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PARLIAMENTARY OVERSIGHT OF EXTRACTIVE INDUSTRIES

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with

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ABSTRACT

Africa has experienced a boom in extractive industries since the beginning of this century. Extractive companies often are exposed not just to government patronage, but also to requests to consider local third-party agents, vendors or applications for employment. But is corruption a necessary evil? While there is consensus that multi-faceted strategies are required to curb corruption, heretofore there has been little research on how legislative oversight can help reduce corruption in general and on legislative oversight of corruption in the extractive sector in particular.

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This article attempts to bridge this gap somewhat and examines legislative oversight of the mining industry in three African countries: Burkina Faso, where — according to Transparency International — corruption levels are moderate and declining; Ghana, where they are moderate and increasing; and Tanzania, where they are high and unchanging. In so doing, it seeks to answer the following questions: How can parliamentary oversight reduce corruption in the mining industry? What are the parliaments of Ghana, Burkina Faso and Tanzania doing to reduce corruption in the mining industry? Could they do more and, if so, what?

1 PARLIAMENTARY OVERSIGHT OF EXTRACTIVE INDUSTRIES

Africa has experienced a boom in extractive industries since the beginning of this century. The substantial growth in Africa’s natural resources exports — ranging from hydrocarbons, such as oil and natural gas, to minerals, such as gold, copper and iron ore — significantly contributed to the remarkable turnaround in the economic growth trajectory of the continent.¹

According to the UN Economic Commission for Africa (UNECA), natural resource endowment represents one of the best ways of mobilising revenues for Africa’s economic growth and development.² The minerals and metals sectors contribute more than 20% of Africa’s overall economic output and, even with currently depressed markets, the extractive sector remains a highly significant source of fiscal revenues for many countries.³ As a result, many international mining companies are expanding their exploration and operations in Africa. While this development is a boon to many African countries, it is not without problems: the oil and gas and mining industries are the fourth and fifth most corrupt industries globally, after public works and construction, utilities and real estate, property, legal and business services.⁴

Extractive companies often are exposed not just to government patronage, but also to requests to consider local third-party agents, vendors or applications for

1 Chuhan-Pole P, Dabalan A & Land B (2017) *Mining in Africa: Are Local Communities Better Off?* Washington, DC: Africa Development Forum and World Bank Group at xvii.

2 UNECA (2016) *Optimising Domestic Revenue Mobilisation and Value Addition of Africa’s Minerals: Towards Harmonising Fiscal Regimes in the Mineral Sector* at 5.

3 Moolman V (8 July 2016) “African Mining Has Potential to Grow Stronger” *Mining Weekly*, available at http://www.miningweekly.com/article/african-mining-has-potential-to-grow-stronger-2016-07-08/rep_id:3650 (visited 12 December 2017).

4 Transparency International (2011) *Bribe Payers Index*, available at <http://www.transparency.org/bpi2011> (visited 11 December 2017).

employment. These requests, especially where associated with a decision by an official, carry an elevated risk as the official might have an undisclosed interest. Indeed, a number of mining and metals companies have felt constrained to sign deals which “compensate” a number of interested third parties, just to be able to do business.⁵ But is corruption a necessary evil? A review of Transparency International’s Corruption Perceptions Indices over the past decade reveals that some African countries, such as Rwanda, Namibia, Senegal, Burkina Faso and Togo, have made considerable progress in curbing corruption, while others such as Ghana, The Gambia, Angola, Uganda and Malawi have slipped back.⁶

According to the World Bank, there is increasing evidence that the costs of corruption are enormous, whether at the economic, social, environmental or political level.⁷ Beyerle states that a risk analysis from the 2011 World Bank Development Report found that countries where government effectiveness, the rule of law and control of corruption are weak have a 30-45% higher risk of civil war and significantly higher risk of extreme criminal violence than other developing countries.⁸ The role of parliament is critical in the control of corruption. Wolfowitz notes that parliament is an important institution which cuts across both vertical and horizontal accountability and, in most countries, it has the constitutional mandate both to oversee government and hold government to account.⁹

It is important to note that, while the role of parliament is critical in overseeing the executive and ensuring effective implementation of the anti-corruption laws, the implementation of the laws is beyond the remit of parliament alone. The laws are implemented in tandem with other government agencies such as courts, the prosecution service and the police. This poses a significant challenge to the oversight function of parliament. Pope observes that, while appropriate laws may be a necessary component in a country’s arsenal of policies and interventions to curb corruption, they

5 Ernst & Young (2012) *Managing Bribery and Corruption Risks in the Mining and Metals Industry* at 4.

6 Transparency International *Corruption Perceptions Index 2016*, available at http://www.transparency.org/news/feature/corruption_perceptions_index_2016 (visited 10 November 2017).

7 World Bank (2016) “Corruption and Development” *Connecting Voices: Corruption and Development Issue*. World Bank Global Practice Middle East & North Africa, Issue 7 at 3.

8 Beyerle S (2014) *Curtailing Corruption: People Power for Accountability and Justice* Colorado: Lynne Rienner at 8.

9 Wolfowitz P (2006) “Preface” in Stapenhurst R, Johnston N & Pelizzo R (eds) *The Role of Parliament in Curbing Corruption* Washington, DC: World Bank at xi.

are never sufficient.¹⁰ Parliament must address certain relevant issues such as conflicts of interest, nepotism and statutes of limitation, not only to provide for the necessary punitive measures but also to promote an administrative and social environment adverse to corruption.

According to Draman, active and effective committees are an important indicator of parliament's role in fighting corruption.¹¹ For instance, in Ghana oversight committees meet regularly and have been active when it comes to uncovering corruption, but that activism has not translated into effective oversight. Furthermore, Ghana's maturing political culture has been compromised often by excessive partisanship that hinders the work of the legislature. This partly explains the weakness of committees in providing effective oversight and fighting corruption despite their activism. Similarly, Tritiku observes that in the parliament of Uganda, legislative committees are effective in uncovering fraud and corruption, but at other times the reports of the committees are shelved without debate or the recommendations are not implemented.¹² The situation is complicated by the fact that Uganda has adopted the "multi-agency model" for its anti-corruption agency, that is, a number of offices which are autonomous but together weave a web of agencies to fight corruption. Though there is no dedicated anti-corruption agency, there are a number of institutions that collectively make up the anti-corruption architecture in the country, albeit operating in a parallel manner. They include the Ombudsman — known as the Inspector General of Government (IGG) — parliament, the Auditor-General, the police and the anti-corruption court.

According to Kaufmann, there is consensus that multi-faceted strategies are required to curb corruption.¹³ While there is general agreement that one of the key components of such strategies is legislative oversight, heretofore there has been little research on how legislative oversight can help reduce corruption in general and on

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- 10 Pope J (2006) "Parliament and Anti-Corruption Legislation" in Stapenhurst, Johnston & Pelizzo at 66.
- 11 Draman R (2017) *The Role of Parliament in Curbing Corruption: The Case of Ghana* Policy Brief, available at <https://www.britac.ac.uk/sites/default/files/Parliamentary%20oversight%20and%20corruption%20in%20Ghana.pdf> (visited 2 February 2018).
- 12 Tritiku A (2017) *The Role of Parliament in Curbing Corruption: The Case of Uganda* Policy Brief at 2 & 3, available at <https://www.britac.ac.uk/sites/default/files/Parliamentary%20oversight%20and%20corruption%20in%20Uganda.pdf> (visited 3 March 2018).
- 13 Kaufmann D (2015) "Corruption Matters" 52(3) *Finance & Development* at 22.

legislative oversight of corruption in the extractive sector in particular. This article attempts to bridge this gap somewhat and examines legislative oversight of the mining industry in three African countries: Burkina Faso, where — according to Transparency International — corruption levels are moderate and declining; Ghana, where they are moderate and increasing; and Tanzania, where they are high and unchanging.¹⁴ These countries were chosen because we wanted both West African and East African countries, countries with a Napoleonic form of government and Westminster form of government, and countries where extractive industries played an important role in the economy. Specifically, the article focuses on the role of parliaments in promoting transparency and government accountability, and thereby reducing corruption.

In the next section, we review the literature on legislative oversight, particularly insofar as it refers to reducing corruption in the extractive industries, which are among the most corrupt sectors globally. We seek to answer the following questions: How can parliamentary oversight reduce corruption in the mining industry? What are the parliaments of Ghana, Burkina Faso and Tanzania doing to reduce the corruption in the mining industry? Could they do more and, if so, what? We look specifically at some of the tools and mechanisms that parliaments have available for reducing corruption. Then, we present the analytical framework that guided our research and the methodology adopted. We present our findings, answer the questions noted above and make some recommendations. The final section presents our conclusions.

2 LITERATURE REVIEW

Corruption in the value chain of extractives is a major impediment to development. There have been increased efforts to improve transparency and accountability in the management of revenues from the extractive industry. However, little attention has been paid to the role of elected representatives, despite the fact that recent studies have shown that legislators are important stakeholders in the strategies to reduce corruption, and that parliaments have a critical role to play in fighting corruption, not only in the enactment of anti-corruption legislation but also in ensuring that such legislation is implemented effectively.¹⁵

14 Transparency International *Corruption Perceptions Index 2017*, available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 (visited 3 February 2018).

15 Pope (2006) at 66.

An Ernst & Young report observes that there is an increasing level of global legislative and enforcement alignment on anti-corruption laws. It indicates that:

the number and severity of overseas anti-bribery and anti-corruption laws and the increasing scope of their reach are increasingly influencing not only the resources sector, but corporations conducting business outside their home markets.¹⁶

Similarly, Barkan argues that legislatures are mechanisms for achieving both vertical and horizontal accountability of the rulers to the ruled.¹⁷ In general, parliaments seem relatively good at enacting anti-corruption legislation, but weak at overseeing the implementation of such legislation. Stapenhurst, Ulrich & Strohal comment that, considering the extensive causes of corruption as well as the complexity of anti-corruption measures, parliaments need to exploit fully their constitutional roles and use parliamentary oversight tools to carry out their constitutional responsibilities effectively. They also note that parliamentarians could explore further their representative role as an important instrument for building integrity in public governance by engaging their constituents on matters of public policy, including corruption.¹⁸

As part of their legislative mandate, parliaments are responsible for ensuring that there is a strong legal framework in place to curb corruption. This involves not only passing national legislation that tackles corruption and money laundering, but also lobbying national governments to ratify relevant international instruments, such as the United Nations Convention against Corruption.¹⁹ Stapenhurst, Ulrich & Strohal argue that parliaments have the authority to enact any laws they wish and therefore can create the necessary legal framework to prevent and curb corruption. They can enact laws to address inappropriate behaviour by citizens, businesses and other organisations. In addition, they can curb corruption by holding government accountable by effective participation in the budget process, by exercising

16 Ernst & Young (2012) *Managing Bribery and Corruption Risks in the Mining and Metals Industry* at 4.

17 Barkan J (2009) *Legislative Power in Emerging African Democracies* Colorado: Lynne Rienner at 1.

18 Stapenhurst R, Ulrich M & Strohal S (2006) "Introduction: Parliamentarians Fighting Corruption" in Stapenhurst, Johnston & Pelizzo at 6 & 7.

19 Chene M (2007) *Parliamentary Approaches to Corruption* U4 Anti-Corruption Resource Centre, available at <https://www.u4.no/publications/parliamentary-approaches-to-corruption.pdf> (visited 3 January 2018).

parliamentary oversight through anti-corruption commissions, by collaboration with the supreme audit institutions (SAIs), and by promoting a media-friendly environment.²⁰ Beetham, Deveaux, Heller & Laberge submit that parliaments and parliamentarians can play active roles in the design and implementation of national anti-corruption strategies, in the establishment and strengthening of relevant national anti-corruption bodies, and in framing and reviewing relevant legislation.²¹

One important area where many African parliaments are active is the review of various mining codes. Besada & Martin record that more than 30 African countries passed new legislation between 1990 and 2000 to regulate the mining industry, adding that many changes have occurred between 2000 and 2010. However, they observe also that many of these reforms were directed towards attracting greater foreign investment through decreased regulation, liberalised social and labor policies, and more private sector-friendly ownership and taxation schemes rather than towards ensuring transparency and accountability.²²

Bryan & Hofmann go further and note that a robust committee system is the appropriate framework for effective legislative involvement in lawmaking and executive oversight, as well as a platform for citizen engagement. These committees are empowered, among other things, to enact laws that govern the operations of the extractive sector, hold public hearings, conduct outreach visits, engage with citizens and communities, and conduct effective oversight.²³ For example, the Ghanaian Parliament has a Mines and Energy Committee, the Cameroon National Assembly has established a Natural Resource Committee, South Africa's parliament has Energy and Mineral Resources committees, and the Nigerian National Assembly has committees on oil and gas, as well as a committee on solid minerals. Stapenhurst submits that while all these committees perform some level of oversight, some legislatures have established specialised audit or Public Accounts Committees, which work closely with the SAI. Such committees can enhance *ex post* budget oversight and complement the

20 Stapenhurst, Ulrich & Strohal (2006) at 3, 4, 5, & 6.

21 Beetham D, Deveaux K, Heller N & Laberge M (2014) *Anti-Corruption Assessment Tool for Parliamentarians* GOPAC and UNDP at 4.

22 Besada H & Martin P (2013) "Mining Codes in Africa: Emergence of a Fourth Generation?" North-South Institute at 3, available at <http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf> (visited 10 November 2017).

23 Bryan S & Hofmann B (2007) *Transparency and Accountability in Africa's Extractive Industries: The Role of the Legislature* Washington, DC: National Democratic Institute for International Affairs at 32.

policy oversight of other committees. He observes also that in some legislatures, such as Nigeria's, anti-corruption committees have been established to work closely with anti-corruption agencies.²⁴

Many legislatures have set up special commissions of inquiry, or investigation committees, to examine issues of public concern and to make recommendations on current and future policies and legislation. Such commissions are time-bound, and their subjects typically cut across the responsibilities of several government agencies or departments and several parliamentary committees. They usually are empowered to summon witnesses to testify under oath, including officials of the executive branch, and to demand documents and order on-site inspections. Countries that have established such commissions to examine corruption include Kenya, São Tomé and Príncipe, Nigeria and Ghana.²⁵ Though most of these special committees uncover instances of fraud and corruption, many of the culprits are never prosecuted, either by anti-corruption agencies or by the police. For example, in 2012 the Nigerian House of Representatives set up an *ad hoc* committee to investigate the federal government's implementation of the fuel subsidy. It found that the subsidy regime, as operated in the period under review (2009 to 2011), was fraught with endemic corruption and entrenched inefficiency. The committee made several recommendations (including prosecutions and recovery of huge funds) to the Nigerian Economic and Financial Crimes Commission (EFCC), an anti-corruption agency. Unfortunately, six years after the report of the committee had been tabled in the National Assembly, the EFCC and the courts have not jailed any of the indicted individuals.²⁶ Many of the cases still are pending in the courts. Similarly, Draman observes that, while parliamentary committees in Ghana are relatively effective at uncovering fraud and corruption, they have not been effective at ensuring that sanctions are meted out to those found culpable by the country's anti-corruption agency and the courts.²⁷

Despite the constitutional provisions that empower parliaments to act as a major catalyst in the fight against corruption, many parliamentarians still experience serious challenges in fulfilling their roles and responsibilities. Bryan & Hofmann observe that African legislators face many constraints in this connection, including

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- 24 Stapenhurst F (2011) *Legislative Oversight and Curbing Corruption: Presidentialism and Parliamentarianism Revisited* Unpublished PhD Thesis, Australian National University at 25.
 25 Stapenhurst (2011) at 26.
 26 Nigerian House of Representatives, Report of Ad-Hoc Committee on Fuel Subsidy (Resolution No HR1/2012).
 27 Draman (2017).

weak individual and institutional capacity, little independence from more powerful executives and ruling political parties, and, perhaps most especially, limited political will. They also state that oversight of the extractive industries is complicated by a common perception, held by many legislators themselves, that the industry's technical complexity is beyond their comprehension.²⁸ Further, they submit that, faced with proposals from well-informed or connected executive branch agencies or officials, legislators often lack both the information and the confidence to influence legislation, policy or management of the extractive industries.²⁹

The Extractive Industries Transparency Initiative (EITI) was set up by governments, companies and civil society organisations in the shared belief that natural resource wealth should benefit citizens and that this requires high standards of transparency and accountability. The EITI Standard requires governments to publish timely and accurate information on key aspects of their natural resource management, including how licences are allocated, how much tax and social contributions companies are paying, and where this money ends up in the government at the national and regional level. By so doing, legislators, along with governments and citizens, increasingly know who is operating in the sector and under what terms, how much revenue is being generated, where it goes and who it benefits.³⁰ According to Brouwer, Haytayan & Smitham, one of the key roles of parliamentarians is to help improve policy and initiate reforms in the extractive sector, and to help oversee EITI compliance by companies and governments.³¹

Various assessments of the capability of African parliaments to undertake oversight show that they are at different levels of engagement in ensuring transparency and accountability in the management of natural resources in their countries.³² In addition to having the oversight tools and mechanisms noted above, their ability to conduct oversight depends on the prevailing political climate, the capacity of the parliamentarians, the level of development of legislative institutions, the educational background of the parliamentarians, the financial resources available

28 Bryan & Hofmann (2007) at 10.

29 Bryan & Hofmann (2007) at 10.

30 EITI *The Global Standard for the Good Governance of Oil, Gas and Mineral Resources* (Factsheet 2017).

31 Brouwer F, Haytayan L & Smitham L (2014) *EITI: A Parliamentary Tool for Extractive Sector Governance in Liberia and Yemen* (NRGI) at 1.

32 Mohammed A (2011) *Supporting Ghana's Parliament for Good Governance in the Extractive Sector* Parliamentary Centre at 2.

to parliaments and the political will of the elected representatives in each country. Clearly, a few parliaments are striving to play more active roles in providing effective oversight of the extractive sector, while others are constrained by a lack of financial and administrative autonomy from government and excessive executive dominance of the polity.

3 ANALYTICAL FRAMEWORK AND METHODOLOGY

For this project, we adapt analytical frameworks developed by Wang to guide our research design.³³

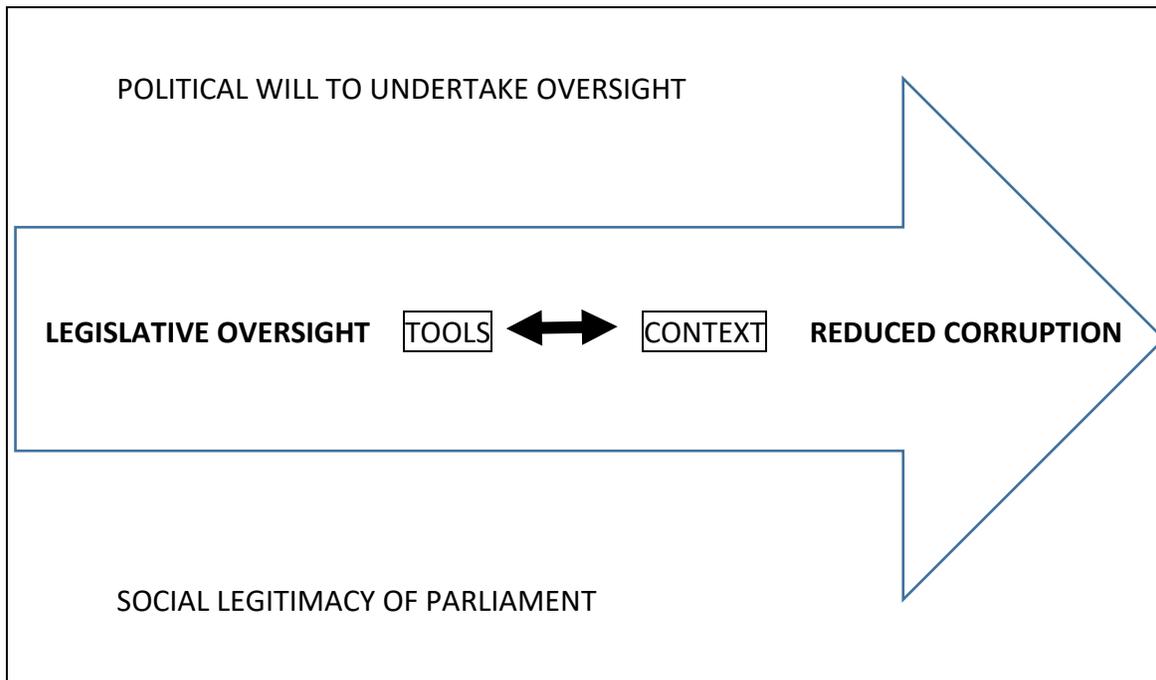
3.1 A Conceptual Framework

As recorded above, legislatures have developed a variety of “internal” oversight tools, most notably committees (examining legislation, public spending and public procurement, including major contracts) and special commissions of inquiry, as well as “external” mechanisms (for example, SAIs such as Auditors-General and anti-corruption commissions) to help them in holding the executive to account.³⁴ But such tools only partially explain the role of the legislative oversight in lowering corruption. Contextual factors matter. We consider two of the factors identified by Stapenhurst to be particularly relevant in shaping this context: social legitimacy of parliament (which for this article includes public trust in parliament and political parties) and institutional learning.³⁵

33 Wang V (2005) *The Accountability Function of Parliament in New Democracies: Tanzanian Perspectives* Bergen, Norway: Christer Michelsen Institute Working Paper 2 at 16.

34 Adoption of these tools is influenced by “path-dependent” pressures and by the borrowing of good practices from other legislatures (for example, the adoption of Public Accounts Committees, historically associated with Westminster-style parliamentary systems, by non-Commonwealth countries with no political-historical ties to the UK). There is evidence that this encourages diverse legislatures to converge, as they learn about one another’s procedures and practices through bodies such as the Inter-Parliamentary Union and the Commonwealth Parliamentary Association.

35 Stapenhurst (2011) at 139 also notes that the electoral system and type of government affect oversight, but these factors were not considered in this research.

Diagram 1: Conceptual Framework of Legislative Oversight

Source: Adapted from Stapenhurst (2011) and Pelizzo & Stapenhurst (2012)

As illustrated in Diagram 1, it is the combination of these oversight tools and contextual factors that explains legislative oversight. At the heart of the diagram are the oversight tools and contextual factors. There is a two-way relationship between these variables. Contextual factors influence the number of oversight tools available to a legislature.³⁶ There is some reason to believe that the greater number of oversight tools used by legislatures in parliamentary systems reflect the relative weakness of contextual factors in such systems, relative to presidential systems.³⁷ Legislative oversight comprises both oversight tools and contextual factors and together these influence the efficacy of oversight. This conceptual framework also lends theoretical support to Olson & Norton who argue that external factors:

36 Pelizzo R & Stapenhurst R (2002) "A Bigger Role for Legislatures" 39(4) *Finance and Development* at 46-48.

37 Stapenhurst (2011) at 180.

will largely determine [the capacity of the legislature] to exercise an independent influence in ... policy making and that variables internal to it — along with the nature of the policy brought before it — will, at most, reinforce, but not determine that capacity.³⁸

The framework suggests further that contextual factors are driven more by a country's social-political history than by notions of international best practice. Here, the concept of templates associated with archetypes and path dependency is important. For example, former British colonies now usually have a parliamentary form of government with a majoritarian electoral system, while former French colonies have a hybrid (semi-presidential) form of government and a proportional representation electoral system. The framework also acknowledges the importance of social legitimacy — public trust in parliament, which acts as the glue helping to hold the framework together — and the political will of parliamentarians to use whatever tools they have available to oversee governments and mining operations.

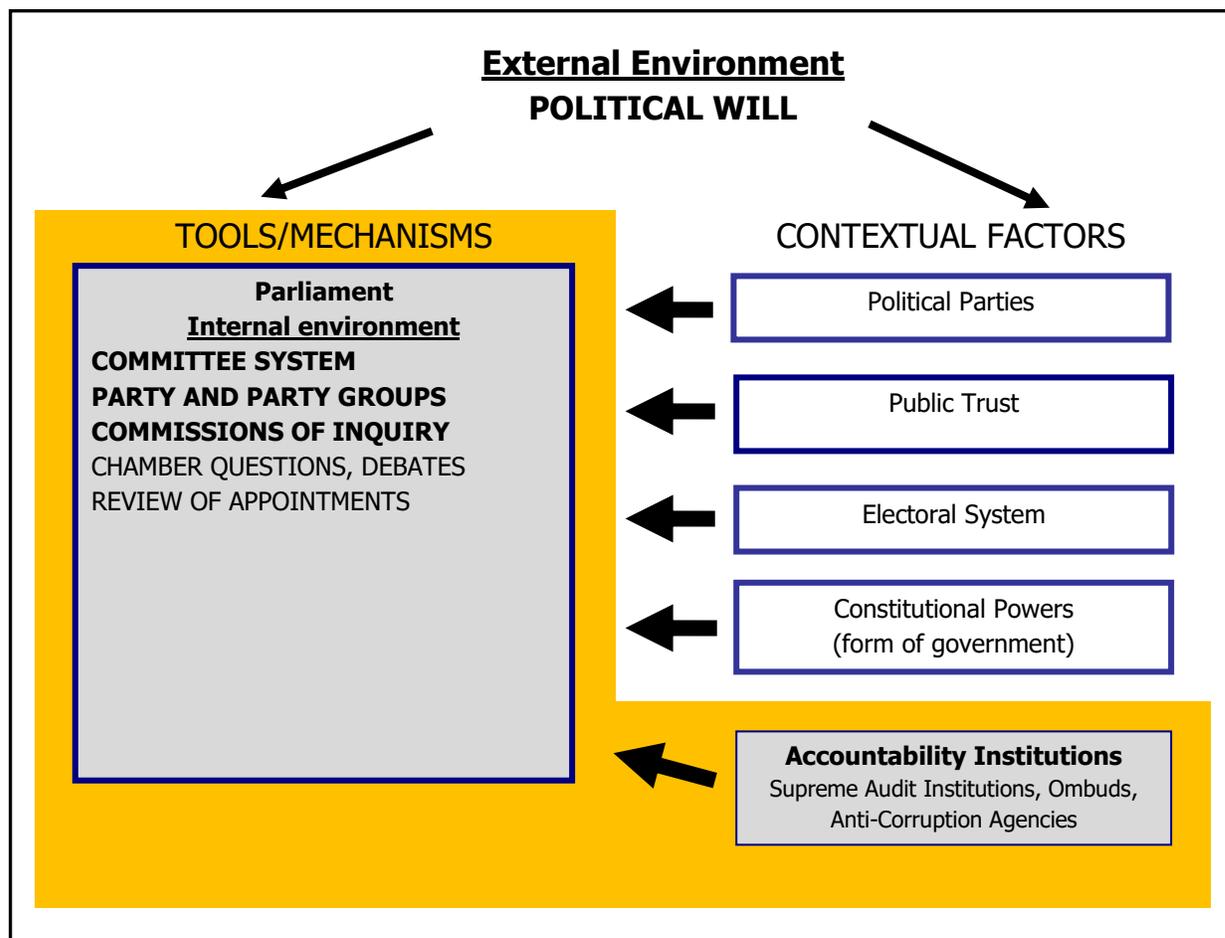
A key issue remains: how can this conceptual framework be operationalised? Wang has developed a framework for analysing legislative oversight,³⁹ which subsequently was extended by Pelizzo & Stapenhurst,⁴⁰ differentiating between internal oversight mechanisms and contextual factors. We modify this framework further, as presented in Diagram 2.

38 Olson D & Norton P (1996) *The New Parliaments of Central and Eastern Europe* London: Frank Cass at 6.

39 Wang (2005) at 16.

40 Pelizzo R & Stapenhurst R (2012) *Parliamentary Oversight Tools: A Comparative Analysis* London: Routledge.

Diagram 2: Legislative Oversight Tools — Modified Framework



Source: Adapted from Stapenhurst (2011) and Pelizzo & Stapenhurst (2012)

3.2 Methodology

Applying the Framework presented in Diagram 2, we examined: the internal oversight tools and mechanisms, such as the committee system, political party groups, question time and commissions of inquiry; and the contextual factors of political parties and social legitimacy (as measured by trust in parliament).

A mixed method of data collection was adopted because it enabled us to triangulate our results. In so doing, we juxtaposed the approaches by Lieberman and Robson. The former suggested that “because such materials are produced in such different shapes and forms across time and space, it is often impossible to specify a

priori, a set of very precise coding rules”.⁴¹ The latter argued that “if the purpose is confirmatory, where previous work has suggested an explanation of some phenomenon, then there is a place for some degree of pre-structure”.⁴²

Three data collection methods were followed. Firstly, in-depth research of publicly available documents at the World Bank library and on the internet was undertaken. This provided a general overview of the roles of African parliaments in curbing corruption in the extractive industries and the constraints and challenges that such parliaments face. Secondly, we conducted key informant interviews with a total of approximately 20 Canadian mining representatives, host government officials, legislators and civil society representatives in each of the three countries in October 2016 to June 2017. Interviews were semi-structured, combining fully structured and open-ended questions, which allowed us to go into more depth and to clarify possible ambiguities. Respondents were encouraged to supply any additional information they deemed relevant. The survey instrument used for government officials and parliamentarians is presented in Appendix 1; the survey instruments for mining company executives and civil society organisations were similar. The interviews were transcribed, and participants’ responses were coded. Thirdly, we held focus groups comprising 10 respondents (different from those interviewed) in two of the three countries (Burkina Faso was excluded, due to logistical problems), both to gather additional information and to enable us to verify interview results. The focus group protocol is presented in Appendix 2.

The project, along with the survey instrument and focus group protocol, was reviewed and approved by McGill University’s Ethics Board.

3.3 Data Analysis

The process of thematisation, which entails clustering common descriptions, key phrases and statements, was employed to organise participants’ experiences into common themes and recurring features captured in the interviews. This was an iterative process that involved reading and re-reading the interview transcripts, and grouping and re-grouping key phrases and important statements into appropriate thematic groups.

41 Lieberman E (2005) “Nested Analysis as a Mixed-Method Strategy for Comparative Research” 99(3) *American Political Science Review* 435-52 at 441.

42 Robson C (2002) *Real World Research* Malden, MA: Blackwell at 182.

Based on the conscientious analysis of the transcripts, five cross-cutting themes were identified as essential to the experiences of the participants and crucial to the study. These were: (1) regardless of oversight tools and mechanisms available, weak institutional capacity of legislators and legislative institutions seriously undermined oversight in general and of the extractive industries in particular; (2) this inherent weakness is compounded by the complex and opaque nature of the industries and by the extreme information asymmetry between companies and governments, on the one hand, and legislatures, on the other; (3) the resulting lack of implementation of legislation/regulations; (4) an absence of political will by legislators to confront the culture of corruption, which in part is due to; (5) conflicts of interest. A sixth theme was gleaned from literature, namely, public trust in parliament. These themes are examined in more detail in the next section.

3.4 Findings and Discussion

Findings from the study confirm that corruption is pervasive in the mining sector in African countries, and that parliaments (as bodies of elected representatives of the people) have an important role to play in curbing corruption in the extractive industries. Parliaments have three important functions: to enact new laws or amend the existing legislation (lawmaking); to serve as representatives of the people (representation); and to oversee the activities of the executives (oversight). Similarly, in the management of natural resources, parliaments must ensure that there is appropriate (and updated) legal frameworks guiding the extractive industries, legislators must have regular dialogues and consultations with citizens throughout the extractive industries value chain, and they must provide effective oversight of management and effective utilisation of revenues from extractive industries. However, the study shows that African parliaments are constrained by, among others, weak institutions and lack of capacity among their members and parliamentary staff, absence of political will, conflicts of interest, lack of financial autonomy and the complex nature of extractive industries.

Five important themes emerged from an examination of the roles of legislatures in curbing corruption in the mining sector and the extractive industries in general.

3.4.1 *Weak Institutional Capacity*

The first major theme that emerged is weak institutional capacity of legislators and legislatures. A common trend among African legislatures is that the majority of legislators are inexperienced, and they are operating within weak institutions. Bryan & Hofmann observe that weak legislative bodies cannot serve as counterweights to more powerful executive branches.⁴³ A Ghanaian Member of Parliament stated that often “the issue boils down to lack of capacity”, adding that: “Most MPs do not have the background to understand the contracts, but they still get approved on the floor of the House.” For example, when a power plant contract was to be considered by the Energy and Finance Committees, the MP said that “most committee members attested to not understanding the terms of the contract, but the report was still approved by the parliament”. This is common practice among African parliamentarians. They do not possess the technical knowledge required to examine critically the mining contracts or documents that come before them for scrutiny. Many respondents referred to the same problem in Tanzania. Thus, a civil society organisation (CSO) leader remarked that:

Lack of capacity, knowledge and understanding of the extractive sector by the Parliamentarians are major challenges. You have members of Mining Committee who do not understand the mining sector, and they do not have any technical staff to assist them in conducting research and analysis of the sector. On top of this, Parliamentary Committees are re-shuffled every two and a half years. How do you retain and sustain the technical knowledge of the industry in this manner?

Bryan & Hofmann note that this phenomenon cuts across African legislatures and they confirm that African legislators face many constraints in fulfilling their roles and responsibilities, including weak individual and institutional capacity.⁴⁴

In some cases, institutional constraints prevent legislators from engaging effectively in the extractive industries. For example, an elected representative indicated that parliament has very little role or influence in negotiating the mining contracts, saying that:

negotiations are done between the Minerals Commission, the Sector Ministry and the Chamber of Mines. Parliament only ratifies it. So all the works would have been done without parliament’s involvement. By the time it gets to parliament, it is already a done deal. Most of these

43 Bryan & Hofmann (2007) at 11.

44 Bryan & Hofmann (2007) at 10.

negotiations are even held outside the country with the mining companies paying for government delegation. A lot of the mining contracts never even went to parliament.

Part of the institutional challenge is the lack of resources. Most institutions mandated to fight corruption are not resourced well nor are they independent.

Most respondents agreed that there is a huge problem of corruption and lack of transparency in the mining/extractive industries. More importantly, corrupt practices manifest at different phases and stages of the mining sector. One respondent said that “the sector has different levels of corruption and different presentations of it”. This could be from the granting of the concessions to contract negotiations and contract awards, compliance with the industry regulations, to the district assembly level and traditional chiefs. Another respondent confirms this notion that corruption in the mining sector operates at different levels:

This corruption is on several levels: firstly, at the issuance of mining titles corruption. Mining titles are often granted to mining officials in conditions where the political authorities receive huge sums and where the transparency in the management of these funds remains to be seen.

According to this respondent, the same problem is observable in the private sector, particularly under the public-private partnerships in the mining sector. According to the OECD, there are corruption risk factors specific to each value chain of the extractives, and there are also several corruption risk factors which are of cross-cutting relevance to all the extractive value chains.⁴⁵ These factors include weaknesses in the anti-corruption legal and judicial system, high politicisation and discretionary power in decision-making processes, inadequate governance of the extractive sector, gaps and discrepancies in corporate due diligence procedures, and opacity on beneficial ownership.

There is a web of corrupt practices at different levels, which leaves citizens of these countries as the ultimate losers and highly impoverished. One respondent stated that “when it comes to extractives, there is feeling citizens are not benefiting”, going on to say that: “Foreign companies come and mined the resources and take them away.” There was a consensus among respondents that citizens are being shortchanged. A former Member of Parliament argued that:

45 OECD (2016) *Corruption in the Extractive Value Chain: Typology of Risks Mitigation Measures and Incentives* at 15.

we don't have much to show for all the mineral wealth. Whether it is because we are not getting as much revenues as we should get because of corruption in that area or whether the revenues that end up with government are not properly utilised, one is not very sure.

This is consistent with the observation made by Chuhan-Pole, Dabalen & Land that although the resource boom has underpinned growth in Africa's commodity producers, it has been less successful in improving people's welfare.⁴⁶

3.4.2 Complexity and Opacity of the Mining Industry

The complex and opaque nature of the mining industry is another major theme that emerged during the study. Bryan & Hofmann submit that effective oversight of the extractive industries is complicated by a common perception held by legislators themselves that the industry's technical complexity is beyond their comprehension.⁴⁷ A respondent affirms this position: "Parliament's understanding and appreciation of the issues is very low, so they are unable to do much." Another factor responsible for this perception is that the mining industry in most African countries is shrouded in secrecy. A former Member of Parliament observed that when:

you look at how some of the mining companies operate, transparency seems to be an issue – when you look at declaration of revenues, how concessions are acquired, you cannot rule out corruption. The whole process is shrouded in secrecy.

Similarly, another respondent observed that mining contracts or processes leading to signing of these agreements usually are not accessible or open to the public. As a result:

citizens are not privy to whatever compromises that might have been made. There have been contracts that had stability clauses that protected the interest of mining companies more than that of the nation or host community.

One respondent summed it up by saying that a:

lack of transparency in the processes for awarding concessions is a major problem in the mining industry. There seems to be a lot happening that people are not aware of. For instance, you sometimes hear of lands

46 Chuhan-Pole, Dabalen & Land (2017) at xvii.

47 Bryan & Hofmann (2007) at 10.

reserved for small-scale mining going to large-scale mining companies and you wonder how that came about.

Another respondent concluded that:

whatever contracts the government signed, is on behalf of the people. Hence, there should be no secrecy in contracts that involve public interest. Therefore, every contract should have the blessing of the Parliament because Parliament is the organ that represents people's interest.

According to the OECD, the asymmetry of information between the negotiating parties and the lack of transparency in contract negotiations constitute major risk factors for corruption in the negotiation phase. Further, non-transparent negotiations provide the ideal setting for the exchange of abnormal and non-traceable cash payments, either as fees or commissions.⁴⁸

The complex and opaque nature of the mining industry provides incentives for some stakeholders in the sector to shut out the public (including parliament) from knowing what exactly is going on in the industry, thereby preventing effective public scrutiny and participation in the management of natural resources. Rosenblum & Maples argue that contract transparency is critical to achieving better resource management.⁴⁹ Given the history of corruption and mismanagement in the extractives, there are increased calls for more transparency and accountability in the sector. With extractive contracts publicly available, government officials will have a strong incentive to stop negotiating bad deals, motivated by corruption, incompetence or otherwise. More importantly, citizens will understand better the complex nature of extractive agreements if they are out in the open and explained by the contract parties.

3.4.3 Failure to Implement Anti-Corruption Laws

The third theme that emerged from the study is the lack of implementation of existing laws and regulations that govern corrupt practices. There are various laws against corruption in the three countries studied. For example, Ghanaian anti-corruption law is contained in the Criminal Code, which criminalises active and passive bribery, extortion, wilful exploitation of public office, use of public office for private gain and

48 OECD (2016) at 15.

49 Rosenblum P & Maples S (2009) *Contracts Confidential: Ending Secret Deals in the Extractive Industries* Revenue Watch Institute, New York at 11.

bribery of foreign public officials.⁵⁰ Similarly, the interim Parliament of Burkina Faso, under the National Transitional Council (TNT), passed an anti-corruption law in 2015. Under the new legislation, government officials, including the president, lawmakers and anyone charged with managing state funds, must declare their assets as well as any gifts or donations received while in office. In Tanzania, there is the Prevention and Combating of Corruption Act (PCCA) passed in 2007.

The problem therefore is not a lack of laws, but of non-implementation of the extant anti-corruption laws and other regulations guiding the mining industry. According to a Member of Parliament from Burkina Faso:

government has set up structures such as the Court of Auditors, and the Superior authority of State Control to fight against corruption. These structures are responsible for controlling the management of public finances. The government also presented a Bill on the definition and punishment of corruption which was passed by the Parliament. However, the implementation of the Act is what is lacking.

Another respondent observed that:

There are so many laws that tell you what not to do but do not spell out what happens if you do it. There is a very weak sanctions regime and very weak oversight mechanisms.

One respondent explained that there are several government initiatives, such as appropriate laws, public sensitisation, various sanction regimes and monitoring mechanisms, but lamented that:

These measures exist, and they are sufficient to control corruption, but unfortunately, they are not properly implemented.

Another respondent believed that enforcement of existing regulations will make a huge difference in the fight against corruption. He submitted that:

enforcement is key in the fight against corruption, because it impacts everything that is done. Ghana has an anti-corruption action plan with a three-prong approach of education, prevention and enforcement. Enforcement has to do with investigating and prosecution. But the focus has largely been on prevention and education. But prevention is only effective if you're able to enforce. So, if people see those who are corrupt walking around freely, then it becomes attractive. There is a need to

50 Business Anti-Corruption Portal-GAN, available at <https://www.business-anti-corruption.com/country-profiles/ghana/> (visited 15 November 2017).

ensure that corrupt people are prosecuted and proceeds from corrupt acts are confiscated. That will serve as the lessons and deterrent.

Similarly, a CSO leader in Tanzania observed that: “We have sufficient laws to deal with corruption, but the problem is lack of implementation.” Unfortunately, in some countries, parliamentarians are the ones responsible for flouting anti-corruption laws they helped to create, such as the Leadership Code (of 2002 as amended in 2017) in Uganda and the Asset Declaration Code in Nigeria. For instance, the Nigerian Senate President has been charged with making false assets declaration since 2015. The case is still before the country’s Supreme Court.⁵¹

In view of the huge gap that exists between anti-corruption laws and their implementation, a Member of Parliament advocates focusing on strong enforcement regimes rather than on enacting new legislation. He stated that:

Beyond having the laws, we should seek to enforce them. If companies know there is a price to pay, they will not be tempted to pay bribes, etc. Deprivation makes room for people to accept bribes. If people are educated well enough that there are consequences, these things can be curbed.

However, another respondent placed the blame for non-implementation of the laws and regulations at the door of implementing agencies, including parliament. He argued that:

We have laws, but the implementation is a problem. It is not a lack of laws. It is the weak implementation. This is when people should be looking in a particular way, but choose to look another way because they have been bribed.

This supports the finding of Stapenhurst, Ulrich & Strohal that it is not a lack of laws that is the problem but the weak implementation of the laws.⁵² Similarly, the Natural Resource Governance Institute (NRGI) observed in its 2017 *Resource Governance Index* report that countries often fail to follow rules that do exist. The report stated that, on average, countries score 54 of 100 points on their legal frameworks, while in practice (implementation) they score 45 — an average difference of nine points. And this gap is

51 *The Guardian* “Supreme Court Fixes July 6 for Ruling on False Assets Declaration Charges against Saraki”, available at <https://guardian.ng/news/supreme-court-fixes-july-6-for-ruling-on-false-assets-declaration-charges-against-saraki/> (visited 10 May 2018).

52 Stapenhurst, Ulrich & Strohal (2006) at 3.

even wider for countries exhibiting the worst overall governance of the extractive sector.⁵³

It is evident from our research that Burkina Faso, Ghana and Tanzania all are striving hard to provide an appropriate regulatory framework for the mining sector, including other anti-corruption laws and initiatives. However, having laws is not enough. They must be enforced. Unfortunately, many African parliaments still operate like an appendage of the executive — they lack both administrative and financial autonomy, as well as the courage to confront the executive on the lack of implementation of the laws they enacted. In fact, most African parliaments are rubber stamps for proposals from the executive, including the most important development tool — the national budget. According to Bryan & Hofmann, weak legislative bodies cannot serve as counterweights to more powerful executive branches. They observe that in many African countries, legislatures are marginalised from decision-making processes and dissuaded from conducting oversight activities.⁵⁴

3.4.4 Absence of Political Will

The fourth theme is the absence of political will to confront the culture of corruption in the extractive industries. Many respondents argued that, though there are several anti-corruption laws and regulations in the three countries, lack of political will among elected officials to enforce these laws is a major problem. A respondent from Tanzania observed that:

Tanzania does not lack laws and regulations ... What is lacking in this country but which fortunately is being demonstrated right now with our current President is leadership. The current President is making things happen. It is not because he has changed the country's laws. No, it is because of strong political will and desire for change.

An interviewee from Ghana stated that the “culture of impunity, lack of political will to fight corruption and weak enforcement of anti-corruption laws” are the bane of the fight against corruption. He argued that “application of these laws and the implementation of various reforms remain major challenges that could only be met with firm political will from governments”. Another respondent claimed that the:

53 NRGI (2017) Resource Governance Index at 15.

54 Bryan & Hofmann (2007) at 11.

issue of corruption often gets politicised which makes it difficult to prosecute. For instance, the Access to Information Bill has been on the table for a long time. It never gets passed. Each side of the House always promises to pass it when they come into government only to change their mind when they do come into government. Parliament unites only on issues that affects them directly.

He concluded that: “It is evident that parliament is the major block standing in the way of the bill becoming law.” A parliamentarian observed that the governance system in these countries also encourages executive dominance:

The average parliamentarian is not looking for faults. The onus lies on opposition to do that and often, people tend to look at it as political even when it is technical.

He argues that until there is a complete separation of power between the executive and the legislature, there may not be any significant change in the fight against corruption.

According to Bryan & Hofmann, many African legislatures have little independence from more powerful executives and ruling political parties, and they also have limited political will to carry out their legislative oversight functions without fear.⁵⁵ This confirms the finding of Stapenhurst *et al* that anti-corruption laws largely are unenforced, and this seems to reflect a lack of political will among some key influential bureaucrats and politicians to combat corruption.⁵⁶

3.4.5 Conflicts of Interest

Finally, conflicts of interest are an important theme identified as an obstacle to effective oversight of the mining industry by legislators and government officials. A Member of Parliament from Ghana observed that:

Political parties reward members with appointments. Almost all public service appointments are made by the President. Even MPs are serving on Boards which is wrong because these are entities parliament is supposed to oversee.

55 Bryan & Hofmann (2007) at 26.

56 Stapenhurst R, Sarigollu E, Jo M-S, Karakas F & Draman R (2017) “The Supply and Demand Sides of Corruption: Canadian Extractive Companies in Africa” 23(1) *Journal of Canadian Foreign Policy* at 69.

However, this same problem was addressed in Tanzania by preventing MPs from serving on boards of State Owned Enterprises. A former MP said:

This presents a conflict of interest as MPs cannot perform oversight functions over government organisations where they are serving as Board members, so we stopped this practice.

Participants also pointed out that it was difficult for people to separate their private lives from their public lives. For instance:

there have been many examples of people in high offices who have allowed family ties and relationships to affect their judgment ... they always allow personal ties and personal interests to override the public interest.

The study also reveals that there is widespread compromise among the local chiefs. For instance, a respondent observed that:

some of the chiefs had become sub-contractors for the mining companies making it difficult for them to stand firm when they have to defend the interest of the community.

There are cases where the government agency (Customs Division) responsible for assessing the volumes of mineral exported is compromised by mining companies. One of the respondents reported that:

There was an instance where the individual posted by the Customs Service was housed by the mining company, relied on their canteen for meals and spent a great deal of time in their company. It would be difficult for such a person to be objective.

Unfortunately, Members of Parliament also are not immune to this problem. One of the respondents gave an example of a “case where the local MP was a member of the Board of the mining company operating in his constituency because Ghanaian MPs could sit on private Boards provided they declare”.

There are generally low levels of public trust in parliament. For instance, the 2016 Afrobarometer study indicated that fewer than half of respondents (48%) across African countries affirmed that they trust their parliament. The study found that trust in parliament varies considerably across countries, with more than seven in 10 Tanzanian citizens trusting their MPs "somewhat" or "a lot". Overall, however, among the 18 countries tracked by the study since 2005/2006, trust in parliament has decreased by 5 percentage points, with trust decreasing sharply in Ghana (by 32

percentage points).⁵⁷ Bryan & Hofmann argue that concern over standards of ethics in public office is one of the reasons for widespread skepticism about legislators' capacity and will for improved transparency and accountability in the extractive industries. Therefore they advocate improved ethical conduct among legislators to build public confidence and increase legitimacy.⁵⁸ As they represent citizens:

members of parliament need to reflect the ethical standards of their community, be exemplary in performing their mandate and adhere to the highest standards of integrity. This is a pre-requisite for promoting/restoring trust in the institution which is often perceived as one of the most corrupt institutions in many countries of the world.⁵⁹

4 CONCLUSIONS

This article presents findings of an exploratory study that examines the roles of parliament in reducing corruption, particularly from the demand side. In the study, we set out to answer these three questions:

- Can parliamentary oversight reduce corruption in the mining industry?
- What is parliament doing to stop corruption in the mining industry?
- What do parliaments need to do, in collaboration with civil society organisations, to address this problem?

Findings from this study establish that “Parliament Matters” across the whole spectrum of the extractive industries value chain in the fight against corruption, particularly in the mining sector. Parliamentarians are people's representatives, and they must serve and protect always the interests of their constituents. Hence, it is their responsibility to ensure sustainable and judicious use of natural resources that belong to the people. Nevertheless, this can be achieved only through a multi-stakeholder approach, particularly when parliaments work closely or collaborate with other demand-side actors in the accountability eco-system, such as civil society organisations, the media, supreme audit institutions, anti-corruption agencies, and national secretariats of the Extractive Industries Transparency Initiative (EITI). Effective

57 Afrobarometer (2016) *Job Performance of MPs, Local Councillors: Are Representatives Serving Voters or Themselves?*, available at <http://afrobarometer.org/press/job-performance-mps-local-councillors-are-representatives-serving-africas-voters-or-themselves> (visited 28 August 2017).

58 Bryan & Hofmann (2007) at 12.

59 Transparency International *Corruption Perceptions Index 2016*, available at http://www.transparency.org/news/feature/corruption_perceptions_index_2016 (visited 7 July 2017).

legislative engagement creates a multiplier effect, reinforcing the efforts of civic groups and others to improve management of the extractive industries.⁶⁰ Similarly, civil society's active engagement in the EITI has been described as critical to ensure that the broader public has access to information about the payments and transfers made from the extractive industries. If civil society is empowered with information about extractive revenues, it can hold companies and government accountable.⁶¹ Good governance of the extractive sector requires participation, transparency and accountability across the extractive industries value chain. Therefore, parliaments and parliamentarians must seek collaboration with multi-stakeholder organisations or groups active in this space to address the challenges of corruption in the extractive industries.

Parliamentarians must also be very proficient and effective in their financial oversight of the extractive sector. In particular, they need to acquire the knowledge and skills needed to monitor and validate government estimates and forecasts of extractive revenues included in the annual budget. In addition, parliament must develop internal mechanisms, tools and skill sets needed to participate effectively in ensuring that revenues from the sector are properly accounted for, optimised and deployed appropriately for current and long-term sustainable development purposes.⁶² One such tool is the establishment of a parliamentary budget office (PBO) which assists parliamentarians to analyse the national budget in an objective and non-partisan manner and forecasts revenues from the extractive industries. Establishment of a PBO will help African parliaments overcome such institutional barriers as lack of information, inexperience of legislators, and excessive executive dominance. What is more, such an institution will enhance parliament's credibility and promote accountability.⁶³ Finally, there is a need for further research to examine evidence of what works and what does not work through legislative engagements in the oversight of the extractive industries. There is a major knowledge gap around this issue, and a systematic assessment of the roles of legislatures in curbing corruption throughout the

60 Bryan & Hofmann (2007) at 26.

61 World Bank Group (2015) *Annual Report: Extractive Industries Transparency Initiative — Multi-Donor Trust Fund (EITI-MDTF)* Washington, DC at 7.

62 World Bank Group (2016) *Guide to Effective Parliamentary Financial Oversight of the Extractive Industries* Washington, DC at 5.

63 World Bank (2013) "Parliamentary Budget Offices and Extractive Revenues" Presentation at the *Global Conference on Parliament and Extractive Industries*, Vienna at 26-28.

extractive industries value chain is suggested as a means better to understand this phenomenon.

APPENDIX 1: KEY INFORMANT QUESTIONNAIRE

Semi-Structured Interview Protocol for Government Officers/Leaders/Parliamentarians

1) Interviewee and the Organisation

1. Interviewee general information: Age, sex, demographics; job and position, years and experiences in Government & Parliament (e.g. Minister; Chair of committees)
2. Basics about the organisation: ministry/agency; parliament
3. Organisational culture, values and how they are related to the foreign mining corporations; attitudes toward business ethics, corporate social responsibility, and corruption

2) Experiences/Perceptions of Corruption

Local context

4. How would you define or describe corruption in the business environment?
5. Perceptions about foreign mining companies and the challenges of dealing with/overseeing foreign mining operations

Probe into perceptions/experiences of corruption in the local context

6. Experiences/perceptions of foreigners in this sector
7. Experiences/perceptions of corruption in the in this sector
8. Experiences/perceptions of corruption regarding public-private sector relationships in this sector
9. Experiences/perceptions of corruption regarding the mining sector and mining operations

Narratives of corruption

10. Any experiences/moments in daily life that you have encountered cases/instances of corruption/bribery? Please explain.
11. Any instances/experiences where you have had to make tough choices?
12. How do you make decisions when ethical/moral obligations clash with pragmatic realities of doing business in this context?
13. Any cases where your Ghanaian (Burkinabe/Tanzanian) identity/values clashed with the foreign mining company?

3) Reducing/Preventing Corruption

14. Structural challenges in preventing/reducing corruption?
15. How do you try to prevent or reduce corruption?
16. How do you try to prevent or reduce corruption as an individual?
17. What government initiatives/policies are there to prevent/reduce corruption?
18. Does the EITI make a difference in the way foreign mining companies operate in your country?

4) Corporate Social Responsibility

19. Are you aware of any CSR principles/policies/projects by foreign mining companies? Please describe.
20. How do foreign mining companies contribute to the lives of local communities here?
21. Do you think CSR practices help in reducing/preventing corruption in the local context? How?

APPENDIX 2: FOCUS GROUPS PROTOCOL

1) Introductions

1. Attendants' introduce themselves/meet each other
2. General knowledge/perceptions about the company and its local practices
3. Probe into attitudes toward salient local issues (perhaps ask about recent cases/events involving business ethics, social responsibility, and corruption topics — such as a recent mining accident or a demonstration of miners)

2) Experiences/Perceptions of Corruption

4. Experiences/perceptions of corruption in this country

3) Reducing/Preventing Corruption

5. How would you try to prevent or reduce corruption?

4) Corporate Social Responsibility

6. How does this company contribute to the lives of local communities here?
7. Do you think CSR practices help in reducing/preventing corruption in the local context? How?