance, the Court had this to say: "a public nuisance is a nuisance which is so widespread in its range, or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large"^[35]

Given the widespread nature of environmental damage that arises from mining activities, an action is maintainable under public nuisance to restrain the perpetrators of those environmentally unfriendly practices to refrain from same. The difficulty, however, is that public nuisance actions may be instituted only at the instance of the State^[36]. Nonetheless, seeing how the State has constantly failed to adopt the other available mechanisms for the protection of the environment from mining activities, private nuisance actions may be initiated by individuals who are affected by such activities.

Regarding private nuisance, the law is that any interference with one's enjoyment, tranquillity, personal liberty, convenience or comfort, provided the degree of interference is sufficiently serious, constitutes an actionable nuisance^[37]. In the case of CFC Construction Company Ltd and Others v Accra City Council^[38], the dumping of refuse near the property of the plaintiffs was deemed an actionable nuisance. The plaintiffs, who are occupiers of premises adjoining the quarry where the refuse was being dumped by the defendant council, maintained that the stench emanating from the refuse had seriously interfered with their comfort and well-being. The stench had attracted a battalion of flies and mosquitoes, and the burning of incense to partially neutralise the full effects of the smell all contributed to the nuisance complained about. The evidence showed, among others, that the health and wellbeing of the inhabitants of the adjoining properties were heavily impaired. The Court found the act of the defendant to constitute nuisance and therefore issued an injunction, restraining the defendant from continuing such activities.

Quite clearly, the nature of environmental damage arising from mining activities as recounted would be good cause to

entitle one to a relief in private nuisance against perpetrators of such acts. It now behooves individuals affected by mining activities to rise up and bring to book all persons actively involved in the destruction of the environment through mining.

4. Actions in International Tribunals

The African Charter of Human and Peoples' Rights, which Ghana has ratified, guarantees the right to a clean and healthy environment^[39]. Actions may be instituted at the African Commission on Human and Peoples' Rights (ACHPR) to protect the treaty right to a safe and healthy environment. The case of the Social and Economic Rights Center and Another v Nigeria (Ogoni case)^[40] gives eloquent testimony to the fact that actions for the enforcement of the environment are cognizable before the ACHPR.

In that case, the Nigerian National Petroleum Company formed a joint venture with Shell Petroleum Development Corporation to mine for oil in the Ogoni region. The irregular nature in which the mining activities were conducted caused serious environmental damages. In particular, the complaint denounced the widespread contamination of soil, water, and air, the destruction of homes, the burning of crops and killing of farm animals, and the terror the Ogoni communities had been experiencing, all of which constituted a violation of their rights to health, a healthy environment, housing, and food. In terms of the African Charter, the allegations cited violations of the right to life (1992 Constitution, article 4), right to property (1992 Constitution, article 14), right to health (1992 Constitution, article 16), right of peoples to freely dispose of their wealth and natural resources, (1992 Constitution, article 21) and the right of peoples to a satisfactory environment (1992 Constitution, article 24).

Several calls on the Nigerian government to remedy the situation fell on deaf ears. Therefore, the two plaintiff non-governmental organizations took up the matter on behalf of the Ogoni people before the ACHPR. After hearing the application, the Commission found that the various alleged environmental rights had been violated by the mining companies, and it therefore issued directives to the Nigerian government to rectify the situation.

This decision of the ACHPR paves a well-beaten path for the invocation of the Commission's jurisdiction for the protection of the environment, and natural and juridical persons may take a cue from it to ensure that the environment is kept unspoiled by mining activities.

Aside the ACHPR, the ECOWAS Community Court of Justice has the mandate to entertain and adjudicate on applications for relief from individuals for the violation of their fundamental human rights^[41]. Hence, individuals of member states whose right to a clean and healthy environment is violated may apply to the Court for relief.

5. Administrative Complaints to the Environmental Protection Agency

Complaints may be lodged with the Environmental Protection Agency (EPA) to take appropriate action towards abating environmental pollution. The Environmental Protection Agency Act obligates the EPA to, among others, control environmental pollution, issue notices and warnings to people who cause environmental pollution, ensure that the standards contained in environmental impact statements

are complied with, and conduct investigations into environmental issues^[42]. It is for this reason that in the case of Center for Public Interest Law and Another v Environmental Protection Agency and Others,^[43] the Court held that the EPA had breached its statutory duty to protect the environment by ensuring that the mining company complied with all the environmental requirements and standards.

Accordingly, where mining activities pose significant damage to the environment, persons may lodge administrative complaints with the EPA to take the appropriate action towards protecting the environment. This is particularly relevant in the case of illegal mining, which is usually carried out on the blind side of State institutions such as the EPA.

6. Administrative Complaints to the Water Resources Commission

Complaints of environmental damage arising from mining activities may be made to the Water Resources Commission for redress where water bodies are adversely affected by mining activities. The Water Resources Commission is the statutory body charged with the responsibility of regulation of the utilization of water resources^[44]. The Commission also issues water permits to persons whose activities require the use of water^[45]. In addition, the Commission is empowered to issue notices to persons whose activities pose threats to water resources^[46].

So, where mining activities, whether legal or illegal, pose threats to or pollute water resources, complaints may appropriately be made to the Commission for the necessary actions to be taken.

7. Administrative Complaints to the Forestry Commission

The Forestry Commission oversees and regulates the forests of this country^[47]. They also have powers to ensure that our forests and wildlife resources are preserved^[48].

Accordingly, where legal or illegal mining activities destroy forests and wildlife, complaints may be lodged with the Commission to probe into such matters and take appropriate remedial actions.

Conclusion

The protection of the environment is not the sole responsibility of the State, but the collective responsibility of everyone. Fortunately, there are various mechanisms available for grounding civil liabilities for environmental damage caused by illegal mining, which have not been utilized enough. This paper brings these mechanisms to the fore and encourages citizens and civil society organizations, in particular, to take up the mantle of ensuring environmental justice. Only then can we meaningfully maintain a clean and healthy environment, not only for ourselves but for posterity, as the Constitution mandates.

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39. African Charter on Human and Peoples Rights, article 24.
40. Communication 155/96, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria.
41. ECOWAS, Protocol of the Community Court of Justice, 1991 (A/P.1/7/91) as amended by the Supplementary Protocol of the Community Court of Justice, 2005 (A/SP.1/01/05), article 10(d).
42. Environmental Protection Agency Act, 1994, (Act 490), section 2.
43. Center for Public Interest Law (CEPIL) and Center for Environmental Law v. Environmental Protection Agency and Ors (2009) Unreported Case, Suit No. A (EN) 1/2005.
44. Water Resources Commission Act, 1996 (Act 552), section 2.
45. Water Use Regulations, 2001, L.I. 1692, regulation 1.
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47. Forest Commission of Ghana. "About FSD". Available at: https://fcghana.org/?page_id=2042. (Accessed: 12th May 2023).
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