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# **CORRUPTION AS INSTITUTION: ROADBLOCKS TO U.S.-FUNDED "BUSINESS FORMALIZATION" PROGRAMS IN NIGER**

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## **I. Introduction**

### **a. The Rise of Institution Building and Business Formalization in International Development**

Barak Obama is the first United States president whose recent descendants hail from Africa, yet his young administration has revealed little about its attitude toward the continent. Perhaps the Africa-focused community in the U.S., including the narrow swath of the population that cares about law and development in Africa, should excuse the administration's inaction. After all, it has been compelled to devote its attention to extricating the country from an inherited financial crisis, managing two inherited wars, addressing an environmental disaster not of its making, and repairing the country's dysfunctional healthcare system.

As result of these many crises, Africa has remained in its usual position on the policy periphery, and Americans who focus on Africa have for the most part been reduced to reading tea leaves to divine the administration's priorities. One policy priority, however, seems clear: the administration believes that healthy, high-functioning institutions are vital to the future stability and prosperity of African nations.<sup>1</sup> President Obama's speech in Accra, Ghana on July 11, 2009 – one of the administration's few important declarations on Africa – mentioned institutions five separate times, including the quotable admonition that “Africa doesn't need strong men, it needs strong institutions.”<sup>2</sup> According to the President, “[i]n the 21st century, capable, reliable and transparent institutions are the key to success.”<sup>3</sup> When the President specified the institutions to which he was referring, there was a distinct legal tint, including

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<sup>1</sup> Press Release, The White House Office of the Press Secretary, Remarks by the President to the Ghanaian Parliament (July 11, 2009) *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-the-Ghanaian-Parliament](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Ghanaian-Parliament).

<sup>2</sup> *Id.* ¶ 25.

<sup>3</sup> *Id.* ¶ 22.

parliaments, police forces, and judiciaries.<sup>4</sup>

A survey of U.S.-funded aid programs seems to indicate that the focus on institution building is more than mere rhetoric. A surfeit of new U.S.-funded programs aims to build rational, predictable institutions, with a particular emphasis on institutions that will stimulate commercial development in poor countries.<sup>5</sup> The Millennium Challenge Corporation (MCC), a relatively new and increasingly important US aid organization,<sup>6</sup> and the more venerable United States Agency for International Development (USAID), are initiating programs in poor countries throughout Africa and the developing world based on the assumption that their future stability and prosperity depends on unleashing and guiding the entrepreneurial spirit of small enterprises,<sup>7</sup> and that this can be accomplished by improving the institutions – most notably the laws and legal enforcement mechanisms – that regulate them.<sup>8</sup> The new wave of aid programs aims to remove burdensome, bureaucratic institutions laden with red tape and introduce streamlined, predictable,

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<sup>4</sup> *Id.* Secretary of State Hillary Clinton also mentioned institutions in a major address at the 8th Forum of the African Growth and Opportunity Act, stating that “[c]itizens and governments need to work together to build and sustain strong democratic institutions.” See Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at the 8th Forum of the African Growth and Opportunity Act, at ¶ 34 (Aug. 5, 2009) (transcript available at <http://www.state.gov/secretary/rm/2009a/08/126902.htm>).

<sup>5</sup> U.S. AGENCY FOR INT’L DEV., LAND AND BUSINESS FORMALIZATION FOR LEGAL EMPOWERMENT OF THE POOR: STRATEGIC OVERVIEW PAPER 7 (Jan. 2, 2007), available at [http://www.ardinc.com/upload/photos/677Land\\_and\\_Business\\_Formalization\\_Strategic\\_Overview\\_Paper\\_FINAL\\_with\\_Annexes.pdf](http://www.ardinc.com/upload/photos/677Land_and_Business_Formalization_Strategic_Overview_Paper_FINAL_with_Annexes.pdf) [hereinafter USAID Land and Business Formalization Report]; see also Jefferey Gettleman, *Kenya’s Volatile Politics Shadow Clinton*, N.Y. TIMES, Aug. 6, 2009, at A8, available at <http://www.nytimes.com/2009/08/06/world/africa/06diplo.html> (quoting U.S. Secretary of State Hillary Clinton as stating that the new U.S. approach to aid to Africa would include the goal of “bolstering support for African entrepreneurs”).

<sup>6</sup> See Doug Johnson & Tristan Zajonc, Can Foreign Aid Create an Incentive for Good Governance? Evidence from the Millennium Challenge Corporation (Apr. 2006) (unpublished manuscript), <http://www.cid.harvard.edu/cidwp/pdf/grad-student/001.pdf> (referring to the creation of the MCC as the most significant shift in U.S. foreign aid policy since the creation of USAID in 1961).

<sup>7</sup> See generally USAID Land and Business Formalization Report, *supra* note \_\_, at 2 (noting that formalization programs include improved opportunities designed to assist small and newly-formed operations); Julie Hudson, *Why Regulations Matter: A Small Business Perspective*, in REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA 223, 238 (Edmund Amann, ed., 2006) (commenting that small and medium sized enterprises, or SMEs, are vital drivers of economic growth in developing countries).

<sup>8</sup> USAID Land and Business Formalization Report, *supra* note \_\_ at 7; see also Devin E. Davis & Michael B. Kruse, *Taking Measure of Law: the Case of the Doing Business Project*, 32 LAW & SOC. INQUIRY 1095, 1096 (2007) (referring to a recent “surge in interest” in the role of institutions in determining economic outcomes, particularly in the developing world).

business-facilitative institutions that will lend support and structure to poor countries' commercial sectors.<sup>9</sup>

According to this view, which has been heavily influenced by the scholarly works of the Peruvian political scientist, Hernando de Soto, and the American economist, Douglas North<sup>10</sup> (both of whom will be discussed at more length later in this paper), entrepreneurs in developing countries often choose to operate their businesses in the informal sector of their countries' economies in order to avoid confusing, burdensome governmental regulations and taxation.<sup>11</sup> By seeking refuge in the informal sector, the entrepreneurs avoid the grasping hand of government, but in the long run they harm themselves and their countries' economies. They harm themselves by limiting their ability to access expansion capital, by compelling themselves to keep their enterprises unnaturally small to avoid scrutiny by governmental actors, and by preventing themselves from gaining standing to initiate formal legal actions if they have disputes with other business people.<sup>12</sup> They harm their societies by failing to pay taxes, failing to follow employment safety and welfare regulations, and failing to grow their businesses to optimum efficiency, create employment, and buoy the overall economy.<sup>13</sup>

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<sup>9</sup> See Mary M. Shirley, *Institutions and Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 611 (Claude Menard & Mary M. Shirley eds., 2005) (attributing underdevelopment in the Third World to weak, missing or perverse institutions).

<sup>10</sup> See *supra* Part II.a, for a more detailed description of De Soto's and North's work and its influence on U.S. aid policy. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Basic Books 2003); HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (Harper & Row 1989); Douglas C. North, *Institutions and the Performance of Economies Over Time*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, *supra* note \_\_, at 21; Douglas C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359 (1994).

<sup>11</sup> EDGARDO BUSCAGLIA & WILLIAM RATLIFF, *LAW AND ECONOMICS IN DEVELOPING COUNTRIES* 4 (2000); see USAID Land and Business Formalization Report, *supra* note \_\_, at 8, 15 (indicating a majority of business conducted in sub-Saharan Africa takes place in the informal sector).

<sup>12</sup> USAID Land and Business Formalization Report, *supra* note \_\_, at 29.

<sup>13</sup> USAID Land and Business Formalization Report, *supra* note \_\_, at 7; see, generally, U.S. AGENCY FOR INT'L DEV., *REMOVING BARRIERS TO FORMALIZATION: THE CASE FOR REFORM AND EMERGING BEST PRACTICE* 4 (March 2005) [hereinafter, USAID Removing Barriers Report], available at <http://www.oecd.org/dataoecd/36/27/38452590.pdf>; Paul H Rubin, *Legal Systems as Frameworks for Market*

The development experts' implicit assumption is that those who remain in the informal sector live in a Hobbsian world where there are few predictable rules and little is secure. No rational entrepreneur would intensify his or her investments under these conditions, nor would an outsider wish to invest his capital, and this is why businesses in the developing world tend to remain comparatively unproductive and foreign direct investment is constrained.

The obvious policy solution to these problems is to replace bad institutions with good ones: to pass laws and regulations that are simple to understand and comply with and that unambiguously protect entrepreneurs' property and contract rights, along with legal enforcement mechanisms that are quick, easy and inexpensive.<sup>14</sup> With the introduction of these improved institutions, entrepreneurs will flock toward the formal sector, and all will be well. Accordingly, Western-funded business formalization programs have focused on simplifying the process of registering new businesses, rewriting business and investment codes to enshrine secure property rights and *laissez-faire*, free-market liberal economic principles, and shoring up the justice systems that will enforce all of these newly enshrined rational rules.<sup>15</sup>

The issue of corruption plays an ancillary role in the story told by proponents of institution building and business formalization. In brief, one of the reasons that the typical, complex business regulations in developing countries are so vexing to entrepreneurs is that each bend in the tortuous regulatory process creates a bottleneck where corrupt governmental officials

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*Exchanges*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, *supra* note \_\_, at 210 (arguing that institutional and legal uncertainty in countries business sectors leads to economic inefficiency and lack of growth).

<sup>14</sup> Hossein Jalilian, et al., *Creating the Conditions for International Business Expansion: the Impact of Regulation on Economic Growth in Developing Countries – A Cross-Country Analysis*, in REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA, *supra* note \_\_, at 15-16; BUSCAGLIA & RATLIFF, *supra* note \_\_, at 1-2.

<sup>15</sup> WORLD BANK, DOING BUSINESS 2007: HOW TO REFORM 1-2 (2007) [hereinafter Doing Business Report 2007] available at [http://www.doingbusiness.org/documents/DoingBusiness2007\\_FullReport.pdf](http://www.doingbusiness.org/documents/DoingBusiness2007_FullReport.pdf).

can extract bribes – or rents, as economists call them.<sup>16</sup> If the entrepreneur does not offer a bribe to the petty official, the official will not issue the permit necessary to conduct or expand the entrepreneur’s business. The existence of such petty corruption and the inefficiency it causes provide yet more reasons to improve the country’s institutions by simplifying its regulatory and legal structure and improving its law enforcement mechanisms.<sup>17</sup>

The thesis of this paper, which is based largely on field work performed among the owners of small business enterprises in the West African Republic of Niger, is that development experts who focus on institution building – business formalization programs in particular – are mistaken in two of their foundational assumptions. First, it is not true that the so-called informal sector lacks rules and consistent, predictable institutions. Second, and very much related, corruption is far from an ancillary issue when it comes to formalizing the business sector; in fact, it is the main issue. Corruption is so engrained in the culture of Nigerien society, including its business sector, that at present it supplies the logic and the rules that most businessmen live by. Stated in the terminology of New Institutional Economics, which provides a theoretical foundation for business formalization programs and which will be explored in Part \_\_, below, corruption is the primary institution that provides the rules of the game for Niger’s business sector.

Corruption exists everywhere in Niger. It is so much an expected, banal part of daily existence that most people who live there consider it hardly worth mentioning. This paper will

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<sup>16</sup> See, e.g., USAID Removing Barriers Report, *supra* note \_\_, at 18; see also WORLD BANK, INTERNATIONAL DEVELOPMENT ASSOCIATION PROGRAM DOCUMENT FOR A PROPOSED GROWTH POLICY REFORM GRANT 1(GPRG-1) TO THE REPUBLIC OF NIGER IN THE AMOUNT OF 26.5 MILLION (US \$40 MILLION EQUIVALENT 1-2 (February 27, 2009) [hereinafter World Bank Niger Growth Policy Reform Grant Document], available at \_\_\_\_\_ (referring to importance of removing bureaucratic bottlenecks); Patrick Glynn et al., *The Globalization of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY (Kimberly Ann Elliott, ed. 1997) (employing the term “rent seeking” to describe the solicitation of bribes).

<sup>17</sup> USAID Land and Business Formalization Report, *supra* note \_\_, at 3 (arguing that corruption in the formal sector dissuades informal businesses from formalizing); USAID Removing Barriers Report, *supra* note \_\_, at 18.

describe it in detail in Part V, below, but, for the benefit of readers unfamiliar with Niger, Africa, and other parts of the developing world, I offer an introductory illustration from my own recent experience.

A few years ago, when I was establishing a temporary household in Niamey, Niger's capital city, I learned that it was hopeless trying to have utilities turned on unless I offered small bribes to the clerks in the central offices and to the field technicians who actually turned the knobs and threw the switches. Telephone landlines were (and still are) scarce and precious in Niamey, and when it came to getting mine, I not only paid small bribes to everyone at the telephone company, but had to take the additional step of tracking down the technicians, who were working in my neighborhood on other matters, to remind them that I had paid them. Acknowledging that I had played by the rules and was in the right, the technicians led me to a neighborhood switching box and, while I stood over their shoulders, opened a wire board that appeared to be of Victorian vintage, unplugged someone else's line, and plugged mine in. It is important to understand that this anecdote came to mind only because it happened recently. I have experienced similar incidents countless times in Niger, and such incidents take place constantly whenever a civilian (including a businessman) interacts in any way with a representative (official or unofficial) of the state.

For those promoting institution building and business formalization as the medicine for what ails the developing world, this means that the task of growing the formal sector is even more challenging than advertised. It is not simply a matter of creating predictable institutions and then inviting entrepreneurs to abandon their Hobbsian struggle in favor of a rational, predictable business environment. Rather, the task is to convince a broad array of actors in the business sector, and other sectors of society, that they will be better off if they abandon one engrained



institution and one set of rules – corruption – in favor of another – the Western ideal of a lightly and rationally regulated market.

## **b. Project Methodology**

At this project's genesis, my aim was to understand institution building – in particular business formalization – as a strategy of international development by studying a country where such aid programs were being implemented. I subscribe to the notion that when designing law reform programs for developing countries, and when evaluating or studying those programs, one cannot hope to succeed without thoroughly understanding the law, legal system, and culture of the country that is to be reformed, and that the only way to do that is to actually spend time there.<sup>18</sup> Indeed, in the past I have critiqued law and development projects in Africa as either ineffective or inadvertently harmful because they were designed and implemented by people who lacked sufficient understanding of the societies they were attempting to reform.<sup>19</sup>

For this project, my focus on the West African Republic of Niger was far from random. It is a country that I know well, having spent almost four years there in recent decades, including a two-year stint as a Peace Corps volunteer in the late 1980s, a Fulbright year from 2003 to 2004, and many month-long visits, the most recent of which, in the spring of 2009, was to perform fieldwork for this project. In Niger I enjoy privileged access because I have a large social and professional network in both rural and urban areas and because, in addition to French, I can converse in one of the local languages, Zarma.

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<sup>18</sup> See Stephen Golub, *Beyond the Rule of Law Orthodoxy, The Legal Empowerment Alternative 25* (Carnegie Endowment For Int'l Peace, Working Paper No 41, 2003) (encouraging law reform experts to spend more time in the in the countries they are trying to reform).

<sup>19</sup> See, e.g., Thomas Kelley, *Unintended Consequences of Law Reform in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 999 (2008) (arguing, based on ethnographic fieldwork, that anti-slavery law reform efforts introduced by Western countries unintentionally harmed Niger's contemporary slaves).

Studying business in a country such as Niger poses unique methodological challenges. My aim was to develop an understanding of small businesses in Niger and the institutional framework in which those businesses operate, paying particular heed to entrepreneurs' incentives and disincentives to operate in the country's formal sector. Armed with an on-the-ground, practical understanding of how Nigerien entrepreneurs operate, I intended to comment on whether the new business formalization programs, which were designed by economists with little specific knowledge of Niger, were hitting their mark; that is, whether they were addressing and remedying institutional shortcomings that Nigerien entrepreneurs were actually concerned with.

As in past law and development projects, my specific methodology was essentially ethnographic. I performed forty interviews, mostly with owners of small enterprises, mostly semi-structured and one-on-one. I asked them how they started and grew their businesses, what their plans were for the future and whether and if so how Niger's legal and regulatory environment helped or hindered their plans.<sup>20</sup>

The interviews produced surprising information. Based on past study of Niger, I had hypothesized that familial, ethnic, and Islamic religious networks were more extensive and efficacious than aid experts assumed, that in combination they provided an adequate institutional framework for Nigerien commerce,<sup>21</sup> and that this would explain why business formalization

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<sup>20</sup> It bears mentioning that my qualitative methodology for the study of law and development is unfashionable. For the past decade and more, scholarship on international development has been dominated by economists and lawyers who ascribe to a law and economics view of the world. Although it may be painting with an overly broad brush to say so, they tend to discount the value of any knowledge that cannot be expressed quantitatively, verified scientifically, and summarized in a chart or a Venn diagram. See UGO MATTEI & LAURA NADER, *PLUNDER: WHEN RULE OF LAW IS ILLEGAL* 48-9, 94 (2008) (discussing the predominance of economists, their insistence on "scientific study" and their predilection for graphs). See also MILLENNIUM CHALLENGE CORPORATION, *GUIDE TO THE MCC INDICATORS AND THE SELECTION PROCESS: FISCAL YEAR 2008* (2008) (mentioning the MCC's insistence on objective data and analytically rigorous methodology); Johnson & Zajonc, *supra* note \_\_, at 10-14 (describing the MCC's empirical approach to evaluating international development programs); Davis & Kruse, *supra* note \_\_, at 1096 (noting that the study of law and development has been dominated by non-lawyers).

<sup>21</sup> This hypothesis was based partly on what I had casually observed in Niger and partly on literature I had reviewed before traveling there to perform fieldwork for this project. See, e.g., Robert Charlick, *Niger: Islamist Identity and*

efforts were having trouble gaining traction. What I discovered was that those informal networks do exist and do facilitate commerce, but that the essential institution setting the rules of the game was corruption.

This led to a further methodological challenge, which is that businessmen<sup>22</sup> are reluctant to discuss corruption.<sup>23</sup> It is, after all, illegal even if it is an essential aspect of commerce in Niger.<sup>24</sup> The upshot of these methodological challenges was that I was able to conduct fewer in-depth interviews than I had hoped during my month of fieldwork,<sup>25</sup> and I suspected that at least a few of my interview subjects were less than candid about how they operate or, in the case of governmental officials, regulate businesses.<sup>26</sup>

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*the Politics of Globalization*, in POLITICAL ISLAM IN WEST AFRICA 19 (William F.S. Miles, ed., 2007) (arguing that conservative Islamic networks give structure to the business sector in the Nigerien city of Maradi and are emerging as a popular alternative among young businessmen to Western market capitalism); EMMANUEL GREGOIRE, THE ALHAZAI OF MARADI: TRADITIONAL HAUSA MERCHANTS IN A CHANGING SAHELIAN CITY (Benjamin H. Hardy, trans., Boulder, 1992) (1986) (similar); ABNER COHEN, CUSTOM AND POLITICS IN URBAN AFRICA, A STUDY OF HAUSA IMMIGRATION IN YORUBA TOWNS (1969) (describing ties of religion and ethnicity among African businessmen); JANET MACGAFFEY & REMY BAZENGUISSA-GANGA, CONGO-PARIS: TRANSNATIONAL TRADERS ON THE MARGINS OF THE LAW (2000) (describing familial reliance on ties of family, friendship, and ethnicity among African traders); *see generally* USAID Removing Barriers Report, *supra* note \_\_, at 18-19 (mentioning that socio-cultural factors such as networks of trust and interdependence can hinder formalization).

<sup>22</sup> I use this gendered term because, in fact, all of my interview subjects were men. This is partly because Niger is an overwhelmingly patriarchal society and, though women are well represented in the ranks of micro-entrepreneurs, often selling prepared foods on the street or spices in the market, few are owners of small or medium sized enterprises. The gender skewed sample is doubtless also due to the fact that I rely on “snowball sampling” to identify interview subjects. Niger is Islamic and patriarchal, so most of my social and professional contacts are male. They in turn tend to introduce and recommend me to other males to interview. Throughout this paper I refer to “businessmen” and “entrepreneurs” interchangeably.

<sup>23</sup> George Blundo & Jean Pierre Olivier de Sardan, *Why We Should Study Everyday Corruption and How We Should Go About It*, in EVERYDAY CORRUPTION AND THE STATE: CITIZENS AND PUBLIC OFFICIALS IN AFRICA 8-9 (G. Blundo & J.P. Olivier de Sardan eds., Susan Cox trans., Zed Books 2006); Susan Rose-Ackerman, *Introduction*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION xvi (Susan Rose-Ackerman, ed. 2006). *See* Interview with Owner of Several Small Businesses, in Niamey, Niger (February 19, 2009) (offering to describe the advantages of operating in the informal sector but then repeatedly avoiding the discussion).

<sup>24</sup> Interview with Former Director General of a Private Radio Station, in Niamey, Niger (February 26, 2009). In addition to the illegality, Nigerien businesses are generally reluctant to discuss their enterprises because the more their friends and family members know about the businesses’ profitability, the more likely they are to ask for support. *See infra* note \_\_ and accompanying text (discussing Nigeriens norms regarding patriarchs’ social obligations and reciprocal gift giving).

<sup>25</sup> I had planned to perform no fewer than fifty interviews during my month of fieldwork.

<sup>26</sup> *See, e.g.*, Interview with Nigerien Customs Official, in Niamey, Republic of Niger (March 8, 2009) (in which an official of Niger’s notoriously corrupt customs service disclaimed all knowledge of corruption).

Before turning to substance, I offer one additional methodological observation concerning my frame of reference for this project. In past law and development articles, my conclusions and critiques were based on interviews that I performed primarily in rural areas of Niger. During the course of those interviews, I developed a sense of unease about how Western legal interventions were affecting the daily lives and social organization of rural Nigeriens.<sup>27</sup> I argued that Western law reformers should avoid launching into law reform in faraway places like Niger until they understood the law that already existed there and that they should tailor their interventions to mesh with extant institutions. Otherwise, the Westerners risked having their laws ignored as irrelevant or, worse yet, harmful to the people they were intended to help.

This project, however, requires a different perspective. Here, I am assessing the effects of Western legal and policy interventions in an urban, governmental and commercial milieu that has, to a much greater extent than rural society, bought into (or at least declared fealty to) the logic of Western rules and Western institutions.<sup>28</sup> Where, for example, it might be an acceptable, even laudable, response from a rural, subsistence millet farmer to reject Western notions of land formalization that might upset the delicate balance of overlapping, reciprocal land rights that currently exist in his community, it is not an equally acceptable response from a governmental

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The lower than expected number of interviews was to a certain degree offset by the fact that, once I discovered that petty corruption was important to my research topic, I realized that I had vast store of personal experience to draw upon. Like most Nigeriens, I had come to accept corruption as an inevitable and unremarkable aspect of daily life. I rarely thought about it. However, once corruption unexpectedly became relevant to my research, I began recalling and cataloguing my experiences and deploying them to illustrate particular points. I have not hesitated in this paper to share personal anecdotes when they add clarity or color to the discussion.

<sup>27</sup> See, e.g., Thomas Kelley, *Squeezing Parakeets Into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 635 (2002).

<sup>28</sup> See G. Blundo & J.P. Olivier de Sardan, *Everyday Corruption in West Africa*, in EVERYDAY CORRUPTION AND THE STATE, *supra* note \_\_, at 108-09 (arguing that governmental actors and other elites in Africa have accepted the logic of the western state and may legitimately be judged according to its norms). It is, of course, a fair question whether this “buy-in” has been under duress by donor countries.

official to claim that corruption is a healthy and acceptable aspect of his culture of patriarchy and reciprocal gift-giving.<sup>29</sup>

### **c. The Roadmap**

The organization of this paper meanders a bit more than is usual, reflecting the fact that it started out focusing on one topic – business formalization programs as a form of institution building – and then shifted its focus once it became apparent that corruption was the institution furnishing the rules of the game for Nigerien business. Accordingly, Part II will review the theory and practice of institution building and business formalizations programs, focusing particular attention on the role that New Institutional Economics has played in giving shape to U.S.-funded international law and development programs. Part III will describe the business formalization programs that have been implemented in Niger, and will take the additional step – one often skipped by law and development experts – of describing the practices and concerns of Nigerien businessmen. Because an exploration of Niger’s small business sector revealed that corruption is a vitally important institution, Part IV will provide a primer on corruption, explaining its various definitions and exploring competing explanations of its causes and consequences. Part V will narrow the focus to corruption in Niger and will illustrate how it has emerged as the primary institution giving shape to Niger’s business sector. The paper will conclude in Part VI with the modest observation that Western aid organizations and the lawyers and economists who populate them must, if they are to be effective, alter their conception of corruption and the role it plays in the business sectors of poor countries such as Niger. Stated bluntly, those Western aid experts must shed the notion that corruption is an inefficient drag on the system, and acknowledge that it is the system.

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<sup>29</sup> See *infra* notes \_ and accompanying text [re: reciprocal gift giving and client-patron social structure].

## II. Institution Building and Business Formalization in Theory and Practice

### a. Theoretical Foundations

Tracing the theoretical roots of contemporary business formalization programs in a few paragraphs is a daunting task, particularly for one who is not inclined toward the discipline of economics. As is true of many discussions of Western economic principles, this one begins with Adam Smith and *The Wealth of Nations*, which taught that governmental regulation and central planning were not necessary to bring order to economic systems because the Invisible Hand of supply and demand and competitive pricing would always accomplish the task more effectively.<sup>30</sup>

In the 1960s, the renowned economist, Ronald Coase, generated two important insights that added nuance to Adam Smith's Invisible Hand theory, insights that have had a formative influence on today's business formalization programs.<sup>31</sup> Coase argued that Adam Smith's intellectual heirs – with their laser-like focus on pricing as a regulatory mechanism and their unshakeable assumption that the world was inhabited by atomized utility maximizers – ignored the fact that firms play a vital role in creating economic efficiency.<sup>32</sup> Coase believed there were costs associated with relying on the pricing mechanism.<sup>33</sup> For example, the individual participant in the market had to investigate and negotiate prices, and once those prices were determined, had to enforce them by entering into contracts.<sup>34</sup> When those contracts failed, the individuals were forced to seek the intervention of courts and other dispute resolution

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<sup>30</sup> See, e.g., Ronald H. Coase, *The Institutional Structure of Production*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 31, 31-32 (Claude Menard & Mary M. Shirley eds. 2008).

<sup>31</sup> KOFI OTENG KUFOUR, THE INSTITUTIONAL TRANSFORMATION OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES 2-3 (2006) (arguing Coase's novel ideas were at the root of New Institutional Economics).

<sup>32</sup> *Id.* at 3.

<sup>33</sup> Coase, *supra* note \_\_, at 34 (discussing Coase's own initial realization of these costs in 1932).

<sup>34</sup> *Id.*

mechanisms.<sup>35</sup> All of these necessary steps to participation in the market created what Coase termed “transaction costs.”<sup>36</sup> In his view, firms naturally formed as a means of reducing transaction costs and creating greater efficiency.

Coase also argued that what are traded in the open market are not so much physical things as rights to perform actions in relation to those things.<sup>37</sup> He believed that the contours of those rights were determined by a given society’s legal system and, logically therefore, that the society’s legal system had a profound effect on its economy.<sup>38</sup> He asserted that as a matter of sound economic policy, legal systems should operate in such a way that rights could be assigned to those market actors who would use them most productively and efficiently.<sup>39</sup> Stated otherwise, an economically efficient society’s legal system should ensure that the costs of transferring economic rights are low so that they can be expeditiously transferred to their most efficient users. The upshot, according to Coase and his intellectual progeny, is that laws, particularly those governing the negotiation and enforcement of contracts and the protection of property rights resulting from such contracts, must be clear, simple and strong.<sup>40</sup>

Building upon Coases’s insights about the importance of firms and transaction costs, the work of the American economist Douglas North highlights the vital role that institutions play in efficiently regulating economies. North defined institutions broadly as “humanly devised constraints that structure human interactions,”<sup>41</sup> including the legal systems that Coase thought

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (“It was the avoidance of the costs of carrying out transactions through the market that could explain the existence of the firm in which the allocation of factors came about as a result of administrative decisions.”).

<sup>37</sup> *Id.* at 37.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Douglas C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994).

so vital, but also including less formal non-state social networks and norms.<sup>42</sup> Together, the formal and informal institutions define the “rules of the game” for the economy and the “way the game is played.”<sup>43</sup>

In the oversimplified version of North’s work that often appears in action plans and project reports drafted by international aid organizations, good institutions, most particularly good laws and legal enforcement mechanisms that facilitate contracts and protect property rights, lead to strong economies.<sup>44</sup> Weak institutions, most notably laws, regulatory bodies and law enforcement mechanisms that are confusing, laden with red tape, and corrupt, lead to weak economies.<sup>45</sup> The key to successful economic transformation, and ultimately to socio-economic development, is therefore to replace bad institutions with good ones.

When international aid agencies apply North’s institutional theories – often referred to by the moniker New Institutional Economics (NIE) – they tend to ignore the fact that his writings consistently emphasize the arduous, incremental nature of institutional change.<sup>46</sup> He writes that individuals and organizations invariably exist within an institutional matrix, the logic of which is determined by the society’s history and norms and upon the experiences and belief systems of the individuals who make up the society.<sup>47</sup> The interwoven nature of the society’s institutional matrix creates a path dependency that largely determines the shape that future institutions will take, from which it is extremely difficult to break free.<sup>48</sup> Most policy reform interventions aimed

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<sup>42</sup> Douglas C. North, *Institutions and the Performance of Economies Over Time*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, *supra* note \_\_, at 22.

<sup>43</sup> *Id.*

<sup>44</sup> See generally, USAID Land and Business Formalization Report, *supra* note \_\_, at 7-9 (discussing the need for institutional reform and citing explicitly to Douglas North’s work); Doing Business Report 2007, *supra* note \_\_, at 1-7 (laying out an overly simplistic version of institutional reform).

<sup>45</sup> See generally, Doing Business Report 2007, *supra* note \_\_, at 1-7.

<sup>46</sup> North [Institutions], *supra* note \_\_, at 24.

<sup>47</sup> *Id.* at 23-24.

<sup>48</sup> *Id.*



at a society's institutions focus only on its formal laws and regulations, and are often ineffective due to path dependency and because so many institutions are informal rather than formal.<sup>49</sup>

The focus of Coase and North and their intellectual descendants on the importance of consistent property rights and the necessity of institutional reform was echoed and amplified by the Peruvian social scientist, Hernando de Soto, who, perhaps to an even greater extent than Coase and North, has become the guiding intellectual light of the new wave of institutionalists, including business formizers.<sup>50</sup> According to De Soto, poor countries can rise with the economic tide of globalization and grow their way out of poverty if and only if they reform their regulatory institutions to eliminate or at least reduce the unnecessary red tape that creates insuperable "barriers to entry" for would-be entrepreneurs.<sup>51</sup> Those entrepreneurs, understandably daunted by unnecessarily complex regulatory and legal requirements, simply avoid the mess (described by Coase and North as "transaction costs") by conducting their businesses underground in the informal sector.<sup>52</sup> This in turn has a deleterious effect, not only on the entrepreneurs' prospects for economic growth, but on the country's overall economy.<sup>53</sup>

Because the entrepreneur chooses to operate in the informal sector, he has no secure rights or title to his own assets and therefore cannot convert those assets into productive capital.<sup>54</sup> He cannot pledge his business or his office building as collateral for a loan to expand because, in the eyes of the law and necessarily in the eyes of the institutional lender, his business does not

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<sup>49</sup> See *id.* at 27-8 (expressing distain for simplistic development nostrums that seek to abruptly change developing countries' institutional frameworks).

<sup>50</sup> See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Basic Books 2003); see also THE WORLD BANK, *WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS* 34-38 (2001), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946\\_01092204010636?rendered=PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946_01092204010636?rendered=PDF/multi0page.pdf) (citing De Soto regarding the importance of secure property rights and formal land titles).

<sup>51</sup> DE SOTO, *supra* note \_\_, at 30.

<sup>52</sup> *Id.* at 21.

<sup>53</sup> *Id.* at 21, 28.

<sup>54</sup> *Id.* at 40, 51-54.

exist.<sup>55</sup> Without a formal legal existence, and in the broader context of an unpredictable and inconsistent institutional framework, intensification of investment by the entrepreneur himself or any investment by outside sources of capital is unacceptably risky.<sup>56</sup> Consistent with the NIE scholars, the solution to the problem that De Soto describes is to establish better institutions, particularly those that rationalize and protect private property, allowing property owners to revive their “dead” capital and generate surplus value from their assets.<sup>57</sup>

#### **b. New Institutionalism Displaces the Washington Consensus as a Guiding Force in International Development**

When the Berlin Wall fell in 1989, New Institutional Economics was gestating and had not yet convinced international law and development experts of the importance of institutions. In the flush of Cold War victory, Western nations and the aid agencies they controlled interpreted the results as an unambiguous repudiation of government regulation and a ringing endorsement of the value of unregulated free markets.<sup>58</sup> They tailored their international development strategies to this view and more or less dictated their radical deregulation philosophy to poor countries through *ex ante* “conditionalities” that were written into aid agreements.<sup>59</sup> In essence, the poor countries received the development assistance they desperately needed only on the condition that they agreed to adopt a standard Western package of liberal economic and political reforms, sometimes referred to collectively as the Washington

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<sup>55</sup> *Id.* at 51-54.

<sup>56</sup> *Id.* at 51-54, 56.

<sup>57</sup> *Id.* at 54-55; THE WORLD BANK, DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH 3 (2005), available at [http://www.doingbusiness.org/documents/DoingBusiness\\_2005.PDF](http://www.doingbusiness.org/documents/DoingBusiness_2005.PDF).

<sup>58</sup> See Edmund Amann, *Introduction*, in REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA 1-2 (Edmund Amann ed., 2006) (describing 1990s development policy as focusing on privatization and market deregulation).

<sup>59</sup> Johnson & Zajonc, *supra* note \_\_, at 2 (referring to *ex ante* conditionalities).

Consensus.<sup>60</sup> The reforms emphasized the shrinking of the state, the deregulation of the economy, privatization, and overall economic and social liberalization.<sup>61</sup>

By the dawn of the new millennium, Washington Consensus policies had shown little in the way of positive economic results.<sup>62</sup> Explanations varied,<sup>63</sup> but a new and improved development consensus, based partly upon the academic work of Coase, North, and De Soto,<sup>64</sup> was that radical deregulation was not necessarily the answer and that rational, efficient institutions – especially governmental institutions – were in fact vital for maintaining a healthy economy and long term stability.<sup>65</sup> The task of guiding poor countries toward more prosperous futures therefore shifted from disassembling their regulatory institutions to improving their quality.<sup>66</sup>

### **c. The Millennium Challenge Goals Adopt the New Institutional Approach**

Translating NIE scholars' writings into concrete policy initiatives fell in part to another American economist, Jeffrey Sachs, who spearheaded an effort to bring the insights of NIE, along with the general empirical rigor of economics,<sup>67</sup> to international development work.<sup>68</sup> Sachs took a leading role in orienting both the U.S. government and the United Nations toward what became known as the Millennium Development Goals, specific poverty reduction and

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<sup>60</sup> See generally, Thomas Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 39 GEO. WASH. INT'L L. REV. 321, 327-33 (2007).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g. Jalilian et al., *supra* note \_\_, at 12 (referring to arguments that privatization failed due to political mismanagement and corruption). See generally Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AM. JOURNAL COMP. L. 999, 1002 (summarizing various explanations of why the Washington Consensus failed).

<sup>64</sup> See *supra* notes \_\_ and accompanying text.

<sup>65</sup> See Jalilian et al., *supra* note \_\_, at 12-13, 15 (describing the development consensus that institutions matter).

<sup>66</sup> *Id.*

<sup>67</sup> See Davis & Kruse, *supra* note \_\_, at 1097 (referring to the “empirical and quantitative flavor” of the latest wave of law and development schemes).

<sup>68</sup> See generally JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (Penguin Press 2005). Sachs advocated “shock therapy,” also referred to as “big bang” reform, for developing countries. North, as noted earlier, viewed institutional change as an inevitably slow, iterative process.

development targets that donor countries, along with their partners in the developing world, would commit to achieving. In 2004, the United States created a new agency, the Millennium Challenge Corporation (MCC), to tackle its Millennium Development commitments.<sup>69</sup>

The MCC delivers US development assistance to countries that demonstrate that they have good institutions, or are at least on the path toward developing them.<sup>70</sup> In an attempt to avoid past instances where poor countries promised to undertake reforms but then failed to follow through, the MCC adopted an *ex ante* development strategy; that is, the MCC will not turn over the aid money until the developing countries have already demonstrated progress in institution-building, and will not continue to invest in countries unless they show ongoing progress.<sup>71</sup>

In keeping with the quantitative nature of the economic philosophy to which the MCC is committed, progress on institution building is measured empirically rather than by the mere qualitative intuition of policy makers and aid experts.<sup>72</sup> In the confident words of a recent World Bank report, “what gets measured gets done.”<sup>73</sup> The MCC has energetically addressed the challenge of finding meaningful quantitative measurements of institutional progress in poor

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<sup>69</sup> Johnson & Zajonc, *supra* note \_\_, at 1 (referring to the 2004 founding of the MCC as perhaps the most significant shift in US foreign aid policy since President Kennedy created USAID in 1961).

<sup>70</sup> *See id.* at 4 (employing the terminology “sound policy environments”).

<sup>71</sup> *Id.* at 5. The MCC’s incentive system is based upon a two-tier program of engagement. Poor countries that are heading in the right direction on institutional reform but that have not yet achieved sufficient scores on the MCC’s quantitative indicators (described below) may be offered comparatively modest, short-term assistance in the form of a so-called Threshold Program. *Id.* at 6. The Threshold countries receive cash infusions and a period of time to improve their scores and earn full engagement by the MCC. *Id.* Full engagement comes in the form of an MCC Compact, a written agreement in which a package of institutional and policy reforms is proposed, at least in theory, by the recipient nation. *Id.* at 5. (In fact, the process is directed by Americans from the start. The countries use aid money to hire American consultants, who, in close communication with the American Embassy in the country and the USAID or MCC staff, crafts the application that it meets the expectations of the United States.) Once crafted and adopted, the Compact can provide tens of millions of dollars in development support over a period of several years. *See id.* at 6 (noting the first two MCC Compacts included a combined \$34 million in development assistance).

<sup>72</sup> *Id.* at 5.

<sup>73</sup> Doing Business Report 2007, *supra* note \_\_, at 3. [NB: the ILJ cited this to: THE WORLD BANK, DOING BUSINESS IN 2010: REFORMING THROUGH DIFFICULT TIMES 3 (2010), <http://www.doingbusiness.org/features/Highlights2010.aspx> (follow “Download the full report” hyperlink)].

countries by developing sixteen so-called “MCC indicators” that rely on empirical data collected from various existing sources to measure good governance and institutional soundness.<sup>74</sup> The indicators are divided into three distinct themes or categories: Encouraging Economic Freedom, Ruling Justly, and Investing in People.<sup>75</sup>

The indicators most relevant to “business formalization” programs fall under the categories Encouraging Economic Freedom and Ruling Justly. Specifically, Encouraging Economic Freedom includes a “business start-up indicator,” which measures the number of bureaucratic steps and the amount of time it takes a typical businessman to establish a small business in the subject country’s capital city.<sup>76</sup> It also includes a “regulatory quality” indicator that claims to quantitatively measure the subject country’s ability to create a regulatory and legal structure that facilitates economic activity.<sup>77</sup> The Ruling Justly category includes a separate category, purporting to measure “control of corruption,” that ranks countries based on an amalgamation of several surveys that purport to measure citizens’ perceptions of corruption in their countries.<sup>78</sup>

The MCC gathers the empirical data described above, along with quantitative information on thirteen other topics as diverse as “immunization rates,” “girls’ primary education” and “natural resource management,” and as vague as “government effectiveness.” It plugs the data into a formula and summarizes it on easy-to-read charts. Active and aspiring participants in

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<sup>74</sup> Millennium Challenge Corporation, *Guide to the MCC Indicators and the Selection Process 2* (2008) [hereinafter MCC Guide to Indicators] 3-4, available at <http://www.mcc.gov/mcc/bm.doc/mcc-1010-guide-to-the-indicators-2.pdf>; see also Johnson & Zajonc, *supra* note \_\_, at 6 (citing sixteen indicators, as opposed to the seventeen listed in the MCC Guide to Indicators).

<sup>75</sup> MCC Guide to Indicators, *supra* note \_\_, at 30.

<sup>76</sup> See *id.* Note that this indicator borrows directly from the International Finance Corporation’s (IFC’s) annual “Doing Business” survey in which it ranks countries around the world on how easy or difficult it is to do business within their borders. The IFC is an arm of the World Bank.

<sup>77</sup> *Id.* at 26-8. The data supporting this indicator is drawn from a combination of fourteen different polls and surveys, combined by the World Bank Institute, that purport to measure the quality of the regulatory environment from the perspective of domestic businessmen and outside investors.

<sup>78</sup> *Id.* at 20-21.

MCC programs are supposed to vie with one another in what is essentially a horserace to see who has made the most progress on the various indicators.<sup>79</sup> Only the best performers are graced with continuing financial support.<sup>80</sup>

#### **d. Dissenting Voices**

Not everyone is enamored of the New Institutional approach to international development. Some critique it on empirical grounds, arguing that there is little evidence that the institutional package promoted by the U.S. actually leads to economic growth, prosperity and stability.<sup>81</sup>

Others critique the institutional approach on more normative grounds, arguing that it tends to treat law as a politically neutral technology that can be transplanted and left behind in a developing country like a road or a hydroelectric dam,<sup>82</sup> ignoring the fact that law is inextricably intertwined with a society's particular notions of justice.<sup>83</sup> Legal institutions introduced as mere technology from the outside ignore the existing political economy of the subject country and often are used by elites to solidify their positions in ways that are manifestly unjust.<sup>84</sup>

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<sup>79</sup> See Davis & Kruse, *supra* note \_\_, at 1096 (referring to the trend toward “legal benchmarking and competition”).

<sup>80</sup> See *id.* at \_\_.

<sup>81</sup> See Johnson & Zajonc, *supra* note \_\_, at 4, 19; USAID Land and Business Formalization Report, *supra* note \_\_, at 119-27 (Annex 6 (Jan. 2, 2007) (summarizing results of multiple empirical studies, some concluding that improved institutions lead to economic growth, others concluding they do not); see also (concluding that there is no meaningful relation between economic growth and the purely formal attributes of a country's legal system and mentioning China as an example of an economically successful country without the NIE package of institutions); Michael A. McPherson & Carl Liedholm, *Determinants of Small Micro Enterprise Registration: Results from Surveys in Niger and Swaziland*, 24 WORLD DEV. 481, 485-86 (concluding that heavy bureaucratic requirements do not have a significant effect on entrepreneurs' decisions whether or not to register their businesses).

<sup>82</sup> MILHAUPT & PISTOR, *supra* note \_\_, at 20.

<sup>83</sup> See generally Blundo & Olivier de Sardan, [Why Should We Study], *supra* note \_\_, at 6 (arguing that the law-as-technology approach strips law from all political considerations and ignores the specific conditions of the subject country).

<sup>84</sup> See MATTEI & NADER, *supra* note \_\_, at 3, 7 (arguing that current aid policy too often focuses on efficiency and competition to the exclusion of social justice, which tends to favor local elites over the poor).

As to why law and development experts have put forward this sterilized, essentially technological view of law and law reform, there are two predominant theories. One can be described by the adage that “if you are a hammer, every problem looks like a nail.” That is, if you are an economist, as it seems most development experts these days are, notions like justice and the distribution of political power are hard to measure, squeeze into regression analyses, and plot on charts. Therefore, you ignore, or at least marginalize, such considerations. See *id.* at

My hope is that this paper will be included among the dissenting voices, but my grounds for dissent are pragmatic and experience-based rather than quantitatively empirical or normative. As the paper will illustrate in the following sections, institutional reform will not work in Niger, at least not in the short term, because it fails to account for the fact that an engrained institution – corruption – already exists.

### **III. Business and Business Formalization in Niger**

Conceptually, it would make sense to describe Niger's business sector in its current form before delving in to a discussion about how the institutions that govern it can and should be reformed. This is not, however, how most law and development experts approach the task. They tend to dive directly into business formalization programs without pausing to understand the extant institutions in the subject country. This section will follow the conceptual path of those law and development experts – discussing plans for formalization before understanding what already exists – and by doing so will help illustrate what they are missing.

#### **a. Business Formalization: Policy Prescriptions and Legal Reform**

In Niger, business formalization efforts have closely followed the NIE/MCC script.<sup>85</sup> In March, 2008 Niger signed a \$23 million<sup>86</sup> Threshold Agreement<sup>87</sup> that includes, among other

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49, 94 (arguing that economists find ideology intellectually uninteresting and that they consider obsolete any argument that cannot be understood and described in graphs and numbers); *see generally* NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS* (Cornell Univ. Press 2006) (examining the role of the IMF and the World Bank in international relations). A slightly more cynical version of this explanation points out that the international financial organizations such as the World Bank and the IMF that have taken the lead in implementing the law-as-technology approach are forbidden by their charters from straying into the realm of politics, whereas nothing prevents them from being involved in technology transfer. MILHAUPT & PISTOR, *supra* note \_\_, at 20-21. They therefore adopt, consciously or unconsciously, strained definitions of law that permit them to take what they view as appropriate action. *Id.*

<sup>85</sup> See *supra* Part \_\_.

<sup>86</sup> MILLENNIUM CHALLENGE CORPORATION, NIGER THRESHOLD QUARTERLY STATUS REPORT (January 2009) [hereinafter MCC Niger Status Report], *available at*: <http://www.mcc.gov/mcc/bm.doc/qsr-niger.pdf>.

<sup>87</sup> MILLENNIUM CHALLENGE CORPORATION, MILLENNIUM CHALLENGE ACCOUNT THRESHOLD PROGRAM ASSISTANCE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE

goals, “streamlining the process of starting a business by establishing the administrative, legal and regulatory structures required to implement business facilitation reforms . . . .”<sup>88</sup> Through these legal and regulatory reforms the government aims to “reduce the cost for starting a business by 84 percent,” and “reduce the number of days to start a business from 24 to 14 and the number of procedures required from 11 to 7.”<sup>89</sup> The Threshold Program also aims to attack corruption, particularly within Niger’s health and education sectors<sup>90</sup> where corrupt practices are thought to be most rampant.<sup>91</sup> A year after Threshold Program agreement was signed, the MCC was still fitting out office space in Niger’s capital, Niamey, and hiring host country and expatriate staff,<sup>92</sup> but that has not stopped the government from moving forward with its legal and administrative reforms.

Niger’s business-facilitation legal reforms have been numerous and rapid. Although this purports to be an article that is at least partly about law reform, we do not dwell on the details of the various reformed codes and legal decrees because it suffices to say that they all aim to usher Niger toward the business-facilitative legal environment desired by NIE and MCC reformers.<sup>93</sup> They streamline and rationalize government regulation, they liberalize economic oversight, they protect investors’ contracts and property and permit them to move their investment capital and

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REPUBLIC OF NIGER TO SUPPORT PRIMARY SCHOOL EDUCATION FOR GIRLS, IMPROVE THE CONTROL OF CORRUPTION, AND STREAMLINE BUSINESS CREATION, LAND ACCESS AND TITLING PROCEDURES [hereinafter MCC Niger Threshold Agreement], *available at* <http://www.mcc.gov/mcc/bm.doc/tpaa-niger.pdf>; *see* MCC Niger Status Report, *supra* note \_\_ (reporting March 17, 2008 as the signing date of the Threshold agreement).

<sup>88</sup> MCC Niger Status Report, *supra* note \_\_.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* Interview with Seller of Home and Office Furnishings, in Niamey, Republic of Niger (March 5, 2009) (indicating that health and education are particularly valued as opportunities for corruption because, compared to other ministries, they purchase large quantities of materials).

<sup>92</sup> *See* Niger Status Report, *supra* note \_\_ (indicating that evaluation consultants had been hired in December of 2008 and that the program anticipated a launch in Niamey in February, 2009). I visited the MCC offices in Niamey in late February of 2009 and observed that it was just beginning to function.

<sup>93</sup> *See supra* notes \_\_ and accompanying text.



profits freely in and out of the country.<sup>94</sup> Such features are included in Niger's new Investment Code, which is designed to attract foreign direct investment by enhancing the investors' property rights.<sup>95</sup> Likewise, Niger's recent adoption of a Mining Code and a Petroleum Code are intended to attract foreign direct investment and intensification of business activity in Niger by allowing market competition between private actors and liberalizing strictures on the removal of business profits.<sup>96</sup> Finally, in addition to a surfeit of new laws aimed at opening and rationalizing Niger's domestic business environment, it has also fully adopted the regional OHADA Business Code – the equivalent of a West African Uniform Commercial Code – in an effort to harmonize its laws with those with other countries in the region and thereby stimulate regional trade.<sup>97</sup>

In addition to these major legislative projects, the Government of Niger has created by decree several new business-enhancing institutions. For example, it recently formed a National Council of Private Investors, under the direction of the Prime Minister's office, to address at the highest levels the needs and concerns of private investors.<sup>98</sup> Linked to this Council of Investors and also under the direction of the Prime Minister, the government formed a refinancing fund that will in theory provide investment capital to small and medium sized enterprises.<sup>99</sup> Many

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<sup>94</sup> See generally REPUBLIQUE DU NIGER, MINISTERE DU COMMERCE, DE L'INDUSTRIE ET DE LA NORMALISATION, POUR UNE AMELIORATION DU CLIMAT DES AFFAIRES [undated] (hereinafter Publication on the Improvement of Niger's Business Climate) (copy on file with author).

<sup>95</sup> See *id.* at 1; see generally, Code Des Investissements en Republique Du Niger, Ordonnance no 89-19 du 8 decembre 1989, portant Code Des Investissements en Republique du Niger, modifiee par l'Ordonnance no 97-09 du 27 fevrier 1997, L'Ordonnance no 99-69 du 20 decembre 1999 et la Loi no 2001—20 du 12 juillet 2001.

<sup>96</sup> Publication on the Improvement of Niger's Business Climate, *supra* note \_\_, at 5; see generally Loi no 2007-01 du 31 janvier 2007 portant Code petrolier.

<sup>97</sup> Publication on the Improvement of Niger's Business Climate, *supra* note \_\_, at 1; see generally Claire Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17 (2005) (furnishing a general description of OHADA).

<sup>98</sup> Publication on the Improvement of Niger's Business Climate, *supra* note \_\_, at 1.

<sup>99</sup> *Id.*; but see Interview with Former Director General of a Private Radio Station (February 26, 2009), *supra* note \_\_ (expressing dismay that small loan funds in Niger are ineffectual and never seem to actually loan money to anyone who needs it); Interview with Young Man Who Services Computers and Sells Computer Peripherals, Niamey, Niger (February 23, 2009) (stating that government programs never help small businessmen, even when that is what they are designed to do).

other legal reforms, all intended to improve the economic climate and the institutional and regulatory structure for doing business in Niger.<sup>100</sup>

The Government of Niger has also committed to enhancing the business environment by undertaking certain administrative reforms. For example, it has pledged to further ease the burden of starting a new business by forming “one-stop centers” (*guichet unique*) for new enterprises where they can, at least in theory, take care of all necessary formalities for forming a business entity.<sup>101</sup> The government further pledges to reduce the number of bureaucratic steps necessary to complete the business registration process, to computerize that multi-step process, and to develop and distribute “how to” guides on new business creation geared toward citizen entrepreneurs.<sup>102</sup>

In addition to these measures, the government has, at least in form, undertaken legal and administrative reform aimed at combating corruption. The anti-corruption steps, which have been pledged but not yet fully implemented, include enhancing the government’s ability to conduct audits, providing anti-corruption training for officials who are in charge of public procurement for government agencies, publishing in the media and on websites information about government purchasing and opportunities for businessmen to bid on government contracts, and teaching media organizations and civil society groups how to scrutinize government actors and root out corruption.<sup>103</sup> For purposes of this paper, it is significant to note that the MCC treats business formalization as an entirely separate program component from “control of corruption,”

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<sup>100</sup> Publication on the Improvement of Niger’s Business Climate, *supra* note \_

<sup>101</sup> See Interview with A Top Official in Niger’s Ministry of Commerce, Niamey, Niger (March 5, 2009) (describing the benefits of the *guichet unique*); Interview with a Top Official of Niger’s Chamber of Commerce, Niamey, Niger (February 24, 2009) (mentioning the *guichet unique* but saying many officials in various government ministries were determined to make the « one stop centers » fail because it cut into their opportunities for corruption) ; *see also* Publication on the Improvement of Niger’s Business Climate, *supra* note \_, at 2 (mentioning the *guichet unique* as an important improvement in Niger’s business climate).

<sup>102</sup> MILLENNIUM CHALLENGE CORPORATION, NIGER FACT SHEET 2-3 [hereinafter MCC Niger Fact Sheet] (January 30, 2008), available at <http://www.mcc.gov/mcc/bm.doc/factsheet-013008-niger.pdf> .

<sup>103</sup> *Id.* at 1-2.

and focuses its anti-corruption interventions not on interactions between the business and public sectors, but on government activity in the Health and Education ministries.<sup>104</sup>

## **b. Business in Niger as It Is Actually Practiced**

### **i. Quantitative Description**

Niger is an extremely poor country, perpetually ranking at or near the bottom of the United Nation's Human Development Index.<sup>105</sup> According to the World Bank, sixty-one percent of its population lives in extreme poverty on less than one dollar per day and average per capita income in 2007 was \$280.<sup>106</sup> It is vast and landlocked and most of its terrain is in the Sahara Desert, which means it has limited arable land,<sup>107</sup> a critical problem in a country where most

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<sup>104</sup> See *id.* at 4-5, 12, 16 (describing Niger's improved business climate, noting that Niger in 2006-07 overtook fifteen countries in the World Bank's "Doing Business" rankings, and declaring Niger's specific commitment to improving its "private and public institutions").

In addition to these legal and regulatory steps, Niger has unleashed what might be described as a charm offensive to promote the efficiency of its improved business climate. With the Ministry of Commerce in the forefront, the government has produced glossy, sometimes bilingual (French/English) publications that trumpet its commitment to business-facilitative institutional reform. They employ language that is strikingly similar to that of the MCC and other Western aid organizations, unabashedly trumpeting the government's embrace of business enhancement, improvement of the investment climate, open trade, regional economic integration, free competition but more general commitments to the rule of law, good governance, and democracy. *See, e.g.,* L'ENVESTISSEUR: GUIDE DE L'INVESTISSEMENT AU NIGER, June-July, 2008 (bilingual magazine promoting Niger's investment opportunities and stable business environment) (copy on file with author); Publication on the Improvement of Niger's Business Climate, *supra* note \_ (an eight-page, multi-color publication in French) (copy on file with author); MINISTERE DU COMMERCE, DE L'INDUSTRIE ET DE LA NORMALISATION, NOTE SURE LE CLIMAT DES AFFAIRES, March 5, 2009 (a two-page summary, authored by the minister's office, of Niger's recent business enhancement measures) (copy on file with author).

<sup>105</sup> U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2009 (2009) *available at* <http://hdr.undp.org/en/statistics/> (ranking Niger as the least developed country in the world). The U.N. Development Index measures countries' achievements in terms of life expectancy, educational attainment, and adjusted real income. It is compiled annually as part of the U.N. Development Program's annual Human Development Report.

<sup>106</sup> THE WORLD BANK, NIGER COUNTRY BRIEF (2009), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGEREXT>.

<sup>107</sup> THE WORLD BANK, INTERNATIONAL DEVELOPMENT ASSOCIATION PROGRAM DOCUMENT FOR A PROPOSED GROWTH POLICY REFORM GRANT 1 (GPRG-1) TO THE REPUBLIC OF NIGER IN THE AMOUNT OF SDR 26.5 MILLION (US \$40 MILLION EQUIVALENT) 2 [hereinafter World Bank Niger Growth Policy Reform Grant Document] *available at:* [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/03/27/000350881\\_20090327100827/Rend ered/PDF/446110PGD0IDA11120ADDENDUM01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/03/27/000350881_20090327100827/Rend ered/PDF/446110PGD0IDA11120ADDENDUM01PUBLIC1.pdf); *see* THE WORLD BANK, PUBLIC EXPENDITURE MANAGEMENT AND FINANCIAL ACCOUNTABILITY IN NIGER 1 (2005) (noting that thirteen percent of Niger's land is "cropped" and one percent is irrigated).

people survive as subsistence farmers.<sup>108</sup> Its population is estimated at almost 15 million<sup>109</sup> with an approximately thirty percent rate of literacy.<sup>110</sup> At 3.3 percent, its population growth rate is among the fastest in the world.<sup>111</sup>

Officially, Niger's private sector economy is miniscule, with fewer than 1,000 formal enterprises.<sup>112</sup> It suffers from an underdeveloped financial sector,<sup>113</sup> a fact that will become important when we discuss corruption in Part \_ of this paper. The country's economy has grown strongly in recent years, but that growth is due largely to better than average rains, which bolstered Niger's predominantly rain fed agricultural sector,<sup>114</sup> and increased commodity prices associated with Niger's uranium mining and nascent oil extraction industry.<sup>115</sup> Unless Niger's economy diversifies beyond agriculture and natural resource extraction, it will remain subject to factors that it has no control over: seasonal rainfall and international commodity prices.<sup>116</sup>

Given Niger's diminutive formal private sector, it should not be surprising that the government is a major force in its economy in spite of IMF and World Bank-inspired retrenchment in recent years.<sup>117</sup> According to the World Bank, government expenditures account

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<sup>108</sup> See THE WORLD BANK, NIGER COUNTRY BRIEF (2009) (noting that Niger's economy is dominated by rain fed agriculture).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> World Bank Niger Growth Policy Reform Grant Document, *supra* note \_\_, at 2.

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.* at 2-3, 12-13. WORLD BANK, SUMMARY OF NIGER: INVESTMENT CLIMATE ASSESSMENT 2-3 (2006), available at <http://siteresources.worldbank.org/INTAFRISUMAFRPS/Resources/aftpsnote30F0610-17.pdf> (arguing lack of access and high cost of financing impede Niger's economic growth).

<sup>114</sup> THE WORLD BANK, NIGER COUNTRY BRIEF, *supra* note \_\_.

<sup>115</sup> World Bank Niger Growth Policy Reform Grant Document, *supra* note \_\_, at 4; see generally Adam Nossiter, *After A Coup, Niger Resumes Business as Usual With China*, N.Y. TIMES, April 24, 2010, at A1 (mentioning Niger's growing oil industry).

<sup>116</sup> World Bank Niger Growth Policy Reform Grant Document, *supra* note \_\_, at 4.

<sup>117</sup> *Id.* at 5.

for approximately one third of the country's gross domestic product.<sup>118</sup> This too will become an important statistic when we arrive later at the discussion of corruption.

## **ii. Qualitative Description**

Three themes emerge from a close study of small businesses in Niger.<sup>119</sup> First, and perhaps most obvious given the topic of this paper, the proprietors of small businesses in Niger tend to undertake their activities in the informal sector outside of direct government oversight and regulation. Second, small Nigerien businesses, whether formal or informal, constantly struggle to obtain start-up and expansion capital. Third, ambitious Nigerien businessmen, particularly merchants who buy and sell goods, aspire to move up the commercial chain from retail to wholesale, and, to accomplish that hoped-for evolution, must travel to distant lands to purchase their goods at lower prices.

### **1. Informality as the Norm**

There are no reliable statistics regarding the prevalence of informal businesses in Niger so one must rely on inference, anecdote, and observation. This is understandable, since it is a defining feature of informal businesses that they prefer not to be counted or otherwise recognized.<sup>120</sup> Recent studies of the informal business sector across Africa find that a significant percentage of all businesses operate informally.<sup>121</sup> An official of Niger's tax service

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<sup>118</sup> *Id.*; see also INTERNATIONAL MONETARY FUND, NIGER: SELECTED ISSUES AND STATISTICAL APPENDIX 85 (2009), available at: <http://www.imf.org/external/pubs/ft/scr/2009/cr0970.pdf> (indicating that government expenditures account for approximately one third of the country's "modern sector").

<sup>119</sup> See *supra* Part I.b.

<sup>120</sup> Alex Dreher & Friedrich Schneider, *Corruption and the Shadow Economy: An Empirical Analysis* (Unpublished Manuscript submitted to the Annual Meeting of the Public Choice Society, January 18, 2006), at p. 2 (noting that the "shadow economy" does not lend itself to easy measurement); USAID Land and Business Formalization Report, *supra* note \_\_, at 12-13 (discussing the difficulty of measuring informality).

<sup>121</sup> See, e.g., Friedrich Schneider & Dominik H. Enste, *Shadow Economies: Size, Causes, and Consequences*, 38 JOURN. OF ECON. LIT. 77, 81 (remarking that some countries, including Nigeria, show an underground sector nearly three-quarters the size of officially recorded GDP); USAID Land and Business Formalization Report, *supra* note \_\_, at 14 (estimating that the overall informal economy in Africa accounts for 42% of GDP).

told me that the service had recently undertaken an in-house study and concluded that merchants in Niamey's Grand Marche paid business taxes on approximately five percent of their profits while the rest of the economic activity took place in the informal sector.<sup>122</sup> The best that can be said is that many businesses in Africa and certainly most small businesses in Niger operate informally.

Niamey's central business district has a handful of large, well established retail businesses, many of which are owned by Lebanese entrepreneurs. Those stores are patronized mostly by expatriates and wealthy Nigeriens, and, not surprisingly, their prices tend to be high. Bargain hunters – a class that includes the overwhelming majority Niger's population and American Peace Corps volunteers – patronize instead the Grand Marche, Niamey's bustling, centrally located open air market. Most any shopping expedition in the Grand Marche, or any of Niamey's other open air markets, provides an object lesson in the ways and means of the informal sector.

In the Grand Marche, thousands of businessmen<sup>123</sup> sell all description of wares. They are crammed together in small stalls amidst a profusion of sounds and brilliant colors. Most of the market is open to the weather, but the businessmen string colorful cloths overhead to provide shade, enhancing the sense that the market is a multi-colored maze.

The market does not have the outwardly orderly appearance and structure that most Western observers are accustomed to. There is virtually no signage and no advertising. Merchants who sell similar wares tend to cluster together, so in the vast market there is a consumer electronics section, a hardware section, a food section, and a women's footwear section.

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<sup>122</sup> Interview with an Employee of Niger's Tax Service, Niamey, Niger (March 6, 2009).

<sup>123</sup> *Id.* (indicating that approximately three thousand enterprises are officially registered to do business in the Grand Marche).

A shopper strolling through the market might notice that certain merchants appear quite prosperous: their shops are somewhat larger and their customers address them with the honorific title El Hadgi, which means that they have been able to afford to make the pilgrimage to Mecca.<sup>124</sup> This may seem incongruous given that there appears to be little retail traffic into their shops, but the explanation is linked to their businesses' informality.

A shopper searching for women's shoes who has arrived at the proper corner of the market will discover that none of the merchants' wares are tagged, and that sale prices must be determined through haggling.<sup>125</sup> Eventually, when the terms of the transaction are settled, the buyer must hand over cash. No businesses in the market or anywhere else in the country, save for a few high-end hotels and boutiques, accept personal checks or credit cards. When the transaction is complete, the merchant will offer no bill of sale. In the rare case where a customer asks for written record, the merchant will say he has no paper. If the customer insists, the merchant may write a receipt with someone else's name on it or he may simply refuse to complete the sale.

Each of these observations about the market can be explained by the businessmen's desire to operate informally. There are two reasons for the lack of signage and advertising. The first is

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<sup>124</sup> The term El Hadgi refers in its strictest sense to a man who has made the Islamic pilgrimage to Mecca. The pilgrimage is one of the five pillars of Islam and most Nigeriens aspire to it, though only the wealthiest few can afford it. When young businessmen achieve their first significant economic success, their first major expense, after marrying and setting up a household, is making the pilgrimage and, if funds allow, sponsoring pilgrimages for elderly family members. In common usage, the term "El Hadgi businessman" or "El Hadgi merchant" is used to refer to the rich and powerful merchants who dominate Niger's economic and political realms. *See generally* GREGOIRE, *supra* note \_ (describing the "Alhazai" businessmen who populate the markets in Maradi, a market city in south-central Niger).

<sup>125</sup> The final price will depend on a multiplicity of factors: what he paid for the goods, the time of day and the time of the month, whether he has made recent sales, whether he has bills due, his estimation of your willingness to pay, and whether in fact it is his boutique. Many who run retail operations are younger relatives of the true owners or are friends or fellow merchants covering for the owner while he attends Muslim prayers or to personal business. If the person you are dealing with is not the true owners, he will be less likely to sell the goods at a low price. *See generally* Thomas Kelley, [Law School Admissions Essay], in *ESSAYS THAT WORKED FOR LAW SCHOOLS* 22-3 (Boykin Curry ed. 1988) (describing strategies for bargaining for meat in West African markets).

that there is a specific governmental tax on business signs,<sup>126</sup> which small merchants typically do not wish to pay. More important, most of the merchants run their small businesses informally, and they prefer not to draw the attention of government tax assessors or other agents. This reluctance to advertise explains, at least in part, why similar businesses cluster together in vast market. If all of the women's shoe stalls are in the same section of the market, customers in search of shoes learn quickly where to begin browsing in spite of the absence of signs.

The explanation for the lack of written records is obvious. In the unlikely event that government investigators appear, there will be no written records to audit, indeed, no written record to indicate that any business transaction has taken place.<sup>127</sup>

The fact that some merchants appear prosperous in spite of an apparent lack of retail traffic is not directly related to business informality but is worth noting because it bolsters another observation regarding Nigerien business, explored in Part III.b.3, below. Those apparently prosperous El Hadgis have very likely succeeded in moving up the chain from retail to a mix of wholesale and retail, and much of their wealth comes from the selling goods to other merchants.

A final important observation regarding the informality of Niger's businesses is that the descriptors "informal" and "formal" are points on a continuum rather than binary categories. Many businesses choose to have no formal existence but they do sometimes pay taxes and other fees when they are pinned down by government tax collectors and investigators.<sup>128</sup> Some

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<sup>126</sup> WORLD BANK, DOING BUSINESS 2010: COUNTRY PROFILE FOR NIGER 70, *available at*: <http://www.doingbusiness.org/Documents/CountryProfiles/NER.pdf> (listing taxes that businesses in Niger must pay, including an "advertising tax").

<sup>127</sup> See Nassirou Bako Arifari, *We Don't Eat the Papers: Corruption in Transport, Customs, and Civil Forces*, in EVERYDAY CORRUPTION AND THE STATE: CITIZENS AND PUBLIC OFFICIALS IN AFRICA, *supra* note \_\_, at 213 (referring to the general preference for oral dealings when negotiating corrupt customs transactions).

<sup>128</sup> See Interview with Owner of Several Small Businesses, Niamey, Niger (February 20, 2009) (revealing that he runs some of his ventures through a formally established business and others informally); *see also* Interview with a Seller of Women's Shoes in the Grand Marche, in Niamey, Niger (February 22, 2009) (saying he prefers to operate informally but had to obtain a govern tax identification number for doing business directly with government agencies).



businesses, for strategic reasons take limited steps toward formalizing, for example by requesting a “NIF” (roughly the equivalent of an Employer Identification Number in the U.S.) from the Nigerien government but will undertake none of the remaining steps.<sup>129</sup> Also, certain entrepreneurs strategically move in and out of the formal sector. They may have no ongoing relationship with a formal business, but seek one out for purposes of a single business transaction in which official status is required. Afterwards, they migrate back to the informal sector. This paper will continue to refer to informal and formal as if they were starkly separate categories, trusting the reader to remember the gray areas in between.

## **2. A Constant Struggle for Capital**

When Nigerien businessmen recount the histories of their enterprises, their stories often revolve around the quest for start-up or expansion capital.<sup>130</sup> Financial institutions such as banks are rarely on their list of possible sources.<sup>131</sup>

Most entrepreneurs fund their start-ups with a loan of cash and saleable goods from family members or from personal savings. A typical small business owner’s story centers on an older male relative such as a father, uncle, or brother who helps establish the younger man in business.<sup>132</sup> The youngster spends several years working as an apprentice in his relative’s business, receiving basic maintenance but no fixed salary in exchange for his work.<sup>133</sup>

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<sup>129</sup> See Interview with a Seller of Women’s Shoes in the Grand Marche (February 22, 2009), *supra* note \_.

<sup>130</sup> See, e.g., Interview with Three Members of the Young Chamber, in Niamey, Niger (February 24, 2009) (identifying start-up capital as young entrepreneurs’ primary problem); Interview with A Young Man Who Services Computers and Sells Computer Peripherals, Niamey, Niger (March 2, 2009) (describing his desperate need for expansion capital).

<sup>131</sup> See Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_ (explaining that banks rarely lend to small businesses and, when they do, only on outrageous terms); see also Interview with An Owner of Several Small Businesses, Niamey, Niger (February 20, 2009 (second interview)) (expressing suspicion and distrust of banks in Niger).

<sup>132</sup> See, e.g., Interview with Seller of Women’s Shoes in the Grand Marche (February 22, 2009), *supra* note \_ (recounting that he got his start in business working for his older brother); Interview with the Manager of a Rental Car Business, Niamey, Niger (February 23, 2009) (same).

<sup>133</sup> Interview with the Manager of a Rental Car Business (February 23, 2009), *supra* note \_.

Eventually, when the younger male is ready, the elder male gives him or loans him sufficient capital – in most cases the equivalent of a few thousand dollars – to launch his own retail venture.<sup>134</sup>

The other common route to accumulating start-up capital is through the sweat of the aspiring entrepreneur's brow. Here, the young man spends his evenings and school vacations peddling goods on the street.<sup>135</sup> After years of such labor and a strong determination to save the profits, the young man moves from ambulatory selling to purchasing higher-end goods and renting a retail space in the Grand Marche or elsewhere.<sup>136</sup> One young merchant got his start selling cell phones to his school companions and to pedestrians near his school.<sup>137</sup> When he had accumulated sufficient capital, he opened a consumer electronics boutique in the Grand Marche.<sup>138</sup> Another spent his summers cutting grass for animal fodder in the countryside outside of Niamey, transporting it to the city by donkey cart, and selling it to urban dwellers.<sup>139</sup> He used his accumulated profits from that and other petty labor to buy a bar in Niamey and he eventually became a wealthy and powerful merchant.<sup>140</sup> Of the many proprietors of small businesses I interviewed in Niger, not one had started his business by borrowing from any financial institution.

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<sup>134</sup> *Id.*

<sup>135</sup> *See, e.g.,* Interview with Young Electronics Merchant in the Grand Marche, in Niamey, Niger (March 5, 2009) (recounting his accumulation of start-up capital through petty commerce and wage labor). The streets of Niamey are full of young men carrying stacks of portable goods on their heads: pirated music cassettes or films on CD, cheap sunglasses, medicines and sundries, articles of used clothing, and so on.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Interview with The Owner of Numerous Small, Medium and Large Business Enterprises, Niamey, Niger (February 27, 2009).

<sup>140</sup> *Id.*

Businessmen in Niger are almost as reluctant to approach banks for expansion capital as they are for start-up capital.<sup>141</sup> Most of the entrepreneurs I interviewed in Niamey had expanded their businesses or had ambitions to do so and all but one considered it either unlikely or impossible that they would ever borrow from a financial institution.<sup>142</sup> For most small businessmen, a bank loan would be out of the question because the business does not officially exist and the bank would not loan to a shadow enterprise.<sup>143</sup> However, even for fully formalized businesses, banks are often not an option because they are too expensive and too risky.<sup>144</sup>

For example, a scrappy young owner of a small boutique that services computers and sells computer peripherals expressed an intense desire to expand his fully formalized business, but said he would not approach a bank because typical loan terms include ruinously high interest rates and the necessity of rapid repayment.<sup>145</sup> His boutique was located in a shack by the side of a dirt road in Niamey, but through the sweat of his brow he had done extremely well, employing seven fulltime workers, paying good salaries with benefits to everyone including himself, and accumulating enough money personally to purchase several residential properties in Niamey.<sup>146</sup> According to him, if he could borrow the equivalent of \$50,000 to \$60,000 on reasonable terms,

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<sup>141</sup> Interview with A Seller of Women's Shoes in the Grand Marche, Niamey, Niger (March 1, 2009) (describing Nigerien banks as expensive, slow and unreliable); Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_ (similar); Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_ (similar).

<sup>142</sup> Interview with Owner of Numerous Small, Medium and Large Business Enterprises (February 27, 2009), *supra* note \_ (saying that with his many enterprises he occasionally takes business loans from banks but only if absolutely necessary).

<sup>143</sup> Interview with Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note \_.

<sup>144</sup> Interview with The Owner of Several Small Businesses (February 19, 2009), *supra* note \_ (recounting an instance where a bank employee embezzled money from his business account); Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_ (complaining about the ruinous interest rates and difficult repayment terms that banks require of small businesses and small businessmen's high risk of losing their enterprises if they cannot meet the banks' terms); Interview with An Owner of Numerous Small, Medium and Large Business Enterprises (February 27, 2009), *supra* note \_ (decrying the unfair terms of most bank loans); *see also*, Interview with A Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note \_ (saying he often accepts payment from other merchants in goods rather than cash to avoid dealing with banks).

<sup>145</sup> Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_.

<sup>146</sup> Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_.

he could expand his business rapidly and, due to his high level of training and expertise, compete with the larger, typically foreign-owned computer companies in Niamey.<sup>147</sup> But his plans were stymied because of the unavailability of expansion capital at reasonable rates.<sup>148</sup> Even though his business fully formalized under Niger's laws, and even though he was willing to pledge his personal real estate as collateral, Nigerien banks would charge high interest on a business expansion loan<sup>149</sup> and would demand that the principal and interest returned within six months.<sup>150</sup> On those terms, there would be too much risk of losing the enterprise and the investment properties that he would offer as collateral.<sup>151</sup> He and others complained bitterly that Nigerien banks refuse to invest in small business enterprises with prospects for long-term growth but trip over one another to loan hundreds of thousands of dollars each year to powerful business and political figures who use the money to buy enormous quantities of sugar before Ramadan, the Muslim month of fasting, when the faithful often break their fast by munching on sugar cubes.<sup>152</sup> The upshot is that, without viable banks or other financial institutions, small businessmen in Niger are starved for capital, particularly expansion capital.<sup>153</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_ (stating banks would charge at least 15% interest even if they accepted his homes as collateral, which they generally do not).

see also Interview with Owner of Numerous Small, Medium and Large Business Enterprises (February 27, 2009), *supra* note \_ (saying banks do not consider real estate safe collateral, not because of lack of secure title, but because the overall economy is so weak that there are few bidders when foreclosed real estate is sold at auction).

<sup>150</sup> Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_. Interview with Owner of Numerous Small, Medium and Large Business Enterprises (February 27, 2009), *supra* note \_.

<sup>151</sup> Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_.

<sup>152</sup> *Id.*; Interview with A Top Official of Niger's Chamber of Commerce (February 24, 2009), *supra* note \_.

<sup>153</sup> Nigerien businessmen sometimes employ parallel, informal finance mechanisms – even in international business transactions – that help them avoid dealing with banks and other formal financial institutions. Some simply carry huge amounts of cash on their bodies. See Interview with The Manager of a Rental Car Business (February 23, 2009), *supra* note \_ (recounting purchasing trips to West African ports where he carried as much as \$40,000 on his body). Others employ an international network of wealthy El Hadgi traders who, much like merchant bankers in medieval Europe, cooperate to provide credit and the transfer of capital across borders. See Interview with A Young

### 3. Moving Up the Commercial Chain From Retail to Wholesale and the Importance of Cross-Border Purchasing Trips

It is common wisdom among the proprietors of small businesses in Niger that one becomes prosperous by moving up the chain from retail to wholesale.<sup>154</sup> A small retail operation such as a stall or small boutique in the Grand Marche can produce enough income to cover household expenses for the proprietor and his immediate family, but in most cases not enough to contribute significantly to the welfare of the wider family or to accumulate capital.<sup>155</sup> With wholesale operations – for example, importing large quantities of electronic goods from distant countries and selling them in lots to merchants in the Grand Marche and other large urban markets – the margins are narrower than retail, but the profits are comparatively swift and certain.<sup>156</sup> For many businessmen, the long term strategy, or at least the long term hope, is to cover household expenses from the proceeds of retail operations, and to use the proceeds from wholesale operations to move further up the wholesale chain, purchasing ever larger quantities of goods from ever more distant markets. This, small businessmen in Niger say, is the path to prosperity.<sup>157</sup>

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Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_\_. A detailed discussion of this parallel finance system is beyond the scope of this article.

<sup>154</sup> See Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_\_ (describing the benefits of moving from retail to wholesale); Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_\_ (same); Interview with A Seller of Fabric in the Grand Marche, Niamey, Niger (March 12, 2009) (same); Interview with A Young Money Changer, Niamey, Niger (March 11, 2009) (ruing that he had not accumulated enough capital to move to wholesale and retail sales).

<sup>155</sup> See Interview with Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_\_.

<sup>156</sup> See *id.*; see also Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_\_.

<sup>157</sup> Interview with Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_\_; Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_\_. This mix of retail and wholesale operations helps explain the phenomenon, described in Part III.b.ii.1, of the businessman who sells retail goods out of a market stall or tin shack or crumbling store front, yet who appears prosperous by Nigerien standards. Often, that businessman *is* comparatively prosperous because his retail operation is only the tip of the iceberg: he or his underlings may be traveling to distant ports and selling wholesale goods all over Niger.

Moving from retail to wholesale, however, is not an easy progression.<sup>158</sup> It generally requires the businessman to obtain goods in quantity from a distant port. In most cases, he must travel to that port to choose the goods and make payment in person.<sup>159</sup> As a rule of thumb, the farther he can travel from landlocked Niger to purchase the goods, the lower the purchase price and the higher the profits.<sup>160</sup> Nigerien businessmen's most common destinations for these wholesale purchasing trips are the West African port cities of Cotonou, Lome, Abidjan and Lagos.<sup>161</sup> Prices are lower yet, and profits are correspondingly larger, if the businessman can travel to more distant lands such as Dubai, China, the United States, or Europe.<sup>162</sup>

But the challenge of purchasing wholesale goods in distant lands links directly to Nigerien businessmen's challenge of accumulating expansion capital, described in the previous section, because buying goods in quantity in distant ports requires a significant initial investment to cover the cost of bulk purchasing as well as the high costs of travel, shipping purchased goods back to Niger, clearing customs, and paying the requisite taxes.<sup>163</sup> To return to the example of the ambitious young businessman who services computers and sells peripherals from a shack by the side of a dirt road, he claimed that he could become a significant commercial player in Niger's

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<sup>158</sup> Interview with A Seller of Fabric in the Grand Marche (March 12, 2009), *supra* note \_ (complaining that it is very difficult to move from retail to wholesale unless one has "connections"); *see* Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_ (explaining that he already engages in some wholesaling but that he could really become prosperous if he could purchase wholesale goods from beyond Africa).

<sup>159</sup> Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_.

<sup>160</sup> *See id.*

<sup>161</sup> *See, e.g.,* Interview with Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note \_ (mentioning purchasing trips to Lome, Abidjan and Lagos).

<sup>162</sup> *See* Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_ (discussing the advantages of Dubai and China as purchasing destinations); Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_ (explaining that France is the best place to buy high quality computer equipment for Niger); Interview with The Owner of an Auto Parts Shop Near the New Market, Niamey, Niger (March 13, 2009) (explaining that Dubai is the best and cheapest place to buy most auto parts but Holland is the best place to purchase motor oil). *See also* Interview with A Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note \_ (expressing frustration that he had not been able to finance purchasing trips beyond West Africa).

<sup>163</sup> *See* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_ (saying he could not launch a proper purchasing expedition because of lack of capital); *see also* Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_ (explaining how he avoids paying the heavy taxes and customs duties on goods he imports from Dubai and China).

computer industry if he could add the sale of computer hardware – both wholesale and retail – to his business.<sup>164</sup> France would be the best place for him to purchase high quality, reliable computer hardware, but for him to mount a meaningful purchasing trip to France, he would need at least \$50,000 in cash.<sup>165</sup> As discussed in the previous section, no bank or other formal financial institution will loan him such an amount on viable terms.<sup>166</sup> For the young computer entrepreneur, and for most other Nigerien businessmen, the only way to raise the necessary capital is to engage in corruption, which is the topic of the following section.

#### **IV. A Primer on Corruption**

Proprietors of small businesses in Niger aspire to move up the commercial chain from retail to wholesale. Doing so requires them to travel to distant ports to purchase goods in quantity, but such trips are difficult to accomplish because they are expensive and require significant amounts of capital in an atmosphere where formal financial institutions are unable or unwilling to provide the funds.<sup>167</sup> Where then do businessmen obtain their capital? The surprising conclusion that arose from my fieldwork in Niger is that corruption provides the primary mechanism by which businessmen obtain capital to fund their purchasing expeditions. Corruption also aids them to maximize their profits by avoiding customs duties and taxes.

Because corruption is so central to the functioning of Niger's small business sector, this section provides a primer: how and why corruption has emerged in recent years as a global issue, how it manifests itself in Africa, how it is defined, why it is objectionable, and theories regarding

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<sup>164</sup> Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_

<sup>165</sup> *Id.*

<sup>166</sup> See *supra* notes [141-144] and accompanying text.

<sup>167</sup> See *supra* notes \_\_\_\_; see also SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM 110 (1999) (arguing that corrupt elites who control credit and finance in developing countries may work to ensure that normal commercial banking does not flourish in their societies).

its causes. The paper will then turn in Part \_ to a specific description of Niger’s corruption and how it furnishes the rules of the game for the small business sector.

**a. Corruption Emerges as a Global Issue**

Corruption in the developing world emerged as a hot global topic in the 1990s.<sup>168</sup> During the Cold War, the U.S. and other Western powers were loath to focus on corruption for fear of driving developing countries’ corrupt leaders toward the Eastern bloc.<sup>169</sup> This changed with the fall of the Berlin Wall. Western donor nations felt empowered to press the issue of corruption even if it caused the leaders of developing countries to squirm.<sup>170</sup> At the same time, Western countries began to adopt the rubric of “human security” as the basis of development policy: the view that long-term peace in the developing world depended not only on armies and weapons but on such matters political stability, public health, and economic prosperity.<sup>171</sup> Because corruption was thought to retard these positive outcomes, anti-corruption programs migrated to the center of international development policy.<sup>172</sup> Indeed, both the United States State Department and USAID proclaim that global battle against corruption as among their highest priorities.<sup>173</sup>

The intense international focus on corruption has been accompanied by a surfeit of new anti-corruption organizations, most prominently, Transparency International (“TI”). TI took the lead in measuring corruption by devising surveys that test citizens’ perceptions of corruption in their

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<sup>168</sup> Glynn et al., *supra* note \_\_, at 7.

<sup>169</sup> See Steven E. Hendrix, *New Approaches to Addressing Corruption in the Context of U.S. Foreign Assistance with Examples from Latin America and the Caribbean*, SOUTHWESTERN J. OF L. AND TRADE IN THE AMERICAS 2 (2005) (noting that as late as the 1990s many governments and aid organizations did not want to admit to or discuss corruption due partly to resistance from powerful vested interests); Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note \_\_, at 7.

<sup>170</sup> Hendrix, *supra* note \_\_, at 2.

<sup>171</sup> Glynn, et al., *supra* note \_\_, at 9.

<sup>172</sup> Glynn, et al., *supra* note \_\_, at 9; Hendrix, *supra* note \_\_, at 7 (noting that a powerful global consensus against corruption has emerged and that nearly 100 nations had signed the 2003 United Nations Convention Against Corruption and that the US now views corruption as a threat to national security).

<sup>173</sup> Hendrix, *supra* note \_\_, at 3.



countries, quantifying the results, and publishing them in comparative reports.<sup>174</sup> In the latest TI survey, for example, one can glance at a chart and see that New Zealand is perceived to be the least corrupt country in the world while Somalia is the most corrupt.<sup>175</sup> Niger is ranked as number 106 out of 180 countries measured, not bad compared to many other sub-Saharan African countries.<sup>176</sup>

As corruption became an important issue for western aid agencies through the 1990s and 2000s, certain common prescriptions emerged. For example, many western financed anti-corruption programs focused on paring back poor countries' civil services to limit the number of functionaries possessing sufficient discretionary power to extract rents from citizens.<sup>177</sup> In addition to shrinking the civil service, anti-corruption programs promoted the reform of civil

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<sup>174</sup> Although such surveys have become an important tool of anti-corruption policy, they are subject to criticism because they are premised on the unproven assumption that there is a strong correlation between perceived and actual corruption. Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What Do We Know from A Cross-Section of Countries?*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, *supra* note \_\_, at 3. It is beyond the scope of this paper to explore the methodology of the corruption perception surveys, but my own fieldwork in Niger has caused me to be skeptical on two grounds. First, I have encountered Nigerien and American NGO officials engaged in anti-corruption programs in Niamey who openly discuss the need to manipulate the public's perception of corruption by means of media blitzes coupled with officially (but quietly) imposed temporary moratoria on petty corruption. See Interview with An American NGO Consultant, Niamey, Niger (March 4, 2009) (discussing the need for a media blitz and temporary moratorium in order to rescue a foundering U.S.-funded anti-corruption program); see also Hendrix, *supra* note \_\_, at 4 (arguing that governmental corruption cannot be addressed without acknowledging corruption within NGOs). The NGO officials implement this strategy when they need a bump in their corruption index scores so that their anti-corruption contracts will be renewed. See Interview with An American NGO Consultant (March 4, 2009), *supra*. Stated plainly, the players have learned to game the perception-based anti-corruption system. Second, even if anti-corruption NGO and government shenanigans did not exist, I doubt that the perceptions of citizens from different countries are truly comparable. In Niger, most people are resigned to the existence of corruption in their daily lives. They are so inured to it that they do not perceive it as a particular problem. I question whether the same would be true in other less corrupt parts of the world. See generally Dreher & Schneider, *supra* note \_\_, at 3 (questioning the validity of corruption perception surveys).

<sup>175</sup> TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2009 (2009), available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

<sup>176</sup> *Id.*

<sup>177</sup> Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What Do We Know From a Cross-Section of Countries*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, *supra* note \_\_, at 5; see SUSAN ROSE-ACKERMAN, [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 42-59 (describing anti-corruptions programs' efforts to privatize industry as a means of shrinking government and eliminating discretion).

service rules so that positions would be granted based on merit rather than patronage.<sup>178</sup> Poor countries' government procurement systems were also a frequent target of corruption reforms.<sup>179</sup> As described in more detail, below, procurement fraud is major source of corruption in Niger and across the developing world, and many countries including Niger have passed laws intended to create efficiency and transparency in those systems.<sup>180</sup> Finally, many western-funded anti-corruption programs focus on enhancing the enforcement and punishment of corrupt behavior. One aspect of this push for enforcement is engendering a free press that will bring instances of corruption to the attention of the public and legal authorities.<sup>181</sup> Another is the reform of developing countries' law enforcement systems, including the promulgation of clear and strict laws defining and punishing corruption and the training and cajoling of judicial authorities (who are often corrupt)<sup>182</sup> to persuade them to enforce the new anti-corruption laws.<sup>183</sup>

## **b. Petty vs. Grand Corruption**

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<sup>178</sup> ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 69-71.

<sup>179</sup> *Id.* at 59.

<sup>180</sup> See *infra* notes \_\_ and accompanying text.

<sup>181</sup> See Lamsdorff, *supra* note \_\_, at 40 (reporting studies that show high correlation between vibrant free press and low levels of corruption). It is beyond the scope of this paper to explore the role of the free press in combating corruption, but my findings from Niger indicate that there are at least two problems with relying on the press. First, the press itself is subject to corruption. Niger is rife with stories of newspaper reporters and owners who accept payment in exchange for squelching stories of corruption and other misbehavior. Interview with The Former Director General of a Private Radio Station (February 26, 1999), *supra* note \_\_. Second, even where the press pursues corruption stories, powerful political actors often ensure that no prosecutorial agency pursues the information. Often, when a newspaper publishes an expose of corrupt practices, the end result is that the government actors go free and the newspaper reporter or publisher is sued and convicted of defamation or illegally obtaining secret information. See U.S. DEPARTMENT OF STATE, 2009 HUMAN RIGHTS REPORT: NIGER (March 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135969.htm> (describing several instances where journalists were jailed after reporting on government corruption).

<sup>182</sup> See *infra* notes \_\_ and accompanying text (discussing judicial corruption in Niger).

<sup>183</sup> See ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 68, 151-55 (discussing the importance of consistent enforcement of clear criminal laws in combating corruption; see also Lamsdorff, *supra* note \_\_, at 40 (arguing that a corrupt judiciary that lets the "big fish" go free is strongly correlated with more corruption); see generally Hendrix, *supra* note \_\_, at 3 (summarizing the anti-corruption policy package as administrative simplification, reform of state procurement and financial management, tax, customs and budget systems, providing access to information systems, stronger and more independent judiciaries, audit offices, and independent media and civil society oversight.)

When Westerners think of corruption, particularly in an African context, they envision rapacious dictators who bleed their countries dry of valuable natural resources and shelter their ill gotten gains in Swiss bank accounts.<sup>184</sup> Over the past thirty years, dozens of politicians and military leaders have fit that general description, with Zaire’s Mobutu Sese Seko as the prototype and Gabon’s recently deceased president, Omar Bongo – including his villas on the French Riviera and his family’s fleet of luxury automobiles – as a recent prominent example.<sup>185</sup> This brand of “grand corruption”<sup>186</sup> exists in Niger, but it tends not to be so eye-popping, perhaps because of the country’s dearth of exploitable natural resources.<sup>187</sup> Instead, “petty corruption”<sup>188</sup> provides the rules of the game for businesses in Niger and indeed for most social, legal,

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<sup>184</sup> See Howard W. French, *An Anatomy of Autocracy: Mobutu’s Era*, N.Y. TIMES, May 17, 1997, at \_ (discussing the massive, legendary state corruption in the former Zaire).

<sup>185</sup> See *id.* at \_ (discussing the Mobutu era and its corruption); Adam Nossiter, *Underneath Palatial Skin, Corruption Rules Gabon*, N.Y. TIMES, September 15, 2009, at A5 (reporting President Bongo’s “66 bank accounts, 183 cars, 39 luxury properties in France . . .”); Adam Nossiter, *Omar Bongo, Gabon Leader, Dies at 73*, N.Y. TIMES, June 9, 2009, at \_ (mentioning Bongo’s “dozens of luxurious properties around Paris, a \$500 million presidential palace, [and] fancy cars”).

<sup>186</sup> Rose-Ackerman, [Introduction, in INTERNATIONAL HANDBOOK], *supra* note \_\_, xix (defining the term “grand corruption”).

<sup>187</sup> There is some indication that grand corruption is beginning to blossom in Niger as its oil industry grows. The Chinese have been particularly active in Nigerien oil exploration. Before Niger’s unpopular president Tanja was overthrown in a coup d’état in early 2010, general speculation and some news reports indicated that the Chinese were not only bankrolling Tanja’s political machine, but paying large amounts of cash directly to him. See generally, Adam Nossiter, *After Coup, Niger Resumes Business as Usual with China*, N.Y. TIMES, April 24, 2010, at \_\_ (referring to a \$300 million “signing bonus” the Chinese paid to the Nigerien government under a secretive oil deal, as well as a \$6.6 million payment into an account directly controlled by President Tanja).

<sup>188</sup> See Elliott, *supra* note \_\_, at 175, 178 (employing the term “petty corruption” and arguing it occurs when private actors interact with non-elected governmental officials, particularly lower-level administrative bureaucrats); Rose-Ackerman [Introduction, in HANDBOOK], *supra* note \_\_, at xvii (referring to “low level” corruption and stating that it usually occurs where a public benefit or cost exists and officials have discretion to assign it to applications); Mushtaq H. Kahn, *Determinants of Corruption in Developing Countries: The Limits of Conventional Economic Analysis*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, *supra* note \_\_, at 216, 220 (employing the term “petty corruption” and noting that the poor and powerless are most often its victims); Hendrix, *supra* note \_\_, at 1, 4 (employing the term “administrative corruption” to refer to the same phenomenon).

economic, and political transactions.<sup>189</sup> To re-introduce the readers to a typical instance of Niger's ubiquitous<sup>190</sup> petty corruption, I turn again to recent personal experience.

When I arrived in Niger's capital, Niamey, in early 2009 to perform fieldwork for this project, the customs inspector who examined my bags at the airport focused on two solar powered lamps that I had bought at a Wal-Mart in the U. S. and intended to give as gifts to rural Nigerien friends. He said it was clear that I intended to sell them and therefore would have to pay customs duties on them. He pulled me out of the exit line, ordered me to stand alone in a hot room, and told me I would have to wait for all other passengers to clear customs before I could process my goods. From long experience in Niger and elsewhere in Africa I knew that he intended to extract a bribe and that it would cost me money and at least an hour of my time. I also knew that I had two options: offer him money or appeal to someone with more power and influence. In this instance, I chose the latter. I contacted a highly placed Nigerien friend, who contacted the customs inspector's boss, who ordered the inspector to release me and my baggage immediately. Within fifteen minutes of being pulled out of line, I was on my way with my lamps.

For foreigners, such petty corruption is annoying and sometimes frightening.<sup>191</sup> For Nigeriens, including Nigerien businessmen, it is a predictable part of daily existence.

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<sup>189</sup> Blundo & Olivier de Sardan, [*Why We Should Study Everyday Corruption and How We Should Go About It, in EVERYDAY CORRUPTION AND THE STATE*], *supra* note \_\_, at 5 (arguing everyday corruption in Africa is pervasive and guided by a complete, complex set of rules and expectations).

<sup>190</sup> *Id.* at 4-5.

<sup>191</sup> It bears mentioning that the personal experiences described above and much of the corruption that will be described below are hidden from most Americans and other foreigners who live in places like Niger and work in their countries' embassies or in nongovernmental organizations. Those ex-patriots, many of whom are involved in formulating both business formalization and anti-corruption policy, are insulated from everyday corruption partly because they employ host country nationals to run interference for them. The intermediaries, sometimes referred to as "fixers" or "facilitators," are often themselves engaged in corruption, skillfully espousing the discourse of anti-corruption while bleeding their foreign employers dry. *See generally* Blundo & Olivier de Sardan, *supra* note \_\_, at

### c. Varying Definitions of Corruption

While corruption was moving to the center of global development policy, there was a flowering of academic interest in the topic. Economists have been in the forefront and, not surprisingly, they tend to define corruption in terms that are compatible with their discipline.

Perhaps the most prolific scholar of corruption is the American law and economics professor, Susan Rose-Ackerman. She defines corruption as payment by private citizens and firms for the favorable distribution of valuable benefits and onerous costs by the state where the distribution of such benefits and costs is under the control of public officials who possess discretionary power.<sup>192</sup> Because economists tend to quantify human interactions, and because it is difficult to know what to count and not to count in the absence of bright lines, economists' definitions, such as that articulated by Rose-Ackerman, strive to distinguish between illicit corruption on one hand and culturally appropriate gift-giving behavior on the other.<sup>193</sup>

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7 (arguing political elites in Niger are masters at producing an official discourse that fulfills the expectations and conditions of their donors but is extremely far removed from the realities that remain largely inaccessible to the donors).

Even when ex-patriots come into direct contact with low level government officials – those who routinely extract bribes from end-users – the officials tend to let the rent-seeking opportunities pass if they perceive that the foreigners are backed by powerful institutions. By way of example, when I spent a year in Niamey as a Fulbright scholar I was not formally affiliated with the U.S. Embassy, but as a courtesy the American officials issued me an identity badge so that I could circulate freely within the Embassy compound. During the year, I regularly drove around the capital in a private vehicle and was often whistled to the roadside by policemen seeking bribes. A few months into the year, I discovered that if I happened to be wearing the Embassy identification badge around my neck, the police officers invariably dismissed me without demanding bribes. For the remainder of my stay, I wore the badge like a talisman when behind the wheel and had no further problems with the police. Experience has taught them that such people are more likely than powerless Nigeriens or unaffiliated foreigners to react with outrage and lodge annoying official complaints.

<sup>192</sup> ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 9; *see also* Susan Rose-Ackerman [Introduction, in INTERNATIONAL HANDBOOK], *supra* note \_\_, at xvii (defining corruption as a private individual or firm paying a public official in return for a benefit). Stated somewhat more simply by Steven Hendrix, a USAID official who straddles the border between practitioner and academic, corruption is “the abuse of entrusted authority for private gain.” Hendrix, *supra* note \_\_, at 4.

<sup>193</sup> *See* ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 52, 92; *see also* Blundo & Olivier de Sardan, *supra* note \_\_, at 5 (acknowledging the difficulty of distinguishing between favoritism, clientism, and outright corruption); Elliott, *supra* note \_\_, at 180 (arguing that a payment is a gift if it is handed over in public but a bribe if made in secret).

But it is not always possible to count corrupt behavior with precision. Bright line definitions often do not capture the peculiarities of corruption in the context of a particular culture, peculiarities that are the stock in trade of other academic disciplines such as anthropology.<sup>194</sup> When anthropologists study corruption, their definition tends to be more elastic.<sup>195</sup> For example, rather than attempting to draw lines between gift giving and corruption, they refer to a more generalized “complex of corruption” that includes the outright payment of bribes in exchange for provision of government benefits but also includes all of the gift-giving, favoritism and influence peddling that might escape quantification – and sanction – under the economists’ narrower definition.<sup>196</sup> This paper shares the anthropologists’ more flexible definition: gift-giving, favoritism, and influence peddling are among the many strategies for gaining favorable access to governmental services and they must be understood as part of the complex of corruption even if they would not be counted as corruption in a survey or explicitly sanctioned by an anti-corruption law.<sup>197</sup>

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<sup>194</sup> See Blundo & Olivier de Sardan, [*Why We Should Study Everyday Corruption and How We Should Go About It, in EVERYDAY CORRUPTION AND THE STATE*], *supra* note \_\_, at 12 (arguing that anthropology is better suited than other disciplines to the study of petty corruption because “can assess shaded areas”).

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 5; see Interview with Manager of a Rental Car Business, Niamey, Niger (February 24, 2009) (explaining that it is vital for businessmen in Niamey to have friends in high places and pulling out a three-ring binder to display dozens of business cards from government ministers and others highly placed in Niger’s government); Interview with Seller of Home and Office Furnishings (March 5, 2009), *supra* note \_\_ (saying one has to have friends if one wants to do business in Niger, and that giving people envelopes stuffed with money is one way of making friends).

<sup>197</sup> See Interview with Manager of Rental Car Business, Niamey, Niger (March 2, 2009). An experience from my 2009 research trip to Niger illustrates the fine line between the payment of bribes and gift giving. While driving between interviews in Niamey, I was whistled to the roadside by a police officer. In this case, I had, indeed, unintentionally committed a minor traffic infraction. I declined to offer the policeman a bribe, so he wrote me a ticket, seized my permit, and told me I could pick it up the next day at the police station when I paid my fine. Even though he had followed correct procedure, I reacted as most Nigeriens would by phoning an acquaintance who knows most of Niamey’s traffic cops and asked him to intervene. He rushed to the scene and told me to wait around the corner while he went and talked to the officer who issued me the ticket and held my permit. A few minutes later, he returned with my permit and told me that everything had been taken care of. I asked him if he had paid a bribe, because I wanted to reimburse him if he had. He explained that he did not have to pay a bribe because he consistently gives “gifts” to Niamey’s traffic cops. When they have medical expenses or other unexpected financial obligations, they stop by his office and he gives them cash. He does this because he runs a car rental agency and it is important for him to ensure that his clients can circulate around Niamey without interference. When something arises, for example when a client is whistled to the side of the road for a real or imagined traffic infraction, the cops

#### **d. What's Wrong With A Little Corruption?**

This paper argues, and in the following sections will illustrate, that corruption supplies the rules of the game for business in Niger. If corruption supplies rules, and if everyone understands them, one might legitimately ask whether it is such a bad thing. Indeed, some scholars, particularly in the 1960s and 70s, characterized corruption in the developing world as a healthy reaction to overly complicated and repressive government regulations,<sup>198</sup> as grease that caused muddled government bureaucracies to move more efficiently.<sup>199</sup> In a similar vein, some scholars argued that corruption was a rational reaction – or even a heroic example of popular resistance – to the deviant practices of predatory post-Independence states.<sup>200</sup>

However the consensus among contemporary scholars is that corruption causes more problems than it solves. Some point out that as a matter of common sense if users of government services rely on corruption in the form of bribes as grease to make the system work more efficiently, the bribes create an incentive for the government's petty bureaucrats to create more delays so that they will have more opportunities to collect bribes, or "speed money" as it is sometimes called.<sup>201</sup>

Corruption also leads to inefficient policy decisions, since public goods are allocated to those who have sufficient capital to pay bribes rather than the most efficient producers.<sup>202</sup> The individuals and firms that receive corrupt government contracts are often either unqualified to

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– who are already his "friends" because of the gifts he bestows – let his clients go as a favor to him without the need for an explicit bribe.

<sup>198</sup> Lamsdorff, *supra* note \_\_, at 4.

<sup>199</sup> Mark Pieth, *International Cooperation to Combat Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note \_\_, at 120; see Ray Fisman & Roberta Gatti, *Bargaining for Bribes: The Role of Institutions*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, *supra* note \_\_, at 127 (referring to a 1968 study by Huntington that referred to petty corruption as a form of "personalized deregulation").

<sup>200</sup> George Blundo, *Corruption in Africa and the Social Sciences: A Review of the Literature*, in EVERYDAY CORRUPTION AND THE STATE: CITIZENS AND PUBLIC OFFICIALS IN AFRICA, *supra* note \_\_, at 20.

<sup>201</sup> Kahn, *supra* note \_\_, at 221; see *infra* note \_\_ (describing how Nigerien bureaucrats sometimes sell speed rather than the service itself).

<sup>202</sup> Rose-Ackerman, [Handbook Introduction], *supra* note \_\_, at xix.

carry out the required tasks, are permitted by their corrupt collaborators within the government to skimp on quality, or both.<sup>203</sup> Rather than serving the needs of citizens, public investment funds end up paying for roads that crumble, buildings that fall down, and factories that produce goods that no one wants.<sup>204</sup> In the terminology of economists, the corrupt transactions produce a “deadweight loss” for society.<sup>205</sup>

In addition to its inefficiencies, corruption exacerbates unfairness in developing countries because it favors the interests of haves over the have-nots.<sup>206</sup> In societies where citizens must bribe governmental officials to obtain the services from the state, only those who are already wealthy or are connected to wealth and power have the means.<sup>207</sup> The result is that developing countries’ strained, often ineffective social service networks are unable to deliver services to the poor.<sup>208</sup>

Finally, some argue that corruption harms developing countries by impeding democratization.<sup>209</sup> The public in developing democracies comes to believe that government is for sale to the highest bidder,<sup>210</sup> and that market based economic systems, dragged down by the

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<sup>203</sup> Interview with the Owner of Several Small Businesses (February 2, 2009 (second)), *supra* note \_ (explaining generally how procurement corruption works and stating that the businessman usually tenders fewer goods than stated in the contract or goods of inferior quality); see Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note \_, at 42 (noting that corrupt firms and individuals that receive government contracts often skimp on quality).

<sup>204</sup> ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note \_, at 3; see Pieth, *supra* note\_, at 121 (noting that some corrupt governments organize huge public works projects for the sole purpose of graft, leaving the next generation to pay).

<sup>205</sup> Kahn, [Handbook], *supra* note \_, at 221 (employing the term “deadweight loss”).

<sup>206</sup> Rose-Ackerman, [Corruption and the Global Economy], *supra* note \_, at 33.

<sup>207</sup> See *id.* (arguing that corruption distributes a country’s wealth to insiders and corrupt bidders).

<sup>208</sup> Hendrix, *supra* note \_, at 5; see Rose-Ackerman [Handbook Introduction], *supra* note \_, at xvi, xix (arguing that policy makers should consider the negative effects that corruption has on poor citizens dependent on the state for assistance).

<sup>209</sup> Hendrix, *supra* note \_, at 5.

<sup>210</sup> Rose-Ackerman, [Corruption and the Global Economy], *supra* note \_, at 45.



inefficiencies described above, are unworkable.<sup>211</sup> They begin to yearn for the comparatively less corrupt,<sup>212</sup> economically predictable systems that preceded democratization.<sup>213</sup>

#### **e. Causes of Corruption in sub-Saharan Africa**

It is far beyond the scope of this paper to resolve the question of what causes corruption in the developing world and why corruption seems particularly prevalent across Africa. For readers not familiar with the corruption literature, it will devote a few paragraphs to summarizing various theories

Some point to poverty itself as a major cause of corruption in Africa. In one version of this story, African countries are too poor to pay their bureaucrats living wages so they are forced to supplement their incomes through rent-seeking behavior.<sup>214</sup> This explanation is appealing to Africans and Africafiles because it portrays corruption as a moral necessity, like a hungry waif stealing an apple. Unfortunately, it appears not to be true. Studies indicate that boosting salaries does little or nothing to decrease corruption and that bureaucrats view the raises as gravy on top of the much larger amounts they can accumulate through corrupt practices.<sup>215</sup> Another poverty-related explanation is that poor countries generally have high rates of illiteracy and that corrupt government officials can more easily manipulate and exploit illiterate end users of government

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<sup>211</sup> Glynn, et al, *supra* note \_\_, at 9.

<sup>212</sup> See *infra* note \_\_ (discussing the link between democratization and increased corruption).

<sup>213</sup> It is worth noting that there is disagreement among scholars – particularly economists – over whether corruption harms countries by impeding overall economic growth. Rose-Ackerman [Handbook], *supra* note \_\_, at xvi. Some studies conclude yes, others no. According to Susan Rose-Ackerman, the doyenne of corruption studies, the bottom line is that corruption is associated with lack of economic development – that is, they often appear together – but causation is unclear. Rose-Ackerman [Handbook], *supra* note \_\_, at xvi; Kahn [Handbook], *supra* note \_\_, at 218. As she and others point out, however, the world includes numerous examples of countries that have enjoyed strong economic growth in spite of rampant corruption. See *id*; see also Kahn [Handbook], *supra* note \_\_, at 217 (noting that most developing countries suffer from endemic corruption but that some grow much faster than others).

<sup>214</sup> See ROSE-ACKERMAN, [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 65.

<sup>215</sup> *Id*; see also Blundo [Corruption in Africa], *supra* note \_\_, at 61-3 (mentioning studies that conclude that raising salaries does not work in an atmosphere of rampant corruption); Lamsdorff, *supra* note \_\_, at 39 (claiming that studies of the link between low salaries and corruption have been inconclusive).

services.<sup>216</sup> A final poverty-related explanation of corruption is that poor countries lack technology for monitoring corruption.<sup>217</sup> In Niger, for example, there are still many government offices where records are kept in pencil in large ledger books. Where databases cannot be searched electronically, and where fudging budget figures requires nothing more complex than an eraser, monitoring corruption is all but impossible.

Another theory that deflects blame away from Africans is that corruption is a legacy of colonialism. According to this view, Africans generally dislike state institutions and view them as legitimate objects of plunder because the colonial state was alien and unjust<sup>218</sup> and post-Independence governments generally continued the despotism of the colonial regimes.<sup>219</sup> In these circumstances, cheating the state was and is the equivalent of a patriotic gesture.<sup>220</sup>

Others see roots of African corruption in its rural cultural traditions. African villages are often characterized by high degrees of collectivism and patriarchy.<sup>221</sup> In Niger, relational networks are a source of constant preoccupation in the context of daily life.<sup>222</sup> Members of the collective are often obligated to engage in ceremonial, reciprocal gift giving and patriarchs are

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<sup>216</sup> Elliott, *supra* note \_\_, at 185.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*; see Blundo, *supra* note \_\_, at 39 (arguing that African peoples' notion of their relationship to the state was formed by the coercion, violence and corruption of the colonial era).

<sup>219</sup> See Blundo & Olivier de Sardan [*Everyday Corruption in West Africa*], *supra* note \_\_, at 71 (arguing that the violence, venality and corruption of the colonial regime was carried over into the post-Independence era).

<sup>220</sup> Blundo, *supra* note \_\_, at 46. An alternate colonial explanation is that the colonial powers exited the continent so quickly that they left behind the mechanism of rule of law without teaching their colonial subjects the skills and habits necessary to make it function. See Blundo, *supra* note \_\_, at 37.

<sup>221</sup> *Id.* at 26; see generally Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves By Reconceptualizing Property*, 56 AM. J. COMP. L. 999, 1006-9 (describing the patriarchal social structure of the Zarma people of Niger).

<sup>222</sup> Blundo & Olivier de Sardan [*Everyday Corruption in West Africa*], *supra* note \_\_, at 98. Nigeriens carry their collectivist obligations with them to the United States, often supporting large extended families in their home country with the wages they earn here. I am acquainted with Nigeriens who work for minimum wage in fast food restaurants in the U.S. who are considered fabulously wealthy by their extended families in Niger. They are dunned so often by their relatives that they periodically change their telephone numbers just to limit the requests from overseas. It would be culturally unacceptable to receive the request but refuse to send the money.

culturally obligated to provide for their dependents.<sup>223</sup> When the apparatus of the modern state is imposed on this cultural foundation, it is natural for people to engage in gift giving to achieve the results they seek from government, and it is natural for patriarchs in powerful positions to accumulate wealth so that they can provide for their many dependents.<sup>224</sup> Citizens in such a system may even view the notion of an impersonal meritocracy uninfluenced by ties of loyalty, friendship and kinship as illegitimate and morally suspect.<sup>225</sup> These collectivist and patriarchal traditions do not inexorably cause corruption, but they may permit it to develop and they make the cost of honest behavior high because those in positions of power are expected to exploit their positions for gain and distribute those gains throughout their relational network.<sup>226</sup>

Some explain corruption in Niger and Africa, or at least the recent steady increase in corruption,<sup>227</sup> as caused by post-Cold War democratization and the rise of party politics.<sup>228</sup> Beginning in the late 1980s, African politicians received the message from donor countries that aid money was going to dry up if they did not begin choosing leaders by the ballot rather than the rifle.<sup>229</sup> This, combined with domestic pressure for democratization from students and human right organizations, led to free and fair elections in Niger and elsewhere across Africa.<sup>230</sup> Up until that time, African strongmen from the post-Independence era had ruled through a

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<sup>223</sup> See Blundo, *supra* note \_\_, at 26 (explaining but ultimately rejecting as simplistic the notion that African culture causes corruption).

<sup>224</sup> See ROSE-ACKMERMAN, [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 91 (arguing it is natural and culturally appropriate for Africans to give jobs and other benefits to friends and relations).

<sup>225</sup> *Id.* at 106.

<sup>226</sup> See Blundo & Olivier de Sardan [*Everyday Corruption in West Africa*], *supra* note \_\_, at 100 (stating that Nigeriens cannot afford complete propriety given their heavy social obligations).

<sup>227</sup> *Id.* at 93 (arguing democratization has led to a spectacular increase in political clientism and corruption).

<sup>228</sup> Blundo, *supra* note \_\_, at 53.

<sup>229</sup> See generally, Peter Von Doepp & Leonardo A. Villalon, *Elites, Institutions, and the Varied Trajectories of Africa's Third Wave Democracies*, in THE FATE OF AFRICA'S DEMOCRATIC EXPERIMENTS: ELITES AND INSTITUTIONS (Leonardo A. Villalon & Peter VonDoepp eds. 2005) (referring to the fact that post-Cold War African governments were forced to adopt good governance reforms). [better cite?]

<sup>230</sup> See Leonardo A. Villalon & Abdourahamane Idrissa, *Repetitive Breakdowns and a Decade of Experimentation: Institutional Choices and Unstable Democracy in Niger*, in THE FATE OF AFRICA'S DEMOCRATIC EXPERIMENTS: ELITES AND INSTITUTIONS, *supra* note \_\_, at 27-33 (describing Niger's attempts to transition to democratic governance).

combination of terror and cultivating personal patronage networks.<sup>231</sup> When terror fell out of style, they and their political descendants quickly learned that they could stay in power by constructing patronage networks within the context of electoral democracy.<sup>232</sup>

Because they did not wield the stick of terror, political leaders had to spend much more money to persuade followers to get in line behind them.<sup>233</sup> They therefore cultivated wealthy supporters, particularly in the business sector, who in turn secretly funded the leaders' political parties by engaging in the large scale contribution and distribution of cash to potential voters and party loyalists.<sup>234</sup> In some instances, the politicians and political parties actually used governmental resources to create wealthy businesspeople, whom they then employed as conduits for creating and transferring cash to expand their political power.<sup>235</sup> As these networks of political party corruption took shape, even petty bribes from the lowest reaches of the state bureaucracy became integrated into organized systems of cash extraction and distribution used to favor political allies and build campaign war chests.<sup>236</sup> In short, corruption in post-Cold War

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<sup>231</sup> *Id.*

<sup>232</sup> Rose-Ackerman [*Introduction to HANDBOOK*], *supra* note \_\_, at xix; see ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note \_\_, at 45 (noting that corrupt governments do not have to depend on consent by the governed and instead maintain power through corrupt patronage networks).

<sup>233</sup> See ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note \_\_, at 45 (noting that corrupt governments do not have to depend on consent by the governed and instead maintain power through corrupt patronage networks); see also Kahn, *supra* note \_\_, at 231 (arguing that post-Cold War political parties in Africa realized that staying in power required transmitting resources to powerful constituents through patron-client networks, and that corruption increased as a result).

<sup>234</sup> Blundo & Olivier de Sardan [*Everyday Corruption in West Africa*], *supra* note \_\_, at 71. See also Interview with Young Owner of Metal Fabrication Business, in Niamey, Niger (March 13, 2009) (claiming that participation in party politics is one of the only routes to success in business).

<sup>235</sup> See Interview with Owner of Several Small Businesses, in Niamey, Niger (February 20, 2009 (second)) (pointing to a wealthy businessman on the street in Niamey and saying that he had been "created" by former President Barre as a means of financing elections and patronage payments).

<sup>236</sup> Rose-Ackerman, [*Handbook Introduction*], *supra* note \_\_, at xix.

All countries to a certain extent redistribute wealth as a way of achieving political stability, but in developed countries it usually happens through the fiscal system. For example, the late Senator Robert Byrd was renowned for using his political influence to obtain disproportionate economic benefits for his West Virginia constituents. In the developing world, this political redistribution often takes place through off-budget transfers that involve political corruption. Developing countries simply don't collect sufficient taxes through the state fiscal system to both pay government salaries and redistribute money, so they cannot manage political stability using the public fisc. This dynamic creates powerful drivers of corruption that have little to do with the greed of public officials involved in the rent creation. Political factions drive the redistributive demands and state leaders have few

Africa has become a mode of staying in power and has become a sort of cement that binds ruling elites from the political and business sectors together.<sup>237</sup>

An examination of the causes of corruption in Africa would not be complete without casting a glance in the mirror and acknowledging the link between foreign aid and corruption. Aid projects, including business formalization and anti-corruption programs, account for a significant percentage of public expenditure in the poorest of African countries<sup>238</sup> and they are, practically without fail, rife with corruption.<sup>239</sup> Every new aid program, including anti-corruption programs, gives rise to rich new opportunities for more corruption.<sup>240</sup> It is met by a cadre of high level host country civil servants who are well practiced in the lingo and who have vast experience at milking such programs dry.<sup>241</sup> Donor countries are complicit because they either know, suspect, or are criminally negligent, but move blithely forward justifying it as the cost of doing business in the developing world.<sup>242</sup>

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tax resources to deal with these demands. The standard response in developing countries has been to select the most powerful or dangerous factional groups and transfer resources to them through informal patron-client networks. Alternatively, as in Niger, powerful clients are permitted to raise resources for themselves through corruption with the state turning a blind eye. *See generally* Kahn, *supra* note \_\_, at 227-30.

<sup>237</sup> Blundo, *supra* note \_\_, at 51.

<sup>238</sup> *Id.* at 57 (saying ninety percent of public investment and thirty percent of ongoing state expenses in sub-Saharan Africa come from foreign aid).

<sup>239</sup> *Id.*; *see* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_\_ (claiming that Nigerien ministries tend to squash innovative business facilitation programs proposed by Nigerien businessmen because they want to keep the NGO gravy for themselves).

<sup>240</sup> Blundo, *supra* note \_\_, at 57-8.

<sup>241</sup> *Id.* at 58; Blundo & Olivier de Sardan, *supra* note \_\_, at 72 (claiming the NGO “project system” creates a privileged class of host-country NGO managers and “brokers” who make everything run smoothly for the foreigners).

<sup>242</sup> *See* Interview with An American NGO Consultant (March 4, 2009), *supra* note \_\_ (stating plainly that a major U.S.-funded business formalization and anti-corruption program in Niger was rife with corruption and that the funders knew it).

On the general topic of NGOs turning a blind eye toward corruption, I again draw upon personal experience. Many years ago I was working for a USAID-funded agriculture project in Niger. Observing that it was accomplishing little and curious to know where the millions of dollars were going, I mounted my own field investigation and discovered several different methods by which the Nigerien project officials were stealing money, some of them banal, some ingenious. I reported my detailed findings to an American evaluation team that had been sent by USAID to make recommendations on whether to continue funding for the project. The evaluation team did nothing with my information, the funding was extended, and the project limped along accomplishing nothing for several more years. I later discovered that the supposedly neutral evaluators were from a prominent agricultural university in the States, and that the U.S. Government was paying full tuition for Nigeriens associated with the

No single factor provides a complete, convincing explanation of why Africa suffers rampant corruption. Its material poverty, its colonial legacy, its collectivist and patriarchal culture, and the rise of patronage driven partly politics likely all contribute to the magnitude of the problem.<sup>243</sup>

## **V. Corruption in Niger**

### **a. In General**

In the realm of government, everything is for sale in Niger. Within the government bureaucracy, there are lucrative posts and there are “dry” posts and everyone knows which is which.<sup>244</sup> Police and customs jobs are particularly valued because they involve frequent interactions with end users and thus frequent opportunities for rent extraction.<sup>245</sup> Likewise, positions within certain government ministries, such as the Ministries of Health and Education, are particularly sought after because they purchase large quantities of hospital and school supplies and each such transaction creates an opportunity for individual enrichment.<sup>246</sup> In contrast, few want to work for or do business with Niger’s Foreign Service because, though it

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project to study and obtain degrees there. In other words, the evaluation team was not neutral and had a strong financial incentive to ensure that the program continued at full funding.

Space constraints prevent a detailed description of the methods employed by host country NGO officials to extract wealth from aid projects, but they are legion and infamous. To touch on a few, officials routinely pilfer project construction materials to build private villas for themselves and their families. Similarly, they commandeer project vehicles for private use. Some are more subtle and creative. For example, highly placed officials in the cooperating host country ministries will sell lucrative host country NGO positions to the highest bidders or grant them to family members. Among host country intellectuals and academics, a common method is charging for empirical baseline or evaluation studies that are never performed or are slapped together with no meaningful underlying data. An old standby that pervades the NGO sector involves project officials who collude with vendors to inflate the price of inputs (e.g., construction materials, computer equipment, office supplies, furniture, rental vehicles, etc.) and then split the difference between the market price and the NGO price. *See generally* Blundo, *supra* note \_\_, at 58; Interview with An American NGO Consultant (March 4, 2009), *supra* note \_\_ (explaining how host country academics cheat the NGO projects).

<sup>243</sup> Blundo, *supra* note \_\_, at 30.

<sup>244</sup> Blundo & Olivier de Sardan, *supra* note \_\_, at 90.

<sup>245</sup> *See supra* Part IV.b. (describing my corrupt encounter at Niamey’s airport); *see supra* note [197] (describing a recent encounter with a Niamey traffic cop).

<sup>246</sup> Interview with a Seller of Home and Office Furnishings (March 5, 2009), *supra* note \_\_ (specifying that the best opportunities for graft often arise from the various “services” that are attached to government ministries, and identifying the best ministries as Education, Public Health, Transportation and Defense).

provides opportunities for living comparatively comfortably in far away countries, it buys little in the way of materials and there are few opportunities for rapid accumulation of wealth by means of corrupt practices.<sup>247</sup>

There is fierce competition among Nigerien functionaries for the more lucrative posts<sup>248</sup> and that competition has given rise to a lively market in which higher level functionaries sell government positions to lower level functionaries, sometimes for a lump sum, sometimes for monthly rent.<sup>249</sup> The lower level functionaries who successfully produce wealth from their positions, and who regularly send wealth upstream to their superiors, are rewarded with ever-more lucrative positions.<sup>250</sup> Those who fail to produce wealth or who display a lack of loyalty to their superiors or a reluctance to go along with the corrupt program are subject to “administrative banishment,”<sup>251</sup> meaning they are stuck in lower-level positions without opportunities for supplementing their salaries, passed over for promotion and training opportunities, and, as often as not, forced to work in field offices far from their homes and families. Nigerien functionaries grimly joke about being sent to Diffa – a windswept city in the far eastern part of Niger – if they fail to go along with their superiors’ schemes for personal enrichment.<sup>252</sup>

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<sup>247</sup> ROSE-ACKMERMAN [CORRUPTION AND GOVERNMENT], *supra* note \_\_, at 73; *but see* Interview with A Former Employee of Niger’s Ministry of Foreign Affairs, Niamey, Republic of Niger (March 1, 2009) (describing his experience with certain “standard” corrupt purchasing practices within Foreign Affairs).

<sup>248</sup> *See* Interview with an Employee of Niger’s Tax Service (March 6, 2009), *supra* note \_\_ (expressing frustration that the lucrative posts, promotions, and opportunities for professional training within the service always went to the protégés and family members of powerful Ministry officials); *see also* Interview with an Employee of Niger’s Customs Service, Niamey, Niger (March 8, 2009) (explaining that his job was to travel around the interior of the country to perform customs inspections but that he was in Niamey seeking to mobilize political influence to receive a transfer to a better post).

<sup>249</sup> *See* ROSE-ACKMERMAN [CORRUPTION AND GOVERNMENT] *supra* note \_\_, at 82 (stating that in corrupt government hierarchies, payment to superiors becomes essentially a rent to hold on to lower level positions). [Blundo?]

<sup>250</sup> *Id.*

<sup>251</sup> Blundo & Oliver de Sardan, *supra* note \_\_, at 90.

<sup>252</sup> *See* Interview with employee of Niger’s Tax Service (March 6, 2009), *supra* note \_\_ (discussing administrative banishment).

In explaining the banishment problem, Nigerien functionaries sometimes use the French term *limoger*, which is translated by most dictionaries as “to dismiss” but derives historically from French bureaucrats’ fear that they would be administratively banished to the reputedly backward and isolated city of Limoges, France.

Corruption in Niger can be quite blunt. Bureaucrats who wield sufficient power sometimes engage in the straightforward extraction of rents. The most notorious of these are the gendarmes and customs agents who set up armed, unofficially authorized checkpoints by the side of Niger's highways.<sup>253</sup> All commercial vehicles are obliged to stop and all must pay what is in essence a quasi-official toll before continuing.<sup>254</sup> Drivers who complain, or skimp on the bribe, are ordered to unload their vehicles by the side of the road, a process that can take hours.<sup>255</sup>

Corrupt practices in Niger are guided by their own practical rules and customs.<sup>256</sup> In many cases, the amount of the appropriate bribe is known to all.<sup>257</sup> When a commercial truck driver is stopped by a gendarme, he and all other drivers will know that the price is 2,000 CFA (approximately \$4) to pass. Often, the climate of corruption is so pervasive and the corrupt practice so routine that no explicit demands are required.<sup>258</sup>

Corrupt practices are also generally governed by norms that determine fair play within the system.<sup>259</sup> For example, if there is a particular stretch of Nigerien highway that usually has a gendarme stop on it that costs the commercial drivers 2,000 CFA,<sup>260</sup> but on a particular day a rival group of corrupt government officials (say, from the Customs Service) sets up a second

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<sup>253</sup> See Blundo & Olivier de Sardan, *supra* note \_\_, at 77 (referring to the itinerant customs inspectors as “flying squads”); see also Arifari, *supra* note \_\_, at 180 (claiming the roads in Niger, Senegal and Benin are “dens of routine and highly visible institutionalized corruption”).

<sup>254</sup> Blundo & Olivier de Sardan, *supra* note \_\_, at 77.

<sup>255</sup> Many times I have traveled around Niger in quasi-public “bush taxis” that were stopped by gendarmes. In the few instances that the chauffeur refused to pay, all passengers were ordered to take their luggage and their goods off of the roof and stand for inspection.

<sup>256</sup> Blundo & Olivier de Sardan, *supra* note \_\_, at 84.

<sup>257</sup> See Giorgio Blundo, *An Ordered Corruption? The Social World of Public Procurement*, in EVERYDAY CORRUPTION AND THE STATE: CITIZENS & PUBLIC OFFICIALS IN AFRICA, *supra* note \_\_, at 229 (arguing that corruption in West Africa is governed by unwritten rules and that the businessman who receives a contract and fails to pay an appropriate bribe will not receive another).

<sup>258</sup> Michael Johnston, *Public Officials, Private Interests, and Sustainable Democracy: When Politics and Corruption Meet*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note \_\_, at 62.

<sup>259</sup> Blundo & Olivier de Sardan, *supra* note \_\_, at 84; see Arifari, *supra* note \_\_, at 179 (illustrating an instance of fair play among corrupt officials).

<sup>260</sup> Arifari, *supra* note \_\_, at 197 (explaining that most experienced drivers know exactly how much each official at each roadside stop is permitted his superiors to extract, and that such extractions are generally viewed as a toll based on agreed upon charges).



“flying patrol,” the gendarmes will temporarily reduce their prices until the other stop disappears, thereby ensuring that the truckers do not have to pay more than the customary price.<sup>261</sup>

In sum, petty corruption is the rule, not the exception in Niger. It should not be surprising, therefore, that small businessmen are compelled to engage in it, as described in the following section.

## **b. Corruption in Niger’s Business Sector**

### **i. Corruption in Public Purchasing Contracts as a Source of Expansion Capital**

As described in Part \_\_, above, proprietors of small businesses in Niger struggle to obtain capital to expand their enterprises.<sup>262</sup> They aspire to move up the commercial chain from retail to wholesale, usually by mounting international purchasing expeditions.<sup>263</sup> However, unless the businessmen are connected to wealthy families,<sup>264</sup> their only hope of obtaining a financial windfall large enough to finance their expeditions is to engage in corrupt transactions with the government.<sup>265</sup> In a country where the economy is dominated by subsistence farming and animal

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<sup>261</sup> *Id.* at 179. I experienced another example of fair play among corrupt African government officials, this time outside of Niger. One evening I was walking through Maputo, the capital of Mozambique, and was stopped by a machinegun-toting military patrol. The leader asked for my passport and, when I replied that I had left it in my hotel room for safekeeping, told me I had broken the law and would be arrested. After I paid a small bribe, he let me go with a warning that I should return directly to my hotel to pick up my passport. On the way there, I was detained by a second military patrol that asked for my passport and made the same threat. When I explained to the leader of the second patrol that I had just paid a bribe to a different group and that I was on my way to fetch my passport, he agreed after a brief consultation with his charges that it would be unfair to force me to pay again. He saluted and sent me on my way.

<sup>262</sup> See *supra* notes \_\_ and accompanying text.

<sup>263</sup> See *supra* notes \_\_ and accompanying text.

<sup>264</sup> See Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_\_.

<sup>265</sup> See *id.* (saying Niger’s government is the only source for expansion capital).

husbandry,<sup>266</sup> where there are few commercial enterprises of any size,<sup>267</sup> and where the banking and finance sector is moribund,<sup>268</sup> the government, which purchases comparatively large quantities of goods and services, is the only game in town.<sup>269</sup>

To gain the financing they need, ambitious businessmen seek to form symbiotic, corrupt relationships with government officials who purchase goods and services on behalf of government ministries or the various services attached to those ministries.<sup>270</sup> They work their networks of kinship, friendship,<sup>271</sup> and to an increasing degree, political party affiliation,<sup>272</sup> hoping to identify officials on the inside of government who have discretion and power over purchasing, and who will adopt the businessman into their stable of corrupt collaborators. Once the relationship has been formed, the insider steers valuable government purchasing contracts toward the chosen businessman.<sup>273</sup> The businessman who has been favored by the corrupt

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<sup>266</sup> See U.S. CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 2010, at \_ (2010), *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/ng.html> (describing Niger's economy as agrarian and subsistence).

<sup>267</sup> See *supra* notes [112-116] and accompanying text.

<sup>268</sup> *Id.*

<sup>269</sup> See *id.* (explaining that the government accounts for a large percentage of Niger's economic activity).

<sup>270</sup> See *supra* notes \_ and accompanying text (explaining that some ministries are more desirable objects of corruption than others). Although most of the businessmen I interviewed had trades or businesses that they hoped to expand by obtaining government procurement contracts, some businessmen have no particular business other than chasing such contracts. No matter what the government wants to purchase, they will offer to supply it. See Interview with Seller of Home and Office Furnishings (March 5, 2009), *supra* note \_ (explaining clearly that his true vocation is chasing procurement contracts of any sort); Interview with The Manager of a Rental Car Business (February 24, 2009), *supra* note \_ (saying he spent several years doing nothing but chasing public procurement contracts). They spend much of their time hanging around the hallways of ministries cultivating new friends and searching for opportunities. See Interview with Seller of Home and Office Furnishings (March 5, 2009), *supra* note \_ (saying "knowing people" is the key to his business).

<sup>271</sup> See Interview with Seller of Home and Office Furnishings (March 5, 2009), *supra* note \_ (demonstrating how he roams the hallways of government ministries – on the day of the interview, the Ministry of Commerce – greetings friends and acquaintances and looking for opportunities).

<sup>272</sup> See Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009) (complaining bitterly that one cannot obtain government contracts, and thus expansion capital, without being involved in party politics).

<sup>273</sup> See Gorgio Blundo, [An Ordered Corruption? The Social World of Public Procurement, in EVERYDAY CORRUPTION AND THE STATE], *supra* note \_, at 228 (stating that each decision maker inside government has "his" businessmen whom he can count on).

official must in turn split the ill-gotten profits with that insider.<sup>274</sup> If the system of corruption is working well, both the insider and the businessman will prosper.<sup>275</sup>

The specific methods employed by the businessmen and their corrupt government collaborators are varied and ever evolving, but several are considered standard practice.<sup>276</sup> One is to avoid scrutiny by segmenting purchasing contracts into small units that are not subject to public bidding regulations.<sup>277</sup> Under present law, any government purchase of goods or services of a value less than 5 million CFA (approximately \$10,000) can be entered into without a public bidding process.<sup>278</sup> Therefore, businessmen and their corrupt collaborators inside of government simply break their \$30,000 dollar contracts into three segments and proceed quietly with their transactions.<sup>279</sup>

A businessman's profits on a \$10,000 purchasing contract are typically quite low,<sup>280</sup> even if he and his inside collaborator employ typical profit-boosting (and doubly corrupt) methods such as agreeing that the quantity and quality of the tendered goods will be less than required by the terms of the purchasing contract.<sup>281</sup> Once the businessman has purchased and shipped the goods,

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<sup>274</sup> Interview with the Owner of Several Small Businesses (February 20, 2009) (second)), *supra* note \_ (proving a general description of how procurement corruption works); *see also* Interview with Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_ (stating that businessman must always pass the "envelope" back to the government insider); Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_ (same).

<sup>275</sup> Interview with the Owner of Several Small Businesses (February 20, 2009) (second)), *supra* note \_ .

<sup>276</sup> Interview with A Former Employee of the Ministry of Foreign Affairs (March 1, 2009), *supra* note \_ (referring to "standard" methods of corrupt purchasing within the ministry).

<sup>277</sup> Blundo [*An Ordered Corruption*], *supra* note \_, at 233-4; *see also* Interview with Young Owner of Metal Fabrication Business, in Niamey, Niger (March 13, 2009), *supra* note \_ (referring to the practice of segmenting government purchasing contracts to avoid scrutiny).

<sup>278</sup> *See* Blundo [*An Ordered Corruption?*], *supra* note \_, at 227- 232.

<sup>279</sup> *Id.* at 233; *see also* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_ (discussing his recent receipt of a procurement contract for computer paper in an amount just under 5 million CFA).

<sup>280</sup> Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_ (describing his urgent need for expansion capital and ruing the fact that the only purchasing contract he had obtained – for \$10,000 worth of copy paper –was too small to provide significant profits).

<sup>281</sup> *See* Pieth, *supra* note \_, at 121 (stating that corruption leads the government to purchase inadequate equipment); *see also* Rose-Ackerman [*The Political Economy of Corruption*], *supra* note \_, at 42 (stating that corrupt actors in government purchasing often increase their profits by skimping on quality).

and then shared as much as half of his profits with his inside collaborator, he might clear less than \$1,000.<sup>282</sup> But businessmen typically need much larger amounts of cash to mount their international purchasing expeditions, so they are anxious whenever possible to enter into large scale purchasing contracts that should, at least in theory, be subject to the full panoply of public bidding regulations.<sup>283</sup>

Where the purchasing contract is too large to avoid a public bidding process, Nigeriens employ numerous methods to circumvent public bidding laws and the attendant public scrutiny so that they can engage in the corrupt transactions. One straight-forward technique is that the government insider – if he has access to privileged information regarding competing bids – simply passes that information to his businessman on the outside, who adjusts his bid accordingly.<sup>284</sup> The insider might require an up-front payment from the businessman, plus a share of the downstream profits once the purchasing transaction is complete.<sup>285</sup> In a slight variation, the government insider may wield sufficient power within the ministry to simply override or fix the public bidding process by ordering his underlings to choose his favored businessman.<sup>286</sup> In either case, the corrupt collaborators often maximize their profits by agreeing

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<sup>282</sup> See Interview with Manager of Rental Car Business (February 24, 2009), *supra* note \_\_ (saying he spent years chasing public purchasing contracts but saying it was hard to generate significant profits because the corrupt insiders take the majority of profits for themselves); Interview with the Owner of an Auto Parts Shop Near the New Market (March 13, 2009), *supra* note \_\_ (describing his corrupt purchasing transactions with officials of the Ministry of Defense and stating that it is hard to make reasonable profits on the transactions when so much has to be turned over to the insiders).

<sup>283</sup> See Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009) (explaining the need for expansion capital and bemoaning that small government procurement contracts, though welcome, did not provide sufficient capital); *see also* Interview with a Young Man Who Services Computers and Sells Computer Peripherals (March 3, 2009) (similar).

<sup>284</sup> See Blundo [*An Ordered Corruption*], *supra* note \_\_, at 241 (mentioning the practice of government insiders leaking privileged bidding information to their outside business collaborators).

<sup>285</sup> ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note \_\_, at 34; *see generally* Interview with the Owner of an Auto Parts Shop Near the New Market (March 13, 2009), *supra* note \_\_ (discussing a corrupt transaction with the Department of Defense where he was compelled to turn over most of his profits to government insiders).

<sup>286</sup> ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note \_\_, at 42.

that the outside businessman doing the purchasing will skimp on the quality and/or quantity of the tendered goods while the insider ensures that the inferior goods will be accepted.<sup>287</sup>

Even where the insider lacks decisive power, he can employ proven methods for steering contracts toward favored bidders, all of which involve limiting the information that goes to the public and sharing as much information as possible with the corrupt collaborators. For example, a government official in charge of purchasing materials for his ministry can minimize or eliminate competition for public contracts by giving his collaborator advance word on upcoming bids while waiting until the last minute to publicly advertise the bids.<sup>288</sup> In a slight twist, the corrupt official can withhold from the public vital information necessary to a successful bid while ensuring that the favored businessman receives that information.<sup>289</sup> Similarly, corrupt ministry officials can withhold from all but their chosen businessmen the documents necessary to formally bid on a contract.<sup>290</sup> As an alternative, a corrupt ministry official can painstakingly craft the wording of a public tender offer so narrowly that only his preferred business collaborators can possibly qualify.<sup>291</sup>

Where reformers try to limit this panoply of corrupt practices by establishing review committees to scrutinize the propriety of contracting and bidding procedures, the tainted insiders either use their influence to stack the committees with friends, relatives and party partisans,<sup>292</sup> or, if the committee members are independent, intimidate them by applying political pressure.<sup>293</sup> If

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<sup>287</sup> Blundo, *supra* note \_\_, at 240-42

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 240.

<sup>291</sup> *Id.* at 243.

<sup>292</sup> See Hedrix, *supra* note \_\_, at 12 (discussing the difficulty of combating corruption when both the agents and principals are in on it and the fact that incremental corruption reforms risk being “hijacked by corrupt elites”).

<sup>293</sup> See *supra* notes \_\_ and accompanying discussion (discussing the rise of party politics and politician’s use of administrative banishment to control civil servants).

There is a somewhat less common but still renowned method of employing political power to skirt purchasing regulations. If a politician is prominent enough, he can establish a “special fund.” These funds typically are earmarked for appealing purposes such as stimulating literacy for young women or combating childhood

the financial prize is large enough, the corrupt official can simply buy the committee members off with shares of the proceeds.<sup>294</sup>

As indicated in Part \_\_, above, party politics plays an increasingly important role in shaping the rules of the game of business-government corruption.<sup>295</sup> Businessmen who wish to win government contracts can no longer rely exclusively on ties of kinship or friendship or mere

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diseases. Because the fund's aims are so urgent, and because the normal government purchasing strictures are known to be cumbersome, the high official receives unfettered discretion to spend the money for the stated purposes. Blundo, *supra* note \_\_, at 237. The politician and his corrupt collaborators are then relatively free to enrich themselves. See Interview with a Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_\_ (referring to the abuse of special accounts, including former President Tanja's special fund for building rural schools).

<sup>294</sup> Blundo, *supra* note \_\_, at 244.

Some less common methods for circumventing anti-corruption rules rely on deft action taken by the businessmen doing the bidding. For example, businessmen who have connections within ministries will form public procurement *tontines* where they collude to create the semblance of a public bid process but where they agree that they will rotate actually winning the bids. Blundo, *supra* note \_\_, at 245. In another twist, they sometimes create fictitious companies that put in bogus high bids so that the winner in a bid competition is the only real company involved. *Id.*

There are many other forms of government corruption in Niger that this paper does not explore in detail because they do not bear as directly on Niger's business sector. For example, government bureaucrats routinely sell services that they are supposed to provide for free. Blundo & Olivier de Sardan, *supra* note \_\_, at 74. I have vast personal experience paying for goods and services – including printed collections of laws – that are supposed to be free for everyone.

In somewhat of a twist, government bureaucrats sometimes sell speed rather than the good or service itself. See Interview with A Former Employee of Niger's Ministry of Foreign Affairs (March 1, 2009), *supra* note \_\_ (recalling that when he worked for the Ministry, he would routinely extract bribes for expediting payment to merchants who had already earned the money through complete performance); Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_\_ (claiming that business transactions involving the government go much faster if you pay a bribe or have friends on the inside who can speed the process); see also Rose-Ackerman [*The Political Economy of Corruption*], *supra* note \_\_, at 37 (mentioning the corrupt selling of speed by government officials). Typically, a person who approaches a bureaucrat without a bribe or a connection through family or friends is simply ignored. See Interview with Manager of a Rental Car Business (February 24, 2009), *supra* note \_\_ (explaining that many businessmen in Niger must wait weeks to resolve problems with government agencies, which sometimes harm their businesses, but that he is so well connected he can always pick up the phone and resolve issues within five minutes); see also Blundo & Olivier de Sardan, *supra* note \_\_, at 92 (discussing personal connections as a strategy for avoiding corrupt bureaucratic delay). When bureaucrats' main means of collecting bribes is charging for speed, they find ways to artificially create, or at least exacerbate, delay. See Interview with an American NGO Consultant (March 4, 2009), *supra* note \_\_ (recounting a story of a Nigerien businessman whose travel agency business was delayed for years by bureaucrats seeking bribes to speed up the issuance of various necessary licenses); Interview with the Owner of an Auto Parts Shop Near the New Market (March 13, 2009), *supra* note \_\_ (describing how officials in the Ministry of Defense delayed processing payment for a business transaction and then requested a bribe in exchange for speeding it up); see also Blundo & Olivier de Sardan, *supra* note \_\_, at 90 (arguing that the creation of queues is a central strategic resource to be exploited in corrupt exchanges). They invent unofficial, ex-post regulatory hurdles, or suddenly decide to zealously enforce regulatory or criminal laws that historically have been ignored. Rose-Ackerman [*Corruption and the Global Economy*], *supra* note \_\_, at 39. Perhaps most galling to end users of government services, bureaucrats behave arbitrarily or ambiguously and thereby create a demand for clarity that they must pay for. Rose-Ackerman [*Corruption and the Global Economy*], *supra* note \_\_, at 39; Blundo & Olivier de Sardan, *supra* note \_\_, at 74.

<sup>295</sup> See *supra* note \_\_ and accompanying text.

mutual advantage: to an increasing degree they must approach with ties of political party affiliation.<sup>296</sup> Residents of Niamey tell stories of once obscure businessmen who have become wealthy and powerful through government purchasing contracts tied to party politics.<sup>297</sup> The dominant role of party affiliation increases the deadweight loss to society because, to an increasing extent, men with limited talent and experience but strong political connections are awarded important public contracts. Illiterate sheep herders win contracts to purchase and service thousands of computers that they do not even know how to turn on.<sup>298</sup> Men who have spent their careers as tailors but who became active in party politics end up in charge of constructing large government buildings.<sup>299</sup> The government pays higher than necessary prices for goods and services that often are of inferior quality and,<sup>300</sup> even more troubling, pays for equipment (including medical equipment) that does not work, and buildings and roads that crumble.<sup>301</sup>

Following these rules of the game, the proprietors of small businesses in Niamey vie for expansion capital from corrupt government purchasing contracts. Those who succeed in

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<sup>296</sup> See Interview with a Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note \_ (expressing distaste for the new rules of the game that require businesspeople to be active in political parties).

<sup>297</sup> Interview with the Owner of Several Small Businesses (February 2, 2009 (second)), *supra* note \_ (pointing to a prosperous businessman on the street and claiming that he was “created” by former President Barre, who needed a wealthy business class to support his political campaigns); see also Blundo at 249 (offering an example of a small business owner who became fabulously successful as a result of Prime Minister’s support).

<sup>298</sup> Interview with a Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note \_; see Blundo, *supra* note \_, at 248 (noting that unqualified winners of procurement bids will sometimes “sell” the procurement contracts to more qualified and knowledgeable businessmen and that the usual split in such arrangements is fifty percent of profits for the sheep seller who obtained the contract, fifty percent to the person who actually does the work).

<sup>299</sup> See Blundo, *supra* note \_, at 251.

<sup>300</sup> Rose-Ackerman, [Corruption in Global Economy], *supra* note \_, at 42; see *supra* Part \_;

<sup>301</sup> See Blundo, *supra* note \_ at 248 (arguing that businessmen who are completely unqualified often receive the bids to carry out government purchasing and services); Rose-Ackerman [the political economy of corruption], *supra* note \_, at 42 (noting that corruption causes government contracts to go to providers who are less efficient and who skimp on quality).

Reformers try to limit this sort of corruption and prevent dangerous conditions in public works projects by establishing review boards to inspect and verify that public works have been performed adequately. But the review boards, like all other government institutions, are simply intimidated by political pressure or paid off in exchange for peremptorily approving the results they were supposed to verify. Blundo, *supra* note \_, at 255.

establishing corrupt collaborative relationships with government insiders prosper and move up the chain from retail to wholesale.<sup>302</sup> Those who lack good luck, as well as ties of family, friendship, or political affiliation, have faint hope of prospering.<sup>303</sup>

## **2. Avoiding Governmental Burdens and Maximizing Business Profits by Employing *Transiteurs* as Wholesale Brokers of Corruption**

The preceding section described the corrupt government purchasing transactions that small businessmen rely upon to accumulate sufficient capital to mount their international buying expeditions. But accumulating expansion capital by engaging in corrupt purchasing deals with governmental insiders is not the only form of routine corruption that Niger's businessmen rely upon. Another involves maximizing profit margins by minimizing financial obligations owed to the state, particularly in the form of taxes and customs duties.

For small-scale businessmen, this can mean the straightforward negotiation with tax officials over the amount of taxation owed. In a typical corrupt, tax avoiding transaction, a government tax collector agrees understate the amount that the business owes, and the businessman then pays official a percentage of difference.<sup>304</sup> For businessmen that mount international purchasing expeditions, however, there is a much more important and efficacious method for reducing the state's share of business profits: the use of *transiteurs*, or transit agents,<sup>305</sup> who act as wholesale brokers of corruption.

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<sup>302</sup> See *supra* notes \_ and accompanying discussion.

<sup>303</sup> See Interview with Seller of Fabric in the Grand Marche (March 12, 2009), *supra* note \_ (ruing that he has no such connections and will never be able to move beyond his small retail stall); see generally Blundo, *supra* note \_, at 256-7 (arguing that if a businessman wants to obtain expansion capital, there is little alternative but to participate in corruption).

<sup>304</sup> See Interview with the Owner of a Small Hotel and Several Bars, Niamey, Niger (March 12, 2009) (claiming he constantly must bargain with tax collectors over the amount of his payments); Interview with an Employee of Niger's Tax Service (March 6, 2009) (claiming that no one pays full taxes and that the amounts depend largely on the businessman's political influence and/or ability to bribe the tax collector).

<sup>305</sup> At least one author refers to the *transiteurs* as "ambulant customs brokers." See Arifari, *supra* note \_, at 187.



If a Nigerien businessman were to follow the official rules of the game, he would purchase his goods in a distant port, carry those goods back to Niger's border (or pay someone else to do so) and then, upon reaching Niamey, clear them through a customs depot. Before proceeding to market, he would have to pay customs duties and value added taxes on everything he had carried into the country. The amount owed would depend on the customs category of the goods and upon their value. This, however, is very rarely what happens.

Instead, the businessman purchases his goods in the foreign port and immediately puts them in the hands of his preferred *transiteur*.<sup>306</sup> Once the goods have been turned over to the *transiteur*, the businessman need not think about them further until they arrive at a lot adjacent to the Grand Marche in Niamey, having already cleared customs and owing no further taxes.<sup>307</sup> The businessman need not dicker with customs agents regarding the classification of the goods<sup>308</sup> or fill out paperwork: all of that has already been taken care of by the *transiteur*.<sup>309</sup> The businessman merely pays a flat fee in cash to the *transiteur* – a fee based on the weight of the goods rather than their worth or customs category, and typically much less than he would officially owe – and goes on his merry way to sell them.<sup>310</sup>

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<sup>306</sup> The various *transiteurs* in a given port compete with one another based on their ability to deliver businessmen's goods quickly as well as their ability to minimize the customs and taxation burdens placed on the businessman's goods. Each businessman has "his" *transiteurs* in a given port, but will switch to a competing *transiteur* if the competitor can produce better results in terms of speed or price. Interview with the Owner of an Auto Parts Shop near the New Market (March 4, 2009) (explaining that he recently switched *transiteurs* and that the new one is cheaper and faster); see also Mahaman Tidjani Alou, *Etat, Réseaux, Marchands et Mondialization, Le Cas des Convois au Niger*, [Journal], at 125 (copy on file with author) (explaining that most merchants in Niger use *transiteurs* to reduce expenses and avoid entanglement with the government).

<sup>307</sup> Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_.

<sup>308</sup> See Arifari, *supra* note \_, at 191. (explaining that many Nigerien businessmen employ *transiteurs* – even when their business are formal and they have all the necessary official paperwork – just to minimize the financial burdens and avoid the hassle of dealing with the government).

<sup>309</sup> Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note \_ (saying his *transiteur* takes care of the entire process of transporting the goods and shepherding them through customs); Interview with a Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_ (claiming he never deals with customs agents because he employs a *transiteur* who "arranges" everything).

<sup>310</sup> Interview with the Owner of an Auto Parts Shop Near the New Market (March 4, 2009), *supra* note \_ (claiming the amount of duty is calculated based on weight and that he has gotten a much better deal since he switched to a *transiteur* who has better connections).

Who are these *transiteurs* and how do they accomplish the feat of transporting goods internationally while drastically cutting businessmen's taxation and customs burdens? Generally, they are men of great wealth and political influence,<sup>311</sup> many of whom were customs officials at some point in their past, who know how to manipulate, circumvent, and undermine Niger's governmental bureaucracy.<sup>312</sup> They or their agents can be found in ports where Nigeriens do business: West Africa ports such as Cotonou, Lome, Abidjan and Dakar, as well as far flung trading destinations such as Dubai and China.<sup>313</sup> They also are present and active at all border points entering Niger.<sup>314</sup>

Their method is to bundle together huge caravans of goods that Nigerien businessmen have purchased in distant ports, and, before initiating the transport of those goods, negotiating directly with Nigerien customs officials to establish vastly discounted customs rates.<sup>315</sup> The customs rates typically are based on volume rather than the classification of the goods, and no one takes the time to look inside the containers to see whether they are filled with diamonds or coal.<sup>316</sup> Other than the customs officials' steeply discounted estimation of the value of the bundled goods, nothing concerning the transaction goes in writing<sup>317</sup> and the entire business is transacted in cash.<sup>318</sup>

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<sup>311</sup> Arifari, *supra* note \_\_, at 182 (arguing that smuggling is a systematic activity often carried on by extremely influential actors).

<sup>312</sup> See Arifari, *supra* note \_\_, at 130, 190 (stating the *transiteurs* have strong contacts with the government and understand the system, which permits them to act as intermediaries between the state and the informal sector).

<sup>313</sup> *Id.* at 189.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 199-200.

<sup>316</sup> See *id.* (stating that the customs duties are usually negotiated in bulk rather than by category); see also Alou [article], *supra* note \_\_, at 133-35 (stating that the value of the goods is irrelevant and that the cost to the businessman, as well as the size of the bribes paid to the government officials, are typically based on the volume of the bundled goods in the caravan, and that no one actually looks inside the boxes).

<sup>317</sup> Arifari, *supra* note \_\_, at 189, 213; see Alou [article], *supra* note \_\_, at 136 (arguing the entire transaction is paperless).

<sup>318</sup> Arifari, *supra* note \_\_, at 189.

The customs officials are willing to participate in this system, of course, because the *transiterus* pay cash bribes to everyone up and down the governmental chain of command.<sup>319</sup> They maintain close personal, political and financial ties to prominent government officials, who send the word down the line that they are not to be interfered with. In spite of their strong influence among governmental leaders, they typically also pay petty bribes to the lower level customs officials who dot the convoys' routes and guard the border crossings into Niger. When the convoy of goods finally arrives in Niamey, the *transiteur* simply adds up his total outlay for the steeply discounted customs and taxation payments, the bribes paid, and the cost of transport, adds his profit margin, bills the businessmen on a pro rata basis.<sup>320</sup>

Everyone is happy. The businessmen are happy to pay the *transiteurs* to exercise their connections, power and influence to reduce customs and taxation burdens and to streamline the process of shipping goods. The *transiteurs* themselves, along with corrupt government collaborators high and low, are happy to divide the wealth produced by vastly undercharging the businessmen. It is only the state – and the citizens who depend on the state – that suffers by receiving a fraction of the desperately needed customs proceeds than it should.<sup>321</sup>

### 3. The Necessity of Judicial Impunity

Customs duties account for more than half of Niger's budget,<sup>322</sup> which helps explain why the damage caused by *transiteurs* is so crippling to Niger's economy and, at the same time, why it is so difficult to combat. Because the customs service produces so much of the government's wealth, it wields inordinate power. If politicians even hint at an investigation into the rampant

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<sup>319</sup> See *id.* at 187 (arguing that the corruption among customs officers generally reaches to the top rungs of the government).

<sup>320</sup> Alou [article], *supra* note \_\_, at 135.

<sup>321</sup> See *id.* at 139 (explaining that the state receives some money but far less than it would if the laws were enforced, since the negotiated duties are low and the *transiteurs* and the corrupt officials each take a slice of the proceeds).

<sup>322</sup> Arifari, *supra* note \_\_, at 184-185.

corruption, the service can threaten a slowdown or strike, which would mean certain financial disaster for the state.<sup>323</sup>

Even if Nigerien officials' corrupt practices were revealed and confronted, it would be extremely difficult to deter and punish them because Niger's judicial system is notoriously dysfunctional and corrupt. Economists who study corruption say that the cost of corrupt activity to those who engage in it is the probability of being caught times the probability of being convicted times the amount of punishment levied.<sup>324</sup> In Niger, the likelihood of being caught, convicted and punished is exceedingly low.

One form of judicial corruption is linked to Niger's proto-democratic party politics.<sup>325</sup> To an ever-increasing degree, the petty bureaucrat who engages in corrupt practices has been placed in his lucrative position as a result of his party loyalty.<sup>326</sup> If he has played by the rules and kicked a share of his profits up the chain of corruption, he will be shielded from accusation and prosecution by more powerful members of the political network.<sup>327</sup> If he is accused of corruption, a powerful party member will phone the Minister of Justice, who in turn will phone the investigating judge and tell him to make the case disappear.<sup>328</sup> If the judge complies, he is rewarded with cash and a promotion to a more lucrative position. If he refuses, he finds himself

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<sup>323</sup> *Id.*

<sup>324</sup> Rose-Ackerman [ in Corruption and the Global Economy ], *supra* note \_\_, at 40.

<sup>325</sup> See *supra* notes \_\_ and accompanying text.

<sup>326</sup> See *supra* notes \_\_ and accompanying text.

<sup>327</sup> See generally Interview with Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note \_\_ (stating that justice in Niger is a matter of political influence and money); Interview with an Employee of Niger's Tax Service (March 6, 2009), *supra* note \_\_ (stating that owners of large businesses often pay no tax and know they will be shielded from prosecution by high ranking members of their political parties); see also Interview with a Prominent Lawyer, Niamey, Niger (March 5, 2009) (claiming that everyone knows that the outcomes of investigations and trials are routinely determined by phone calls from ministers' offices); Maman Tidjani Alou, *Corruption in the Legal System*, in EVERYDAY CORRUPTION AND THE STATE, *supra* note \_\_, at 156-60 (similar).

<sup>328</sup> See Interview with the Manager of Rental Car Business (February 24, 2009), *supra* note \_\_ (noting that those who engage in corruption with ministry officials are protected because the officials can simply pick up the telephone and order judges not to pursue charges).

in Diffa in short order.<sup>329</sup> Everyone in Niger knows that the only time anyone is openly accused of and prosecuted for corruption is if they step out of line and exhibit disloyalty to higher political figures.<sup>330</sup>

Even where a bureaucrat accused of corruption lacks political ties, he has little to fear as long as he has cash on hand because the Nigerien justice system itself is notoriously corrupt from bottom to top.<sup>331</sup> It is common knowledge in Niger that one can be assured of prevailing in any court action so long as the “judge’s share” is sufficient.<sup>332</sup> If an accused bureaucrat is not being actively punished by powerful actors who order the judges to convict him,<sup>333</sup> he can simply pay the judges to make the accusations and investigations go away.

## **VI. Conclusion**

In some respects this paper’s contribution to the literature on international law and development, and more specifically to the literature on institution building and business formalization programs in the international arena, may appear slight. It describes but does not take an explicit position in economists’ empirical debates over whether efficient, streamlined governmental institutions do or do not ineluctably lead to economic prosperity and long term stability in the developing world.<sup>334</sup> Nor does it take sides in the normative debate over whether U.S. aid organizations’ focus on institution building tacitly and illegitimately removes questions of justice and politics from international development efforts and unjustifiably gives financial institutions such as the World Bank and the IMF an exaggerated role in determining the future

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<sup>329</sup> See *id.*; see also *supra* notes \_\_ (discussing administrative banishment).

<sup>330</sup> See Johnston, *supra* note \_\_, at 64 (arguing that anti-corruption enforcement is commonly used as a tool to attack political rivals); see also Blundo & Olivier de Sardan [*Why Should We Study*], *supra* note \_\_, at 7 (arguing that elites use the war against corruption to eliminate their political enemies and settle old scores).

<sup>331</sup> See Alou [*Corruption in the Legal System*], *supra* note \_\_, at 147 (arguing that in Niger there is a widespread view that justice is for sale).

<sup>332</sup> *Id.* at 156.

<sup>333</sup> See *supra* note \_\_, [re punishing political rivals].

<sup>334</sup> See *supra* notes \_\_ and accompanying text.

structure of poor countries' legal systems.<sup>335</sup> Furthermore, readers who skipped ahead to the conclusion hoping to view the standard three-part solution to the problems faced by institution building business formalization programs will be disappointed. The fact is, I do not know how to solve the problems and I am not sure that anybody does. This paper's modest contribution to the literature is to undertake a step that most promoters and practitioners of international law and development projects skip: assessing the on-the-ground reality in the country whose institutions are to be reformed to determine what institutions already exist and how the proposed Western institutions are likely to be received.

Interviews with the proprietors of small businesses in Niger reveal that the promoters of business formalization in Niger are mistaken in their assumption that the business sector, which is overwhelmingly informal, in fact lacks predictable institutions. Concomitantly, they are mistaken in their assumption that the introduction of new U.S.-style legal and regulatory institutions will rapidly be embraced by Niger's business sector.

The homegrown, durable institution already in place in Niger's business sector – the institution that supplies the extant rules of the game and hinders businessmen's embrace of Western-style business laws and regulations – is corruption. U.S. and other international aid organizations are, of course, well aware of corruption in Niger and other developing countries, but they portray it as an annoyance and an inefficient drag on the system when in fact it is the system.

Proprietors of small businesses in Niger who wish to prosper must participate in a vast, well organized system that operates according to its own logic and its own set of widely understood rules. Small businessmen aspire to move up the commercial chain from retail to wholesale by

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<sup>335</sup> See *supra* notes \_ and accompanying text.

mounting international purchasing expeditions. Because such expeditions require large amounts of capital, and because Niger's financial sector cannot or will not provide it, businessmen finance their trips by engaging in systematic corrupt purchasing transactions with the largest economic actor in the country: the Nigerien government. They also rely on corrupt *transiterus* to preserve the profits that are generated by their purchasing expeditions. The *transiteurs*, acting as wholesale brokers of corruption, help the businessmen by minimizing the customs duties and taxes that the businessmen would be legally obliged to pay on their goods, and by sweeping aside the bureaucratic regulatory burdens that businessmen otherwise would have to grapple with. In short, if U.S. aid organizations were to look carefully at the institutional terrain they intend to reform, they would find that Niger's small business sector is far from a Hobbsian struggle of all against all and in fact is governed by rules of the game that are well understood by all of the players.

This paper elevates corruption to the status of an important institution in Niger's business sector, but readers should not interpret that declaration as an endorsement. At present, corruption provides the institutional matrix that supplies the rules of the game for Niger's business sector, but for reasons summarized in Part \_\_\_, it is not an institution that many would choose if there were alternatives. Corruption greases the wheels of government and produces (and preserves) wealth for those who engage in it, but it has terrible negative consequences for the rest of society: public buildings that fall down, roads that crumble, medical equipment that does not function, and technological hardware that is hopelessly inappropriate or out of date. It also undermines citizens' confidence in the state as government funds are diverted to private use by businessmen and their corrupt governmental collaborators.

If the findings of this paper are correct, and if corruption is the fundamental institution of Niger's business sector, then the challenge faced by U.S.-funded business formalization programs is daunting indeed. Douglas North, who more than any other individual is associated with New Institutionalism, states quite clearly that institutions are path dependent and generally not amenable to rapid reform.<sup>336</sup> There is no doubt that corruption is well entrenched in Nigerien society, including its business sector, and it is doubtful that it will disappear quickly in spite of urgings and earnest attempts by the MCC and other aid organizations.

Rather than end on that dour note, I conclude with a ray of hope. While conducting interviews in Niger in 2009, I happened across a small subclass of businessmen – young, relatively highly educated entrepreneurs who have been exposed to the philosophy and the lingo of Western capitalist entrepreneurship – who rue the fact that the system of corruption now in place prevents them from moving up in the market and competing. In their view, the corrupt collaborators within the governmental and business sectors wish to keep the system the same because they wish to keep the spoils for themselves and block ambitious young entrepreneurs from entering.<sup>337</sup>

Among these young entrepreneurs, the institutional reforms proposed by the U.S.-funded aid programs – reforms that this article has implicitly critiqued as naïve – are quite popular. They laud the idea of a one-stop shop where entrepreneurs can quickly and cheaply accomplish all of the formalities necessary for establishing a business; they like the idea of stimulating foreign direct investment by rationalizing business laws and loosening restrictions on expatriating business profits; they long for an environment in which the financial burdens placed on

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<sup>336</sup> See *supra* notes \_ and accompanying text.

<sup>337</sup> See, e.g., Interview with a Young Hydrologist Entrepreneur, Niamey, Niger (March 5, 2009); Interview with Three Members of the Young Chamber International (February 24, 2009), *supra* note \_.



businesses by government will be inexpensive and predictable. In short, this young class of entrepreneurs is already sold on the benefits of the institutional reform program being promoted by the U.S. and other Western governments. Although they are in a distinct minority, one could imagine that they could become promoters for the reform package, and that they could help stimulate a virtuous cycle whereby businessmen try out the new institutions, find that they prefer their stability and predictability, and demand more.<sup>338</sup> This momentum might, just might, overcome corruption's path dependency and begin to dislodge it from its foundational position in Niger's business, government and judiciary.

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<sup>338</sup> Corruption and Gov at 108.