February 21, 2011

CORRUPTION AS INSTITUTION IN NIGER'S BUSINESS SECTOR

Thomas A Kelley, III, *University of North Carolina at Chapel Hill*

CORRUPTION AS INSTITUTION IN NIGER'S BUSINESS SECTOR

Thomas Kelley
Professor, UNC-Chapel Hill School of Law

I. Introduction

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

At the midpoint of its first term, the Obama administration has revealed relatively little about its Africa policy. One priority, however, seems clear: the administration believes that healthy, high-functioning institutions are vital to the future stability and prosperity of African nations.[1] 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."[2] According to the President, "[i]n the 21st century, capable, reliable and transparent institutions are the key to success."[3] When the President specified the institutions to which he was referring, there was a distinct legal tint, including parliaments, police forces, and judiciaries.[4]

A survey of U.S.-funded aid programs indicates that the focus on institution building is more than mere rhetoric. A surfeit of U.S.-funded programs aims to build rational, predictable institutions, with a particular emphasis on institutions that will stimulate commercial development in poor countries.[5] The Millennium Challenge Corporation (MCC), a relatively

---

[1] 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.

[2] *Id.* ¶ 25.

[3] *Id.* ¶ 22.

[4] *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).

[5] 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 [hereinafter USAID Land and Business Formalization Report]; *see also* Jefferey Gettleman, *Kenya's Volatile Politics*

new and increasingly important US aid organization,[6] 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,[7] and that this can be accomplished by improving the institutions – most notably the laws and legal enforcement mechanisms – that regulate them.[8] The new wave of aid programs aims to remove burdensome, bureaucratic institutions laden with red tape and introduce streamlined, predictable, business-facilitative institutions that will lend support and structure to poor countries' commercial sectors.[9]

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[10] (both of whom will be discussed at more length later in this paper), entrepreneurs in developing

---

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").

[6] *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).

[7] *See generally* USAID Land and Business Formalization Report, *supra* note 5, 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).

[8] USAID Land and Business Formalization Report, *supra* note 5, 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).

[9] *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).

[10] *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 CAPTIALISM 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 9, at 21; Douglas C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359 (1994).

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.[11] 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.[12] 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.[13]

The development experts' implicit assumption is that those who remain in the informal sector live in a Hobbesian 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

---

[11] EDGARDO BUSCAGLIA & WILLIAM RATLIFF, LAW AND ECONOMICS IN DEVELOPING COUNTRIES 4 (2000); *see* USAID Land and Business Formalization Report, *supra* note 5, at 8, 15 (indicating a majority of business conducted in sub-Saharan Africa takes place in the informal sector).
[12] USAID Land and Business Formalization Report, *supra* note 5, at 29.
[13] *Id.* 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 Exchanges*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, *supra* note 9, at 210 (arguing that institutional and legal uncertainty in countries business sectors leads to economic inefficiency and lack of growth).

mechanisms that are quick, easy and inexpensive.[14] 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.[15]

The issue of corruption plays a 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 path creates a bottleneck where corrupt governmental officials can extract bribes – or rents, as economists call them.[16] 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.[17]

---

[14] 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 7, at 15-16; BUSCAGLIA & RATLIFF, *supra* note 11, at 1-2.

[15] 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.

[16] *See, e.g.,* USAID Removing Barriers Report, *supra* note 13, at 18; *see also* WORLD BANK, INTERNATIONAL DEVELOMENT 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* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/03/27/000350881_20090327100827/Rendered/PDF/446110PGD0IDA11120ADDENDUM01PUBLIC1.pdf(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).

[17] USAID Land and Business Formalization Report, *supra* note 5, at 3 (arguing that corruption in the formal sector dissuades informal businesses from formalizing); USAID Removing Barriers Report, *supra* note 13, at 18.

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 assumptions. First, it is not true that the so-called informal sector lacks rules and consistent, predictable institutions. Second, and very much related, when it comes to formalizing the business sector, corruption is more than an annoyance or an additional drag on a structurally dysfunctional system. In fact, it is the system. 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 II**,** below, corruption is the primary institution that provides the rules of the game for Niger's business sector.

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 Hobbesian 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.[18] 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.[19]

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 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

[18] *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).

[19] *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).

the future and whether and if so how Niger's legal and regulatory environment helped or hindered their plans.[20]

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,[21] and that this would explain why business formalization 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[22] are reluctant to discuss corruption.[23] It is, after all, illegal even if it is an essential aspect of commerce in

---

[20] 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); s*ee 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 6, at 10-14 (describing the MCC's empirical approach to evaluating international development programs); Davis & Kruse, *supra* note 8, at 1096 (noting that the study of law and development has been dominated by non-lawyers).

[21] 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 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 reliance on ties of family, friendship, and ethnicity among African traders); *see generally* USAID Removing Barriers Report, *supra* note 13, at 18-19 (mentioning that socio-cultural factors such as networks of trust and interdependence can hinder formalization).

[22] I use this gendered term because, in fact, all of my interview subjects were men. Although women are well represented in the ranks of micro-entrepreneurs, often selling prepared foods on the street or spices in the market, comparatively few are owners of small or medium sized enterprises. The gender skewed sample is doubtless also

Niger.[24] 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,[25] 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.[26]

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 reviews 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 describes 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 provides a brief primer on corruption, explaining its

---

due to the fact that I rely on "snowball sampling" to identify interview subjects. Because Niger is patriarchal and Islamic, 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.

[23] 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).

[24] 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 189 (discussing Nigerien norms regarding patriarchs' social obligations).

[25] I had planned to perform no fewer than fifty interviews during my month of fieldwork.

[26] *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).

various definitions and exploring competing explanations of its causes and consequences. Part V narrows 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 face the fact that it is the system.

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.[27]

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.[28] Coase argued that Adam Smith's intellectual heirs – with their laser-like focus on pricing as a regulatory mechanism and their

[27] *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).
[28] 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).

unshakeable assumption that the world was inhabited by atomized utility maximizers – ignored the fact that firms play a vital role in creating economic efficiency.[29] Coase believed there were costs associated with relying on the pricing mechanism.[30] 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.[31] When those contracts failed, the individuals were forced to seek the intervention of courts and other dispute resolution mechanisms.[32] All of these necessary steps to participation in the market created what Coase termed "transaction costs."[33] 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.[34] 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.[35] 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.[36] 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,

---

[29] *Id.* at 3.
[30] Coase, *supra* note 27, at 34 (discussing Coase's own initial realization of these costs in 1932).
[31] *Id.*
[32] *Id.*
[33] *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.").
[34] *Id.* at 37.
[35] *Id.*
[36] *Id.*

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.[37]

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,"[38] including the legal systems that Coase thought so vital, but also including less formal non-state social networks and norms.[39] Together, the formal and informal institutions define the "rules of the game" for the economy and the "way the game is played."[40]

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.[41] Weak institutions, most notably laws, regulatory bodies and law enforcement mechanisms that are confusing, laden with red tape, and corrupt, lead to weak economies.[42] 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

---

[37] *Id*.
[38] Douglas C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994). [NB: introduced in note 10]
[39] Douglas C. North, *Institutions and the Performance of Economies Over Time, in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, *supra* note 9, at 22. [Introduced in Note 10]
[40] *Id*.
[41] *See generally*, USAID Land and Business Formalization Report, *supra* note 5, at 7-9 (discussing the need for institutional reform and citing explicitly to Douglas North's work); Doing Business Report 2007, *supra* note 15, at 1-7 (laying out an overly simplistic version of institutional reform).
[42] *See generally*, Doing Business Report 2007, *supra* note 15, at 1-7.

consistently emphasize the arduous, incremental nature of institutional change.[43] 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.[44] 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.[45] Most policy reform interventions aimed 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.[46]

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 formalizers.[47] 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.[48] 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

---

[43] North [Institutions], *supra* note 10, at 24.
[44] *Id*. at 23-24.
[45] *Id*.
[46] *See id.* at 27-8 (expressing distain for simplistic development nostrums that seek to abruptly change developing countries' institutional frameworks).
[47]*See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE, *supra* note 10; *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 (citing De Soto regarding the importance of secure property rights and formal land titles).
[48] DE SOTO, *supra* note 10, at 30.

businesses underground in the informal sector.[49] This in turn has a deleterious effect, not only on the entrepreneurs' prospects for economic growth, but on the country's overall economy.[50]

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.[51] 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 exist.[52] 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.[53] 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.[54]

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

When the Berlin Wall fell in 1989, NIE was still gestating as an economic theory and had not yet been adopted as a lodestar for international law and development experts. In fact, the development game during the 1990s – influenced by the West's victory in the Cold War and its assumption that free-market capitalism had caused it to prevail – focused on eliminating governmental institutions in poor countries, or at least paring them back to the bare minimum, so

[49] *Id*. at 21.
[50] *Id*. at 21, 28.
[51] *Id*. at 40, 51-54.
[52] *Id*. at 51-54.
[53] *Id*. at 51-54, 56.
[54] *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.

that unregulated markets could work their magic.[55] By the dawn of the new millennium, when it became clear that the aggressive deregulation espoused by Western governments (the general deregulation and liberalization program was often referred to as the Washington Consensus[56]) was not improving conditions in the developing world,[57] a new development consensus began to take shape, based in part on the economic theories of Coase, North, and De Soto.[58] This new NEI consensus held that rational, efficient institutions – especially governmental institutions – were in fact vital for maintaining a healthy economy and long term political and social stability.[59] Thus, the task of guiding poor countries toward more prosperous futures shifted from disassembling their regulatory institutions to improving their quality.[60]

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,[61] to international development work.[62] 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 development targets that donor countries, and their partners in the developing world, would

---

[55] *See* Edmund Amann, *Introduction, in* REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA, *supra* note 7, at 1-2 (describing 1990s development policy as focusing on privatization and market deregulation).
[56] *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).
[57] *Id; see also* Jalilian et al., *supra* note 14, at 12 (referring to arguments that privatization failed due to political mismanagement and corruption); *see generally* Kelley, *supra* note 19, at 1002 (summarizing various explanations of why the Washington Consensus failed).
[58] *See supra* notes _ and accompanying text.
[59] *See* Jalilian et al., *supra* note 14, at 12-13, 15 (describing the development consensus that institutions matter).
[60] *Id*.
[61] *See* Davis & Kruse, *supra* note 8, at 1097 (referring to the "empirical and quantitative flavor" of the latest wave of law and development schemes).
[62] *See generally* JEFREY 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. As noted earlier, Douglas North viewed institutional change as an inevitably slow, iterative process.

commit to achieving. In 2004, the United States created a new agency, the Millennium Challenge Corporation (MCC), to tackle its Millennium Development commitments.[63]

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.[64] 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, meaning 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.[65] 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.[66] In the confident words of a recent World Bank report, "what gets measured gets done."[67]

The MCC has addressed the challenge of finding meaningful quantitative measurements of institutional progress in poor countries by developing sixteen so-called "MCC indicators" that rely on empirical data collected from various existing sources to measure, among other things, institutional soundness.[68] The indicators are divided into three distinct themes or categories:

---

[63] Johnson & Zajonc, *supra* note 6, 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).
[64] *See id*. at 4 (employing the terminology "sound policy environments").
[65] *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. 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).
[66] *Id*. at 5.
[67] Doing Business Report 2007, *supra* note 15, at 3.
[68] 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-guilde-to-the-indicators-

Encouraging Economic Freedom, Ruling Justly, and Investing in People.[69] The MCC gathers the data, plugs them into a formula, and summarizes them on easy to read charts. Active and aspiring participants in 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.[70] Only the best performers are graced with continuing financial support.[71]

As discussed in more detail in Part III.a, below, Niger entered into an agreement with the MCC and in doing so committed to creating more efficient institutions to guide and regulate its business sector.[72] Its hopes for winning larger sums of money from the MCC in the future will depend on its ability to empirically demonstrate progress on the MCC indicators.[73]

Before turning to a discussion of Niger's business sector and how it is grappling with the new NIE reality, it should be noted that 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

---

2.pdf; *see also* Johnson & Zajonc, *supra* note 6, at 6 (citing sixteen indicators, as opposed to the seventeen listed in the MCC Guide to Indicators).

[69] MCC Guide to Indicators, *supra* note 68, at 30.

[70] *See* Davis & Kruse, *supra* note 8, at 1096 (referring to the trend toward "legal benchmarking and competition"). 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. *See id*. 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. 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. *Id.* at 20-21.

[71] *See id*.

[72] *See generally* MILLENNIUM CHALLENGE CORPORATION, MILLENNIUM CHALLENGE ACCOUNT THRESHOLD PROGRAM ASSISTANCE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE 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.

[73] Niger's progress down the MCC pathway was interrupted in 200_ by domestic political instability. See [NYT article describing the political situation; MCC announcement that the Threshold Program had been suspended].

growth, prosperity and stability.[74] Others critique it 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,[75] ignoring the fact that law is inextricably intertwined with a society's particular notions of justice.[76] Legal and regulatory 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.[77]

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,

---

[74] *See* Johnson & Zajonc, *supra* note 6, at 4, 19; USAID Land and Business Formalization Report, *supra* note 5, 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).

[75] MILHAUPT & PISTOR, *supra* note _, at 20.

[76] *See generally* Blundo & Olivier de Sardan, [*Why Should We Study*], *supra* note 23, at 6 (arguing that the law-as-technology approach strips law from all political considerations and ignores the specific conditions of the subject country).

[77] *See* MATTEI & NADER, *supra* note 20, 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 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.*

at least not in the short term, because it fails to account for the fact that an engrained institution – corruption – already exists.

III. Institutionalism and Business Formalization in Niger's Business Sector

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 might 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. Policy Prescriptions and Legal Reform

In Niger, business formalization efforts have closely followed the NIE/MCC script.[78] In March, 2008 Niger signed a $23 million[79] Threshold Agreement[80] that includes, among other goals, "streamlining the process of starting a business by establishing the administrative, legal and regulatory structures required to implement business facilitation reforms . . .."[81] 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."[82] The Threshold Program also aims to attack

[78] *See supra* Part II.
[79] 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.
[80] MCC Niger Threshold Agreement, *supra* note 72, at _; *see* MCC Niger Status Report, *supra* note 79 (reporting March 17, 2008 as the signing date of the Threshold agreement).
[81] MCC Niger Status Report, *supra* note 79.
[82] *Id*.

corruption, particularly within Niger's health and education sectors[83] where corrupt practices are thought to be most rampant.[84] 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,[85] 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, it will not dwell on the details of the various reformed codes and legal decrees because is suffices to say that they all aim to usher Niger toward the business-facilitative legal environment desired by NIE and MCC reformers.[86] 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 profits freely in and out of the country.[87] Such features are included in Niger's new Investment Code, which is designed to attract foreign direct investment by enhancing the investors' property rights.[88] 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

---

[83] *Id*.
[84] *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).
[85] *See* Niger Status Report, *supra* note 86 (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.
[86] *See supra* notes __ and accompanying text.
[87] *See generally* REPUBLIQUE DU NIGER, MINISTERE DU COMMERCE, DE L'INDUSTRIE ET DE LA NORMALISATION, POUR UNE AMELIORATION DU CLIMAT DES AFFAIRS [undated] (hereinafter Publication on the Improvement of Niger's Business Climate) (copy on file with author).
[88] *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'Ordannance no 99-69 du 20 decembre 1999 et la Loi no 2001—20 du 12 juillet 2001.

profits.[89] 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.[90]

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.[91] 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.[92] Many other legal reforms, all intended to improve the economic climate and the institutional and regulatory structure for doing business in Niger.[93]

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.[94] The government further pledges to reduce the number of bureaucratic steps

---

[89] Publication on the Improvement of Niger's Business Climate, *supra* note 87, at 5; *see generally* Loi no 2007-01 du 31 janvier 2007 portant Code petrolier.
[90] Publication on the Improvement of Niger's Business Climate, *supra* note 87, 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).
[91] Publication on the Improvement of Niger's Business Climate, *supra* note 87, at 1.
[92] *Id.*; *but see* Interview with Former Director General of a Private Radio Station (February 26, 2009), *supra* note 24 (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).
[93] Publication on the Improvement of Niger's Business Climate, *supra* note 87.
[94] *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

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.[95]

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.[96] 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," 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.[97]

(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 87, at 2 (mentioning the *guichet unique* as an important improvement in Niger's business climate).

[95] 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 .

[96] *Id.* at 1-2.

[97] *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 proclaim 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, commitment 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 87 (an eight-page, multi-color publication in French) (copy on file with author) ; MINISTERE DU COMMERCE, DE L'INDUSTRIE ET DE LA NORMALISATION, NOTE SUR LE

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.[98] 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.[99] It is vast and landlocked and most of its terrain is in the Sahara Desert, which means it has limited arable land,[100] a critical problem in a country where most people survive as subsistence farmers.[101] Its population is estimated at almost 15 million[102] with an approximately thirty percent rate of literacy.[103] At 3.3 percent, its population growth rate is among the fastest in the world.[104]

Officially, Niger's private sector economy is miniscule, with fewer than 1,000 formal enterprises.[105] It suffers from an underdeveloped financial sector,[106] a fact that becomes important when the paper discusses corruption in Part V.b. The country's economy has grown strongly in recent years, but that growth is due largely to better than average rains, which

---

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).

[98] 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.

[99] THE WORLD BANK, NIGER COUNTRY BRIEF (2009), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGEREXT.

[100] World Bank Niger Growth Policy Reform Grant Document, *supra* note 15, at_____; *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).

[101] *See* THE WORLD BANK, NIGER COUNTRY BRIEF (2009) (noting that Niger's economy is dominated by rain fed agriculture).

[102] *Id.*

[103] *Id.*

[104] World Bank Niger Growth Policy Reform Grant Document, *supra* note 16, at 2.

[105] *Id.* at 2.

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

bolstered Niger's predominantly rain fed agricultural sector,[107] and increased commodity prices associated with Niger's uranium mining and nascent oil extraction industry.[108] 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.[109]

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.[110] According to the World Bank, government expenditures account for approximately one third of the country's gross domestic product.[111] 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.[112] 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.

---

[107] THE WORLD BANK, NIGER COUNTRY BRIEF, *supra* note 99.
[108] World Bank Niger Growth Policy Reform Grant Document, *supra* note 16, 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).
[109] World Bank Niger Growth Policy Reform Grant Document, *supra* note 16, at 4.
[110] *Id.* at 5.
[111] *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").
[112] *See supra* Part I.b.

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.[113] Recent studies of the informal business sector across Africa find that a significant percentage of all businesses operate informally.[114] An official of Niger's tax service 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.[115] 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.

---

[113] 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 5, at 12-13 (discussing the difficulty of measuring informality).

[114] *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 5, at 14 (estimating that the overall informal economy in Africa accounts for 42% of GDP).

[115] Interview with an Employee of Niger's Tax Service, Niamey, Niger (March 6, 2009).

In the Grand Marche, thousands of businessmen[116] 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.

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.[117] 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.[118] Eventually, when the terms of the transaction are settled, the

---

[116] *Id.* (indicating that approximately three thousand enterprises are officially registered to do business in the Grand Marche).

[117] 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" refers to the rich and powerful merchants who dominate Niger's economic and political realms. *See generally* GREGOIRE, *supra* note 21 (describing the "Alhazai" businessmen who populate the markets in Maradi, a market city in south-central Niger).

[118] 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*

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, accepts 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 that there is a specific governmental tax on business signs,[119] 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.[120]

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

---

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).

[119] 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").

[120] *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 23, at 213 (referring to the general preference for oral dealings when negotiating corrupt customs transactions).

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.[121] Some 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.[122] 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.[123] Financial institutions such as banks are rarely on their list of possible sources.[124]

---

[121] *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).

[122] *See* Interview with a Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note 121.

[123] *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).

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.[125] 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.[126] 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.[127]

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.[128] 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.[129] One young merchant got his start selling cell phones to his school companions and to pedestrians near his school.[130] When he had accumulated sufficient capital, he opened a consumer electronics boutique in the Grand Marche.[131] Another spent his summers cutting grass for animal fodder in the countryside outside

---

[124] *See* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123 (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).
[125] *See, e.g.,* Interview with A Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note 121 (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).
[126] Interview with the Manager of a Rental Car Business (February 23, 2009), *supra* note 125.
[127] *Id*.
[128] *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.
[129] *Id*.
[130] *Id*.
[131] *Id*.

of Niamey, transporting it to the city by donkey cart, and selling it to urban dwellers.[132] 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.[133] Of the many proprietors of small businessmen I interviewed in Niger, not one had started his business by borrowing from any financial institution.

Businessmen in Niger are almost as reluctant to approach banks for expansion capital as they are for start-up capital.[134] 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.[135] 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.[136] However, even for fully formalized businesses, banks are often not an option because they are too expensive and too risky.[137]

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

---

[132] Interview with The Owner of Numerous Small, Medium and Large Business Enterprises, Niamey, Niger (February 27, 2009).
[133] *Id.*
[134] 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 123 (similar); Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128 (similar).
[135] Interview with Owner of Numerous Small, Medium and Large Business Enterprises (February 27, 2009), *supra* note 132 (saying that with his many enterprises he occasionally takes business loans from banks but only if absolutely necessary).
[136] Interview with a Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note 121.
[137] Interview with The Owner of Several Small Businesses (February 19, 2009), *supra* note 23 (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 92 (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 132 (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 121 (saying he often accepts payment from other merchants in goods rather than cash to avoid dealing with banks).

rates and the necessity of rapid repayment.[138] 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.[139] According to him, if he could borrow the equivalent of $50,000 to $60,000 on reasonable terms, 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.[140] But his plans were stymied because of the unavailability of expansion capital at reasonable rates.[141] Even though his business was 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[142] and would demand that the principal and interest returned within six months.[143] On those terms, there would be too much risk of losing the enterprise and the investment properties that he would offer as collateral.[144] 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,

---

[138] Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92.
[139] Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123.
[140] *Id.*
[141] *Id.*
[142] *Id.; see* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123 (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 132 (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).
[143] Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92. Interview with Owner of Numerous Small, Medium and Large Business Enterprises (February 27, 2009), *supra* note 132.
[144] Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92.

the Muslim month of fasting, when the faithful often break their fast by munching on sugar cubes.[145] Without viable banks or other financial institutions, small businessmen in Niger are starved for capital, particularly expansion capital.[146]

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.[147] 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.[148] 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.[149] 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

---

[145] *Id.*; Interview with A Top Official of Niger's Chamber of Commerce (February 24, 2009), *supra* note 94.

[146] 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 125 (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 Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128. A detailed discussion of this parallel finance system is beyond the scope of this article.

[147] *See* Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134 (describing the benefits of moving from retail to wholesale); Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128 (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).

[148] *See* Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134.

[149] *See id.; see also* Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128.

from ever more distant markets. This, small businessmen in Niger say, is the path to prosperity.[150]

Moving from retail to wholesale, however, is not an easy progression.[151] 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.[152] 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.[153] Nigerien businessmen's most common destinations for these wholesale purchasing trips are the West African port cities of Cotonou, Lome, Abidjan and Lagos.[154] 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.[155]

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

---

[150] Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134; Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128. 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.

[151] Interview with A Seller of Fabric in the Grand Marche (March 12, 2009), *supra* note 147 (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 134 (explaining that he already engages in some wholesaling but that he could really become prosperous if he could purchase wholesale goods from beyond Africa).

[152] Interview with A Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134.

[153] *See id.*

[154] *See, e.g.,* Interview with A Seller of Women's Shoes in the Grand Marche (February 22, 2009), *supra* note 121 (mentioning purchasing trips to Lome, Abidjan and Lagos).

[155] *See* Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128 (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 92 (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 121 (expressing frustration that he had not been able to finance purchasing trips beyond West Africa).

Niger, clearing customs, and paying the requisite taxes.[156] 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 computer industry if he could add the sale of computer hardware – both wholesale and retail – to his business.[157] 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.[158] As discussed in the previous section, no bank or other formal financial institution will loan him such an amount on viable terms.[159] 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.[160] Where do businessmen obtain their capital? The surprising conclusion that arose from my fieldwork in Niger is that corruption provides the primary mechanism by which

---

[156] *See* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92 (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 128 (explaining how he avoids paying the heavy taxes and customs duties on goods he imports from Dubai and China).
[157] Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92.
[158] *Id*.
[159] *See supra* notes [ ] and accompanying text.
[160] *See supra* notes ___; *see also* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQEUNCES 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).

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, and why it is harmful. The paper will then turn to a 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.[161] 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.[162] This changed with the fall of the Berlin Wall. Western donor nations felt empowered to press the issue even if it caused the leaders of developing countries to squirm.[163] 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.[164] Because corruption was thought to retard these positive outcomes, anti-corruption programs migrated to the center of international

[161] Glynn et al., *supra* note 16, at 7.
[162] *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 16, at 7.
[163] Hendrix, *supra* note 162, at 2.
[164] Glynn, et al., *supra* note 16, at 9.

development policy.[165] Indeed, both the United States State Department and USAID proclaim that global battle against corruption as among their highest priorities.[166]

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 countries, quantifying the results, and publishing them in comparative reports.[167] 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.[168] Niger is ranked as number 106 out of 180 countries measured, not bad compared to many other sub-Saharan African countries.[169]

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-

---

[165] Glynn, et al., *supra* note 16, at 9; Hendrix, *supra* note 162, 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).

[166] Hendrix, *supra* note 162, at 3.

[167] 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 Lamsdorff, *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 23, 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 162, 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 113, at 3 (questioning the validity of corruption perception surveys).

[168] TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2009 (2009), *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table**.**

[169] *Id.*

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.[170] In addition to shrinking the civil service, anti-corruption programs promoted the reform of civil service rules so that positions would be granted based on merit rather than patronage.[171] Poor countries' government procurement systems were also a frequent target of corruption reforms.[172] 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.[173] 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.[174] 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)[175] to persuade them to enforce the new anti-corruption laws.[176]

---

[170] Johann Graf Lamsdorff, *supra* note 167, at 5; *see* SUSAN ROSE-ACKERMAN, [CORRUPTION AND GOVERNMENT], *supra* note 160, at 42-59 (describing anti-corruptions programs' efforts to privatize industry as a means of shrinking government and eliminating discretion).
[171] ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note 160, at 69-71.
[172] *Id.* at 59.
[173] *See infra* notes __ and accompanying text.
[174] *See* Lamsdorff , *supra* note 167, 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 24. 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).
[175] *See* infra notes _ and accompanying text (discussing judicial corruption in Niger).
[176] *See* ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note 160, at 68, 151-55 (discussing the importance of consistent enforcement of clear criminal laws in combating corruption; *see also* Lamsdorff, *supra*

b. What is Meant by "Corruption"?

In the literature on corruption in the developing world, each academic paper and each aid report seems to adopt its own particular definition of corrupt behavior. It would require pages to catalogue them, but this paper will highlight two definitional points. First, it adopts an anthropological approach in that it considers its subject matter to be a generalized culture, or "complex" of corruption. Second, the paper focuses on "petty" as opposed to "grand" corruption.

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, their definitions of corruption often attempt to distinguish between illicit corruption on one hand and culturally appropriate gift-giving behavior on the other.[177] Anthropologists, in contrast, generally believe that bright line definitions fail to capture the peculiarities of corruption in the contexts of particular cultures.[178] Rather than attempting to draw lines between gift giving and corruption, anthropologists refer to a more generalized "complex of corruption" that includes the outright payment of bribes in exchange for the 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.[179] This paper shares anthropologists' more flexible definition:

---

note 167, 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 162, 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.)

[177] *See* ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note 160, at 9; *see also* Susan Rose-Ackerman [*Introduction, in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION], *supra* note 23, at xvii (defining corruption as a private individual or firm paying a public official in return for a benefit).

[178] *See* Blundo & Olivier de Sardan, [*Why We Should Study*], *supra* note 23, at 12 (arguing that anthropology is better suited than other disciplines to the study of petty corruption because "can assess shaded areas").

[179] *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

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.[180]

Though economists and anthropologists tend to disagree on the exact definition of corrupt behavior, they agree that there is an essential difference between "petty" and "grand" corruption. When Westerners think of corruption, particularly in an African context, they often envision rapacious dictators who bleed their countries dry of valuable natural resources and shelter their ill gotten gains in Swiss bank accounts.[181] 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 – with his villas on the French Riviera and his family's fleet of luxury automobiles – as a recent prominent example.[182] This brand of "grand corruption"[183] exists in Niger, but it tends not to be so eye-popping, perhaps because of the country's dearth of exploitable natural resources.[184] Instead, "petty corruption"[185] furnishes

---

with Seller of Home and Office Furnishings (March 5, 2009), *supra* note 84 (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).

[180] *See* Interview with Manager of Rental Car Business, Niamey, Niger (March 2, 2009) (explaining that it is not necessary to pay explicit bribes to police if one regularly gives them gifts and then asks for favors in return).

[181] *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).

[182] *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").

[183] Rose-Ackerman, [*Introduction, in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION], *supra* note 23, xix (defining the term "grand corruption").

[184] 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).

the rules of the game for businesses in Niger and indeed for most social, legal, economic, and political transactions.[186] Petty corruption in Niger – the payment of gifts or bribes in association with virtually any official or quasi official interaction – is constant and varied. The examples discussed in provided in Part V.b., below, focus on bribery and fraud in government procurement, and on specific methods for cheating on taxes and customs duties.[187]

c. What's Wrong With A Little Corruption?

This paper argues, and in the following sections will illustrate, that petty corruption supplies the rules of the game for businesses 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,[188] as grease that caused muddled government bureaucracies to move more efficiently.[189] In a similar vein, some

---

[185] *See* Elliott, *supra* note 162, 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* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION], *supra* note 23, 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 23, at 216, 220 (employing the term "petty corruption" and noting that the poor and powerless are most often its victims; Hendrix, *supra* note 162, at 1, 4 (employing the term "administrative corruption" to refer to the same phenomenon).

[186] Blundo & Olivier de Sardan, [*Why We Should Study*], *supra* note 23, at 5 (arguing everyday corruption in Africa is pervasive and guided by a complete, complex set of rules and expectations); *see* Interview with Manager of Rental Car Business, Niamey, Niger (March 2, 2009), *supra* note 180 (explaining that it is not necessary to pay explicit bribes to police if one regularly gives them gifts and then asks for favors in return).

[187] *See infra* note _ and accompanying discussion.

[188] Lamsdorff, *supra* note 167, at 4.

[189] Mark Pieth, *International Cooperation to Combat Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 16, at 120; *see* Ray Fisman & Roberta Gatti, *Bargaining for Bribes: The Role of Institutions, in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, *supra* note 23, at 127 (referring to a 1968 study by Hutington that referred to petty corruption as a form of "personalized deregulation").

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. Some point to poverty itself as a major cause of corruption in Africa. In the most common 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. *See* ROSE-ACKERMAN, [CORRUPTION AND GOVERNMENT], *supra* note 160, at 65; *but see* George Blundo, *Corruption in Africa and the Social Sciences: A Review of the Literature,* in EVERYDAY CORRUPTION AND THE STATE:

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.[190]

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.[191]

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.[192] The individuals and firms that receive corrupt government contracts are often either unqualified to carry out the required tasks, are permitted by their corrupt collaborators within the government to skimp on quality, or both.[193] Rather than serving the needs of citizens, public investment funds

---

CITIZENS AND PUBLIC OFFICIALS IN AFRICA, *supra* note 23, at 61-3 (mentioning studies that conclude that raising salaries does not work in an atmosphere of rampant corruption); *but see* Lamsdorff, *supra* note 167, at 39 (claiming that studies of the link between low salaries and corruption have been inconclusive). Others explain corruption as 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. *See* Blundo, *supra* 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). Still others see roots of contemporary African corruption in its rural cultural traditions, particularly the fact that patriarchs and others with access to resources are obligated to provide for their extended families and villages. *Id.* at 26; *see generally* Kelley, *supra* note 19, at 1006-9 (describing the patriarchal social structure of the Zarma people of Niger). A further common explanation of African corruption blames the Western aid industry itself. Aid projects, including business formalization and anti-corruption programs, account for a significant percentage of public expenditures in the poorest of African countries, Blundo, *supra* at 57 (saying ninety percent of public investment and thirty percent of ongoing state expenses in sub-Saharan Africa come from foreign aid). The projects are, practically without fail, rife with corruption *Id*; *see* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92 (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).

[190] Blundo, [*Corruption in Africa]*, *supra* note 189, at 20.

[191] Kahn,*supra* note 185, at 221; *see infra* note _ (describing how Nigerien bureaucrats sometimes sell speed rather than the service itself).

[192] Rose-Ackerman, [Handbook Introduction], *supra* note 23, at xix.

[193] Interview with the Owner of Several Small Businesses (February 20, 2009 (second)), *supra* note 124 (explaining 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

end up paying for roads that crumble, buildings that fall down, and factories that produce goods that no one wants.[194] In the terminology of economists, the corrupt transactions produce a "deadweight loss" for society.[195]

In addition to its inefficiencies, corruption exacerbates unfairness in developing countries because it favors the interests of haves over the have-nots.[196] 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.[197] The result is that developing countries' strained, often ineffective social service networks are unable to deliver services to the poor.[198]

Finally, some argue that corruption harms developing countries by impeding democratization.[199] The public in developing democracies comes to believe that government is for sale to the highest bidder,[200] and that market based economic systems, dragged down by the inefficiencies described above, are unworkable.[201] They begin to yearn for the comparatively less corrupt,[202] economically predictable systems that preceded democratization.[203]

CORRUPTION AND THE GLOBAL ECONOMY, *supra* note __, at 42 (noting that corrupt firms and individuals that receive government contracts often skimp on quality).

[194] ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note 160, at 3; *see* Pieth, *supra* note 189, at 121 (noting that some corrupt governments organize huge public works projects for the sole purpose of graft, leaving the next generation to pay).

[195] Kahn, [Handbook], *supra* note 185, at 221 (employing the term "deadweight loss").

[196] Rose-Ackerman , [Corruption and the Global Economy], *supra* note __, at 33 [this is first appearance; need full cite].

[197] *See id.* (arguing that corruption distributes a country's wealth to insiders and corrupt bidders).

[198] Hendrix, *supra* note 162, at 5; *see* Rose-Ackerman [Handbook Introduction] , *supra* note 23, at xvi, xix (arguing that policy makers should consider the negative effects that corruption has on poor citizens dependent on the state for assistance).

[199] Hendrix, *supra* note 162, at 5.

[200] Rose-Ackerman, [Corruption and the Global Economy], *supra* note 16, at 45 [first is 196].

[201] Glynn, et al, *supra* note 16, at 9.

[202] *See infra* note _ (discussing the alleged link between democratization and increased corruption).

[203] There is disagreement among scholars – particularly economists – over whether corruption harms countries by impeding overall economic growth. Rose-Ackerman [Handbook], *supra* note 23, 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 23,at xvi; Kahn [Handbook], *supra* note 185, at 218. As she and

V. Corruption Supplies the Rules of the Game for Niger's Businesses

a. Corruption in Nigerien Society

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.[204] Police and customs jobs are particularly valued because they involve frequent interactions with end users and thus frequent opportunities for rent extraction.[205] 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.[206] In contrast, few want to work for or do business with Niger' Foreign Service because, though it 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.[207]

There is fierce competition among Nigerien functionaries for the more lucrative posts[208] 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

---

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 185, at 217 (noting that most developing countries suffer from endemic corruption but that some grow much faster than others).

[204] Blundo & Olivier de Sardan [Why We Should Study], *supra* note 23, at 90.

[205] *Cite* .

[206] Interview with a Seller of Home and Office Furnishings (March 5, 2009), *supra* note 84 (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).

[207] ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note 160, 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).

[208] *See* Interview with an Employee of Niger's Tax Service (March 6, 2009), *supra* note 115 (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), *supra* note 26 (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).

monthly rent.[209] The lower lever functionaries who successfully produce wealth from their positions, and who regularly send wealth upstream to their superiors, are rewarded with ever-more lucrative positions.[210] 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,"[211] 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.[212]

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.[213] All commercial vehicles are obliged to stop and all must pay what is in essence a quasi-official toll before continuing.[214] 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.[215]

---

[209] *See* ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT] *supra* note 160, at 82 (stating that in corrupt government hierarchies, payment to superiors becomes essentially a rent to hold on to lower level positions).
[210] *Id*.
[211] Blundo & Olivier de Sardan, *supra* note 23, at 90.
[212] *See* Interview with employee of Niger's Tax Service (March 6, 2009), *supra* note 115 (discussing administrative banishment).

In explaining the banishment problem, Nigerien functionaries sometimes use employ 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.
[213] *See* Blundo & Olivier de Sardan, *supra* note 23, at 77 (referring to the itinerant customs inspectors as "flying squads"); *see also* Arifari, *supra* note 120, at 180 (claiming the roads in Niger, Senegal and Benin are "dens of routine and highly visible institutionalized corruption").
[214] Blundo & Olivier de Sardan, *supra* note 23, at 77.
[215] Many times I have traveled around Niger in quasi-public "bush taxies" 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.

Corrupt practices in Niger are guided by their own practical rules and customs.[216] In many cases, the amount of the appropriate bribe is known to all.[217] 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.[218]

Corrupt practices are also generally governed by norms that determine fair play within the system.[219] 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,[220] but on a particular day a rival group of corrupt government officials (say, from the Customs Service) sets up a second "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.[221]

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

[216] Blundo & Olivier de Sardan, *supra* note 23, at 84.
[217] *See* Giorgio Blundo, *An Ordered Corruption? The Social World of Pubic Procurement, in* EVERYDAY CORRUPTION AND THE STATE: CITZENS & PUBLIC OFFICIALS IN AFRICA, *supra* note 23, 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).
[218] Michael Johnston, *Public Officials, Private Interests, and Sustainable Democracy: When Politics and Corruption Meet, in* CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 16, at 62.
[219] Blundo & Olivier de Sardan, *supra* note 23, at 84; *see* Arifari, *supra* note 120, at 179 (illustrating an instance of fair play among corrupt officials).
[220] Arifrai, *supra* note 127, 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).
[221] *Id.* at 179.

As described in Part III**,** above, proprietors of small businesses in Niger struggle to obtain capital to expand their enterprises.[222] They aspire to move up the commercial chain from retail to wholesale, usually by mounting international purchasing expeditions.[223] However, unless the businessmen are connected to wealthy families,[224] their only hope of obtaining a financial windfall large enough to finance their expeditions is to engage in corrupt transactions with the government.[225] In a country where the economy is dominated by subsistence farming and animal husbandry,[226] where there are few commercial enterprises of any size,[227] and where the banking and finance sector is moribund,[228] the government, which purchases comparatively large quantities of goods and services, is the only game in town.[229]

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.[230] They work their networks of kinship, friendship,[231] and to an increasing degree, political party affiliation,[232]

---

[222] *See supra* notes __ and accompanying text.
[223] *See supra* notes __ and accompanying text.
[224] *See* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123.
[225] *See id.* (saying Niger's government is the only source for expansion capital).
[226] *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).
[227] *See supra* notes [ ] and accompanying text.
[228] *Id.*
[229] *See id.* (explaining that the government accounts for a large percentage of Niger's economic activity).
[230] *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 84 (explaining 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 179 (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 84 (saying "knowing people" is the key to his business).
[231] *See* Interview with Seller of Home and Office Furnishings (March 5, 2009), *supra* note 84 (demonstrating how he roams the hallways of government ministries – on the day of the interview, the Ministry of Commerce – greeting friends and acquaintances and looking for opportunities).

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.[233] The businessman who has been favored by the corrupt

---

[232] *See* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123 (complaining bitterly that one cannot obtain government contracts, and thus expansion capital, without being involved in party politics).

Some commentators link recent increases in corruption with the rise of party politics in post-Cold War Africa. Blundo, *supra* note 189, at 53. In the 1960s and 70s, African strongmen leaders ruled their countries through a combination of carrots and sticks: carrots in the form of personal patronage doled out to loyal supporters, sticks in the form of physical violence and arbitrary detention perpetrated against perceived political enemies. *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 27-33 (Leonardo A. Villalon & Peter VonDoepp eds. 2005) (describing Niger's attempts to transition to democratic governance). But beginning in the late 1980s, many strongmen leaders were pressured by international and domestic actors into democratic reforms, which made it difficult to rely on violence and terror to stay in office. *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, *supra* (referring to the fact that post-Cold War African governments were forced to adopt good governance reforms); *see* Villalon & Idrissa, *Repetitive Breakdowns and a Decade of Experimentation: Institutional Choices and Unstable Democracy in Niger*, *supra*, at 27-33 (describing Niger's attempts to transition to democratic governance). The leaders quickly learned that the only effective tool they had left for illegitimately remaining in power was the personal patronage network. Rose-Ackerman [*Introduction to* HANDBOOK], *supra* note 23, at xix; *see* ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note 16, at 45 (noting that corrupt governments do not have to depend on consent by the governed and instead maintain power through corrupt patronage networks). Stated simply, political leaders no longer wielded the stick of terror, so they had to spend much more money to persuade followers to get in line behind them. *See* ROSE-ACKMERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note 16, at 45; *see also* Kahn, *supra* note 185, 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). 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 distribution of cash to potential voters and party loyalists. Blundo & Olivier de Sardan [*Everyday Corruption in West Africa*], *supra* note 23, at 71; s*ee 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) 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. *See* Interview with Owner of Several Small Businesses, in Niamey, Niger, supra note 124 (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). 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. Rose-Ackerman, [Handbook Introduction], *supra* note 23, at xix. In short, according to this theory, corruption in post-Cold War 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. Blundo, *supra* note 189, at 51.

[233] *See* Blundo, [*An Ordered Corruption]* , *supra* note 217, 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.[234] If the system of corruption is working well, both the insider and the businessman will prosper.[235]

The specific methods employed by the businessmen and their corrupt government collaborators are varied and ever evolving, but several are considered standard practice.[236] One is to avoid scrutiny by segmenting purchasing contracts into small units that are not subject to public bidding regulations.[237] 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.[238] 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.[239]

A businessman's profits on a $10,000 purchasing contract are typically quite low,[240] even if he and his inside collaborator employ the usual profit-boosting (and doubly corrupt) method of agreeing that the quantity and quality of the tendered goods will be less than required by the terms of the purchasing contract.[241] Once the businessman has purchased and shipped the goods,

---

[234] Interview with the Owner of Several Small Businesses (February 20, 2009) (second)), *supra* note 124 (providing 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 134 (stating that businessmen 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 123 (same).
[235] Interview with the Owner of Several Small Businesses (February 20, 2009) (second)), *supra* note 124.
[236] Interview with A Former Employee of the Ministry of Foreign Affairs (March 1, 2009), *supra* note 207 (referring to "standard" methods of corrupt purchasing within the ministry).
[237] Blundo [*An Ordered Corruption*], *supra* note 217, at 233-4; s*ee also* Interview with Young Owner of Metal Fabrication Business, in Niamey, Niger (March 13, 2009), *supra* note 232 (referring to the practice of segmenting government purchasing contracts to avoid scrutiny).
[238] *See* Blundo [*An Ordered Corruption?*] , *supra* note 217, at 227- 232.
[239] *Id.* at 233; *see also* Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123 (discussing his recent receipt of a procurement contract for computer paper in an amount just under 5 million CFA).
[240] Interview with A Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123 (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).
[241] *See* Pieth, *supra* note 189, at 121 (stating that corruption leads the government to purchase inadequate equipment); *see also* Rose-Ackerman [*The Political Economy of Corruption]*, *supra* note 193, 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.[242] 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.[243]

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.[244] The insider might require an up-front payment from the businessman, plus a share of the downstream profits once the purchasing transaction is complete.[245] 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.[246]

---

[242] *See* Interview with Manager of Rental Car Business (February 24, 2009), *supra* note 179 (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 155 (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).

[243] *See* Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134 (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).

[244] *See* Blundo [*An Ordered Corruption*], *supra* note 217, at 241 (mentioning the practice of government insiders leaking privileged bidding information to their outside business collaborators).

[245] ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note 16, at 34 [need full cite; first is 196]; *see generally* Interview with the Owner of an Auto Parts Shop Near the New Market (March 13, 2009), *supra* note 155 (discussing a corrupt transaction with the Department of Defense where he was compelled to turn over most of his profits to government insiders).

[246] ROSE-ACKERMAN [CORRUPTION AND THE GLOBAL ECONOMY], *supra* note 16, at 42[need full cite; first is 196].

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.[247] Alternatively, the corrupt official can withhold from the public vital information necessary to a successful bid while ensuring that the favored businessman receives that information.[248] Similarly, corrupt ministry officials can withhold from all but their chosen businessmen the documents necessary to formally bid on a contract.[249] Finally, 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.[250]

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,[251] or, if the committee members are independent, intimidate them by applying political pressure.[252] If

---

[247] Blundo, supra note 217, at 241.
[248] *Id.*
[249] *Id*. at 240.
[250] *Id.* at 243.
[251] *See* Hedrix, *supra* note 169, 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").
[252] *See supra* notes __ and accompanying discussion (discussing the rise of party politics and politician's sue 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 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 217, 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

the financial prize is large enough, the corrupt official can simply buy the committee members off with shares of the proceeds.[253]

Party politics plays an increasingly important role in shaping the rules of the game of business-government corruption.[254] Businessmen who wish to win government contracts can no longer rely exclusively on ties of kinship or friendship or mere mutual advantage: to an increasing degree they must approach with ties of political party affiliation.[255] Residents of Niamey tell stories of once obscure businessmen who have become wealthy and powerful through government purchasing contracts tied to party politics.[256] 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

---

23, 2009), *supra* note 92 (referring to the abuse of special accounts, including former President Tanja's special fund for building rural schools).

[253] Blundo, *supra* note 217, 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 217, 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 23, at 74. 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 207 (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 134 (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). Still other bureaucrats 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 16, at 39 [first is 196]. 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 [first is 196].

[254]*See supra* note _ and accompanying text.

[255] *See* Interview with a Young Man Who Services Computers and Sells Computer Peripherals (February 23, 2009), *supra* note 92 (expressing distaste for the new rules of the game that require businesspeople to be active in political parties).

[256] Interview with the Owner of Several Small Businesses (February 2, 2009 (second)), *supra* note 128 (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, supra note 217, at 249 (offering an example of a small business owner who became fabulously successful as a result of Prime Minister's support).

contracts. Illiterate sheep herders win contracts to purchase and service thousands of computers that they do not even know how to turn on.[257] Men who have spent their careers as tailors but who became active in party politics end up in charge of constructing large government buildings.[258] The government pays higher than necessary prices for goods and services that often are of inferior quality and,[259] even more troubling, pays for equipment (including medical equipment) that does not work, and buildings and roads that crumble.[260]

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 establishing corrupt collaborative relationships with government insiders prosper and move up the chain from retail to wholesale.[261] Those who lack good luck, as well as ties of family, friendship, or political affiliation, have faint hope of prospering.[262]

ii. 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

---

[257] Interview with a Young Man Who Services Computers and Sells Computer Peripherals (March 2, 2009), *supra* note 123; *see* Blundo, *supra* note 217, 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).

[258] *See* Blundo, *supra* note 217, at 251.

[259] Rose-Ackerman, [Corruption in Global Economy], *supra* note 16, at 42 [first is 196]; *see supra* Part __;

[260] *See* Blundo, *supra* note 217, 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 193, 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 his 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 217, at 255.

[261] *See supra* notes _ and accompanying discussion.

[262] *See* Interview with Seller of Fabric in the Grand Marche (March 12, 2009), *supra* note 147 (ruing that he has no such connections and will never be able to move beyond his small retail stall); *see generally* Blundo, *supra* note 217, at 256-7 (arguing that if a businessman wants to obtain expansion capital, there is little alternative but to participate in corruption).

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.[263] 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,[264] who act as wholesale brokers of corruption.

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*.[265] Once the goods have been turned over to the

---

[263] *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), *supra* note 115 (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).

[264] At least one author refers to the *transiteurs* as "ambulant customs brokers." *See* Arifari, supra note 120, at 187.

[265] 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

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.[266] The businessman need not dicker with customs agents regarding the classification of the goods[267] or fill out paperwork: all of that has already been taken care of by the *transiteur*.[268] 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.[269]

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,[270] many of whom were customs officials at some point in their past, who know how to manipulate, circumvent, and undermine Niger's governmental bureaucracy.[271] They or their agents can be found in ports where Nigeriens do business: West Africa ports such as Cotounou, Lome, Abidjan and Dakar, as well

---

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, Reseaux, Marchands et Modialization,: Le Cas des Convoisau 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).

[266] Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134.

[267] *See* Arifari, *supra* note 120, 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).

[268] Interview with a Seller of Women's Shoes in the Grand Marche (March 1, 2009), *supra* note 134 (saying his *transiteur t*akes 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 128 (claiming he never deals with customs agents because he employs a *transiteur* who "arranges" everything).

[269] Interview with the Owner of an Auto Parts Shop Near the New Market (March 4, 2009), *supra* note 265 (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).

[270] Arifari, *supra* note 120, at 182 (arguing that smuggling is a systematic activity often carried on by extremely influential actors).

[271] *See id.* 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).

as far flung trading destinations such as Dubai and China.[272] They also are present and active at all border points entering Niger.[273]

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.[274] 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.[275] Other than the customs officials' steeply discounted estimation of the value of the bundled goods, nothing concerning the transaction goes in writing[276] and the entire business is transacted in cash.[277]

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.[278] 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

---

[272] *Id.* at 189.
[273] *Id.*
[274] *Id.* at 199-200.
[275] *See id.* (stating that the customs duties are usually negotiated in bulk rather than by category); *see also* Alou [article], *supra* note 265, 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).
[276] Arifari, *supra* note 120, at 189, 213; *see* Alou [article], *supra* note 265, at 136 (arguing the entire transaction is paperless).
[277] Arifari, *supra* note 120, at 189.
[278] *See id.* at 187 (arguing that the corruption among customs officers generally reaches to the top rungs of the government).

the steeply discounted customs and taxation payments, the bribes paid, and the cost of transport, adds his profit margin, and bills the businessmen on a pro rata basis.[279]

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.[280]

iii. Impunity for Corrupt Practices

Customs duties account for more than half of Niger's budget,[281] 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 corruption, the service can threaten a slowdown or strike, which would mean certain financial disaster for the state.[282]

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

[279] Alou [article], *supra* note 265, at 135.
[280] *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).
[281] Arifari, *supra* note 120, at 184-185.
[282] *Id*.

convicted times the amount of punishment levied.[283] 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.[284] 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.[285] 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.[286] 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.[287] If the judge complies, he is rewarded with cash and a promotion to a more lucrative position. If he refuses, he finds himself in Diffa in short order.[288] 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.[289]

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

---

[283] Rose-Ackerman [in Corruption and the Global Economy], *supra* note __, at 40 [first is 196].
[284] *See supra* notes _ and accompanying text.
[285] *See supra* notes _ and accompanying text.
[286] *See generally* Interview with A Young Electronics Merchant in the Grand Marche (March 5, 2009), *supra* note 128 (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 115 (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); s*ee 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); Alou, *supra* note 286, at 156-60 (similar).
[287] See Interview with the Manager of Rental Car Business (February 24, 2009), *supra* note 179 (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).
[288] See *id; see also supra* note _ (discussing administrative banishment).
[289] *See* Johnston, *supra* note 218, at 64 (arguing that anti-corruption enforcement is commonly used as a tool to attack political rivals); s*ee also* Blundo & Olivier de Sardan [*Why Should We Study*], *supra* note 23, at 7 (arguing that elites use the war against corruption to eliminate their political enemies and settle old scores).

bottom to top.[290] 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.[291] If an accused bureaucrat is not being actively punished by powerful actors who order the judges to convict him,[292] 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. Readers who skipped ahead to the conclusion hoping to view a standard three-part solution to the problems faced by institution building and 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 contribution to the literature is to undertake a step that most promoters and practitioners of international law and development projects skip: assessing in detail 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.

---

[290] *See* Alou [*Corruption in the Legal System*], *supra* note 286, at 147 (arguing that in Niger there is a widespread view that justice is for sale).
[291] *Id.* at 156.
[292] *See supra* note _, [re punishing political rivals].

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 tend to 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 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 Nigerien government, which is the largest economic actor in the country. 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 Hobbesian 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.[293] 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, 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

[293] *See supra* notes _ and accompanying text.

because they wish to keep the spoils for themselves and block ambitious young entrepreneurs from entering.[294]

Among these young entrepreneurs, the institutional reforms proposed by the U.S.-funded aid programs – reforms that this article has implicitly critiqued as naïve, or at least premature – 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 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.[295] 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.

---

[294] *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 123.
[295] ROSE-ACKERMAN [CORRUPTION AND GOVERNMENT], *supra* note 160, at 108.