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Corruption as Institution Among Small Businesses in Africa

Thomas Kelley

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CORRUPTION AS INSTITUTION AMONG SMALL BUSINESSES IN AFRICA

*Thomas Kelley**

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I. Introduction

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

Past 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,² including the quotable admonition that “Africa doesn’t need strongmen, it needs strong institutions.”³ According to the President, “[i]n the 21st century, capable, reliable and transparent institutions are the key to success.”⁴ When the President specified the institutions to which he was referring, there was a distinct legal tint, including parliaments, police forces, and judiciaries.⁵

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 aim to build rational, predictable institutions, with a particular emphasis on institutions that will stimulate commercial development in

1. See Press Release, White House Office of the Press Secretary, Remarks by the President to the Ghanaian Parliament, para. 22 (July 11, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Ghanaian-Parliament.

2. *Id.* paras. 3, 22, 25, 26, 51.

3. *Id.* para. 25.

4. *Id.* para. 22.

5. See *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, “Citizens and governments need to work together to build and sustain strong democratic institutions.” Hillary Rodham Clinton, U.S. Secretary of State, Remarks at the 8th Forum of the African Growth and Opportunity Act, para. 34 (Aug. 5, 2009) (transcript available at <http://www.state.gov/secretary/rm/2009a/08/126902.htm>).

poor countries.⁶ The Millennium Challenge Corporation (MCC), a relatively new and increasingly important U.S. aid organization,⁷ and the more venerable U.S. Agency for International Development (USAID), are initiating programs in poor countries throughout Africa and the developing world based on the assumption that the future stability and prosperity of these countries depends on unleashing and guiding the entrepreneurial spirit of small enterprises,⁸ and that this can be accomplished by improving the institutions—most notably the laws and legal enforcement mechanisms—that regulate them.⁹ 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.¹⁰

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 Douglass North,¹¹ entrepreneurs in

6. See JOHN W. BRUCE ET AL., U.S. AGENCY FOR INT'L DEV., *LAND AND BUSINESS FORMALIZATION FOR LEGAL EMPOWERMENT OF THE POOR: STRATEGIC OVERVIEW PAPER 7* (2007), available at http://pdf.usaid.gov/pdf_docs/PNADI080.pdf. See also Jeffrey Gettleman, *Kenya's Volatile Politics Shadow Clinton*, N.Y. TIMES, Aug. 6, 2009, available at <http://www.nytimes.com/2009/08/06/world/africa/06diplo.html> (paraphrasing U.S. Secretary of State Hillary Clinton as saying that the new U.S. approach to aid to Africa would include the goal of bolstering support for African entrepreneurs).

7. See Doug Johnson & Tristan Zajonc, *Can Foreign Aid Create an Incentive for Good Governance? Evidence from the Millennium Challenge Corporation 1* (Ctr. for Int'l Dev. at Harvard Univ., Working Paper No. 11, 2006), available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/publications/student-fellows/wp/011.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).

8. See BRUCE ET AL., *supra* note 6, at 2 (noting that formalization programs include improved opportunities “designed to assist small and newly-formalized operations. . . .”); see also Judi Hudson, *Why Regulations Matter: A Small Business Perspective*, in *REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA* 223, 238 (Edmund Amann ed., 2006) [hereinafter *REGULATING DEVELOPMENT*] (commenting that small and medium-sized enterprises, or SMEs, are vital drivers of economic growth in developing countries).

9. See BRUCE ET AL., *supra* note 6, at 7-8; see also Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 *LAW & SOC. INQUIRY* 1095, 1096 (2007) (referring to a recent “surge of interest” in the role of “institutions” in determining economic outcomes, particularly in the developing world).

10. See BRUCE ET AL., *supra* note 6, at 7. See also Mary M. Shirley, *Institutions and Development*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 611 (Claude Ménard & Mary M. Shirley eds., 2005) [hereinafter *HANDBOOK*] (attributing underdeveloped countries to “weak, missing or perverse institutions . . .”).

11. See discussion *infra* Part II.A (detailing De Soto's and North's work and its influence on U.S. aid policy); see generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) [hereinafter *DE SOTO, THE MYSTERY OF CAPITAL*] (postulating the economic success of the West is rooted in a transformation from an informal, extralegal property system to a formal and legal property

developing countries often choose to operate their businesses in the informal sector of their countries' economies in order to avoid confusing, burdensome governmental regulations and taxation.¹² By seeking refuge in the informal sector, 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.¹³ 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.¹⁴

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.¹⁵

system); HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989) [hereinafter DE SOTO, *THE OTHER PATH*] (discussing the informal economies in Peru and facilitating economic development with formal institutions); Douglass C. North, *Institutions and the Performance of Economies Over Time*, in *HANDBOOK*, *supra* note 10, at 21 (discussing the role institutions play in economic change); Douglass C. North, *Economic Performance Through Time*, 84 *AM. ECON. REV.* 359 (1994) (discussing the role of institutions in improving economic performance over time).

12. See EDGARDO BUSCAGLIA & WILLIAM RATLIFF, *LAW AND ECONOMICS IN DEVELOPING COUNTRIES* 4-5 (2000) (discussing De Soto's and North's research that suggests the reasons people use the informal sector of an economy). See also BRUCE ET AL., *supra* note 6, at 8, 15 (indicating a majority of business conducted in sub-Saharan Africa takes place in the informal sector).

13. See BRUCE ET AL., *supra* note 6, at 28-29 (noting the benefits businesses forego by operating in the informal sector).

14. See *id.* at 7 (discussing the link between informality and poverty). See generally DEV. ALTERNATIVES, INC. & BANNOCK CONSULTING LTD., U.S. AGENCY FOR INT'L DEV., *REMOVING BARRIERS TO FORMALIZATION: THE CASE FOR REFORM AND EMERGING BEST PRACTICE 4* (2005) [hereinafter USAID REMOVING BARRIERS REPORT], available at <http://www.oecd.org/dataoecd/36/27/38452590.pdf> (listing several reasons for seeking to reduce the informal sector of an economy); Paul H. Rubin, *Legal Systems as Frameworks for Market Exchanges*, in *HANDBOOK*, *supra* note 10, at 210-11 (arguing institutional and legal uncertainty in countries' business sectors leads to economic inefficiency and lack of growth).

15. See Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 *AM. J. COMP. L.* 999, 1001-02 (2008) (discussing the theory that a lack of secure property rights results in an investment climate that is risky).

The obvious policy solution to these problems is to replace bad institutions with good ones: to pass laws and regulations that are simple to understand and comply with and that unambiguously protect entrepreneurs' property and contract rights, along with legal enforcement mechanisms that are accessible, efficient, and inexpensive.¹⁶ 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.¹⁷

The issue of corruption plays a role in the story told by proponents of institution building and business formalization.¹⁸ In brief, one of the reasons that 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.¹⁹ 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 provides yet more reasons to improve the country's institutions by simplifying its regulatory and legal structure and improving its law

16. See 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, *supra* note 8, at 15-16 (suggesting the proper institutions and the proper rules can foster beneficial market activity). See also BUSCAGLIA & RATLIFF, *supra* note 12, at 1-2.

17. See THE WORLD BANK, DOING BUSINESS 2007: HOW TO REFORM 1-2 (2007) [hereinafter DOING BUSINESS REPORT 2007], available at <http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB07-FullReport.pdf>.

18. See USAID REMOVING BARRIERS REPORT, *supra* note 14, at 18.

19. See *id.* (discussing the extent to which small businesses are hampered by rampant bribery, especially where it is decentralized); see also THE WORLD BANK, REPORT NO. 44611-NE, INTERNATIONAL DEVELOPMENT ASSOCIATION PROGRAM DOCUMENT FOR A PROPOSED GROWTH POLICY REFORM GRANT 1 (GPRG-1) TO THE REPUBLIC OF NIGER IN THE AMOUNT OF SDR 26.5 MILLION (US \$40 MILLION EQUIVALENT) 1-2 (2009) [hereinafter WORLD BANK NIGER GROWTH POLICY REFORM GRANT DOCUMENT], http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/03/27/000350881_20090327100827/Rendered/PDF/446110PGD0IDA11120ADDENDUM01PUBLIC1.pdf (referring to the importance of removing bureaucratic bottlenecks); Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross-country Analysis, The Globalization of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 85 (Kimberly Ann Elliott ed., 1996) (employing the term "rent seeking" to describe the solicitation of bribes).

enforcement mechanisms.²⁰

The thesis of this Article, which is based largely on fieldwork 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, 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.²¹ Indeed, in the past I have critiqued law and

20. See BRUCE ET AL., *supra* note 6, at 3 (arguing that corruption in the formal sector dissuades informal businesses from formalizing); see also USAID REMOVING BARRIERS REPORT, *supra* note 14, at 18 (noting businesses are less likely to formalize operations in a corrupt environment and noting evidence when corruption decreases, formalization increases).

21. See Stephen Golub, *Beyond Rule of Law Orthodoxy, The Legal Empowerment*

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.²²

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 the future and how Niger's legal and regulatory environment helped or hindered their plans.²³

The interviews produced surprising information. Based on past study of Niger, I 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,²⁴ and that this explains why

Alternative 24-25 (Carnegie Endowment for Int'l Peace, Working Paper No. 41, 2003) (encouraging law reform experts to spend more time in the countries they are trying to reform).

22. See generally Kelley, *supra* note 15 (arguing, based on the author's ethnographic fieldwork, that anti-slavery law reform efforts introduced by Western countries unintentionally harmed Niger's contemporary slaves).

23. It bears mentioning that my qualitative methodology for the study of law and development is unfashionable. For at least the past decade, scholarship on international development has been dominated by economists and lawyers who subscribe to a law and economics view of the world. Broadly speaking, these scholars 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 THE RULE OF LAW IS ILLEGAL* 48-49, 94 (2008) (discussing the predominance of economists, their insistence on "scientific study" and their predilection for graphs); see also MILLENNIUM CHALLENGE CORP., *GUIDE TO THE MCC INDICATORS AND THE SELECTION PROCESS: FISCAL YEAR 2008* (2008), <http://mauritania.usembassy.gov/uploads/DJ/wn/DJwnMBPt6qVzzLeqINQgcg/mccen.pdf> (mentioning the MCC's insistence on objective data and analytically rigorous methodology); Johnson & Zajonc, *supra* note 7, at 10-14 (describing the MCC's empirical approach to evaluating international development programs); Davis & Kruse, *supra* note 9, at 1096 (noting that the study of law and development has been dominated by non-lawyers).

24. This hypothesis was based partly on what I had casually observed in Niger and partly

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 businessmen²⁵ are reluctant to discuss corruption.²⁶ It is, after all, illegal even if it is an essential aspect of commerce in Niger.²⁷ The upshot of these methodological challenges was that I was able to conduct fewer

on literature I reviewed before traveling there to perform fieldwork for this project. *See, e.g.*, Robert B. Charlick, *Niger: Islamist Identity and the Politics of Globalization*, in *POLITICAL ISLAM IN WEST AFRICA* 19-20, 39 (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 to Western market capitalism among young businessmen); EMMANUEL GREGOIRE, *THE ALHAZAI OF MARADI: TRADITIONAL HAUSA MERCHANTS IN A CHANGING SAHELIAN CITY* 167-69 (Benjamin H. Hardy ed. & trans., rev. ed. 1992) (arguing a traditional social structure undergirds modern commercial structures); ABNER COHEN, *CUSTOM AND POLITICS IN URBAN AFRICA, A STUDY OF HAUSA MIGRANTS IN YORUBA TOWNS* 6-25 (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 also* USAID REMOVING BARRIERS REPORT, *supra* note 14, at 18-19 (mentioning that sociocultural factors such as networks of trust and interdependence can hinder formalization).

25. I use this gendered term because, in fact, all 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, based on my observations, comparatively few are owners of small or medium-sized enterprises. The gender skewed sample is doubtless also due to the fact that I relied 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 interview other males. Throughout this Article, I refer to “businessmen” and “entrepreneurs” interchangeably.

26. *See* Giorgio Blundo & Jean-Pierre Olivier de Sardan, *Why Should We Study Everyday Corruption and How Should We Go About It?* [hereinafter Blundo & de Sardan], in *EVERYDAY CORRUPTION AND THE STATE: CITIZENS AND PUBLIC OFFICIALS IN AFRICA* 3, 9 (Giorgio Blundo et al. eds., Susan Cox trans., 2006) [hereinafter *EVERYDAY CORRUPTION*]; *see also* Susan Rose-Ackerman, *Introduction and Overview* [hereinafter Rose-Ackerman], in *INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION* xiv, xxxi (Susan Rose-Ackerman ed., 2006) [hereinafter *INTERNATIONAL HANDBOOK*]; *see* Interview with Owner of Several Small Businesses, in Niamey, Niger (Feb. 19, 2009) [hereinafter *First Interview with Owner*] (on file with author) (offering to describe the advantages of operating in the informal sector but then repeatedly avoiding the discussion). In recognition of the delicate nature of conversations about corruption, this Article avoids naming interview subjects, instead referring to them by a descriptive moniker.

27. Interview with Former Director General of a Private Radio Station, in Niamey, Niger (Feb. 26, 2009) (on file with author) (noting many newspapers and radio stations in Niger engage in corruption). Based on my knowledge from doing work in the field, in addition to the illegality, Nigerien businesses are generally reluctant to discuss their enterprises because the more their friends and family members know about their businesses’ profitability, the more likely they are to ask for support.

in-depth interviews than I had hoped during my month of fieldwork,²⁸ 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.²⁹

C. *The Roadmap*

Part II of this Article reviews the theory and practice of institution building and business formalization 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.³⁰ Part III describes the business formalization programs that have been implemented in Niger, and takes the additional step—one often skipped by law and development experts—of describing the practices and concerns of Nigerien businessmen.³¹ 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 various definitions and exploring competing explanations of its causes and consequences.³² 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.³³ This Article concludes 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.³⁴ 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

28. I planned to perform no fewer than fifty interviews during my month of fieldwork.

29. In an interview with a Nigerien Customs Official working for a notoriously corrupt agency, the official disclaimed all knowledge of his agency's corruption. Interview with Nigerien Customs Official, in Niamey, Niger (Mar. 8, 2009) (on file with author).

30. See discussion *infra* Part II.

31. See discussion *infra* Part III.

32. See discussion *infra* Part IV.

33. See discussion *infra* Part V.

34. See discussion *infra* Part VI.

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.³⁵

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 a formative influence on today's business formalization programs.³⁶ Coase argued that Adam Smith's intellectual heirs—with their laser-like focus on pricing as a regulatory mechanism and their unshakeable assumption that the world was inhabited by atomized utility-maximizers—ignored the fact that firms play a vital role in creating economic efficiency.³⁷ Coase believed there were costs associated with relying on the pricing mechanism.³⁸ 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.³⁹ When those contracts failed, the individuals were forced to seek the intervention of courts and other dispute resolution mechanisms.⁴⁰ All of these necessary steps to participation in the market created what Coase termed “transaction costs.”⁴¹ In his view, firms formed naturally as a means of reducing transaction costs and creating greater efficiency.⁴²

Coase also argued that what is traded in the open market are not so much physical things as rights to perform actions in relation to those things.⁴³ He believed that the contours of those rights were determined by a given society's legal system and, logically therefore, that the

35. See, e.g., Ronald H. Coase, *The Institutional Structure of Production*, in HANDBOOK, *supra* note 10, at 31-32.

36. 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).

37. *Id.*

38. See Coase, *supra* note 35, at 34 (discussing Coase's own initial realization of these costs in 1932).

39. *Id.*

40. *Id.*

41. *Id.* As Coase noted, “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” *Id.*

42. See *id.* at 33-34.

43. *Id.* at 37.

society's legal system had a profound effect on its economy.⁴⁴ 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.⁴⁵ Stated otherwise, an economically efficient society's legal system should ensure that the costs of transferring economic rights are low so that they can be expeditiously transferred to their most efficient users. The upshot, according to Coase and his intellectual progeny, is that laws, particularly those governing the negotiation and enforcement of contracts and the protection of property rights resulting from such contracts, must be clear, simple and strong.⁴⁶

Building upon Coase's insights about the importance of firms and transaction costs, the work of the American economist Douglass North highlights the vital role that institutions play in efficiently regulating economies. North defined institutions broadly as "humanly devised constraints that structure human interaction,"⁴⁷ including the legal systems that Coase thought so vital, but also including less formal non-state social networks and norms.⁴⁸ Together, the formal and informal institutions define the "rules of the game" for the economy and "the way the game is played."⁴⁹

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.⁵⁰ Weak institutions, most notably laws, regulatory bodies and law enforcement mechanisms that are confusing, laden with red tape, and corrupt, lead to weak economies.⁵¹ The key to successful economic transformation, and ultimately to socio-economic development, is therefore to replace bad institutions with good ones.

When international aid agencies apply North's institutional theories—often referred to by the moniker New Institutional Economics (NIE)—they tend to ignore the fact that his writings consistently

44. *Id.*

45. *Id.*

46. *Id.*

47. See Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994).

48. See Douglass C. North, *Institutions and the Performance of Economies Over Time*, in HANDBOOK, *supra* note 10, at 22.

49. *Id.*

50. See generally BRUCE ET AL., *supra* note 6, at 7-9 (discussing the need for institutional reform and citing explicitly to Douglass North's work); DOING BUSINESS REPORT 2007, *supra* note 17, at 1-7 (laying out an overly simplistic version of institutional reform).

51. See generally DOING BUSINESS REPORT 2007, *supra* note 17, at 1-7.

emphasize the arduous, incremental nature of institutional change.⁵² 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 based upon the experiences and belief systems of the individuals who make up the society.⁵³ The interwoven nature of the society's institutional matrix creates a path dependency that largely determines the shape that future institutions will take and from which it is extremely difficult to break free.⁵⁴ 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.⁵⁵

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.⁵⁶ 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.⁵⁷ Those entrepreneurs, understandably daunted by unnecessarily complex regulatory and legal requirements, simply avoid the mess (described by Coase and North as "transaction costs") by conducting their businesses underground in the informal sector.⁵⁸ This in turn has a deleterious effect, not only on the entrepreneurs' prospects for economic growth, but on the country's overall economy.⁵⁹

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.⁶⁰ He cannot pledge his

52. See North, *supra* note 48, at 24.

53. *Id.* at 23-24.

54. *Id.*

55. See *id.* at 27-28 (expressing disdain for simplistic development nostrums that seek to abruptly change developing countries' institutional frameworks).

56. See generally DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 11. 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/WDSP/IB/2000/12/13/000094946_99092312334240/Rendered/PDF/multi_page.pdf (citing De Soto regarding the importance of secure property rights and formal land titles).

57. See DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 11, at 30.

58. See *id.* at 21.

59. See *id.* at 21, 30-32.

60. See *id.* at 40, 52-54 (comparing the West's formalized property system with Third World countries' lack of a formalized property system).

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.⁶¹ 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.⁶² Consistent with 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.⁶³

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 that unregulated markets could work their magic.⁶⁴ 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 Consensus⁶⁵) was not improving conditions in the developing world,⁶⁶ a new development consensus began to take shape, based in part on the economic theories of Coase, North, and De Soto.⁶⁷ This new NEI consensus held that rational, efficient institutions—especially governmental institutions—were in fact vital for maintaining a healthy

61. *See id.* at 32.

62. *See id.* at 52-54, 56.

63. *See id.* at 56; *see also* THE WORLD BANK, *DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH 3* (2005), *available at* <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db05-fullreport.pdf>.

64. *See* Edmund Amann, *Introduction*, in *REGULATING DEVELOPMENT*, *supra* note 8, at 1-2 (describing 1990s development policy as focusing on privatization and market deregulation).

65. *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).

66. *Id.* *See* Jalilian et al., *supra* note 16, at 12 (referring to arguments that privatization failed due to political mismanagement and corruption); *see also* Kelley, *supra* note 15, at 1002 (summarizing various explanations of why the Washington Consensus failed).

67. *See supra* Part II.A.

economy and long term political and social stability.⁶⁸ Thus, the task of guiding poor countries toward more prosperous futures shifted from disassembling their regulatory institutions to improving the quality of those systems.⁶⁹

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,⁷⁰ to international development work.⁷¹ 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 commit to achieving.⁷² In 2004, the United States created a new agency, the Millennium Challenge Corporation (MCC), to tackle its Millennium Development commitments.⁷³

The MCC delivers U.S. development assistance to countries that demonstrate that they have good institutions, or are at least on the path toward developing them.⁷⁴ 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.⁷⁵ In

68. See Jalilian et al., *supra* note 16, at 12-13, 15 (describing the development consensus that institutions matter).

69. *Id.*

70. See Davis & Kruse, *supra* note 9, at 1097 (referring to the "empirical and quantitative flavor" of the latest wave of law and development schemes).

71. See generally JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 122 (2005). Sachs advocated "shock therapy," also referred to as "big bang" reform, for developing countries.

72. See *id.* at 210-13.

73. See Johnson & Zajonc, *supra* note 7, at 1 (referring to the 2004 founding of the MCC as perhaps the most significant shift in U.S. foreign aid policy since President Kennedy created USAID in 1961).

74. See *id.* at 4 (employing the terminology "sound policy environments").

75. *Id.* at 5. The MCC's incentive system is based upon a two-tier program of engagement. *Id.* 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 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 are 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).

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 policymakers and aid experts.⁷⁶ In the confident words of a recent World Bank report, “what gets measured gets done.”⁷⁷

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.⁷⁸ The indicators are divided into three distinct themes or categories: Encouraging Economic Freedom, Ruling Justly, and Investing in People.⁷⁹ The MCC gathers the data, plugs them into a formula, and summarizes them in easy to read charts.⁸⁰ Active and aspiring participants in MCC programs are supposed to vie with one another in what is essentially a horserace to determine who has made the most progress on the various indicators.⁸¹ Only the best performers are graced with continuing financial support.⁸²

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.⁸³ Its hopes for winning larger sums of money from

76. *Id.* at 5.

77. DOING BUSINESS REPORT 2007, *supra* note 17, at 3.

78. MILLENNIUM CHALLENGE CORP., GUIDE TO THE MCC INDICATORS AND THE SELECTION PROCESS: FISCAL YEAR 2011, at 3-4 (2011) [hereinafter MCC GUIDE TO INDICATORS], http://www.mcc.gov/documents/reports/reference-2010001040503-_fy11guidetotheindicators.pdf. See also Johnson & Zajonc, *supra* note 7, at 6 (listing sixteen indicators).

79. MCC GUIDE TO INDICATORS, *supra* note 78, at 3-4.

80. See generally *id.*

81. See Davis & Kruse, *supra* note 9, 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.” See MCC GUIDE TO INDICATORS, *supra* note 78, at 3-4. Specifically, the category “Encouraging Economic Freedom” includes the use of 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.* at 3. 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. See Davis & Kruse, *supra* note 9, at 1097-98. The IFC is an arm of the World Bank. The Ruling Justly category includes a separate indicator, 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. See MCC GUIDE TO INDICATORS, *supra* note 78, at 3, 11-13.

82. See generally MCC GUIDE TO INDICATORS, *supra* note 78.

83. See generally U.S. AGENCY FOR INT’L DEV., AGREEMENT No. 624-AA-A3-08-01, MILLENNIUM CHALLENGE ACCOUNT THRESHOLD PROGRAM ASSISTANCE AGREEMENT BETWEEN THE U.S. AND THE REPUBLIC OF NIGER TO SUPPORT PRIMARY SCHOOL EDUCATION FOR GIRLS, IMPROVE THE CONTROL OF CORRUPTION AND STREAMLINE BUSINESS CREATION, LAND ACCESS

the MCC in the future will depend on its ability to empirically demonstrate progress on the MCC indicators.⁸⁴

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 United States actually leads to economic growth, prosperity and stability.⁸⁵ 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,⁸⁶ ignoring the fact that law is inextricably intertwined with a society's particular notions of justice.⁸⁷ 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.⁸⁸

AND TITLING PROCEDURES (2008), available at <http://www.mcc.gov/documents/agreements/soag-niger.pdf> [hereinafter MCC NIGER THRESHOLD AGREEMENT].

84. Niger's progress down the MCC pathway was interrupted in late 2009 by domestic political instability. See Adam Nossiter, *President Claims More Power in Niger's Disputed Referendum*, N.Y. TIMES, Aug. 7, 2009, available at <http://www.nytimes.com/2009/08/08/world/africa/08niger.html> (quoting political opponents describing the president's actions as "a coup d'état in all but name"); MILLENNIUM CHALLENGE CORP., CONGRESSIONAL NOTIFICATION TRANSMITTAL SHEET (2009), <http://www.mcc.gov/documents/cn-cn-121709-niger-suspension.pdf> (informing Congress of the suspension of assistance to Niger as a result of "several undemocratic actions to extend the Presidential term beyond the limits imposed by the constitution of Niger and to consolidate power"). Threshold program assistance was reinstated in mid-2011 under a new Nigerien president. Press Release, Millenium Challenge Corp., MCC CEO Informs Niger President Mahamadou Issoufou of Reinstatement of Threshold Program Assistance (2011), <http://www.mcc.gov/pages/press/release/mcc-ceo-informs-niger-president-mahamadou-issoufou-of-reinstatement-of-thre>.

85. See Johnson & Zajonc, *supra* note 7, at 4, 19; see also BRUCE ET AL., *supra* note 6, at 119-27 (summarizing results of multiple empirical studies, some concluding that improved institutions lead to economic growth, others concluding they do not); Michael A. McPherson & Carl Liedholm, *Determinants of Small Micro Enterprise Registration: Results from Surveys in Niger and Swaziland*, 24 WORLD DEV. 481, 485-86 (1996) (concluding that heavy bureaucratic requirements do not have a significant effect on entrepreneurs' decisions whether or not to register their businesses).

86. CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 20 (2008).

87. See generally Blundo & de Sardan, *supra* note 26, at 6 (arguing that the law-as-technology approach strips law from all political considerations and ignores the specific conditions of the subject country).

88. See MATTEI & NADER, *supra* note 23, 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

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

III. 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 part 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.⁸⁹ In March 2008, Niger signed a \$23 million⁹⁰ Threshold Agreement⁹¹ that includes, among other goals, “streamlining

theories. One is that 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* (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. *See* MILHAUPT & PISTOR, *supra* note 86, at 20-21. They therefore adopt, consciously or unconsciously, strained definitions of law that permit them to take what they view as appropriate action. *See id.*

89. *See supra* Part II.

90. MILLENNIUM CHALLENGE CORP., NIGER THRESHOLD QUARTERLY STATUS REPORT (2009) [hereinafter MCC NIGER STATUS REPORT], <http://www.mcc.gov/documents/reports/qsr-niger.pdf>.

91. *See id.* (reporting Mar. 17, 2008 as the signing date of the Threshold Agreement). *See generally* MCC NIGER THRESHOLD AGREEMENT, *supra* note 83.

the process of starting a business by establishing the administrative, legal and regulatory structures required to implement business facilitation reforms”⁹² 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.”⁹³ The Threshold Program also aims to attack corruption, particularly within Niger’s health and education sectors⁹⁴ where corrupt practices are thought to be most rampant.⁹⁵ A year after the 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,⁹⁶ 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 it suffices to say that they all aim to usher Niger toward the business-facilitative legal environment desired by NIE and MCC reformers.⁹⁷ 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.⁹⁸ Such features are included in Niger’s new Investment Code, which is designed to attract foreign direct investment by enhancing investors’

92. MCC NIGER STATUS REPORT, *supra* note 90.

93. MILLENNIUM CHALLENGE CORP., *Working with Niger to Promote Education, Combat Corruption 3-4* (2008) [hereinafter MCC NIGER FACT SHEET], <http://www.mcc.gov/documents/press/factsheet-013008-niger.pdf>.

94. *Id.* at 1.

95. See Interview with Seller of Home and Office Furnishings, in Niamey, Niger (Mar. 5, 2009) [hereinafter Interview with Seller] (on file with author) (indicating that health and education are particularly valued as opportunities for corruption because, compared to other ministries, they purchase large quantities of materials; specifically, while casually talking about which ministries are open for corruption, he pulled an exemplar out of his briefcase and showed it to me, indicating that corruption is commonplace if not rampant).

96. See MCC NIGER STATUS REPORT, *supra* note 90 (indicating that evaluation consultants had been hired in December 2008 and that the program anticipated a launch in Niamey in February 2009). I visited the MCC offices in Niamey in late February 2009 and observed that it was just beginning to function.

97. See *supra* Part II.

98. See generally REPUBLIQUE DU NIGER, MINISTERE DU COMMERCE, DE L’INDUSTRIE ET DE LA NORMALISATION, POUR UNE AMELIORATION DU CLIMAT DES AFFAIRES [REPUBLIC OF NIGER, MINISTRY OF COMMERCE, INDUSTRY AND NORMALIZATION, FOR AN IMPROVEMENT OF THE BUSINESS CLIMATE] (n.d.) [hereinafter PUBLICATION ON THE IMPROVEMENT OF NIGER’S BUSINESS CLIMATE] (copy on file with author).

property rights.⁹⁹ 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 by liberalizing strictures on the removal of business profits.¹⁰⁰ Finally, in addition to adopting a surfeit of new laws aimed at opening and rationalizing its domestic business environment, Niger 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 of other countries in the region and thereby stimulate regional trade.¹⁰¹

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.¹⁰² 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.¹⁰³ Many other legal reforms have been put in place, all intended to improve the economic climate and the institutional and regulatory structure for doing business in Niger.¹⁰⁴

99. See *id.* at 5. See generally Ordinance No. 89-19 of Dec. 8, 1989 on the Investment Code in the Republic of Niger, as amended by Ordinance No. 97-09 of Feb. 27, 1997, Ordinance No. 99-69 of Dec. 20, 1999 and Law No. 2001-20 of July 12, 2001, available at <http://translate.google.com/translate?hl=en&sl=fr&u=http://www.ccaian.org/codeinvestissement.html&ei=XqEuT8O7MIu5tweN4PzRDw&sa=X&oi=translate&ct=result&resnum=6&ved=0CFUQ7gEwBQ&prev=/search%3Fq%3DCode%2Bdes%2Binvestissements%2BNiger%26hl%3Den%26biw%3D1680%26bih%3D925%26prmd%3Dimvns>.

100. PUBLICATION ON THE IMPROVEMENT OF NIGER'S BUSINESS CLIMATE, *supra* note 98, at 5. See generally Niger Petroleum Code, Law Number 2007-01 of Jan. 31, 2007, available at <http://translate.google.com/translate?hl=en&sl=fr&u=http://www.droit-afrique.com/images/textes/Niger/Niger%2520-%2520Code%2520petrolier%25202007.pdf&ei=faMuT5zrE8iltweGn43sDw&sa=X&oi=translate&ct=result&resnum=1&sqi=2&ved=0CDAQ7gEwAA&prev=/search%3Fq%3DLoi%2Bno%2B2007-01%2Bdu%2B31%2Bjanvier%2B2007%2Bportant%2BCod e%2Bpetrolier%26hl%3Den%26biw%3D1680%26bih%3D925%26prmd%3Dimvns>.

101. PUBLICATION ON THE IMPROVEMENT OF NIGER'S BUSINESS CLIMATE, *supra* note 98, at 2. 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).

102. PUBLICATION ON THE IMPROVEMENT OF NIGER'S BUSINESS CLIMATE, *supra* note 98, at 2.

103. *Id.* But see Interview with Former Director General of a Private Radio Station, *supra* note 27 (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, in Niamey, Niger (Feb. 23, 2009) [hereinafter Feb. 23, 2009 Interview with Young Man] (on file with author) (stating that government programs never help small businessmen, even when that is what they are designed to do).

104. PUBLICATION ON THE IMPROVEMENT OF NIGER'S BUSINESS CLIMATE, *supra* note 98,

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.¹⁰⁵ The government further pledges to reduce the number of bureaucratic steps necessary to complete the business registration process, to computerize that multi-step process, and to develop and distribute “how to” guides on new business creation geared toward citizen entrepreneurs.¹⁰⁶

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 information in the media and on websites 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.¹⁰⁷ For purposes of this Article, 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.¹⁰⁸

at 5.

105. See Interview with a Top Official in Niger’s Ministry of Commerce, in Niamey, Niger (Mar. 5, 2009) [hereinafter Interview with Top Official] (on file with author) (describing the benefits of the *guichet unique*); see also Interview with a Top Official of Niger’s Chamber of Commerce, in Niamey, Niger (Feb. 24, 2009) (on file with author) (mentioning the *guichet unique* but saying many officials in various government ministries were determined to make the “one-stop centers” fail because they cut into their opportunities for corruption); PUBLICATION ON THE IMPROVEMENT OF NIGER’S BUSINESS CLIMATE, *supra* note 98, at 2 (mentioning the *guichet unique* as an important improvement in Niger’s business climate).

106. MCC NIGER FACT SHEET, *supra* note 93, at 2-3.

107. *Id.* at 1-2.

108. See generally PUBLICATION ON THE IMPROVEMENT OF NIGER’S BUSINESS CLIMATE, *supra* note 98 (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,

B. Business in Niger as It Is Actually Practiced

1. Quantitative Description

Niger is an extremely poor country, perpetually ranking at or near the bottom of the U.N. Human Development Index.¹⁰⁹ According to the World Bank, 61% of its population lives in extreme poverty on less than one dollar per day and average per capita income in 2008 was \$330.¹¹⁰ It is vast and landlocked and most of its terrain is in the Sahara Desert, which means it has limited arable land,¹¹¹ a critical problem in a country where most people survive as subsistence farmers.¹¹² Its population is estimated at almost 15 million¹¹³ with an approximately 30% rate of literacy.¹¹⁴ At 3.3%, its population growth rate is among the fastest in the world.¹¹⁵

Officially, Niger's private sector economy is miniscule, with fewer than 1000 formal enterprises.¹¹⁶ It suffers from an underdeveloped

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.*, THE INVESTMENT CODE OF NIGER, June-July, 2008 (bilingual magazine promoting Niger's investment opportunities and stable business environment); PUBLICATION ON THE IMPROVEMENT OF NIGER'S BUSINESS CLIMATE, *supra* note 98; MINISTERE DU COMMERCE, DE L'INDUSTRIE ET DE LA NORMALISATION, NOTE SUR LE CLIMAT DES AFFAIRES [MINISTRY OF COMMERCE, INDUSTRY AND STANDARDS, A NOTE ON THE BUSINESS CLIMATE] (2009) (copy on file with author) (a two-page summary, authored by the minister's office, of Niger's recent business enhancement measures).

109. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT (2009), *available at* <http://hdr.undp.org/en/reports/global/hdr2009> [hereinafter 2009 HUMAN DEVELOPMENT REPORT] (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. *See id.* at 49-60. It is compiled annually as part of the U.N. Development Program's annual Human Development Report. *Id.*

110. *See* THE WORLD BANK, NIGER: COUNTRY BRIEF [hereinafter THE WORLD BANK, NIGER], *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICA_EXT/NIGEREXTN/0,,menuPK:382460~pagePK:141132~piPK:141107~theSitePK:382450,00.html (last visited Feb. 5, 2012).

111. *See* WORLD BANK NIGER GROWTH POLICY REFORM GRANT DOCUMENT, *supra* note 19, at 2 (stating 12% of Niger's land is arable); *see also* THE WORLD BANK, REPORT NO. 29752-NE, REPUBLIC OF NIGER PUBLIC EXPENDITURE MANAGEMENT AND FINANCIAL ACCOUNTABILITY REVIEW 1 (2005), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/03/25/000012009_20050325091610/Rendered/PDF/297520NE.pdf (noting 13% of Niger's land is "cropped" and 1.5% is irrigated).

112. *See* THE WORLD BANK, NIGER, *supra* note 110 (noting that Niger's economy is dominated by rain-fed agriculture).

113. *Id.*

114. *Id.*

115. WORLD BANK NIGER GROWTH POLICY REFORM GRANT DOCUMENT, *supra* note 19, at 2.

116. *Id.*

financial sector.¹¹⁷ The country's economy has grown strongly in recent years, but that growth is due largely to better than average rains, which bolstered Niger's predominantly rain fed agricultural sector,¹¹⁸ and increased commodity prices associated with Niger's uranium mining and nascent oil extraction industry.¹¹⁹ 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.¹²⁰

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.¹²¹ According to the World Bank, government expenditures account for approximately one third of the country's gross domestic product.¹²² This too will become an important statistic when we arrive later at the discussion of corruption.

2. Qualitative Description

Three themes emerge from a close study¹²³ of small businesses in Niger.¹²⁴ First, and perhaps most obvious given the topic of this Article, the proprietors of small businesses in Niger tend to undertake their activities in the informal sector outside of direct government oversight and regulation.¹²⁵ Second, small Nigerien businesses, whether formal or informal, constantly struggle to obtain start-up and expansion capital.¹²⁶ Third, ambitious Nigerien businessmen, particularly merchants who buy

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

118. THE WORLD BANK, NIGER, *supra* note 110. See WORLD BANK NIGER GROWTH POLICY REFORM GRANT DOCUMENT, *supra* note 19, at 4 (noting "Niger's economy has been growing strongly in the past four years . . . mainly due to a rebound from the 2004 drought").

119. WORLD BANK NIGER GROWTH POLICY REFORM GRANT DOCUMENT, *supra* note 19, at 4. See generally Adam Nossiter, *After a Coup, Niger Resumes Business as Usual with China*, N.Y. TIMES, Apr. 24, 2010, available at <http://www.nytimes.com/2010/04/25/world/africa/25niger.html> (mentioning Niger's growing oil industry).

120. See WORLD BANK NIGER GROWTH POLICY REFORM GRANT DOCUMENT, *supra* note 19, at 4.

121. *Id.* at 5.

122. *Id.* See also INTERNATIONAL MONETARY FUND, COUNTRY REPORT NO. 09/70, NIGER: SELECTED ISSUES AND STATISTICAL APPENDIX 85 (2009) (indicating that government expenditures account for approximately one third of the country's "modern sector"), available at <http://www.imf.org/external/pubs/ft/scr/2009/cr0970.pdf>.

123. See *supra* Part I.B.

124. See discussion *infra* Part III.B.

125. See discussion *infra* Part III.B.2.a.

126. See discussion *infra* Part III.B.2.b.

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.¹²⁷

a. 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, because it is a defining feature of informal businesses that they prefer not to be counted or otherwise recognized.¹²⁸ Recent studies of the informal business sector across Africa find that a significant percentage of all businesses operate informally.¹²⁹ 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 Marché* paid business taxes on approximately 5% of their profits while the rest of the economic activity took place in the informal sector.¹³⁰ The best that can be said is that many businesses in Africa and certainly most small businesses in Niger operate informally.¹³¹

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 of Niger's population and American Peace Corps volunteers—patronize instead the *Grand Marché*, Niamey's bustling, centrally located open air market. Most any shopping expedition in the *Grand Marché*, or any of Niamey's other open air markets, provides an object lesson in the ways and means of the informal sector.

In the *Grand Marché*, thousands of businessmen¹³² sell all

127. See discussion *infra* Part III.B.2.c.

128. Alex Dreher & Friedrich Schneider, *Corruption and the Shadow Economy: An Empirical Analysis 2* (Ctr. for Research in Econ., Mgmt. & the Arts, Working Paper No. 2006-01, 2006) (noting the "shadow economy" does not lend itself to easy measurement). See BRUCE ET AL., *supra* note 6, at 10-13 (discussing the difficulty of measuring informality).

129. See, e.g., Friedrich Schneider & Dominik H. Enste, *Shadow Economies: Size, Causes, and Consequences*, 38 J. ECON. LITERATURE 77, 81 (2000) (remarking that some countries, including Nigeria, show an underground sector nearly three-quarters the size of officially recorded GDP); BRUCE ET AL., *supra* note 6, at 124 (estimating the overall informal economy in Africa accounts for 42% of GDP).

130. Interview with an Employee of Niger's Tax Service, in Niamey, Niger (Mar. 6, 2009) (on file with author).

131. See *supra* text accompanying notes 128-29.

132. Interview with an Employee of Niger's Tax Service, *supra* note 130 (indicating that approximately three thousand enterprises are officially registered to do business in the *Grand Marché*).

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.¹³³ 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.¹³⁴ Eventually, when the terms of the transaction are settled, the buyer must hand over cash. No businesses in the market or anywhere else in the country, save for a few high-end hotels and boutiques, accept personal checks or credit cards. When the transaction is complete, the merchant will offer no bill of sale. In the rare case

133. Through my experience in the field, I have discovered that "*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. Further field work has uncovered that 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 24 (describing the "*Alhazai*" businessmen who populate the markets in Maradi, a market city in south-central Niger).

134. Based upon my field work, the final price will depend on a multiplicity of factors: what the merchant 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 the customer's willingness to pay, and whether in fact it is his boutique. Similarly, my field work has demonstrated that 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. Someone covering for the owner is less likely to sell the goods at a low price. See generally Thomas Kelley, *Law School Admissions Essay*, in *ESSAYS THAT WORKED FOR LAW SCHOOLS* 22-23 (Boykin Curry ed., 1988) (describing strategies for bargaining for meat in West African markets).

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,¹³⁵ 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.¹³⁶

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. Those apparently prosperous El Hadgis have very likely succeeded in moving up the chain from retail to a mix of wholesale and retail, and much of their wealth comes from the selling goods to other merchants.

A final important observation regarding the informality of Niger's businesses is that the descriptors "informal" and "formal" are points on a continuum rather than binary categories. Many businesses choose to have no formal existence but they do sometimes pay taxes and other fees when they are pinned down by government tax collectors and investigators.¹³⁷ Some businesses, for strategic reasons take limited steps toward formalizing, for example by requesting a "NIF" (roughly

135. THE WORLD BANK, DOING BUSINESS 2012: NIGER 72, <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/profiles/country/NER.pdf> (listing taxes businesses in Niger must pay, including an "advertising tax").

136. See Nassirou Bako Arifari, *We Don't Eat the Papers: Corruption in Transport, Customs, and Civil Forces*, in EVERYDAY CORRUPTION, *supra* note 26, at 213 (referring to the general preference for oral dealings when negotiating corrupt customs transactions).

137. See Interview with Owner of Several Small Businesses, in Niamey, Niger (Feb. 20, 2009) (second interview) [hereinafter Second Interview with Owner] (on file with author) (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 Marché*, in Niamey, Niger (Feb. 22, 2009) [hereinafter Feb. 22, 2009 Interview with Seller of Women's Shoes] (on file with author) (saying he prefers to operate informally but had to obtain a government tax identification number for doing business directly with government agencies).

the equivalent of an Employer Identification Number in the United States) from the Nigerien government but will undertake none of the remaining steps.¹³⁸ 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 Article 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.

b. 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.¹³⁹ Financial institutions such as banks are rarely on their list of possible sources.¹⁴⁰

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.¹⁴¹ 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.¹⁴² 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.¹⁴³

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.¹⁴⁴ After years of such labor and a strong determination to save

138. See Feb. 22, 2009 Interview with a Seller of Women's Shoes, *supra* note 137.

139. See, e.g., Interview with Three Members of the Young Chamber, in Niamey, Niger (Feb. 24, 2009) (on file with author) (identifying start-up capital as young entrepreneurs' primary problem); Interview with Young Man Who Services Computers and Sells Computer Peripherals, in Niamey, Niger (Mar. 2, 2009) [hereinafter Mar. 2, 2009 Interview with Young Man] (on file with author) (describing his desperate need for expansion capital).

140. See Mar. 2, 2009 Interview with Young Man, *supra* note 139 (explaining that banks rarely lend to small businesses and, when they do, only on outrageous terms); see also Second Interview with Owner, *supra* note 137 (expressing suspicion and distrust of banks in Niger).

141. See, e.g., Feb. 22, 2009 Interview with a Seller of Women's Shoes, *supra* note 137 (recounting that he got his start in business working for his older brother); Interview with the Manager of a Rental Car Business, in Niamey, Niger (Feb. 23, 2009) (on file with author) (also recounting that he got his start in business working for his older brother).

142. See Interview with the Manager of a Rental Car Business, *supra* note 141.

143. *Id.*

144. See, e.g., Interview with Young Electronics Merchant in the *Grand Marché*, in

the profits, the young man moves from ambulatory selling to purchasing higher-end goods and renting a retail space in the *Grand Marché* or elsewhere.¹⁴⁵ One young merchant got his start selling cell phones to his school companions and to pedestrians near his school.¹⁴⁶ When he had accumulated sufficient capital, he opened a consumer electronics boutique in the *Grand Marché*.¹⁴⁷ Another spent his summers cutting grass for animal fodder in the countryside outside of Niamey, transporting it to the city by donkey cart, and selling it to urban dwellers.¹⁴⁸ 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.¹⁴⁹ Of the many proprietors of small businesses that I interviewed in Niger, not one had started his business by borrowing from any financial institution.¹⁵⁰

Businessmen in Niger are almost as reluctant to approach banks for expansion capital as they are for start-up capital.¹⁵¹ 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.¹⁵² 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.¹⁵³ However, even for fully formalized

Niamey, Niger (Mar. 5, 2009) [hereinafter Interview with Young Electronics Merchant] (on file with author) (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.

145. *Id.*

146. *Id.*

147. *Id.*

148. See Interview with the Owner of Numerous Small, Medium, and Large Business Enterprises, in Niamey, Niger (Feb. 27, 2009) (on file with author).

149. *Id.*

150. See, e.g., First Interview with Owner, *supra* note 26; see also Interview with Seller, *supra* note 95; Feb. 23, 2009 Interview with Young Man, *supra* note 103.

151. See Interview with a Seller of Women's Shoes in the *Grand Marché*, in Niamey, Niger (Mar. 1, 2009) [hereinafter Mar. 1, 2009 Interview with Seller of Woman's Shoes] (on file with author) (describing Nigerien banks as expensive, slow and unreliable); see also Mar. 2, 2009 Interview with Young Man, *supra* note 139 (discussing how it is very difficult to receive reasonable financing from a bank); Interview with Young Electronics Merchant, *supra* note 144 (mentioning avoiding banks).

152. See Interview with Owner of Numerous Small, Medium, and Large Business Enterprises, *supra* note 148 (saying with his many enterprises he occasionally takes business loans from banks but only if absolutely necessary).

153. See generally DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 11 (informal businesses cannot get access to capital because they have nothing concrete to offer as collateral); see generally DE SOTO, *THE OTHER PATH*, *supra* note 11 (informal businesses cannot get access to capital because they have nothing concrete to offer as collateral).

businesses, banks are often not an option because they are too expensive and too risky.¹⁵⁴

For example, a scrappy young owner of a small boutique that services computers and sells computer peripherals expressed an intense desire to expand his fully formalized business, but said he would not approach a bank because typical loan terms include ruinously high interest rates and the necessity of rapid repayment.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ But his plans were stymied because of the unavailability of expansion capital at reasonable rates.¹⁵⁸ 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 loan¹⁵⁹ and would demand that the principal and interest be returned in three years or less.¹⁶⁰ On those terms, there would be too much risk of losing the enterprise and the investment properties that he would offer

154. See First Interview with Owner, *supra* note 26 (recounting an instance where a bank employee embezzled money from his business account); see also Feb. 23, 2009 Interview with Young Man, *supra* note 103 (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, *supra* note 148 (decrying the unfair terms of most bank loans); Feb. 22, 2009 Interview with a Seller of Women's Shoes, *supra* note 137 (saying he often accepts payment from other merchants in goods rather than cash to avoid dealing with banks).

155. Feb. 23, 2009 Interview with Young Man, *supra* note 103.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* See Mar. 2, 2009 Interview with Young Man, *supra* note 139 (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, *supra* note 148 (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).

160. See Mar. 2, 2009 Interview with Young Man, *supra* note 139 (complaining about "taking a three-year loan" and having to pay back double at the end of that time). Interview with Owner of Numerous Small, Medium, and Large Business Enterprises, *supra* note 148 (complaining that "I cannot get a decent rate or even a term of more than about 30 months, even for a significant real estate purchase . . .").

as collateral.¹⁶¹ He and others complained bitterly that Nigerien banks refuse to invest in small business enterprises with prospects for long-term growth but trip over one another to loan hundreds of thousands of dollars each year to powerful business and political figures who use the money to buy enormous quantities of sugar before Ramadan, the Muslim month of fasting, when the faithful often break their fast by munching on sugar cubes.¹⁶² Without viable banks or other financial institutions, small businessmen in Niger are starved for capital, particularly expansion capital.¹⁶³

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.¹⁶⁴ A small retail operation such as a stall or small boutique in the *Grand Marché* 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.¹⁶⁵ With wholesale operations—for example, importing large quantities of electronic goods from distant countries and selling them in lots to merchants in the *Grand Marché* and other large urban markets—the margins are narrower than retail, but the profits are comparatively swift and certain.¹⁶⁶ 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,

161. Feb. 23, 2009 Interview with Young Man, *supra* note 103.

162. *See id.* *See also* Interview with Top Official, *supra* note 105.

163. 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, *supra* note 141 (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 Young Electronics Merchant, *supra* note 144. A detailed discussion of this parallel finance system is beyond the scope of this Article.

164. *See* Mar. 1, 2009 Interview with a Seller of Women's Shoes, *supra* note 151 (describing the benefits of moving from retail to wholesale); Interview with Young Electronics Merchant, *supra* note 144 (same); Interview with a Seller of Fabric in the *Grand Marché*, in Niamey, Niger (Mar. 12, 2009) [hereinafter Interview with Seller of Fabric] (on file with author) (same); Interview with a Young Money Changer, in Niamey, Niger (Mar. 11, 2009) (on file with author) (ruing that he had not accumulated enough capital to move to wholesale).

165. *See* Mar. 1, 2009 Interview with a Seller of Women's Shoes, *supra* note 151.

166. *See id.*; *see also* Interview with Young Electronics Merchant, *supra* note 144.

purchasing ever larger quantities of goods from ever more distant markets. This, small businessmen in Niger say, is the path to prosperity.¹⁶⁷

Moving from retail to wholesale, however, is not an easy progression.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ Nigerien businessmen's most common destinations for these wholesale-purchasing trips are the West African port cities of Cotonou, Lome, Abidjan, and Lagos.¹⁷¹ 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.¹⁷²

But the challenge of purchasing wholesale goods in distant lands links directly to Nigerien businessmen's challenge of accumulating expansion capital, because buying goods in quantity in distant ports requires a significant initial investment to cover the cost of bulk purchasing as well as the high costs of travel, shipping purchased goods back to Niger, clearing customs, and paying the requisite taxes.¹⁷³ To

167. Mar. 1, 2009 Interview with a Seller of Women's Shoes, *supra* note 151; Interview with Young Electronics Merchant, *supra* note 144. This mix of retail and wholesale operations helps explain the phenomenon, described in Part III.B.2.a, 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.

168. Interview with Seller of Fabric, *supra* note 164 (complaining that it is very difficult to move from retail to wholesale unless one has "connections"); *see* Mar. 1, 2009 Interview with Seller of Women's Shoes, *supra* note 151 (explaining that he already engages in some wholesaling but that he could really become prosperous if he could purchase wholesale goods from beyond Africa).

169. Mar. 1, 2009 Interview with Seller of Women's Shoes, *supra* note 151.

170. *See id.*

171. *See, e.g.*, Feb. 22, 2009 Interview with Seller of Women's Shoes, *supra* note 137 (mentioning purchasing trips to Lome, Abidjan, and Lagos).

172. *See* Interview with Young Electronics Merchant, *supra* note 144 (discussing the advantages of Dubai and China as purchasing destinations); Feb. 23, 2009 Interview with Young Man, *supra* note 103 (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, in Niamey, Niger (Mar. 13, 2009) (on file with author) (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* Feb. 22, 2009 Interview with Seller of Women's Shoes, *supra* note 137 (expressing frustration that he had not been able to finance purchasing trips beyond West Africa).

173. *See* Feb. 23, 2009 Interview with Young Man, *supra* note 103 (saying he could not launch a proper purchasing expedition because of lack of capital); *see also* Interview with

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.¹⁷⁴ 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.¹⁷⁵ No bank or other formal financial institution will loan him such an amount on viable terms.¹⁷⁶ 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 part.

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.¹⁷⁷ 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 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 part 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. This Article will then turn to a description of Niger's corruption and how it furnishes the rules of the game for the small business sector.

Young Electronics Merchant, *supra* note 144 (explaining how he avoids paying the heavy taxes and customs duties on goods he imports from Dubai and China).

174. Feb. 23, 2009 Interview with Young Man, *supra* note 103.

175. *Id.*

176. See *supra* notes 151-54 and accompanying text.

177. See *supra* notes 139-40 and accompanying text; see also SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 110 (1999) [hereinafter ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT] (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).

A. Corruption Emerges as a Global Issue

Corruption in the developing world emerged as a hot global topic in the 1990s.¹⁷⁸ During the Cold War, the United States and other Western powers were loath to focus on corruption for fear of driving developing countries' corrupt leaders toward the Eastern bloc.¹⁷⁹ 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.¹⁸⁰ 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 as political stability, public health, and economic prosperity.¹⁸¹ Because corruption was thought to retard these positive outcomes, anti-corruption programs migrated to the center of international development policy.¹⁸² Indeed, both the U.S. State Department and USAID proclaim the global battle against corruption as among their highest priorities.¹⁸³

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.¹⁸⁴ In the latest TI survey, for example, one

178. Patrick Glynn et al., *The Globalization of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 19, at 7.

179. 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*, 12 SW. J.L. & TRADE AM. 1, 3 (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 19, at 175-76.

180. Hendrix, *supra* note 179, at 9.

181. Glynn et al., *supra* note 178, at 9-10.

182. *Id.*; Hendrix, *supra* note 179, at 2 (noting that a powerful global consensus against corruption has emerged and that nearly 100 nations had signed the 2003 U.N. Convention Against Corruption and that the United States now views corruption as a threat to national security).

183. Hendrix, *supra* note 179, at 2-3.

184. Although such surveys have become an important tool of anti-corruption policy, they are subject to criticism because they are premised on the unproven assumption that there is a strong correlation between perceived and actual corruption. Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries?* [hereinafter Lambsdorff], in INTERNATIONAL HANDBOOK, *supra* note 26, at 3. It is beyond the scope of this Article 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

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.¹⁸⁵ Niger is ranked as number 123 out of 180 countries measured, not bad compared to many other sub-Saharan African countries.¹⁸⁶

As corruption became an important issue for Western aid agencies through the 1990s and 2000s, certain common prescriptions emerged. For example, many Western financed anti-corruption programs focused on paring back poor countries' civil services to limit the number of functionaries possessing sufficient discretionary power to extract rents from citizens.¹⁸⁷ 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.¹⁸⁸ Poor countries' government procurement systems were also a frequent target of corruption reforms.¹⁸⁹ Procurement fraud is the 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.¹⁹⁰ 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.¹⁹¹ Another

blitzes coupled with officially (but quietly) imposed temporary moratoria on petty corruption. See Interview with an American NGO Consultant, in Niamey, Niger (Mar. 4, 2009) [hereinafter Interview with American NGO Consultant] (on file with author) (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 179, 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 American NGO Consultant, *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 128, at 3 (questioning the validity of corruption perception surveys).

185. TRANSPARENCY INTERNATIONAL, *Corruption Perceptions Index 2010*, at 2-3 (2010), http://www.locationselector.com/images/stories/featured_reports/CPI_report_ForWeb.pdf.

186. *Id.*

187. Lambsdorff, *supra* note 184, at 5; see ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 177, at 42-59 (describing anti-corruptions programs' efforts to privatize industry as a means of shrinking government and eliminating discretion).

188. ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 177, at 69-71.

189. *Id.* at 59.

190. See *infra* Part V.B.1.

191. See Lambsdorff, *supra* note 184, at 40 (reporting studies that show high correlation between vibrant free press and low levels of corruption). It is beyond the scope of this Article to

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)¹⁹² to persuade them to enforce the new anti-corruption laws.¹⁹³

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 Article 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, this Article 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.¹⁹⁴ Anthropologists, in contrast, generally believe that bright line definitions fail to capture the

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 (Feb. 26, 1999), *supra* note 27. 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 exposé 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* (Mar. 11, 2010), available at http://niamey.usembassy.gov/2009_nigerhrr.html (describing several instances where journalists were jailed after reporting on government corruption). *But see* U.S. DEPARTMENT OF STATE, *2010 Human Rights Report: Niger* 11 (Apr. 8, 2011) (reporting that "[a]fter Tandja was deposed, independent media were active and expressed a wide variety of views without restriction"), <http://www.state.gov/documents/organization/160138.pdf>.

192. *See* ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 177, at 153-56.

193. *See id.* at 68, 151-55 (discussing the importance of consistent enforcement of clear criminal laws in combating corruption); *see also* Lamsdorff, *supra* note 184, 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 179, 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).

194. *See* ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 177, at 9; *see also* Rose-Ackerman, *supra* note 26, at xvii (defining corruption as a private individual or firm paying a public official in return for a benefit).

peculiarities of corruption in the contexts of particular cultures.¹⁹⁵ 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.¹⁹⁶ This Article shares anthropologists’ more flexible definition: gift-giving, favoritism, and influence peddling are among the many strategies for gaining favorable access to governmental services and they must be understood as part of the complex of corruption even if they would not be counted as corruption in a survey or explicitly sanctioned by an anti-corruption law.¹⁹⁷

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.¹⁹⁸ 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.¹⁹⁹ This brand of

195. See Blundo & de Sardan, *supra* note 26, at 12 (arguing that anthropology is better suited than other disciplines to the study of petty corruption because it “can assess shaded areas”).

196. *Id.* at 5; see Interview with Manager of a Rental Car Business, in Niamey, Niger (Feb. 24, 2009) (on file with author) (explaining that it is vital for businessmen in Niamey to have friends in high places and pulling out a three-ring binder to display dozens of business cards from government ministers and others highly placed in Niger’s government); Interview with Seller, *supra* note 95 (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).

197. See Interview with Manager of Rental Car Business, in Niamey, Niger (Mar. 2, 2009) (on file with author) (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).

198. See Howard W. French, *An Anatomy of Autocracy: Mobutu’s Era*, N.Y. TIMES, May 17, 1997, available at <http://www.nytimes.com/1997/05/17/world/an-anatomy-of-autocracy-mobutu-s-era.html?pagewanted=all&src=pm> (discussing the massive, legendary state corruption in the former Zaire).

199. See *id.* at 1 (discussing the Mobutu era and its corruption); Adam Nossiter, *Underneath Palatial Skin, Corruption Rules Gabon*, N.Y. TIMES, Sept. 15, 2009, available at <http://www.nytimes.com/2009/09/15/world/africa/15libreville.html> (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, available at <http://www.nytimes.com/2009/06/09/world/africa/09bongo.html> (mentioning Bongo’s “dozens of luxurious properties around Paris, a \$500 million presidential palace, [and] fancy cars”).

“grand corruption”²⁰⁰ exists in Niger, but it tends not to be so eye-popping, perhaps because of the country’s dearth of exploitable natural resources.²⁰¹ Instead, “petty corruption”²⁰² furnishes the rules of the game for businesses in Niger and indeed for most social, legal, economic, and political transactions.²⁰³ 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 Part V.B focus on bribery and fraud in government procurement, and on specific methods for cheating on taxes and customs duties.²⁰⁴

C. What’s Wrong with a Little Corruption?

This Article argues 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 1970s, characterized corruption in the developing world as a healthy reaction to overly complicated and repressive government regulations,²⁰⁵ as grease that caused muddled government bureaucracies

200. Rose-Ackerman, *supra* note 26, at xix (defining the term “grand corruption”).

201. 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 also paying large amounts of cash directly to him. See generally Adam Nossiter, *After a Coup, Niger Resumes Business as Usual with China*, N.Y. TIMES, Apr. 24, 2010, available at <http://www.nytimes.com/2010/04/25/world/africa/25niger.html?pagewanted=all> (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).

202. See Elliott, *supra* note 179, 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, *supra* note 26, at xvii, xviii (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* [hereinafter Kahn], in INTERNATIONAL HANDBOOK, *supra* note 26, at 220 (employing the term “petty corruption” and noting that the poor and powerless are most often its victims); Hendrix, *supra* note 179, at 2, 4 (employing the term “administrative corruption” to refer to the same phenomenon).

203. Blundo & de Sardan, *supra* note 26, 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, *supra* note 197 (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).

204. See *infra* Part V.B.2.

205. Lambsdorff, *supra* note 184, at 4.

to move more efficiently.²⁰⁶ In a similar vein, some scholars argued that corruption was a rational reaction—or even a heroic example of popular resistance—to the deviant practices of predatory post-Independence states.²⁰⁷

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.²⁰⁸

Corruption also leads to inefficient policy decisions, since public goods are allocated to those who have sufficient capital to pay bribes

206. Mark Pieth, *International Cooperation to Combat Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 19, at 120; *see* Ray Fisman & Roberta Gatti, *Bargaining for Bribes: The Role of Institutions*, in INTERNATIONAL HANDBOOK, *supra* note 26, at 127 (referencing a 1968 study by Huntington that referred to petty corruption as a form of "personalized de-regulation"). It is far beyond the scope of this Article 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 177, at 65. *But see* Giorgio Blundo, *Corruption in Africa and the Social Sciences: A Review of the Literature* [hereinafter Blundo], in EVERYDAY CORRUPTION, *supra* note 26, at 61-64 (mentioning studies that conclude that raising salaries does not work in an atmosphere of rampant corruption); Lambsdorff, *supra* note 184, 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 38 (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 15, at 1006-08 (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 (stating 90% of public investment and 30% of ongoing state expenses in sub-Saharan Africa come from foreign aid). The projects are, practically without fail, rife with corruption. *See id.*; *see* Feb. 23, 2009 Interview with Young Man, *supra* note 103 (claiming that Nigerien ministries tend to squash innovative business formalization programs proposed by Nigerien businessmen because they want to keep the NGO gravy for themselves).

207. Blundo, *supra* note 206, at 20.

208. Kahn, *supra* note 202, at 220-21; *see infra* note 270 (describing how Nigerien bureaucrats sometimes sell speed rather than the service itself).

rather than the most efficient producers.²⁰⁹ 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.²¹⁰ Rather than serving the needs of citizens, public investment funds end up paying for roads that crumble, buildings that fall down, and factories that produce goods that no one wants.²¹¹ In the terminology of economists, the corrupt transactions produce a “deadweight loss” for society.²¹²

In addition to its inefficiencies, corruption exacerbates unfairness in developing countries because it favors the interests of haves over the have-nots.²¹³ In societies where citizens must bribe governmental officials to obtain services from the state, only those who are already wealthy or are connected to wealth and power have the means.²¹⁴ The result is that developing countries’ strained, often ineffective social service networks are unable to deliver services to the poor.²¹⁵

Finally, some argue that corruption harms developing countries by impeding democratization.²¹⁶ The public in developing democracies comes to believe that government is for sale to the highest bidder,²¹⁷ and that market based economic systems, dragged down by the inefficiencies described above, are unworkable.²¹⁸ They begin to yearn for the comparatively less corrupt,²¹⁹ economically predictable systems that preceded democratization.²²⁰

209. Rose-Ackerman, *supra* note 26, at xix.

210. Second Interview with Owner, *supra* note 137 (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* [hereinafter Rose-Ackerman, *Political Economy*], in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 19, at 42 (noting that corrupt firms and individuals that receive government contracts often skimp on quality).

211. See ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 177, at 3; see Pieth, *supra* note 206, at 121 (noting that some corrupt governments organize huge public works projects for the sole purpose of graft, leaving the next generation to pay).

212. Kahn, *supra* note 202, at 221 (employing the term “deadweight loss”).

213. Rose-Ackerman, *Political Economy*, *supra* note 210, at 33.

214. See *id.* at 42 (arguing that corruption distributes a country’s wealth to insiders and corrupt bidders).

215. Hendrix, *supra* note 179, at 5; see Rose-Ackerman, *supra* note 26, at xvi, xix (arguing that policymakers should consider the negative effects that corruption has on poor citizens dependent on the state for assistance).

216. Hendrix, *supra* note 179, at 5.

217. Rose-Ackerman, *Political Economy*, *supra* note 210, at 45.

218. See Glynn et al., *supra* note 178, at 8.

219. See *infra* note 249 (discussing the alleged link between democratization and increased corruption).

220. There is disagreement among scholars—particularly economists—over whether corruption harms countries by impeding overall economic growth. Rose-Ackerman, *Political Economy*, *supra* note 210, at xvi. Some studies conclude yes, others no. According to Susan

III. 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.²²¹ Police and customs jobs are particularly valued because they involve frequent interactions with end users and thus frequent opportunities for rent extraction.²²² 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.²²³ In contrast, few want to work for or do business with Niger's 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.²²⁴

There is fierce competition among Nigerien functionaries for the more lucrative posts²²⁵ and that competition has given rise to a lively market in which higher level functionaries sell government positions to

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. *Id.*; Kahn, *supra* note 202, at 218. As she and others point out, however, the world includes numerous examples of countries that have enjoyed strong economic growth in spite of rampant corruption. *See id.* at 216-17; *see also* Kahn, *supra* note 202, at 187 (noting that most developing countries suffer from endemic corruption but that some grow much faster than others).

221. Blundo & de Sardan, *supra* note 26, at 89.

222. *See* ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 177, at 73 (stating that positions in police departments are coveted because of opportunities to engage in corruption); Rose-Ackerman, *Political Economy*, *supra* note 210, at 32 (stating that customs and tax collectors are particularly notorious for corruption).

223. Interview with a Seller, *supra* note 95 (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).

224. ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 177, at 73. *But see* Interview with a Former Employee of Niger's Ministry of Foreign Affairs, in Niamey, Niger (Mar. 1, 2009) [hereinafter Interview with Former Employee] (on file with author) (describing his experience with certain “standard” corrupt purchasing practices within Foreign Affairs).

225. *See* Interview with an Employee of Niger's Tax Service, *supra* note 130 (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 Nigerien Customs Official, *supra* note 29 (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).

lower level functionaries, sometimes for a lump sum, sometimes for monthly rent.²²⁶ The lower level functionaries who successfully produce wealth from their positions, and who regularly send wealth upstream to their superiors, are rewarded with ever-more lucrative positions.²²⁷ 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,”²²⁸ meaning they are stuck in lower-level positions without opportunities for supplementing their salaries, passed over for promotion and training opportunities, and, more often than 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.²²⁹

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.²³⁰ All commercial vehicles are obliged to stop and all must pay what is in essence a quasi-official toll before continuing.²³¹ 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.²³²

Corrupt practices in Niger are guided by their own practical rules and customs.²³³ In many cases, the amount of the appropriate bribe is known to all.²³⁴ When a commercial truck driver is stopped by a

226. See ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 177, at 82 (stating that in corrupt government hierarchies, payment to superiors becomes essentially a rent to hold on to lower level positions).

227. *Id.*

228. Blundo & de Sardan, *supra* note 26, at 90.

229. See Interview with an Employee of Niger’s Tax Service, *supra* note 130 (discussing administrative banishment). In explaining the banishment problem, Nigerien functionaries sometimes use the French term *limoger*, which is translated by most dictionaries as “to dismiss” but derives historically from French bureaucrats’ fear that they would be administratively banished to the reputedly backward and isolated city of Limoges, France.

230. See Blundo & de Sardan, *supra* note 26, at 77 (referring to the itinerant customs inspectors as “flying squads”); see also Arifari, *supra* note 136, at 180 (claiming the roads in Niger, Senegal and Benin are “dens of routine and highly visible institutionalized corruption”).

231. Blundo & de Sardan, *supra* note 26, at 77.

232. 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.

233. Blundo & de Sardan, *supra* note 26, at 84.

234. See Giorgio Blundo, *An Ordered Corruption? The Social World of Public Procurement*, in EVERYDAY CORRUPTION, *supra* note 26, at 229 (arguing that corruption in West

gendarme, he and all other drivers will know that the price is 2000 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.²³⁵

Corrupt practices are also generally governed by norms that determine fair play within the system.²³⁶ For example, if there is a particular stretch of Nigerien highway that usually has a gendarme stop on it that costs the commercial drivers 2000 CFA,²³⁷ 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.²³⁸

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 part.

B. Corruption in Niger’s Business Sector

1. Corruption in Public Purchasing Contracts as a Source of Expansion Capital

Proprietors of small businesses in Niger struggle to obtain capital to expand their enterprises.²³⁹ They aspire to move up the commercial chain from retail to wholesale, usually by mounting international purchasing expeditions.²⁴⁰ However, unless the businessmen are connected to wealthy families,²⁴¹ their only hope of obtaining a financial windfall large enough to finance their expeditions is to engage in corrupt transactions with the government.²⁴² In a country where the economy is dominated by subsistence farming and animal husbandry,²⁴³

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).

235. Michael Johnston, *Public Officials, Private Interests, and Sustainable Democracy: When Politics and Corruption Meet*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 19, at 62.

236. Blundo & de Sardan, *supra* note 26, at 84; see Arifari, *supra* note 136, at 179 (illustrating an instance of fair play among corrupt officials).

237. Arifari, *supra* note 136, 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).

238. *Id.* at 179; Blundo & de Sardan, *supra* note 26, at 77.

239. See *supra* Part III.B.2.b.

240. *Id.*

241. See Mar. 2, 2009 Interview with Young Man, *supra* note 139.

242. See *id.* (stating Niger’s government is the only source for expansion capital).

243. See CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 469 (2010), available at

where there are few commercial enterprises of any size,²⁴⁴ and where the banking and finance sector is moribund,²⁴⁵ the government, which purchases comparatively large quantities of goods and services, is the only game in town.²⁴⁶

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.²⁴⁷ They work their networks of kinship, friendship,²⁴⁸ and to an increasing degree, political party affiliation,²⁴⁹ hoping to identify officials on the inside of

<https://www.cia.gov/library/publications/the-world-factbook/geos/ng.html> (describing Niger's economy as agrarian and subsistence).

244. See *supra* notes 117-19 and accompanying text.

245. *Id.*

246. See *id.* (explaining that the government accounts for a large percentage of Niger's economic activity).

247. See *supra* notes 95, 222-24 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, *supra* note 95 (explaining that his true vocation is chasing procurement contracts of any sort); Interview with Manager of a Rental Car Business, *supra* note 196 (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, *supra* note 95 (saying "knowing people" is the key to his business).

248. See Interview with Seller, *supra* note 95 (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).

249. See Mar. 2, 2009 Interview with Young Man, *supra* note 139 (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 206, 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. Villalón & Abdourahmane 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. Villalón & Peter Von Doepp 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 *id.* Peter Von Doepp & Leonardo A. Villalón, *Elites, Institutions, and the Varied Trajectories of Africa's Third Wave Democracies* (referring to the fact that post-Cold War African governments were forced to adopt good governance reforms). The leaders quickly learned that the only effective tool they had left for illegitimately remaining in power was the personal patronage network. Rose-Ackerman, *supra* note 26, at xix; see Rose-Ackerman, *Political Economy*, *supra* note 210, at 45 (noting that corrupt governments do not have to

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.²⁵⁰ The businessman who has been favored by the corrupt official must in turn split the ill-gotten profits with that insider.²⁵¹ If the system of corruption is working well, both the insider and the businessman will prosper.²⁵²

The specific methods employed by the businessmen and their corrupt government collaborators are varied and ever evolving, but several are considered standard practice.²⁵³ One is to avoid scrutiny by segmenting purchasing contracts into small units that are not subject to public bidding regulations.²⁵⁴ Under present law, any government purchase of goods or services of a value less than 5 million CFA

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. *Id.*; see also Kahn, *supra* note 202, 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 & de Sardan, *supra* note 26, at 71; see also Interview with Young Owner of Metal Fabrication Business, in Niamey, Niger (Mar. 13, 2009) (on file with author) (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 business people, whom they then employed as conduits for creating and transferring cash to expand their political power. See Second Interview with Owner, *supra* note 137 (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, *supra* note 26, 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 206, at 51.

250. See Blundo, *supra* note 234, at 228 (stating that each decision-maker inside government has "his" businessmen whom he can count on).

251. Second Interview with Owner, *supra* note 137 (providing a general description of how procurement corruption works); see also Mar. 1, 2009 Interview with Seller of Women's Shoes, *supra* note 151 (stating that businessmen must always pass the "envelope" back to the government insider); Mar. 2, 2009 Interview with Young Man, *supra* note 139 (same).

252. Second Interview with Owner, *supra* note 137.

253. Interview with a Former Employee, *supra* note 224 (referring to "standard" methods of corrupt purchasing within the ministry).

254. Blundo, *supra* note 234, at 233-34; see also Interview with Young Owner of Metal Fabrication Business, *supra* note 249 (referring to the practice of segmenting government purchasing contracts to avoid scrutiny).

(approximately \$10,000) can be entered into without a public bidding process.²⁵⁵ 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.²⁵⁶

A businessman's profits on a \$10,000 purchasing contract are typically quite low,²⁵⁷ 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.²⁵⁸ Once the businessman has purchased and shipped the goods, and then shared as much as half of his profits with his inside collaborator, he might clear less than \$1,000.²⁵⁹ 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.²⁶⁰

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 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.²⁶¹ The insider might require an up-front payment from the businessman, plus a

255. See Blundo, *supra* note 234, at 227-32.

256. *Id.* at 233; see also Mar. 2, 2009 Interview with Young Man, *supra* note 139 (discussing his recent receipt of a procurement contract for computer paper in an amount just under 5 million CFA).

257. Mar. 2, 2009 Interview with Young Man, *supra* note 139 (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).

258. See Pieth, *supra* note 206, at 121 (stating that corruption leads the government to purchase inadequate equipment); see also Rose-Ackerman, *Political Economy*, *supra* note 210, at 42 (stating that corrupt actors in government purchasing often increase their profits by skimping on quality).

259. See Interview with Manager of Rental Car Business, *supra* note 196 (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, *supra* note 172 (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).

260. See Mar. 1, 2008 Interview with Seller of Women's Shoes, *supra* note 151 (explaining the need for expansion capital and bemoaning that small government procurement contracts, though welcome, did not provide sufficient capital); see also Mar. 3, 2009 Interview with Young Man, *supra* note 139 (explaining a similar need).

261. See Blundo, *supra* note 234, at 241 (mentioning the practice of government insiders leaking privileged bidding information to their outside business collaborators).

share of the downstream profits once the purchasing transaction is complete.²⁶² 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.²⁶³

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 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.²⁶⁴ 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.²⁶⁵ Similarly, corrupt ministry officials can withhold from all but their chosen businessmen the documents necessary to formally bid on a contract.²⁶⁶ 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.²⁶⁷

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,²⁶⁸ or, if the committee members are independent, intimidate them by applying political pressure.²⁶⁹ If the financial prize is large enough, the corrupt

262. See Blundo & de Sardan, *supra* note 26, at 73 (stating that corrupt payments to government insiders sometimes take the form of a fixed payment plus an ongoing rent); see generally Interview with the Owner of an Auto Parts Shop Near the New Market, *supra* note 172 (discussing a corrupt transaction with the Department of Defense where he was compelled to turn over most of his profits to government insiders).

263. See ROSE-ACKERMAN, *Political Economy*, *supra* note 210, at 34-35.

264. Blundo, *supra* note 234, at 241.

265. *Id.*

266. *Id.* at 240.

267. *Id.* at 243.

268. See Hendrix, *supra* note 179, 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”).

269. See *supra* notes 225-26, 249 and accompanying discussion (discussing the rise of party politics and politician’s use of administrative banishment to control civil servants). There is a somewhat less common but still renowned method of employing political power to skirt purchasing regulations. If a politician is prominent enough, he can establish a “special fund.” These funds are typically earmarked for appealing purposes such as stimulating literacy for young women or combating childhood diseases. Because the funds’ aims are so urgent, and because the normal government purchasing strictures are known to be cumbersome, the high

official can simply buy the committee members off with shares of the proceeds.²⁷⁰

Party politics play an increasingly important role in shaping the rules of the game of business-government corruption.²⁷¹ 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.²⁷² Residents of Niamey tell stories of once obscure businessmen who have become wealthy and powerful through government purchasing contracts tied to party politics.²⁷³ The dominant role of party affiliation increases the deadweight loss to society because, to an increasing extent, men with limited talent and experience but strong political connections are awarded important public contracts. Illiterate sheep herders win contracts to purchase and service thousands of computers that they do not even know how to turn on.²⁷⁴ Men who have spent their careers as

official receives unfettered discretion to spend the money for the stated purposes. Blundo, *supra* note 234, at 237. The politician and his corrupt collaborators are then relatively free to enrich themselves. See Feb. 23, 2009 Interview with Young Man, *supra* note 103 (referring to the abuse of special accounts, including former President Tanja's special fund for building rural schools).

270. Blundo, *supra* note 234, 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. *Id.* 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 Article 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, *supra* note 206, 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, *supra* note 224 (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); Mar. 1, 2009 Interview with Seller of Women's Shoes, *supra* note 151 (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, *Political Economy*, *supra* note 210, at 39. Perhaps most galling to end users of government services, bureaucrats behave arbitrarily or ambiguously and thereby create a demand for clarity that they must pay for. *Id.*

271. See *supra* note 249 and accompanying text.

272. See *id.*; Feb. 23, 2009 Interview with Young Man, *supra* note 103 (expressing distaste for the new rules of the game that require businesspeople to be active in political parties).

273. See *supra* note 249; see also Blundo, *supra* note 234, at 249 (offering an example of a small business owner who became fabulously successful as a result of a Prime Minister's support).

274. Mar. 2, 2009 Interview with Young Man, *supra* note 139; see Blundo, *supra* note

tailors but who became active in party politics end up in charge of constructing large government buildings.²⁷⁵ The government pays higher than necessary prices for goods and services that are often of inferior quality and,²⁷⁶ even more troubling, pays for equipment (including medical equipment) that does not work, and buildings and roads that crumble.²⁷⁷

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.²⁷⁸ Those who lack good luck, as well as ties of family, friendship, or political affiliation, have faint hope of prospering.²⁷⁹

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

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

For small-scale businessmen, this can mean the straightforward

234, 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 50% of profits for the sheep seller who obtained the contract, 50% to the person who actually does the work).

275. See Blundo, *supra* note 234, at 251.

276. Rose-Ackerman, *Political Economy*, *supra* note 210, at 42; see *supra* Part IV.C.

277. See Blundo, *supra* note 234, at 248 (arguing that businessmen who are completely unqualified often receive the bids to carry out government purchasing and services); see also Rose-Ackerman, *Political Economy*, *supra* note 210, at 42 (noting that corruption causes government contracts to go to providers who are less efficient and who skimp on quality). Reformers try to limit this sort of corruption and prevent dangerous conditions in public works projects by establishing review boards to inspect and verify that public works have been performed adequately. But the review boards, like all other government institutions, are simply intimidated by political pressure or paid off in exchange for peremptorily approving the results they were supposed to verify. Blundo, *supra* note 234, at 255.

278. See *supra* note 164; see also *supra* text accompanying notes 167-68.

279. See Interview with Seller of Fabric, *supra* note 164 (ruing that he has no such connections and will never be able to move beyond his small retail stall); see generally Blundo, *supra* note 234, at 256-57 (arguing that if a businessman wants to obtain expansion capital, there is little alternative but to participate in corruption).

negotiation with tax officials over the amount of taxation owed. In a typical corrupt, tax avoiding transaction, a government tax collector agrees to understate the amount that the business owes, and the businessman then pays the official a percentage of the difference.²⁸⁰ 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,²⁸¹ 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*.²⁸² Once the goods have been turned over to the *transiteur*, the businessman need not think about them further until they arrive at a lot adjacent to the *Grand Marché* in Niamey, having already cleared customs and owing no further taxes.²⁸³ The businessman need not dicker with customs agents regarding the classification of the goods²⁸⁴ or fill out paperwork:

280. See Interview with the Owner of a Small Hotel and Several Bars, in Niamey, Niger (Mar. 12, 2009) (on file with author) (claiming he constantly must bargain with tax collectors over the amount of his payments); Interview with an Employee of Niger's Tax Service, *supra* note 130 (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).

281. At least one author refers to the *transiteurs* as "ambulant customs brokers." See Arifari, *supra* note 136, at 187.

282. 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" *transiteur* in a given port, but will switch to a competing *transiteur* if the competitor can produce better results in terms of speed or price. Interview with the Owner of an Auto Parts Shop Near the New Market, *supra* note 172 (explaining that he recently switched *transiteurs* and that the new one is cheaper and faster); see also Mahaman Tidjani Alou, *Etat, réseaux marchands et mondialisation. Le cas des convois au Niger*, 15 *Les Nouveaux cahiers de l'Institut universitaire d'études du développement* 125 (2004) [State, Market Networks and Globalization. For Convoys in Niger, 15 *The New Papers of the Graduate Institute of Development Studies* 125 (2004)] (copy on file with author) (explaining that most merchants in Niger use *transiteurs* to reduce expenses and avoid entanglement with the government).

283. Mar. 1, 2009 Interview with Seller of Women's Shoes, *supra* note 151.

284. See Arifari, *supra* note 136, at 191 (explaining that many Nigerien businessmen employ *transiteurs*—even when their businesses 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).

all of that has already been taken care of by the *transiteur*.²⁸⁵ 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.²⁸⁶

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,²⁸⁷ many of whom were customs officials at some point in their past, who know how to manipulate, circumvent, and undermine Niger's governmental bureaucracy.²⁸⁸ They or their agents can be found in ports where Nigeriens do business: West Africa ports such as Cotonou, Lome, Abidjan and Dakar, as well as far flung trading destinations such as Dubai and China.²⁸⁹ They are also present and active at all border points entering Niger.²⁹⁰

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, negotiate directly with Nigerien customs officials to establish vastly discounted customs rates.²⁹¹ The customs rates are typically 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.²⁹² Other than the customs officials' steeply discounted estimation of the value of the bundled goods, nothing concerning the transaction goes in writing.²⁹³

285. Mar. 1, 2009 Interview with Seller of Women's Shoes, *supra* note 151 (saying his *transiteur* takes care of the entire process of transporting the goods and shepherding them through customs); *see also* Interview with Young Electronics Merchant, *supra* note 144 (claiming he never deals with customs agents because he employs a *transiteur* who "arranges" everything).

286. Interview with the Owner of an Auto Parts Shop Near the New Market, *supra* note 282 (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).

287. Arifari, *supra* note 136, at 182 (arguing that smuggling is a systematic activity often carried on by extremely influential actors).

288. *See id.* at 190 (stating *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).

289. *Id.* at 189.

290. *Id.* at 190.

291. *Id.* at 199.

292. *See id.* (stating that customs duties are usually negotiated in bulk rather than by category); *see also* Alou, *supra* note 282, 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, is typically based on the volume of the bundled goods in the caravan, and that no one actually looks inside the boxes).

293. Arifari, *supra* note 136, at 213; *see* Alou, *supra* note 282, at 136 (stating the entire transaction is paperless).

and the entire business is transacted in cash.²⁹⁴

Customs officials are willing to participate in this system, of course, because the *transiteurs* pay cash bribes to everyone up and down the governmental chain of command.²⁹⁵ 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 lower level customs officials who dot the convoys' routes and guard the border crossings into Niger. When the convoy of goods finally arrives in Niamey, the *transiteur* simply adds up his total outlay for the steeply discounted customs and taxation payments, the bribes paid, and the cost of transport, adds his profit margin, and bills the businessmen on a pro rata basis.²⁹⁶

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 only a fraction of the desperately needed customs proceeds it should receive.²⁹⁷

3. Impunity for Corrupt Practices

Customs duties account for more than half of Niger's budget²⁹⁸ 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.²⁹⁹

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

294. Arifari, *supra* note 136, at 189.

295. *See id.* at 187 (arguing that corruption among customs officers generally reaches to the top rungs of the government).

296. Alou, *supra* note 282, at 135.

297. *See id.* at 140 (explaining that the state receives some money but far less than it would if the laws were enforced, because the negotiated duties are low and the *transiteurs* and corrupt officials each take a slice of the proceeds).

298. Arifari, *supra* note 136, at 184.

299. *Id.* at 184-85.

activity to those who engage in it is the probability of being caught times the probability of being convicted times the amount of punishment levied.³⁰⁰ 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.³⁰¹ 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.³⁰² 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.³⁰³ 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.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶

Even where a bureaucrat accused of corruption lacks political ties, he has little to fear as long as he has cash on hand because the Nigerien justice system itself is notoriously corrupt from bottom to top.³⁰⁷ 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.³⁰⁸ If an

300. Rose-Ackerman, *Political Economy*, *supra* note 210, at 40.

301. *See supra* notes 249; *see also supra* text accompanying note 273.

302. *See supra* notes 225.

303. *See generally* Interview with Young Electronics Merchant, *supra* note 144 (stating that justice in Niger is a matter of political influence and money); Interview with an Employee of Niger's Tax Service, *supra* note 130 (stating that owners of large businesses often pay no tax and know they will be shielded from prosecution by high ranking members of their political parties); *see also* Interview with a Prominent Lawyer, in Niamey, Niger (Mar. 5, 2009) (on file with author) (claiming that everyone knows that the outcomes of investigations and trials are routinely determined by phone calls from ministers' offices); Alou, *supra* note 282, at 156-60 (similar).

304. *See* Interview with Manager of Rental Car Business, *supra* note 196 (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).

305. *See id.*; *see also supra* notes 229 and accompanying text (discussing administrative banishment).

306. *See* Johnston, *supra* note 235, at 64 (arguing that anti-corruption enforcement is commonly used as a tool to attack political rivals); *see also* Blundo & de Sardan, *supra* note 26, at 7 (arguing that elites use the war against corruption to eliminate their political enemies and settle old scores).

307. *See* Interview with Young Electronics Merchant, *supra* note 144 (stating that in Niger, there is a widespread view that justice is for sale).

308. *See id.* (stating that much of the judiciary is influenced by "friends" who call in favors).

accused bureaucrat is not being actively punished by powerful actors who order the judges to convict him,³⁰⁹ he can simply pay the judges to make the accusations and investigations go away.

VI. CONCLUSION

In some respects this Article'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 Article'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.

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. United States 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

309. See Blundo & de Sardan, *supra* note 26, at 7 (arguing that elites use the war against corruption to eliminate their political enemies and settle old scores).

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 *transiteurs* 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 Article 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 IV.C, it is not an institution that many Nigeriens 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 Article 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. Douglass 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.³¹⁰ 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

310. See North, *supra* note 47; see also *supra* text accompanying notes 50, 55.

Western capitalist entrepreneurship—who rue the fact that the system of corruption now in place prevents them from moving up in the market and competing. In their view, the corrupt collaborators within the governmental and business sectors wish to keep the system the same because they wish to keep the spoils for themselves and block ambitious young entrepreneurs from entering.³¹¹

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.³¹² This momentum might, just might, overcome corruption's path dependency and begin to dislodge it from its foundational position in Niger's businesses, government and judiciary.

311. See, e.g., Interview with a Young Hydrologist Entrepreneur, in Niamey, Niger (Mar. 5, 2009) (on file with author); Interview with Three Members of the Young Chamber, *supra* note 139.

312. ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 177, at 108.