

The Cooperative as a Proletarian Corporation: The Global Dimensions of Property Rights and the Organization of Economic Activity in Cuba

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Abstract: Since the 1970s, the relationship between productive property, and the state and individual has been contested in Marxist-Leninist nations. Though China has moved to permit robust private activity and the private aggregations of capital in corporate form, Cuba has strictly adhered to traditional communist principles. In the face of recent financial upheavals, Cuba is seeking to liberalize its approach to economic organization, but in a way that would retain a state monopoly of the use of the corporate form while opening a small and well-managed consumer oriented private sector. Among the most innovative alternatives being developed is the cooperative, which has the potential to develop into a useful form of what this Article calls a proletarian corporation. But innovation faces substantial hurdles. This Article examines in Part II the context for the development of this new approach to cooperative organization. Part III then turns to a close study of the cooperative and its constraints, starting with a consideration of the agricultural cooperative as template for changes. It then turns to a critical consideration of the development of a theoretical basis for changing the function and operation of cooperatives developed by Cuban intellectuals, and ends with an examination of the transposition of that theory into the guidelines for restructuring the Cuban economy (Lineamientos) adopted by the Cuban government, and then articulated through a regulatory framework. Part IV then briefly considers the role of the cooperative in efforts to internationalize the Cuban economic model through vehicles such as the Alianza Bolivariana. This Article concludes that while the cooperative fits nicely within Cuba's efforts to develop a complex and

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well-integrated program of economic organization, its theoretical elegance remains in tension with the realities of Cuban politics. This tension increases the risk that cooperatives will be reduced to little more than a means of privatizing central planning.

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I. INTRODUCTION

Cuba has been facing increasingly challenging economic problems since the fall of the Soviet Union¹ and the end of the Soviet system of state-to-state based economic activity.² In the absence of Soviet aid, and in the face of U.S. political and economic hostility,³ Cuba has sought new partners and allies.⁴ Cuba also has increasingly experimented with innovative ways of organizing economic activity that avoid reducing the paramount power

¹ See Jorge Pérez-López, *The Cuban Economic Crisis of the 1990s and the External Sector*, 8 CUBA TRANSITION 386, 386 (1998), <http://www.ascecuba.org/publications/proceedings/volume8/pdfs/41perez.pdf>.

² On the Soviet trade system, see Nicolas Spulber, *The Soviet Block Foreign Trade System*, 24 L. & CONTEMP. PROBS. 420 (1959). Even before the collapse of the Soviet Union and its trade system, some argued that the Soviet economic trade model mimicked, in one important respect, the exploitative traits of Western markets-based trade systems. See David Ray, *The Dependency Model of Latin American Underdevelopment: Three Basic Fallacies*, 15(1) J. INTERAMERICAN & WORLD AFF. 7–10 (1973) (arguing that Soviet economic imperialism produces economic dependence within the Soviet system similar to that ascribed to capitalist states in their relationship with developing states); but see Guy J. Gilbert, *Socialism and Dependency*, 1 LATIN AM. PERSPS. 107 (1974).

³ See generally Daniel Hansen, Dayne Batten & Harrison Ealey, *It's Time for the U.S. to End Its Senseless Embargo of Cuba*, FORBES (Jan. 16, 2013, 8:36 AM), <http://www.forbes.com/sites/realspin/2013/01/16/its-time-for-the-u-s-to-end-its-senseless-embargo-of-cuba/>; see also *Cuba*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/cuba/index.html> (last visited Mar. 20, 2013) (news, reference, and archival information as well as photographs, graphics, audio, and visual files published on Cuba).

⁴ Among the most important partners are China, Venezuela and Brazil. See Agence Fr. Presse [AFP], *China Pledges Financial Aid to Cuba's Castro*, GOOGLE NEWS (July 5, 2012), http://www.google.com/hostednews/afp/article/ALeqM5jp478hKoBt_VhSt_Fig-sg5y7wsw?docId=CNG.729b36b74b4f8c4edaf9dedb0dad5cb.401 (“China on Thursday pledged financial aid to Cuba as it undertakes historic economic reforms, promising visiting President Raul Castro a new credit line as well as help in health care and technology.”); Juan O. Tamayo, *Raul Castro's Long Trip to China Raises Questions About a Secret Stopover*, MIAMI HERALD (July 5, 2012), <http://www.miamiherald.com/2012/07/05/2883487/raul-castros-long-trip-to-china.html#storylink=cpy> (“China is Cuba's second or third-largest trade partner after Venezuela and neck-and-neck with Canada, with bilateral trade totaling \$1.8 billion in 2010. Beijing's interests in Cuba and other parts of the Caribbean have been growing in recent years.”); see generally María Alejandra Calle, *A Brief Note About the China-Latin American Trade Partnership: An Opportunity for Trade Diversification or a Threat to a Green Agenda in the Region?*, 3 REVISTA DE NEGOCIOS INTERNACIONALES 57 (2010), available at <http://publicaciones.eafit.edu.co/index.php/rni/article/download/50/48>; Daniel Erickson, *Cuba, China, Venezuela, New Developments*, 15 CUBA TRANSITION 410 (2005), <http://www.ascecuba.org/publications/proceedings/volume15/pdfs/erikson.pdf>; Jorge F. Pérez-López, *Swimming Against the Tide: Implications for Cuba of Soviet and Eastern European Reforms in Foreign Economic Relations*, 33 J. INTERAMERICAN STUD. & WORLD AFF. 81 (1991); Hernán Yáñez, *The Cuba-Venezuela Alliance: 'Emancipatory Neo-Bolivarismo' or Totalitarian Expansion* (Inst. for Cuban & Cuban Am. Studies, Occasional Paper No. 7, 2005), available at <http://scholarlyrepository.miami.edu/iccaspapers/7>.

of the State to own and control property, especially capital, but that also permit the aggregation of effort for mutual economic benefit.⁵ At the center of this tension, Cuba faces issues of the role and character of property, along with the issue of how to divide the power to control and use property between the State and individuals. This Article considers one of the most interesting innovations—the Cuban cooperative—both as a theoretical and practical solution to the peculiar political and economic problems of Cuba, as constrained by its own legal system, and as a vehicle of economic activity with application beyond the peculiarities of Cuba.

In the West, notions of property are at the center of economic and political organization.⁶ The law-state—that complex of social, governmental, administrative, and economic organization⁷—is to a great extent grounded on the elaboration of rules and systems for the taxonomy and systemic protection of property. This means creating systems for dividing things and ideas into manageable and negotiable bits, and then developing rules to govern transactions in these bits, along with rights to exploit these bits.⁸ Individuals can aggregate property for the production of private wealth; organized as corporations, this property assumes a double character.⁹ In one sense, corporations are understood as property that is represented, for example, by shares, which in turn constitute property in the hands of shareholders, giving each shareholder certain rights including control, income, and assets of the entity. In another sense, corporations are also understood as autonomous entities with a governance architecture constructed and existing outside the direct control of the shareholders in whose collective interests the enterprise operates. In this sense, as a government independent of investors, but operating to further investors'

⁵ Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 337 (2004); Raj Desai, *Can Raúl Castro Revive Cuba's Private Sector?*, *BROOKINGS POL'Y BRIEF SERIES* (Brookings Inst., Wash., D.C.), no. 165, Mar. 2008, available at <http://www.brookings.edu/research/papers/2008/03/cuba-desai>.

⁶ For an excellent short discussion, see JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT UNJUST ENRICHMENT* 7–31 (2006); UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 39 (2000).

⁷ See generally Larry Catá Backer, *On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders* (Consortium for Peace & Ethics, Working Paper Apr. 16, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038103.

⁸ See, e.g., *Index of Economic Freedom*, HERITAGE FOUND., <http://www.heritage.org/index/property-rights> (last visited Feb. 24, 2013) (“The more certain the legal protection of property, the higher a country’s score; similarly, the greater the chances of government expropriation of property, the lower a country’s score.”).

⁹ Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 *AM. J. COMP. L.* 583, 584 (1999).

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interests, corporations resemble other institutions formed by communal aggregations—such as religious institutions and even states¹⁰—in their character though, of course, with a more limited scope.¹¹ As an entity, for example, corporations may acquire political rights under domestic law¹² and at least some measure of responsibility under international law.¹³

A very different picture emerges in Marxist-Leninist states.¹⁴ In such states, the means of production traditionally belong to the revolutionary elements of society organized within a structure of a democratic dictatorship awaiting the transition from socialism to pure Marxism.¹⁵ Deeply embedded in these states is the distinction between property ownership and property use.¹⁶ Productive property¹⁷ is understood as

¹⁰ Larry Catá Backer, *Reifying Law—Government, Law and the Rule of Law in Governance Systems*, 26 PENN ST. INT'L L. REV. 521 (2000).

¹¹ See generally JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 8 (2006); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 933 (2004).

¹² See, e.g., *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

¹³ See Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69 (2012); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) [hereinafter *Multinational Corporations*].

¹⁴ See, e.g., JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 5–16 (1988) (offering a critical assessment of prominent property theories, from Marxist to libertarian theories); Barden N. Gale, *The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions*, 74 CHINA Q. 334, 334–35 (1978) (analyzing Chinese Marxist view towards intellectual property).

¹⁵ See, e.g., XIANFA pmbl. (1982) (China), translated in *Constitution of the People's Republic of China*, PEOPLE'S DAILY ONLINE, <http://english.people.com.cn/constitution/constitution.html> (last visited May 15, 2013) (“After the founding of the People's Republic, the transition of Chinese society from a newly-democratic to a socialist society was effected step by step. The socialist transformation of the private ownership of the means of production was completed, the system of exploitation of man by man eliminated, and the socialist system established. The people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat, has been consolidated and developed.”).

¹⁶ “Indeed, since political power is in the hands of the working class, since this political power owns all the means of production, the only task, indeed, that remains for us is to organize the population in co-operative societies.” VLADIMIR I. LENIN, *On Co-Operation, in WHAT IS SOVIET POWER?* 91 (1973).

¹⁷ “It is important to understand that Marx defines the word property in two senses, as personal property and as productive property By productive property, Marx means objects people owned privately which did produce social wealth, such as oil wells, coal

inherently political in character—an instrument for the satisfaction of the needs of the people. Conversely, productive property owned or controlled by individuals, especially where that ownership is not under state control or direction, could be understood as a challenge to the unity of the people and a political threat. Vesting political or economic power in institutions through the aggregation of property in the hands of private individuals, such as the shareholders of a corporation, is viewed as a challenge. Like the organization of political power, which is assumed to be necessarily centered on the state as the sole embodiment of collective power, the organization of economic power is understood to be centered on the state apparatus as the sole embodiment of economic power. Corporations could be organized as a form for the aggregation of capital and be considered separate legal entities, but such enterprises remain instrumentalities of the state.¹⁸

The relationship of property to the individual (the proletariat) and the state has been at the center of revolutions in Marxist-Leninist theory for the last generation. But the last several decades have seen an ideological split about the relationship of the ownership of productive property to the state within the Marxist-Leninist community of states. Led by changes in China that accelerated in the years after the late-1970s, China has abandoned the traditional notion of the state's monopoly on productive property and the necessity of aggregating for the apparatus of the state all power to direct and manage productive assets and the people through which productivity is extracted.¹⁹ Central planning has been abandoned in favor of centralized control of key sectors and central direction of the rest, with control conforming generally to Marxist-Leninist principles as continuously developed within the Chinese Communist Party. In effect, China has been moving from micro to macro management, with exceptions for key economic sectors. Yet, as its critics argue, this is still a Marxist approach to property and its relationship to individuals and collective ownership.²⁰ The

mines or steel mills.” GYÖRGY LUKÁCS, *THE PROCESS OF DEMOCRATIZATION* 8 (Dennis J. Schmidt ed., Susanne Bernhardt & Norman Levine trans., 1991).

¹⁸ A.F.M. Maniruzzaman, *The Relevance of Public International Law in Arbitrations concerning International Economic Developments*, *J. WORLD INV. & TRADE* 263, 281 (2005). Maniruzzaman notes: “As far as we are concerned here . . . it is quite likely that in most countries the separation between a State and a State enterprise as parties may be disregarded and the presence of the State itself through its State Enterprise can be attributed as such.” *Id.* at 279.

¹⁹ See PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (David S.G. Goodman ed., 2001); Mathew S. Erie, *China's (Post-)Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 *H.K.L.J.* 919 (2007) (explaining the tension between reformers and orthodox Chinese Marxists).

²⁰ See, e.g., Ryan Van Steenis, *From Mao to Madison and Back: An Examination of China's National Property Law and Its Diminished Potential*, 23 *TEMP. INT'L & COMP. L.J.*

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process has not been without deep division within the Chinese Communist Party at times, as different groups advance distinct visions of the future course of development of Marxist-Leninist economies.²¹

Cuba, however, is an entirely different story.²² Under the leadership of Fidel Castro from 1959 to 2006, Cuba remained deeply committed to the central planning model.²³ Though Cuba has been moving away from an old Soviet-style model under the leadership of Raúl Castro,²⁴ it has retained both the state apparatus and communist party ideology to support the idea that substantially all control of significant economic activity must be directed, as a political matter, by party loyalties according to communist principles but as ordered directly through a large state bureaucracy. Productive property, for all intents and purposes, retains its direct connection to the state along with a strong commitment to the direct ownership and management role of the state in economic activity.²⁵ In this respect, Cuba retains the strongest loyalty to the Soviet model of state organization, which all but disappeared after the dissolution of the Soviet

35, 58–63 (2009).

²¹ See generally JOSEPH FEWSMITH, *DILEMMAS OF REFORM IN CHINA: POLITICAL CONFLICT AND ECONOMIC DEBATE* (Mark Selden ed., 1994).

²² See FIDEL CASTRO RUZ, *Cuba's Revolutions in Economy and Defense*, in FIDEL CASTRO: SPEECHES 1984–85: WAR AND CRISIS IN THE AMERICAS 57, 57–81 (Michael Taber ed., Pathfinder Press 1st ed. 1985) (documenting Castro's speech delivered December 28, 1984 at the close of the seventh session of the National Assembly of People's Power in Havana, Cuba).

²³ Daniel P. Erikson, *The Future of American Business in Cuba: Realities, Risks, and Rewards*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 691, 694–95 (2004).

²⁴ Some in the West have described this as a move away from Marxism toward capitalism. See, e.g., *Revolution in Retreat*, *ECONOMIST*, Mar. 24, 2012, at S.3 (“Raúl Castro, who formally took over as Cuba's president in February 2008 and as first secretary of the Communist Party in April 2011, is trying to revive the island's moribund economy by transferring a substantial chunk of it from state to private hands, with profound social and political implications.”).

²⁵ As one commentator notes:

In communist countries, the state repealed or emasculated private law in employment relations, land ownership, antitrust, consumer products liability, and worker safety. Once the legal impediments were removed, officials ruled by decree. So, central planning is a way of making law as well as commodities. Central planning produced remarkably similar results in vastly different countries, such as Poland, Vietnam, and Cuba. Specifically, central planning emphasized economic growth through forced savings and expansion of the capital stock in heavy industry. Everywhere, central planning failed to produce consumer goods in abundant quantity or high quality.

Robert D. Cooter, *The Theory of Market Modernization of Law*, 16 *INT'L REV. L. & ECON.* 141, 146 (1996); cf. George Philip, *The Political Economy of Development*, 38 *POL. STUD.* 485, 486 (1990).

Union nearly half a generation ago.²⁶ Though Cuba remains very much in the Soviet orbit long after its center disappeared,²⁷ Cuba's ideological foundations remain perhaps more aggressively Marxist-Leninist than even the Soviet model.²⁸

Yet, modern realities have produced a strong pull against this form of economic organization.²⁹ Globalization has substantially changed the rules through which global production of goods is organized,³⁰ though not without criticism.³¹ Liberalized trade regimes have made the movement of goods, capital, enterprises, and to some extent people, easier, while permitting local diversity that complements global tastes in variety.³² Cuba's poor economic performance and its difficulty in providing for its people has been exacerbated for many years by a state and administrative apparatus that seemed oblivious and jealous of its power³³ and a U.S. policy of isolating Cuba from globalization.³⁴

Cuba has both recognized and resisted these realities.³⁵ On the one hand, over the past decade Cuba has sought to internationalize a counter-model to that offered by conventional globalization, forming for that purpose the *Alianza Bolivariana para los Pueblos de Nuestra América* (Bolivarian Alliance for the Peoples of Our Americas) (ALBA).³⁶ On the

²⁶ Edward Yates, *Central Planning Meets the Neighborhood: Land Use Law and Environmental Impact Assessment in Cuba*, 16 TUL. ENVTL. L.J. 653, 653–54 (2003) (discussing Cuba's alignment with the former Soviet Union).

²⁷ See Jorge Pérez López, *Coveting Beijing, but Imitating Moscow: Cuba's Economic Reforms in a Comparative Perspective*, 5 CUBA TRANSITION 11, 11–20 (1995), <http://www.ascecuba.org/publications/proceedings/volume5/pdfs/FILE04.pdf>.

²⁸ "In Castro's ideal socialist world the worker identifies totally with the society, the state, and the means of production and covets complete harmony between his work and himself." SHELDON B. LISS, FIDEL!: CASTRO'S POLITICAL AND SOCIAL THOUGHT 61 (1994).

²⁹ Cf. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999) (discussing how the modern realities of globalization clash with local culture and efforts to preserve ancient traditions).

³⁰ Cf. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004) (arguing that globalization has the capacity to be a powerful tool to further social goods).

³¹ See, e.g., JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK (2006).

³² Boaventura de Sousa Santos, *Globalizations*, 23 THEORY, CULTURE & SOC'Y 393, 396–97 (2006).

³³ See generally SERGIO DÍAZ-BRIQUETS & JORGE PÉREZ-LÓPEZ, CORRUPTION IN CUBA: CASTRO AND BEYOND (2006).

³⁴ See, e.g., Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–302, 22 U.S.C. §§ 6081–6082 (2006).

³⁵ See, e.g., FIDEL CASTRO, *La globalización neoliberal conduce al mundo al desastre* [Neoliberal Globalization is Leading the World to Disaster], in DE SEATTLE AL 11 DE SEPTIEMBRE [FROM SEATTLE TO SEPTEMBER 11] 175, 175–79 (2002).

³⁶ Larry Catá Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas*, 31 U. PA. J. INT'L L. 679

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other hand, Cuba has also embarked on what was a potentially far-reaching project of internal self-reflection and change within the parameters of the current political structure of the Cuban state.³⁷ This project produced a potentially far-ranging set of economic reforms, undertaken through the Cuban Communist Party (CCP), with the objective of establishing a new direction in CCP policy to be followed by changes to Cuban law through appropriate legislation undertaken by the Cuban government.³⁸ The broad structures of economic reform policies were memorialized in a set of Guidelines, the *Lineamientos de la política económica y social del partido y la Revolución* (Lineamientos),³⁹ which were approved at the Sixth Party Congress in 2011. Subsequently, these Guidelines were expected to be taken up by the government and transposed into legislation and ministerial regulations.⁴⁰

As a consequence, what has been emerging—especially since 2009 and accelerating with the adoption of the Lineamientos—is what appears to

(2010).

³⁷ Heather E. Shreve, Note, *Harmonization, but Not Homogenization: The Case for Cuban Autonomy in Globalizing Economic Reforms*, 19 IND. J. GLOBAL LEGAL STUD. 365, 378–81 (2012).

³⁸ Lina Forero-Niño, *The Cuban Government Approves Guidelines to Reform Cuba's Economic Model and Develops an Implementation Strategy*, 17 LAW & BUS. REV. AM. 761 (2011); Marc Frank, *In Cuba, Reforms Bring Cheers but also Jeers*, REUTERS (July 13, 2011), <http://www.reuters.com/article/2011/07/13/us-cuba-reform-idUSTRE76C4MF20110713>.

³⁹ LINEAMIENTOS DE LA POLÍTICA ECONÓMICA Y SOCIAL DEL PARTIDO Y LA REVOLUCIÓN [GUIDELINES ON THE POLITICAL AND SOCIAL ECONOMY OF THE PARTY AND THE REVOLUTION], VI CONGRESO DEL PARTIDO COMUNISTA DE CUBA [SIXTH CONGRESS OF THE COMMUNIST PARTY OF CUBA] (adopted Apr. 18, 2011) (Cuba) [hereinafter LINEAMIENTOS], available at <http://www.granma.cubaweb.cu/secciones/6to-congreso-pcc/Folleto%20Lineamientos%20VI%20Cong.pdf> (translation available at <http://www.cuba.cu/gobierno/documentos/2011/ing/1160711i.html>); see also *infra* note 56 and accompanying text for the state-apparatus implementing measures.

⁴⁰ See *Resolución sobre los Lineamientos de la Política Económica y Social del Partido y la Revolución* [Resolution on the Guidelines on the Political and Social Economy and of the Party and the Revolution], CUBA DEBATE (Apr. 18, 2011), <http://www.cubadebate.cu/especiales/2011/04/18/resolucion-sobre-los-lineamientos-de-la-politica-economica-y-social-del-partido-y-la-revolucion/>. Among other things, the resolution adopting the Lineamientos suggested the creation of a governmental commission to implement and further the project of the Lineamientos. The National Assembly then ratified the Lineamientos and committed to move them to implementation through appropriate law making. See Archibald Ritter, *El VI Congreso Del Partido Y Los Lineamientos: ¿Un Punto De Viraje Para Cuba?* [The Sixth Congress of the Party and the Guidelines: A Turning Point for Cuba?] ESPACIO LAICAL SUPLEMENTO DIGITAL [LAY SPACE DIGITAL SUPPLEMENT], No. 132, June 2011, http://espaciolaical.org/contens/esp/sd_132.pdf translated in CUBAN ECONOMY (June 17, 2011), <http://thecubaneconomy.com/articles/2011/06/a-ritter-espaciolaical-the-sixth-party-congress-and-%E2%80%9Clineamientos%E2%80%9D-a-turning-point-for-cuba/>.

be significant efforts by Cuba's leaders to embark on a peculiarly Cuban version of economic experimentation.⁴¹ That experimentation has been carefully circumscribed within the CCP's sense of its Marxist-Leninist organizational principles. Cuba continues to re-affirm its fundamental commitment to some of the ideals of Soviet state organization: strong and direct state ownership and control of the principal levers of economic activity and a deep suspicion of the allocation and aggregation of productive property in the hands of private individuals. But some key factions within the CCP—the intellectuals that support it and state officials—are also trying to create spaces beyond a centrally-planned control economy, both in the state sector and within what is hoped to be an important (although small) non-state sector.⁴² Both are reflected in the thrust of the conceptual basis of ALBA and of the Lineamientos, and to some extent in the first tentative steps toward regulatory implementation.

The resulting approach, being slowly and unevenly incorporated into the legal structures of Cuban economic regulation,⁴³ is grounded in the division of economic activity regulation around four distinct spheres. The first is public and centered on the reorganization of state-managed economic activity; the second is private and centered on the production and delivery of consumer goods and services; the third is national and centered on the development of an integrated economy grounded in direct and indirect state ownership and management; and the fourth is regional and centered on the development of state-to-state economic activity under the ALBA model. Integrating these approaches requires a careful balancing of the logic of a centrally-planned and publicly-oriented Marxist-Leninist approach to economic control and the logic of the framework of a markets-based system of economic globalization. But that balancing produces the potential for an important contradiction. At the heart of this contradiction is the tension between the norms and forms of economic globalization, grounded in the free movement of capital through market transactions, and the current conventional framework of Cuba's Marxist-Leninist state organization, grounded in state control and management of economic activity.

Some of the elements of this experimentation have been widely discussed and criticized⁴⁴—from the efforts to produce a rigidly controlled

⁴¹ See generally John Cairncross, *Raúl's Plan: Examining the 2010 Cuban Reform Initiative*, 21 CUBA TRANSITION 265 (2011), <http://www.ascecuba.org/publications/proceedings/volume21/pdfs/cairncross.pdf>.

⁴² Stephen Wilkinson, *Cuba Lay-offs Reveal Evolving Communism*, BBC NEWS (Sept. 14, 2010), <http://www.bbc.co.uk/news/world-latin-america-11302430>.

⁴³ See Manuel Barcia, *Cuba's Slow Path to the Future*, AL JAZEERA (Jan. 11, 2012), <http://www.aljazeera.com/indepth/opinion/2012/01/20121883342630706.html>.

⁴⁴ For an excellent analysis of this economic experimentation, see Carmelo Mesa-Lago,

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class of proprietorship businesses,⁴⁵ to the limited and highly regulated efforts to open agricultural cultivation to farmers.⁴⁶ The institutional forms in which economic development is to be undertaken are less developed. The Lineamientos strictly limited the availability of the corporate form to state-owned enterprises (SOEs) and enterprises involving the state and foreigners.⁴⁷ The rationale is that the Marxist-Leninist foundation of the state would be undermined if the corporate form were made available to individuals or others without the direct oversight of the CCP and operated as an instrumentality of the state apparatus. That rationale, in turn, is founded on the idea that only the state may aggregate the ownership of property and that the corporate form, in effect, is a manifestation of political rather than economic or property power. The foundational principle is that under Cuba's Marxist-Leninist economic organization, only the people, organized through the state sector and directed by the CCP, can aggregate the means of production and engage in collective activities for social rather than individual profit. To permit collective activities outside the state sector would be understood as a threat to the principal authority of the state and its apparatus as the vanguard of popular action. For those brought up under Soviet Socialist theory, this approach sounds familiar. However, it has, to some extent, been abandoned virtually everywhere outside of Cuba, at least in the form that the CCP seeks to preserve.⁴⁸ In its place, other, more limited vehicles for aggregating productive activity in private ventures have been suggested.

Will the VI Communist Party Congress Solve Cuba's Economic and Social Problems?, 21 CUBA TRANSITION 292 (2011), <http://www.ascecuba.org/publications/proceedings/volume21/pdfs/mesalago.pdf>.

⁴⁵ For an analysis from within Cuba by one of its most prominent independent economists, see Oscar Espinosa Chepe, *Situación económica, política y social de Cuba* [Economic, Political, and Social Development of Cuba], 21 CUBA TRANSITION 18 (2011), <http://www.ascecuba.org/publications/proceedings/volume21/pdfs/chepe.pdf>.

⁴⁶ See G. B. Hagelberg, *If It Were Just the Marabú. . . Cuba's Agriculture 2009–10*, 20 CUBA TRANSITION 32 (2010), <http://www.ascecuba.org/publications/proceedings/volume20/pdfs/hagelberg.pdf>.

⁴⁷ LINEAMIENTOS, *supra* note 39, at 11 (“En las Formas de gestión no estatales no se permitirá la concentración de la propiedad en personas jurídicas o naturales.”).

⁴⁸ In China, for example, the government has developed a sophisticated regulatory framework for corporations, including enterprises owned by non-state parties and has sought to develop a socialist approach to the regulation of corporations and corporate governance that furthers the governing state ideology while permitting private access to the corporate form and the development of robust securities markets in the shares of such enterprises. See, e.g., The Company Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993), *available at* <http://www.china.org.cn/english/government/207344.htm>. For an example of Chinese corporate governance standards, see Code of Corporate Governance for Listed Companies in China (promulgated by the Sec. Regulatory Comm'n & the State Econ. & Trade Comm'n, Jan. 7, 2001), *available at* http://www.ecgi.org/codes/documents/code_en.pdf.

If corporations are prohibited as a means of engaging in private market based activities, and reducing private economic activity to prescribed simple sole proprietorships may not produce the sort of positive economic growth necessary to avoid economic stagnation, then the question of finding an alternative form of economic activity that permits private aggregations of economic activity becomes critical to the forward movement of Cuban economic reforms, constrained by its governing ideology. To be palatable, these vehicles cannot be understood as a means of aggregating capital for absent owners. Instead, they must provide a basis for pooling labor or other direct contributions by the participants in the enterprise. These aggregations of activity must permit the use of capital while remaining grounded in principles of participant control and operation. And, for Cuba, they must be compatible with the organization of the national economy, within which only a small place is available for individual activity that must be licensed and controlled by the state.

Among the most important of these alternatives are cooperatives.⁴⁹ The cooperative device is not new. It has become an important element in the aggregation of efforts around the world.⁵⁰ Since the 1990s, new models have emerged that “appear to be not only a reaction to the exogenous environmental influences of globalization, industrialization, consolidation, technological advances, institutional uniqueness of the country to legal environment, and overcapacity in the food sector but also to the intrafirm coordination challenges of redirecting strategy.”⁵¹ Indeed, cooperatives

⁴⁹ Int’l Labor Org. [ILO], Promotion of Cooperatives Recommendation, art. 2, R193, (June 20, 2002), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312531 (“[T]he term ‘cooperative’ means an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.”); *Co-operative Identity, Values & Principles*, INT’L CO-OPERATIVE ALLIANCE, <http://ica.coop/en/what-co-op/co-operative-identity-values-principles> (last visited Feb. 7, 2013) (“[A] cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.”). The International Co-operative Alliance (“ICA”) was established in 1895 and serves as a representative of cooperatives worldwide. See *The ICA*, INT’L CO-OPERATIVE ALLIANCE, <http://2012.coop/en/ica> (last visited Feb. 7, 2012). Cooperatives come in a large variety of forms, including producer, agricultural, and marketing cooperatives. In some of the literature, cooperatives are more broadly defined to include partnerships and non-profit organizations. See John P. Bonin et al., *Theoretical and Empirical Studies of Producer Cooperatives: Will Ever the Twain Meet?*, 31 J. ECON. LIT. 1290, 1292 (1993) (“The theory of the PC focuses on the changes resulting from replacing the profit-maximizing objective of the neo-classical firm with some other maxim and reflecting both workers’ participation in the decision-making process and workers’ sharing in the residual surplus.”).

⁵⁰ *Co-operative Identity, Values & Principles*, supra note 49.

⁵¹ Michael L. Cook & Brad Plunkett, *Collective Entrepreneurship: An Emerging*

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“represent a substantial share of the economy in most developed market economies. . . . [and are] larger in advanced market economies than it is in less developed economies.”⁵² But these traditional models tend to be based on the property rights being restricted to members-patrons.⁵³

Since the 1959 revolution in Cuba, the cooperative has served principally as a device for managing agricultural production. But the continuing economic crisis in Cuba now may be spurring new and potentially more radical economic organization based on the cooperative form. The steps being taken are both tentative and circumscribed by the realities of Cuban politics.⁵⁴ Indeed, the Cuban authorities were slow to deliver a set of regulations implementing the Lineamientos, promising⁵⁵ and then announcing their enactment only at the end of 2012.⁵⁶ Despite this, the theoretical premises underlying this movement suggest the possibility of the development of a theory for aggregations of productive capacity in which

Phenomenon in Producer-Owned Organizations, 38 J. AGRIC. & APPLIED ECON. 421, 423 (2006), available at <http://ageconsearch.umn.edu/bitstream/43777/2/421.pdf>.

⁵² Henry Hansmann, *Cooperative Firms in Theory and Practice*. 4 LIKETA LOUDELINEN AIKAKAUSKIRJA [LTA] 387, 387 (1999) (Fin.), available at http://lta.hse.fi/1999/4/lta_1999_04_a2.pdf.

⁵³ See F.R. Chaddad & Michael L. Cook, *Understanding New Cooperative Models: An Ownership-Control Rights Typology*, 26 REV. AGRIC. ECON. 348, 348–60 (2004).

⁵⁴ See Patricia Grogg, *Cubans Want Faster Economic Reforms*, INTER PRESS SERVICE (May 8, 2012), <http://www.ipsnews.net/2012/05/cubans-want-faster-economic-reforms/> (“Among non-state forms of production, Cuban authorities are prioritising cooperatives, although new legislation announced for that sector is still being studied. ‘One of the aspects that apparently is being discussed is the scope or degree of autonomy that this type of association should have,’ said a source who asked to remain anonymous.”).

⁵⁵ See Peter Orsi, Associated Press, *Cuba Economy Czar Says Cooperatives By Year End*, BIG STORY (July 23, 2012), <http://bigstory.ap.org/article/cuba-economy-czar-says-cooperatives-year-end>.

⁵⁶ These include two decree-laws of the Council of State, one decree from the Council of Ministers, and two ministerial regulations. See Consejo de Estado Decreto-Ley Número 305 [Council of State Decree-Law Number 305] (GACETA OFICIAL EXTRAORDINARIA NO. 53, Dec. 11, 2012, at 249) (Cuba) [hereinafter Decreto-Ley No. 305]; Consejo de Estado Decreto-Ley Número 306 [Council of State Decree-Law Number 306] (GACETA OFICIAL EXTRAORDINARIA NO. 53, Dec. 11, 2012, at 254) (Cuba) [hereinafter Decreto-Ley No. 306]; Consejo de Ministros Decreto No. 309 [Council of Ministers Decree No. 309] (GACETA OFICIAL EXTRAORDINARIA NO. 53, Dec. 11, 2012, at 260) (Cuba) [hereinafter Decreto No. 309]; Ministerio de Economía y Planificación Resolución No. 570/12 [Minister of Economics and Planning Resolution No. 570/12] (GACETA OFICIAL EXTRAORDINARIA NO. 53, Dec. 11, 2012, at 270) (Cuba) [hereinafter Ministerio de Economía y Planificación Resolución No. 570/12]; Ministerio de Finanzas y Precios Resolución No. 427/12 [Minister of Finances and Pricing Resolution No. 427/12] (GACETA OFICIAL EXTRAORDINARIA NO. 53, Dec. 11, 2012, at 273) (Cuba) [hereinafter Ministerio de Finanzas y Precios Resolución No. 427/12]. For a discussion of the above regulations, see O. Fonticoba Gener, *Cambio a la actualización del modelo económico [Updating Changes to the Economic Model]*, GRANMA (Dec. 11, 2012) (Cuba), <http://www.granma.cubaweb.cu/2012/12/11/nacional/artic01.html>.

capital is not privileged—a theory identified here as a “proletarian corporation.”

This Article examines the potential consequences of the current approach to the creation and management of economic enterprises within Cuba. The examination is structured around the work of academics organized by Camila Piñeiro Harnecker of the University of Havana’s *Centro de Estudios de la Economía Cubana*.⁵⁷ The new policies that have emerged from this work have had practical consequences on the legal regulation and management of economic enterprises can be seen in recent actions of the CCP, both in the construction of an internal governance order and in the exportation of that order in the construction of multilateral trade relations.⁵⁸ The principal insight of this work is that by constraining the ability of individuals to aggregate capital, the Cubans may have stumbled onto the key to the development of a proletarian corporation. A proletarian corporation can be constructed on the structures of the cooperative by emphasizing the contribution of labor, rather than capital, to the firm.

Following this Introduction, Part II examines the development of the new Cuban economic model. This new structure of economic organization in Cuba reveals a limited space for individual economic activity in the shadow of but not directly managed by the state. To operationalize that structure, the Lineamientos provides a framework that allocates permitted forms of economic activities and specifies their limits: private individual enterprise, corporate organization for some state enterprises, and the possibility of individual labor aggregation through cooperatives. Part III then considers the cooperative in more depth. It examines the way in which the structures of the agricultural cooperative—a peasant socialization technique with roots in Leninist theory—was redeployed as a vehicle for the aggregation of productive forces without displacing state ownership and management of capital. Thus re-purposed, the cooperative was transformed. From theoretical transformation, Part III then considers the transposition of cooperative theory first the Lineamientos, and then as written into law through the measures adopted on December 11, 2012. The analysis reveals the way in which the move toward acceptance of the cooperative as a means of aggregating economic activity in the small non-state sector has opened potentially deep ideological fissures within the CCP. Within that context, the analysis also suggests the benefits and limitations of this peculiarly Cuban innovation within the confines of Cuban political

⁵⁷ See generally COOPERATIVAS Y SOCIALISMO: UNA MIRADA DESDE CUBA [COOPERATIVES AND SOCIALISM: A CUBAN PERSPECTIVE] (Camila Piñeiro Harnecker ed., 2011) [hereinafter COOPERATIVAS Y SOCIALISMO].

⁵⁸ See Grogg, *supra* note 54 (“The [policy] changes should be sped up in some economic sectors . . . [and the] best candidates for obtaining immediate significant results’ through the new policies appear to be non-state forms of organising small-scale production . . .”).

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ideology, as well as what the turn to the cooperative form in private enterprise may mean for the future course of the development of Cuba's state-party ideology.

Part IV analyzes Cuba's approach within the structures of its regional economic engagements. The cooperative is an important element for the development of an integrated approach to regional trade grounded in state-to-state economic transactions. The focus is the internationalization of the Cuban model through the structure of the socialist trade organization, ALBA. The problem of the cooperative highlights a fundamental conundrum of Cuban economic development: can Cuba develop a conceptually useful vehicle, like the cooperative, that enhances individual autonomy, and not hobble it for fear that it will undermine the socialist character of the 1959 Revolution? Cuba's solution to that problem will determine the course of its future.

II. ECONOMIC ORGANIZATIONS IN CUBA: LIMITING POWER OF INDIVIDUALS TO AGGREGATE CAPITAL OR LABOR WITHOUT DIRECT STATE CONTROL

Since the fall of the Soviet Union and the end of its program of subsidized state-to-state trade,⁵⁹ the Cuban economy has suffered a series of severe shocks.⁶⁰ From the early-1990s until the end of Fidel Castro's direct control of both the state and Party apparatus in 2006,⁶¹ the State had tried a variety of different programs. Each was viewed as temporary and exceptional during this "Special Period,"⁶² and was meant to reposition the economy so that it might revert to "normal": an economy driven by central planning management, and control rather than either by frameworks control or by markets.⁶³ Markets were viewed as the aggregation of efforts to

⁵⁹ See Cole Blasier, *The End of the Soviet-Cuban Partnership*, in *CUBA AFTER THE COLD WAR* 59, 87 (Carmelo Mesa-Lago ed., 1993) ("Beginning in the late 1980s, Soviet leaders began to accept a reality that neither party had been willing to articulate publicly and the Cubans have not admitted even to themselves: the Cuban economy is not viable at established levels, and with its then partners, without extensive foreign aid.").

⁶⁰ See, e.g., Carmelo Mesa-Lago & Pavel Vidal-Alejandro, *The Impact of the Global Crisis on Cuba's Economy and Social Welfare*, 42 *J. LATIN AM. STUD.* 689 (2010) (discussing the most recent financial crisis).

⁶¹ *Fidel Castro Quit as Cuba Communist Party Chief in 2006*, BBC NEWS (Mar. 22, 2011), <http://www.bbc.co.uk/news/world-latin-america-12818651>.

⁶² See, e.g., Archibald Ritter, *Cuba's Economy During the Special Period, 1990–2010*, in 1 *CUBA: PEOPLE, CULTURE, HISTORY* 232 (Alan West-Durán ed., 2011) ("In a speech in 1997, President Fidel Castro lamented the pro-market policy moves and implied that they were temporary only—possibly only for the duration of the 'Special Period.'"); see also *CUBA IN THE SPECIAL PERIOD: CULTURE AND IDEOLOGY IN THE 1990S* (Ariana Hernandez-Reguant ed., 2009).

⁶³ Carmelo Mesa-Lago, *Introduction: Cuba, the Last Communist Warrior*, in *CUBA*

manipulate consumers as part of a complex system of global economics designed to maintain the economic and political hegemony of developed states.⁶⁴ The transfer of control over the state and Party machinery from Fidel Castro to his brother Raúl after Fidel's hospitalization⁶⁵ and the shocks of the global economic crisis that began in 2007⁶⁶ produced further stress on the viability of the Cuban economy as it operated,⁶⁷ and diminished the taste of the elite for maintaining the status quo.⁶⁸

It is in this context that the State commenced what would eventually result in a somewhat tentative, though from their perspective somewhat profound, effort to re-set Cuba's economic model. That process of attempting the development of a new(er) model of Cuban economics catalyzed the development of a new theory of cooperatives and their role in the economy. Cooperatives, which had been a backwater of Cuban economic planning for some time, suddenly assumed a central role in the development of a vibrant, though small and tightly controlled, non-state sector that would be permitted to develop in response to market forces.

This Part sets the context for the more detailed examination of cooperatives that follows in Part III. It first describes the context in which economic change was effectuated. It then considers the form of the proposed transformation, one grounded in the division of economic activity into separate but highly regulated state and non-state sectors.

A. Resetting the Regulatory Context: From Command to Lineamientos

Over the last decade, two great factions within the Cuban governing elite have been debating the future course of Cuban economic development. On the one side stood the governing apparatus of traditionalists tied to the

AFTER THE COLD WAR, *supra* note 59, at 3, 4–7; Mesa-Lago & Vidal-Alejandro, *supra* note 60, at 710 (“Until 2010, the government’s economic response had fundamentally relied on centrally implemented expenditure cuts.”).

⁶⁴ Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN ST. INT’L L. REV. 497, 517–33 (2006); Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems, and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, L. & CONTEMP. PROBS., Autumn 2007, at 1, 16–24.

⁶⁵ Peter Whoriskey, *Cubans in Miami Cheer Castro Illness*, WASH. POST, Aug. 2, 2006, at A08.

⁶⁶ See Lorenzo L. Pérez, *The Impact of the Global Financial and Economic Crisis on Cuba*, 19 CUBA TRANSITION 116, 116–23 (2009), <http://www.ascecuba.org/publications/proceedings/volume19/pdfs/perez.pdf>.

⁶⁷ See Mesa-Lago & Vidal-Alejandro, *supra* note 60.

⁶⁸ See Nick Miroff, *Cuba Examines Asian Model for Economic Reforms*, NPR (Aug. 21, 2012), <http://www.npr.org/2012/08/21/159466378/cuba-views-china-vietnam-as-economic-hope>; cf. Julie M. Bunck, *Market Oriented Marxism: Post-Cold War Transition in Cuba and Vietnam*, in CUBAN COMMUNISM 182 (Irving Louis Horowitz & Jaime Suchlicki eds., 2001).

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old Soviet model of development. This group assumed there was no flaw in the Soviet model and were determined to show that they could succeed where the Soviet sphere failed. On the other side stood a group that might be identified as “progressives,” with significant elements in the Cuban military (the *Fuerzas Armadas Revolucionarias*)⁶⁹ “that increasingly looked to East Asian models of development as a means of preserving the political system while modifying the economic system to preserve political stability and the legitimacy of the leadership role of the [CCP].”⁷⁰ Traditionalists grounded their opposition to change on the ideology developed by Fidel Castro; the other side was supported if only tacitly by Raúl Castro.⁷¹

The battle between the two sectors of the governing elite appeared to tip in favor of the progressives at the beginning of September, 2010, when, in a carefully staged interview with a U.S. journalist, Fidel Castro appeared to concede the point. “It was a casual remark over a lunch of salad, fish and red wine but future historians are likely to parse and ponder every word: ‘The Cuban model doesn’t even work for us any more.’”⁷²

⁶⁹ See Terry L. Maris, *Revolutionary Management: The Role of the Fuerzas Armadas Revolucionarias in the Cuban Economy*, MILITARY REV., Nov.–Dec. 2009, at 63, 66. The Cuban military has a significant stake in the national economy, providing a substantial amount of industrial capacity. Its website, *Industria Militar*, notes somewhat critically that military deploys a part of its industrial activity toward meeting the needs of the national economy. This is possible because the military’s industrial capacity exceeds its needs and the needs of the State have increased. See *Fuerzas Armadas Revolucionarias, Reconversión Industrial [Revolutionary Armed Forces, Industrial Reconstructing]*, INDUSTRIA MILITAR [MILITARY INDUSTRY], http://www.cubagob.cu/otras_info/minfar/industria/industria_militar.htm (last visited Feb. 9, 2013).

⁷⁰ Larry Catá Backer, *Cuba Responds to Globalization and Reorganizes Its Political Economy: Revolution, Retrenchment or Small Steps Towards Market Engagement Within a Marxist Framework Under the Leadership of a Vanguard Party Apparatus*, LAW END DAY (Sep. 24, 2010, 7:09 PM), <http://lbackerblog.blogspot.com/2010/09/cuba-respondes-to-globalization-opening.html>; see also Pin Zuo, *A Survey of the Relationship Between Cuba and China: A Chinese Perspective*, 20 CUBA TRANSITION 193, 199 (2010), <http://www.ascecuba.org/publications/proceedings/volume20/pdfs/pinzuo.pdf> (“With Raúl Castro’s takeover of the presidency from his brother, Cuba has entered a period of adjustment of its policies and potential reconsideration of the Chinese path. Cuba is now very interested in the Chinese reform. This would be a good point of confluence for building a positive relationship between Cuba and China.”).

⁷¹ See PHILIP PETERS, LEXINGTON INST., A VIEWER’S GUIDE TO CUBA’S ECONOMIC REFORMS 4–6 (2012), available at <http://www.lexingtoninstitute.org/library/resources/documents/Cuba/ResearchProducts/ViewersGuide.pdf>.

⁷² Rory Carroll, *Fidel Castro Says His Economic System Is Failing*, GUARDIAN (Sept. 9, 2010, 5:31 PM), <http://www.guardian.co.uk/world/2010/sep/09/fidel-castro-cuba-economic-model> (“Towards the end of a long, relaxed lunch in Havana, Jeffrey Goldberg, a national correspondent for the Atlantic magazine, asked Castro if Cuba’s economic system was still worth exporting. The reply left him dumbfounded. ‘Did the leader of the revolution just say,

The interview, of course, produced a bit of misdirection in the west, where analysts would predictably misread the meaning and effect of the “admission.”⁷³ Westerners and the enemies of the regime found it too difficult to resist the urge to over-read into the statement their own hopes, desires, and long term perspectives.⁷⁴ Yet, the evidence of its effect within Cuban conversations about the future of economic organization was not hidden. In fact, “Raúl Castro has been saying the same thing in public and private since succeeding his older brother two years ago.”⁷⁵ Stephen Wilkinson, a Cuba expert at London Metropolitan University, better contextualized the remark:

The remark should not, however, be interpreted as a condemnation of socialism, added Wilkinson. “That is clearly not what he means, but it is an acknowledgement that the way in which the Cuban system is organised has to change. It is an implicit indication also that he has abdicated governing entirely to Raúl, who has argued this position for some time. We can now expect a lot more changes and perhaps more rapid changes as a consequence.”⁷⁶

Yet, a directional shift was clearly anticipated by Raúl Castro. And so it is important to ask, at this point, what the Cuban elite is permitting to be said about this change.

Reports published in *Granma* in 2010 suggested indirectly that over the last several years, it is Raúl and not Fidel who has been asserting the leadership role with respect to economic issues.⁷⁷ Rather than referring to Fidel’s observation, the author starts with Raúl’s address to the National Assembly in early August, a month before the carefully staged interview

in essence, Never mind?’ Goldberg wrote on his blog.”).

⁷³ See *id.* (“Fidel Castro’s nine-word confession, dropped into conversation with a visiting US journalist and policy analyst, undercuts half a century of thundering revolutionary certitude about Cuban socialism.”).

⁷⁴ See, e.g., Jim Wyss & Luisa Yanez, *Fidel Castro: Cuba’s Economic Model Is Broken*, MIAMI HERALD, Sept. 9, 2010, at A1 (“‘He is either crazy or senile. This certainly does not sound like something Castro would say,’ said Jaime Suchlicki, a long-time Castro observer and head of the University of Miami’s Research Institute for Cuban Studies. ‘But if he was quoted accurately, then I guess he’s come to the realization, like everyone else, that Marxist-Leninist governments do not function. So the real question is, what is he going to do about it now? Is he going to bring about change in Cuba since the Cuba model doesn’t work?’”).

⁷⁵ Carroll, *supra* note 72.

⁷⁶ *Id.* (quoting Stephen Wilkinson).

⁷⁷ See Leticia Martínez Hernández, *Mucho más que una alternativa [Much More Than an Alternative]*, GRANMA (Sept. 24, 2010) (Cuba), <http://www.granma.cu/espanol/cuba/24sept-trabajo.html>. *Granma* is the official publication of the Central Committee of the CCP. It is circulated online at <http://www.granma.cubaweb.cu/>.

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with Fidel, describing the plans to reduce public employment.⁷⁸ Raúl Castro also indicated a substantial revision to the legal impediments to private economic activity, at least at the lowest levels of such activity.⁷⁹ The western press reported that he also indicated that any such opening up would be limited and controlled: “Cuban President Raul Castro has ruled out large-scale market reforms to revive the communist island’s struggling economy. But Mr. Castro said the role of the state would be reduced in some areas, with more workers allowed to be self-employed or to set up small businesses.”⁸⁰ Thus, at least in the public discussions within Cuba, it was clear that there would be no revolutionary opening up, even when judged by the Chinese or Vietnamese standards.⁸¹

Instead, the public discussion and hint-dropping served as the foundation for small incremental steps away from the model of almost complete state control in economic planning and decision-making. The most important comment was made in late-2010 in an address by Raúl Castro in which he “admitted: ‘We have to erase forever the notion that Cuba is the only country in the world in which people can live without working.’ He further admitted that the decades old US embargo—‘a crippling, punitive measure’—could no longer be blamed for all the island’s woes.”⁸² The reforms opened a very small space for private economic activity, but that opening came with limits.⁸³ It was restricted to a set of very specific occupations or services, each of which required a separate permit, and all of which were confined to the lowest level in the retail sector.⁸⁴ These were made necessary by the previous announcement of

⁷⁸ In 2010, Raúl Castro announced the State’s decision to increase the availability of opportunities to work for one’s own account, which will serve as an alternative means of employment for dismissed state workers. Martínez Hernández, *supra* note 77 (“El pasado primero de agosto el General de Ejército Raúl Castro Ruz anunció en la Asamblea Nacional la decisión de ampliar el ejercicio del trabajo por cuenta propia, y utilizarlo como una alternativa más de empleo para los trabajadores que queden disponibles luego del proceso de reducción de plantillas infladas que deberá asumir el país.”).

⁷⁹ *Id.* (“En la reunión parlamentaria se conoció, además, que se eliminarían varias de las prohibiciones vigentes para el otorgamiento de nuevas licencias y la comercialización de algunos productos, además de flexibilizar la posibilidad de contratar fuerza de trabajo en determinadas actividades.”).

⁸⁰ *Raúl Castro: No Reform but Cuba Economy Control to Ease*, BBC NEWS (Aug. 2, 2010), <http://www.bbc.co.uk/news/world-latin-america-10834192>.

⁸¹ See Enrique Pumar, *The Arduous Paths of Political Transitions: A Comparison of Cuba, China and Vietnam*, 19 CUBA TRANSITION 56 (2009), <http://www.ascecuba.org/publications/proceedings/volume19/pdfs/pumar.pdf>.

⁸² Michael Kline, *Economic Reforms in Cuba?*, AM. DIPL. (Oct. 2010), http://www.unc.edu/depts/diplomat/item/2010/0912/comm/kline_cuba.html.

⁸³ See Martínez Hernández, *supra* note 77.

⁸⁴ Kline, *supra* note 82. As Kline notes:

potentially large mass terminations of state workers and the intention to impose a substantial tax reform to support the government's social welfare programs.⁸⁵

These efforts were followed by a much more substantial effort at systemic reform. That effort was sanctioned by Raúl Castro, who “kicked off a national ‘discussion’ to reinvent socialism The aim was straightforward enough: shake up the dysfunctional Cuban economy in order to save the revolution.”⁸⁶ The process was meant to produce the guidelines (Lineamientos) toward economic reform. The Lineamientos were the product of what for Cuba was a fairly open process, directed by the CCP, to seek popular input for a framework of reform that would move toward resolving Cuba's economic crisis without changing its political system or the foundations of its economic system.

The origins of the Lineamientos, at least in its broad outline, are well known.⁸⁷ It was circulated widely in a draft form⁸⁸ and there was an effort, significant in the historical context of post-Revolutionary Cuba, to promote greater circulation and consultation of the draft version in and outside of Cuba.⁸⁹ The Lineamientos were considered, modified, and approved at the

The plan does little more than to encourage laid off workers to start “small businesses,” or form cooperatives for farming, construction, taxi services, auto repairs, etc. On 24 September, Granma printed the entire list of 178 approved private activities, only seven of which are entirely new—including accountants, bathroom attendants, tutors and fruit vendors. The remaining 171 approved activities include such everyday jobs as bricklayer, garbage collector, automobile mechanic, hairdresser, etc.

Id.

⁸⁵ See Elisabeth Malkin, *Cuba Details New Policies on Budding Entrepreneurs*, N.Y. TIMES, Sept. 25, 2010, at A7.

⁸⁶ Mac Margolis, *Cuba's Leaders Talk of Reform, but It Doesn't Add Up to Much*, DAILY BEAST (Oct. 26, 2012, 10:30 PM), <http://www.thedailybeast.com/articles/2012/10/26/no-country-for-old-dictators.html> (“He encouraged Cubans to ‘discuss openly and without worry’ how to ‘upgrade the national economy.’”).

⁸⁷ Larry Catá Backer, “*Order, Discipline and Exigency*”: *Cuba's VIth Party Congress, the Lineamientos (Guidelines) and Structural Change In Education, Sport and Culture?*, 21 CUBA TRANSITION 148 (2011), <http://www.ascecuba.org/publications/proceedings/volume21/pdfs/backer.pdf>.

⁸⁸ PARTIDO COMUNISTA DE CUBA [COMMUNIST PARTY OF CUBA], PROYECTO DE LINEAMIENTOS DE LA POLITICA ECONOMICA Y SOCIAL DEL PARTIDO [DRAFT GUIDELINES OF THE ECONOMIC AND SOCIAL POLICY OF THE PARTY] (2010), available at <http://lapupilainsomne.files.wordpress.com/2010/11/proyecto-lineamientos-pcc.pdf>.

⁸⁹ As one commentator notes:

Perhaps the most important early initiative of Raúl Castro was the call for a consulta (consultation) with the Cuban people. Barrio committees, factory workers, local party organizations, and others were encouraged to meet and

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Sixth Congress of the CCP. In its final version, 313 sections of the Lineamientos suggest action affecting nearly every aspect of Cuban economic life.⁹⁰ A companion booklet summarizes the changes made to the draft Lineamientos and the official reasons for the changes.⁹¹

The Lineamientos now serve as a basis for reordering the failing economic framework within Cuban socialism. They also suggest a change in the internal politics of Cuba, though this change suggests the extent of the caution among Cuban leaders that appears to slow down the pace and scope of reform. That the Lineamientos were modified at all, and in some respects in significant fashion, suggests deep changes in the relationship between the CCP, as a body, and the leadership, which can no longer count on unquestioning approval of its programs. It also indicates a deep strain of suspicion behind the wisdom of substantive reform, which was grudgingly adopted in the Lineamientos,⁹² and appears to be even more narrowly implemented in the regulations.⁹³

There is little dispute that the Lineamientos arose from a recognition that the system of managing the Cuban economy at that time was not

register their thoughts and complaints. By August 2009, 5.1 million people out of a total Cuban population of 11.2 million had participated in the consultation. There were 3.3 million registered comments of which almost half were critical.

Roger Burbach, *Cubans Seek Change, Not End to Revolution*, NEW AM. MEDIA (June 26, 2012), <http://newamericamedia.org/2012/06/cubans-seek-change-not-end-to-revolution.php>.

Whatever one believes about the legitimacy of the consultation process, and whatever one thinks of its real effectiveness, the call for such a process of consultation, and its use, even marginally, marks a very different culture of governance from that in effect in the decades before. But it also raised the stakes. If the Cuban population is engaged in the process and buys into it, there is a greater expectation of success and follow-through and a greater penalty to be paid in the event of failure. See Marcelo Vieta, *Cuba's Coming Co-Operative Economy? Reflections From Two Recent Field Trips*, GLOBAL RES. (July 18, 2012), <http://www.globalresearch.ca/index.php?context=va&aid=31966> (“The release of the ‘Draft Guidelines’ of the economic reforms in the fall of 2010, and the promising public consultations that were had between December 2010 and February 2011 with over 1 million Cubans in the process of developing the lineamientos, has, most certainly, committed Cuba to a massive reform of the economy such as it has never seen before. Cuba is, in a word, at a crossroads right now.”).

⁹⁰ See LINEAMIENTOS, *supra* note 39.

⁹¹ VI CONGRESO PARTIDO COMUNISTA DE CUBA [SIXTH CONGRESS OF THE COMMUNIST PARTY OF CUBA], INFORMACIÓN SOBRE EL RESULTADO DEL DEBATE DE LOS LINEAMIENTOS DE LA POLÍTICA ECONÓMICA Y SOCIAL DEL PARTIDO Y LA REVOLUCIÓN [INFORMATION ON THE OUTCOME OF THE DEBATE OF THE POLICY GUIDELINES OF THE POLITICAL AND SOCIAL ECONOMY OF THE PARTY AND THE REVOLUTION] (2011) (Cuba), available at <http://www.scribd.com/doc/55084978/Tabloide-Debate-Lineamientos-VI-Congreso-Partido-Comunista-de-Cuba> [hereinafter TABLOIDE].

⁹² See *infra* Part III.C.1.

⁹³ See *infra* Part III.C.2.

working.⁹⁴ More importantly, that economic model was unsustainable even in the short run. The Lineamientos were not undertaken in a vacuum. Nor did they emerge without foundation. The State had been moving for years to develop public sector enterprises, at the national and transnational level, as vehicles through which it could engage in economic activities, especially with foreign partners. In the year preceding their introduction, the State had moved dramatically in attempt to open up private sector activity.⁹⁵ That opening, such as the development of state sector corporations, reflected a deep suspicion of autonomous economic activity, and a presumption that opening up had to be tightly regulated and supervised. As is typical in Marxist-Leninist states, the ideas behind these efforts originated in the CCP and were then implemented through the state apparatus. But the Lineamientos also suggest that Raúl Castro's reform efforts have generated opposition within the CCP and state sector leaders. That opposition was most evident in the success that the Sixth Party Congress achieved in significantly narrowing the reforms proposed by Raúl Castro, especially in the opening and management of the non-state sector.⁹⁶ This is both good and bad news—good news for those seeking to strengthen an institutionalized CCP apparatus to preserve stability in government,⁹⁷ bad news because the price of that stability appears to be a significant conservatism in political views of the appropriate implementation of Marxist-Leninist statecraft.

The Lineamientos start from a presumption that they are directed toward the preservation of the fundamental character of the 1959 Revolution, and effectuated to preserve its gains. But within this framework, the Lineamientos appear to nod in the direction of the realities of the economic situation that has brought the CCP to the reevaluation of its values. Thus, the Lineamientos sought to guarantee changes to the system by which services are provided, but to limit those promised changes to those possible under existing economic circumstances.

At a 2011 Conference in New York, Cuban economists from the University of Havana's Center for the Study of the Cuban Economy (*Centro de Estudios de la Economía Cubano*) addressed these tensions and provided a window on the way in which these issues are approached within

⁹⁴ See, e.g., Oscar Echevarría, *Cuba—A Glance at the Future: Challenges and Opportunities*, 21 CUBA TRANSITION 143 (2011), http://www.ascecuba.org/publications/proceedings/volume21/pdfs/oa_echevarria.pdf.

⁹⁵ See PETERS, *supra* note 71.

⁹⁶ See *infra* Part III.C.1.

⁹⁷ The need to strengthen the institutional party is an important one. See Arturo López Levy, *Change in Post-Fidel Cuba: The Challenges of Political Liberalization and Economic Reform*, 21 CUBA TRANSITION 374, 382–86 (2011), <http://www.ascecuba.org/publications/proceedings/volume21/pdfs/lopezlevy.pdf>.

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Cuba.⁹⁸ First, and perhaps the most important conceptually, was a point raised by Omar Everleny Pérez Villanueva, who forcefully argued that Cuban economists, political theorists, and government officials should embrace the construction of internal markets in which individual small and medium sized enterprises might play a role that would aid in the development of the Cuban economy without doing damage to its political framework.⁹⁹ His review of the willingness of China and Vietnam to embrace a vigorous internal market, even as they preserved their Marxist social and political framework,¹⁰⁰ provided strong evidence that, though capitalism used markets in accordance with the logic of its ideology, there is a place for markets within socialism.¹⁰¹ Indeed, the move toward pragmatism suggested that it might be possible to take a fresh and more sophisticated approach to socialist markets both within Cuba and as a means of Cuban engagement with global markets in which “the state should study a future role for itself regulating enterprises rather than directly administering them.”¹⁰² This move toward pragmatism was based on the utility of opening internal markets to small and medium sized enterprises as well as to cooperatives that both reflected global trends,¹⁰³ and that furthered the Cuban Marxist project of socializing the economy.¹⁰⁴

⁹⁸ For an overview of the programming, see Symposium, *Cuba Futures: Past and Present*, BILDNER CTR. FOR W. HEMISPHERE STUDIES (2011), available at <http://cubasyposium.org/Cuba%20Futures%20Final%20Program%20With%20Updates.pdf>; see also, Larry Catá Backer, *The State of the Cuban Economy: Divergent Views of Economists from Inside Cuba*, LAW END DAY (Aug. 3, 2010), <http://lbackerblog.blogspot.com/2010/08/state-of-cuban-economy-divergent-views.html>.

⁹⁹ Omar Everleny Pérez Villanueva, *La Actualización del Modelo Económico Cubano [The Updated Cuban Economic Model]*, in POLITICAL ECONOMY OF CHANGE IN CUBA 1, 2–3 (2011), <http://web.gc.cuny.edu/dept/bildn/cuba/PEchangeCuba.pdf> (“Pero el tiempo transcurrido en el decursar del proyecto socialista, más el análisis de las experiencias de otros países socialistas asiáticos, colocan al estado cubano ante la imperiosa necesidad de actualizar su modelo económico, donde el mercado deba tener un papel cada vez más creciente en la economía cubana, aunque se manifieste que revalecerá la planificación y no el mercado.”).

¹⁰⁰ *Id.* 15–18; see also CAROLYN L. HSU, *CREATING MARKET SOCIALISM* (2007).

¹⁰¹ Villanueva, *supra* note 99, at 3–4 (“Y ya se reconoce que el estado puede ceder actividades que no le son estratégicas, y que sean capaces de absorber la gran cantidad de trabajadores que quedarán disponibles en los próximos años, en la nueva reorganización en curso en las empresas y en las unidades presupuestadas.”).

¹⁰² Omar Everleny Pérez Villanueva, *The Cuban Economy: A Current Evaluation and Proposals for Necessary Policy Changes* (Japan Trade Org., Inst. of Developing Econs. Discussion Papers, Paper No. 217, 2009), available at <http://www.ide.go.jp/English/Publish/Download/Dp/pdf/217.pdf>.

¹⁰³ Villanueva, *supra* note 99, at 14 (“Lo interesante es que ese término no es derivado de la coyuntura que atraviesa la economía cubana, es una tendencia mundial que se está imponiendo de estructurar la producción sobre la base de pequeñas y medianas empresa.”).

¹⁰⁴ *Id.* at 14–15 (“Es cierto que en la actualidad se analiza por parte del gobierno cubano

A second point was the recognition that, even if markets were to be a means of reform, the private sector markets envisioned would remain small and effectively dependent on the public sector markets and enterprises.¹⁰⁵ There were two parts to this point. The first was that the private enterprise would remain small because of the inability of the state to provide capital. That inability was both structural and functional. Structurally, Cuba has no system for easily providing access to capital for individuals. Functionally, even if it had such a system, there are few funds available for that purpose, and little use for the funds with a wholesale market still essentially undeveloped.¹⁰⁶ Second, the solution to this approach of state control of finance coupled with its inability to provide financing was to internationalize micro financing.¹⁰⁷

The last point, raised by Camila Piñero Harnecker, is also telling.¹⁰⁸ Among the reforms contemplated in the Lineamientos is permitting individuals to hire others in their small businesses.¹⁰⁹ This reform reflects a substantial change in the Cuban economic system in which only self-employment and employment by the state were possible. Piñero Harnecker, however, suggested that this new form of an employment relationship might be tightly controlled by the state.¹¹⁰ She suggested that Cuba was considering, for these private enterprise employees, creating a state-sponsored union that would have substantial authority to determine the terms and conditions of employment available in the private sector.¹¹¹ These might well mimic the state enterprises that now determine both the conditions of employment and the wages of Cuban workers hired by foreign enterprises. The reforms, then, do not contemplate the creation of independent or private labor markets. Nor do they contemplate vesting individuals with authority over the control of capital. Rather, to emphasize

la necesidad de implementar algunas de las variantes de las llamadas PYMES, especialmente las llamadas cooperativas por la socialización de la producción y los beneficios que la misma trae consigo.”).

¹⁰⁵ Pavel Vidal Alejandro, *Las restricciones de divisas en la economía cubana al terminar el 2010: crisis, ajuste y salida paulatina* [Currency Restrictions in the Cuban Economy at the End of 2010: Crisis, Adjustment and Gradual Solution], in POLITICAL ECONOMY OF CHANGE IN CUBA, *supra* note 99, at 19, 43.

¹⁰⁶ *Id.* at 61–63.

¹⁰⁷ *Id.* at 63 (“[E]ro si se promueve el microcrédito con colaboración internacional, ello significaría una entrada de divisas al país que posibilitarían abrir la importación para los uentapropistas, microempresarios y cooperativistas.”).

¹⁰⁸ See Camila Piñero Harnecker, *New Forms of Enterprise in Cuba’s Changing Economy*, in POLITICAL ECONOMY OF CHANGE IN CUBA, *supra* note 99, at 43, 67.

¹⁰⁹ See *infra* notes 360–362 and accompanying paragraph (discussing provisions of Lineamientos governing cooperative authority to hire labor).

¹¹⁰ Piñero Harnecker, *supra* note 108, at 67–68.

¹¹¹ *Id.* at 74–75.

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the limited nature of the market opening, the reforms reinforce the limits of aggregated economic activity outside the state sector by emphasizing aggregation of labor rather than of capital.¹¹² This is a framework that is replicated at the inter-governmental level. For example, the only corporate enterprises the ALBA framework calls for are state-owned or state-based joint ventures (*empresas grannacionales*).¹¹³ And, indeed, there was a suggestion made that Cuba expected to hire these proprietors in a sort of state-supported privatized sector.

Taken together, these insights help explain the role of the Lineamientos not just in reshaping the Cuban economy through limited privatization, but also in the re-organization of the economy as well. This was an important objective, with significant regulatory consequences, as Cuba moves from a monolithic central planning model to one in which the economy is divided between a state and a non-state sector, and where both may be affected by internal and external trade. To understand the scope and direction of approaches to cooperatives in the non-state sector, it is necessary to understand the premises of the framework within which the organization and division of the economy is structured under the Lineamientos.

The Lineamientos allocate distinct forms of economic organization between two spheres of economic activities: the small-scale local and regional/national activity. This is a division that is then carried forward in the construction of Cuba's form of global engagement through socialist regional trade organizations, principally ALBA.¹¹⁴ Small-scale activities are to be open to individuals, but remain limited and target local retail sectors.¹¹⁵ The private sector is allocated a precise set of activities that may be undertaken as sole proprietorships or through collectives. In either case, the focus is on the aggregation and utilization of labor, and avoiding the means of aggregating and allocating capital in economic activities outside the control of the state. Property remains firmly attached to the state under

¹¹² See Camila Piñero Harnacker, *Las cooperativas en el Nuevo modelo económico cubano* [*The Cooperatives in the New Cuban Economic Model*], in MIRADAS A LA ECONOMÍA CUBANA: EL PROCESO DE ACTUALIZACIÓN [LOOKS TO THE CUBAN ECONOMY: THE UPGRADE PROCESS] 73, 86 (2009) (“Esto refleja la preocupación redistributiva y la despreocupación por la naturaleza de las relaciones sociales de los sujetos que construyen, o no, la sociedad post-capitalista; enfoque este que ha marcado las experiencias socialistas y lleva a desestimar las potencialidades productivas y transformadoras de las cooperativas y otras formas autogestionarias.”).

¹¹³ *Conceptualización de Proyecto y Empresa Grannacional en el Marco del ALBA* [*Conceptualization of Company and Project Grannationals under ALBA*], ALBA-TCP, <http://www.alba-tcp.org/contenido/conceptualizacion-de-los-grannacional> (last visited Mar. 29, 2013) [hereinafter *ALBA Grannacional*].

¹¹⁴ See Backer & Molina, *supra* note 36.

¹¹⁵ See *infra* Part II.B.2.

the direction of the CCP. In contrast, the bulk of economic activity is to be organized at the national/regional level.¹¹⁶ This activity is to remain an instrument to national control and marked by direct micro state planning or organization into well-controlled juridical persons (mostly in corporate forms). The state sector dictates the overall direction of economic activity and includes enterprises understood to have national impact. These are organized by sectors and may be run via direct state control or devolution of SOEs. Their use is also bound by the conceptualization of globalization within the ideological parameters of ALBA. It is to this re-organization of the economic sector of Cuban state activity that the Article turns to next.

B. Economic Organization After the Lineamientos

The development of the new Cuban economic model suggests a pattern of both tight control of the means and substance of economic activity and a tentative willingness to tolerate a small space in which control is devolved to individuals. In return for this greater autonomy, the State eliminates a need to support individuals and individuals are viewed as sources of funds, in the form of taxes and fees that might then subsidize other public activities. But the limits of the devolution from tight state control are severe. While individuals may now engage in economic activity in the non-state sector, the forms of permitted economic activity are tightly controlled. Licensing makes supervision and control more powerful. And this oversight substantially constrains individual autonomy and flexibility in meeting demands. The State remains in direct control of the economy and reserves for itself any form of economic activity that implicates ownership of productive property. Loosening comes only at the very bottom of the retail and service sector. The regulatory ideal¹¹⁷ of great state enterprises and a small army of small proprietors satisfies the specific needs of consumers for everyday items.

¹¹⁶ See *infra* Part II.B.1.

¹¹⁷ The regulatory ideal describes the normative conception of a thing that then serves to determine the rules used to ensure the coherence of that normative conception. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 1 (1993) ("The category of 'sex' is, from the start, normative; it is what Foucault called a 'regulatory ideal.' In this sense, then, 'sex' not only functions as a norm, but it is part of a regulatory practice that produces the bodies it governs."). In this case, the regulatory ideal of the economy serves not merely as a norm (Marxist-Leninist economic organization), but also as its regulatory practice (SOEs and individual-cooperatives) that creates a self-referencing loop where each reinforces the other through constant invocation. It thus produces what it names. See *id.* at 7–8 ("The naming is at once the setting of a boundary, and also the repeated inculcation of a norm."). This is a powerful and stable (if contextual) relationship that makes the rejection of the norm unlikely merely by suggesting a distinct regulatory ideal—for example, U.S. style-free market regulatory normativity.

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1. *The Omnipresent State Sector*

Corporations constitute property in the hands of their owners, but they also constitute collective persons.¹¹⁸ As great autonomous collectives of people and resources, operating in accordance with their own constitution and serving the needs of their own constituents, corporations are institutions that exercise significant social, political, and economic power. In the latter respect, their organization and operations tend to mirror those of the state.¹¹⁹ This close connection between corporate and state forms created a conceptual problem for European Marxist Leninist states, and for the Cuban Communist Party as well.

Marxist-Leninist “socialist” states are grounded in the fundamental notion of state monopoly over the social, political, and economic organization. Collectives of people and things, operating independent of the state, even if subject to state regulation, deprive the state of its monopoly position, and, if they can amass enough power, threaten the fundamental ordering principles of state organization. Retaining an organizational form based on the suppression of all collectives other than those “owned” by the state provides the simplest and most effective form for safeguarding the Marxist-Socialist character of the state. Even when organizations, like corporations, are permitted to mimic the state, they serve as convenient means to allocate resources within the state apparatus and divide authority for its use.

The Lineamientos do little to change this basic set of premise that have guided Cuban economic policy since the 1959 Revolution. The corporation remains an instrument of state policy. The socialist system continues to frame economic organization, and for that purpose socialist state enterprises are formed.¹²⁰ These constitute the principal form of national economic activity.¹²¹ Cuba allows additional forms of economic organizations to be recognized—mixed enterprises, cooperatives, individuals operating as sole proprietorships, and various agricultural ventures—aimed at improving economic efficiency.¹²² However, individuals are not permitted to aggregate property in juridical or natural persons.¹²³ While the Lineamientos seek to separate administrative from economic activity, since

¹¹⁸ See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 583 (1999).

¹¹⁹ It is replication, in part, that suggests the premises underlying recent efforts at the international level to impose state obligations directly on multinational corporations. See Backer, *supra* note 13; Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INTL L. 1 (2003).

¹²⁰ LINEAMIENTOS, *supra* note 39, ¶ 1.

¹²¹ *Id.* ¶ 2.

¹²² *Id.*

¹²³ *Id.* ¶ 3.

the original version, the Sixth Party Congress inserted a provision ensuring that the process of separation will be gradual and ordered.¹²⁴ Under the Lineamientos, corporations are viewed as ways to efficiently organize the economic sector on productive rather than competitive lines.¹²⁵ Thus, cooperation rather than competition is privileged. This represents a retreat from the provision as originally proposed that spoke of strong and well-organized enterprises, but did not speak to any sort of enforced cooperation among them.¹²⁶ That was added during the course of debate, again suggesting the difficulty of control for those who sought to put forward more aggressively progressive structural reforms.

Central planning remains the heart of the economic system,¹²⁷ and state sector planning is meant to take into account the management of emerging market sectors as well.¹²⁸ While the form of planning may change to meet the realities of new forms of activities, the object remains the effective control and integration of all aspects of economic activity in Cuba by bringing them all under the political direction of the state.¹²⁹ However, the opening of a private space for economic activity and the recognition of the need to deal with foreigners also requires the elaboration of a system to regulate and enforce agreements between these enterprises.¹³⁰ It also contemplates the organization of wholesale markets to service both state sector corporations and participants in private sector activities,¹³¹ including cooperatives.¹³² The focus on reorganizing at least part of the

¹²⁴ *Id.* ¶ 6.

¹²⁵ *Id.* ¶ 7 (“Lograr que el sistema empresarial del país esté constituido por empresas eficientes, bien organizadas y eficaces, y serán creadas las nuevas organizaciones superiores de dirección empresarial. Se desarrollará la cooperación entre las empresas para garantizar mayor eficiencia y calidad. Se elaborará la norma jurídica que regule todos estos aspectos.”).

¹²⁶ See TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 7, col. original (“Será necesario lograr que el sistema empresarial del país esté constituido por empresas fuertes y bien organizadas, y creadas las nuevas organizaciones superiores de dirección empresarial. Se elaborará el Reglamento General para estas organizaciones.”).

¹²⁷ LINEAMIENTOS, *supra* note 39, ¶ 1 (“El sistema de planificación socialista continuará siendo la vía principal para la dirección de la economía nacional, y debe transformarse en sus aspectos metodológicos, organizativos y de control.”).

¹²⁸ *Id.* (“La planificación tendrá en cuenta el mercado, influyendo sobre el mismo y considerando sus características.”).

¹²⁹ *Id.* ¶ 5 (“La planificación abarcará el sistema empresarial estatal, la actividad presupuestada, las asociaciones económicas internacionales, y regulará otras formas de gestión no estatales que se apliquen y será más objetiva en todos los niveles. Los nuevos métodos de planificación cambiarán las formas de control sobre la economía. La planificación territorial tendrá en cuenta también estas transformaciones.”).

¹³⁰ *Id.* ¶ 10.

¹³¹ *Id.* ¶ 9.

¹³² TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 9.

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state sector through state enterprises continues, refining a slow-developing process dating back to the efforts at enterprise optimization of 1998,¹³³ but is now more clearly tied to the preservation of state control of economic activity.

Since the 1990s, Cuba has revised its Constitution and laws to permit joint ventures between state enterprises and foreign corporations, and to provide for the operation of foreign corporations within Cuba.¹³⁴ “Cuba further increased this flexibility in October 1994, when it officially declare[d] that all sectors of the economy, with the exception of public health, education, and the armed forces, were open to foreign investment.”¹³⁵ Notwithstanding these permissive revisions, the internal Cuban economy is substantially insulated from the activities of these enterprises, and Cuban individuals are substantially prohibited from forming or investing in these export-oriented enterprises.¹³⁶ The difficulty lies in the arbitrariness built into the approval process, one that is multilayered and substantially opaque.¹³⁷ In other respects, Cuba retains a commercial code, which is not much different from the Spanish colonial law it inherited at the end of the nineteenth century, and the primitive and largely outdated codification of corporations law.¹³⁸

Cuban foreign investment is governed by Decreto-Ley No. 77,¹³⁹ which permits inbound foreign investment and the establishment of joint ventures, but only with Cuban state enterprises and subject to a fairly complicated system of approvals under the direction of the Ministry of Foreign Investments and Economic Cooperation.¹⁴⁰ Moreover, foreign

¹³³ See generally Matias F. Travieso-Diaz, *Cuba's Perfeccionamiento Empresarial Law: A Step Towards Privatization?*, 23 U. PA. J. INT'L ECON. L. 119 (2002).

¹³⁴ Matias F. Travieso-Diaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, 37 GEO. WASH. L. REV. 885, 887 (2005).

¹³⁵ *Id.*

¹³⁶ See RICHARD E. FEINBERG, *THE NEW CUBAN ECONOMY: WHAT ROLES FOR FOREIGN INVESTMENT?* 10 (2012), available at http://www.brookings.edu/~media/Research/Files/Papers/2012/12/cuba%20economy%20feinberg/cuba%20economy%20feinberg%209.pdf?_lang=en (“The more orthodox factions within the government and Communist Party seem to have gained the upper hand in drafting the section on foreign investment. The conservatives inserted language revealing their enduring distrust of foreign capital and underscored the need to carefully screen projects, as well as to monitor closely those projects that are allowed to proceed.”).

¹³⁷ *Id.* at 12–13.

¹³⁸ See Backer, *supra* note 5, at 365–75.

¹³⁹ See Asamblea Nacional del Poder Popular Ley No. 77: Ley de la Inversion Extranjera [National Assembly of the People's Power Law No. 77: Foreign Investment Law] (GACETA OFICIAL EXTRAORDINARIA NO. 3, Sept. 6, 1995, at 5) arts. 1.1, 3 (Cuba).

¹⁴⁰ Kathleen Claussen, *Engaging Closed Societies Through International Arbitration: Lessons From the Cuban Experience*, 17 LAW & BUS. REV. AM. 11, 15–18 (2011).

ventures may take a majority stake in joint enterprises, but may not invest in domestic corporations in Cuba.¹⁴¹ Though Decreto-Ley No. 77 “allows for 100 percent foreign ownership . . . only six such wholly foreign-owned firms exist today: three in petroleum and energy, two in maritime transport, and one in the financial sector.”¹⁴² There is nothing that would prevent Cuban state enterprises operating in a corporate form from taking a minority stake in a foreign corporation operating abroad. Individual authorization is required for every foreign entity.¹⁴³ Scholars outside of Cuba have criticized Cuban foreign investment law.¹⁴⁴ Some have argued that the system is highly inefficient.¹⁴⁵ The areas set aside for investments are limited and designed more like quarantine zones than economic zones. They are meant to prevent all but the most controlled contact between Cubans and foreigners. Moreover, the underlying law of contract through which business and investment relationships must be effectuated within Cuba remains primitive by global standards. Lastly, recent Cuban government anti-corruption efforts have negatively impacted investment.¹⁴⁶

Cubans have generally rejected the Chinese approach to economic re-organization, especially in the matter of permitting individuals to use the corporate form.¹⁴⁷ Such a variant of Marxist-Leninist structuring permits too much individual autonomy for Cuban tastes. Moreover, the resulting disparities of wealth that arise, as has been the case in China, are still unacceptable in Cuba, especially as between individuals. These observations are usually deployed to support a basic line—that the Chinese model does not work. Indeed, from the perspective of some, any sort of hybridity would invariably create the conditions for a return to

¹⁴¹ Feinberg notes that “whereas in the 1990s the government often granted the foreign partner majority control, now it is seeking to revert 51 percent or more of the voting shares to the SOE partner.” FEINBERG, *supra* note 136, at 13. For the earlier framework, see Joy Gordon, *Cuba’s Entrepreneurial Socialism*, ATLANTIC, Jan. 1997, at 18, available at <http://www.theatlantic.com/past/docs/issues/97jan/cuba/cuba.htm>.

¹⁴² FEINBERG, *supra* note 136, at 13.

¹⁴³ See María C. Werlau, *Foreign Investment in Cuba: The Limits of Commercial Engagement*, 6 CUBA TRANSITION 456, 474–75 (1996), <http://www.ascecuba.org/publications/proceedings/volume6/pdfs/57Werlau.fm.pdf>.

¹⁴⁴ See FEINBERG, *supra* note 136, at 12–17; Matias F. Travieso-Diaz & Charles P. Trumbull IV, *Foreign Investment in Cuba: Prospects and Perils*, 35 GEO. WASH. INT’L L. REV. 903, 908–09 (2003).

¹⁴⁵ See, e.g., FEINBERG, *supra* note 136.

¹⁴⁶ Marc Frank, *Cuba Crackdown Sees Foreign Companies Exit*, FIN. TIMES (May 21, 2012), <http://www.ft.com/intl/cms/s/0/e76f3952-a34b-11e1-8f34-00144feabdc0.html> (“It was hoped that sweeping reforms adopted by the Communist party last year would open the way for significant foreign investment. But the government has instead re-examined existing agreements and stalled new projects, foreign business sources said.”).

¹⁴⁷ See LINEAMIENTOS, *supra* note 39, ¶ 3 (prohibiting individuals from holding aggregations of property for non-state purposes).

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capitalism.¹⁴⁸

There are other arguments that have been made to resist the Chinese approach and in defense of substantially greater state direction of economic activity.¹⁴⁹ First, neither Maoism nor Stalinism has overcome the contradictions of Marxist-Leninism and the autonomous private economic collective. Second, Cuban Stalinism is fundamentally incompatible with Deng Xiaoping-style Marxist-Leninism and the evolving Chinese model. Third, the Chinese model is impossible to implement because Cuba remains isolated from global capital flows, both by design and because of Cuba's poor record of paying its debts.¹⁵⁰ Fourth, the U.S. embargo and aggressive American policies makes adoption of the Chinese model impossible., principally because it makes access to markets more costly and because any global engagement might provide an opening for U.S. inspired regime change efforts. While the U.S. facilitated Chinese economic reform even as they remained critical of its political system, they would hinder similar moves by Cuba precisely because it remains U.S. policy to destabilize and aid in the overthrow of the current Cuban government. That leads into the last argument—that Cuba may not be yet able to compete in the global marketplace, because of its size, its lack of infrastructure, and its inability to access capital through global institutions, most notably the International Monetary Fund (IMF) and World Bank.

2. The Role of Private Enterprise

Large-scale, capital-intensive, and nationally significant economic activity remains the sole province of the state in Cuba. That does not preclude the possibility of opening a sector of the economy to private activity. The structures of these new regulatory structures center on the scope and objectives of efforts to privatize economic activities, the role of the state in that revised system, and the extent of autonomy of privatized occupations from state control. The issue is where to draw the line between state control and private initiative. The real danger for Cuba is that these reforms, like the lukewarm reforms of the 1990s—which also followed the familiar pattern of opening at the bottom to a limited number of individual entrepreneurs—will not produce the self-sustaining local economic market-oriented enterprises at the core of Chinese-style progress.¹⁵¹

¹⁴⁸ Helen Yaffe, *El Ché Guevara: las cooperativas y la economía política de la transición al socialismo* [*Ché Guevara: Cooperatives and the Political Economy of the Transition to Socialism*], in *COOPERATIVAS Y SOCIALISMO*, *supra* note 57, at 132.

¹⁴⁹ See generally Backer, *supra* note 5.

¹⁵⁰ See, e.g., Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 *PENN STATE INTERNATIONAL LAW REVIEW* 497-561 (2006).

¹⁵¹ Roger Betancourt, *Cuba's Economic 'Reforms': Waiting for Fidel on the Eve of the Twenty-First Century*, 9 *CUBA TRANSITION* 276, 278 (1999).

Though the pieces of this puzzle are messy, the basic parameters developed since 2006 are becoming clearer. Private enterprise is to be limited to the non-state sector. Though undefined, it is structured along the lines of specific occupations and services that are made lawful to deliver by individuals for their own account. State control and management remains paramount and pervasive: licenses are needed for each listed occupation, the state continues to control all markets for goods and distribution channels not otherwise covered by a licensed activity, pricing of materials remains essentially driven by state planning rather than by demand or supply, and the state aggressively taxes all activities in the non-state sector.

The central focus of privatization is centered on individual economic activity, grounded on the sole proprietorship connected to local small-scale production or service delivery. The idea, effectively, is that it might be more efficient to permit some individual autonomy at the lowest and smallest levels of economic activity because the cost of state supervision at this level far exceeds its value. The issue remains, though, the extent to which even in this privatized space, the state ought to assert a more or less aggressive regulatory or supervisory presence.

Control is most effectively exercised by strictly limiting the kinds of activity that might qualify for privatization. The State has carefully and perhaps over-precisely limited the sorts of occupations or economic activities to which liberalization applies. Each of the 178 occupations listed requires a separate license. The types of occupations listed are not capital-intensive activities. Nor do they directly challenge the state's control of the non-retail sector. This suggests a focus on the lowest level of economic activity, that is, on activity with respect to which aggregation of labor or capital is not required. The official account, as elaborated in *Granma*,¹⁵² suggested that the privatization of a small retail sector was meant to respond to popular demand for a wider variety of goods and services and the need for the State to reduce its support for goods already made available through state enterprises, especially in difficult financial times.¹⁵³ Despite the limitations, many Cubans have sought to apply for licenses—some regularizing current unregulated private activity, and others seeking entry into the non-state sector for the first time.¹⁵⁴

The small, local sole entrepreneur is, therefore, the model that is to be cultivated at the heart of the reformation of the political economy of Cuba.¹⁵⁵ One can view this either as bottom up development or as the

¹⁵² Martínez Hernández, *supra* note 77.

¹⁵³ *Id.*

¹⁵⁴ Nick Miroff, *Cuba Issues Thousands of Self-Employment Licenses*, NPR (Jan. 18, 2011), <http://www.npr.org/2011/01/18/133020988/cuba-issues-thousands-of-self-employment-licenses> (reporting the issuance of over 75,000 licenses by January 2011).

¹⁵⁵ *Cf.* Tracy Wilkinson, *Cuba Opening to Private Enterprise Spurs Service Sector Start-*

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necessary bifurcation of the economy, with a market-based local sector and a state sector for everything else. Privatization was characterized as a means of revamping the political economy of Cuba to increase productivity and efficiency, to increase a collective sense of worker self-worth, and to move away from the consequences of a communist party line in the 1990s that seemed to condemn private enterprise legitimately permitted (and regulated) by the state.¹⁵⁶

Even before the process of formulating the Lineamientos moved to center stage, the strategy of dumping state workers into a newly opened non-state sector of sole proprietors and simple cooperatives was taking shape. This was confirmed by internal Cuban state documents that surfaced in late 2010¹⁵⁷ and suggested that a limited amount of aggregation would be permitted: cooperatives of individuals but not corporations.¹⁵⁸ That document appeared to premise privatization on the willingness of individuals to take advantage of a new form of cooperative in ordering their economic activities, but only economic activities within professions identified and permitted by the State and subject to appropriate licensure, regulation, monitoring, and the like. But it was also anticipated that “many of the fledgling businesses won’t get off the ground because laid-off workers often lack the experience, skill or initiative to make it on their own.”¹⁵⁹

While one of the objectives is to reduce the State’s obligation to

ups, L.A. TIMES (Aug. 6, 2011), [http:// www.latimes.com/news/nationworld/world/la-fg-cuba-entrepreneurs-20110807,0,7604565.story](http://www.latimes.com/news/nationworld/world/la-fg-cuba-entrepreneurs-20110807,0,7604565.story).

¹⁵⁶ Martínez Hernández, *supra* note 77. The need to expand the availability of self-employment was appropriate in light of official efforts to redesign the political economy of the state, and to do so in a way that contributes to the sense of worker self-worth. More importantly, in a way that signalled the scope of the change of the CCP line, Martínez Hernández also described the move toward this opening as a means of abandoning the old 1990s conceptions of private economic activity and the state policy of stigmatizing those who engaged in it.

¹⁵⁷ Paul Haven & Andrea Rodriguez, *Document Charts Cuba’s Path to Economic Reform*, MIAMI HERALD, Sept. 14, 2010, *reprinted in* JAM. OBSERVER (Sept. 15, 2010), http://www.jamaicaobserver.com/Document-charts-Cuba-s-path-to-economic-reform_7963709.

¹⁵⁸ It was reported that the intent of the government was both to push individuals into the newly created small private retail and basic services sector and to manage the choices for private sector activity:

The document obtained by AP—which is dated August 24 and laid out like a PowerPoint presentation with bullet points and large headlines—said many laid-off workers will be urged to form private cooperatives. Others will be pushed into jobs at foreign-run companies and joint ventures. Still more will need to set up small business—particularly in the areas of transportation, food and house rental.

Id.

¹⁵⁹ *Id.*

support its working age population through public sector jobs, another equally significant objective was to use non-state sector activity to generate what was hoped to be significant tax revenue to fund Cuban social services, which are under stress.¹⁶⁰ All signs, therefore, indicate that the principal objective of the State is to convert workers from cost items to revenue generators. The hope is that as a result people will have a larger assortment of goods and services available to them and the State will not be burdened with the subsidies necessary to provide these items. Work flexibility is taken to redesign the political economy of Cuba to increase individual productivity and efficiency as well as to provide a means through which workers can feel more useful, change popular conceptions of work, and reduce the country's stigma. Furthermore, the revenue generated is not merely available to the producers, but also to the State in the form of taxes.¹⁶¹ This income is meant to fund state activity in ways not currently available.¹⁶² And so these private operators of commercial activity will be taxed if they mean to enjoy all of the social benefits provided by the State.¹⁶³

A further review of the government's presentation of these changes also provides evidence of objectives and approaches.¹⁶⁴ The government suggested that, in addition to strict controls on the sorts of occupations subject to liberalization, it will tightly control economic activities only for some of which private markets will be permitted.¹⁶⁵ Market control is indirect—it is focused not on the markets for permitted activities, but rather on markets for materials necessary to conduct business in a wide variety of activities that might otherwise have been permitted. Access to these markets will be carefully controlled and changes made slowly over the

¹⁶⁰ See Carmelo Mesa-Lago, *Social Services in Cuba: Antecedents, Quality, Financial Sustainability, and Policies for the Future*, in *THE CUBAN ECONOMY: RECENT TRENDS* 51 (José Raúl Perales ed., 2011). Mesa-Lago notes: "Raúl Castro (2010) has stated: 'The sustainability and preservation of our social system depends on the economic battle, today more than ever our principal task.'" *Id.* at 71 (quoting Raúl Castro, Closing Remarks at the Ninth Congress of the Young Communist League in Havana, Cuba (Apr. 4, 2010)).

¹⁶¹ The initial *Granma* report explained the State's intent to tax private activity and the anticipation that such activity would be both profitable and generate tax revenue that could serve to redistribute wealth and maintain a socialist character. Martínez Hernández, *supra* note 77.

¹⁶² See Mesa-Lago, *supra* note 160.

¹⁶³ Martínez Hernández, *supra* note 77 (noting obligation to pay taxes to extend to personal income, services rendered, for hired labor and in addition to contribute to the state social security system).

¹⁶⁴ Thus, the reliance, in the next several paragraphs, is on the report prepared by Martínez Hernández. *See id.*

¹⁶⁵ Martínez Hernández notes that new forms of permitted private economic activity would be limited because of the lack of legitimate product markets necessary to carry on such activities. *Id.*

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course of 2011 and beyond.¹⁶⁶ At its base, these secondary markets will be treated as part of the controlled sector. And space for private market activities—especially in foodstuffs—will be expanded a little.¹⁶⁷

These changes are treated not so much as a deviation from prior practice as a return to the practices of the early post-revolutionary period. The fig leaf for this opening of economic activity is the regulations that grandfathered professionals in the practice of their profession entered into before 1964; but it is a fig leaf that also drew the outer boundaries of reform. The State characterized its reforms largely as a ratification of more fundamental policy first articulated in the grandfathering provisions of 1964 and as building on the premises on which this grandfathering was structured.¹⁶⁸ It was made quite clear that the framework for opening a private enterprise sector would be the connection between the need to identify a narrow band of professions as the only permitted basis for private activities and the conversion of a visible portion of currently illegal and underground activities into regulated ones.¹⁶⁹

This additional benefit has important ramifications beyond the small opening of the retail sector at the heart of the Lineamientos project.¹⁷⁰ This

¹⁶⁶ Martínez Hernández quotes Marino Murillo Jorge, vice president of the Council of Ministers, who suggested the need for additional planning to meet the need for infrastructure to support even the small private sector contemplated by the Lineamientos reforms. Particularly important was the need to develop a wholesale market, without which even the limited private sector contemplated would struggle. But such a development, Murillo Jorge warned, would take years to develop. *See id.* (“[E]stamos diseñando en el plan de la economía del año próximo qué debemos incorporar teniendo en cuenta las nuevas transformaciones que demandarán ferreterías, exigirán de equipamientos gastronómicos que hoy no se venden. Tenemos que conducir el plan para lograr coherencia con lo hecho. Lo óptimo es un mercado mayorista con precios diferentes para ellos. Pero eso no lo vamos a poder hacer en los próximos años. Ahora tenemos que lograr un mercado donde ellos puedan comprar lo necesario aunque sin diferenciar los precios minoristas.”). During that time, of course, the development of socialist private markets contemplated in the Lineamientos would be vulnerable to the still-considerable power of the CCP’s conservative elements, which opposed any deviation from a wholly state directed economy.

¹⁶⁷ The efforts represent an expansion of current practices rather than a transformative opening up. The suggestion focused on increasing the room for private activity already permitted, and even this opening would be highly managed at a level of detail that might effectively transform what appears to be opening up into little more than indirect state regulation. *See id.* (“Valhuerdi comentó que, cuando entre en vigor la resolución, podrán utilizarse hasta 20 plazas en las “paladares”, donde antes se podían tener 12; que se permitirá comercializar en ellas productos alimenticios elaborados a base de papa, mariscos y carne de res.”).

¹⁶⁸ Martínez Hernández, *supra* note 77 (suggesting the grandfathering as a ratification but one justified because the few number of people involved makes such an exception tolerable).

¹⁶⁹ *Id.* (explaining that in opening the private sector there was taken into account its potential to reduce the scope of underground and illegal market activities).

¹⁷⁰ *Id.*

is especially the case with respect to markets in real estate.¹⁷¹ With appropriate licenses from the State, a limited market in rentals will be tolerated, available for the most part to those who receive permission to leave the country for a certain amount of time.¹⁷² The difficulty, though, remains formidable. Such a transformation requires an equivalent change in the institutional structures of administration that have been notorious for cronyism, arbitrariness, and lack of accountability.¹⁷³

A careful review thus suggests that the great changes to the Cuban political economy assume a coherent shape that is hardly revolutionary or that otherwise point to a rejection of its current framework. This is change at the margins, even if understood as significant within the framework of Cuban political thinking. As such, control remains the key, and the avoidance of the creation of potential challengers to state-party power is critical. The State controls private economic activity in three ways: first, it does not permit aggregations of economic power by individuals; second, it limits the occupations with respect to which private activity is permitted; and third, it tightly controls markets open to private activity however it is described.

The great opening, so emotively received in the West, in actuality provides a very tightly regulated set of activities within sectors that would not compete with the State for financial power, or otherwise threaten to open society to the possibility of aggregations by private individuals other than through state-approved (and -controlled) organs. And, indeed, Martínez Hernández ends with an explicit reminder of the framework within which these changes are made. The government clearly intends to tolerate a small non-state sector at the level of individual basic needs. The State will also manage this non-state sector to ensure that it does not otherwise interfere with the power of the state to command the economy at the macro-level and in its dealings with global actors.¹⁷⁴

¹⁷¹ *Id.* (“Igualmente, y para apoyar el trabajo por cuenta propia, se concede la posibilidad de alquilar viviendas, habitaciones y espacios para su ejercicio.”).

¹⁷² *Id.* Yet these markets, like those to be developed around cooperatives, remain highly regulated, at least indirectly—in this case principally through the retention by state authorities of the power to review and approve these transactions and to do so in a way that may leave applicants little recourse against arbitrary decisions. *Id.* (“Es oportuno señalar que el dueño de la vivienda puede designar a un representante para pedir una licencia de arrendamiento, lo cual viabilizará la gestión a quienes no estén en el país y deseen alquilar su domicilio. La aprobación será, en todos los casos, del director municipal de Vivienda.”). As such, the costs of licensing will likely be seen both as an impediment to an exuberant market and as a source of revenue to the State—and sadly, possibly also a source of graft for front line officials.

¹⁷³ See generally SERGIO DIAZ-BRIQUETS & JORGE F. PÉREZ-LÓPEZ, CORRUPTION IN CUBA: CASTRO AND BEYOND (2006).

¹⁷⁴ According to Martínez Hernández, the object is to defend, maintain, and continue to

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For all of that, it is not clear that those who continue to defend the traditional control economy model have given up. The newspapers in Miami reinforce this point. There, both the scope of the attempted reform (at least by the internal measure of these changes within Cuban politics) and the strongly voiced expectations of failures (and thus of reversion to traditional models) were acknowledged. They were described as “a cold dose of reality for those who think reforming one of the last bastions of Soviet-style communism will be easy: It warns that many of the new businesses will be shuttered within a year.”¹⁷⁵

There is a tension here between the State’s carefully crafted, ideologically harmonious efforts to manage a small, potentially lucrative opening and the reality that, once open, the State will not be able to control the non-state sector in the way that it controls the rest of the economy.¹⁷⁶ This is a frightening prospect within orthodox circles of the CCP, especially where foreign states, and particularly the United States, can substantially impact Cuban state control of wholesale markets, including supplies and pricing, merely by the expedient of permitting Cuban émigrés the right to travel more freely to Cuba.¹⁷⁷ But as Roger Betancourt explains, the tension is more complex, grounded in the relationship between political and economic control in Cuba:

This outcome is not an accident, but the result of a conscious attempt by the Cuban leadership to maintain absolute political control. It seems to have two basic policies in the economic realm. One is adopting economic mechanisms that yield control of foreign exchange for the leadership, which allows them to buy the support of the elite that makes up its power base and throw some crumbs to the rest (in dissident circles the crumbs are known as *la jabita*, *la merienda* and *la propina*). The other one is rejecting mechanisms that provide permanent and independent access to wealth creation for anyone who is not a member of the nomenklatura, and even to some who think they are members.¹⁷⁸

What economic reform has produced, then, is an extension of what Javier Corrales described as the development, between 1989 and 2002, of a

perfect socialism, not to destroy it. See Martínez Hernández, *supra* note 77 (“[E]l fin es defender, mantener y continuar perfeccionando el socialismo, no destruirlo.”).

¹⁷⁵ Haven & Rodriguez, *supra* note 157.

¹⁷⁶ See, e.g., Sean Goforth, *Cuba’s Economic Desperation*, NAT’L INT. (July 31, 2012), <http://nationalinterest.org/commentary/cuba%27s-economic-desperation-7269>.

¹⁷⁷ *Id.*

¹⁷⁸ Betancourt, *supra* note 151, at 280–81. The terms *la jabita*, *la merienda* and *la propina* are derogatory slang terms for “official graft.”

gatekeeper state.¹⁷⁹ The object of economic reform consists of a strong rejection of privatization. But it also opens, if somewhat timidly, a door for devolution of control. That devolution is substantially focused on the state sector. There, the State might consider a form of organization in which economic planning is shifted from the ministries to SOEs. These are understood as functional centers of planning, now more autonomous and also expected to function more efficiently (as that term is generally understood) but that may still be obliged to take their overall direction from the ministries. Yet, devolution also recognizes a space for non-state sector activity. These are more tightly regulated—the particular activities that might be undertaken are specified quite precisely. The system of licensing provides a mechanism for substantial control, surveillance, and monitoring of private activity. Sadly, it also permits the development of corruption among low-level CCP cadres and state officials charged with permits, tax, form filling, and the like.

III. IDEAL AND REALITY: FROM AGRICULTURAL COOPERATIVE TO PROLETARIAN CORPORATION

The possibility of aggregating effort for economic activity is severely curtailed in Cuba. Individuals may not aggregate capital. Nor may they join together to form corporate entities—that is a privilege left to the State, and such entities must remain organs of state power. Yet, if the non-state sector is to survive, some measure of aggregation must be permitted. To that end, the CCP has chosen to focus not on the aggregation of capital, but of labor, goods, and services. For that purpose, Cuban intellectuals, now joined institutionally by the CCP and the State, ironically revive and revise a form of collectivization developed by Lenin and enforced under Stalin from the 1920s for the solution to the problem of agricultural production and to eliminate capitalist tendencies among peasants,¹⁸⁰ most notable for its failures. But in revised form, Cuban authorities believe they can turn to the old agricultural cooperative to provide the structural bones of something related but quite different, to expand productive capacity without losing control of markets. No longer merely a means for organizing agricultural production, cooperatives now are meant to serve as the framework for the aggregation of economic forces for mutual production that would not divert

¹⁷⁹ See Javier Corrales, *The Gatekeeper State: Limited Economic Reforms and Regime Survival in Cuba, 1989–2002*, 39 *LATIN AM. RES. REV.* 35 (2004).

¹⁸⁰ LENIN, *supra* note 16; LYNNE VIOLA, *PEASANT REBELS UNDER STALIN: COLLECTIVIZATION AND THE CULTURE OF PEASANT RESISTANCE* (Oxford University Press, 1996) (“Although the Communist party publicly proclaimed collectivization to be the ‘socialist transformation’ of the countryside, it was in reality a war of cultures” *id.*, at 3); SHIELA FITZPATRICK, *STALIN’S PEASANTS: RESISTANCE AND SURVIVAL IN THE RUSSIAN VILLAGE AFTER COLLECTIVIZATION*, 7-13, 16-18 (Oxford University Press, 1994).

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ownership or control of capital away from the State but which might shift the focus of production from the dictates of central planners to the demands of consumers, while retaining an obligation to operate for the benefit of its members and also of the broader social good.¹⁸¹ This is a tall order demanded of a system in which there is no consensus about the extent to which economic activity might escape, even in small measure, the control of management of the State.

For cooperatives to work as an acceptable alternative under the current regime's assumptions about the corporate form, it would be necessary to distinguish between the autonomous governance form at the foundation of the corporate form and a cooperative form more amenable to state supervision and control. It is to the transformation of the Cuban agricultural cooperative from a vestigial form of collectivism to something akin to a proletarian corporation that this Article turns to next. This Part considers the cooperative as a mediating device between the state-sector corporation and the sole proprietorship as the basic building block of private economic activity in Cuba. It suggests the political and cultural¹⁸² as well as the economic dimension of the project of theorizing a proletarian corporation.

A. Structural Template: The Agricultural Cooperative in Cuba Post-1959

The Cuban government has sought to follow, in some respects, the Leninist pattern of collectivization through agricultural cooperatives.¹⁸³ That framework, developed over the first half-century of the current government, emphasized aggregation of labor, control of pricing, state ownership of means of production, and some degree of autonomy in the actual production of crops.¹⁸⁴ Agricultural cooperatives also have served as a venue for experimenting autonomous collective activities.¹⁸⁵ Though these models of cooperatives have been criticized recently as fatally

¹⁸¹ “Under our present system, cooperative enterprises differ from private capitalist enterprises because they are collective enterprises, but do not differ from socialist enterprises if the land on which they are situated and means of production belong to the state, i.e., the working-class.” *Id.* ch. II.

¹⁸² See generally Iñaki Gil de San Vicente, *Cooperativismo socialista y emancipación humana: El legado de Lenin* [Socialist Cooperative and Human Emancipation: Lenin's Legacy], in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 103.

¹⁸³ See LENIN, *supra* note 16.

¹⁸⁴ See José L. Rodríguez, *Agricultural Policy and Development in Cuba*, 15 WORLD DEV. 23 (1987).

¹⁸⁵ See José Alvarez, *Independent Agricultural Cooperatives in Cuba?*, 9 CUBA TRANSITION 157 (1999), <http://www.ascecuba.org/publications/proceedings/volume9/pdfs/alvarez.pdf>; *Cuba Envisages Greater Role for Farm Cooperatives in Economic Development*, XINHUA NEWS (Apr. 26, 2012), http://news.xinhuanet.com/english/business/2012-04/26/c_131553022.htm.

flawed,¹⁸⁶ orthodox and experimental structures have provided a framework for broader application since 2010.¹⁸⁷ The development of cooperatives in Cuban agriculture is based on the first and second laws of the agrarian reform in May 1959 and 1963.¹⁸⁸ With the enactment of the two laws, more than seventy percent of farmland was expropriated by the Cuban government, creating the state agricultural sector in Cuba.¹⁸⁹ Collectivization followed, along with a growing exodus of people to the cities and intermittent agricultural crises.¹⁹⁰

The first cooperatives created in the revolutionary period were known as peasant associations.¹⁹¹ These were embryos of the latter cooperatives. With the exit of financial institutions that provided credits to cooperatives from Cuba, the Credit and Services Cooperative (CCS) was founded in 1960.¹⁹² The CCS was voluntarily formed by peasants that benefitted from the agrarian law reforms.¹⁹³ The sugar cane cooperatives were created after much of the land which was nationalized or retaken in 1959 was harvested in 1960.¹⁹⁴ The first sugar cane cooperatives were organized by peasants, who did not own the land they worked on, and later transformed into sugar cane collectives.¹⁹⁵

To respond to the strain placed on agricultural production after 1975, the Agricultural Production Cooperatives (*Cooperativa de Producción*

¹⁸⁶ Daisey Valera, *The Cooperatives We Cubans Want*, HAVANA TIMES (July 13, 2012) (Cuba), <http://www.havanatimes.org/?p=74307>.

¹⁸⁷ See *Cooperativas en Cuba podrían extenderse a transporte, gastronomía y servicios* [*Cooperatives in Cuba Could Extend to Transportation, Dining and Services*], CUBA DEBATE (July 9, 2012), <http://www.cubadebate.cu/noticias/2012/07/09/cooperativas-en-cuba-podrian-extenderse-a-transporte-gastronomia-y-servicios/> [hereinafter *Cooperatives in Cuba*].

¹⁸⁸ Armando Nova González, *Las cooperativas agropecuarias en Cuba: 1959–presente* [*Agricultural Cooperatives in Cuba: 1959–present*], in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 321.

¹⁸⁹ *Id.*

¹⁹⁰ See José Alvarez & William A. Messina, Jr., *Cuba's New Agricultural Cooperatives and Markets: Antecedents, Organization, Early Performance and Prospects*, 6 CUBA TRANSITION 175, 176 (1996), <http://www.ascecuba.org/publications/proceedings/volume6/pdfs/28alvmess.fm.pdf>.

¹⁹¹ José Alvarez, *Transformations in Cuban Agriculture after 1959*, UNIV. OF FLA. IFAS EXTENSION, <http://edis.ifas.ufl.edu/fe481> (last visited Feb. 18, 2013).

¹⁹² Ólöf Andra Proppé & Jonathan Silberman, *Young Farmers Help Boost Cuba's Food Production*, MILITANT, Nov. 26, 2012, vol. 76, no. 43, available at <http://www.themilitant.com/2012/7643/764350.html> (“In these, farm families work their own land individually but share credit facilities, equipment, services and help each other as needed.”).

¹⁹³ Gonzalez, *supra* note 188, at 322.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 323.

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Agropecuaria) (CAP) were created. They were formed voluntarily by peasants who owned land and means of production. Unlike members of the CCS, members of the CAP who sold their properties to the cooperatives were paid, and became owners and collective workers.¹⁹⁶ The Cuban agricultural model was characterized by the state-owned business with large scale of production and elevated centralization. It was an industrial agricultural model, with a high rate of consumption of its inputs and immense investment and equipment per area. With the collapse of the socialist nations, the Cuban agricultural sector was hit by an economic crisis.¹⁹⁷ The basic units of cooperative production were created in 1993, and it was established that these units were going to be owners of their production and that they would sell their production to the state through a business venture or any other way the State chose.¹⁹⁸

The Cuban agriculture sector is an integration of five types of productive entities:¹⁹⁹ Basic Unit of Cooperative Production (*Unidad Básica de Producción Cooperativa*) (UBPC), CAP, CCS, private, and the state. The first three are considered cooperatives. The forms that are most efficient are the CCS and private peasants.²⁰⁰ The UBPC has been offered as a model for a generalized form of cooperative structure outside the agricultural sector.²⁰¹ In addition, Cuban farmers have sought to develop an independent cooperative movement, which was effectively discouraged by the state about a decade ago.²⁰² The restructuring that produced the Lineamientos has not left agricultural cooperatives untouched. In 2011, the government announced a review and a consolidation plan for agricultural cooperatives.²⁰³

The regulatory forms of these cooperatives were similar. Private activity was tolerated, but highly managed. State approvals and review

¹⁹⁶ *Id.* at 325.

¹⁹⁷ OFFICE OF GLOBAL ANALYSIS, U.S. DEP'T OF AGRIC., CUBA'S FOOD & AGRICULTURE SITUATION REPORT 4 (Mar. 2008), available at <http://www.fas.usda.gov/itp/cuba/cubasituation0308.pdf>.

¹⁹⁸ *Id.* at 7.

¹⁹⁹ See González, *supra* note 187, at 329.

²⁰⁰ *Id.* at 325.

²⁰¹ Emilio Rodríguez Membrado & Alcides López Labrada, *La UBPC: forma de rediseñar la propiedad estatal con gestión cooperativa* [*The UBPC: How to Redesign State Ownership with Cooperative Management*], in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 337, 355.

²⁰² Álvarez, *supra* note 184, at 161.

²⁰³ See *Cuba to Dissolve Inefficient Farming Cooperatives—Cuba Headlines*, COOPERATIVE NEWS (Sept. 15, 2011, 12:57 PM), <http://www.thenews.coop/node/5117> (“The President of the National Association of Small Farmers (ANAP) Orlando Lugo Fonte announced Cuba will reorganize cooperatives to strengthen those that are profitable and strike off the ones that are not.”).

were required at critical points in cooperative formation, operation, and production. The state controlled productive property but made it available to cooperative members. Cooperatives were viewed as cash generators from which the state would take the first, and to the extent possible, a substantial cut. The state reserved to itself the right to modify and direct operations of cooperatives when necessary, and the objectives of cooperatives tended to privilege their social obligations. But the Lineamientos framework has exerted pressure to allow some autonomy for farm cooperatives as well,²⁰⁴ reorganizing UBPCs, liquidating some of their debt, and granting them greater autonomy from the state control.²⁰⁵ By the early-twenty-first century, cooperatives had become a backwater. But the economic crisis of the first decade of the twenty-first century provided an impetus to rethink about economic relationships. That rethinking moved from capital-privileged form of conventional corporation to labor-privileged forms of cooperatives. These structural characteristics would serve as the foundation for the regulatory structure of non-agricultural cooperatives,²⁰⁶ even when the intellectual movement seeking the expansion of cooperatives into the non-state sector focused on the socialist character of economic aggregations of productive power, which de-centered capital and shareholders from construction of viable economic enterprises.²⁰⁷

B. The Cooperative as a Proletarian Corporation: the Debate Within Cuba

With ideological barriers against the use of corporate form in the non-state sector of Cuba, its intellectual elites have been exploring cooperative as the socialist form of individually aggregated enterprise. Much of the theoretical justifications and arguments supporting this form as an acceptable alternative for organizing private economic activity have been recently explored in a collection of important essays assembled by Camila Piñeiro Harnecker.²⁰⁸ The Cuban intellectuals assembled around this problem have attempted to develop a theoretical framework within which the cooperative form can be legitimated and applied to meet the objectives of the state in its retail sector privatization efforts. These efforts are worth considering in some detail both to examine the difficulties of translating

²⁰⁴ See Dimas Castellanos, *Why the UBPC Cooperatives Failed*, DIMAS'S BLOG (Dec. 20, 2012), <http://dimasblogen.wordpress.com/2012/12/20/why-the-ubpc-cooperatives-failed/> (providing English translation of El Blog de Dimas, a blog by Cuban scholar Dimas Castellanos).

²⁰⁵ *Cuba Announces Steps to Save Agricultural Cooperatives*, NEWS TRACK INDIA (Sept. 12, 2012), <http://newstrackindia.com/newsdetails/2012/09/12/35—Cuba-announces-steps-to-save-agricultural-cooperatives-.html>.

²⁰⁶ See *infra* Part III.B.

²⁰⁷ See *infra* Part III.C.

²⁰⁸ See COOPERATIVAS Y SOCIALISMO, *supra* note 57.

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theoretical advances into law, and to understand the tight conceptual connection between the internal and external economic policies of Cuba, faced with internal financial difficulties and the challenge of contesting globalization in Cuba's relations abroad.

One of the problems for them is the looseness in the current application of the term "cooperative." It currently serves as the name for various enterprises with little in common other than that they are neither sole proprietorships nor corporations.²⁰⁹ Indeed, cooperatives have evolved to include forms that are compatible within the normative frameworks of anarchists,²¹⁰ Marxists,²¹¹ capitalists,²¹² and non-governmental organizations in globalization.²¹³ Piñeiro Harnecker also notes the predominance of cooperatives in the agricultural sector, a characteristic of cooperatives that she, like Henry Hansmann,²¹⁴ believes is not necessarily inevitable.²¹⁵

Perhaps a bigger problem is the close connection or convergence between the cooperative and corporation. Hansmann notes that there are few functional differences between a consumer cooperative (owned by its customers), a producer cooperative (owned by individuals selling a factor of production to the firm), and a business corporation.²¹⁶ As he notes, "the same is true of the standard business corporation, which is a firm that is owned by persons who supply capital to the firm. In fact, the conventional investor-owned business corporation is nothing more than a special type of producer cooperative—namely a lenders' cooperative or a capital cooperative."²¹⁷ Enterprise organization, then, can be understood in terms of factors of its respective organization, as a function of the way in which it is built on a particular set of factors of production. Hansmann thus suggests a basis for separating these organization forms in ways that address the political economy of states: "A business corporation is different from a dairy cooperative or a wheat cooperative or a workers' cooperative only

²⁰⁹ Jesús Cruz Reyes & Camila Piñeiro Harnecker, *Una Introducción a las Cooperativas [An Introduction to Cooperatives]*, in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 31.

²¹⁰ See THE ANARCHIST COLLECTIVES: WORKERS' SELF-MANAGEMENT IN THE SPANISH REVOLUTION 1936–1939 (Sam Dolgoff ed., 1990).

²¹¹ Humberto Miranda Lorenzo, *Cooperativismo y autogestión en las visiones de Marx, Engels y Lenin [Cooperatives and Self-management in the Visions of Marx, Engels, and Lenin]*, in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 71.

²¹² See Chaddad & Cook, *supra* note 53; Hansmann, *supra* note 52.

²¹³ See *Co-operative Identity, Values & Principles*, *supra* note 49.

²¹⁴ Hansmann, *supra* note 52, at 396.

²¹⁵ Camila Piñeiro Harnecker, *Prólogo [Prologue]*, in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 7 translated in Marce Cameron, *Camila Piñeiro Harnecker: Cooperatives and Socialism in Cuba*, LINKS: INT'L JOURNAL OF SOCIALIST RENEWAL, <http://links.org.au/node/2515> (last visited Feb. 15, 2013).

²¹⁶ Hansmann, *supra* note 52, at 388.

²¹⁷ *Id.*

with respect to the particular factor of production that the owners supply the firm.²¹⁸

And that insight may be the key to the development of a proletarian corporation using the cooperative structure. A proletarian corporation can be constructed by emphasizing the contribution of labor rather than capital to the firm. It may be possible to offer a labor cooperative in place of a capital cooperative (the corporation), but one tied to the mass politics and solidarity norms of classical Marxist-Leninist theory within which such labor privileging enterprises remain subject to the political requirements of the state identified by the party in power.²¹⁹ Thus, Piñeiro Harnecker and her colleagues suggest there is a way of emphasizing the solidarity aspects of cooperative organization and from the start, better merging its form and operation with the basic tenets of Marxist-Leninist state organization as practiced in Cuba.²²⁰ In contrast to the work of western economists, then, this is as much a political enterprise as it is an economic one, but one in which labor, rather than capital, serves as the organizing foundation of economic enterprises.²²¹

Piñeiro Harnecker, for example,²²² starts with the ICA's seven principles of cooperative practice: (1) voluntary and open membership; (2) democratic member control; (3) members' autonomy and independence in economic participation; (4) education, training, and information; (5) cooperation among cooperatives; (6) concern for community; and (7) the proletarian element.²²³ Emphasizing the political element of choice of organizational form, she suggests that cooperatives are inherently socialist precisely because they reject the fundamental organizing principal of capitalism—the privileging of capital in the formation of enterprises.²²⁴ Just as it is natural for the political objectives of capitalism to treat the capital cooperative as a unique entity and fashion its law around its development, so it may be natural of socialist states to do the same for labor cooperatives, in which the emphasis is on labor contribution in determining ownership and rights to direct the productive factors of joint or aggregate enterprises. For Cruz Reyes and Piñeiro Harnecker, the labor cooperative is essentially anti-capitalist because it does not build on the premise of an

²¹⁸ *Id.*

²¹⁹ Julio C. Gambina & Gabriela Roffinelli, *La construcción de alternativas más allá del capital* [*The Construction of Alternatives Beyond Capital*], in *COOPERATIVAS Y SOCIALISMO*, *supra* note 57, at 55.

²²⁰ Cruz Reyes & Piñeiro Harnecker, *supra* note 208, at 34–35.

²²¹ Gambina & Roffinelli, *supra* note 218; Lorenzo, *supra* note 210.

²²² See Cruz Reyes & Piñeiro Harnecker, *supra* note 208.

²²³ *Co-operative Identity, Values & Principles*, *supra* note 49. On the ICA principles, see note 49, *supra*.

²²⁴ Cruz Reyes & Piñeiro Harnecker, *supra* note 208.

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inevitable connection between capital and ownership.²²⁵ They thus argue against the corporation as a special type of producer cooperative, tied to the values and hierarchies of capitalism, and for the labor cooperative (referred to as the proletarian corporation in this article), which is a special type of producer cooperative tied to the values and hierarchies of Marxist-Leninist states.

For this to work, at least at the retail service level, a strong governmental hand is required to suppress the usual determinants of demand—markets and price. The proletarian corporation operates in a world in which demand is measured internally by the decision making and planning functions of the associates of the cooperative, rather than externally through market and price mechanisms.²²⁶ This is not as strange as it may sound, especially to western ears. Hansmann notes that one of the strengths of cooperatives was their ability to measure success in terms beyond wealth production in the form of dividends. He links the need for strong member control in cooperatives to the “benefits that the members of a cooperative receive . . . in the form of higher quality goods or services.”²²⁷ This is the suggestion made by Piñeiro Harnecker as well.²²⁸ And it makes sense from an economic perspective: if “ownership need not be, and frequently is not, associated with investment of capital,” then neither organizational form nor assessment of welfare maximization need follow corporate models, and an approach more compatible with Marxist-Leninist ideals might be reached.²²⁹

But in the Cuban context, this may not be possible. Cuban cooperatives do not operate autonomously; their operations are substantially constrained indirectly through regulation that has the effect of vesting the state with substantial control over the kind, amount and pricing of good produced or services provided. Thus, the State is interposed between labor and the cooperative. The State, which continues to operate on the basis of capital and as the monopoly capitalist within the national economy. The

²²⁵ *Id.*

²²⁶ Gambina & Roffinelli, *supra* note 218.

²²⁷ Hansmann, *supra* note 52, at 398.

²²⁸ Piñeiro Harnecker notes that consumer cooperatives make it possible for their members to obtain goods and services at a better price and quality than those available from individual proprietors in the market; in that sense, cooperatives contribute to an increase in real income and the care of human health or the environment. Piñeiro Harnecker, *supra* note 112, at 18 (“Las cooperativas de consumidores les permiten a sus asociados obtener bienes y servicios de mejor precio y calidad que los que podrían obtener de forma individual en el mercado. Así, contribuyen a aumentar los ingresos reales de las personas, o al cuidado de la salud humana y del medio ambiente.”). She also notes the role of cooperatives in promoting a new paradigm of wealth maximization, which is not necessarily solely measured by material consumption. *Id.* at 17.

²²⁹ Hansmann, *supra* note 52, at 389.

cooperative necessarily takes on the control and decisional characteristics of the enterprises that control capital. These are anchored in large state corporations and state control of capital, guided by the ideals of welfare maximization based on that ownership in the public sector.. It follows that the move from price and market to socially privileged production appears to lead inevitably back to the state. The proletarian corporation, then, becomes a vehicle through which state planning mechanisms and the incorporation of the political sensibilities (expressed as policy and economic choices) of CCP and state officials can be exported and outsourced. In the absence of price and market structures, cooperative associates must engage in the same patterns of planning and production as state functionaries for production in the national economy. Indeed, Avelino Fernández Peiso has suggested that Cuban cooperatives have been seen in great measure as state businesses rather than as self-managed groups of people.²³⁰

In this respect, the autonomy of the private sector is meant to be constrained by a normative structure that requires each enterprise to act as if it were an instrumentality of the state, even as these enterprises are encouraged to develop closer connections with the small subpart of the population they are meant to serve. The effect is privatization in appearance, but with the retention of the structures of state control in a way that parallels control-economy planning mentality now applied at the cooperative level. This approach can give rise to problems of sustainability similar to those that required the Cuban government to privatize in the first place. To resolve that problem, Piñeiro Harnecker suggests that state institutions should not demand that cooperatives provide services at prices that do not generate sufficient revenues to sustain the cooperatives as going concerns.²³¹ To increase the likelihood of success, state intervention is required. Piñeiro Harnecker suggests that the issue is to design regulatory mechanisms and coordinated spaces that permit cooperatives to internalize social interests.²³²

The solution to privatized central planning offered through the cooperative, then, might be more indirect planning at the state level. Indeed, the consequence is that the cooperative becomes dependent on state pricing policy; since enterprise inputs are not market-driven as to availability and price, market distortions in inputs markets will be reflected

²³⁰ Avelino Fernández Peiso, *Notas características del marco legal del ambiente cooperativo cubano* [Characteristic Features of the Legal Framework of the Cuban Collaborative Environment], in *COOPERATIVAS Y SOCIALISMO*, *supra* note 57, at 366.

²³¹ Piñeiro Harnecker, *supra* note 214, at 28.

²³² Piñeiro Harnecker, *supra* note 112, at 14 (“El asunto es diseñar mecanismos de regulación y espacios de coordinación que permitan a las cooperativas internalizar intereses sociales.”).

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in the viability of cooperatives. That is not encouraging and might require substantially more development. If the object is to embrace the upsides of cooperatives, even in the form of proletarian corporations, then the operationalization of the cooperative framework ought not to impose those structures and norms that led to privatization in the first place. Yet, this may be precisely the result sought by the Lineamientos, which insists that all sectors of the economy, including the non-state sectors, are to be managed by the state. New methods of planning may change the form of control, but autonomy of the private sector is not to be undertaken outside the premises of the central planning model at the heart of the conventional Cuban economic system.²³³ Indeed, Piñeiro Harnecker also emphasizes institutional intervention. For example, she suggests that when it is necessary for the state to manage cooperative decision-making, the state could include necessary terms within leases, concessions and franchises obtained from or through the state, or when direct intervention is required, by placing a government official as a member of the cooperative itself.²³⁴

For that purpose, the ICA principles²³⁵ are necessary but not sufficient. They suggest additional principles of organization that emphasize the privileging of labor and the marginalization of capital ownership in the organization of the proletarian corporation.²³⁶ These include what Piñeiro Harnecker identifies as redistributive solidarity and social transformation.²³⁷ But as an instrument of political and social goals, the traditional markers of enterprise success (based perhaps on the logic of the corporation as a capital cooperative) become problematic—in lieu of risk and profit, they favor solidarity and risk aversion.²³⁸ Cooperatives must be differentiated from capitalist corporations in a substantive manner. Table 1 shows the fundamental differences between the capitalist corporations and cooperatives.²³⁹

TABLE 1

ATTRIBUTE	CAPITALIST	COOPERATIVES
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²³³ LINEAMIENTOS, *supra* note 39, at 5.

²³⁴ *Id.* at 22. This, she also suggests, would assure that cooperatives remain committed to preserving social interests in their economic activities.

²³⁵ See *supra* note 49.

²³⁶ See Larraitz Altuna Gabilondo, Aitzol Loyola Idiákez & Eneritz Pagalday Tricio, *Mondragón: los dilemas de un cooperativismo maduro* [*Mondragón: The Dilemmas of a Mature Cooperative*], in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 191.

²³⁷ Piñeiro Harnecker, *supra* note 112, at 1 (“[S]u potencia para la transformación social”); see also *id.* at 17 (“Contribuye a la equidad y justicia distributiva”).

²³⁸ Cruz Reyes & Piñeiro Harnecker, *supra* note 208.

²³⁹ *Id.* at 49.

	CORPORATIONS	
Control of decision-making	Rests in stock holders, who are not necessarily workers	The collective of the associates, i.e. all workers
Destiny of the enterprise	Decided by the stock holders	Decided by the associates
Workers' income	Decided by the stock holders	Decided by the associates
Democratic rights of the workers	Workers might have a say through a union, but they do not have a vote	Each worker has both a voice and vote
Main objective	Maximize the revenue of the stock holders	Satisfy the needs of the associates
Primary motivation of the proprietors	Individual benefits	Collective benefits, material and spiritual

Because proletarian corporations favor labor rather than capital, Piñeiro Harnecker suggests such enterprises may define efficiency differently—not grounded in the minimization of labor for the production of profit, but the minimization of capital for the production of worker satisfaction.²⁴⁰

This proletarian corporation would operate within a limited field of production—one that parallels the Cuban retail sector liberalization policies. In those areas, such a model of economic activity could be understood as socially productive. The targets are those activities where economies of scale are absent (and with respect to which the state, through its corporate enterprises would be expected to operate alone). Another advantage of cooperatives in the retail and small production sector²⁴¹ is their ability to adapt quickly to local needs without the need to reduce their workforce (and thus meet the government's objective of keeping people employed). Small and medium businesses have their fundamental strength in the capacities of their workers and not so much on technology; they have more flexibility to modify or add new lines of production, and thus offer new products that satisfy the variables and different preferences of the consumers. This focus suggests the tendency to criticize efforts—like those on Mondragon, the Basque cooperative²⁴²—that appear to leverage labor (for example, by permitting the hiring of labor that is not part of the management structure); the fear is that bureaucratization and institutionalization will cause a cooperative to move away from a labor to a

²⁴⁰ *Id.*

²⁴¹ Piñeiro Harnecker, *supra* note 112, at 22 (“No son las formas empresariales más adecuadas para realizar actividades relacionadas con bienes o servicios de carácter estratégico . . . las que requieren de grandes inversiones, compromisos a largo plazo y complejas exigencias.”).

²⁴² *Introduction*, MONDRAGON (Feb. 15, 2012, 1:04 PM), <http://www.mondragon-corporation.com/language/en-US/ENG/Who-we-are/Introduction.aspx>.

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capital privileging model.²⁴³

Yet, the lessons of cooperative organization can also have potential for challenging the cultural norms that currently exist in Cuba in the operation of state enterprises.²⁴⁴ Drawing heavily from Istvan Mészáros,²⁴⁵ Novaes argues that Marx's vision of a post-capitalist society corresponds to a self-managed socialism that is not concerned only in distributing material wealth under certain criteria of equality, but instead is focused on the production of wealth in a superior form.²⁴⁶ That form replaces material with intangible markers—one that focuses on human dignity rather than wealth accumulation, that is what he refers to as a society beyond capital.²⁴⁷ Cooperatives can overcome the alienation that is present in the private corporation but also in the state corporation managed in an authoritarian manner where the participation of the workers is just a formality. He proposes democratic management of the corporation, even the SOE, as a way around the socialist conundrum of worker collectives in which labor has no voice in the operation of the enterprise. Others take this notion farther, suggesting that cooperatives are a central element in the construction of a solidarity economy²⁴⁸—one whose principles become closely intertwined with the organizational paradigms of ALBA.

An emerging enterprise-like culture of cooperative management might have an effect on the operation of the state sector, even as the state sector appears to mold cooperative organization in its own image.²⁴⁹ Within Cuba, that dialogue would have profound possibilities if not suppressed. And indeed, the possibility of cooperative autonomy and its effects on state enterprises concerns Cuban theorists. Yet, the idea of increasing the autonomy of labor in cooperatives beyond the direct control of the State is also viewed by traditionalists as a dangerous adventure that will destabilize

²⁴³ Gabilondo, Idiakez & Tricio, *supra* note 236.

²⁴⁴ Henrique Novaes, *Las bases del socialismo autogestionario: la contribución de István Mészáros* [*The Basis of Self-managed Socialism: the Contribution of István Mészáros*], in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 167.

²⁴⁵ E.g., ISTVAN MÉSZÁROS, LA EDUCACIÓN MÁS ALLÁ DEL CAPITAL [EDUCATION BEYOND CAPITAL] (Maria Maneiro & Ernesto Grance trans., 2008); ISTVÁN MÉSZÁROS, LA TEORÍA DE LA ENAJENACIÓN EN MARX [MARX'S THEORY OF ALIENATION] (2003); ISTVÁN MÉSZÁROS, PARA ALÉM DO CAPITAL [BEYOND CAPITAL] (Paulo Cezar Castanheira & Sergio Lessa trans., 2002).

²⁴⁶ Novaes, *supra* note 244.

²⁴⁷ *Id.* at 174–78.

²⁴⁸ Claudio Alberto Rivera Rodríguez, Odalys Labrador Machín & Juan Luis Alfonso Alemán, *Retos del cooperativismo como alternativa de desarrollo ante la crisis global. Su papel en el modelo económico cubano* [*Challenges of Development Cooperation as an Alternative to the Global Crisis: Cooperatives' Role in the Cuban Economic Model*], in COOPERATIVAS Y SOCIALISMO, *supra* note 57, at 397–415.

²⁴⁹ Piñeiro Harnecker, *supra* note 112.

the Cuban economic system.²⁵⁰ Thus, rather than suggesting greater autonomy for non-state sector enterprises, like cooperatives, some call for closer control of these entities along the lines already in place for SOEs. Ironically, Hansmann's notion of the fundamental similarity of the cooperative and the corporation tends to serve as a brake on the possibility of creating a class of private enterprises outside the control of the State, where the State has all control of productive activity.

The potential to challenge economic cultural norms through cooperatives is limited by ideological divisions within the CCP that have been transposed into a set of structural constraints on cooperative activity. Ideological constraints are grounded in the reluctance to open up even a very limited space for private activity. This approach is based on a very conservative perspective of the requirements of Marxist-Leninist economic organization, one at variance with the official positions in other Marxist-Leninist states but consistent with the majority view within the CCP leadership before 2006.²⁵¹ The strength of this perspective is evidenced by the finalization of the Lineamientos provisions on cooperatives. But there is also growing support among cadres and CCP leadership for an approach grounded in state direction, and ultimate control, but with a larger space within which economic activity can be devolved to individuals, either in a private sector or through the operation of state enterprises. However, the state-directed model, rather than state-control model, has not yet been accepted among a majority of CCP leaders.

As a consequence, cooperatives (and SOEs) remain subject to a number of structural constraints. In addition to the formal constraints described in the Lineamientos, the rules are grounded on a premise of cooperation, rather than competition, with the state sector. One consequence is that the operation of the private sector is understood as functioning for the production of income first for the state and then for the participants. Additionally, the cooperation premise serves as a justification for retaining the regime of tightly constrained and licensed private sector vocations and the control of basic goods and products necessary for cooperative activity. Limited to the contribution of goods (usually retail ready) and labor (for direct service provision), the cooperative operations are limited by the availability of goods and the scope of permitted occupations, both of which are controlled by the State. Even if

²⁵⁰ Gil de San Vicente, *supra* note 181, at XX.

²⁵¹ Piñero Harnacker highlights this conflict, between those she identifies as followers of the ideological framework associated with Ché Guevara, who viewed any sort of private activity as impossible without direct guidance of the state, as opposed to those who viewed that state control could be indirectly asserted through structural regulation of non-state enterprises. Piñero Harnacker, *supra* note 112, at 13–14 (referencing in part Yaffe, *supra* note 148).

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cooperatives could be structured for the contribution of unfinished goods or components for assembly and sale through the cooperative, something contemplated for second-level cooperatives in the proposed Lineamientos but perhaps eliminated in the final version, the State would still control cooperatives' sizes and operations through control of the provision of goods and the approval of activity to which those goods are directed. As a consequence, cooperatives are structured to remain small and contribute to the residual economy, something in line with the general re-organization of the Cuban economy, but they remain dependent on state planning because there is no access to goods markets and the scope of activities are tightly controlled. The State remains very much in control—but now that control is indirect, something contemplated in the Lineamientos.²⁵²

Piñero Harnecker understands the challenges. She acknowledges that new cooperative theory is criticized by some as merely utopian.²⁵³ Others criticize it for being unrealistic within the context of the regulation of the Cuban economy by the State—cooperatives will never have sufficient autonomy to be effective. Still others fear cooperatives; even labor cooperatives are a threat to the state precisely because they will be too autonomous and fracture the unity of proletarian power on which the ideology of the organization of the state rests.²⁵⁴ These were the themes raised in the essays Piñero Harnecker assembled.²⁵⁵ More broadly, those difficulties also continue to make the form of corporate organization

²⁵² Lineamientos, *supra* note 39, ¶¶ 1–10.

²⁵³ See Piñero Harnecker, *supra* note 214.

²⁵⁴ According to Piñero Harnecker:

When it is proposed that the production cooperative be one—though not the only—form of enterprise in Cuba, three concerns above all are frequently encountered: some consider it too “utopian” and therefore inefficient; others, on the basis of the cooperatives that have existed in Cuba, suspect that they will not have sufficient autonomy or that they will be “too much like state enterprises”; while others still, accustomed to the control over enterprise activities exercised by a state that intervenes directly and excessively in enterprise management, reject cooperativism as too autonomous and therefore a “seed of capitalism”. This book tries to take account of all these concerns, though there is no doubt that more space would be required to address them adequately.

Cameron, *supra* note 215 (translating Piñero Harnecker, *supra* note 215 (“Cuando en Cuba se propone a la cooperativa de producción como una —no la única— forma de organización empresarial, es común encontrarse sobre todo con tres preocupaciones: unos la consideran demasiado “utópica” y por tanto ineficiente; otros, a partir de las formas que ha tomado en Cuba, sospechan que será insuficientemente autónoma o “demasiado parecida a la empresa estatal”; y otros, habituados a un control de la actividad empresarial por un Estado que interviene de manera directa y excesiva en la gestión, la rechazan como demasiado autónoma y por tanto un “germen del capitalismo”. Este libro intenta tener en cuenta todas estas inquietudes, aunque sin dudas se requiere de más espacio para tratarlas adecuadamente.”)).

²⁵⁵ *Id.*

(whether as a capital cooperative or in the new labor cooperatives form) particularly troublesome for regimes like Cuba, which view juridical or legal persons that constitute the aggregation of popular power as a threat to the state unless the state owns or controls these organizations.²⁵⁶

Cooperatives are viewed as a means of economic aggregation that avoids the problems of corporations in their relationship to the state and society—shareholder wealth maximization, avoidance of corporate social responsibility principles, and labor exploitation.²⁵⁷ Yet, like the corporate form that remains the sole province of the state, the problem of autonomy remains a key issue in the academic debates in ways that mirror the political debate of the Sixth Party Congress. It is the issue that raises, for the Cuban political economy, the ideological question of the extent of the role of the state in planning economic decisions: should the state set the general goals and objectives of economic activity, or should it direct more precisely the economic choices of individuals and cooperatives at an operational level? The framework of analysis is quite clearly tailored to Cuban circumstances:

The managerial autonomy of the collective that makes up the cooperative—the ability of this group of people to make decisions independently—is the key reason why the historical experiences of socialist construction have rejected their relevance to the building of socialism and have relegated them to agriculture or marginal economic spaces. Some see in autonomy a disconnection from, or a wanting to have nothing to do with, social interests and the strategic objectives embodied in the socialist economic plan, and ask the following questions: Is it possible to “hitch” an autonomous enterprise to a planned economy? Can a cooperative respond not only to the interests of its members but also to wider social interests? When one thinks in terms of absolute autonomy and authoritarian (i.e. undemocratic) planning, if the interests of collectives (groups) are considered a priori to be indifferent to social interests, then the answer is obviously negative. The authors of this book are motivated by the certainty that the answer is affirmative. We argue the case here, though we are unable to respond to all of the questions about how this can be achieved in practice.²⁵⁸

Piñero Harnecker highlights both the peculiarities of the Cuban discussion about economic reform and engagement in global economic

²⁵⁶ See Backer, *supra* note 5, at 384.

²⁵⁷ See Piñero Harnecker, *supra* note 214, at 28 (“Asimismo, para evitar la concentración de riqueza que explica los altos impuestos aplicados a los cuentapropistas, debería sobre todo promoverse que el nuevo sector no estatal adopte *preferentemente* el modelo de gestión cooperativo, donde los beneficios son distribuidos de forma equitativa entre sus miembros y que favorezcan en alguna medida las comunidades aledañas.”).

²⁵⁸ Cameron, *supra* note 215 (translating Piñero Harnecker, *supra* note 214).

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movements, and its distance from the path followed by the Chinese Communist Party since the 1980s. Cuba is seeking to forge a third path between the market oriented economic model of the West and the pattern of economic control developed by the great Asian Marxist–Leninist states. It remains committed to a significant degree of central planning, and suspicious of autonomous aggregations of capital or individuals not directly controlled or managed by the State. It has sought to build these notions into its international and regional economic planning to the same extent it seeks to base its internal economic model on those principles.²⁵⁹ But Piñero Harnecker may not be fully considering the institutional challenges of creating the rule system contemplated in the Lineamientos—founded on contract law that is viewed as legitimate and fairly enforced, the absence of which substantially raises the risks and costs of forming these enterprises as going concerns.

The case of the Cabildo nightclub²⁶⁰ is quite telling in this respect, both for the difficulties of drawing entrepreneurs out of the so-called black market (unregulated) sector and for what it portends for creating rule-of-law based (that is, non-arbitrary) regulatory systems managing cooperatives:

El Cabildo is the product of one man's moxie and of changes in government policy aimed at improving Cuba's struggling economy. Ulises Aquino, a 50-year-old opera singer who founded Opera in the Street in 2006, was looking for a home for the company, so when President Castro announced a series of reforms two years ago promoting private businesses he decided to seize the opportunity In 2011, Aquino, whose performers were accustomed to playing in rudimentary conditions, including in the street, convinced authorities in Havana's upscale Playa district to let him use the remnants of one of the city's many collapsed buildings.²⁶¹

By July 2012, the enterprise had about 130 employees operating a 150-seat venue. However, to get to this size, Aquino had to deal with the complex system of rules governing the licensing of private activity in the non-state sector.²⁶² His solution illustrated the objective of those

²⁵⁹ Backer & Molina, *supra* note 36, at 687–89.

²⁶⁰ Marc Frank, *In Cuba an Opera Singer Builds an Empire*, REUTERS (July 11, 2012, 5:08 PM), <http://www.reuters.com/article/2012/07/11/us-cuba-theater-reform-idUSBRE86A1B620120711>.

²⁶¹ *Id.*

²⁶² *Id.* (“The new entrepreneurs had to get a license for their business and private restaurants were limited to a maximum of 50 seats. Aquino got around the limit by taking out three restaurant licenses, which enabled him to put in 150 seats, and then another as an ‘organizer of events and other activities.’ Using the latter, he plans to expand the business by offering boat rides on the Almendares River, which flows beside El Cabildo just before

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regulations—to ensure that private enterprises remain small and local, to avoid a threat to the economic dominance of the state sector. No sooner had the Cabildo nightclub garnered international attention than it was closed by state authorities:

A week ago[,] government inspectors burst into the El Cabildo cultural center to the shock of patrons, artists and staff attending musical performed by its theater company, the “Opera in the Street.” The local authorities, citing a recent Reuter’s story on the center that mentioned a cover charge for customers, took away El Cabildo’s license on the grounds of “illicit enrichment.” The vast majority of El Cabildo’s clients were Cuban, paying a 50-peso cover charge, the equivalent of \$2, while foreigners paid more. The inspectors searched El Cabildo for hours and interrogated its young artists and restaurant staff, but found nothing more amiss than two cooks working on a trial basis without proper papers, employees said.²⁶³

The original international news story piqued the interest of state bureaucrats, who called Aquino to discuss his operations.²⁶⁴ What he described suggested a cooperative, in which all workers shared in the revenues of the enterprise.²⁶⁵ There was a sense that the operations were allowed to continue in the absence of publicity, but were shut down when news stories revealed not merely the extent of the operation, but more significantly, that the workers in that enterprise were able to make substantially more money than in the state sector, even after the payment of all state tax and other obligations. Rather than seeing this as a challenge for the state sector to do better, the bureaucracy appeared to take the operations as a challenge to the system itself. If success is interpreted as a threat, then it is unlikely, at least with this generation of CCP and state cadres, that the reforms developed at the elite level will be successfully implemented on the ground. The decision to shut down the operations rather than to fine it and

opening into the Straits of Florida.”).

²⁶³ Marc Frank, *Cuban Opera Singer Challenges “Jealous” Bureaucrats Over Closed Theater*, REUTERS (Aug. 1, 2012, 6:28 PM), <http://www.reuters.com/article/2012/08/01/us-cuba-theater-reform-idUSBRE8701R120120801> (“A Cuban economist said El Cabildo’s cover charge may have fallen into a gray area in Cuban law. Though private establishments were not prohibited from having cover charges, establishments associated with the Culture Ministry, such as such as El Cabildo, might be more restricted in what they can charge.”).

²⁶⁴ *Id.*

²⁶⁵ *Id.* (“Reuters also had reported that El Cabildo’s proceeds were shared after expenses, taxes, and investments, resulting in monthly wages four times greater than the country’s 450 pesos average, or around \$19. ‘The earnings of the Opera of the Street are divided among everyone . . . including me All the artists perform with a subsidy from the Culture Ministry, but as our president has said, salaries do not correspond with the cost of living,’ Aquino said in his letter.”).

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the lack of the appearance of process, suggested the possibility of arbitrariness that will impede other risk-takers seeking to take the State up on its offer to invigorate the non-state sector. As a solution, the government announced that it would allow the presentation of the artistic part of the operation as a state-subsidized activity.²⁶⁶ It seems that, here, the consequence of private sector success is incorporation into the state sector.

In this story, the scope of the challenges facing Cuba can be seen: a bureaucracy that may be resisting changes proposed at the top of the state and CCP hierarchies; limited ability to manage implementation of economic reforms for lack of deep cultures of non-state sector management; limited rule structures for determining conformity to the new economic model; and the lack of a set of procedures for challenging government action. In a sense, the closure is as much a challenge to senior CCP leaders as it is to the emerging non-state sector.²⁶⁷ It also illustrates the determination of Cuban authorities to maintain the division of economic activities within which the private sector always occupies a small part. It is clear that, whatever the shape of the reforms, the state sector will not be challenged, and challenge, for the moment appears to be quite broadly construed.²⁶⁸ But the Cabildo affair also suggests the power of Raúl Castro's efforts to move from a state-controlled to a state-directed economic model. These enterprises can operate successfully as cooperatives; Mr. Aquino was creating a sort of proletarian corporation whose success suggests that reform might have been on the right path. The Cabildo appeared to provide a substantial boost to the Cuban economy. It did so on a cooperative basis whereby the members contributed labor to provide a local service through an enterprise in which the workers shared in the governance and the proceeds while meeting local needs. The Cabildo paid its taxes and generated income for the State. It operated in a sector that posed little danger to the integrity of the national

²⁶⁶ *El Gobierno prefiere subvencionar la Ópera de la Calle antes que permitir su gestión privada* [The Government Prefers to Subsidize Street Opera Before Allowing Private Management], DIARIO DE CUBA (Aug. 2, 2012, 6:12 PM), <http://www.diariodecuba.com/cultura/12378-el-gobierno-prefiere-subvencionar-la-opera-de-la-calle-antes-que-permitir-su-gestion-p> [hereinafter *The Government Prefers*] (“Un comunicado del Consejo Nacional de las Artes Escénicas, dependiente del Ministerio de Cultura, señala que la Compañía de Teatro Lírico y Espectáculos Ópera de la Calle ‘mantiene sus actividades como proyecto cultural comunitario subvencionado.’”).

²⁶⁷ Nick Miroff, *Opera Unfolds When a Cuban Cabaret Is Closed Down*, NPR (Jul. 31, 2012, 4:13 PM), <http://www.npr.org/2012/07/31/157656452/opera-unfolds-when-a-cuban-cabaret-is-shut-down> (“Raúl Castro himself told Cubans in a recent speech that bureaucrats who stand in the way of change will be swept aside. He’s laid out plans to resuscitate Cuba’s state-run economy by creating millions of jobs in new small businesses and cooperatives. But the process is dragging. Closing El Cabildo has eliminated 130 of the jobs created for Cubans like Angel Basterrechea, who fears he may have lost the highest-paying job he’ll ever have.”).

²⁶⁸ *The Government Prefers*, *supra* note 266.

economy. If the Cabildo can be considered to pose a threat to the organization of the Cuban economy, then it is not clear that there will be much space for the non-state sector or that effective reform will be possible soon.²⁶⁹ The cooperative, like the rest of the reform agenda, will remain an elegant theory with powerful insights into the operation of a Marxist–Leninist economy without any possibility of effective implementation.²⁷⁰

Additionally, the cooperative structure envisioned in Cuba, with its focus on the possibilities of producer–labor cooperatives but dependent on the state apparatus as the holder of productive capital, presents a more fundamental challenge. That challenge suggests the extent to which Cuba may be missing an opportunity for change in line with the basic tenets of its system. Many of those focusing on labor issues tend to overlook a potentially powerful form of labor organization that might tilt the balance of power away from capital on the capital’s home turf. When labor controls labor through the mechanics of power that operate within a dominant system of institutionalized power, labor will be able to meet capital on its own terms: domiciled within the network of nation states but free to move globally and to take advantage of disjunctions in capital markets. It might be worth thinking through the possibilities of a global system in which labor controls labor, and in which the individual laborer is no longer arrayed against aggregations of capital, but is able to aggregate itself within markets in which labor and capital both engage in markets on a more equal basis.

Yet, this requires labor to lose its dependence on the state by taking the step that capital took two centuries ago when it effected what would be an increasing independence from the state. When labor begins to use the state in the way that capital has learned; when labor ceases to organize itself like an element of civil society and becomes more like a value–optimizing

²⁶⁹ Indeed, among Cuban intellectuals committed to the regime, this affair has been reported as revealing the real intent of the government with respect to reforms. See *El Gobierno cierra un centro cultural considerado la mayor empresa privada de Cuba* [*The Government Closed a Cultural Center Considered the Largest Privately Cuba*], EUROPAPRESS (Aug. 3, 3012) (Sp.), <http://www.europapress.es/latam/cultura/noticia-cuba-gobierno-cierra-centro-cultural-considerado-mayor-empresa-privada-cuba-20120803154826.html> (“El destino del centro cultural El Cabildo está en el centro de atención de intelectuales y artistas de la isla, y se ha convertido en una prueba de fuego en los esfuerzos impulsados por Castro para expandir el sector privado mientras reduce drásticamente la burocracia estatal.”).

²⁷⁰ Frank, *supra* note 263 (“A staunch advocate of socialism, Aquino charged in his letter that the forces behind the closing of his center were ‘jealous’ of its success. ‘Those who fear that the worker, the intellectual and the artist might find their own productive road are not revolutionaries, they are conservatives,’ he wrote. ‘They enjoy the benefits of power that gives them the ability, as in this case, to decide the destiny of human works, not to help them flourish, but to destroy them,’ Aquino charged.”).

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factor of production, then perhaps the global conversation about labor may take on a different hue. However, this is not possible under a construct in which cooperatives are constituted formally as autonomous and labor-driven while organized as little more than privatized centers of central planning that reinforce traditional (and now clearly failed) approaches to economic governance *even within* Marxist–Leninist premises.

Within this environment, cooperatives—so benign in China and Vietnam—assume a more problematic place in the Cuban political economy. Whether the experiment will succeed remains to be seen. However, the search for forms of economic organization that are not necessarily grounded in shareholder–wealth maximization, and that serve social goals (even those controlled by the state apparatus) may provide insights and models that can be used elsewhere for other purposes. Indeed, it is precisely this model that underlies an important element of Cuban foreign policy as it seeks to develop a counter-approach to regional trade that challenges the norms and structures of conventional economic globalization. In the face of continued governmental policy incoherence evidenced by the Cabildo affair, the transposition of the theoretical developments of a cooperative model, first into policy guidelines (the Lineamientos) and then into a coherent regulatory system, suggests the power of theory and the substantial limits of politics, even in the face of economic crisis. It is to that transposition that this Article turns to next.

C. The Cooperative in the Lineamientos and Regulation—From Political Guidelines to Regulatory Program

It is clear that the determination to limit the private sector to cooperatives, preserving the corporate form to the state, is not essential to preserve the socialist character of the state, and might make little sense from the perspective of increasing the efficiency and scope of the private sector.²⁷¹ The Chinese have shown how a Marxist–Leninist state can extend the corporate franchise to individuals and still retain overall control over the direction of the economy and the Marxist basis of state organization. They have moved from a system of direct command of all facets of productivity to an objectives-based system of regulation for the

²⁷¹ This is a view shared within and outside Cuba by people sympathetic to the current government:

Cuba's economic model has suffered from excessive concentration in decision making and ownership of the means of production, as well as lack of incentives and low efficiency. These problems have impaired output and productivity and have worsened during the last decade due to structural weaknesses in the pattern of growth.

Mesa-Lago & Alejandro, *supra* note 60, at 714.

private sector and a more closely monitored control of the state sector. If the object was merely to foster productivity and increase wealth, the division does no more than impede progress while retaining the need for a bloated public sector of managers who would substitute themselves for pricing and market mechanisms for productivity and wealth creation.

But, the Lineamientos suggest that economic efficiency and wealth production are not the only, or even perhaps the most important, objectives of privatization. Equally important in the ideological debates about economic reform are the social role of economic collectives—whether organized around capital, labor, production, or otherwise—and the role of the state in the management of economic activities (up to and including the role of the state as a substitute for the market). It is ultimately the central role of the state in economic affairs and the mistrust of the market on political grounds that reinforce Cuba's unwillingness to follow the Chinese model. Markets shift power over economic planning from the state to producers and consumers. It shifts the power to set prices and allocate resources from central planners to those involved in production, manufacturing, sales, and consumption. It changes the role of the state from serving as the nexus point of demand and supply to the manager of economic goals. There is a struggle over the role of the state, even within the very limited space reserved to the non-state sector. Debates over the form of the cooperative that took place in the development of the final form of the Lineamientos, one characterized by the tension between the necessity of permitting autonomous economic activity and the desire to retain strong and direct state control of all economic activity, is much in evidence in the structure of the new cooperatives law. It is a tension that remains unresolved in either Lineamientos or law.

1. The Lineamientos

At first glance, the Lineamientos cooperative provisions appear fairly straightforward and liberal. First-level (*primer grado*) cooperatives are recognized as an economic organization with a legal personality that aggregates goods and labor.²⁷² Interests in cooperatives have the character of social property that may not be negotiated (in contrast to shares).²⁷³

²⁷² LINEAMIENTOS, *supra* note **Error! Bookmark not defined.**, ¶ 25 (“Se crearán las cooperativas de primer grado como una forma socialista de propiedad colectiva, en diferentes sectores, las que constituyen una organización económica con personalidad jurídica y patrimonio propio, integradas por personas que se asocian aportando bienes o trabajo, con la finalidad de producir y prestar servicios útiles a la sociedad y asumen todos sus gastos con sus ingresos.”).

²⁷³ *Id.* ¶ 26 (“La norma jurídica sobre cooperativas deberá garantizar que éstas, como propiedad social, no sean vendidas, ni transmitida su posesión a otras cooperativas, a formas de gestión no estatal o a personas naturales.”).

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They may enter into contracts with other entities and natural persons. They may also determine the distribution of funds to participants.²⁷⁴ Second-level (*segundo grado*) cooperatives are collections of first-level cooperatives.²⁷⁵ They can be formed as separate juridical persons and their objective is to facilitate the business of the associated cooperatives.²⁷⁶

But, a closer reading of the Lineamientos suggests both the tensions within the CCP over liberalization and a clear tilt in favor of state control. The final version of the cooperative form in the Lineamientos contains certain significant changes from the initial version, which suggest a conservative pushback from elements in the CCP that viewed the liberalization of economic activity, even in this small space, as potentially threatening to the core values of the Revolution. Thus, for example, the Lineamientos originally provided for a broader conceptualization of the cooperative, grounded in the basic premise that workers were free to join together in cooperative enterprises.²⁷⁷ This power of association for cooperative economic activity extended to ownership, lease, and use of the means of production in permanent usufruct²⁷⁸—echoing the idea of usufruct being developed for the lease of non-productive agricultural land.²⁷⁹ As

²⁷⁴ *Id.* ¶ 27 (“Las cooperativas mantienen relaciones contractuales con otras cooperativas, em-presas, unidades presupuestadas y otras formas no estatales, y después de cumplido el compromiso con el Estado, podrán realizar ventas libremente sin interme-diaros, de acuerdo con la actividad económica que se les autorice.”).

²⁷⁵ *Id.* ¶ 29 (“Se crearán cooperativas de segundo grado, cuyos socios son cooperativas de pri-mer grado, las que tendrán personalidad jurídica y patrimonio propio y se forman con el objetivo de organizar actividades complementarias afines o que agreguen valor a los productos y servicios de sus socios (de producción, servicios y comer-cialización), o realizar compras y ventas conjuntas con vistas a lograr mayor eficiencia.”).

²⁷⁶ *Id.* ¶ 28 (“Las cooperativas, sobre la base de lo establecido en la norma jurídica correspon-diente, después de pagar los impuestos y contribuciones establecidos, determinan los ingresos de los trabajadores y la distribución de las utilidades.”).

²⁷⁷ See TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 25, col. original (“Estarán basadas en la libre disposición de los trabajadores a asociarse en ellas. Pueden ser propietarias de los medios de producción, arrendarlos o emplearlos en usufructo permanente.”).

²⁷⁸ Usufruct is a civil law concept that describes a cluster of rights of an individual to enjoy the use of property either titled to another or held in common as long as the property is neither damaged nor destroyed. Usufruct is a legal concept that was in place at the time of Cuban Independence and survived into the post-Revolutionary period after 1959. See CODE CIVIL [C. CIV.] tit. VI, ch. 1, art. 467 (1899) (Cuba) *translated in* U.S. War Department, Division of Customs and Insular Affairs, I LAW OF CUBA, PUERTO RICO AND THE PHILIPPINES 69 (1899), *available at* <https://play.google.com/books/reader?id=rySvAAAAMAAJ&printsec=frontcover&output=reader&authuser=0&hl=en&pg=GBS.PP1>.

²⁷⁹ Marc Frank, *Cuba Grants Land to Thousands of Farmers*, REUTERS (Feb. 2, 2009, 9:59 AM), <http://www.reuters.com/article/globalNews/idUSTRE5113IY20090202>. On usufruct in the agricultural sector, see Laura Enriquez, *Economic Reform and*

modified, the emphasis was distinctly directed away from a focus on the right of association for the exploitation of productive capacity to an emphasis on the character of these enterprises as the instrument through which economic activity is devolved from the state and incorporated within a system of state-centralized control.²⁸⁰

Rather than promote free association of workers with control in usufruct over the means of production, the final version of the Lineamientos emphasizes the socialist collective nature of the cooperative and its property. It underscores the power of the State to manage the scope of the economic sectors within which it can operate. Significantly, it also limits the forms of contributions to the enterprise specifically to goods or labor and only for the production or offer of socially useful services. For that privilege, these collectives would assume their own expenses. The explanation for the change was quite clear: uneasiness with the idea of private aggregation or collectivization outside the direct control of the State.²⁸¹ One can understand this as a means of privatizing central planning and exploiting operation costs.

Likewise, the limitations on the power of cooperatives to negotiate cooperative assets to other private enterprises was strengthened to emphasize that cooperative property was public property (*propiedad social*) devolved to the use of the cooperative participants.²⁸² The scope of

Repeasantization in Post 1990 Cuba, 38 *LATIN AM. RES. REV.* 202–18 (2003). According to Pujol:

To stimulate the domestic production of foodstuffs and substitute imports, the government started to allow the leasing of small plots of State owned land in usufruct by private individuals and corporate bodies. To this end, landless individuals could obtain up to 13.42 hectares and existing landholders could bring their total up to 40.26 hectares under licenses valid for up to 10 years, with the possibility of being renewed.

Joaquín P. Pujol, *The Cuban Economy in 2010 as Seen by Economists Within the Island and Other Observers*, 20 *CUBA TRANSITION* 1, 8 (2010), <http://www.ascecuba.org/publications/proceedings/volume20/pdfs/pujol.pdf>.

²⁸⁰ LINEAMIENTOS, *supra* note **Error! Bookmark not defined.**, ¶ 25 (“Se crearán las cooperativas de primer grado como una forma socialista de propiedad colectiva en diferentes sectores, las que constituyen una organización económica con personalidad jurídica y patrimonio propio, integradas por personas que se asocian aportando bienes o trabajo, con la finalidad de producir y prestar servicios útiles a la sociedad y asumen todos sus gastos con sus ingresos.”). For the original version of paragraph 25, see TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 25, col. original.

²⁸¹ See TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 25, col. fundamentación del cambio (“Aclara y especifica el concepto de cooperativas de primer grado, 1 130 dudas en todo el país. Agrega que la cooperativa es una forma socialista de propiedad colectiva, por 29 opiniones en 9 provincias.”).

²⁸² See *id.* ¶ 26, col. original (providing original draft language of paragraph 26 of the Lineamientos: “El Reglamento General de las Cooperativas deberá garantizar que la

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cooperative activity was also subtly restricted, permitting private transactions but strengthening the direct power of the State to manage those relations. The original provision permitted economic activity in the non-state sector as long as these conformed to pre-approved social objectives.²⁸³ As revised, the provision imposes a requirement that cooperatives first satisfy whatever economic needs the State imposes before it can engage in private economic activities in the non-state sector.²⁸⁴ The provision also reinforces the limits of private activity as authorized for individual proprietorships.²⁸⁵ This last imposition represents a significant effort to bring the cooperative back into the state sector. Cooperatives will have to service the State before they can engage in private activities; state ministries can effectively devolve state sector obligations to the cooperatives.

Rather than create an autonomous private sector that responds to local needs, the cooperative appears to run the danger of becoming a vehicle for privatizing the state sector without a loss of state control. The commentary made clear that the presumption for cooperatives must be to service and supplement the state sector—non-state sector transactions must be understood, from that perspective, as the exception rather than the rule, and possible only after all of the needs of the state sector have been satisfied.²⁸⁶ The resulting narrowing of the activities of cooperatives could be significant.

The provisions on the tax obligations of cooperatives²⁸⁷ reinforce the Lineamientos' focus on expense and fiscal responsibility in the Lineamientos.²⁸⁸ As originally proposed, Paragraph 28 provided that

propiedad cooperativa no sea vendida, alquilada o arrendada a otras cooperativas o formas no estatales de producción”).

²⁸³ *Id.* ¶ 27, col. original (“Las cooperativas mantienen relaciones contractuales con otras cooperativas, empresas, unidades presupuestadas y otras formas no estatales, y realizan ventas directas a la población de acuerdo con el objeto social aprobado.”).

²⁸⁴ Paragraph 27 of the revised, final version of the Lineamientos provides, in part that the cooperative may engage in private economic activity only after satisfying their commitment to the State. LINEAMIENTOS, *supra* note **Error! Bookmark not defined.**, pt. I, ¶ 27.

²⁸⁵ For the full version of the final revised paragraph, see *id.* (“Las cooperativas mantienen relaciones contractuales con otras cooperativas, empresas, unidades presupuestadas y otras formas no estatales y después de cumplido el compromiso con el Estado, podrán realizar ventas libremente sin intermediarios, de acuerdo con la actividad económica que se les autorice.”).

²⁸⁶ That, perhaps, explains the somewhat curious explanation for the change from paragraph 27's original draft version to its final version. See TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 27, col. fundamentación del cambio (“Agrega la posibilidad de venta sin intermediario y se mejora la redacción. Responde a 438 opiniones en 14 provincias.”).

²⁸⁷ *Id.* ¶ 28.

²⁸⁸ LINEAMIENTOS, *supra* note 39, ¶ 25.

cooperatives, within the requirements of any enabling rules, would set the income allocation for its workers, provide for additional distributions, make public contributions, and pay taxes.²⁸⁹ As adopted, the primary obligation of the cooperative is to pay its taxes and other contributions to the State, then to determine worker income, and then to make additional distributions.²⁹⁰ The change is subtle but telling. The initial focus was on the wealth creation possibilities of the cooperative—the benefits of private sector activity. The final focus was on the utility of the cooperative for the production of wealth for the State—to be distributed as the state apparatus determines. It reduces the scope of the autonomy of the cooperative and ties it more closely to the state sector by re-focusing the purpose from one centered on the activities of the workers to one centered on the production of income for the State.

The last provision deals with second-level cooperatives, which are meant to be aggregations of first-level cooperatives. As originally conceived, second-level cooperatives had the object of organizing common processes of production or services among cooperatives or the aggregation of cooperatives to buy and sell goods with greater efficiency.²⁹¹ As adopted, the objectives of second-level cooperatives changed in some respects: their principal objective is now described as organizing similar or complementary activities that add value to products and services of their partners (production and marketing services), or joint purchases and sales in order to achieve greater efficiency.²⁹²

²⁸⁹ TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 28, col. original (“Las cooperativas, sobre la base de lo establecido en su Reglamento General de la cooperativa, definen los ingresos de los trabajadores y la distribución de las utilidades, y liquidan al Estado los impuestos y las contribuciones establecidas.”).

²⁹⁰ LINEAMIENTOS, *supra* note **Error! Bookmark not defined.**, ¶ 28 (“Las cooperativas, sobre la base de lo establecido en la norma jurídica correspondiente, después de pagar los impuestos y contribuciones establecidos, determinan los ingresos de los trabajadores y la distribución de las utilidades.”).

²⁹¹ TABLOIDE, *supra* note **Error! Bookmark not defined.**, ¶ 29, col. original (“Las cooperativas de primer grado, de forma voluntaria, pueden acordar entre ellas la constitución de cooperativas de segundo grado, con personalidad jurídica y patrimonio propio, con el objetivo de organizar procesos comunes (de producción y servicios), realizar compras y ventas conjuntas con vista a lograr mayor eficiencia.”).

²⁹² LINEAMIENTOS, *supra* note **Error! Bookmark not defined.**, ¶ 25 (“Se crearán cooperativas de segundo grado, cuyos socios son cooperativas de primer grado, las que tendrán personalidad jurídica y patrimonio propio y se forman con el objetivo de organizar actividades complementarias afines o que agreguen valor a los productos y servicios de sus socios (de producción, servicios y comercialización), o realizar compras y ventas conjuntas con vistas a lograr mayor eficiencia.”). The change was justified on grounds of producing greater clarity but it also noted a large number of questions about second level cooperatives. See TABLOIDE, *supra* note **Error! Bookmark not defined.**, pt. I, ¶ 25, col. fundamentación del cambio.

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The proposed formal changes in the Lineamientos, of course, suggest only half of the challenge for the State and CCP. Beyond the formal aspects of economic reorganization lies the potentially more intractable problem of suppressing, or at least managing, the so-called black market, better known as the informal sector system within Cuba.²⁹³ That, in turn, will require a substantial movement toward popular confidence in the ability of the State to fairly and consistently enforce the rules it has formally imposed, and to enforce them through appropriate public organs. The informality of the current legal system in Cuba reflects, in part, earlier generation Marxist-Leninist notions of the convergence between law and politics, in which systems of rules consistently applied were understood as contingent on the needs of the State as determined by the CCP.²⁹⁴ But a move toward state-directed economic activity necessarily requires a rules-based system of managing that enterprise, and a system for the enforcement of those rules that may be distinct from the traditional approaches of a centrally directed economic model.

The CCP recognized, in limited ways, this need for a system of rules and enforcement. Lineamientos Paragraphs 2 and 27 speak to the need to arrange relations among state and non-state sector enterprises, including cooperatives, which Paragraph 22 emphasizes are to be implemented through contracts.²⁹⁵ Lineamientos Paragraph 16 includes a provision for the liquidation of SOEs that fail to meet their contractual obligations.²⁹⁶ Lineamientos Paragraph 73 expresses the ideal that the State will increase its international credibility through strict compliance with its obligations.²⁹⁷ Lineamientos Paragraph 181 emphasizes the need to arrange contracts in a form that encourages compliance with their terms.²⁹⁸ This suggests both the increasing importance of systems of contract rules, but also the absence of such a system in Cuba today. It also suggests that the rules for the

²⁹³ See JORGE F. PÉREZ LÓPEZ, CUBA'S SECOND ECONOMY: FROM BEHIND THE SCENES TO CENTER STAGE (1995).

²⁹⁴ Cf. PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 185 (3rd ed. 2006).

²⁹⁵ See LINEMAIENTOS, *supra* note 39, ¶ 22 (“El contrato constituirá una herramienta de trabajo en la planificación y control de todas las etapas del proceso inversionista, asegurando el resultado final de la inversión, con la calidad requerida y dentro de los plazos previstos en el cronograma de ejecución.”).

²⁹⁶ *Id.* ¶ 16.

²⁹⁷ *Id.* ¶ 73 (“Trabajar con el máximo rigor para aumentar la credibilidad del país en sus relaciones económicas internacionales, mediante el estricto cumplimiento de los compromisos contraídos.”); see also *id.* ¶¶ 90, 98.

²⁹⁸ *Id.* ¶ 181 (“Adecuar la producción agroalimentaria a la demanda y la transformación de la comercialización, elevando la calidad y exigencia en los contratos, para que las partes cumplan sus obligaciones; limitando la circulación centralizada a aquellos renglones vinculados a los balances nacionales; otorgando un papel más activo a los mecanismos de libre concurrencia para el resto de las producciones.”).

enforcement of obligations among individuals remains informal and customary—and is situated well below the structures of state enforcement vehicles. Lastly, it points to the absence of certain and consistently applied practices at the state level. The result may be a fear of arbitrariness in the management of economic activity, especially economic activity in the non-state sector. That fear might be fed by the very public narrowing of the scope of cooperative activity. The consequence is a likelihood that, for small operators, the risks of investing and doing business will increase. Increased risk substantially increases the transactions costs of operation. This may make transactions uneconomic in general. But more importantly, it may substantially impede the value of forming cooperatives.

In 2012, Cuba announced that it was moving from theory and intent to practice. It announced that Mafrino Murillo, the Vice President of the Counsel of Ministers, had confirmed the preparation of new rules for the operation of cooperatives outside the agricultural sector²⁹⁹ to include services, transport, and restaurants.³⁰⁰ The announcement was timed to coincide with the visit of Pope Benedict XVI and was meant to suggest sustained movement to implement the previously approved Lineamientos, without encouraging political reform.³⁰¹ The priority was to be given principally to the reorganization of the most important posts of the state sector—agriculture, mining, tourism, and the biotech industry—followed by a review of the public health and education sectors. But the most important tasks were the reorganization of the SOEs to make them more efficient, and the need to stimulate economic productivity in the non-state sector.³⁰² It is this move from theory to guideline to statute that this Article turns to next.

2. *The December 2012 Regulatory Framework*

This Article has shown how the cooperative form is thought to hold much potential for Cuba (and other developing states). For Cuba, the most innovative part of this economic reconstruction project was the development of a new governance framework for cooperatives. But this experiment will not succeed if the regulatory framework used to manage it seeks merely to replicate and privatize the system of state management—the failures of which, acknowledged by the highest levels of the CCP, were the very impetus for the reform reflected in the new socialist cooperative.

²⁹⁹ *Cuba priorizará sector cooperativo* [*Cuba Prioritizes Cooperative Industry*], INTER PRESS SERVICE (Mar. 27, 2012), http://www.ipscuba.net/index.php?option=com_k2&view=item&id=3773%3Acuba-priorizar%C3%A1-sector-cooperativo&Itemid=42.

³⁰⁰ *Cooperatives in Cuba*, *supra* note 186.

³⁰¹ *Cuba priorizará sector cooperativo*, *supra* note 299.

³⁰² *Id.*

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The regulatory policy reflected in the Lineamientos suggests that this tension between potential and fear remains quite strong. The cooperative regulations were announced only after a long period of gestation and with the strong support for an innovative approach from influential Cuban academics. On December 11, 2012, the Cuban government published the long awaited regulations on cooperatives.³⁰³ The new cooperative regulations comprise a cluster of related regulations, including two decree-laws of the Council of State,³⁰⁴ one decree from the Council of Ministers,³⁰⁵ and two ministerial resolutions.³⁰⁶ i. Consejo de Estado Decreto-Ley No. 305: the “Proletarian” Corporate Law of Cooperatives

The Council of State’s Decreto-Ley No. 305, which implements portions of the Lineamientos, is preceded by a short preamble³⁰⁷ that substantially restates the justifications for the development of non-agricultural cooperative regulations that were included in the Lineamientos.³⁰⁸ But it also quite clearly suggests the tentative nature of the reforms and the limited scope within which these regulations will be given effect. It notes that since 1987, cooperatives have been recognized as separate juridical persons and as a legitimate form of collective property that contributes positively to the national economy.³⁰⁹ More importantly it reluctantly concedes that in order to develop the Cuban economic model, it is necessary, but only as an experiment, to create a legal framework for non-agricultural cooperatives.³¹⁰ These conceptual constraints structure the framework that guides the organization, powers, and authority of non-agricultural cooperatives elaborated in the decree-laws, decrees, and resolutions that follow.

The regulations follow the Lineamientos,³¹¹ dividing cooperatives into two classes—*primer grado* cooperatives and *segundo grado* cooperatives.³¹² *Primer grado* cooperatives are the focus of Decreto-Ley

³⁰³ See *supra* note 56.

³⁰⁴ See Decreto-Ley No. 305, *supra* note 56; Decreto-Ley No. 306, *supra* note 56.

³⁰⁵ See Decreto No. 309, *supra* note 56.

³⁰⁶ See Ministerio de Economía y Planificación Resolución No. 570/12, *supra* note 56; Ministerios de Finanzas y Precios Resolución No. 427/12, *supra* note 56.

³⁰⁷ Decreto-Ley No. 305, *supra* note 56, pmb1 (“POR CUANTO: La Ley número 59, “Código Civil,” de 16 de julio de 1987, reconoce a las cooperativas como personas jurídicas, y una forma de propiedad colectiva, que contribuye al desarrollo de la economía nacional. POR CUANTO: En el proceso de actualización del modelo económico cubano es necesario la creación, con carácter experimental, de cooperativas en sectores no agropecuarios, lo que requiere de una norma jurídica que instrumente su creación y funcionamiento.”).

³⁰⁸ *Id.*; see also LINEAMIENTOS, *supra* note 39, ¶ 25

³⁰⁹ Decreto-Ley No. 305, *supra* note 56, pmb1.

³¹⁰ *Id.*

³¹¹ See discussion *supra* Part III.C.1.

³¹² Decreto-Ley No. 305, *supra* note 56, art. 5.1.

No. 305; *segundo grado* cooperatives are governed by the rules of this law-decree unless the rules are incompatible with its operation.³¹³ Beyond this division, the Decreto-Ley is divided into thirty-two substantive articles covering cooperative regulation from formation to dissolution and liquidation.

Articles 1 through 10 of Decreto-Ley No. 305 focus on general principles and provisions. Article 1 sets out the objectives of the experimental decree-law: to establish the norms that regulate the constitution, operation, and dissolution of cooperatives within non-agricultural sectors in the national economy.³¹⁴ The decree-law's self-characterization as fundamentally experimental in nature is especially troubling. It suggests the impermanent nature of the legal structure being created, provides notice that the State might at any time end or change the rules of the experiment, and that the legitimacy of the project within the Cuban economic model is still unsettled. The importance of this characterization cannot be understated—by signalling that the rules may not survive, it serves to substantially increase the risk of forming and operating a cooperative. It deprives people of legal certainty. This may well reduce the number of people willing to take the risk of investing substantial effort or resources into a cooperative form that may be yanked out from under them at any time.

Article 2 emphasizes that cooperatives have economic and social objectives—that they are invested with private and public obligations that extend beyond the individuals involved.³¹⁵ This reflects the debate in the Sixth Party Congress about the social role of economic aggregations, such as cooperatives, and their insistence that, whether public or private, such enterprises must serve the State and its economic policy objectives even as it serves to increase the well being of its operators. The principal objectives of cooperatives are to serve the retail sector through the production of goods and the offer of services, all of which must be compatible with social objectives (managed by state organs and the CCP) and the interests of the cooperative's members. As long as it meets these objectives it may enjoy

³¹³ See *id.* at cuarta disposiciones especial [fourth special provision]. It is likely that the state ministries will have the discretion to make that determination and not the members of the *segundo grado* cooperatives.

³¹⁴ Decreto-Ley No. 305, *supra* note 56, art. 1 (“El presente Decreto-Ley tiene por objeto establecer con carácter experimental las normas que regulan la constitución, funcionamiento y extinción de cooperativas en sectores no agropecuarios de la economía nacional, en lo sucesivo cooperativas.”).

³¹⁵ *Id.* art. 2.1 (“La cooperativa es una organización con fines económicos y sociales, que se constituye voluntariamente sobre la base del aporte de bienes y derechos y se sustenta en el trabajo de sus socios, cuyo objetivo general es la producción de bienes y la prestación de servicios mediante la gestión colectiva, para la satisfacción del interés social y el de los socios.”).

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autonomous juridical personality, use and distribute its property, meet its expenses from its revenues, and otherwise comply with its obligations (contract).³¹⁶

Articles 3 and 4 deal with the internal organization of the cooperative. Article 3 describes the universe of rules that define the regulatory universe of cooperatives.³¹⁷ These include the relevant law-decrees, decrees, resolution of ministries, as well as its own internal organizational documents. Article 4 sets out the core substantive premises that define the fundamental characteristics of the cooperative and the standards under which they are to be operated. More specifically, Article 4 articulates the seven basic organizing principles of operation of cooperatives: (1) cooperatives are voluntary organizations formed and dissolved by mutual consent (*Voluntariedad*); (2) all members are expected to collaborate in the work of the cooperative (*Cooperación y ayuda mutua*); (3) management decisions are to be made by all members, each of whom have the same participation rights; decision making is guided by democratic principles (*Decisión colectiva e igualdad de derechos de socios*); (4) cooperative expenses must be paid out of its revenues, and after payment of taxes and other impositions owing to the state, net revenues may be distributed to the members but only in proportion to the members' contribution (*Autonomía y sostenibilidad económica*); (5) all members are to comply with their work obligations in conformity to the terms of the agreements establishing the cooperative and in conformity to the direction of those charged with its administration (*Disciplina cooperativista*); (6) the social obligations of the cooperative are to be emphasized in establishing and managing its objectives, in addition to which cooperatives must in their operations contribute to the economic and social development of the nation, protect the environment, avoid speculation, and ensure compliance with law; the members of the cooperative must work to promote cooperative culture and to satisfy the material, training, social, cultural, moral, and spiritual needs of its members and their families (*Responsabilidad social, contribución al desarrollo planificado de la economía y al bienestar de sus socios y familiares*); and (7) the cooperative will express its relations to other enterprises through contract, collaboration agreements, exchanges, and other lawful means (*Colaboración y cooperación entre cooperativistas y con otras entidades*).³¹⁸

³¹⁶ *Id.* art. 2.2 (“La cooperativa tiene personalidad jurídica y patrimonio propio; usa, disfruta y dispone de los bienes de su propiedad; cubre sus gastos con sus ingresos y responde de sus obligaciones con su patrimonio.”).

³¹⁷ *Id.* art. 3 (“Las cooperativas se rigen por el presente Decreto-Ley, su Reglamento, las disposiciones complementarias a estos, sus estatutos, y de forma supletoria las disposiciones legales que les resulten aplicables.”).

³¹⁸ *Id.* art. 4.

These organizing principles are notable, at first blush, not merely for their breadth and ambiguity. That is too easy a charge to lodge against these provisions, and ultimately, a distraction. The principles are useful for establishing the conceptual limits of cooperatives. It is clear that these enterprises are meant to remain small and closely tied to the primary contributions of its members. The efficiencies of corporate form have denied this form of organization. Yet there is a hint of movement toward conventional rule of law notions in the emphasis of the use of contract in managing relationships among entities. That may well open the door to the construction of state organs (judicial) for the vindication of these rights, and might contribute in that way to the development of a body of private and commercial law that may in turn contribute to the development of a more robust commercial sector.

More important, though, is the emphasis on the social obligations of cooperatives. This is not meant as mere rhetorical bluster. Rather, it is the gateway through which state management of the business of cooperatives may be effectuated. Because the State may control the meaning and application of social obligations, it may also control the functioning of cooperatives. It is in this way that the state ministries may still be able to control cooperatives even as they appear to be directed by their members. In effect, the State seeks to transfer the risk of the enterprise to the members but retain substantial control over its operation, at least at a macro-level. It remains to be seen how aggressively state organs, and functionaries seek to use this power to interfere in the operations of cooperatives, and to what ends. It will also be interesting to see if in these powers the law provides an opening to corruption in the relations between cooperatives and the functionaries responsible for their oversight.

But social objectives can be liberating principles as well. Free of bureaucratic micro-management, and perhaps subject to review and reporting on a periodic basis, requiring businesses to adopt something like a broad stakeholder model and reject the traditional shareholder or investor model of conventional enterprises can provide a values-based foundation. This foundation can help in assessing the value of enterprise activity that can much more efficiently produce socially useful objectives than the traditional system of control and regulation managed by state bureaucrats. The reason for this is simple: incorporating a stakeholder model as the foundational basis of the assessment of the value of enterprise activity internalizes the values and objectives of socially conscious activities. As a consequence, monitoring and management costs (to the state) are reduced substantially as the objective becomes internalized and self managed. That, for example, is the objective of moves outside of Cuba to provide a

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regulatory space for socially conscious enterprises.³¹⁹ The difficulty of traditional control policies is that it remains something that is exogenous to the cultures of enterprises, is imposed and controlled by state actors who are not intimately connected with enterprise activity and who may impose transaction costs in the form of corruption.³²⁰

In effect, because the enterprise itself does not own its own obligation to increase stakeholder (or social) value, and because it appears alien to the operation—something imposed by an outside actor—it will not be easy to internalize the values of social welfare within the cultures of enterprise operation. The concern with the system created by Decreto-Ley No. 305, then, is precisely this: it points to a system of internalizing the requirements of stakeholder operations while retaining the inefficient structures created by the specific implementation of social objectives through state management and control. That is the potential tension between the general operational principles of Article 2 and the impositions of the regulatory framework.³²¹

Article 6 of Decreto-Ley No. 305 describes the lawful types of contributions (only by natural persons) for the formation of *primer grado* cooperatives. These include: (1) cash aggregated for collective activity;³²² (2) the use of property or services contributed to the venture without transferring ownership;³²³ (3) the use of the means of production owned by the state, the right to which must be acquired lawfully (including state enterprises whose operations might be privatized through leaseholds or otherwise);³²⁴ and (4) any combination of these.³²⁵

³¹⁹ See Larry Catá Backer & Edward Waitzer, *Edward Waitzer on Fiduciary Duty and Corporate Social Responsibility: Are Benefit Corporations a Step in the Right Direction?*, LAW END DAY (Mar. 6, 2012), <http://lbackerblog.blogspot.com/2012/03/edward-waitzer-on-fiduciary-duty-and.html>.

³²⁰ See Larry Catá Backer, *Corruption in Cuba—The Cuban Communist Party Signals Public Recognition and Party Obligation*, LAW END DAY (July 16, 2011), <http://lbackerblog.blogspot.com/2011/07/corruption-in-cuba-cuban-communist.html>.

³²¹ See generally Decreto-Ley No. 305, *supra* note 56, art. 11; Decreto No. 309, *supra* note 56 (the implementing regulations).

³²² Decreto-Ley No. 305, *supra* note 56, art. 6(a) (“A partir del patrimonio integrado por los aportes dinerarios de personas naturales que deciden voluntariamente asociarse entre sí bajo el régimen de propiedad colectiva.”).

³²³ *Id.* art. 6(b) (“Por personas naturales que decidan voluntariamente asociarse entre sí, solo con la finalidad de adquirir conjuntamente insumos y servicios, comercializar productos y servicios, o emprender otras actividades económicas, conservando los socios la propiedad sobre sus bienes.”).

³²⁴ *Id.* art. 6(c) (“A partir de medios de producción del patrimonio estatal, tales como inmuebles y otros, que se decida gestionar de forma cooperativa y para ello puedan cederse estos, por medio del arrendamiento, usufructo u otras formas legales que no impliquen la transmisión de la propiedad.”).

³²⁵ *Id.* art. 6(d).

The contribution of state assets under Article 6(c) is particularly noteworthy. It suggests the possibility of privatizing state operations through cooperatives under appropriate circumstances, none of which are specified. That suggests, in turn, that the State might contribute or not under standards that may be non-transparent, non-uniform, and arbitrarily applied. The transfer of the rights to use state assets is treated further in Articles 7 through 9, which focus on the use of state property. Article 7 limits lease transfer contributions of state assets to a maximum term of ten years.³²⁶ Article 8 permits state entities to sell equipment and other goods to cooperatives in accordance with the law.³²⁷ Article 9 permits cooperatives (whether or not they are fully established in accordance with the law) to bid for state property and to contest the award of property open for bid.³²⁸

Cooperative formation is the subject of Articles 11 through 16,³²⁹ most of which are supplemented by the implementary regulations of the Council of Ministers.³³⁰ Article 10 specifies the mechanics of cooperative formation. Members are limited to natural persons, at least eighteen years of age, who are permanent residents of Cuba who are able to perform productive work for the cooperative.³³¹ Where state enterprises contributed, the workers of those enterprises will have priority in becoming cooperative members.³³² Lastly, new members may be added in accordance with the operating principles of Article 4.³³³ Articles 11 through 16 focus on the governing documents for a cooperative and the process for obtaining state consent for operation. They specify the appropriate review agency,³³⁴ the type of review provided by local authorities and the Council of Ministers,³³⁵ the supervision and control responsibilities of state agencies authorizing

³²⁶ *Id.* art. 7 (“El término del arrendamiento, usufructo u otras formas legales que no impliquen la transmisión de la propiedad a la cooperativa, a que se refiere el inciso c) del artículo anterior será de hasta diez (10) años, prorrogables por igual término en periodos sucesivos.”).

³²⁷ Decreto-Ley No. 305, *supra* note 56, art. 8 (“Las entidades estatales podrán vender a las cooperativas que se constituyan, equipos, medios, implementos u otros bienes muebles que se determinen, de acuerdo a lo legalmente establecido.”).

³²⁸ *Id.* art. 9 (“[P]odrán participar en la licitación de arrendamientos de inmuebles y de la venta de otros activos fijos de un establecimiento estatal . . . podrán impugnar la decisión firme en la vía judicial conforme a lo legalmente establecido.”).

³²⁹ Chapter II of Decreto-Ley No. 305 is entitled “De la Constitución.” *Id.* arts. 11–16.

³³⁰ Decreto-Ley No. 309, *supra* note 56.

³³¹ Decreto-Ley No. 305, *supra* note 56, art. 10.1.

³³² *Id.* art. 10.2.

³³³ *Id.* art. 10.3. These principles include non-coercion, collective decision-making, and equal rights for members. *Id.* arts. 4(a), 4(c), 4(f).

³³⁴ *Id.* art. 11.

³³⁵ *Id.* art. 12.

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cooperative formation,³³⁶ the writing requirements for cooperative constitutions,³³⁷ the authority of cooperatives to merge or modify,³³⁸ and the sources of governing law.³³⁹

These provisions raise a number of interesting issues related to the control, supervision, and ongoing relationships between the State and these enterprises. The framework for formation and supervision highlights the issues and choke points of the regulation. Article 11 specifies the governmental unit from which approval must be obtained in order to form a cooperative, distinguishing between cooperatives formed from private contributions and those organized from privatized state enterprises.³⁴⁰ The request must include the cooperative's constitution, though it is not clear what kind of review process is necessary or which forms must be filled out. Article 14 lists the formalities required in the preparation of a cooperative constitution.³⁴¹ Article 12 indicates that the Council of Ministers and the appropriate local regulatory bodies must review all applications for cooperative formation.³⁴² Article 13 provides that approval for cooperative formation must contain, in some detail, the enterprise's authorized activities and any other obligations the approving agencies might deem appropriate.³⁴³ Article 13 also notes that the approving agency remains responsible for the control and evaluation of the cooperative's operations.³⁴⁴ Indeed, under Article 15, a cooperative may not merge, dissolve, split up, or modify its organization or operations without the approval of the state organ that approved its constitution.³⁴⁵

What is clear is that even though anyone who meets the requirements for cooperative formation may apply, the State has reserved the right to refuse the formation of any cooperative, apparently for any reason. Those reasons are likely to be based on an assessment that the cooperatives do not appropriately meet the social or national objectives. This is a significant method of control of both individuals and cooperative activity. The State stands as the gatekeeper in a way that has no parallel in the West, where most enterprise formations that comply with formal requirements are not subject to particular review. It also substantially limits cooperatives in their engagement with market changes. Any change in the operations, business,

³³⁶ *Id.* art. 13.

³³⁷ Decreto-Ley No. 305, *supra* note 56, art. 14.

³³⁸ *Id.* art. 15.

³³⁹ *Id.* art. 16.

³⁴⁰ *Id.* art. 11.

³⁴¹ *Id.* art. 14.

³⁴² *Id.* art. 12.

³⁴³ Decreto-Ley No. 305, *supra* note 56, art. 13.

³⁴⁴ *Id.*

³⁴⁵ *Id.* art. 15.

or focus of the cooperative will require governmental review and approval. This is another way by which the State retains substantial control over the operations of cooperatives—it effectively serves as the ultimate controlling entity with respect to changes in operations or scope of business. That authority extends not just to consent rights for cooperative business decisions that change its operations, but also to evaluation and control of the cooperative.

The structure of corporate governance is the subject of Articles 17 through 19, which regulate the internal organization of cooperatives. Article 17 provides that each cooperative has a General Assembly of its members that serves as the supreme governance unit of the cooperative.³⁴⁶ The General Assembly elects a president, presidential alternate, and secretary by direct and secret ballot.³⁴⁷ It also may appoint an administrator or administrative committee,³⁴⁸ and elect a board of directors (*Junta Directiva*) overseen by the cooperative's president.³⁴⁹ These provisions are similar to organizational provisions for private companies. Article 18 provides a waiver of these organizational requirements for small and less complex cooperatives.³⁵⁰ Whatever their organizational form, Article 19 provides that all cooperatives must administer their financial affairs through a specially designated member or through a Control and Audit Committee (*Comisión de Control y Fiscalización*) appointed by the General Assembly.³⁵¹

Issues of cooperative finance are the focus of Articles 20 through 25. Article 20 specifies the accounting standards to be applied by cooperatives,³⁵² while the Council of Ministers Regulations still define the requisite accounting conventions. Article 21 specifies the initial capital of

³⁴⁶ *Id.* art. 17.1 (“El órgano superior de dirección de la cooperativa es su Asamblea General, de la cual forman parte todos los socios.”).

³⁴⁷ *Id.* art. 17.2.

³⁴⁸ *Id.* art. 17.3.

³⁴⁹ Decreto-Ley No. 305, *supra* note 56, art. 17.4.

³⁵⁰ *Id.* art. 18. Cooperatives with twenty members or less may operate by appointing an administrator. Cooperatives with more than twenty but no more than sixty members may operate through an Administrative Council (Consejo Administrativo). *Id.* Cooperatives with more than sixty members may elect both an administrative council and a board of directors. *Id.*

³⁵¹ *Id.* art. 19 (stating that the form of the financial oversight will vary by the number of members and the complexity of the cooperative organization).

³⁵² *Id.* art. 20. The type of accounting standards adopted is based on the organizational characteristics of the cooperative. *See id.* (“Las cooperativas aplican normas específicas de contabilidad y elaboran sus planes de ingresos y gastos en correspondencia con el nivel de producción y servicios proyectado, tomando en cuenta los vínculos contractuales que establezcan con las empresas, unidades presupuestadas y demás formas de gestión económica.”).

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the cooperative using a qualitative standard.³⁵³ The focus is on “work capital” (*capital del trabajo*) rather than financial capital,³⁵⁴ which constitutes the cooperative’s assets under Article 22.³⁵⁵ Article 23 provides an important disciplinary element—it requires all members of a cooperative to participate in the work of the enterprise.³⁵⁶ That, of course, is at the heart of this form of economic organization—the notion that labor and production rather than capital is at the heart of the organization and operation of the enterprise. Lastly, Article 24 deals with profit distributions, providing for the development of rules for the distribution of net revenues (*utilidades* or profits) to members in conformity with the principles and other limitations of law.³⁵⁷ More importantly, and implied in Article 24, distribution rules must also conform to the conditions for approval imposed by the state agencies with regulatory and supervisory authority over each cooperative under Articles 13 and 15.

Articles 25 and 26 deal with issues of cooperatives in markets. More specifically, they deal with pricing authority and the authority to hire labor. Article 25 regulates the particularly sensitive issue of pricing goods and services.³⁵⁸ The provision nicely illustrates the conflicted nature of the cooperative regulations—at once solicitous of a small market sector and deeply suspicious of markets as a driver of economic activity. On the one hand, its basic premise is that the cooperative may set prices for goods and services in accordance with market conditions. Yet, the provision also specifies that this rule may be altered by rules promulgated by competent state authorities.³⁵⁹ In effect, the provision makes it possible for the State to privatize its operations without loss of any power over the management of pricing. Markets for goods and services may be tolerated only to the extent, and for as long as, competent state agencies permit them. But clearly the

³⁵³ *Id.* art. 21 (“[Q]ue le permita sostener sus operaciones al nivel previsto.”).

³⁵⁴ *Id.*

³⁵⁵ Decreto-Ley No. 305, *supra* note 56, art. 22 (providing that corporate assets include work capital, other contributions, and any bank loans).

³⁵⁶ *Id.* art. 23 (“[E]stán en la obligación de participar con su trabajo.”).

³⁵⁷ *Id.* art. 24. The provision is ambiguous about the need to distribute profit. It is clear that at year end the cooperative must determine the profits to be distributed in each cooperative. *Id.* art. 24.1 (“[U]tilidades a distribuir en cada cooperativa”). But it also provides that the cooperative must establish rules for distribution from profits, subject to the limitations of the Regulations (of Council of Ministers). Article 56 of the Regulation provides for setting aside reserves for obligations to the state, as well as other reserves established by the General Assembly, limiting distributions to net profits. Decreto No. 309, *supra* note 56, art. 56.1.

³⁵⁸ Decreto-Ley No. 305, *supra* note 56, art. 25 (“Los precios y tarifas de los productos y servicios que comercialicen las cooperativas se determinan por estas, según la oferta y la demanda, excepto aquellos que se establecen por los órganos estatales competentes.”).

³⁵⁹ *Id.*

State has the discretion to step in at any time and regulate pricing. For cooperatives seeking welfare maximization, and even ones sensitive to their social obligations, this may work against the creation of robust enterprises that might be able to survive. Worse, to the extent that pricing is not centrally controlled, it is possible that pricing schemes for cooperative goods and services may vary among regulatory regions, creating incentives for strategic behavior and corruption.

Article 26 deals with the equally sensitive issue of labor hiring by cooperatives.³⁶⁰ The provision represents a compromise between an enterprise view of cooperatives that would treat them like other economic enterprises able to hire capital and labor and a social view of cooperatives that understands this form as grounded in the equality of labor participation. Article 26.1 gives cooperatives a very limited power to hire labor: individuals may be hired for no more than three months, and hiring is permitted only when there are no members able to perform the task.³⁶¹ The object of this regulation, of course, is to create incentives to eventually convert hired labor into cooperative members. In effect, the labor hire provision appears to be meant to serve as a means of creating something like a probationary period for potential members.³⁶²

Conflict resolution among members is the subject of Articles 27 through 29. Article 27 urges negotiation as the first step to resolving conflicts among members or between members and the cooperative.³⁶³ Negotiation is initially between the principals to the dispute. The provision leaves open the possibility of setting up some sort of institutional mechanism within the cooperative for mediating disputes. Article 28 provides that after sixty days without resolution, the dispute may be taken to the administration of the cooperative, again under rules that may be organized by the cooperative.³⁶⁴ If this does not resolve the dispute, it may be taken to judicial bodies.³⁶⁵ Article 29 reminds all participants that

³⁶⁰ *Id.* art. 26.1 (“Las cooperativas pueden contratar trabajadores asalariados hasta tres meses en el período fiscal, para las actividades y tareas que no puedan asumir los socios en determinado período de tiempo.”). The provision is sensitive because, at its limit, the ability of hiring labor is fundamentally incompatible with an enterprise founded on the premise that all labor will contribute to the production of revenue to be divided among the participants articulated in Article 2.

³⁶¹ *Id.*

³⁶² *See id.* art. 26.4.

³⁶³ *See* Decreto-Ley No. 305, *supra* note 56, art. 27. The provisions apply not just to the cooperative’s activities, but also to the interpretation of the application of the Decreto-Ley No. 305 and the subsequent implementing regulation to the cooperative.

³⁶⁴ *Id.* art. 28 (“[P]odrá someterse al conocimiento de los órganos de dirección o administración de la cooperativa; agotada esta vía, queda expedita la acción judicial, según la naturaleza del conflicto.”).

³⁶⁵ *Id.*

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disputes are to be resolved in accordance with Decreto-Ley No. 305 (rather than some other law or principle) along with the regulations developed to implement it and the internal cooperative governance documents.³⁶⁶

The last articles of Decreto-Ley No. 305 provide a legal basis for dissolution and liquidation. Articles 30 through 32 deal with dissolution and its legal effects. As in conventional corporate law statutes, cooperative extinction is a two-step process: dissolution and liquidation.³⁶⁷ Dissolution is covered under Article 31,³⁶⁸ the legal effects of which are described in Article 32.³⁶⁹

ii. Consejo de Estado Decreto-Ley No. 306: Governmental Impositions and the Private Sector Contributions to the National Social Security System

A companion statute of Decreto-Ley No. 305, Decreto-Ley No. 306, sets out an ambitious program for capturing revenues from the operations of cooperatives.³⁷⁰ Yet, given the extent of state control and management of both markets and entities in Decreto-Ley No. 305, it is hard to imagine substantial market-derived revenues for cooperatives, the production of which is the premise that animates the financial optimism of Decreto-Ley No. 306. Beyond that, of course, the object of this provision is the same as that of similar provisions in western welfare states: to tax economic enterprises with the social costs of maintaining public support services for individuals. But taxes are transaction costs to enterprises and these present a substantial burden on new enterprises. Taken together with the potential for substantial state control of cooperative activities and internal organization and the possibility that the State could rescind the entire experiment at its whim, the burden on the cooperative enterprises beyond usual business risks becomes formidable indeed. Ironically, it is unlikely that there would have been sufficient political will to undertake even this anemic step toward a fundamentally sound Marxist-Leninist approach to collective activity without these institutional hobbling mechanisms. Yet, the tensions that result make it as likely that this experiment will fail as a consequence of institutional impediments as it is likely that it can succeed because it serves the public interest in robust markets to satisfy basic consumer demands.

³⁶⁶ *Id.* art. 29.

³⁶⁷ *Id.* art. 30.

³⁶⁸ *Id.* art. 31. It provides for dissolution triggers, including by operation of the cooperative governance documents, by principles of impossibility of engaging in the work of the cooperative or its operation, upon the loss of critical leases or use permits, by judicial order, and for other lawful reasons. *Id.*

³⁶⁹ Decreto-Ley No. 305, *supra* note 56, art. 32.

³⁷⁰ Decreto-Ley No. 306, *supra* note 56.

iii. Consejo de Ministros Decreto No. 309: the Implementing Regulations

The Council of Minister's Decreto No. 309 forms an integral part of the regulatory governance framework of the cooperative. Articles 1 and 2 set out the framework of the regulation. Article 1 reinforces the character of the cooperative as a regulatory experiment and describes the objectives of the regulation: to specify rules for the formation, registration, operation, and dissolution of cooperatives.³⁷¹ Article 2 emphasizes that, despite the rhetoric about the coordination of cooperatives within markets for consumer goods and services, cooperatives are subject to the supervision and enforcement of tax, pricing, accounting, and other applicable regulations.³⁷²

Articles 3 through 6 regulate the constitutions of cooperatives. The requirements are quite specific. They mandate, for example, the articulation of both the activities to be undertaken by the cooperative and the expected territorial scope of the activity.³⁷³ Articles 3 through 5 detail the approval path to be taken for the constitution. All cooperatives must be reviewed and approved by the Council of Ministers.³⁷⁴ Of course, depending on the volume of applications, this procedure requiring local and national approvals may substantially slow down cooperative formation. As a result, a less-than-optimal number of cooperatives may be formed, or equally as likely, cooperatives will be formed outside of the process. The possibilities for corruption may thereby also be increased.

As a further alternative, cooperatives "in formation" (*en formación*) may be tolerated while they await approval from the Council of Ministers. Those will only exist in a semi-official limbo, however, and as a result may also increase the temptation of corruption, because officials will have greater power to shut them down. The possibility of a large number of cooperatives in formation is the object of Articles 7 through 10 of the regulation. Article 7 contemplates the operation of cooperatives without official approval by permitting these entities to operate with an indication of their status.³⁷⁵ This permits the cooperative *en formación* to lawfully engage in a limited number of transactions to further the development of its

³⁷¹ Decreto No. 309, *supra* note 56, art. 1 ("El presente Reglamento establece con carácter experimental el procedimiento para la constitución, registro, funcionamiento y extinción de las Cooperativas no Agropecuarias de primer grado.").

³⁷² *Id.* art. 2. This appears to set the time for the rest of the implementing regulation—that this experiment in markets-based private enterprises will be closely monitored by the State.

³⁷³ *Id.* art. 3.1. Cooperatives founded on privatized state operations are subject to a special provision. *Id.* art. 4.

³⁷⁴ *Id.* art. 6.

³⁷⁵ *Id.* art. 5 ("La Comisión Permanente para la Implementación y Desarrollo evalúa las solicitudes de creación de Cooperativas a que se refieren los artículos 3 y 4 del presente Decreto y con sus consideraciones presenta al Consejo de Ministros la propuesta sobre su incorporación o no a la experiencia.").

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internal organization.³⁷⁶ However, cooperatives en formación are not deemed to have acquired juridical personality,³⁷⁷ so the individual members remain personally liable during this formation period. While the cooperative is in formation, and pending final approval, the local approval agency is empowered to negotiate the final form of the cooperative's constitution.³⁷⁸ Among the objects of negotiation are (1) the social objective of the cooperative (*posible objeto social*); (2) the organization of cooperative financial structures (*diseño financiero*); (3) the property to be leased to acquired (*inmuebles y otros bienes a arrendar*); (4) goods or services to be sold (*medios, utensilios y herramientas a vender*); (5) goods or services to be utilized from the state sector (*bienes o servicios que constituyen el pedido estatal*); (6) the pricing of goods and services to be offered by the cooperative (*los precios de bienes y servicios que se man tendrán centralmente establecidos*); (7) draft contracts or agreements (*los proyectos de contratos de arrendamiento, usufructo, compraventa y otros*); (8) if applicable deferments of lease payment provisions (*si procede, la determinación del período de exoneración del pago del arrendamiento*); (9) the materials (consumables) necessary for the production of goods or services to be rendered (*los insumos principales a suministrar*); (10) environmental impacts (*el impacto ambiental*); (11) the ways in which the cooperative will comply with land use regulations (*el cumplimiento de normas y regulaciones so bre el ordenamiento territorial*); (12) the proposed governance framework (articles of association) (*el proyecto de estatutos*); and (13) anything else considered appropriate (*otros aspectos que se consideran de interés*).³⁷⁹ Some of these items appear better suited for agricultural cooperatives (the prior establishment of which provided the framework for these new regulations). Others might be evidence that the State intends to treat these cooperatives substantially like any other state enterprise within a highly centralized planned economy. If that is true, the regulation considerably impedes all efforts to permit cooperatives to develop to serve consumer demand. Instead, it appears that the planning needs of the State take precedence over the ability of the cooperative to adjust supply and price in the market. This is especially true with respect to price and objects offered for sale or service. If these require state approval before they can be changed, the ability of the cooperative to operate in markets is substantially gutted because cooperatives will not be able to adjust to fast-moving market conditions.

Articles 11 and 12 set out the details for setting up the cooperative.

³⁷⁶ *Id.* art. 8.

³⁷⁷ Decreto No. 309, *supra* note 56, art. 10

³⁷⁸ *Id.* art. 9.

³⁷⁹ *Id.*

The principal focus is on the content of the cooperative's constitutional documents,³⁸⁰ and the acquisition of property.³⁸¹ Article 13 focuses on the process of bidding for state assets. The process is also heavily managed by the State, whose officials are given approval and supervisory authority.³⁸²

The foundational character of the cooperative—its social purpose³⁸³—is fleshed out in Articles 14 and 15. Article 14 defines the social object simply as the commercial activities of the cooperative.³⁸⁴ This is possible because no cooperative can be licensed without approval of the State. It stands to reason, then, that what the State approves must out of necessity also include a sufficient social objective.

Articles 16 through 19 specify requirements for setting up the constitution of a cooperative and the role of the general assembly. Articles 20 through 22 deal with the articles of association (*estatutos*). The constitution of the cooperative appears to function like a corporate charter while the *estatutos* seems to have been assigned the function of corporate bylaws, but with substantially more detail about the business to be undertaken and substantially more limits on the flexibility of operations. A notary (*notario*) prepares the constitution,³⁸⁵ the costs of which are borne by the founding members.³⁸⁶ The constitution is filed with the Registro Mercantil,³⁸⁷ and the *estatutos* must be approved by the General Assembly.³⁸⁸ The *estatutos* include the fundamental regulations for the operation of the cooperative and form part of the constitution.³⁸⁹ The minimum content of the *estatutos* is prescribed in Article 21.³⁹⁰ These include many of the items usually found in both corporate charters and

³⁸⁰ *Id.* art. 11. These include much of the basic information found in a corporate charter; in addition, they are also meant to lock in pricing where pricing discretion is not permitted as a condition of approval. *Id.* art. 11(h) (“[L]os precios de bienes y servicios que se mantendrán centralmente establecidos, cuando corresponda.”).

³⁸¹ *Id.* art. 12.

³⁸² *Id.* art. 13.1.

³⁸³ Decreto-Ley No. 305, *supra* note 56, art. 2.

³⁸⁴ Decreto No. 309, *supra* note 56, art. 14 (“El objeto social de la Cooperativa comprende las producciones, prestación de servicios o la actividad de comercialización, a que se dedicará de acuerdo con lo que se autorice.”). Article 15 provides the basis for the use of trademarks and the like. *Id.* art. 15.

³⁸⁵ *Id.* art. 16.

³⁸⁶ *Id.* art. 19.

³⁸⁷ *Id.* art. 23.

³⁸⁸ *Id.* art. 18.

³⁸⁹ *Id.* art. 20.

³⁹⁰ Article 21 includes items such as the number of members in the cooperative, the requirements of membership, banking information, distributions for members, conflict resolution, amendments to the statutes, and procedures for dissolution and liquidation. Decreto No. 309, *supra* note 56, art. 21.

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bylaws. Article 22 presents rules for the modification of the estatutos. These include super-majority provisions for cooperatives with more than twenty members.³⁹¹ For smaller cooperatives, such rules can be made to suit the members. Revisions to the estatutos must also be filed with the Registro Mercantil.³⁹²

Chapter III of Decreto No. 309 is devoted to issues involving the members of the cooperative,³⁹³ including the minimum rights of members.³⁹⁴ These minimum rights include rights touching on labor obligations of members as well as rights relating to their interests in the cooperative. Article 29 focuses on member obligations, including the obligation to provide the labor services that represent the “benefit of the bargain,” in exchange for which the individual obtained an interest in the cooperative.³⁹⁵ Article 30 lists the basis on which a person can lose his status as a cooperative member (including, among other things, expulsion, death, retirement, and incapacity).³⁹⁶ Articles 67 through 68 elaborate on member discipline, which includes fines, suspension, or expulsion.³⁹⁷ Worker discipline is detailed in Article 69.

Articles 33 through 45 provide rules relating to the governance organs of the cooperative. Much of this is similar to the provisions of corporate rules for private companies (such as ordinary and special meetings of collective bodies, quorum rules, notice of meetings, and agendas), though some of the rules are more specific. For example, collective bodies are required to have an odd number of members.³⁹⁸ The General Assembly is the supreme organ of cooperative authority. It elects a president. It has a long list of attributes specified in the regulation.³⁹⁹ The General Assembly’s authority resembles in a general way that of shareholders. The authority of the President of the General Assembly is also specified,⁴⁰⁰ most of which resembles that of the chair of a board of directors. The authority of the Secretary is also specified.⁴⁰¹ The Junta Directiva appears to act like the standing committee of the General Assembly.⁴⁰² The administrator (or

³⁹¹ *Id.* art. 22.

³⁹² *Id.* art. 24.

³⁹³ *Id.* arts. 26–30.

³⁹⁴ *Id.* art. 28.

³⁹⁵ *Id.* art. 29.

³⁹⁶ Decreto No. 309, *supra* note 56, art. 30.

³⁹⁷ *Id.* arts. 67–68.

³⁹⁸ *Id.* art. 33.1(2).

³⁹⁹ *Id.* arts. 37(a)–(j).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* arts. 39(a)–(d).

⁴⁰² Decreto No. 309, *supra* note 56, arts. 40–41.

the administrative council) functions like a chief executive officer.⁴⁰³ Lastly, the Control and Audit Commission functions like a legal and audit committee of a board of directors.⁴⁰⁴

Articles 46 through 59 deal with issues of cooperative capital and accounting. Cooperatives account for the operations using the Normas Cubanas de Información Financiera.⁴⁰⁵ The cooperative is required to prepare an annual business plan,⁴⁰⁶ though its scope appears to be more like the plans required for ministerial action in a centrally-planned economy than in a market driven one. This again suggests that the pull of traditional patterns of planning may hamper the already small opening that exists for market based economic activity within the consumer retail sector.

Dividend distribution is tightly managed.⁴⁰⁷ Decreto No. 309 effectively mandates that at least thirty percent of profits (understood in this case as revenues net of expenses and taxes) above reserves set aside to act like a corporate stated capital account⁴⁰⁸ are meant to be reinvested by the cooperative in a number of specified areas.⁴⁰⁹ Reserves are meant to provide funds for payment of workers in lean years and to pay obligations.⁴¹⁰ Advances are possible, and Article 60 specifies the proportion of distribution to members.⁴¹¹ Lastly, Articles 70 through 74 provide procedures and structures for mediating conflict,⁴¹² while Articles 75 through 77 deal with dissolution and liquidation of cooperatives.⁴¹³

⁴⁰³ *Id.* arts. 43–44.

⁴⁰⁴ *Id.* art. 45.

⁴⁰⁵ *Id.* art. 52 (“La Cooperativa está obligada a llevar la contabilidad de sus operaciones a efectos fiscales, a partir de las Normas Cubanas de Información Financiera, con las especificidades que al respecto se establezcan.”); *see also* Larry Catá Backer, *Cuba Issues New Cooperatives Regulations: Tentative Experiment in Socialist Market Enterprise or a Privatization of State Management?*, LAW END DAY (Jan. 20, 2013), <http://lbackerblog.blogspot.com/2013/01/creating-legal-structure-for-experiment.html>.

⁴⁰⁶ Decreto No. 309, *supra* note 56, art. 54.

⁴⁰⁷ *Id.* arts. 56–62.

⁴⁰⁸ *See id.* art. 56.1.

⁴⁰⁹ *Id.* art. 57.1(3) (“La diferencia con el 100% de las utilidades que no se distribuyen a los socios, se destinan al fondo de operaciones, inversiones, actividades socio-culturales, incrementar el fondo de contingencia y otros, según se aprueben en los estatutos.”).

⁴¹⁰ *Id.* art. 59 (“Las Cooperativas que tengan pérdidas las solventarán, en primera instancia, por medio de la reserva para cubrir contingencias.”).

⁴¹¹ *Id.* art. 60 (basing the proportion on the complexity, amount, and quality of the work of each of the cooperative’s members). The operationalization of this standard remains unspecified.

⁴¹² Complaints are to be made in writing, and provisions for notification are specified. Decreto No. 309, *supra* note 56, arts. 70–71. The administrative organ mediating disputes usually has thirty days to render a decisión. *Id.* art. 73.1.

⁴¹³ Under these provisions, the supervising agencies are assigned responsibility for dissolution. *Id.* art. 75. A liquidation committee established by the General Assembly has

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iv. The Ministerial Resolutions

Two ministerial resolutions were included in the basic package of cooperative resolutions. The first resolution provides the procedures for bidding on state property that is to be contributed to the operation of a cooperative.⁴¹⁴

The second resolution deals with issues of taxation, accounting, and pricing for goods and services provided by cooperatives.⁴¹⁵ Its object is to embed cooperatives within the state-based planning for prices and production. This resolution is based on the premise that prices are set by the market unless they are otherwise required to be set at a particular amount by the State.⁴¹⁶ Prices may be set in CUP (*pesos cubanos*) or CUC (*pesos convertibles*).⁴¹⁷ The State continues to regulate the price margins between wholesale and retail markets.⁴¹⁸ This can significantly limit competition among cooperatives. It would follow that the State may be discouraging price competition, evidenced by a regulatory web with the potential to significantly affect the development of markets. The consequence might be that cooperatives are expected to operate like privatized state sector organs. But this essentially defeats the object of the redirection of the Cuban economy at the heart of the objectives of the Lineamientos. It also suggests the triumph of the factions within the Cuban elite that view any change with great suspicion.

IV. THEORY AND ENGAGEMENT: CUBA AND COOPERATIVES IN
THE GLOBAL CONTEXT

The development of a cooperative theory—which started as a solution to the problem of organizing collective activity within a closely cabined retail sector in which only the state can own productive property—highlights the peculiarities of Cuba’s economic reform and engagement in the global economy, and its distance from the path followed by the Chinese Communist Party since the 1980s. The December 2012 Regulations sought to establish this theoretical vision, adhering closely to the narrowly constrained guidelines (Lineamientos) for economic reorganization. Cuba is seeking to forge a third path between the market-oriented economic model of the West and the pattern of economic control developed by the

responsibility for winding up. *Id.* art. 76.

⁴¹⁴ Ministerio de Económica y Planificación Resolución No. 570/12, *supra* note 56.

⁴¹⁵ Ministerios de Finanzas y Precios Resolución No. 427/12, *supra* note 56.

⁴¹⁶ *Id.* ¶ 12.

⁴¹⁷ *Id.* ¶ 13.

⁴¹⁸ See Alejandro, *supra* note 105, at 63 (“En adición a estas limitantes se encuentra las restricciones de divisas que tiene el país para apoyar el microcrédito y un mercado de insumos mayoristas, tan necesario para el desarrollo de las Pymes.”).

great Asian Marxist-Leninist states. It remains committed to a significant degree of central planning and suspicious of autonomous capital aggregations and of individuals not directly controlled or managed by the state. It has sought to build these notions into its international and regional economic planning to the same extent it seeks to base its internal economic model on those principles.⁴¹⁹

The centerpiece of this internationalization of the Cuban model is ALBA. But the internationalization is itself grounded in the exportation of a new model of economic organization based on the primacy of the state as the manager of economic activities and in which the private sector plays a small and well-managed role.⁴²⁰ ALBA appears to be moving to reflect the two-part division of economic activity within Cuba: a public sector populated with state-owned corporate enterprises and a private sector focused on small retail professions.⁴²¹

ALBA is firmly grounded on the idea that internationalization must be effectuated through states and public action rather than individuals and private markets.⁴²² ALBA is not necessarily opposed to all private activity, just those activities that have become liberated from precise control by the state. ALBA is thus founded on the notion that traditional divisions between public and private sectors remains valuable and important, and that certain sectors, traditionally overseen by the state as agent for territorially based communities, are essential for the maximization of the welfare of

⁴¹⁹ See Backer & Molina, *supra* note 36.

⁴²⁰ Larry Catá Backer, *Globalization and the Socialist Multinational: Cuba at the Intersection of Business and Human Rights*, in 1 HANDBOOK ON CONTEMPORARY CUBA: ECONOMY, POLITICS, CIVIL SOCIETY, AND GLOBALIZATION (Mauricio A. Font & Carlos Riobó eds., 2012).

⁴²¹ See generally Nick Hoskyns & David McKnight, *Another Way Is Possible: Fair Trade, Cooperation and Solidarity*, VENEZUELA ANALYSIS (Jan. 13, 2012), <http://venezuelanalysis.com/analysis/6745>. Hoskyns and McKnight, when describing the idea of fair trade as a fundamental principle of ALBA trade policy used the example of Venezuelan cooperatives as an example of the concept at work, and noted in connection with his thought about Nicaraguan contributions to ALBA, that “Cuba is looking at the cooperatives in Nicaragua as a model to develop their economy.” *Id.*

⁴²² ALBA is said to institutionalize radical conflict necessary to build an integrated political space in Latin America, develop a model of twenty-first century socialism, and support the radical revolutionary processes within member states. See Joel D. Hirst, *What Is the Bolivarian Alternative to the Americas and What Does It Do?*, AMERICAS Q., <http://www.americasquarterly.org/HIRST/ARTICLE> (last visited Mar. 20, 2013); *Fundamental Principles of the Peoples’ Trade Treaty—TCP*, ALBA-TCP (Oct. 17, 2009), <http://www.alba-tcp.org/en/contenido/fundamental-principles-tcp>. (“The fortification of the State like central actor of the economy from a country at all the levels, facing the opposite private practices the public interest, such as the monopoly, oligopoly, the cartelization, hoarding, speculation and usury.”).

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people organized into states.⁴²³ To this is added a fundamental distrust of private markets that are not strictly controlled and managed by the state.⁴²⁴ ALBA is both a system of free trade and as a nexus point for legal and political resistance to economic globalization and legal internationalism sponsored by developed states.⁴²⁵ In this respect, ALBA reflects the core premises of the Cuban economic model: a suspicion of markets, a belief in the primacy of the state as the welfare-maximizing source of economic decision-making, and a mistrust of individual decision-making.

The organization of the Cuban economy and its understanding of the notion that property remains a prerogative of the State, embedded in Cuba's regional foreign relations. Critical to that effort is the form of organization that ALBA has developed for the structuring of economic life in the transnational sphere, especially in the context of regional integration. A central framing element of that organization is what ALBA has designated *grannacionales*.⁴²⁶ *Grannacionales*, like cooperatives, are a form of capital aggregation that rejects the fundamental market-oriented principles of conventional economic globalization.⁴²⁷

The conception of the *grannacional* is understood as a political project with three components: (1) historical and geopolitical, (2) socio-economic, and (3) ideological.⁴²⁸ The first of these, the historical and geopolitical premise, is grounded in the sense that the business of Latin America's

⁴²³ Fernando Bossi, *¿Qué es el ALBA? Construyendo el ALBA desde los Pueblos* [What is the ALBA? Building the ALBA from Peoples], ALBA-TCP ¶¶ 3.5, 4–6 (Nov. 2009), <http://www.alianzabolivariana.org/modules.php?name=News&file=article&sid=470>.

⁴²⁴ *Fifth Extraordinary Summit of the ALBA Final Declaration*, ALBA-TCP (Apr. 17, 2009), <http://www.alianzabolivariana.org/modules.php?name=Content&pa=showpage&pid=1982>.

⁴²⁵ Bossi, *supra* note 423. Thus, in framing the fundamental principles of ALBA, it was stated:

Vindicating expressed the revolutionary processes and of liberation in the firm decision of the peoples of our America, to break with the hegemonic schemes and to surpass the neoliberal model and its effects in the region that implies to finish with the logic of the accumulation, the profit, the gain, the competition and the financial speculation, as well as to advance in the construction of an alternative project based on the cooperation, principles of solidarity, complementarity and respect to the sovereignty and the self-determination of the peoples.

Fundamental Principles of the Peoples' Trade Treaty—TCP, *supra* note 422.

⁴²⁶ *ALBA Grannacional*, *supra* note 113.

⁴²⁷ See *Empresas Grannacionales* [Grand-National Companies], EMBAJADA DE LA REPÚBLICA DE CUBA [EMBASSY OF CUBA], <http://www.embajadacuba.com.ve/alba/empresas-grannacionales/> (last visited Mar. 20, 2013).

⁴²⁸ *Conceptualización de Proyecto y Empresa Grannacional en el Marco del Alba: Documentos de la VI Cumbre* [Conceptualization of the Project and Company Grannacional Under ALBA: Documents of the VI Summit], ALBA-TCP (Oct. 30, 2009), <http://www.alianzabolivariana.org/modules.php?name=Content&pa=showpage&pid=2074>.

construction, which started with the nineteenth century wars of liberation, is unfinished. Its object is integration at the supra-national level, that is, to understand grannacionales as the formal expression of efforts to create a single nation. The second, the socio-economic component, incorporates an understanding that the commercial activity and its traditional forms can be used as a functional means to reach the political ends of integration.

Grannacionales are to serve as the great vehicles for state-directed development.⁴²⁹ The third, the ideological premise, envisions the grannacional as functional integration devices advancing political and economic aims of the state. Specifically, the objective of grannacional enterprise is to manifest a united front by generating a multi-national block for the structuring of sovereign regional politics. This parallels the conceptual framework of cooperatives. And, of course, this approach produces consequences when looked at from the perspective of conventional economic globalization. Efficiency is measured differently than in classical economics or under the framework of conventional economic globalization. It is understood only in relation to the aims of the state in meeting its political goals, measured to some extent on the state's assessment of its ability to meet the needs of a majority of its people.⁴³⁰ Both these goals are also constructs of state policy. This approach somewhat inverts classical economic concepts.

The grannacionales' theoretical framework is implemented through grannacionales projects (*proyectos grannacionales*) (PG) and grannacionales companies (*empresas grannacionales*) (EG).⁴³¹ The relationship between PGs and EGs follow the organization of the economy within Cuba—one in which economic sectors (including social and cultural production) are organized through ministries charged with planning and control, and specific production is devolved to economic units organized in “corporate” form. PGs form the structuring element for reorganization of key sectors of state activity.⁴³² These include key fields, encompassing

⁴²⁹ *Fundamental Principles of the Peoples' Trade Treaty-TCP*, *supra* note 422, princ. 15 (“Execution of joint investments in trade issues that can adopt the form of Grand National companies. The association of state companies of different countries to impel a sovereign development and of mutual benefit.”).

⁴³⁰ See *Siete empresas grannacionales del Alba benefician a un mercado de 75 millones de personas* [Seven Companies of Alba Grannacionales Benefit a Market of 75 Million People], AGENCIA VENEZOLANA DE NOTICIAS [VENEZUELAN NEWS AGENCY] (Oct. 26, 2011, 11:34 AM), <http://www.avn.info.ve/contenido/siete-empresas-grannacionales-del-alba-benefician-mercado-75-millones-personas>.

⁴³¹ Backer, *supra* note 420.

⁴³² For an example from the medical sector, see *Qué es el proyecto Grannacional “Centro Regulador de Medicamentos del ALBA”*.ALBAMED? [What is Grannacional Project “Center of Drug Regulatory ALBA” ALBAMED?], ALBAMED (Sept. 7, 2009, 10:40 AM), http://salud.alianzabolivariana.org/index.php?option=com_content&view=article&id=47&It

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political, cultural, economic, scientific, and industrial activity. This organization is grounded in ALBA's normative construction of principles of "just trade" and solidarity commerce.⁴³³ The basis of just trade and solidarity, also foundations for cooperative operation, are based on principles of barter transactions, non-reciprocity in trade relations, and differential treatment of trade partners to advance national and development objectives (*comercio compensado, no-reciprosidad, y trato diferenciado*).⁴³⁴

EGs are entities created to carry out the economic and trade activity organized through PGs. If PGs are meant to organize productive activities, EGs are meant to implement them in an orderly way. EGs are SOEs, establishing separate juridical persons, interests measured through ownership by participating ALBA Member States.⁴³⁵ But they might be organized in other ways by special legislation or as a ministerial department. PG and EG projects are not limited to the supra-national level—single-state PGs and EGs may be created as long as they are consonant with ALBA principles and goals. The relationship between PGs and EGs is not strictly linear. It is clear that every EG must derive from a PG, but not every PG will require the establishment of an EG. The EG and PG embody alternatives to the model of private multinational enterprises. They substitute the state and public welfare maximization for private shareholders and profit maximization as a foundational ordering element. EGs are said to invert the traditional maximization model by seeking to maximize the welfare of the objects of economic (or other) activity, rather than those involved in the production or financing of that activity. EGs are organized as autonomous state enterprises that might enter into joint venture arrangements with private sector enterprises and whose primary focus is within the ALBA zone, with "excess" activity directed outbound. The effect is to develop a regionalist globalization model with economic activity directed by states rather than through markets. This suggests a new face for traditional command economy activity, but it is unclear whether it also suggests a change in function.

EGs embrace the form of organization and production of private

emid=56.

⁴³³ See Norman Girvan, *ALBA, PETROCARIBE and CARICOM: Issues in a New Dynamic*, in *CARICOM: POLICY OPTIONS FOR INTERNATIONAL ENGAGEMENT* 218–234 (Kenneth O. Hall et al. eds., 2010).

⁴³⁴ Backer, *supra* note 420.

⁴³⁵ *ALBA Grannacional*, *supra* note 113 ("Las Empresas Grannacionales no se definen como tales por el ámbito donde se hayan constituido, ni por su composición accionaria, sino por su naturaleza constitutiva. Esto quiere decir que podrán existir Empresas Grannacionales entre dos países (Bilaterales), entre tres países (Trilaterales), entre cuatro países (Multilaterales).").

multinational corporations, including supply and production chain principles, and resource procurement optimization. But their intense connection to states makes them both regulatory and commercial vehicles. Pricing grounded in notions of “fair price,” an ambiguous term likely based on principles of just trade and solidarity as defined by the state. Fair price might best be understood as a political rather than a conventional economic principle. The idea of fair price, paralleling the Cuban theory of a tight integration between centralized planning and the state enterprises as vehicles through which central planning is effectuated, is grounded in harmony and deep management rather than competition and markets.⁴³⁶

This theory is in line with ALBA’s core notion of the conflation of politics and economics.⁴³⁷ That, in turn, is in line with ALBA’s core political principle of the inseparability of public (sovereign) activity and market activity of state or private actors. The concept of the grannacional, then, internationalizes the organizational forms and premises of the Lineamientos. It internationalizes state-based central planning model within a regional trade zone. It adopts conventional organizational forms from emerging private markets framework of economic globalization. It changes conventional welfare maximization model from a focus on the shareholder (or the firm) to something like national welfare maximization effected through firms.⁴³⁸

Together PGs and EGs represent the state sector in the international arena. But, as in Cuba, ALBA also contemplates a private sector.⁴³⁹ That sector, however, is understood to be most valuable when closely tied to the state.⁴⁴⁰ ALBA reflects the idea, as well, of transnational and national private sector enterprises organized as cooperatives and similar entities, built around transnational commitments to public “purchases [which] are a

⁴³⁶ LINEAMIENTOS, *supra* note 39, ¶¶ 1–10.

⁴³⁷ Backer & Román, *supra* note 36.

⁴³⁸ *Id.*

⁴³⁹ See Ivan Barrios, *Un 84% de las transacciones que ejecuta El ALBA proviene del sector privado* [84% of Transactions Running ALBA is Private], YVKE MUNDIAL [YVKE WORLD] (Sept. 25, 2011, 4:54 PM), <http://www.radiomundial.com.ve/node/232106> (“The Executive Secretary of ALBA confirmed that ALBA remained committed to a private sector within ALBA state economies, which remains a driving force in local economies and contributed 84% \$110 million in Sucre zone transactions.”).

⁴⁴⁰ In 2007, for instance, then-President Chavez declared that Venezuelan socialism did not exclude private property but rather contemplated a closer relationship between the state and private sector reflected in proposals for constitutional reform in Venezuela. *Chávez: Alianza estratégica Estado-sector privado es una de las propuestas de la Reforma Constitucional* [Chavez: New Partnership State-Private Sector is One of the Proposals of the Constitutional Reform], APORREA [CLUB] (July 27, 2007, 11:04 AM) <http://www.aporrea.org/actualidad/n98609.html> (“[E]l jefe del Estado venezolano anunció que el acercamiento entre el sector privado y el Estado es una de las propuestas que será presentada en la reforma constitucional.”)

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planning tool for the development and promotion of national production that must be strengthened through participation, cooperation and the joint execution of purchases when convenient.”⁴⁴¹ The ALBA Fundamental Principles also commit ALBA states to “favoring to the communities, communes, cooperatives, companies of social production, small and medium companies. The Joint promotion towards exports markets of our countries and of productions that result actions of productive complementation.”⁴⁴²

The duplication of the Cuban organization model now has a parallel in Venezuela, where cooperatives are organized by the State to serve the local demand of neighborhoods in the production of consumer goods, the training and capital is provided by the State, and the cooperative is managed to produce an aggregate benefit to the people contributing their labor.⁴⁴³ As in Cuba, these are closely connected conceptually to agricultural cooperatives.⁴⁴⁴ And like the emerging Cuban cooperatives, these are meant to serve political, social, and economic objectives—all in the service of the local people (micro-planning) in a way that furthers the larger objectives of the State (macro-planning).⁴⁴⁵ Within ALBA, this process is

⁴⁴¹ *Fundamental Principles of the Peoples’ Trade Treaty—TCP*, *supra* note 422, princ. 14

⁴⁴² *Id.* princ. 9.

⁴⁴³ A participant describing MUDEBAR, a women’s cooperative producing textiles for local consumption, explained:

In reality, we didn’t have money or anything until the government offered us credit so that we could achieve our objective, which was to associate ourselves as a cooperative. The process was a call made by the government to participate in a social mission called Vuelvan Caras, a call to all the women who were in their houses without work, simply doing domestic work, doing housework until god called, watching our grandchildren and taking care of the house and when all of the women were called to the mission we began taking the courses. We took really good courses, and from that they prepared us to become a cooperative.

Radio al Revés, *Cooperatives in Venezuela Promote Solidarity, Equality and Dignity*, UPSIDE DOWN WORLD (Apr. 6, 2011, 10:40 PM), <http://upsidedownworld.org/main/venezuela-archives-35/2988-cooperatives-in-venezuela-promote-solidarity-equality-and-dignity>. MUDEBAR was a product of the efforts of a PG, meant to organize the private clothing sector at the neighborhood level to meet national planning needs.

⁴⁴⁴ LUCIA MICHELUTTI, SMALL-SCALE FARMERS UNDER SOCIALIST GOVERNMENTS: VENEZUELA AND THE ALBA PEOPLE’S TRADE AGREEMENT 11–18 (2012), *available at* <http://pubs.iied.org/pdfs/16516IIED.pdf>.

⁴⁴⁵ Revés, *supra* note 443. Describing a cooperative that runs neighborhood buses, a person noted:

So we organized an assembly in the neighborhoods and those assemblies decided what the bus routes were going to be and who would be some of the workers. And out of those buses we also had political discussions and distributed fliers. So we

socio-political—capital is aggregated in corporations that are vehicles for state trade policy and economic management and that the non-state sector is encouraged to aggregate labor and production (but not capital) within proletarian corporations.⁴⁴⁶

Cuban cooperatives thus serve a political purpose beyond the internal organization of the Cuban domestic economy. They provide a basis for the division and organization of labor within Cuba in ways that are compatible with Cuba's efforts to internationalize its vision of a socialist command economy. Organizations that privilege capital are consigned to the state sector as the only location for capital ownership and exploitation. The private sector may aggregate labor but not capital. For that sector, the labor cooperative offers the model of organization best suited to its circumstances and to the fundamental Marxist notion that the proletariat ought to focus on the offer of its labor in the context of collective economic activity. Capital is to be supplied by the State as the guardian of that means of production for all people. As a consequence, the state sector has the responsibility of organizing the economy, and controlling macro-economic policies and operations at the national and regional levels. The private sector is to provide micro responses to local needs under the supervision of the State, which supplies capital and ensures policy purity. The EGs and PGs are the analogues to Cuba's state sector. Cuban cooperatives are meant to join their counterparts in Venezuela and elsewhere to focus on the local retail sectors to the extent permitted by state policy.

More generally, combined with the opening of the non-state sector for small scale goods and service businesses, the regulatory framework suggested by the Lineamientos seeks to provide a basic framework for reconceptualizing the economic organization of Cuba. What emerges is an outline of an economic structure that is, even among Marxist-Leninist states, somewhat unique. It confirms the state's role as owner of the productive capital of the nation. This capital can be utilized directly through allocations by state ministries, or decisions about allocation and pricing can be devolved to sub-units—corporations, grannacionales, or mixed enterprises.

This re-worked economic model does provide for the creation (or better yet, the recognition and regularization) of a private sector

broke with this business model of division, the separation into a business that gives a service and those who receive it.

Id. It is not clear, of course, whether these stories are ordinary or exceptional and meant to serve hortatory purposes.

⁴⁴⁶ See, e.g., Ken Cole, *ALBA: A Process of Concientización*, 2 INT'L. J. CUBAN STUD. 31–41 (2008), available at http://cubanstudies.plutojournals.org/Portals/8/Issues/sissue_2_bw.pdf#page=31.

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economy.⁴⁴⁷ But that sector is understood to be small and limited to the retail sector. The formal rules for its operation are structured to make large or independent activity difficult. This private sector is not meant to grow large enough to challenge the state sector. Nor is it meant to strip the state of its control of capital. As such, this sector is tightly regulated. However, within the scope of its permitted operations, the state is allowing a limited range of aggregation of activity. In the form of cooperatives, individuals engaging in permitted private activities may aggregate their labor and the objects they may sell for mutual gain. This system is then internationalized within the context of ALBA ideology.

For non-Marxist systems, the ability of individuals to aggregate labor power the way that financial institutions aggregate capital could prove useful in reshaping the usual marginalization of labor within globalization. But the model of the Cuban cooperative—situated within the confines of a system that remains suspicious of non-state economic activity and retains control of goods markets necessary for the sort of activities that are the lifeblood of cooperatives—is likely to substantially reduce the utility of these ventures to effectuate Cuba and CCP's goals. The Cubans appear to insist on doing Lenin one better: Lenin would have combined private interest with state supervision,⁴⁴⁸ the Cubans insist on private enterprise through state control with little privilege.

Conceptually, the cooperative fits nicely within Cuba's efforts to develop a complex and well-integrated program of economic organization that means to tie local activity first to national socio-economic goals and then in a parallel manner, to international economic activity coordinated through networks of state-to-state arrangements. The cooperative could serve as an important ingredient in the construction of these economic structures, providing an alternative to the private markets principles of economic globalization, grounded in state control capital directly and indirectly through SOEs and individual aggregation of labor. This organization is then replicated in the international arena where state-to-state transactions grounded in principles of popular welfare are organized through state sector enterprises with goods and services delivered at the retail level through individuals and private cooperatives.

But the elegance of the system bumps up against the realities of Cuban politics—especially the reluctance of the CCP's left wing to move far from the economic model that has been in place since the 1960s. What this

⁴⁴⁷ In effect, the reworked economic model could be understood as seeking to recognize and regulate the black market economy. See PÉREZ LÓPEZ, *supra* note 293.

⁴⁴⁸ LENIN, *supra* note 16, at 91–92 (“For we have now found that degree of combination of private interest, of private commercial interest, with state supervision and control, that degree of subordination to the common interests which was formerly a stumbling block for very many socialist.”).

tendency produces is some of the outward forms of a new system but one that is hobbled by the insistence of perhaps too great a space for central planning and control by the state sector and too small a space for the operation of private enterprise. This is well-illustrated by the differences between the Lineamientos as proposed and as adopted relating to the provisions on cooperatives. The regulations adopted in late 2012 underscore this point. Both are driven by a mistrust of the power of individuals to aggregate resources without a substantial degree of supervision, management, and control by the state. It is also grounded in a mistrust of principles of social obligation to serve state interests in the absence of state direction. Indeed, the fear of operation in corporate form, in aggregations of people and capital that appear autonomous of the state (something permitted in China) may do more to reduce the success of this opening than any measure of Cuba's external enemies. Sometimes a mania for control may prove fatally counterproductive to the maintenance of that control. The Chinese Communist Party understood this in 1978 (though it took a generation to produce results); it is not clear that the CCP is willing to open itself to that lesson.

Thus, the greatest threat to the development of a proletarian corporation comes, ironically enough, from within Cuba rather than from outside. The reluctance to abandon a state based central planning model for a model in which the non-state sector is given more autonomy in economic decision-making, even within the general parameters of Marxist-Leninist economic organization, is a premise that pervades the final form of the Lineamientos and the implementing regulations. The debates about the problem of the cooperative and corporation in Cuba highlights a fundamental conundrum of Cuban economic development—the extent to which the current economic situation, and the change of leadership, has made possible a reconceptualization of what policy and policy discussion is permissible because it falls within the context of revolutionary thought and what policy alternatives remain outside and therefore likely to be dismissed as counter-revolutionary.⁴⁴⁹ Until recently, what fell within the Revolution was very narrowly circumscribed. Necessity, and perhaps time, has permitted something like a small broadening of what might fall within the Revolution and thus be a permissible approach to reform. Moreover, Cuba,

⁴⁴⁹ Fidel Castro, Address at the Closing Session of a Series of Meetings of Intellectuals and Cultural Figures at the José Martí National Library (June 30, 1961), *translated in* THE CUBAN REVOLUTIONARY READER: A DOCUMENTARY HISTORY OF FIDEL CASTRO'S REVOLUTION 117 (Julio García Luis ed., 2008) *available at* http://www.oceanbooks.com.au/static/pdfs/cuban_revolution_reader_TOC.pdf (“Within the revolution, everything; against the revolution, nothing. Against the revolution, nothing, because the revolution also has its rights, and the first right of the revolution is the right to exist, and no one can oppose the revolution's right to exist.”).

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especially in the context of the Lineamientos, must still confront the basic issue that has been troublesome since the first days after the 1959 Revolution: if something falls outside the Revolution, does it necessarily or invariably constitute an anti-revolutionary act, or might there be a space outside the revolution that is not against the revolution?⁴⁵⁰ Cuban economists looking at the cooperative have suggested yet another interpretation: the issue is not whether there is a space outside the Revolution that is not against the Revolution; instead the question is what constitutes revolutionary space.

The proceedings of the Sixth Party Congress showed just how little revolutionary space there is. On the one hand, in theory, it appears that revolutionary space has indeed been growing. That growth has permitted the development of new forms of economic organization that may find use not just in developing Marxist-Leninist states but also in other states where aggregations of labor, production of other economic forces might be profitable. More importantly, it parallels trends in developed states that are also tentatively moving toward opening a space for stakeholder models of corporate activity, including the enactment of “benefit corporation” statutes.

But the CCP appears less mindful of Lenin’s comment with respect to cooperatives and free enterprise within a socialist system:

We went too far when we reintroduced [the New Economic Policy], but not because we attached too much importance to the principal of free enterprise and trade—we went too far because we lost sight of the cooperatives, because we now underrate cooperatives, because we are already beginning to forget the vast importance of the cooperatives⁴⁵¹

The tentativeness with which the state organs have created its cooperative experiment, and the thoroughness with which it has enveloped the operation of cooperatives within the framework of state economic oversight suggest a reluctance to exploit the potential of cooperatives as both bridges to market efficiency and as vehicles for the internalization of social objectives in economic relations that serve Cuban state ideology and

⁴⁵⁰ See Larry Catá Backer, *Freemasons in Cuba: New Scholarship*, LAW END DAY (June 30, 2010) (discussing Jorge Romeu, *The Cuban Freemasons in the Development of Civil Society and Political Opening*, in 1 HANDBOOK OF CONTEMPORARY CUBA: ECONOMY, POLITICS, CIVIL SOCIETY AND GLOBALIZATION, *supra* note 420). This tension also evidences itself in the struggles of Afro-Cubans for a spiritual space. See generally Zoya Kocur, *The Sparks of Civil Society in Cuba: Afro-Cuban Cultural Production, Art Collectives, and the Struggle for a New Public Sphere*, in POLITICS AND CIVIL SOCIETY 333 (Mauricio Font ed., 2011), available at <http://www.cubaproject.org/wp-content/uploads/2011/07/PoliticsandCivSocFinal.pdf>.

⁴⁵¹ LENIN, *supra* note 15, ch. I.

emerging global consensus on corporate social responsibility.⁴⁵² But even the possibility of discourse about cooperatives within an altogether too small operational space is a step in the right direction. Until the role of the State is better clarified, and until structures are developed to permit the State to trust the economic instincts of individuals acting both for social and personal advantage, the cooperative, will continue to run the risk of becoming no more than an instrumentality of the State. And these failures will be borne by Cuban cooperative members even as it they contribute the fruits of cooperative labor to the State.

V. CONCLUSION

Is it possible to theorize a proletarian corporation? Is it possible to transpose theory into a working model of a proletarian corporation using the cooperative as a platform? Will cooperatives make a difference and set the stage for the development of new forms of economic aggregations that could substitute, to some extent, the benefits the corporate form offers private individuals? The Cubans have been attempting to make the cooperative a reality within their highly regulated system. Theoretically, the cooperative could be a very useful means of modernizing the Cuban economic model within the broad framework of Marxist-Leninist state organization. Indeed, it is well understood that the Cuban form of the cooperative has strong Leninist roots.⁴⁵³ Cooperatives offer a means of aggregating products and labor in ways that do not threaten the national control of the direction of national economic policy. Nor does it impede state planning with respect to macroeconomics. Limiting the financial cooperative (the corporation) to the State, while permitting other forms of aggregation, provides at least some method of communal activity at the simplest levels of economic activity that could stimulate small-scale retail activity and increase public welfare in Cuba.

The cooperative arose as a part of a solution to the stresses on the Cuban economic model that sought to retain its socialist character while also acknowledging that the conventional system of direct state control of virtually all aspects of economic activity was not working. But the solution was constrained by the conceptual limits of restructuring, one in which the State would retain the power to aggregate capital and in which private economic activity was conceived as limited to a small and local retail sector.

This Article considered the cooperative as an alternative to the

⁴⁵² Robert Dobrohoczki, *Co-operatives as Spaces of Cultural Resistance and Transformation in Alienated Consumer Society* (May 2006) (unpublished manuscript), available at http://www.nodo50.org/cubasigloXXI/congreso06/conf3_dobrohoczki.pdf.

⁴⁵³ See discussion *supra* Part III.A.

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corporate form, suggesting both its benefits and its limitations, even within the confines of Cuban political ideology. It examined the development of new theoretical approaches, the use of the old conventional agricultural cooperative as a platform for innovation, and the limited success of transposing theoretical innovation first into the guidelines for reshaping the economy (the Lineamientos) and then into a regulatory system for cooperatives adopted in late 2012. This Article concluded with an analysis of the internationalization of the Cuban approach to private capital aggregation in light of Cuba's regional trade structures and the realities of globalization, as well as the lingering effects of the tensions, still unresolved, about the nature and limits of the role of the State in managing or controlling economic activity. This Article thus ends where it started, with the institutional limitations of the current Cuban approach and its effects of both spurring innovation and constraining it. As long as Cubans continue to politicize the property component of corporate ownership, and split economic aggregation between aggregations of capital in corporate form operated as instrumentalities of the State, and aggregations of labor operated as highly regulated private cooperatives, it will not be able to meet its objectives under the Lineamientos or realize the promise in the new regulations. If the State is the only capitalist and labor is dependent on the State for the ownership of the fruits of the cooperative's efforts, then the structural asymmetries of a capital-privileging regime remains. Yet reinforcing this system of State capitalism supported at the margins by labor cooperatives perpetuates the dominance of capital in a socialist society, denies the cooperative the space to meet its potential to rebalance the relationship between labor and capital in production, and ultimately may make it much more difficult for the functional realization of the potential of this experiment in cooperatives.