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Cuban Corporate
Governance at the
Crossroads: Cuban
Marxism, Private
Economic Collectives,
and Free Market
Globalism

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ABSTRACT

Sooner or later, Cuba will have to engage with globalization. This article considers whether it will be possible for Cuba to remain true to its Marxist-Leninist principles of political and economic organization, and simultaneously embrace the emerging system of economic globalization. China appears to have accomplished this goal, and Cuba could follow China's example. Despite all of the potential benefits to Cuba, a number of factors may make it impossible for Cuba to successfully implement a Cuba-appropriate version of the Chinese model of engagement with globalization. This paper considers six of the strongest arguments against adopting the Chinese model in Cuba. First, it is not clear that the Chinese model of global economic engagement has actually worked as advertised in China. Second, the Chinese model may not translate well to the Cuban context. The sort of engagement consistent with Maoist understandings of Marxist-Leninist theory may be impossible in the context of Cuba's more Stalinist system of politico-economic organization—at least without what in Cuba would be viewed as a substantial shift in the nature of the governing ideology. Third, neither Cuba nor China has solved the core foundational problem of economic development through independent collectives, legal entities that are not an integral part of the state apparatus controlled by the Communist party. Neither China's Maoist Marxist-Leninist theory, nor Cuba's Stalinist version have satisfactorily solved the central contradiction of Marxist-Leninist engagement—the privatization of economic activity essentially directed by autonomous economic collectives regulated by the state. Fourth, Cuba continues to actively resist integration into global patterns of capital. Fifth, Cuba is in a poor position to compete globally—its labor is expensive, its products overpriced, and its infrastructure in need of development in comparison to other developing states. Last, and most perversely, the subjective and highly emotive 'special relationship' between Cuba and the United States limits objective consideration of alternatives and thereby constrains choice. The paper concludes by suggesting that despite the problems, there are significant elements in the Chinese model worth adopting, elements that are already, to some extent, present in the current Cuban approach to engagement with globalization.

INTRODUCTION

Is it possible for a state to remain true to its Marxist-Leninist principles of political and economic organization,¹ and simultaneously embrace the emerging

¹ The principles of Marxism-Leninism, as developed in the Soviet Union, have been divided, for convenience, into three categories:

The first . . . is one of national security: the power of the state must be consolidated and increased in order to discourage the enemies of socialism from attacking the Soviet regime and to assure peaceful co-existence between nations. Soviet law has, in addition, the economic task of developing production on the basis of socialist principles so as to create the abundance which alone will enable everyone to be supplied according to his needs. The third task of Soviet law is

system of economic globalization?²

The answer from the former Soviet Union and its allied states would appear to be no. The Russian Federation³ and former Warsaw Pact nations⁴ each have abandoned Marxist-Leninist state organization in favor of so-called neo-liberal economic organization.⁵ In each case, the state has effectively privatized the economic sphere and implemented a transition to democracy, evidenced by the adoption of a Western-style political organization grounded in a democratically elected representative government.⁶ On the other hand, the People's Republic of China and Vietnam have sought to embrace, with some success, the emerging system of *economic* globalization while remaining true to the fundamental political norms of Marxist-Leninist state organization.

Cuba has yet to confront the question. Its moderate size,⁷ the advantages of its geography,⁸ and its unique history—particularly its relationship with the

one of education: that is, to destroy in Man those tendencies to selfish and anti-social behavior that are the heritage of centuries of poor economic organization.

RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 176 (2d ed., 1978). "The economic task of Soviet law is in itself immense. [G]uarantee[ing] a certain economic organization of the collectivity, plac[ing] the means of production at the disposal of the collectivity, and morality will be satisfied and justice realized besides." *Id.* at 177. For an interesting read in this respect, see Zbigniew Brzezinski, *The Stages of Postcommunist Transformation*, in *THE POLITICAL ANALYSIS OF POSTCOMMUNISM* 103-17 (Yevhen Bystrycky et al. eds., 1995).

² See discussion, *infra*, Part II.

³ See, e.g., Neil Robinson, *Institutions and Political Change in Russia* (2000); DMITRI N. SHALIN, *RUSSIAN CULTURE AT THE CROSSROADS: PARADOXES OF POSTCOMMUNIST CONSCIOUSNESS* (1996); Thomas Parland, *The Rejection in Russia of Totalitarian Socialism and Liberal Democracy: A Study of the Russian New Right* (1993); David Remnick, *Can Russia Change?*, 76 *FOREIGN AFF.* 35-49 (1997).

⁴ See, e.g., ROBERT ZUZOWSKI, *POLITICAL CHANGE IN EASTERN EUROPE SINCE 1989: PROSPECTS FOR LIBERAL DEMOCRACY AND A MARKET ECONOMY* (1998); CSABA LÁSZLÓ, *THE CAPITALIST REVOLUTION IN EASTERN EUROPE: A CONTRIBUTION TO THE ECONOMIC THEORY OF SYSTEMIC CHANGE* (1995); DAVID S. MASON, *REVOLUTION IN EAST CENTRAL EUROPE: THE RISE AND FALL OF COMMUNISM AND THE COLD WAR* (1992); ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* (1991).

⁵ For a discussion of the possibilities from some of the principal architects of the change, see, e.g., Vaclav Havel et al., *Rival Visions: Civil Society after Communism*, 7 *J. DEMOCRACY* 12 (1996). See also essays in *STRATEGIC CHOICE AND PATH-DEPENDENCY IN POST-SOCIALISM* (Jerzy Hausner et al. eds., 1995).

⁶ See, e.g., GEORG SORENSEN, *DEMOCRACY AND DEMOCRATIZATION: PROCESSES AND PROSPECTS IN A CHANGING WORLD* (1998); *PARTICIPATION AND DEMOCRACY, EAST AND WEST: COMPARISONS AND INTERPRETATIONS* (Dietrich Rueschemeyer et al. eds., 1998); JOSÉ MARIA MARAVALL, *REGIMES, POLITICS, AND MARKETS: DEMOCRATIZATION AND ECONOMIC CHANGE IN SOUTHERN AND EASTERN EUROPE* (1997); MINTON F. GOLDMAN, *REVOLUTION AND CHANGE IN CENTRAL AND EASTERN EUROPE: POLITICAL, ECONOMIC AND SOCIAL CHALLENGES* (1997).

⁷ Cuba is roughly 110,860 sq. km. (44,200 sq. mi.), or about the size of Pennsylvania. It has a population of about 11 million people, most of them of mixed race. See U.S. DEPT. OF STATE, *BACKGROUND NOTE: CUBA*, available at <http://www.state.gov/r/pa/ei/bgn/2886.htm> (last visited Sept. 27, 2004).

⁸ Cuba, of course, is an island in the Caribbean Sea. The peculiarities of politics and especially the politics of armed conflict within island states have been explored in several contexts. See, e.g., Robert W. McColl, *The Insurgent State: Territorial Bases of Revolution*, 59 *ANNALS ASSOC. AM. GEOGRAPHERS* 613, 613-631 (1969).

United States⁹—have permitted Cuba to remain aloof from the current push to economic globalization. Cuba has avoided the fate of other developing nations only because it has stubbornly (and successfully) managed to remain isolated from the world community.¹⁰ But Cuba's isolation may be coming to an end. Cuba's current leadership is aging. No potential successor appears as charismatic as the current President, Fidel Castro.¹¹ None appear as committed to the precise form of Marxist-Leninist state system to which Fidel Castro has devoted his efforts in the last half-century. There are great internal pressures to end Cuban isolation.¹² There are even greater external pressures to bring Cuba

⁹ There is a mountain of scholarship on the post-1959 relationship between the United States and Cuba. The subject has been explored from every conceivable political, social, economic, and philosophical angle, though much of modern scholarship has been shaped by the politics of the Cuban Revolution itself. Post-revolutionary scholarship is marked by a tendency to embrace one or the other pole in the struggle between the United States and Cuba. Compare MATAIAS F. TRAVIESO-DIAZ, *THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA: A PROSPECTUS FOR BUSINESS* (1997) [hereinafter *THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA*] with HARRY R. TARG, *CUBA AND THE USA: A NEW WORLD ORDER?* (1992). Pre-Revolutionary scholarship also reflects the state of relations between the two states, though, in this case, much more of the relationship between a colonial center and an outpost. For an interesting example of Cuba's efforts to enter global markets to its advantage in the 1930s, see e.g., Roberta P. Wakefield, *Some Factors in Cuba's Foreign Trade*, 13(2) *ECON. GEOGRAPHY* 109, 109-131 (1937).

¹⁰ That isolation is, in part, not of Cuba's sole making. The United States embargo, from time to time more or less fiercely enforced, has provided a significant basis (or excuse) for this isolation. See Ruben Berrios, *Why America Should Lift Its Cuban Embargo*, 265 *CONTEMP. REV.* 182 (1994) ("The tightening of the embargo has enabled the Cuban regime to blame America for the island's current problems, even though the termination of its privileged relationship with the former Soviet Union and the collapse of socialism in Eastern Europe, as well as its inherent economic fragility, account for most of the adverse effects.").

¹¹ Fidel Castro came to power in Cuba at the end of a successful revolutionary effort on January 1, 1959. Since then he has sought to build a state system based on Marxist-Leninist principles, and, particularly, the Marxist-Leninist principles now commonly understood as Stalinism. For discussion, see Part III, *infra*. On Marxist-Leninist state organization as practiced in the old Soviet Union near the end of its existence, see STEPHEN WHITE, *CULTURE AND SOVIET POLITICS* (1979). On Stalinism, see generally, PAVEL CAMPEANU, *THE GENESIS OF THE STALINIST SOCIAL ORDER* (Michel Vale trans., 1988). Like "Fidelismo," Stalinism rested "on the postulate of overwhelming external danger." ROBERT C. TUCKER, *STUDIES IN STALINISM AND POST-STALINIST CHANGE* 27 (1963).

¹² Cuba remains desperately poor by international standards. A recent report on the World Bank website summarized the consensus in Western elite circles:

There is no accurate measurement of poverty in Cuba. The Cuban government, which has never published statistics on the incidence of poverty, claims poverty is not extensive because the country provides universal access to free social services and pursues other policies, such as full employment and subsidies to consumer goods, that improve living conditions. While no study provides definitive evidence, abundant information indicates that there is poverty in Cuba and that it became more pervasive in the 1990s as a result of the crisis. Further, it is clear that the gap between the poor and the small but growing population of wealthier people expanded in the 1990s and early 2000s.

WORLD BANK, *CUBA: ACHIEVEMENT AND DETERIORATION OF UNIVERSAL ACCESS TO SOCIAL SERVICES*, (2003), available at <http://www.worldbank.org/wbi/reducingpoverty/docs/newpdfs/case-summ-cuba.pdf> (last visited Sept. 27, 2004). This document memorialized a case study produced for a conference hosted by the People's Republic of China and sponsored by the World Bank, see WORLD BANK, *SCALING UP POVERTY REDUCTION: A GLOBAL LEARNING PROCESS, AND CONFERENCE IN SHANGHAI, PEOPLE'S REPUBLIC OF CHINA*, May 25-27, 2004. The proceedings can be viewed at

into the emerging global economic system.¹³

From this vantage point, Cuba looks on the world with a certain amount of fear. Globalization on terms acceptable to Cuba—based on principles of communist internationalism¹⁴—has been replaced by a free market globalization at the service of its greatest political enemy, the United States.¹⁵ Increasingly isolated and insular in their view, Cuban leaders understand globalization as a potent weapon in the battle for control of the character of the nation, and ultimately, of its sovereignty. “In Miami and Washington they are now discussing where, how, and when Cuba will be attacked or the problem of the Revolution will be solved.”¹⁶ For Cuba, this sort of interference in ‘globalized’ clothing must be resisted.

But friends and foes of the regime increasingly understand this position as

<http://www.worldbank.org/wbi/reducingpoverty/about.html> (last visited Sept. 27, 2004).

The popular press outside of Cuba has reported on the political effects of Cuba’s poor economy for years. For a recent example, see, e.g., Nancy San Martin, *Castro Shuffles Posts as Cuban Economy Sags*, MIAMI HERALD, July 14, 2003, available at 2003 WL 57350866. But even the current leadership accepts, to some extent, the power of the global economy and its effects on Cuba. The government has sought to contain the power of globalization by creating foreign enterprise ghettos on the periphery of the state.

¹³ Much of the pressure for “transition” to an open economy (and a more democratic form of political organization) comes from the United States. See, e.g., COMMISSION FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT, (Colin Powell, Chair), May 6, 2004, available at <http://state.gov/p/wha/rt/cuba/> (last visited Sept. 27, 2004) [hereinafter REPORT TO THE PRESIDENT]. Particularly telling has been the work of USAID for “transition” in Cuba. See generally http://www.usaid.gov/locations/latin_america_caribbean/country/cuba/ (last visited Sept. 27, 2004). But there is also pressure from the European Union, especially after the 2003 Cuban crackdown on “dissidents.” See JOAQUÍN ROY, THE CANADIAN FOUNDATION FOR THE AMERICAS, THE EUROPEAN UNION PERCEPTION OF CUBA: FROM FRUSTRATION TO IRRITATION, available at http://www.focal.ca/images/pdf/Cuba_EU.pdf. (last visited Sept. 27, 2004). See also discussion at Section IV.E., *infra*.

¹⁴ Thus, for example, Fidel Castro has said:

But I like to go beyond that. I believe in the unity of all the countries in the world, in the unity of all the peoples in the world and in a free unity, a truly free unity. I am not thinking of a fusion but of a free unity of all cultures in a truly just world, in a truly democratic world, in a world where it would be possible to apply the kind of globalization that Karl Marx talked about in his time and that [Pope] John Paul II talks about today when he speaks of the globalization of solidarity.

Fidel Castro Ruz, Speech at the Closing Ceremony of the First International Congress on Culture and Development, International Convention Center, Havana, Cuba (June 11, 1999), available at <http://www.cuba.cu/gobierno/discursos/1999/ing/f110699i.html> (last visited Sept. 27, 2003) [hereinafter Castro’s Speech, First International Congress on Culture and Development]. With respect to the reference to Pope John Paul II’s views, see *infra* note 63.

¹⁵ The arguments are collected in FIDEL CASTRO RUZ, CAPITALISM IN CRISIS: GLOBALIZATION AND WORLD POLITICS TODAY (2000); FIDEL CASTRO RUZ, ON IMPERIALIST GLOBALIZATION (2003) [hereinafter ON IMPERIALIST GLOBALIZATION].

¹⁶ Fidel Castro Ruz, Cuba and Nazi-Fascism, Speech Delivered at the May Day Rally held in Revolution Square, Havana, Cuba (May 1, 2003), available at <http://www.cuba.cu/gobierno/discursos/2003/ing/f010503i.html> (last visited Sept. 27, 2004).

anachronistic.¹⁷ Commentators outside of Cuba have been critical of Cuba's reform efforts because they have failed even to appear to attempt a broad harmonization with international commercial and enterprise practices.¹⁸ Many contrast Cuba's isolation with China's much more successful efforts to engage with the world community.¹⁹ The general consensus outside of Cuba is that, in the absence of significant reform, significant instability is likely within the decade.²⁰ This instability may range from a rapid breakdown in the socio-political order to rapid liberalization on an Eastern European model, increasing the possibility of anarchy or the rise of a criminal state. Either of these extremes would require internal or external military intervention.²¹ The champions of a middle course envision the emergence of a unity government that would embrace a Chinese-style model of global economic engagement. This would permit the continuation of some form of Marxist-Socialist state apparatus while to some extent harmonizing economic practice with global expectations.²²

The Chinese model is certainly alluring. China seems to offer a blueprint for non-violent structural change focusing on economic transformation that might also offer the possibility of social and political change.²³ It provides a blueprint

¹⁷ For a general survey of scholarship on Cuba, dated but still quite valuable, see LOUIS A. PEREZ, *ESSAYS ON CUBAN HISTORY: HISTORIOGRAPHY AND RESEARCH* 153-162 (1995).

¹⁸ As one author recently put it: "Cuba's prospects, however, are clouded by its sclerotic planned economy and its authoritarian Communist political system, neither of which has the flexibility demanded by the global marketplace." Bruce Stokes, *Cuba Samples Globalization*, NAT'L J., (Jan. 18, 2003), available at http://www.cfr.org/pub5467/bruce_stokes/cuba_samples_globalization.php (last visited Sept. 27, 2004); see also JOHNATHAN G. CLARKE & WILLIAM RATLIFF, *REPORT FROM HAVANA: TIME FOR A REALITY CHECK ON U.S. POLICY TOWARD CUBA*, CATO POLICY ANALYSIS NO. 418, OCT. 31, 2001, available at <http://www.cato.org/pubs/pas/pa-418es.html> ("Cuba has established more developed relations with the outside world and introduced limited reforms in areas including trade, foreign investment, and tourism without renouncing socialism. Cuba is thus no longer backsliding, but neither is it flourishing.").

¹⁹ The form and nature of China's engagement with global economic patterns is discussed in more detail in Part II, *infra*.

²⁰ For an interesting consideration of alternatives, see, e.g., MARK FALCOFF, *DESPERATION ISLAND CUBA: THE MORNING AFTER—CONFRONTING CASTRO'S LEGACY* (2003) (describing the difficulties of transition); Miguel Angel Centano, *Cuba's Search for Alternatives*, in *TOWARD A NEW CUBA? LEGACIES OF A REVOLUTION* 9-10 (Miguel Angel Centeno & Mauricio Font eds., 1997) (concluding that Cuba lacks the institutional structure necessary to implement successful change).

²¹ On the destabilizing potential of pursuing democratization and free market economics in developing states where ethnic or racial minorities control a disproportionate amount of wealth, see, e.g., Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998). On the difficulties of transition in the former Soviet bloc, see, e.g., Victoria Syme & Philip Payton, *Eastern Europe: Economic Transition and Ethnic Tension*, in *EUROPEAN SECURITY: TOWARDS 2000* 86-103 (Michael C. Pugh ed., 1992); Kenneth A. Cutshaw, *Russian Roulette*, FED. L. 30 (Jan. 1996).

²² See, e.g., Jorge F. Pérez-López, *Economic Reforms in a Comparative Perspective*, in *PERSPECTIVES ON CUBAN ECONOMIC REFORMS*, (Jorge F. Pérez-López & Matías F. Travieso-Díaz eds., 1998). See generally, *THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA*, *supra* note 9, at 139-40.

²³ There is commentary, especially in the 1990s, that seems to suggest an expectation that Chinese economic reforms had at least the potential for transforming China economically, and, at some later period, also socially and politically. See, e.g., Frank O. Mora, *A Comparative Study of Civil-Military*

for how nations that choose a more collectivist approach to state organization can engage the emerging economic community on its own terms—using the language of private economic collectives as the primary vehicle for the development of the means of production of the state and reserving to states a secondary role as regulator and shareholder.²⁴ To some extent, this is a particularly American “spin.” The primary characteristic of that spin is to proclaim any change within Cuba (or any Marxist-Leninist state system) as a signal for the perhaps inevitable transformation from Marxist-Leninism to democratic, free-enterprise state organization.²⁵

But the Chinese model for Cuba is also alluring for those who believe there is something worth preserving from Cuba’s experiment in Marxist-Leninist governance. China, it appears, has managed to preserve the “best” of a Marxist-Leninist state system by essentially “partitioning” the hard disk of state—operating a “virtual” global economic system on top of a collectivist state system.²⁶ China has joined the world economic community without, for the time being, losing its soul to it. Perhaps Cuba could do the same and preserve its system of education, universal health care, and those other aspects of its provision of services that are the subject of praise among elements of global civil

Relations in Cuba and China: The Effects of Bingshang, 28 ARMED FORCES & SOC’Y (2002); Pérez-López, *supra* note 22.

²⁴ See, e.g., Anna M. Han, *China’s Company Law: Practicing Capitalism in a Transitional Economy*, 5 PAC. RIM L. & POL’Y J. 457 (1996); Robert C. Art & Mingkang Gu, *China Incorporated: The First Corporation Law of the People’s Republic of China*, 20 YALE J. INT’L L. 273 (1995).

²⁵ There is irony here. In a sense, the American progressive expectation mirrors, in free market form, the socialist dialectical progressivism that marked the rhetoric of Marxist-Leninist states in the twentieth century. A recent USAID Report provides a good example of this progressive vision for Cuban transition.

Based on the experience of the last decade, one can predict that, when given the opportunity to choose, the Cuban people, like the people of every other nation of the Western Hemisphere, and of every other former member of the Soviet bloc, will choose democracy and a market-based economy. The purpose of this report is not to predict the specific timing or circumstances of democratic change in Cuba, but to help to dispel misperceptions regarding the future challenges and opportunities that Cuba will face once the transition process begins.

USAID, REPORT: SUPPORT FOR DEMOCRATIC TRANSITION IN CUBA, Jan. 28, 1997, available at http://www.usaid.gov/locations/latin_america_caribbean/country/cuba/english.htm (last visited Sept. 27, 2004). See also C. Wood Chatham, *Cuba’s Economic Strategy*, FOREIGN AFF. (Winter, 1998), available at <http://www.princeton.edu/~foreigna/winter1998/cuba.html> (“The reforms that were intended to liberalize the economy also possess the potential to introduce socio-economic inequities in Cuban society that could undermine communist doctrines.”).

²⁶ The analogy to modern computer system concepts is particularly apt for understanding the way multiple systems can operate both independently of each other and related to each other. Marxist-Leninist systems, like China, use the language and institutions of free market economies—property rights, transferability, amalgamations of economic power outside the state apparatus—for purposes of interacting with the outside world. Such forms of organization provide the mechanics for communicating with the participants in the global economy. For internal consumption, however, traditional modes of behavior and organization may be preserved—collectivization, state domination (through share ownership), and the primacy of the political collective (through the Communist Party) over all aspects of national activity.

society.²⁷ In a world in which geo-political²⁸ and economic²⁹ realities suggest a global expectation of transition (whether forced or otherwise) rather than adaptation away from its current Marxist-Leninist and isolationist stance, the Chinese model provides the least destabilizing alternative. Indeed, adaptation may make it far more difficult for the world community to justify more forceful intervention to "help" Cuba overcome its isolation.

There are a number of other factors that make the Chinese model potentially useful. First, the Chinese model provides a blueprint for successful communication across systems of economic and political organization. It permits Cuba to communicate more effectively with the rest of the world by substituting the globally understood *idiom of economics* (particularly the idiom of trade through private, autonomous economic collectives), for the more isolating *language of politics*, and particularly the language of Marxist-Leninist collectivist action. Second, the Chinese model provides a means of privatizing economic activity by changing the character of state involvement in economic activity but not necessarily limiting the extent of that involvement. Third, the Chinese model provides a structure for avoiding issues of transition by implementing a viable and proven blueprint for perpetuating a more stable socialist system in Cuba in accordance with fundamental Cuban constitutional norms.³⁰ In this last, and important, respect, the Chinese model provides a

²⁷ There is much writing about the provision of social services in Cuba. The generally accepted view is that "Cuba has become internationally recognized for its achievements in the areas of education and health, with social service delivery outcomes that surpass most countries in the developing world and in some areas match first-world standards." DAN ERICKSON ET AL., WORLD BANK REPORT, INTRODUCTION TO CUBA'S SOCIAL SERVICES (Jan. 31, 2003), available at <http://econ.worldbank.org/wdr/wdr2004/library/doc?id=30599> (last visited Sept. 27, 2004).

²⁸ See, e.g., SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

²⁹ In a lecture before the German Bundesbank in early 2004, Alan Greenspan, the Chairman of the American Federal Reserve Board explained American notions of modern economic determinism:

The long-standing debate between the virtues of economies organized around free markets and those governed by centrally planned socialism, one must assume, is essentially at an end. To be sure, a few still support an old fashioned socialism. But for the vast majority of previous adherents it is now a highly diluted socialism, an amalgam of social equity and market efficiency, often called market socialism. The verdict on rigid central planning has been rendered, and it is generally appreciated to have been unqualifiedly negative. There was no eulogy for central planning; it just ceased to be mentioned, and a large majority of developing nations quietly shifted from socialism to more market-oriented economies.

Alan Greenspan, Remarks Before the Bundesbank Lecture 2004 (Jan. 13, 2004), available at <http://www.federalreserve.gov/boarddocs/speeches/2004/20040113/default.htm> (last visited Sept. 27, 2004) [hereinafter Remarks by Chairman Alan Greenspan Before the Bundesbank Lecture 2004].

³⁰ These norms are more explicitly set forth in the 2002 Cuban Constitution. Article 3 was modified to declare socialism and Marxist-Leninist political organization as the sole and eternal basis of state organization. The provision reads as follows:

El socialismo y el sistema político y social revolucionario establecido en esta Constitución, probado por años de heroica resistencia frente a las agresiones de todo tipo y la guerra económica de los gobiernos de la potencia imperialista más

means of appearing to deepen a "rule of law" norm within Cuba.³¹ As a consequence, embrace of Chinese-style engagement could have the effect of making it harder for other states to justify transition regimes or regime change. This might be especially true for the United States, which has based much of its rhetoric of transition on the current regime's lack of respect for the rule of law.³²

Despite this rather rosy picture, and for all of its potential benefits to Cuba, a number of factors may make it impossible for Cuba to successfully implement a Cuba-appropriate version of the Chinese model of engagement with globalization. First, it is not clear that the Chinese model of global economic engagement has actually worked as advertised in China.³³ Second, the Chinese model may not translate well to the Cuban context.³⁴ The sort of engagement consistent with Maoist understandings of Marxist-Leninist theory may be

poderosa que ha existido y habiendo demostrado su capacidad de transformar el país y crear una sociedad enteramente nueva y justa, es irrevocable, y Cuba no volverá jamás al capitalismo.

Capítulo I, Artículo 3, Ley de Reforma Constitucional, Palacio de las Convenciones, La Habana (26 de junio del 2002) [Constitution], available at <http://www.georgetown.edu/pdba/Constitutions/Cuba/ref02.html> (last visited Sept. 27, 2004).

This provision of article 3 is made unamendable under Article 137 of the Constitution as revised:

Artículo 137. Esta Constitución solo puede ser reformada por la Asamblea Nacional del Poder Popular mediante acuerdo adoptado, en votación nominal, por una mayoría no inferior a las dos terceras partes del número total de sus integrantes, excepto en lo que se refiere al sistema político, económico y social, cuyo carácter irrevocable lo establece el artículo 3 del Capítulo I, y la prohibición de negociar acuerdos bajo agresión, amenaza o coerción de una potencia extranjera. *Id.* at Capítulo II, Artículo 137.

Unalterable constitutional provisions are not unique to Marxist-Leninist governments in general, or Cuba in particular. The German Basic Law contains a similar provision, prohibiting amendment of the Basic Law to alter the basic structure of state organization or the principle of "human dignity" as the basis of the German social and political order. See GRUNDGESETZ [GG] ch. 7, art. 79.

³¹ The rhetorics of a rule of law within the field of constitutionalism have been the subject of a tremendous amount of study and difference of opinion. Whatever its actual nature, character, or content, the phrase "rule of law" now serves as a shorthand for a number of principles of state organization increasingly accepted as mandatory—democratic principles of state organization, structural limitations on the arbitrary use of power by the state or its officials, government of limited power, and a wide ambit of personal freedoms. For a discussion, see, e.g., Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 39 (Michel Rosenfeld ed., 1994); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001).

³² See, e.g., Laura Patallo Sanchez, Institute for Cuban and Cuban-American Studies, *Establishing the Rule of Law in Cuba*, Cuba Transition Project (University of Miami, 2003), available at http://www.dec.org/pdf_docs/PNACS986.pdf (last visited Sept. 27, 2004). "Today, Cuba does not operate under what can be described, even under the broadest description, as a rule of law. Cuba, of course, is ruled by law in that there is a plethora of laws in Cuba. However, Cuba is not a government constrained by law. The lack of any democratic institutions and the lack of respect for law and state authority in general will make the transition to democracy and the creation of a law-based state in Cuba a long and arduous process." *Id.* at i-ii.

³³ See discussion *infra* Part IV.A.

³⁴ See discussion *infra* Part IV.B.

impossible in the context of Cuba's more Stalinist system of politico-economic organization—at least without what in Cuba would be viewed as a substantial shift in the nature of the governing ideology. Third, neither Cuba nor China has solved the core foundational problem of economic development through independent collectives, legal entities that are not an integral part of the state apparatus controlled by the Communist party.³⁵ Neither China's Maoist Marxist-Leninist theory, nor Cuba's Stalinist version have satisfactorily solved the central contradiction of Marxist-Leninist engagement—the privatization of economic activity essentially directed by autonomous economic collectives, which in turn are regulated by the state. Fourth, Cuba continues to actively resist integration into global patterns of capital.³⁶ Fifth, Cuba is in a poor position to compete globally—its labor is expensive, its products overpriced, and its infrastructure in need of development in comparison to other developing states.³⁷ Last, and most perversely, the subjective and highly emotional “special relationship” between Cuba and the United States limits objective consideration of alternatives and thereby constrains choice.³⁸

This paper works through fundamental issues affecting the future of Cuban approaches to economic regulation. Part I sets the context—the shift in the thrust and nature of globalization from one based on Marxist-Leninist revolution to one grounded in the establishment of a unitary system of norms for economic organization and regulation. This context explains Cuba's predicament: since its system of economic organization is increasingly at odds with that of the rest of the world, should it or must it change in order to conform to evolving international standards and expectations? An examination of this predicament is grounded in the context of existing Marxist-Socialist state systems engaging with the world in the twenty-first century, and particularly with global economic and legal harmonization centering on the modern engine of economic activity, the independent corporation.

Parts II and III examine the current state of Cuban and Chinese attempts to deal with the emerging system of global economic activity. The proxy for measuring this engagement will be the Western-style corporation. The Cubans remain suspicious, tentative, and oddly old fashioned in a rapidly changing world, while the Chinese appear to have embraced globalism on their own terms. Yet both have resisted a wholesale adoption of a western-style corporate political economy. Cuba has intensified its resistance to the emerging global system of economic norms. Yet Cuba has not been able to isolate itself completely from the system it so actively appears to disdain. Instead, it has sought to pursue a policy of containment and quarantine by attempting to create an indigenous version of Stalinism. All global economic activity is contained geographically and engaged in only by or through government agencies. China, on the other hand, has

³⁵ See discussion *infra* Part IV.C.

³⁶ See discussion *infra* Part IV.D.

³⁷ See discussion *infra* Part IV.F.

³⁸ See discussion *infra* Part IV.E.

sought to engage the emerging system by experimenting with modifications to the Chinese economic system. It has succeeded, to some extent, in adopting the language and symbols of economic globalism such as economic activity in corporate form, markets in securities, and some ownership rights in property. It has also extended these rights to its own citizens. But at the same time, the vocabulary of global norms has been folded into the basic normative structure of a political community grounded in principles of Marxist Leninism. As a result, it is still not clear whether the changes in China run only skin deep and simply mask a system that has changed very little. At the same time, the system has appeared to change enough to permit China entry into the world economic community, while Cuba remains an economic pariah.

The paper thus arrives at the heart of the problem: could Cuba adopt the Chinese approach with the same degree of success, or is there something unique about either the Cuban or Chinese experience that makes emulation impossible? Part IV suggests the difficulties of emulation in the six critical respects identified above:

First, the question of Cuban emulation may be beside the point if the Chinese approach does not work in the first place.³⁹ There is some evidence that suggests that China's success is no more than skin deep. But the fact that China's reforms may be more successful in the abstract than in practice has not been an impediment for other nations to treat the reforms as if they had worked. And that may be an important consideration in evaluating the success of the reforms.

Second, neither Maoism nor Stalinism have overcome the contradictions growing out of the privatization of economic activity in a state committed to Marxist-Leninist organization.⁴⁰ Neither Cuba nor China has solved the core foundational problem of economic development through collectives, independent of the state and not controlled by the Communist party. China has ignored the issue for the most part, attempting to work around it in theory and treating corporations as traditional parts of the state apparatus in practice. Cuba has yet to confront the issue, but as a matter of Cuban constitutional law, the issue will prove to be difficult, especially given the changes to the constitution in 2002 declaring the current Marxist-Leninist system irrevocable.⁴¹

³⁹ The issue of the true nature of Chinese engagement with globalization has been a subject of much debate. While it is clear that China has embraced the form of Western economic organization, it is less clear whether China has embraced its spirit, or even whether it uses such organization as a means of speaking to the West in the language of global economics while it speaks to its citizens in a more traditional Marxist-Leninist-Maoist way. See *infra* Parts III, IV.A.

⁴⁰ Globalization has provided a cover for finessing the great theoretical problem of Marxism-Leninism: if the people have an undifferentiated ownership interest in all of a polity's means of production, and if their collective will can only be expressed through the singular action of the state, then how can the state tolerate the creation of autonomous entities with respect to which the people do not have an undifferentiated interest. Such an entity would, it might seem, have the character of either a threat to the state or an alien within the body of the polity—to be absorbed or extinguished if necessary. See *infra* Part IV.B and V.

⁴¹ Ley de Reforma Constitucional, *supra* note 30.

Third, even if Chinese Maoism has overcome the contradictions of socialist economics grounded in private economic activity, Cuban Stalinism may be incapable of the same feat.⁴² Cuban Stalinism is incompatible with the Maoist theories critical to the Chinese model. The inflexibility of Stalinist bureaucratization and the fear of contamination inherent in the Cuban government's approach to opening up significantly distinguish Cuba from China.

Fourth, Cuba's ability to successfully emulate China may be defeated because of the difficulty of accessing global capital markets.⁴³ Cuba may find it difficult to emulate China so long as it remains unable and unwilling to access global capital flows. Engagement would require a fundamental shift in thinking about the conditions under which Cuba would will itself to become dependent on global capital. But that willingness may be a condition precedent to engagement—the world economic community may view dependence of global capital as a form of insurance of Cuba's good behavior.

Fifth, current American policy makes it impossible, as a practical matter, for Cuba to emulate the Chinese approach.⁴⁴ At the time China opened to globalization, the world community, including the United States, was eager for the engagement. The West provided substantial encouragement to the Chinese. The same is not true with respect to Cuba. The subjective and highly emotive "special relationship" between Cuba and the United States limits objective consideration of alternatives and constrains choice. American policy is geared toward substantial change in both the political and economic ordering of the Cuban state.

Sixth, even if all other impediments disappeared, Cuba may not be in a position to successfully engage with the global economy without massive economic aid.⁴⁵ Cuba may not yet be able to compete in the global marketplace.

⁴² It is possible for political thinking to become ossified—either as theory or as applied. Stalinism in its time was one of the great forces of the global political order. However, in the end, it failed the Soviet Union. The current Cuban regime means to prove that it can better survive in a more tropical climate. Yet, for Stalinism to survive unmodified, the state will have to continue to quarantine the foreign element and resist the creation of autonomous entities, even entities in which it has a dominant position. But in the global context today, the resulting isolation might be difficult to maintain. See *infra* Parts IV.C and V.

⁴³ The Cuban government is on a crusade of sorts against the current global financial order. While its ideas and rhetoric have attracted a following, especially among academics and nations that cannot seem to meet the standards for a loan or repay those already made, it is unclear whether Cuba can, alone, bring down a global financial order. See *infra* Part IV.D.

⁴⁴ It is easy enough to welcome the global world order, it is quite another to successfully compete in this environment. Cuba has been isolated for the last half-century. Its infrastructure, labor pool, and industrial base are untested and inexperienced. In a world in which dozens of states of equivalent size are competing for advantage (and wealth), Cuba may not be able to reap the rewards of globalization for a long time. Worse, it may find itself following old patterns and revert to its quasi-colonial status, creating a specialized niche economy for the convenience of its more powerful patrons. See *infra* Part IV.F.

⁴⁵ The Americans will play a far more important role in the Cuban drama than it has played in the emergence of China and other states. Cuba has been an American obsession since the nineteenth century. It is unlikely to be anything less in the twenty-first century. Moreover, with a powerful

Even in the absence of the serious problems faced by Cuba, the country is in a poor position to compete globally. Cuba is smaller and more resource poor than China. That difference may make emulation, even if theoretically possible, unrealistic in fact.

The focus of the paper shifts in Part V. Part IV suggested the difficulties of engagement, and the dangers of emulation. Part V looks at the other side of the coin—the pitfalls of resistance. On the one hand, a refusal to embrace global economic organization in the form adopted by a substantial segment of the global community can produce an isolation that might be economically and politically disastrous. On the other hand, isolation may be impossible to maintain over the long run. Change can come from outside the community as well as from within. Like China and Japan in the nineteenth century, and whether the current state apparatus likes it or not, Cuba will be forced to open its ports to the world. Whether that process will produce a re-colonized Cuba or an independent participant in the global economy will depend on the approach taken by this and subsequent Cuban regimes. Part V offers both a conclusion and tentative steps toward a resolution of the problem.

I. GLOBAL ENGAGEMENT

Globalization or globalism⁴⁶—like the Spanish Flu of 1918, or the spread of Communism in the twentieth Century, or the diffusion of Christianity after the third century—is everywhere. Globalization is now best characterized as the institutionalization of systems of transactions, principally of economic transactions. As Joseph Stiglitz recently put it, one can understand globalism as “the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders.”⁴⁷ In a related sense, globalism can be characterized as a “state of the world involving networks of interdependence at multicontinental distances . . .

element of its domestic population intensely interested in a particular result for Cuba, American domestic policy may make it difficult for Cuba to have the same freedom of action as Vietnam or other states. See *infra* Parts IV.E and VI.

⁴⁶ I will use the terms “globalization” and “globalism” interchangeably to describe a set of socio-political, cultural, and economic phenomena that have characterized the relations among world communities in a particular way since the twentieth century.

⁴⁷ JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 9 (2002) (examining the problems of globalization at the hands of international organizations like the International Monetary Fund (IMF) and the World Trade Organization). While Stiglitz is no friend of the current form of globalization, his understanding of the meaning of the term is similar to that of Michael Mussa, an economist at the IMF. See Michael Mussa, Factors Driving Global Economic Integration, Speech Presented in Jackson Hole, Wyoming at a Symposium on Global Opportunities and Challenges (Aug. 25, 2000), available at <http://www.imf.org/external/np/speeches/2000/082500.htm> (last visited Sept. 27, 2004) (“Technology, tastes, and public policy each have important independent influences on the pattern and pace of economic integration in its various dimensions . . . Public policy toward economic integration is also, to an important extent, responsive to the tastes that people have regarding various aspects of such integration, as well as to the technologies that make integration possible.”).

linked through flows and influences of capital and goods, information and ideas, people and force, as well as environmentally and biologically relevant substances (such as acid rain or pathogens).⁴⁸

Not so very long ago, globalization, as we now understand it, wore a Marxist-Leninist face.⁴⁹ The relentless and self-evident inevitability of the collapse of capitalism seemed close—first after 1918, then after 1945, and then after 1959.⁵⁰ Globalization was then understood as the conflation of law and politics,⁵¹ state control of the means of production,⁵² and the establishment of a communist society under the vanguard leadership of the Communist Party.⁵³

Globalism does indeed wear a very different face today.⁵⁴ “As modern

⁴⁸ Robert O. Keohane & Joseph S. Nye, Jr., *Introduction to GOVERNANCE IN A GLOBALIZING WORLD* 1, 2, 4-5 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) (identifying different dimensions to globalization the effects of which can be distinctly measured: economic globalism, military globalism, environmental globalism, social, and cultural globalism).

⁴⁹ For a part of the twentieth century, then, it seemed that Leon Trotsky's vision of world Communism was irresistible:

The completion of the socialist revolution within national limits is unthinkable. One of the basic reasons for the crisis in bourgeois society is the fact that the productive forces created by it conflict with the framework of the national state. From this follow, on the one hand, imperialist wars, and on the other, the utopia of the bourgeois United States of Europe. The socialist revolution commences on the national arena, is developed further on the inter-state and finally on the world arena. Thus, the socialist revolution becomes a permanent revolution in a newer and broader sense of the word; it attains completion only in the final victory of the new society on our entire planet.

LI FU-JEN, *REVOLUTIONARY TEACHER OF THE COLONIAL PEOPLES* 151-155 (1994), citing LEON TROTSKY, *THE PERMANENT REVOLUTION* (1930), available at <http://www.marxists.org/archive/glass/1944/08/teacher.htm> (last visited Sept. 27, 2004).

⁵⁰ In 1920 Lenin could declare: “A world army of the revolutionary proletariat—that is what now stands for communism, and, at the Congress just ended, received organizational form and a clear, precise and detailed programme of action.” Vladimir I. Lenin, *The Second Congress of the Communist International*, in *COLLECTED WORKS* (4th ed. 1965) at 270-72 (Aug. 1920), available at <http://www.marxists.org/archive/lenin/works/1920/aug/x02.htm> (Last visited Sept. 27, 2003).

⁵¹ “As a state philosophy, Marxism-Leninism presents itself as an all-inclusive system, in which all things are held to be dialectically interrelated, so that a mistaken idea in any one field (including law, or even natural science) must ultimately lead to mistaken views in every other field, including politics.” Maimon Schwartzchild, *Variations on an Enigma: Law in Practice & Law on the Books in the USSR*, 99 HARV. L. REV. 685, 686 & n.15 (1986) (reviewing OLYMPIAD S. IOFFE & PETER MAAGS, *SOVIET LAW IN THEORY AND PRACTICE* (1983) and W. E. BUTLER, *SOVIET LAW* (1983)).

⁵² “Classic Marxism, for example, envisioned a future in which social divisions, largely defined by economic classes and their distinctive interests and worldviews, would first sharpen and clash but, once the means of production were socially controlled, would ultimately give way to a harmonious unity of interests and worldviews.” Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1949 (2001).

⁵³ Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1301 (1967) (“The Communist Party controls both Revolution and administration. The Party conforms to the Leninist notion of a Communist Party—a disciplined, elite body of professional revolutionaries leading the masses, especially the proletariat, whose dictatorship it is supposed to embody.”).

⁵⁴ “If the defining economists of the Cold War system were Karl Marx and John Maynard Keynes, who

industrial capitalism has spread throughout the world, so too have discourses about the modern, rationally organized institutions that are assumed to accompany it. "A global economy is seen as portending global institutional and cultural homogeneity, as western beliefs, values and institutions follow western corporations around the world."⁵⁵ But the current face of universalizing norms is neither unique, nor has it yet completely suppressed all of its rivals.

The capitalist system . . . is not the only social system that has global aspirations. It competes for global hegemony with the international system of states, with global systems of religion, the global environmentalist system, and perhaps others. Nevertheless it is the dominant global system precisely because the [transnational capitalist class] owns and controls . . . most of the planet's means of production.⁵⁶

A good part of the influential literature characterizes the current version of economic globalization as inevitable, and leading to a fairly predictable change in global human communal organization.⁵⁷ Others, however, suggest serious flaws in both the process of modern economic globalization⁵⁸ and in its form.⁵⁹ Many fear or mistrust what is characterized as the American face of globalization—that is, that because globalization reinforces American power and values, it must either be bad, dangerous, subversive, or likely to violate some positive value or other.⁶⁰ Whatever the value or moral worth of its current form

each in his own way wanted to tame capitalism, the defining economists of the globalization system are Joseph Schumpeter and Intel chairman Andy Grove, who prefer to unleash capitalism." THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 11 (2000). Though there are substantial voices, even within the heart of globalizing institutions, which still seek to tame or civilize capitalism to ameliorate the more extreme effects of competition, at least for competition's losers. See, e.g., BRANKO MILANOVIK, *THE WORLD BANK DEV. ECONOMICS WORKING PAPER, THE TWO FACES OF GLOBALIZATION: AGAINST GLOBALIZATION AS WE KNOW IT*, available at <http://www.ssrn.com> [hereinafter *THE TWO FACES OF GLOBALIZATION: AGAINST GLOBALIZATION AS WE KNOW IT*] (stating that "[g]lobal capitalism needs to be "civilized" in the same way that national capitalisms of the 19th century were "civilized" after the World War II-period which then witnessed the fastest growth in history").

⁵⁵ Richard P. Appelbaum et al., *Introduction: The Legal Culture of Global Business Transactions*, in *RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* 1, 3 (Richard Appelbaum et al. eds., 2001).

⁵⁶ LESLIE SKLAIR, *THE TRANSNATIONAL CAPITALIST CLASS* 16 (2001).

⁵⁷ The literature is enormous and growing. See, e.g., FRIEDMAN, *supra* note 54; DANIEL YERGIN & J. STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1999); Harald Baum, *Globalizing Capital Markets and Possible Regulatory Responses*, in *LEGAL ASPECTS OF GLOBALIZATION: CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS & INSOLVENCY IN A GLOBAL ECONOMY* 78 (Jurgen Basedow & Toshiyuki Kono eds., 2000).

⁵⁸ STIGLITZ, *supra* note 47, at 214.

⁵⁹ See, e.g., EDWARD N. LUTTWAK, *TURBO-CAPITALISM: WINNERS AND LOSERS IN THE GLOBAL ECONOMY* (1998) (explaining that globalization is not a unitary process, but rather reflects multiple approaches each with its own contradictions).

⁶⁰ See, for example, the suggestion made by a leading economist for the World Bank, Branco Milanovic, *On the Threshold of the Third Globalization: Why Liberal Capitalism Might Fail* (SSRN

and character, the existence of globalization is undeniable. More significant, exposure to globalism is hard to avoid. The surest protection against globalism is isolation. Yet the universalism that forms the core of globalism impels the overcoming of isolation, one way or another. Even its critics recognize this.⁶¹ Globalism is seductive and terrifying, for friend and enemy alike.⁶² It affects individuals and communities, whether or not they want to be affected, and few can resist using its tools.⁶³

Globalization, in all of its facets, has led to the proliferation of a number of supranational regulatory and financial institutions⁶⁴ designed to implement and

Paper N. 262176, 1999) [hereinafter *On the Threshold of the Third Globalization: Why Liberal Capitalism Might Fail*].

⁶¹ Thus, for example, Fidel Castro has noted that:

I can certainly speak of another global threat, namely, ideas. Clear ideas, all that you have analyzed and adopted. We should all help globalize ideas, help them expand. We should all work the miracle of sending them everywhere, as I said the first day. Those are indeed global threats: speaking, reasoning, thinking, explaining, showing.

Castro's Speech, First International Congress on Culture and Development, *supra* note 14.

⁶² Pope John Paul II's speech to the Cuban people, intended for a global audience, at once demonstrates the seductiveness of globalism—the ability to communicate and influence across continents and communities—and its terror—the use of the supra-communalism of globalism to preach against its form and character.

The Church in Cuba is not alone or isolated; rather, it is part of the Universal Church which extends throughout the whole world. . . . The ideological and economic systems succeeding one another in the last two centuries have often encouraged conflict as a method, since their programs contained the seeds of opposition and disunity. This fact profoundly affected their understanding of man and of his relations with others. . . . Hence, at times, unsustainable economic programs are imposed on nations as a condition for further assistance. In the international community, we thus see a small number of countries growing exceedingly rich at the cost of the increasing impoverishment of a great number of other countries; as a result the wealthy grow ever wealthier, while the poor grow ever poorer.

Pope John Paul II, Homily in the José Martí Square of Havana (Jan. 25, 1998).

⁶³ International terrorism and other forces of anti-globalization, are themselves, creatures of the very globalization to which they are opposed. With respect to the attacks on New York and Washington, D.C. on September 11, 2001, it has been observed that “[p]aradoxically, the very forces that drive globalization—transportation, information and communication technologies—were marshaled by opponents of globalization, in an effort to destroy it.” Delissa A. Ridgway & Mariya A. Talib, *Globalization and Development—Free Trade, Foreign Aid, Investment And the Rule of Law*, 33 CAL. W. INT'L L. J. 325, 326 (2003). On communication itself as an aspect of globalism, see, e.g., Viktor Mayer-Schönberger & Deborah Hurley, *Globalization of Communication*, in GOVERNANCE IN A GLOBALIZING WORLD 135 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000). For a more theoretical discussion, see, *On the Threshold of the Third Globalization: Why Liberal Capitalism Might Fail*, *supra* note 60. Milanovic posits three great ages of globalization, a Roman, British, and now American age of globalization—all in the West. He argues that of these ages combined power with a specific ideology. Each power/ideology, in turn (except the last), was eventually overcome by its own limits and the oppositions raised against it. That opposition also took the form of an anti-globalization globalizing force—Christianity in opposition to Rome and Marxism in opposition to England's Industrial Revolution. What made each opposition successful was its ability to absorb the techniques of globalization for its own ends.

⁶⁴ Prominent among them have been the World Trade Organization, the International Monetary

administer the complex web of bilateral, multilateral, and supranational instruments, which increasingly affect the power of a political community to order its internal economic affairs.⁶⁵ These organizations and instruments reflect the development of an emerging consensus on a number of issues critical to the elaboration of a global economic order.⁶⁶ This consensus is based on emerging global norms, which some critics have called a "Washington consensus—a consensus between the IMF, the World Bank and the U.S. Treasury about the 'right' policies for developing countries."⁶⁷ The foundational consensus appears to be the near universal embrace of a set of key principles for ordering and managing behavior among political communities, between political communities and their constituent parts, and among civil society actors. Most important among them is the privatization of conduct and coordination—recasting

Fund, and a number of emerging regional trade associations. See, e.g., James D. Wolfensohn, *The Challenges of Globalization: The Role of the World Bank*, Speech Before the Public Discussion Forum (Apr. 2, 2001), at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20025027~menuPK:34472~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (last visited Feb. 2, 2005); Daniel D. Bradlow, *Development Decision-Making and the Content of International Development Law*, 27 B.C. INT'L & COMP. L. REV. 195 (2004); MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF THE IMF AND WORLD BANK REFORMS* (1997). Some supranational institutions have evolved from economic communities to something that approaches a federal state. The emerging European Union provides the most prominent example. For a discussion of the history of the European Union, see, e.g., JOHN PINDER, *THE BUILDING OF THE EUROPEAN UNION* (3rd ed., 1998). Echoing a position taken consistently by the Cuban government, some critics see in the move to internationalization a cover for the reassertion of Western, and particularly American, efforts to assert control over the rest of the world. See Mario E. Carranza, *MERCOSUR, the Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L. REV. 1029, 1033-41 (2004).

⁶⁵ As an example consider the current battle between the European Union for a monopoly on the use of certain designations of origin to limit the use of terms such as "bologna," "mozzarella," and "feta" by non-EU producers. See Harry N. Niska, Note: *The European Union Trips Over The U.S. Constitution: Can The First Amendment Save The Bologna That Has A First Name?*, 13 MINN. J. GLOBAL TRADE 433 (2004).

⁶⁶ Even so-called conservative commentators have noted that:

There can be little doubt that, barring some kind of cataclysm, the historic trend is, and will continue to be, toward increasing world governance. One need only look at the unending array of international organizations that have proliferated since World War II and the forces that are constantly generating more of them. Those forces include myriad international non-governmental organizations, many of which have captured important levers of power, increasingly influential developing countries, and the whole field of activism now known loosely as "civil society."

Reginald Dale, *European Union, Properly Construed*, 122 POL'Y REV. 39, 54 (Dec. 2003/Jan. 2004).

⁶⁷ STIGLITZ, *supra* note 47, at 16. "According to the Washington Consensus, growth occurs through liberalization, 'freeing up' markets. Privatization, liberalization, and macrostability are supposed to create a climate to attract investment, including from abroad. This investment creates growth." *Id.* at 67. There is also a strain of an ancient cynicism to these notions, stretching back to the ancient Greeks. Consider the position of the Athenians who seeking the submission of the Melians, dismissed their arguments about equity and right: "For ourselves, we shall not trouble you with specious pretenses . . . since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must." THUCYDIDES, *THE PELOPONNESIAN WAR* 331 (Rex Warner trans., Cassell & Co. Ltd., 2nd ed. 1962) (1954).

governmental involvement in commerce and finance from one of active participation for reasons of national public policy (or advantage) to one of maintenance of open, free, non-discriminatory, and neutral 'spaces' within which private actors may engage in commerce and finance.⁶⁸ But even those opposed to the consensus model of globalization suggest that international, rather than national, political institutions are essential for an effective anti-globalization. Even anti-globalization is a globalizing force.⁶⁹

Globalization has also produced great incentives toward the harmonization of national legal systems. Nation-states revise their national legislation to "achieve some level of concordance with other legal systems."⁷⁰ Harmonization is particularly powerful in the context of global economic activity. Economic activity is presumed to be a fundamental part of the private sphere, something separate from the political, the public sphere.⁷¹ Economic activity is posited as natural, neutral, consensual, and non-coercive, and therefore non-political.⁷² As a consequence, economic regulation tends to take a passive and indirect, rather than active and interventionist form. The task of regulation through public law (which expresses public policy) is to ensure that no anti-competitive or deviant behavior interrupts the natural flow of economic activity, and through private laws (laws governing the relations between private individuals) to ensure fairness between contracting parties.⁷³ The public law framework is characterized by the domestication of regulatory legislation by nation-states in a way that mirrors the convergence of practices among important civil society

⁶⁸ "By *global* is meant a fusion of markets that have gone beyond a collection of national markets linked by trade. By *networked* is meant an economic space that has gone beyond the distinction between market and hierarchy but is concerned largely with the direct links between forms." JOHN A. MATTHEWS, *DRAGON MULTINATIONAL: A NEW MODEL FOR GLOBAL GROWTH* 25 (2002).

⁶⁹ See, e.g., THE TWO FACES OF GLOBALIZATION: AGAINST GLOBALIZATION AS WE KNOW IT, *supra* note 54 ("the civilizing role cannot be done by individual states, but, because of the global nature of capitalism, by global institutions").

⁷⁰ Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 404 (1993). See also Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KAN. L. REV. 779 (2002).

⁷¹ The public-private divide has been critical in virtually every aspect of communal and supra-communal governance. From an early era in the history of the United States, this distinction had significant effect on the approach to regulation of contractual relations, labor, and social welfare. See, e.g., Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982). Social concern with drawing legal and cultural distinctions based on public and private has been particularly important in the context of regulating sexual conduct. See Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 U. FLA. L. REV. 755 (1993). The private-public pattern has marked international or transnational governance as well. See, e.g., JUSTIN ROSENBERG, *EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS* (1994) (suggesting that even economic or the private might be considered public and thus political when understood as interest aggregation and agitation).

⁷² For an explanation and critique, see, e.g., Claire Cutler, *Global Capitalism and Liberal Myths: Dispute Settlement in Private International Relations*, 24 MILLENNIUM J. INT'L STUD. 377 (1995).

⁷³ JARROD WIENER, *GLOBALIZATION AND THE HARMONIZATION OF LAW* 28 (1999).

actors.⁷⁴ The framework for harmonizing regulation is influenced in no small way by a small group of the economically dominant states, and to some extent reflects those states' domestic priorities.⁷⁵

Globalization itself, has turned a spotlight on the corporation as a critically important independent actor within this emerging system of economic regulation.⁷⁶ A corporation is a relatively recent development, but one that has ancient roots.⁷⁷ Modern corporations are generally understood to be entities with an existence recognized in law as separate and independent of those who have an interest in the entity, such as owners, lenders, employees, or the state.⁷⁸ As creatures of the nation-states that recognized them,⁷⁹ corporations developed along broadly similar lines, but with certain, sometimes significant, national

⁷⁴ *Id.* at 10. "Significant pressures toward convergence are created by, on the one hand, the forces of international trade, which tend to demand harmonized commercial law because significant differences in local law stand as impediments to international trade, and, on the other hand, by the international human rights and democratization movements, which are arguably based on the values of western liberal democracy and which seek to have all domestic and international legal systems adopt certain characteristics of western liberal democratic law." John C. Reitz, *Doubts About Convergence: Political Economy as an Impediment to Globalization*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 139 (2002) (citing Makau Wa Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT'L L.* 589 (1996)).

⁷⁵ See, e.g., David Law, *Global Hegemony and the Structural Power of Capital*, 33 *INT'L STUD. Q.* 475 (1989). Some have suggested that this hegemonic aspect of harmonization will impede rather than advance convergence of law, even between nation-states with parallel interests. See, e.g., Reitz, *supra* note 74, at 158 ("[T]he increasing integration of the world economy is more likely to intensify conflict over political economy as international trade and investment bring increasing numbers of foreigners into contact with more parts of each nation's economic and political system.").

⁷⁶ "The global corporation is the central driving force, so it is held, of the dominant process of our time, which is globalization." MATTHEWS, *supra* note 68, at 21.

⁷⁷ For a history of the development of the institution which eventually became the corporation, see J. WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* (1970).

⁷⁸ The doctrine, though old, still presents a variety of problems even in advanced free market nations. See, e.g., Yedidia Z. Stern, *Corporate Criminal Personal Liability—Who is the Corporation?*, 13 *J. CORP. L.* 125 (1987). The doctrine of independent legal personality has played a role in the Byzantine politics of the American embargo against Cuba. See, e.g., Julia P. Herd, Note: *The Cuban Democracy Act: Another Extraterritorial Act that Won't Work*, 20 *BROOK. J. INT'L L.* 397 (1994).

⁷⁹ Neither the academic literature, nor the courts, have arrived at consensus on the issue of the relationship of the state to its corporations. The traditional view was that corporations were creatures of the state. Adherents of a more contemporary "contractarian" position among academics, and (mostly American) courts, have taken the position that corporations are webs of contract relations among those with an interest in the enterprise. As such, states cannot assert the sort of control contemplated by the "state instrumentality" model. For a discussion of these different conceptions in the context of American constitutional law, see George Ellard, Note: *Constitutional Rights of the Corporate Person*, 91 *YALE L.J.* 1641 (1982). Some modern "realist" theorists posit corporations as organizations that have the same relationship as individuals to the state. That is, corporations are autonomous (and perhaps even independent—to the extent that any organization can be independent). See Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person*, 36 *AM. J. COMP. L.* 130 (1988). Or, corporations can own themselves and by so doing owe primary loyalty to its principal constituents—employees and managers. See, e.g., Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 *AM. J. COMP. L.* 583 (1999).

characteristics.⁸⁰ Whatever their differences, corporations are among the most efficient and powerful non-governmental organizations through which global economic activity is organized.

Consensus on a number of ideas about the construction of an optimally efficient single system of economic organization may have potentially significant effects on the nature and structure of corporations within a unitary globalized economic order.⁸¹ Corporations are now a central factor in the determination of the character and pace of global economic development. As John Matthews noted in connection with the Asian engagement with the global economic order:

In fact, one can argue that the global economy forms today an economic "system" in the same way that nation-states form an international system. By this is meant that the main protagonists preferentially recognize each other as players and downgrade their recognition of, or involvement with, other kinds of players. . . . A global bank, for example, looks to global IT firms to supply and service its computing requirements, rather than having a variety of local suppliers in its different spheres of operation.⁸²

Because corporations play such an important role in the political economy of a large portion of the world, international attention has been increasingly focused on the nature and attributes of corporations. Systemization, harmonization, and convergence of the law of corporations are very much in the air.⁸³ Corporate

⁸⁰ These differences affected areas such as the composition and duties of the board of directors, the financing of the entity, and the allocation of power among shareholders, officers, directors, labor, and lenders. For a treatment of these differences, see LARRY CATÁ BACKER, *COMPARATIVE CORPORATE LAW: UNITED STATES, EUROPEAN UNION, CHINA AND JAPAN* (2002).

⁸¹ "As more and more countries have adopted market-based approaches to economic policy, there has been an increasing awareness of the importance of private corporations for the welfare of individuals." ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *CORPORATE GOVERNANCE PRINCIPLES: OECD PRINCIPLES OF CORPORATE GOVERNANCE* (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> (last visited Sept. 27, 2004) [hereinafter *OECD PRINCIPLES OF CORPORATE GOVERNANCE*].

⁸² MATTHEWS, *supra* note 68, at 26-27. ("These pressures from existing global firms on other firms to likewise become global is in fact one of the critical—and underrecognized—rivers of globalization today.")

⁸³ This is not to suggest that convergence necessarily means the elimination of all difference. For the moment, even that modest goal seems difficult among national corporate systems of industrialized nations. See, e.g., CHARLES HAMPDEN-TURNER & ALFONS TROMPENAARS, *THE SEVEN CULTURES OF CAPITALISM: VALUE SYSTEMS FOR CREATING WEALTH IN THE UNITED STATES, JAPAN, GERMANY, FRANCE, BRITAIN, SWEDEN AND THE NETHERLANDS* (1993); John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 644 (1999). For example, "[a] striking difference between countries like the United States and the United Kingdom, on one side, and Germany and France on the other, is the difference between a strikingly permissive corporate law combined with active judicial review versus a more restrictive law with less judicial involvement." Edward B. Rock, *America's Shifting Fascination With Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 390-391 (1996). There are differences in effect as well. For example, Marc Goergen and Luc Renneboog show how differences in the details of corporate governance rules can have a substantial effect on patterns of ownership. With respect to the

governance debates parallel debates about the democratization of state systems; corporate governance is as much about the construction of state collectives within a shifting world of citizen interests as it is about the construction of economic collectives within a shifting world of stakeholders. Consensus building about the corporation as collective assumes the character of its object—privatized and voluntary, an independent and autonomous collective expressing the will of its stakeholders but subject to regulation within the wider political communities of state and international collectives.⁸⁴

The work of harmonization is furthered indirectly by the most economically influential nations through supranational, quasi-private organizations such as the Organization for Economic Co-operation and Development (OECD),⁸⁵ which

differences in the costs of control:

In countries with a low protection of shareholder rights, shareholders can prevent a violation of their rights by building up controlling stakes and by taking advantage of a higher level of private benefits of control. A thorough investigation of minority shareholder protection regulation, control disclosure, multiple-class shares, fiduciary duties and composition of the board of directors, ownership structure, voting rules and practice, the arm's length relation with large shareholders, and mandatory takeover thresholds reveals that investors in the United Kingdom are substantially better protected than the ones in Germany and that the relative cost of control is lower in Germany.

Marc Goergen & Luc Renneboog, *Why Are the Levels of Control (So) Different in German and U.K. Companies? Evidence from Initial Public Offerings*, 19 J. L. ECON. & ORG. 141, 142 (2003) (internal citations omitted).

⁸⁴ This was made clear again in a statement issued by the G-8 in the course of its meeting in Evian-les-Bains France, June 1-3, 2003:

Trust and confidence are key ingredients of a well-functioning market economy. Restoring investor confidence through sound corporate governance, as well as corporate structures and market intermediaries that are more accountable, is essential to promoting growth in our economies. We encourage the many initiatives underway, in national capitals, international financial institutions and by international standard-setting bodies, to strengthen governance standards and disclosure regimes. . . . Corporate integrity, strengthened market discipline, increased transparency through improved disclosure, effective regulation and corporate social responsibility are common principles that are the foundations for sound macro-economic growth.

2003 G-8 Summit, *Fostering Growth and Promoting A Responsible Market Economy: A G-8 Declaration* (2003), available at http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/fostering_growth_and_promoting_a_responsible_market_economy_-_a_g8_declaration.html (last visited Sept. 27, 2004) [hereinafter *Fostering Growth and Promoting a Responsible Market Economy: A G8 Declaration*]. The G8 (originally G6) is an annual meeting of leaders of eight of the great economic powers of the world: Germany, Japan, the United Kingdom, the United States, France, Italy, Canada and Russia. See *The Background to the G8*, available at http://www.g8.fr/evian/english/navigation/the_g8/background_to_the_g8.html (last visited Sept. 27, 2004).

⁸⁵ The OECD was established in 1960 when twenty nations entered into the *Convention on the Organisation for Economic Co-operation and Development* (Dec. 14, 1960), available at http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html (last visited Sept. 27, 2004). The current member states of the OECD include: Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1962), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Slovak Republic (2000), Spain (1961), Sweden

"groups 30 member countries in a unique forum to discuss, develop, and refine economic and social policies. The member countries compare experiences, seek answers to common problems, and work to coordinate domestic and international policies to help members and non-members deal with an increasingly globalized world."⁸⁶ Among its more influential efforts has been the development of a number of principles for corporate governance and behavior norms for multi-national economic enterprises.⁸⁷ "The *OECD Principles of Corporate Governance* were agreed to in 1999 and are intended to assist member- and non-member governments in their efforts to evaluate and improve the legal, institutional and regulatory frameworks for corporate governance in their countries, and to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance."⁸⁸

Indeed, corporations have become players, along with nation-states, as objects of public law. In recent years, international bodies have sought to impose a direct connection between multi-national enterprises and human rights standards otherwise applicable to multi-national enterprises only through the

(1961), Switzerland (1961), Turkey (1961), United Kingdom (1961), and the United States (1961). See OECD, RATIFICATION OF THE CONVENTION FOR THE OECD: OECD MEMBER COUNTRIES, available at http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited Sept. 27, 2004). "The Organisation for Economic Co-operation and Development has been called a think tank, a monitoring agency, a rich man's club—and an unacademic university. It has elements of all." OECD, OVERVIEW OF THE OECD: WHAT IS IT? HISTORY? WHO DOES WHAT? STRUCTURE OF THE ORGANISATION?, available at http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (last visited Sept. 27, 2004) [hereinafter OVERVIEW OF THE OECD]. The OECD Convention, on the other hand, suggests that the OECD was founded on a belief that "the economically more advanced nations should co-operate in assisting to the best of their ability the countries in process of economic development [and] that the further expansion of world trade is one of the most important factors favouring the economic development of countries and the improvement of international economic relations." OECD CONVENTION, *supra* note 85, pmbl. Its primary aim is to "achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy." *Id.* at art. I(a).

⁸⁶ *Overview of the OECD*, *supra* note 85. "Policy makers in OECD countries have increasingly come to address company law in an economic context. As company laws are being reformed the impact of legislation on entrepreneurship, corporate competitiveness and resource allocation, are becoming central issues." COMPANY LAW REFORM, OECD, available at http://www.oecd.org/topic/0,2686,en_2649_34727_1_1_1_1_37439,00.html (last visited Sept. 27, 2004).

⁸⁷ See OECD PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 81. See also ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTI-NATIONAL ENTERPRISES: SPECIFIC INSTANCES CONSIDERED BY NATIONAL CONTACT POINTS TO DATE (2004). For a discussion, see, e.g., Janis Sarra, *Convergence Versus Divergence, Global Corporate Governance at the Crossroads: Governance Norms, Capital Markets & OECD Principles for Corporate Governance*, 33 OTTAWA L. REV. 177 (2001-02).

⁸⁸ OECD, REPORT: SURVEY OF CORPORATE GOVERNANCE DEVELOPMENTS IN OECD COUNTRIES 7 (Dec. 2003), available at <http://www.oecd.org/dataoecd/58/27/21755678.pdf> (last visited Sept. 27, 2004). The OECD has explained the genesis of its attention to matters of corporate governance on a global scale thus: "In the aftermath of the Asian financial crisis in 1997, the OECD Council Meeting at Ministerial level called upon the OECD to develop, in conjunction with national governments, other relevant international organisations and the private sector, a set of corporate governance standards and guidelines." *Id.*

nation-state.⁸⁹ In 2003, the UN Commission on Human Rights, Sub-Commission on the Protection of Human Rights, Transnational Corporations, issued its proclamation of norms⁹⁰ on responsibilities of transnational corporations and other business enterprises with regard to human rights.⁹¹ Though not binding, the proclamation urges "that every effort be made so that they become generally known and respected."⁹² The proclamation would impose on transnational corporations, "within their respective spheres of activity and influence. . . the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."⁹³

Globalization has created incentives for the harmonization of corporate law, principally through the regulation of corporate governance.⁹⁴ At their broadest,

⁸⁹ See, e.g., Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002). For an early exploration of the issues, see Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 789 (1970).

⁹⁰ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. ESCOR 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26 2003), available at <http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument> (last visited Sept. 27, 2004) [hereinafter *Norms*].

⁹¹ For a report on the completion of the statement of norms, see U.N. ESCOR, Hum. Rts. Comm., Sub. Comm. on the Promotion and Protection of Hum. Rts., *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations* on its 5th session, U.N. Doc. E/CN.4/Sub.2/2003/13, available at <http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset> (last visited Sept. 27, 2004). The qualified embrace of globalization led by multi-national corporations was best expressed by the chair of the sub-committee: "The Chairperson noted that in spite of the enormous wealth of transnational corporations, they contributed relatively little to job-creation and at times have been known to retrench workers which has exacerbated poverty and impeded the enjoyment of workers' human rights. Similarly, pharmaceutical companies have obstructed access to medicines which has a negative effect on the enjoyment of the right to health." *Id.* at 9.

⁹² *Norms*, *supra* note 90, at Pmbl.

⁹³ *Norms*, *supra* note 90, at 1. Entities that fail to adhere to the norms ought to incur obligations to indemnify adversely affected persons, entities and communities. *Id.* at 18. States are urged to create the necessary legal framework for implementing the norms. *Id.* at 17. The United Nations retains for itself the right to monitor and report behavior. *Id.* at 16. But corporations are urged to adopt the behavior norms voluntarily. *Id.* at 15.

⁹⁴ The term corporate governance has been as malleable a term as Delaware corporate law is reputed to be flexible.

Economists and social scientists have tended to define it broadly as "the institutions that influence how business corporations allocate resources and returns" and "the organizations and rules that affect expectations about the exercise of control of resources in firms." One noted economist has rather cryptically written that governance is "an institutional framework in which the integrity of the transaction is decided." These broad definitions encompass not only the internal structure of the corporation but also its external environment, including capital and labor markets, bankruptcy systems, and governmental competition policies. Corporate managers, investors, policy makers and lawyers, on the other hand, tend to employ a narrower definition. For them, corporate

within the context of developing an international economic system, "Corporate Governance looks at the institutional and policy framework for corporations—from their very beginnings, in entrepreneurship, through their governance structures, company law, privatization, to market exit and insolvency. The integrity of corporations, financial institutions and markets is particularly central to the health of our economies and their stability."⁹⁵ The great economic powers of the early twenty-first century seek both institutional and voluntary harmonization of rules and practices of corporate actors.⁹⁶

In line with the worldwide trend to create codes of corporate governance, on the supra-national level the European Union, the Organization for Economic Cooperation and Development (OECD), and the World Bank (in connection with other institutions) have formulated their own corporate governance standards. The "global code-fever" has in the meantime even reached the Peoples Republic of China, where the All China Securities Regulatory Commission (CSRC) and the State Economic and Trade Commission issued the Standards of Corporate Governance of Listed Companies on January 7, 2002.⁹⁷

This approach reflects traditional patterns of harmonization within large federal and supranational states in which the harmonization of corporate law is particularly apparent, particularly in the United States and the European

governance is the system of rules and institutions that determine the control and direction of the corporation and define relations among the corporation's primary participants—shareholders, the board of directors, and company management.

Jeswald W. Salacuse, *Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch?* 9 L. & BUS. REV. AM. 33, 34-35 (2003) (citing Mary O'Sullivan, *Corporate Governance and Globalization*, 570 AM. ACAD. POL. & SOC. SCI. 153, 154 (2000); WORLD BANK, WORLD BANK DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 68 (2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fm.pdf> (last visited Sept. 27, 2004); OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 11 (1996); and ROBERT A. G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 1 (2d ed. 1995)).

⁹⁵ OECD, *Corporate Governance*, available at http://www.oecd.org/topic/0,2686,en_2649_37439_1_1_1_1_37439,00.html (last visited Sept. 27, 2004).

⁹⁶ Thus, in one of their 2003 formal declarations, the G-8 stated:

We will work with all interested countries on initiatives that support sustainable economic growth, including the creation of an environment in which business can act responsibly. We also welcome voluntary initiatives by companies that promote corporate social and environmental responsibility, such as the OECD Guidelines for Multinational Enterprises and the UN Global Compact principles consistent with their economic interest. We encourage companies to work with other parties to complement and foster the implementation of existing instruments, such as the OECD guidelines and the ILO 1998 Declarations on Fundamental Principles and Rights at work.

FOSTERING GROWTH AND PROMOTING A RESPONSIBLE MARKET ECONOMY: A G8 DECLARATION, *supra* note 84.

⁹⁷ Lutz-Christian Wolff, *Law as a Marketing Gimmick: The Case of the German Corporate Governance Code*, 3 WASH. U. GLOBAL STUD. L. REV. 115, 119-20 (2004).

Union.⁹⁸ In the European Union, harmonization occurs at a number of levels. Member State practice has had an increasingly important influence on rules of corporate governance.⁹⁹ Harmonization at the supranational level has been undertaken, with significant but nonetheless limited success, over the last half century. The European Union provides a modern example of a decades-long process to harmonize the national corporate laws of a number of states with different legal traditions.¹⁰⁰ By 2003, the European Union had issued a number of directives harmonizing large areas of member state corporate law, and had laid the groundwork for the development of an EU corporation.¹⁰¹ This trend is reflected in “the codes that have been issued in Member States in the last decade [which] express significant similarities: they reveal that as reliance on equity financing increases and shareholdings broaden in Europe, a common understanding is emerging of the role that corporate governance plays in the modern European corporation.”¹⁰²

Within the United States, harmonization occurs on several levels. Non-governmental actors with some influence on public policy, like the American Law Institute,¹⁰³ have worked to promote approaches to the harmonization of

⁹⁸ See, e.g., HOLLY J. GREGORY & ROBERT T. SIMMELKJAER, II, *COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES, FINAL REPORT AND ANNEXES I-III* (Jan. 2002), available at http://europa.eu.int/comm/internal_market/en/company/company/news/corp-gov-codes-rpt_en.htm (last visited Sept. 27, 2004) [hereinafter *COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES*]. The authors explain:

Rules and norms of corporate governance are important components of the framework for successful market economies. Although corporate governance can be defined in a variety of ways, generally it involves the mechanisms by which a business enterprise, organised in a limited liability corporate form, is directed and controlled. It usually concerns mechanisms by which corporate managers are held accountable for corporate conduct and performance. Corporate governance is distinct from—and should not be confused with—the topics of business management and corporate responsibility, although they are related. *Id.* at 8.

⁹⁹ See the United Kingdom's 1992 CADBURY REPORTS CADBURY COMM., *WORLD BOOK REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE* (Dec. 1992), available at <http://www.worldbank.org/html/fpd/privatesector/cg/docs/cadbury.pdf> (last visited Sept. 27, 2004). Its approach to corporate governance—“Corporate governance is the system by which businesses are directed and controlled”—is widely quoted. *Id.* at 2.5. See also THE NORBY COMMISSION, *Introduction to RECOMMENDATION FOR GOOD CORPORATE GOVERNANCE IN DENMARK*, Introduction, (Dec. 6, 2001), available at <http://www.corporategovernance.dk> (last visited Sept. 27, 2004).

¹⁰⁰ For an excellent account of these efforts in the twentieth century, see VANESSA EDWARDS, *EC COMPANY LAW* (1999).

¹⁰¹ On the basic outlines of this law, see *id.*

¹⁰² *COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES*, *supra* note 98, at 29. The authors explain that: “Increasing interest in corporate governance improvement and attempts to articulate generally accepted norms and best practices is the result of numerous factors. Chief among them is the recognition that a firm’s ability to attract investment capital, which is now internationally mobile, is related to the quality of its corporate governance.” *Id.* at 8.

¹⁰³ The American Law Institute is a private organization of elected members with the primary objective of reducing the uncertainty and complexity of law in the United States. See AMERICAN LAW INSTITUTE, *ABOUT THE AMERICAN LAW INSTITUTE*, available at <http://www.ali.org/> (last visited Sept. 27, 2004).

corporate law.¹⁰⁴ Other NGOs, particularly the American Bar Association, have been even more influential with the long-term development of the Model Business Corporation Act, adopted in whole or in part by a majority of states in the United States.¹⁰⁵ State legislatures and courts have a long tradition of looking to their sibling states for guidance. This can take the form of adoption of well-developed corporate codes.¹⁰⁶ Alternatively, state judiciaries look to sibling courts for guidance as a matter of course.¹⁰⁷ States, as investors, also have come increasingly to influence the behavioral rules of corporations.¹⁰⁸ Lastly, the federal government has increasingly influenced the form and content of corporate behavioral norms through the federal securities laws.¹⁰⁹

The emerging consensus suggests that a state actor seeking to participate actively in the system of global economic development now emerging must foster an economic climate that channels economic activity through independent private sector enterprises. In the emerging web of international consensus that forms the normative structure of economic interaction, the ideal state-actor participant is now expected to share certain characteristics: those of being democratic, free-market based, and of having institutionally pluralistic systems, in which the state plays an increasingly subordinate role (one among many). The natural and juridical persons, who are citizens of every state, have governance systems that increasingly converge with state governance norms, and their rights and obligations emanate directly from the supranational collectives themselves.¹¹⁰

¹⁰⁴ See, e.g., ALI PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1977-1994) [formerly "PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS," also known as "Corporate Governance Project"].

¹⁰⁵ The Model Business Corporation Act, available at <http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf> (last visited Sept. 27, 2004).

¹⁰⁶ The adoption by the Kansas legislature of the Delaware Corporate Code virtually unchanged provides a case in point. See, e.g., *Hunt v. Data Mgmt. Res., Inc.*, 985 P.2d 730 (Kan. 1999).

¹⁰⁷ For a good example, see *Berreman v. West Publishing Co.*, 615 N.W.2d 362 (Minn. 2000) (looking to federal securities law and the law of other states to answer a question of interpretation of state law).

¹⁰⁸ The administrators of the large state employees pension plans have been particularly significant players in this respect. See, e.g., CAL. PUB. EMPLOYEES' RET. SYS., CORPORATE GOVERNANCE CORE PRINCIPLES & GUIDELINES (1998), available at <http://www.calpers-governanace.org/principles/domestic/us/page01.asp> (last visited Sept. 27, 2004) (last updated Apr. 13, 1998).

¹⁰⁹ See, e.g., Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell and Sue*, 62 L. & CONTEMP. PROBS. 215 (1999).

¹¹⁰ Manuel Cereijo, *Globalización*, REVISTA GUARACABUYA, available at <http://www.amigospais-guaracabuya.org/oagmc218.php> (last visited Sept. 27, 2004):

La globalización obviamente está reduciendo cierta soberanía nacional de los países. El mundo en cuanto a la globalización está en un estado de semi-equilibrio, es decir, en un estado de flujo económico dinámico y de adaptación política. Estamos en un periodo donde lo que impera es lo que se conoce como el desarrollo de "industrias basadas en el talento humano." La globalización beneficia a este tipo de desarrollo económico. . . . El capitalismo y la democracia viven actualmente en una etapa histórica de la humanidad donde no tienen

Globalization on these terms is particularly problematic for Marxist-Leninist state systems. Such states may not be able to accept the emerging consensus on the nature and utility of private economic enterprises, especially of corporations, without significantly affecting the basis of the *political organization* of those states.¹¹¹ Marxist-Leninist states may also be reluctant to change the regulatory environment to engage in economic development through private enterprises. Such a change would require a transformation of the basis of the *economic organization* of those states.¹¹² A study of the nature of Marxist-Socialist state engagement with the emerging global economic order thus serves both to highlight (in exaggerated form) the way globalization can have significant internal effects on the fundamental economic and political organization of states. It also brings to the fore the problem of the corporation as a private economic enterprise, which the emerging global consensus masks but does not resolve. The problem: resolving the tensions inherent in a global system operating through non-state, autonomous, economic collectives exercising great power, that are regulated by and mimic the state, but remain independent of it.

Nowhere might this problem be better highlighted than in contemporary Cuba. Cuba has created a system of engagement neither true to its Marxist-Leninist principles, nor sufficiently harmonized with global practices to be effective. Cuba has attempted to engage globalization using a language of Stalinist Marxist-Leninism that is neither comprehensible nor relevant to the

competencia política, aunque todavía existen tiranos dictadores, y terroristas, estos carecen de ideología, no tienen promesas, no ofrecen futuro.

This consensus is reflected in instruments such as that creating the OECD. OECD membership, for example, is limited to "a group of like-minded countries. Essentially membership is limited only by a country's commitment to a market economy and a pluralistic democracy." OVERVIEW OF THE OECD, *supra* note 85.

¹¹¹ See, e.g., Tony Saich, *Globalization, Governance, and the Authoritarian State: China*, in GOVERNANCE IN A GLOBALIZING WORLD 208 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000)

China's decision to open up its economy during the 1980s and the pressures of globalization have inevitably led to or exacerbated political differentiation within China. Certain regions and groups and new industries are being privileged by engagement with the world economy, while the pillars of CCP power in the state-owned sector are being eroded by international competition. *Id.* at 215.

For an excellent, if now somewhat ironic, analysis of the problem, but from the perspective of a then apparently triumphant Marxist-Socialist perspective, can be found in Gerhard Schüssler, *Politics and Law in the Period of Progressing Towards an Advanced Socialist Society*, in LEGAL THEORY, COMPARATIVE LAW: STUDIES IN HONOUR OF PROFESSOR IMRE SZABÓ 377-398 (Zoltán Péteri ed., 1984).

¹¹² Fidel Castro has explained the views of his government on this score quite clearly:

For two decades, the Third World has been repeatedly listening to only one simplistic discourse while one single policy has prevailed. We have been told that deregulated markets, maximum privatization, and the state's withdrawal from economic activity were the infallible principles conducive to economic and social development. Along this line the developed countries—particularly the United States of America—the big transnationals benefiting from such policies, and the International Monetary Fund have designed in the last two decades the world economic order most hostile to our countries' progress and the least sustainable in terms of the preservation of society and the environment.

Fidel Castro Ruz, Speech at the Opening Session of the South Summit (Apr. 12, 2000), available at <http://www.socialistaction.org/news/200005/castro.html> (last visited Sept. 27, 2004).

emerging economic order. Cuba's failure to adhere to the new orthodoxy of globalization, like the failures to conform to Moscow's Marxist orthodoxy or Rome's Catholic orthodoxy in prior ages, can mean exclusion from the global community.

Marxist-Leninist opposition to globalization assumes three principal forms. The first is theoretical: globalization in its current form is inconsistent with Marxist-Leninist theory. The second is political: based on nationalist concerns, globalization will produce an undesirable loss of sovereignty. The third, largely tied to the second, is cultural: globalization will threaten to Americanize all of its participants.¹¹³ The last two forms of resistance, of course, are not limited to Marxist-Leninist states; each is echoed by virtually every participant, willing or reluctant, in the process of globalization. It is heard no less often in Malaysia, a more developed Asian-Islamic nation,¹¹⁴ or Iran, a developed Islamic Republic,¹¹⁵ or India, a more developed Hindu state,¹¹⁶ or even France, a developed Western state supposedly at the core of modern globalization.¹¹⁷ Indeed, the anti-globalist stance, which combines political and socio-cultural anti-Americanism, forms a global, anti-global common position adopted even within the United States.¹¹⁸

¹¹³ As one author recently noted: "In much of the world the belief is that a sort of Gresham's Law prevails: 'Bad capitalism (United States-style) will drive out good capitalism' (family capitalism, bamboo capitalism, guided capitalism) that serves the social order, much as Gresham posited that bad money will drive out good." Douglas M. Branson, *Teaching Comparative Corporate Governance: The Significance of 'Soft' Law and International Institutions*, 34 GA. L. REV. 669, 687 (2000) (internal citation omitted).

¹¹⁴ See, e.g., MAHATHIR MOHAMAD & SHINTARO ISHIHARA, *THE VOICE OF ASIA* 72 (1995).

Asia has now caught up. Fortunately, the countries of Asia have not totally succumbed to western culture along the way; they have retained much of their distinctive traditions. This will, in the long run, save us from the decay befalling the West today, which has its roots, I believe, in the decline of western culture itself. *Id.*

¹¹⁵ Professor Mohammad Ali Sa'adat, head of the Iranian embassy's cultural office, has observed the inevitability of the globalization phenomenon and its potential as a force for the empowerment of Muslims:

We should accept globalization as a fact. It is difficult to say whether it is good or bad, but the modern world is moving towards globalization and the development of high technology. Taking their own high potential as a starting point, the Western countries are attempting to impose their own cultures and values. As a counterweight to this, we, the Muslim countries, should promote the development of integration and the formation of a world culture.

Charles McDaniel, *Islam and the Global Society A Religious Approach to Modernity*, 2003 B.Y.U. L. REV. 507, 515. See also Fred Halliday, *The Politics of Islamic Fundamentalism: Iran, Tunisia and the Challenge to the Secular State*, in *ISLAM, GLOBALIZATION AND POSTMODERNITY* 91 (Akbar S. Ahmed & Hastings Donnan eds., 1994).

¹¹⁶ See, e.g., Balmurli Natrajan, *Legitimizing Globalization: Culture and Its Uses*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 127 (2002).

¹¹⁷ See, e.g., Sophie Meunier, *The French Exception*, 79 FOREIGN AFF. 104 (2000) (arguing that French resistance to globalization is both anti-American and an attempt to preserve French culture).

¹¹⁸ See, e.g., NOAM CHOMSKY, *HEGEMONY OR SURVIVAL* (2003). A recent reviewer nicely summarized Professor Chomsky's stance: "For Chomsky, the world is divided into oppressor and oppressed. America is the prime oppressor, can do no right, while the sins of those categorized as oppressed

The irony that global anti-Americanism is itself directed from the United States, to some extent, seems lost on global, anti-global actors.¹¹⁹ This sort of anti-globalism, while interesting in its own right, and the parent of much academic and political writing, does not explain the unique difficulties that globalism presents to Marxist-Leninist, and to some extent, deeply Socialist or communitarian-traditionalist, states. This paper focuses on nationalist and socio-political objections to globalization only to the extent they are tied to the harmonization of Marxist-Leninist principles and the form of modern economic globalization.

II. CUBAN ENGAGEMENT: STALINISM FOR THE 21ST CENTURY

Cuba has resisted engagement. Since the collapse of the global Marxist-Socialist state network after 1989, Cuba has reluctantly permitted a limited intercourse based on tight control and containment.¹²⁰ The model embraced, however, follows a pre-1989 Eastern European model in general, and the Soviet Stalinist-statist variant of Marxist-Leninism in particular.¹²¹ The operative focus of that model is to limit change to the minimum necessary to permit an influx of capital or technology or trade. As a consequence, change is targeted only to foreign rather than domestic investment, contact between foreign capital interests and the domestic labor market is kept to a minimum, and physical segregation is attempted to the greatest extent practicable. The idea is to limit the contagion of foreign capitalist elements to the bare minimum necessary for the exploitation of foreign capital within the Marxist-Leninist state.

Cuba has followed this well-worn traditional model to a significant extent. 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.¹²² Cuban economic policy limits the economic activities of foreign corporations and joint ventures to

receive scant mention. Because he deems American foreign policy inherently violent and expansionist, he is unconcerned with the motives behind particular policies, or the ethics of particular individuals in government." Samantha Power, *The Everything Explainer*, N.Y. TIMES, Jan. 4, 2003 at 8 (reviewing NOAM CHOMSKY, *HEGEMONY OR SURVIVAL* (2003)).

¹¹⁹ Thus for example, *HEGEMONY OR SURVIVAL*, *supra* note 118, "was published in 26 countries and translated into 23 languages, finding its way onto best seller lists in the United States, Canada, Germany, India, Italy, Japan and New Zealand." Power, *supra* note 118, at 8.

¹²⁰ See, e.g., Omar Everleny Pérez Villanueva, *Cuba's Economic Reforms: An Overview*, in *PERSPECTIVES ON CUBAN ECONOMIC REFORMS*, *supra* note 22.

¹²¹ For a discussion of the importance of Stalinism in Cuba's approach to and resistance of globalization, see *infra* Part II.C.

¹²² The Cuban Constitution vests all power over foreign investment in the state, which can exploit foreign commerce and investment through a number of different organizational vehicles, including joint ventures with foreigners. See CUBAN CONST. art. 18, available at <http://www.cuba.cu/gobierno/cuba.htm> (last visited Sept. 27, 2004) ("El Estado dirige y controla el comercio exterior. La ley establece las instituciones y autoridades estatales facultadas para: crear empresas de comercio exterior; normar y regular las operaciones de exportación e importación; y determinar las personas naturales o jurídicas con capacidad legal para realizar dichas operaciones de exportación e importación y concertar convenios comerciales.").

export-oriented activities within a few small economic development zones. 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.¹²³ In other respects, Cuba retains a commercial code little different from the Spanish colonial law it inherited at the end of the nineteenth century and a primitive corporations law. And indeed, the pre-Revolutionary Commercial Code continues to serve the state as a vehicle for regulating entities involved in Cuba's insulated dealings with foreigners.¹²⁴

Cuba enacted its first foreign investment legislation in 1982. Foreigners were permitted to pursue joint ventures with state-owned enterprises, but heavy government regulation and restraints limited foreign investment.¹²⁵ In 1985, the government allowed a small portion of the economy to decentralize. Joint ventures, independent corporations, self-financed state organizations, and foreign firms emerged and operated under market economy conditions.¹²⁶

After the collapse of the Soviet Union, Cuba entered an economic crisis. Cuba adopted a program known as "special period in peacetime" to manage the economic crisis, reduce and distribute social costs, adapt the economic system to reality, and build bases for future economic development. During this period, Cuba aimed to reduce levels of consumption, prioritize food production, develop tourism, biotechnology, and the pharmaceuticals industry, and also rationalize external economic relations. These policies opened the economy to external influences including foreign investment, trade, and tourism.¹²⁷

In 1992, the government amended the Constitution and removed important restraints of foreign investment. Law 50 allowed foreign ownership of up to forty-nine percent of enterprise shares, provided a total exemption of taxes on

¹²³ For example, the special economic zones are defined as parts of the national territory devoted to the designated function and otherwise unpopulated. See Decreto-Ley No. 165 (de Zonas Francas y Parques Industriales), available at <http://www.cuba.cu/negocios/DL165E.htm> (last visited Sept. 27, 2004) ("Zona Franca: un espacio dentro del territorio nacional, debidamente delimitado, sin población residente, de libre importación y exportación de bienes, desvinculado de la demarcación aduanera, en el que se realizan actividades industriales, comerciales, agropecuarias, tecnológicas y de servicios, con aplicación de un régimen especial. Parque Industrial: un espacio dentro del territorio nacional, con características análogas a las de la zona franca, pero en el que las actividades a desarrollar son predominantemente industriales y de prestación de servicios que sirven de soporte a estas.").

¹²⁴ As Agustín de Goytisolo recently remarked: "The great majority of the provisions of [the Cuban] commercial law, as amended through 1959, has continued to be in force through date, having been expressly declared suppletorily applicable to joint ventures with foreign investors by Law-Decree 50 of September 15, 1982." Agustín de Goytisolo, *On the Continued Good Standing of Pre-Castro Legal Entities: ubi lex non distinguit, . . . nec nos distinguere debemus*, 6 CUBA IN TRANSITION 502, 508 (1996) (proceedings of the Fifth Annual Meeting of the Association for the Study of the Cuban Economy (ASCE), held at University of Miami, Miami, Florida, on August 8-10, 1996), available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba6/59Goytisolo.fm.pdf> (last visited Sept. 27, 2004).

¹²⁵ THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA, *supra* note 9, at 106.

¹²⁶ *Id.*

¹²⁷ Pérez Villanueva, *supra* note 120, at 24-25.

gross personal income, and allowed the transfer of real estate and businesses.¹²⁸ The amendments allowed foreign investors to participate in joint ventures, production agreements, and joint accounts. The government also negotiated debt-for-equity schemes with foreign investors.¹²⁹

There was a suggestion that foreign investment increased after passage of Law 50, especially in the sectors of tourism, mining, oil exploration, construction, and agro-industry.¹³⁰ Foreign investment was to become a key part of the Cuban economy. Foreign investors were permitted to participate in joint ventures or in contractual associations. The new regulations were said to provide foreign investors with economic benefits including autonomy, financial provisions, taxes, fiscal incentives, investment protection, and special incentives.¹³¹

In 1995, Cuba expanded foreign investment further with the enactment of Foreign Law No. 77 (Law 77). Law 77 replaced Law 50, and although Law 77 retains many of the same restrictions on foreign investment as Law 50, it is still an improvement.¹³² Law 77 "permits foreign investment [in the following areas:] light industry, heavy industry, textiles, agriculture, tourism, real estate, telecommunications and import-export."¹³³

Under Law 77, the Ministry of Foreign Investment and Economic Cooperation (MINVEC) reviews foreign applications on a case-by-case basis.¹³⁴ Joint ventures must still use Cuban-supplied labor, but can apply for an exemption to this rule. Law 77 expressly guarantees that foreign-owned property will not be expropriated without compensation.¹³⁵ Law 77 moves Cuba closer to internationally accepted standards by allowing another form of enterprise, the "enterprises with wholly foreign capital."¹³⁶ Foreign investors can now register a foreign-owned corporation or subsidiary with the Chamber of Commerce.¹³⁷

Amendments to foreign investment law in 1995 allowed 100% foreign

¹²⁸ THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA, *supra* note 9, at 106.

¹²⁹ *Id.*

¹³⁰ *Id.* at 106-7.

¹³¹ Pérez Villanueva, *supra* note 120, at 25-30.

¹³² THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA, *supra* note 9, at 106.

¹³³ CUBAFIRST.COM, available at <http://www.cubafirst.com/index.asp> (last visited Sept. 27, 2004).

¹³⁴ See, e.g., *Como Hacer Negocios en Cuba*, available at <http://www.cubafirst.com/spanish/como.asp> (last visited Sept. 27, 2004).

¹³⁵ For Law 77, see, e.g., *Ley de inversion extranjera: Ley No. 77, del 5 de septiembre de 1995, dictada por la Asamblea Nacionnal del Poder Popular*, available at <http://www.cubafirst.com/spanish/extranjera.asp> (last visited Sept. 27, 2004).

¹³⁶ See *id.*

¹³⁷ THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA, *supra* note 9, at 106; CUBAFIRST.COM *supra* note 133.

ownership of certain property and enterprises. However, the new foreign investment law neither changes the foreign investment environment nor alters the government institutions that regulate foreign investment. Foreign entities face high income taxes and regulatory restraint on the places where each may invest. In addition, foreign investors have little power to select employees; the government provides employees to the entity. Cuba retains state control of enterprises through these measures and capitalizes on unemployment.¹³⁸

Cuba introduced partial reforms in four markets: agricultural or farmers markets, artisan markets, self-employment markets, and prostitution services markets.¹³⁹ Agricultural reforms included the allowance of farmers markets where farmers could sell excess goods at market prices. Cuba created agricultural collectives known as Basic Units of Cooperative Agricultural Production (UBPC). The collectives are required to follow state-set production models and to sell their production to the state at state-fixed prices. UBPC farmers had conflicting roles because they acted as workers, managers, and owners of the farms. In addition to the formation of collectives, the government distributed land to individual farmers. Private farmers had autonomy to produce and sell goods of their choice at market prices. Private farmers compete with UBPCs.¹⁴⁰ In 1994, Cuba allowed for the creation of agricultural markets where private farmers could legally sell their produce. These markets motivated the cultivation of available land, improved performance, and increased the diversity of food production.¹⁴¹

Reforms allowed artisans to set up markets, although these markets were heavily regulated by the state and taxed artisans for the space allocated to them.¹⁴² Reforms in self-employment markets allowed people to open restaurants in their homes. The scope of self-employment was severely defined and the regulation of self-employment was heavy. Prostitution rose during the early nineties, but Castro denounced it in 1995, and it is now heavily regulated by the government.¹⁴³

Further reforms included the legalization of possession of foreign currency and reorganization of the state administration. The government also attempted to balance the budget deficit and reduce cash.¹⁴⁴ Legalization of the holding of foreign currency strengthened the dual economic system and exaggerated the differences between citizens with and without access to foreign currencies. Cuba

¹³⁸ See Luis Locay, *Toward a Market Economy or Tinkering with Socialism?*, in PERSPECTIVES ON CUBAN ECONOMIC REFORMS, *supra* note 22, at 91-92.

¹³⁹ See Roger R. Betancourt, *A New Institutional Economics Perspective on Cuba's Reforms*, in PERSPECTIVES ON CUBAN ECONOMIC REFORMS, *supra* note 22, at 157-60.

¹⁴⁰ See Pérez Villanueva, *supra* note 120, at 38-41.

¹⁴¹ See Pérez Villanueva, *supra* note 120, at 41-43.

¹⁴² See Betancourt, *supra* note 139, at 157-60.

¹⁴³ *Id.*

¹⁴⁴ See Pérez Villanueva, *supra* note 120, at 34-35; Locay, *supra* note 138, at 81-82.

planned to eliminate convertible currency shortages by cashing in on the foreign currency in possession of private citizens. A foreign currency market emerged from the proposals and domestic inflation rose. Cuba set high prices for goods purchased with foreign currency.¹⁴⁵

In 1994, the government passed legislation that reorganized the state administration. Laws decreased the number of state agencies, established social discipline, and provided for punishment of crimes of social significance. The government introduced self-financing schemes for business enterprises. In 1993, the government identified reasons for the financial crisis, including a large budget deficit, excess money in circulation, strong inflationary pressures in the non-state markets, and strong depreciation of the domestic currency. Despite the budget deficit, the government continued to run social programs. However, by 1994, the government attempted to reduce the budget deficit by increasing government revenues, reducing expenditures, and improving financial discipline. Government expenditures for unsuccessful enterprises were decreased. In order to reduce the deflation of domestic currency, the government cut salaries of state workers, adjusted fees for nonessential services, and reduced money to education, health, culture, sports, water, and sewage services.¹⁴⁶

Despite the reforms, or perhaps because of them, the Cuban foreign investment law has been criticized outside of Cuba. The most significant criticism is that the system is highly inefficient. Individual authorization is required for every foreign entity.¹⁴⁷ The areas set aside for investment 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.¹⁴⁸ Moreover, the underlying law of contract through which business and investment relationships must be effectuated within Cuba remains, by global standards, primitive.¹⁴⁹ Yet another source of criticism focuses on the tight control of the labor market for foreign or mixed entities.¹⁵⁰ The foreign investment law essentially creates a state monopoly on labor. All labor is contracted through a state entity. No direct negotiation with labor is possible. As

¹⁴⁵ See Pérez Villanueva, *supra* note 120, at 36-37.

¹⁴⁶ *Id.* at 43-44.

¹⁴⁷ The multi-level approval process permits the government to renegotiate the terms of the investment at several points between the time the proposal is made and the time it is finally approved. See, e.g., TODO SOBRE CUBA, VINCULOS COMERCIALES CON FIRMAS EXTRANJERAS, available at <http://www.cubafirst.com/spanish/vinculos.asp> (last visited Sept. 27, 2004).

¹⁴⁸ See, e.g., TODO SOBRE CUBA, ZONAS FRANCAS Y PARQUES INDUSTRIALES, available at <http://www.cubafirst.com/spanish/zonas.asp> (last visited Sept. 27, 2004).

¹⁴⁹ See *infra* notes 158-160. But the Cubans take a different view of their brush with foreign investment. "Las transformaciones económicas en Cuba han alterado las antiguas estructuras creando nuevas reglas. En particular, se destaca la gradual evolución de la economía desde un sistema de planificación material, que amparaba la producción, hacia un sistema financiero que prioriza la eficiencia económica." CUBAFIRST, UNA NUEVA FORMA PARA DESCUBRIR CUBA, available at <http://www.cubafirst.com/spanish/index.asp> (last visited Sept. 27, 2004).

¹⁵⁰ See NGO MIGUERES, DEPORTO BELTRAN & LEGORRETA, GUIA BASICA DE NEGOCIOS CON CUBA 22-23 (1999-2003).

a result, the assumption is that labor costs are greater than they might otherwise be.¹⁵¹ Of course, the Cuban government would argue that the imperatives of Marxist-Leninist theory compel this sort of arrangement.¹⁵² On the other hand, there is a real disconnect—the wage labor market facing foreign investment entities, in the form of the state's monopoly control of local labor, is very different from the internal wage labor market, that is, the market for labor within Cuba, that, again, is wholly controlled by the state. As a result, the Cuban government stands to profit from the hiring of labor in two respects: first with respect to taxes and fees charged as part of wages to be paid to labor, and second, with respect to the difference between what the government charges foreign firms for Cuban labor and the amounts actually paid. In addition to high labor costs, Cuban investor firms also face fairly high income, labor, utility, and other taxes.¹⁵³ While there is nothing intrinsically wrong with high tax rates, the rates, to the extent they raise the cost of investment and reduce the return for engaging in what remains a risky venture, tend to have a negative impact on rates of investment.

Last, but certainly not least, the foreign investment law suffers from a confidence gap. The Cuban government retains almost unlimited discretion to terminate joint ventures.¹⁵⁴ This last criticism serves as a particular expression of a more generalized criticism: the foreign investment law speaks to changes that are only skin deep. As long as the government continues, in form, effect, and patterns of governance, unchanged, and as long as the investment environment also shows no real change, then the foreign investment law will have much more value as propaganda than as a viable means of raising investment.¹⁵⁵

As is appropriate for a political community founded on Stalinist principles, Cuban corporate and business law remains at a very primitive stage of development. There is a *de jure* corporate law in Cuba. The Marxist-Leninist foundation of post-Revolutionary Cuba has, however, reduced corporate law to a neglected backwater. Cuban corporate law, as a formal matter, remains firmly anchored in the nineteenth century—the Spanish Commercial Code of 1885, made applicable to Cuba by Royal Decree of 1885, effective 1886,¹⁵⁶ and

¹⁵¹ Even if the aggregate charge by the Cuban intermediary form is no greater than the aggregate costs of labor were individuals hired directly, costs rise because the Cuban government demands that all payments to the labor supplying entity be made in foreign currency. Individuals are then paid in Cuban pesos by the Cuban state entity supplying labor. *See id.* at 22.

¹⁵² *See infra* Part IV.C.ii.

¹⁵³ For a summary of the taxes applicable to foreign investments, see, e.g., NGOMIGUERES, *supra* note 150, at 31-32.

¹⁵⁴ *See* Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C.J. INT'L L. & COM. REG. 511, 528 (1996).

¹⁵⁵ And indeed, the Cuban government has expended considerable effort to promote its foreign investment regime on the internet—for the eyes of foreigners only.

¹⁵⁶ *See* Dorporto Betrán & Legorreta, GUÍA BÁSICA DE NEGOCIOS CON CUBA 39 (2003); THE LAWS AND LEGAL SYSTEM OF A FREE MARKET CUBA, *supra* note 9, at 106.

amended from time to time. Beyond the minimum necessary to effect its foreign investment program, the state has attempted to conform wholeheartedly to its Marxist-Leninist economic and political ordering. The Constitution declares as unalterable the principles of socialist political and economic organization. Ownership of the means of production is vested in the state. The Código Civil conflates economic, social, and political organization. Corporations are merely a particular variation of a form of organization of which the state is the supreme manifestation.¹⁵⁷ The articles of incorporation of the highest form of collective organization—the Cuban state—are the Constitution of the Republic and the laws created thereunder. And the Cuban Communist Party constitutes the highest directing force of the direction of this and all other organizations.¹⁵⁸

The Commercial Code permits the formation of corporations in a variety of forms common to Latin American and Western European civil law countries—*compañías colectivas*, *compañías en comandita*, *compañías anónimas*, and *sociedades de responsabilidad limitada*.¹⁵⁹ However, in post-Revolutionary Cuba, ownership and control of these autonomous economic collectives is prohibited to individual Cubans and reserved to the state.¹⁶⁰ Like other Stalinist states, Cuba uses the form of autonomous economic collective as a handy means of dealing with foreigners, as the medium through which the State could deal with the capitalist exterior.¹⁶¹ *Sociedades Mercantiles* are state-owned enterprises; Cuban corporations wholly owned by the state and created by registration in the Commercial Register (*Registro Mercantil*) after authorization for formation is approved by the *Ministerio de Comercio Exterior* (MINCEX) and the *Comité Ejecutivo del Consejo de Ministros*.¹⁶² Since the passage of Ley No. 77 (Foreign Investment) the state has permitted the creation of *Sociedades Mixtas*, nominal

¹⁵⁷ Código Civil, art. 39.1; Decreto Ley 59.

¹⁵⁸ CUBAN CONST. art. V, *supra* note 122.

¹⁵⁹ For a nice general summary and description of the forms of corporate organization permitted in Cuba, see Antonio R. Zamora, *Cuba's Business Enterprises: How Business is Conducted on the Island*, 15 FLA. J. INT'L L. 345, 348-58 (2003).

¹⁶⁰ See Betrán & Legorreta, *supra* note 156, at 40.

¹⁶¹ See Ministerio del Comercio Exterior Resolución No. 260/99, Reglamento de constitución de sociedades mercantiles cubanas, available at <http://www.contadoronline.cubaindustria.cu/Legislacion/Creaci%20Empresa/RES-MINCEX-260-1999.htm> (last visited Sept. 27, 2004).

Resultará de aplicación lo dispuesto mediante la presente Resolución, a las solicitudes de constitución de sociedades mercantiles cubanas cuya finalidad sea: a) La realización de actividades productivas y/o de comercialización de mercancías y servicios. b) La creación de asociaciones económicas internacionales, en las que la sociedad mercantil figure como socio o como parte, según se trate de empresas mixtas o contratos de asociación económica internacional, respectivamente, en cuyo caso, y a los efectos de lo que por la presente se regula, en lo adelante se denominarán 'sociedades instrumentals.'

Id. at Resolved Clause, Segundo.

¹⁶² See *id.* *Sociedades mercantiles* are approved only if required and operation directly by the state is less efficient. See *id.* art. II(3) ("En la fundamentación para la constitución y existencia se observarán los siguientes principios: a) Que sus operaciones y actividades no puedan ser realizadas por una entidad estatal con igual eficiencia y a un costo no mayor").

share corporations in which foreigners may own a minority stake, with the state owning the remainder. In either case, any corporation formed in Cuba remains a creature of the state and ultimately an instrument of state policy.

The same restrictions, of course, would not apply to foreign corporations. As instrumentalities of foreign powers or their citizens, entities with legal personality abroad are recognized by and permitted to operate in Cuba. But as agents of foreign powers, as collectives not a part of the Cuban collective, these foreign entities must be closely supervised and controlled. For example, foreign corporations may establish branches in Cuba after review and approval by the state.¹⁶³ Foreign subsidiaries appropriately registered with Cuban authorities¹⁶⁴ may engage in economic activity within Cuba. Foreign entities may also partner with the Cuban state through state enterprises created or operated for that purpose. But foreign enterprises are quarantined. They have no direct access to the labor market; they have no access to the product markets. All interactions with Cuba must be sieved through the state. To ease the process of this sort of interaction, an artifice is created in form familiar to global foreigners—the state appears in the form of Cuban enterprises or other state entities with authority to deal with the foreigner. The proletariat thereby avoids pollution.

The norms of state-centered containment and regulation underlie, as well, the Cuban government's latest effort to reform economic activity. Law 187's *Perfeccionamiento Empresarial* focuses on the creation of systems of somewhat more independent state-run enterprises modeled on something like a corporate form.¹⁶⁵ Law 187 provides the government with authority to review optimization plans proposed by state run enterprises in accordance with a set of guidelines.¹⁶⁶ Following the success of similar programs in those economic sectors run by the Cuban military, the government sought to generalize the efficiency model of military enterprises.¹⁶⁷ The purpose of optimization is to make state-owned enterprises more efficient and less dependent on government subsidy. For that purpose, managers are given more authority to make decisions, and the enterprise is expected to conform to more rigorous management.¹⁶⁸ While the provision grants enterprise managers more authority, it does not divest the state of its ownership and control of the enterprise. The purpose is to reorganize the basis of state economic activity in corporate form, rather than to divest control to

¹⁶³ Reglamento del Registro Nacional de Sucursales y Agentes de Sociedades Mercantiles Extranjeras, Decreto No. 206 (1996) (Comité Ejecutivo del Consejo de Ministros).

¹⁶⁴ Registration is effected through the *Cámara de Comercio*. The registration process is set forth in Decreto 206, *id.* art. 10. Registration terminates after five years. *Id.*

¹⁶⁵ For an account of this provision from the perspective of its potential as a basis for privatization in the event of a political transition on the Island, see Matias F. Travieso-Diaz, *Cuba's Perfeccionamiento Empresarial Law: A Step Toward Privatization?*, 23 U. PA. J. INT'L ECON. L. 119 (2002) [hereinafter *Cuba's Perfeccionamiento Law*]. Decree-Law 187 was adopted on August 25, 1998. *See id.* at 119.

¹⁶⁶ The guidelines can be found at <http://www.nuevaempresa.cu/bases%20i.htm>.

¹⁶⁷ *See Cuba's Perfeccionamiento Law*, *supra* note 165, at 149-51.

¹⁶⁸ *See* Fidel Vascos Gonzalez, *Upgrading State Enterprises*, 59 CUBAN REV. 5 (2000), available at http://www.globalreflexion.org/cubanrev/CR59/en/CR_05.htm (last visited Sept. 27, 2004).

autonomous actors.¹⁶⁹ Some observers, however, see in provisions such as this a means to eventually effectuate the privatization of the Cuban economy.¹⁷⁰

To some extent, Cuba's reforms have been skin deep. Modernization has occurred at the periphery, such as in special economic zones, special entities created to deal with foreigners and their capital, special entities to provide labor, and constant vigilance, application, approval, review, and payment. Always payment.¹⁷¹ One of the most significant consequences of this form of engagement is that it builds in tremendous transaction costs and limitations. The transaction costs come in the way of regulation and fees. All states regulate and charge for the privilege of transacting business. The character of that regulation tends to affect the nature, quantity, and quality of economic activity. Business is very sensitive to the regulatory environment. In Cuba's case, the transaction costs tend to increase the cost of entry.¹⁷² Transaction costs also increase the cost of operation.¹⁷³ The limitations built into the system are both external and internal. More importantly, the current system does not speak at all to internal development. Cuban citizens are restricted in their ability to participate in the market. The State stands literally on the shores of the Republic, between foreign business, with respect to which the state apparatus reserves a monopoly of the right to exploit, and the Cuban community.

Cuban corporate and foreign investment law is full of irony. Cuba's reforms have resulted in little actual foreign investment and even less penetration of the international market culture into the domestic Cuban market. Investment flows where markets are largest and transaction costs are smallest. Cuba presents a relatively small and poor market. Though essentially unexploited, transaction costs are high and the rate of wealth creation low. Cuba's state-owned enterprises are not even efficiently run monopolies. And there lies the great irony. Though the current government of Cuba has been able to effectively exploit the American blockade,¹⁷⁴ to much greater positive effect than usually

¹⁶⁹ This follows the Chinese model for state owned enterprises. See Xinqiang Sun, *Forward: Reform of China's State-Owned Enterprises: A Legal Perspective*, 20 ST. MARY'S L. J. 19, 28 (1999).

¹⁷⁰ See *Cuba's Perfeccionamiento Law*, *supra* note 165, at 149-51.

¹⁷¹ All applications and interactions with the state, even registration for potential activity, requires the payment of fees. See, e.g., TODO SOBRE CUBA, TARIFA DE HONORARIOS, available at <http://www.cubafirst.com/spanish/tarifas.asp> (last visited Sept. 27, 2004).

¹⁷² The registration and negotiation requirements serve as important examples.

¹⁷³ This is especially evident with respect to the hiring of labor and the costs of taxes and other fees.

¹⁷⁴ The American blockade effectively blocks most transactions with or travel to Cuba without the permission of the federal government. Among the laws which facilitate this embargo are the: (1) Trading With the Enemy Act of 1917, 50 U.S.C. §§ 5 *et seq.*, under which the President may limit trade with an enemy nation during times of war or peace, and under which American presidents issue annual reports on the Cuban state of emergency; (2) Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151 *et seq.*, pursuant to which aid is provided to nations other than Cuba, which is expressly excluded from its provision as long as Cuba retains a Marxist-Leninist government; (3) Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001 *et seq.*, under which foreign aid is promised to Cuba once the Marxist-Leninist government is removed; (4) and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995, 22 U.S.C. §§ 6021-6091, which discourages third country investment in Cuba, encourages

supposed,¹⁷⁵ the most effective blockade of Cuba has not been crafted by the United States.¹⁷⁶ Instead, Cuba has constructed for itself a most effective blockage of direct foreign commerce that, in scope and intensity, mimics the American blockade. The greatest value of the American blockade has not been to reduce the nation to poverty, but to provide a rationale to resist globalization in the form of self-imposed economic isolation, and to shift the blame for the effects of this isolation to the United States. In effect, this preserves the internal status quo. It is much easier to resist change in the face of the blockade than it would be in its absence.¹⁷⁷

Cuba's engagement has taken the form of the classic or standard issue Stalinist response to a resurgent free market globalism; it has focused on a tightly controlled and bureaucratically encumbered system of highly quarantined foreign investment incentives. From within their ghettos, from their 1930s-style Chinese foreign quarter, the Cuban state apparatus services these foreign investors for cash, commodities, or technology. Cuba has become the monopoly employer within the territory of the Republic, bartering the Cuban state's means of production, and principally its labor, for the benefit of foreign investors and the state.

But the picture is not entirely bleak. Engaging with foreign economic entities and organizing collective activities within Cuba as formal economic collectives has significant consequences for the pattern of economic activities with even a Marxist-Leninist state apparatus. Some elements of the Cuban managerial classes will be exposed to the global language of commerce and develop an understanding of the operation of the basic forms of economic collectives, through which most of the world engages in economic (and other) activities. The state also will be better prepared to begin to deal with the outside world using the forms and vocabulary now generally established as the means for commercial intercourse. And lastly, Cuba will have taken the first steps to organize itself in a way that the rest of the world will find tolerable enough to

democratic reform in Cuba, proposes an assistance plan if transition to market economy occurs, protects the property rights of U.S. nationals, and codifies all prior federal regulations involving Cuba. Under regulations implementing the Trading With the Enemy Act, all unlicensed financial and commercial transactions by Americans with Cuba or Cuban citizens is prohibited, Cuban assets of Cuba in the United States are frozen, remittances to Cuban citizens limited, and travel to and expenditure of money in Cuba is prohibited.

¹⁷⁵ One gets a taste of the value of the blockade in Cuba's official and unofficial Internet web sites, through which Cuba is effectively able to exploit the American policy for its own political gain. See, e.g., CUBA CONTRA EL BLOQUEO: EL SITIO DEL PUEBLO CUBANO (2003), available at <http://www.cubavsbloqueo.cu/> (last visited Sept. 27, 2004).

¹⁷⁶ There is a mountain of writing on the American economic blockade of Cuba. Most of it is politically pointed. For a recent sampling, see, e.g., Daniel P. Erikson, *The New Cuba Divide*, in *THE NATIONAL INTEREST* 65 (Spring 2002) (featuring a discussion of then current politics of the Cuban embargo from the perspective of the American actors). The issues of the blockade and its effects, value, legality, or otherwise, are outside the scope of this article.

¹⁷⁷ See discussion *supra* note 12. The American popular press has sometimes expressed this view as well—though to little effect within the American domestic political environment. See, e.g., Nicholas D. Kristof, *Our Man in Havana*, N.Y. TIMES, Nov. 8, 2003, at A1.

refrain from more closely pressing for social and political reform. These last steps, of course, were supposed to be the great lesson of China. In the sections that follow, I will suggest that the use of China as the great Marxist-Leninist exemplar, while useful (and perhaps the most useful for Cuba at this point), also has its own shortcomings and presents considerable risk for Cuba as it tries to chart its own course before the Americans chart it for them.

III. CHINA'S ENGAGEMENT: MAOIST FLEXIBILITY

From 1949 to 1978, the People's Republic of China (PRC) operated a command economy. All property and enterprises were state owned. The state promulgated five-year plans, similar to those of the Soviet Union, to regulate economic activity. Agricultural production was also run through a system of collectives. The collectives produced in accordance with the five-year plans, and sold goods to the state at fixed prices. The state then redistributed the income. Both communes and state-owned enterprises combined economic and social welfare functions. Both were subject to complex webs of government and Communist Party regulations, but neither had clearly established lines of authority. Managers of collectives and state-owned enterprises were responsible to bureaucrats and party officials at a variety of levels. As a principal local site for the integration of law, politics, and economics, communes and state-owned enterprises were deeply involved in the regulation of the lives of their workers. Because they were arms of the state, it was logical, perhaps, to fuse within the operations of state-owned enterprises and communes the duties of employers and local government. State-owned enterprises would sometimes provide employee housing, and personal decisions of the employee, such as marriage and relocation, would be discussed with management.¹⁷⁸ State enterprises, thus, were relatively well-integrated into the governance structure of the state.

Since the 1990s, China has sought a controlled engagement with economic globalization. China has sought to embrace the global economic system while preserving its fundamental attachment to a Maoist version of Marxist-Leninist ideology: Marxism with a Chinese face.¹⁷⁹ China's engagement has included a significant liberalization of its enterprise law to permit, at least to a limited extent, the establishment of corporations in arguably modern form. These entities appear to be given authority to operate independent of the state. This liberalization extends both to China's internal and export markets. However, China has asserted a certain amount of control of corporate entities by retaining ownership of corporate interests and retaining something of an amorphous right

¹⁷⁸ For a discussion, see, e.g., DANIEL C. K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 20-26 (2003).

¹⁷⁹ "The Chinese are, to steal a phrase from a famed Chinese leader's characterization of his nation's adoption of Marxism, busily engaged in putting a "Chinese face" upon what they find of interest in the law of other peoples." William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 955 (1986). See also, Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143, 208 (1991).

to corporate property. Significantly, China emphasizes practices designed to limit the ability of corporations to act as an entity independent of the people with an interest in the enterprise, the most notable of which is the obligation of corporations to name a person who bears responsibility for corporate conduct. China permits private share ownership and trading in corporate shares, but retains operating control of most enterprises. The country retains the right to intervene to some, perhaps large, extent. As a result of its reforms, some have suggested that China has seen huge economic gains. But China also has experienced the return of an economic class structure and wealth divisions between mostly coastal cities and the countryside. And the pressure for further reform remains intense.

Subject to the unfettered authority of the Communist Party to direct otherwise, civil and economic rights are generally set forth in the General Principles of Civil Law (GPCL).¹⁸⁰ The purpose of the Civil Law is to "adjust property relationships and personal relationships between civil subjects with equal status, that is, between citizens, between legal persons and between citizens and legal persons."¹⁸¹ Property rights are defined in Chapter 5 of the GPCL.¹⁸² This section recognizes three forms of property ownership: state property, property owned collectively by the laboring masses, and property owned by a citizen individually. The Chinese approach bends Marxist-Leninist notions of state ownership of the means of production in a crucial respect: it permits individual citizens to own the "means of production that the law allows a citizen to possess" and "other lawful property."¹⁸³ Citizens, along with the state (representing the collective), can now both engage in economic activity, subject always to the right of the state to intervene.

The Company Law 1994 (CL) formalized the new pattern of economic engagement by China with the global economy.¹⁸⁴ The CL was implemented to restructure state-owned enterprises and support private enterprises that would complement state-owned enterprises. The CL, on its face at least, conforms generally to Western (and now global) principles of corporation governance, while providing a means of retaining, as necessary, strict state control over economic development. The CL permits individuals and entities, including the state, to retain ownership, but also makes it easier for the state to oversee

¹⁸⁰ General Principles of Civil Law of the Peoples Republic of China (GPCL, Adopted Apr. 12, 1986, effective Jan. 1, 1987), available at <http://www.qis.net/chinalaw/prclaw27.htm> (last visited Sept. 27, 2004) [hereinafter GPCL]. See, e.g., CHOW, *supra* note 178, at 301.

¹⁸¹ GPCL, *supra* note 180, art. 2.

¹⁸² "Property ownership" means the owner's rights to lawfully possess, utilize, profit from and dispose of his property." GPCL, *supra* note 180, art. 71.

¹⁸³ "Article 75. A citizen's personal property shall include his lawfully-earned income, housing, savings, articles for daily use, objects art, books, reference materials, trees, livestock, as well as means of production the law permits a citizen to possess and other lawful property." GPCL, *supra* note 180, art. 75.

¹⁸⁴ The Company Law, as amended, can be accessed at http://english.mofcom.gov.cn/article/200301/20030100061274_1.xml (last visited Sept. 27, 2004).

managers based on globally recognized measures of success.¹⁸⁵ Two forms of corporations exist under the CL. Limited liability companies (LLCs) usually have between two and fifty shareholders¹⁸⁶ and a minimum capitalization between RM 100,000 and 500,000.¹⁸⁷ In LLCs, shareholders are liable for their capital contributions, and the corporation is liable for assets. Joint stock companies (JSCs) are large corporations with a minimum capitalization of ten million RMB (reniminbi). Stock can be distributed through promotion or public issuance. While shareholders of Chinese corporations enjoy a western-style protection against liability for corporate obligations, corporate managers have greater exposure to liability. These are defined, both for the entity and its legal representative, in the GPCL rather than the CL.¹⁸⁸ Under the principles of *fading dibiao ren*,¹⁸⁹ the LLC or JSC must appoint a legal representative that acts on behalf of and binds the company.¹⁹⁰ The legal representative is exposed to civil and criminal liability for acts of the corporation.¹⁹¹

The CL has not been used as a means of advancing wholesale privatization, as it has in Eastern Europe.¹⁹² Under the CL, LLCs are often wholly owned by the state and the majority of a JSC's shares are owned by the state. The CL gives broad control rights to owners. Although owners do not interfere with the day-to-day operations of the corporation, they can determine business operation policies and investment plans and approve the annual financial plan, the budget, final accounts, and the distribution of profits and dividends.¹⁹³ But the CL was

¹⁸⁵ But the State still retains the power to discipline corporations and their managers for political infractions. See, e.g., Kingsley T.W. Ong & Colin R. Baxter, *A Comparative Study of the Fundamental Elements of Chinese and English Company Law*, 48 INT'L & COMP. L. Q. 88, 118-120 (1999).

¹⁸⁶ GPCL, *supra* note 180, art. 20.

¹⁸⁷ Company Law, *supra* note 183, art. 23.

¹⁸⁸ See GPCL, *supra* note 180, arts. 41-49.

¹⁸⁹ The legal representative is usually the chairman of the board of directors. See Company Law, *supra* note 184, art. 45.

¹⁹⁰ See *supra* note 185.

¹⁹¹ GPCL, *supra* note 180, art. 49 (providing for civil and criminal penalties for corporate legal representatives under a variety of circumstances: "(1) conducting illegal operations beyond the range approved and registered by the registration authority; (2) concealing facts from the registration and tax authorities and practising fraud; (3) secretly withdrawing funds or hiding property to evade repayment of debts; (4) disposing of property without authorization after the enterprise is dissolved, disbanded or declared bankrupt; (5) failing to apply for registration and make a public announcement promptly when the enterprise undergoes a change or terminates, thus causing interested persons to suffer heavy losses; (6) engaging in other activities prohibited by law, damaging the interests of the state or the public interest.").

¹⁹² For an account of the Eastern European experience with privatization, see, e.g., RICHARD J. HUNTER, JR. & LEO V. RYAN, *FROM AUTARCHY TO MARKET: POLISH ECONOMICS AND POLITICS 1945-1995* (1998); GERHARD POHL ET AL., *WORLD BANK TECHNICAL PAPER NO. 368, PRIVATIZATION AND RESTRUCTURING IN CENTRAL AND EASTERN EUROPE: EVIDENCE AND POLICY OPTIONS* (1997), available at <http://www.worldbank.org/html/fpd/notes/123/123pohl.pdf> (last visited Sept. 27, 2004).

¹⁹³ See, e.g., Howard Gensler, *Company Formation and Securities Listing in the People's Republic of China*, 17 HOUS. INT'L L. REV. 399 (1995); Lan Cao, *Chinese Privatization: Between Plan and Market*, 63 L. & CONTEMP. PROBS. 13 (2000).

not meant to serve as a vehicle for privatization. Its primary purposes were to provide a globally recognized structure for the disciplining of state agencies operating as economic units and to provide the administrators of those units with some substantial degree of autonomy, at least by Chinese standards, without betraying the core Marxist-Leninist organizational norm of state ownership of the means of production.¹⁹⁴ Through the CL, the state maintained its ownership of the means of production, but now indirectly through share ownership. Three additional benefits followed from this arrangement: first, it became easier to deal with global commerce through this organizational trope; second, organizing economic activity in corporate form appeared to assure the rest of the world that China was ready to conform to global economic norms without requiring China to change its economic system;¹⁹⁵ third, the CL provided a means of legitimating, thus providing a basis for regulating and controlling, private economic activity that had previously constituted a sort of economic black market.

The CL applies almost exclusively to domestic economic organization. For foreigners, a different set of rules also apply, but one that uses the same vocabulary to different effect. Foreign investment enterprises (FIEs) are governed to some extent by a separate and older set of rules. The CL, enacted after the rules governing FIEs, is supposed to govern all corporations, including

¹⁹⁴ For a summary produced by the PRC Ministry of Commerce, see MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA'S ATTRACTING FOREIGN INVESTMENT POLICY (2002), available at http://search.mofcom.gov.cn/site/siteSearch_en.jsp?ac=d&no=2&p_keyword=%22direct+foreign+investment%22+and+siteid%3Denglish (last visited Sept. 27, 2004) [hereinafter ATTRACTING FOREIGN INVESTMENT POLICY]. For a nice summary, see CHOW, *supra* note 178, at 350-52.

¹⁹⁵ The obligations and requirements of state owned enterprises are nicely summarized in the Law on Industrial Enterprises Owned by the Whole People:

Article 2: An industrial enterprise owned by the whole people (hereinafter referred to as the enterprise) shall be a socialist commodity production and operation unit that shall, in accordance with law, make its own managerial decisions, take full responsibility for its profits and losses and practice independent accounting. The property of the enterprise shall be owned by the whole people, and shall be operated and managed by the enterprise with the authorization of the state in line with the principle of the separation of ownership and managerial authority. The enterprise shall enjoy the rights to possess, utilize and dispose of, according to law, the property that the state has authorized it to operate and manage. The enterprise shall obtain the status of a legal person in accordance with law and bear civil liability with the property that the state has authorized it to operate and manage. The enterprise may, in accordance with the decision of the competent department of the government, adopt contract, leasing or other forms of the system of managerial responsibility.

Article 3: The fundamental task of the enterprise shall be the development of commodity production, creation of wealth, increase of savings and satisfaction of society's growing material and cultural requirements by acting in line with state plans and market demands.

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, LAW ON INDUSTRIAL ENTERPRISES OWNED BY THE WHOLE PEOPLE (2003), available at http://english.mofcom.gov.cn/article/200303/20030300072563_1.xml (last visited Sept. 27, 2004).

FIEs operating in corporate form.¹⁹⁶ The FIE laws permit investment in any of several forms, the most popular of which are equity or contractual joint ventures and the wholly foreign-owned enterprise.¹⁹⁷ Direct foreign investment is geared to maximize the acquisition of technology, expertise, and intellectual property from foreign sources.¹⁹⁸ Since the property that China needs is controlled through amalgamations of economic power organized as corporations, the language of corporations and corporate law would seem well suited to the task.¹⁹⁹ Equally important, direct investment by foreign firms is still tightly controlled by the state and must undergo a complex multi-level approval process.²⁰⁰ As a result, China can stand on all sides of every transaction with the

¹⁹⁶ See Lutz-Christian Wolff, *The Disappearance of the Ultra-Vires Doctrine in Greater China: Harmonized Legislative Action or (Simply) an Accident of History?*, 23 NW. J. INT'L L. & BUS. 633, 640 (2003). "Until today, however, in addition to the basic rules of the P.R.C. Company Law, many special laws and regulations exist providing for diversified rules for different company-types based on the nature of the shareholders, thus creating a complicated corporate system which is rather unclear and inefficient." *Id.* at n.34.

¹⁹⁷ CHOW, *supra* note 178, at 368-409.

¹⁹⁸ See, e.g., MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, THE ENCOURAGED INDUSTRIES (2004), available at http://search.mofcom.gov.cn/site/siteSearch_en.jsp?ac=d&no=0&p_keyword=%22direct+foreign+investment%22+and+siteid%3Denglish (last visited Sept. 27, 2004) ("The items to encourage foreign direct investments mainly includes: items of agricultural new technology and agricultural comprehensive development as well as industrial projects of energy, transportation and vital raw materials; high-tech projects; export-oriented projects; projects of comprehensively utilizing resources, renewing resources and prevention and cure of environmental pollution; projects which can give play to the advantages of western and central regions.").

¹⁹⁹ See *Fostering Growth*, *supra* note 84; see also MATTHEWS, *supra* note 68, at 26 (noting that "the main protagonists preferentially recognize each other as players and downgrade their recognition of, or involvement with, other kinds of players").

²⁰⁰ It is with a certain amount of unintended irony, for example, that the Ministry of Commerce broadly outlines the procedures:

III. Management Procedures for foreign investment enterprises: (I) Establishment Procedure: According to the current rational laws and regulations, in establishing foreign investment enterprises, a term wise government approval and registration system is being carried out, In applying for establishment of China-*faeigu* joint ventures and co-operative enterprises, four steps are generally needed:

1. Submit item propositions for establishing enterprises; after the approval from relevant Departments C Project administration or technical transformation administration, investors may embark on work with item feasibility study as center;
2. Submit reports on item feasibility study. After approval, investors may negotiate and sign Laws and documents such as contracts and statutes of establishing enterprises;
3. Submit contracts and statutes of establishing enterprises; after approval from foreign trade administrations, the Approving authorities may issue approval license to foreign investment enterprises.
4. Investors may go through formalities in industrial and commercial administrations with the approval license issued by approving authorities.

The procedure of establishing foreign funded enterprises is easy, After initial item application is approved in a written form by the governmental approving authorities, relevant documents such as

global economy. The state is the owner of the economic units (state-owned corporations) that will negotiate terms of investment with, or otherwise interact in the global market with, foreign ventures. The state also regulates the nature, character, and terms of any investment or economic activity by foreign ventures within China. The symbiotic possibilities have not escaped official notice.²⁰¹

China has made great strides in conforming its system to the standards of the international global economy. With membership in the World Trade Organization comes the expectation for greater and deeper conformity as the Chinese actually absorb the formal changes within the unconscious patterns of everyday behavior.²⁰² However, Donald Clarke's recent warnings ought to be borne well in mind when considering the realities of Chinese conformity to the standards of the emerging global economic order: first, the norms of Chinese business organizations remain primarily "the study of the activity of governmental and quasi-governmental bodies in the realm of industry and commerce;" second, legal rules, to the extent they apply at all, are better conceptualized as regulatory rather than, as more commonly understood in the West, as enabling; and third, even this regulatory approach to business and commerce remains "fragmented and strongly sector-oriented."²⁰³

The Chinese model is certainly alluring. Since the 1990s, China has sought a controlled engagement with economic globalization. China has sought to embrace the global economic system while preserving its fundamental attachment to a Maoist version of Marxist-Leninist ideology: Marxism with a Chinese face.²⁰⁴ China's engagement has included a significant liberalization of its enterprise law to permit, at least to a limited extent, the establishment of corporations in arguably modern form. These entities appear to be given authority to operate independent of the state. This liberalization extends both to

formal application and company statutes may be submitted. After approval, investors may go through formalities of registration with approval license.

ATTRACTING FOREIGN INVESTMENT POLICY, *supra* note 194.

²⁰¹ See, e.g., MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, ENTERPRISES WITH FOREIGN INVESTMENT (1998), available at http://search.mofcom.gov.cn/site/siteSearch_en.jsp?ac=d&no=3&p_keyword=%22Directing+foreign+investment%22+and+siteid%3Denglish (last visited Sept. 27, 2004).

²⁰² See, e.g., Howard M. Kravitz, *China's Trade Opening: Implications for Regional Stability and U.S.-China Relations*, in THE PEOPLE'S LIBERATION ARMY AND CHINA IN TRANSITION 247 (Stephen J. Flanagan & Michael E. Marti eds., 2003).

²⁰³ DONALD C. CLARKE, HOW DO WE KNOW WHEN AN ENTERPRISE EXISTS? UNANSWERABLE QUESTIONS AND LEGAL POLYCENTRICITY IN CHINA 20-21 (SSRN Working Paper, 2003).

As a result, Chinese enterprise law is only a part of what there is to say about Chinese enterprise organization and the practical rights of various claimants to enterprise assets: investors, creditors, managers, workers, customers, tort victims, and others. Indeed, it follows . . . that legal sanction is not necessary for a Chinese enterprise to have a valid legal existence. . . . An enterprise can 'exist' if a government agency says it exists and has the capacity to make its fiat respected in part or all of the system." *Id.* at 21-22.

²⁰⁴ See *supra* note 178. See also Cheng & Rosett, *supra* note 179, at 208.

China's internal and export markets. However, China has asserted a considerable amount of indirect control of corporate entities. First, the state (or its subdivisions) retains ownership of corporate interests. The state also vests itself with a significant amount of regulatory authority from the local to the national level. Among the most troubling, from a Western perspective, is the retention of something of an amorphous right to corporate property. Significantly, China emphasizes practices designed to limit the ability of corporations to act as an entity independent of the people with an interest in the enterprise. The most noted of these practices is the obligation of corporations to name a person who bears responsibility for corporate conduct. China permits private share ownership and trading in corporate shares, but retains operating control of many critical enterprises and retains the right to intervene to some potentially significant extent. As a result of its reforms, some have suggested that China has seen huge economic gains. But China also has experienced the return of an economic class structure and wealth divisions between mostly coastal cities and the countryside. It is still difficult to distinguish between economic collectives and the state. Moreover, the pressure for further reform remains intense. Lastly, China continues to segregate and control the foreign investment that, to some extent, more closely resembles the old Soviet approach than that of the global standard.

IV. FIGHTING OLD DEMONS: THE DIFFICULTIES OF THE CHINESE MODEL FOR CUBA

It seems inevitable, then, that Cuba will have to look for a model for change, if it desires to preserve its political and social systems while engaging with the emerging global economy on the terms expected by that global community. To continue on the current course is to invite intervention; no state has yet successfully resisted global imperatives by erecting barriers. China and Japan paid a great price in the nineteenth century for following a course of isolation. Cuba faces the real prospect of recolonization if it continues on its current course. The Chinese model seems to offer a blueprint for saving what one can, or at least for buying time. The highest levels of the current Cuban government remain leery; they might not be completely unreasonable in holding this view.

The Chinese model does pose risks and create problems for Cuba. These risks and problems can be easily sorted into six categories. None of the risks poses structural problems for Cuba. Nonetheless, each may require significant adjustment of ideology or communal ways of thinking if the problems are to be overcome. Taken together, they suggest that, transformation or not, the difficulties posed by emulation may be too difficult to overcome. A Chinese style approach to globalization may not work for Cuba if: first, the Chinese model does not work at all; second, the Chinese model is incompatible with the fundamental norms of Marxist-Leninist state organization; third, the Chinese model is incompatible with the fundamental norms of Cuban Marxist-Leninist state organization; fourth, the changes are insufficient to provide critical access to global financial markets; fifth, the United States devotes itself to ensuring the

its (state-owned otherwise interactulates the nature, foreign ventures fiscal notice.²⁰¹

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failure of Cuban engagement; or sixth, Cuba is otherwise unable to take advantage of globalization because it cannot compete effectively.

A. The Chinese Model Does Not Work

It is not clear that the Chinese model has worked for China. China's reform has been more successful in the abstract than in practice. As the initial band of academic (and other) cheerleaders have begun to admit, the Chinese practice is more concerned with problems of agency within state run enterprises, which remain the bulk of Chinese economic power. As Donald Clarke has recently noted: "Corporatization, through the institution of divisible equity shares, allows non-state investors to contribute to the enterprise without, while they remain in a minority, sharing in control. The state maintains the same level of control it had before, but now over a larger pool of assets."²⁰⁵ The paradigmatic enterprise contemplated by the Chinese corporate law is not a firm formed by private investors contracting among themselves, but a corporatizing state-run enterprise.²⁰⁶ China also confronts a contradiction: the rules of the modern enterprise system have not always been used to force efficiency on independent enterprises in which the state has a large stake. Rather, they have been used to permit the state to effect public policy through its share ownership.

Moreover, China still confronts rule of law problems of significant scope. Its court system is still primitive and subject to state bullying.²⁰⁷ As Donald Clarke notes, "[f]urther reforms are hampered by internal tensions and contradictions."²⁰⁸ The fact that China's reform may be more successful in the abstract than in practice has not been an impediment for other nations to treat the reforms as if they had worked. This should be an important consideration in evaluating the success of the reforms.

B. Neither Maoism Nor Stalinism Has Overcome the Contradictions of Marxist-Leninism and the Autonomous Private Economic Collective

Neither Cuba nor China has solved the core foundational problem of economic development through independent collectives, legal entities that are not an integral part of the state apparatus controlled by the Communist party. China has ignored the issue for the most part, attempting to work around it in theory and treating corporations as traditional parts of the state apparatus in

²⁰⁵ Donald C. Clarke, *Corporate Governance in China: An Overview*, 14 CHINA ECON. REV. 494, 497 (2003).

²⁰⁶ *Id.* at 500-01.

²⁰⁷ See, e.g., Xin Chunying, *What Kind of Judicial Power Does China Need?*, 1 I. CON. 58, 61 (2003) (noting that the courts had been set up to combat sabotage and rehabilitate the economy).

²⁰⁸ *Id.* at 68. He notes tensions between strengthening judicial supervision and the resulting weakening of the judiciary; the difficulty of courts to participate in and design their own reform; the difficulty of professionalizing the courts in the face of the Marxist-Leninist administrative culture of China; and the problems of disconnect between the center, Beijing, and the realities of far off parts of the nation. *Id.* at 69-74.

practice. Cuba has yet to confront the issue, but as a matter of Cuban constitutional law, especially given the changes to the constitution in 2002 declaring the current Marxist-Leninist system irrevocable, the issue will prove to be difficult.

Marxist-Leninist ideology assumes that the "state is a product and a manifestation of the *irreconcilability* of class antagonisms. The state arises where, when and insofar as class antagonism objectively *cannot* be reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable."²⁰⁹ But like the capitalism to which it is opposed,²¹⁰ Marxist Leninism does not represent a single vision.²¹¹ There are important differences between two of the great schools of Marxist thinking that emerged after the Second World War—Maoism and Stalinism. Maoism was embraced as the governing ideology of the ruling classes in the Peoples Republic of China;²¹² Stalinism provides the foundation for Cuban political thought.²¹³ The differences between these ideological cousins may explain both the shared suspicion of free market globalization, on the one hand, the very different paths taken by China and Cuba in response to globalization, on the other hand. This section first addresses general Marxist principles that underlie both systems, and then turns to the Maoist and Stalinist variations. The section ends with an attempt to center these ideological differences within the framework of modern economic globalization.

The logic of resistance is specifically acute with respect to efforts to

²⁰⁹ VLADIMIR I. LENIN, *THE STATE AND REVOLUTION* 7 (1970).

According to Marx, the state could neither arise nor maintain itself if it were possible to reconcile classes. . . . According to Marx, the state is an organ of class domination, an organ of oppression of one class by another; its aim is the creation of "order" which legalizes and perpetuates this oppression by moderating the conflict between classes. But, in the opinion of the petty-bourgeois politicians, order means reconciliation of classes, and not oppression of one class by another. *Id.* at 9.

²¹⁰ On the differences between systems of free enterprise organization, see Iwai, *supra* note 79.

²¹¹ On the variations within Marxism, variations that have plagued Marxism almost from its beginnings in the nineteenth century, compare HELMUT MARTIN, *CULT AND CANON: THE ORIGINS AND DEVELOPMENT OF STATE MAOISM* (1982) with TUCKER, *supra* note 11, and ALFRED B. EVANS, JR., *SOVIET MARXISM-LLENINISM: THE DECLINE OF AN IDEOLOGY* (1993). For more information, see the essays in *THE TRANSITION TO SOCIALISM IN CHINA* (Mark Selden & Victor Lippit eds., 1976).

²¹² For more information on the evolution of Chinese Marxism, see, e.g., MAURICE MEISNER, *THE DENG XIAOPING ERA: AN INQUIRY INTO THE FATE OF CHINESE SOCIALISM, 1978-1994* (1996).

²¹³ But Fidel Castro has dismissed the connection between Stalinism and the Marxist-Leninism of Cuba, if only in a glib way. "Castro has never hesitated to discuss Stalin, whom he credits with industrializing the USSR, thus fulfilling a socialist goal, and for helping defeat the Nazis in World War II. But he reproaches Stalin for abusing his power and developing a harmful cult of personality. He has long maintained that Stalinism has never existed in Cuba, 'unless I am considered . . . a Stalin, and in that case I would say that all my victims in our country are in excellent health.'" SHELDON B. LISS, *FIDEL! CASTRO'S POLITICAL AND SOCIAL THOUGHT* 89 (1994). It might be more accurate to suggest that Castro is a Leninist, as was, in his own way, Stalin. See generally JOHN H. KAUTSKY, *MARXISM AND LENINISM, NOT MARXISM-LLENINISM: AN ESSAY ON THE SOCIOLOGY OF KNOWLEDGE* (1994).

modernize corporate or enterprise law. Corporations, particularly, pose great theoretical and practical problems for Cuba. Corporations contain within them all of the difficulties and contradictions of the state within Marxist-Leninist ideology. Just as the state is a problematic institution, a transitional institution on the road to a classless and non-exploitative society, so a corporation must be viewed both as a manifestation of inequality, exploitation, necessity, and transience to be used until no longer needed. Corporations constitute property in the hands of their owners. But corporations also constitute collective persons, and in that respect mirror the state. As juridical persons, as great collectives of people and resources, operating in accordance with their own constitution and serving the needs of their constituents, corporations operate as institutions with social, political, and economic power. Marxist-Socialist states are grounded on the fundamental notion of state monopoly over the social, political, and economic organization. Collectives of people or 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 organization 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.²¹⁴

Consequently, corporations, especially corporations operating independent of the state, form the core of a *Kompetenz-Kompetenz* problem for the Marxist-Leninist state. *Kompetenz-Kompetenz*, usually understood as a fundamental problem of public (and in U.S. terms, constitutional) law, can be viewed as the litmus test for the existence of a nation-state. It refers to the power of a governance unit to exercise all power necessary to deal with issues of concern to it, including the issue of its own competence.²¹⁵ It embodies the ultimate power of the governmental institution to describe itself, as well as its limits, and to

²¹⁴ See RENE DAVID & JOHN E. C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1968). The Soviet concept of ownership of property was based on Marxist doctrine that taught that how property is appropriated is an essential concept in society. The Soviet law of property contained rules on appropriation of things, transfer of rights of ownership, administration, management, and legal operation. There were two types of property recognized under Soviet law: means of production and goods for consumption. There were three types of ownership recognized under Soviet law: personal ownership, co-operative ownership, and socialist ownership. There is no right to property under Soviet law. Property that was personally owned could only be used for the satisfaction of the personal needs of the individual and for the purpose for which the property was intended. It could not be used in order to draw profit or for speculative ends. Personal property was usable, transferable, and bequestable. Property that was co-operatively owned was leased by the state with a perpetual right of use and enjoyment. The retainers of co-operative property were obligated to use or exploit the property in a defined way, make payments to the state, and organize and manage the property under rules provided for by law. Property that was under socialist ownership was divided into fixed capital, which could be exploited, and circulating capital, which could be disposed of. Central planning defined whom and by what means socialist property would be exploited. The holder of the property was considered the state or the people who comprised the state. *Id.* at 213-17.

²¹⁵ See, e.g., TREVOR C. HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION 152-53 (1999).

enforce that description.²¹⁶ In systems in which economics and politics are fused, like Marxist-Leninist systems, the problems of state definition and authority, of sovereignty, can implicate economic as well as political organization. To solve the problem of the independent corporation within a Marxist-Leninist system is to solve the problem of a seamless engagement between those states and the current global economic order.

Understood in this way, it is easier to understand both the reluctance of the Cuban state to permit corporate privatization of economic activity and Cuba's assertions that foreign corporate enterprises act like states. With respect to the former point, Cuba could not remain true to its Stalinist principles and permit the creation of entities or juridical persons with independent control over fundamental attributes of state power. The Cuban state could create juridical persons that are integral parts of the state apparatus. The Cuban government could not facilitate the creation of internally operating juridical persons independent of that apparatus without betraying a basic norm of internal economic organization.²¹⁷ With respect to the later point, when Fidel Castro was "[a]sked about the U.S. proposal to remove trade barriers within North America and South America, Castro said, 'It would be like putting the chicken-eating fox in the cage with the chickens.' . . . U.S. companies would 'annex' Latin America and 'impose their culture on the world: drugs, violence, sex and pornography,' Castro said."²¹⁸

C. Cuban Stalinism is Incompatible with the Maoism Critical to the Chinese Model

Cuba's Stalinism acts an impediment to some types of change; even mere changes in appearance that have been possible under Chinese Maoism may be more difficult to implement in Cuba. Cuba continues to treat foreign investment, and especially economic investment as a disease, and the corporation as the bacillus. The foreign investment program is as much about avoiding contamination as it is about obtaining hard currency and the other benefits of trade. It produces no internal effects. Moreover, its Stalinist bureaucratization substantially limits the success of the program. Multilayered approval processes ultimately requiring the consent of the highest levels of government are reminiscent not only of ossifying managerialism, but of the old form of corporate

²¹⁶ For some, this translates into the idea that sovereign power, and identification as a state, lies with the level of government the constitution of which is not subject to the unanimous approval of its constituent parts. See Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 367-68 (1999).

²¹⁷ "Hemos abierto la economía en la medida de lo posible y lo necesario. . . . No nos invadió la locura de las privatizaciones, mucho menos la de confiscar los bienes del Estado para apoderarnos de ellos o regalarlos a familiares o amigos. . . ." Fidel Castro Ruz, *Cuba no negocia ni vende su Revolución*, in FIDEL CASTRO RUZ, DE SEATTLE AL 11 DE SEPTIEMBRE 69, 71 (2002).

²¹⁸ *Castro Praises Malaysia for Rebelling Against U.S.-led Globalization*, MIAMI HERALD, May 11, 2001, available at <http://64.21.33.164/CNews/y01/may01/11e4.htm> (last visited Sept. 27, 2004)

establishment where every economic entity required an act of a state legislature to become effective. The inflexibility of Stalinist bureaucratization and the fear of contamination inherent in the Cuban government's approach to opening up significantly distinguish Cuba from China.

1. Maoism

Maoism is not a singular and constant ideological vision, slowly developed and firmly imposed, like Stalinism from its origins in the 1920s to its maturity in the 1950s. Instead, Maoism, when properly understood, appears to be employed flexibly to encompass the outlook and needs of the Party. In a sense, ideology became fused with politics in China to an extent unknown in the Soviet Union. This ideological oscillation was quite apparent from the 1940s onward. Its potential flexibly to embrace a variety of heterodox ideas made it possible for Maoist China to embrace globalization without losing the state's basic "Maoist" character.²¹⁹

Before the 1970s, many of China's leaders, in particular Mao Tse-tung, had come to believe that law in any form represented an unnecessary fetter on the Party's ability to govern and develop a socialist society. Legal bureaucracies, such as the Ministry of Justice, were gradually abolished as the role of law in state administration continued to be downgraded. What remained of the formal legal order and its institutions finally disappeared in the chaos of the Cultural Revolution era (1966-1976).²²⁰

(quoting Castro about calling globalization and modern capitalization a form of plunder).

²¹⁹ One gets a good sense of this from the description of the place and nature of the Communist Party set forth in the PRC Ministry of Commerce's website:

The CPC is the vanguard of the Chinese working class, the faithful representative of the interests of the Chinese people of all ethnic groups and the core of leadership over the socialist cause of China. CPC's maximum program of long objective is to realize the Communist social system and the minimum program at present is to build socialism with Chinese characteristics. The CPC takes Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory as the guidance of its actions.

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, POLITICS AND SOCIETY—THE PARTY IN POWER, at http://english.mofcom.gov.cn/article/200406/20040600233624_1.xml (last visited Sept. 27, 2004).

²²⁰ Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 723-24 (1994) (internal citation omitted). To some extent, this view represented a break from the Stalinist conception of the deployment of state power which had been embraced by the Chinese Communists after the end of their civil war.

Chinese theorists embraced Vyshinsky's rigid positivist view that law is a formal, normative expression of the will of the ruling class, as formulated and enforced by the state in the interests of that class. In a socialist state, according to Vyshinsky, the Communist Party, as the representative of the ruling proletariat, should enjoy absolute control over the creation of positive law by the organs of the state. The Party should also determine the form and content of these laws according to the requirements of its evolving programme of economic and social

Yet, at least for a time, like Lenin, Mao compromised with private owners under limited circumstances. Mao protected the "national bourgeoisie," private owners who used Chinese capital and no foreign connections, but discriminated against "imperialists" by confiscating and transferring their property to the state. Private enterprises still had to submit plans of production and sales for government approval and had to distribute income according to government regulations. Article 10 of the 1954 Chinese Constitution permitted the private ownership of means of production, but government regulations encourage private owners to merge their companies with state-owned enterprises. Further government regulations introduced "fixed interest," which first transformed owners into creditors and later into wage employees.²²¹

China's embrace of economic globalism after the 1970s has come with a good bit of trepidation, but without serious contradiction with the core of Maoist thought.

From the beginning of the reform period there has been widespread fear by conservative elements that contract responsibility would be a major step in the unwinding of socialism and the state ownership of the means of production. To mollify these fears the contract law adopted was an economic contract law. The only lawful contracts are those between legal persons, that is, economic units organized or recognized by the state. By the law's terms, individuals generally cannot make economic contracts; their agreements are governed by civil law, if they are legally enforceable at all (which, in practical terms they usually have not been).²²²

And indeed, underlying much of the reform effort is the worry of counterrevolutionary tendencies in reform.²²³

The Chinese elites engaged in bitter debate about the propriety of collective ownership by private individuals throughout the 1980s.²²⁴ At issue was not merely the theoretical approach to the relationship of property ownership to the state in a Maoist state, but the role of the state (and the Party) in the direction

development. *Id.* at 720.

The return to law-making after 1978 represents a return, to some extent, to an earlier understanding of the function of law in socialist states.

²²¹ JOHN HAZARD, COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF MARXIAN SOCIALIST STATES 177-80 (1969).

²²² Cheng & Rosett, *supra* note 179, at 209-10 (1991).

²²³ "Obviously, China's traditional legal concepts are incapable of accommodating the rich essence of modern legal concepts. . . . We must expose and criticize past history and consciously recognize the traditions that we inherited unintentionally." Liang Zhiping, *Explicating "Law: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 91 (1989).

²²⁴ See William H. Simon, *The Legal Structure of the Chinese "Socialist Market" Enterprise*, 21 J. CORP. L. 267 (1996); Howard Chao & Yang Xiaoping, *The Reform of the Chinese System of Enterprise Ownership*, 23 STAN. J. INT'L L. 365 (1987); Howard Chao & Yang Xiaoping, *Private Enterprise in China: The Developing Law of Collective Enterprises*, 19 INT'L LAW. 1215 (1985).

and control of the means of production.²²⁵ The position ultimately adopted represented a compromise of sorts nicely described by Teemu Ruskola:

In 1978, the beginning of the current reformist era, China adopted a two-tier plan which divided the economy into two spheres: one governed by the orthodox "mandatory plan," whereby the most vital goods were to remain under distribution by centralized command, and another governed by a novel "guidance plan," which permitted the sale of certain goods in the marketplace. To justify such heterodoxy, in 1984 the new system was given the obfuscatory label "planned commodity economy," and the creation of wealth was proclaimed the "essential task" of Chinese socialism. In 1987, as the Marx-Lenin-Mao trinity were spinning in their graves, yet another new era dawned, namely, that of the "socialist commodity economy." This twist in policy was explained as a function of the laws of historical materialism: For all its political commitment to socialism, China could not simply leapfrog over capitalism into full-blown communism. Rather, the country was destined to remain for at least fifty years in a "primary stage of socialism" (*shehuizhuyi chuji jieduan*), which would entail the continuing existence of several nonsocialist features. In 1993, this theory was written into the Constitution, as was the new designation of the economic system as a "socialist market economy." . . . [T]he ideological volte-face seems to have reached its final conclusion.²²⁶

Others have argued that the turn in 1978 represented a return to at least one

²²⁵ As one commentator suggested:

When Mao, Chen Boda, and Kang Sheng said revisionism, they meant it. They were opposed to any notion that the Party step back from control over all aspects of administration of the economy, they opposed any notion that the Party should not seek actively to reshape human beings, and they were willing to accept the consequences of surveillance, punishment, and purge that this entailed. The problem with the Soviet Union under Stalin, in their view, was not that the Party and its subordinate administration was too strong, choking off initiative and distorting rational decision-making, but that the Soviet Communist Party drifted away from the principles and revolutionary ideals still espoused during the 1928-1937 period. The Maoist answer was that China should never deviate from the correct principles of this earlier era. This was not so much a call for a radical departure from Soviet patterns as an idealization of a bygone era. This, perhaps, is the greatest irony of all -Maoism as a Chinese offshoot of primeval Stalinism.

Andrew Walder, *Some Ironies of the Maoist Legacy in Industry*, in *THE TRANSITION TO SOCIALISM IN CHINA*, *supra* note 211, at 215, 236.

²²⁶ Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1588, 1687-1688 (2000). The official comment to the 1993 constitutional amendments can be found in *China's Constitution to Be Amended*, 36 *BEIJING REV.* 4 (1993). See also YAN SUN, *THE CHINESE REASSESSMENT OF SOCIALISM 1976-1992* (1995).

earlier strain of Chinese Communist thinking.²²⁷ Less, perhaps, an about-face, than an adaptation of form for the attainment of the primal socialist goal, Chinese participation in the global economy has not resulted in the abandonment of the foundations of Marxist-Leninist understandings of state power.²²⁸

But the adaptation has exposed the contradictions of translating Marxist-Leninist ideals into the language of free-enterprise globalism. While China has acquired many of the outward forms required for participation in the global free market economy, those forms merely paper over the contradictions inherent in their adoption. The most important of those contradictions lies at the heart of the Marxist-Leninist system: squaring the *grundnorm* that all communal organization must be subordinated to the needs and rules of the Communist Party as it leads the community to the attainment of a pure Marxist state,²²⁹ with the realities of autonomous and independent economic collectives which are subject only to regulatory restraint by the state. For the moment, pragmatism seems to be the order of the day. Theory has retreated to the Academy, the 'Opposition,' and the West.²³⁰ But the tensions remain.

²²⁷ For the tensions within the Communist party hierarchy between the pragmatic Deng Xiaoping and the more Marxist orthodox reformer Chen Yuni in the 1980s, see JOSEPH FEWSMITH, *DILEMMAS OF REFORM IN CHINA: POLITICAL CONFLICT AND ECONOMIC DEBATE* 3-19 (1994).

²²⁸ With respect to the revision of the Chinese Constitution in 1993, others have suggested that:

The momentum of nurturing a rational market economy culminated in a landmark, and perhaps irreversible amendment to the Constitution of the People's Republic of China by the National People's Congress (NPC) in March 1993. This amendment drastically changes 'the State shall implement a planned economy on the basis of socialist public ownership system,' a sacred motto in China for more than four decades, to 'the State shall implement a socialist market economy. The State shall strengthen economic legislation to improve macro regulation and control.' This amendment paved an indispensable path for the legislation of the Company Law. The Company Law will fill some of the legislative vacancies in the area of commerce, and gear the process of privatization of Chinese state-owned enterprises towards a legal track.

Yabo Lin, *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC*, 7 *TRANSNAT'L LAW* 327, 331-332 (1994) ("Retrospectively viewed in the context of Chinese legislation and policies aimed at an efficient market economy since 1979, this Amendment is nothing but a natural summary of developments. In addition, Article 3 of this Amendment adds new language, "[t]he State shall stick to reforms and opening to the outside world," to the Preamble of the Constitution, thus further assuring the irreversible direction of market reform in China." *Id.* at n.9 (internal citation omitted).

²²⁹ Keller, *supra* note 220, at 728 ("Even official pronouncements on the need to institute the 'rule of law' in place of the 'rule of men,' made plain that law should still be subordinated to Party policy. . . . In periods of relative tolerance, legal writers have even been able to express new views on the relationship between the Communist Party and the laws of the state. Without challenging the ultimate authority of the Party, writers have also argued for the creation of a rationally ordered and internally consistent legislative order.").

²³⁰ As one commentator noted:

To China, it matters little that "socialism" and "market system" are contradictory terms. The Chinese leadership would like to keep the facade of socialism, as it is the basis which the Chinese Communist came to power, while adopting as much of capitalism in substance as it can in the economic sector. . . . Some scholars may

The quiriness of the corporate law norm adopted provides a glimpse of the unresolved contradictions of globalization with a Chinese face. These take several forms: the legal representative mechanism that blunts the autonomy of the corporation as an entity; the position of the state as majority shareholder in the most powerful enterprises, which blunts the independence of corporations as economic actors; and the supremacy of the Communist Party, which blunts the security of stakeholders other than the state in the corporate enterprise.

2. Fidelismo—Cuba's Stalinist Experiment

The logic of Cuba's form of Marxist-Leninist foundations also strongly militate against an economic globalism based on private transactions controlled through amalgamations of private power in corporate form. Cuba's Constitution declares:

Cuba es un Estado socialista de trabajadores, independiente y soberano, organizado con todos y para el bien de todos, como República unitaria y democrática, para el disfrute de la libertad política, la justicia social, el bienestar individual y colectivo y la solidaridad humana.²³¹

All of the means of production are held by and for the benefit of the people.²³² These include not only natural resources, but also all enterprises used for the production of things.²³³

Estos bienes no pueden transmitirse en propiedad a personas naturales o jurídicas, salvo los casos excepcionales en que la transmisión parcial o total de algún objetivo económico se destine a los fines del desarrollo del país y no afecten los fundamentos políticos, sociales y económicos del Estado, previa aprobación del Consejo de Ministros o su Comité Ejecutivo.²³⁴

As in China, the Communist Party apparatus has pride of place within the

be interested in debating whether China is "maintaining a socialist economy with unique Chinese characteristics" as its leaders declare, or whether it has become capitalist and is simply continuing outdated political rhetoric for the convenience of those in power. Others may well adopt Deng Xiao Ping's pragmatic (and much touted) slogan: "It doesn't matter what color the cat so long as it catches mice." This attitude allows the Chinese government to maintain a pretense that it has not abandoned the principles upon which the Communist Party was founded while implementing reform measures which look more and more like capitalism.

Han, *supra* note 24, at 469.

²³¹ CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 1.

²³² "En la República de Cuba rige el sistema de economía basado en la propiedad socialista de todo el pueblo sobre los medios fundamentales de producción y en la supresión de la explotación del hombre por el hombre. También rige el principio de distribución socialista 'de cada cual según su capacidad, a cada cual según su trabajo.' La ley establece las regulaciones que garantizan el efectivo cumplimiento de este principio." *Id.* art. 14.

²³³ *Id.* art. 15.

²³⁴ *Id.*

political and economic organization of the state.²³⁵ Within the context of this revolutionary society, intangible organizations are recognized, but only to the extent that each is a part of the revolutionary vanguard.²³⁶ These intangible organizations can include juridical persons.²³⁷ But such juridical persons, operating as corporations, are contemplated to exist only as appendages to the state itself. In that form, as an abstracted subset of state power, such enterprises may be vested with ownership of designated economic assets.²³⁸ They also provide the state a means of ordering economic activity, which, to the extent it is not profitable, need not be guaranteed or made good, by the state (and to that extent operates like a wholly owned subsidiary).²³⁹

However, with a Stalinist overlay, this ideological foundation makes any sort of harmonization with the current version of economic globalization far more problematic than under a Maoist approach to Marxist-Leninism. Stalinism was a bundle of contradictions characterized, at its base, by a bureaucratization of the state apparatus and the destabilization of the bureaucratic classes whose loyalty was guaranteed by a fear of punishment. As one academic explained:

The history and ethos of Stalinism made this bureaucracy profoundly conservative in most political and social ways. It yearned, however, for one great reform that would free it from the capricious, terroristic regime at the top, and allow it to become a real bureaucracy—that is, a conservative force based

²³⁵ “El Partido Comunista de Cuba se nutre de la vanguardia organizada de la clase obrera. Es la fuerza dirigente superior de la sociedad y del Estado cubano. Organiza y orienta los esfuerzos comunes hacia los altos fines de la construcción del socialismo. Es la continuación del Primer Partido Marxista fundado en 1925, por Mella y Baliño.” GOVERNMENT OF CUBA, MI PAIS, SISTEMA DE GOBIERNO, ORGANIZACIONES POLITICAS Y DE MASES, PARTIDO COMUNISTA DE CUBA (PCC), available at <http://mipais.cuba.cu/politica.php?ids=53> (last visited Sept. 27, 2004). This sentiment is expressed more formally in the Cuban Constitution: “El Partido Comunista de Cuba, martiano y marxista-leninista, vanguardia organizada de la nación cubana, es la fuerza dirigente superior de la sociedad y del Estado, que organiza y orienta los esfuerzos comunes hacia los altos fines de la construcción del socialismo y el avance hacia la sociedad comunista.” CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 15.

²³⁶ “El Estado socialista cubano reconoce y estimula a las organizaciones de masas y sociales, surgidas en el proceso histórico de las luchas de nuestro pueblo, que agrupan en su seno a distintos sectores de la población, representan sus intereses específicos y los incorporan a las tareas de la edificación, consolidación y defensa de la sociedad socialista.” CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 7. See also *id.* at art. 22 (“El Estado reconoce la propiedad de las organizaciones políticas, de masas y sociales sobre los bienes destinados al cumplimiento de sus fines.”).

²³⁷ See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 23 (“El Estado reconoce la propiedad de las empresas mixtas, sociedades y asociaciones económicas que se constituyen conforme a la ley.”).

²³⁸ “En cuanto a la transmisión de otros derechos sobre estos bienes a empresas estatales y otras entidades autorizadas, para el cumplimiento de sus fines, se actuará conforme a lo previsto en la ley.” *Id.* art. 15. See also *id.* art. 23 (“El uso, disfrute y disposición de los bienes pertenecientes al patrimonio de las entidades anteriores se rigen por lo establecido en la ley y los tratados, así como por los estatutos y reglamentos propios por los que se gobiernan.”).

²³⁹ “Estas empresas y entidades responden de sus obligaciones sólo con sus recursos financieros, dentro de las limitaciones establecidas por la ley. El Estado no responde de las obligaciones contraídas por las empresas, entidades u otras personas jurídicas y estas tampoco responden de las de aquel.” *Id.* art. 17.

on stability, personal security, and predictability.²⁴⁰

The followers of Leon Trotsky²⁴¹ are perhaps at their most useful when they highlight the differences between their view of Marxist-Leninism and Stalinism:

For it was Trotsky who opposed the bureaucratic degeneration of the revolution, building the Left Opposition while others capitulated before Stalin; Trotsky who analyzed and fought against the system of bureaucratic misrule, Stalinism, which continues to this day. Trotsky carried forward the program of the early Comintern in the struggle for the Fourth International, counterposing to the Stalinist-nationalist dogma of "socialism in one country" the Leninist-internationalist program of world socialist revolution.²⁴²

Trotsky suggested one of the great distinguishing characteristics of the mature Stalinist state was its bureaucratization and focus on state-centered production. The Stalinist state is corporatist, in the sense that the state apparatus is refined to run the economic and social spheres in an organized and hierarchical fashion, in a way similar to the form of organization known to western-style monopolies. Recent scholarship has picked up on this similarity.

²⁴⁰ ALEXANDER DALLIN & GAIL LAPIDUS, *THE SOVIET SYSTEM: FROM CRISIS TO COLLAPSE* 65 (1995). The authors note that:

Stalinism began as a radical act of revolution from above and ended as a rigidly conservative social and political system. It combined revolutionary traditions with tsarist ones; humanitarian ideas of social justice with terror; radical ideology with traditional social policies; the myths of socialist democracy and party rule with the reality of personal dictatorship; modernization with archaic practices; a routinized bureaucracy with administrative caprice. *Id.* at 64-65.

²⁴¹ Leon Trotsky was a pivotal figure in the Russian Revolution of 1917 who was ultimately exiled from the USSR and then murdered on orders from Stalin. For the classic biography, see ISAAC DEUTSCHER, *THE PROPHET ARMED: TROTSKY 1879-1921* (1954); ISAAC DEUTSCHER, *THE PROPHET UNARMED: TROTSKY 1921-1929* (1977); ISAAC DEUTSCHER, *THE PROPHET OUTCAST: TROTSKY 1929-1940* (1963).

²⁴² *Trotsky's Grandson in Moscow: A Conversation with Esteban Volkov*, 474 *WORKERS VANGUARD* (Mar. 1989), available at <http://www.marxists.org/history/etol/document/family/volkov.htm> (last visited Sept. 27, 2004). Not everyone within Russia agreed:

In the development of Marxist communism in Russia and elsewhere, there were both continuities and discontinuities. The evaluation of their respective importance depends, above all, on existential factors such as the researcher's historical experience, relation to the communist movement, and sympathy (or lack of it) with its goals. Thus, for instance, Alexander Solzhenitsyn denied the very existence of Stalinism as a distinct historical phenomenon; in his view, it was indistinguishable from Leninism, which in turn was nothing but a practical implementation of Marxism. Trotsky took a view completely opposed to this continuity thesis, maintaining that Stalinism was not a logical development of Bolshevism but rather its counterrevolutionary negation, being divided from Leninism by a "whole river of blood."

ANDRZEJ WALICKI, *MARXISM AND THE LEAP TO THE KINGDOM OF FREEDOM: THE RISE AND FALL OF THE COMMUNIST UTOPIA* 399 (1995). See also ERIK P. HOFFMANN & ROBBIN F. LAIRD, *THE SOVIET POLITY IN THE MODERN ERA* 31 (1984).

All Stalinist-type societies have at least three structural elements in common: the first has to do with their immediate origins, namely, a victorious anticipatory, anticapitalist revolution; the second is the stage ushered in by victory, in which basic social relations, relations of ownership included, were utterly and irrevocably altered, with catastrophic consequences for all economic activity; the third is the absorption of the entire national patrimony by power, with the establishment of a global, ultracentralized monopoly on power and ownership that went on to become the effective agent of a kind of industrialization as alien to capitalism as it is to socialism.²⁴³

The peculiarities of Stalinist Marxist-Leninism on state economic organization are most clearly evidenced within the old Soviet Union itself. A foundational object of Marxist-Leninist systems is that the bourgeoisie be deprived of ownership of productive wealth.²⁴⁴ Lenin compromised with industrial leaders and allowed owner/managers to continue running plants. On the other hand, Stalin was not one to compromise. He introduced state planning in 1927, heavily taxed private producers and merchants in 1930, criminalized private production in 1932, and prohibited hiring of employees for productive purposes in 1936.²⁴⁵ Two features characterized Soviet production: cost accounting and one-man management. "Cost accounting by what amounted to an independent accounting unit, similar to a public corporation, to which assets would be assigned, and within which income would be attributed directly to expenditures without going through the process of budget allocation . . ." ²⁴⁶

Like the Cuban Constitution many years later, the 1936 Soviet Constitution fixed the "economic foundation of the USSR" as

the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the elimination of exploitation of man by man.²⁴⁷

²⁴³ CAMPEANU, *supra* note 11, at 5. Other commentators, sympathetic to the post-Stalinist Soviet system noted that "Stalin (1879-1953) may very well have said that 'the aim of production is [not] profit, but man and his needs, in other words the satisfaction of his material and cultural needs.' His own style of government did not however respect that policy: "[M]an, during his time, was in effect sacrificed to production and to the state." DAVID & BRIERLEY, *supra* note 1, at 178.

²⁴⁴ HAZARD, *supra* note 221, at 171-72.

²⁴⁵ *Id.* at 172-74.

²⁴⁶ *Id.* at 181-86. For a more detailed look at Soviet management see VLADIMIR GSOVISK, *SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME* 96-99 (1948).

²⁴⁷ SSSR [CONSTITUTION], art. 4 (1936); HAZARD, *supra* note 221, at 174. See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 1.

As such, the foundation of economic organization is the nationalization of all means of production, and the deployment of those means of production solely by the state for the benefit of the proletariat.²⁴⁸

"If the guiding principles established by Marxist-Leninist doctrine are clear, namely that 'economic power' be taken away from private interests, it does not specify how this power is to be exercised anew."²⁴⁹ Some Stalinist theoreticians from the 1940s employed the term "legal entity" to describe public entities operating Soviet businesses. "The term 'legal entity' has been selected to translate the Russian *iuridicheskoe litso*, the exact equivalent of *personne morale* in French, *Rechtsperson* in German, and *ente legale* in Italian. This term, sometimes translated as 'legal personality' or 'juridical personality,' is close to, although not identical with, the corporation in Anglo-American law. . . . The term 'legal entity' in Soviet law now means primarily a governmental agency engaged in business that in non-Soviet countries is conducted by private enterprises."²⁵⁰ To a great extent, corporations in a Marxist-Leninist polity are most realistically conceptualized as words that mask a reality that these amalgamations of state property were nothing more than special purpose administrative units of the state.

Soviet law recognized two kinds of legal entities: institutions "on government budget" and enterprises operating "on a commercial basis" or "on a business basis." Agencies "on government budget" are comparable to administrative agencies.²⁵¹ These agencies were funded by the government and could only spend money as specified in the government budget. Some of these agencies enjoy the same status as enterprises "on commercial basis" because they are statutorily empowered to act as such.²⁵² However, in all cases, it the enterprise itself is better understood as a contingent concession of the state rather than as a collective with rights, including the right to exist, which may not be affected by the state except through the operation of generally applicable law.²⁵³

Enterprises operating "on commercial basis" are comparable to government-owned corporations.²⁵⁴ These enterprises are organized under government charter and are required to produce a profit.²⁵⁵ These enterprises enjoy

²⁴⁸ DAVID & BRIERLEY, *supra* note 1, at 177.

²⁴⁹ *Id.*

²⁵⁰ GSOVISK, *supra* note 246, at 379-380.

²⁵¹ *Id.* at 379-84.

²⁵² *Id.* at 379-82.

²⁵³ Thus, for example, some commentators have noted "that property forming capital assets has been gratuitously affected by the state to certain enterprises by virtue of a kind of concession, the terms of which can always be unilaterally modified by the state authorities; with respect to such assets, therefore, the enterprise has, properly speaking, no right which can prevail over that of the state itself." DAVID & BRIERLEY, *supra* note 1, at 272.

²⁵⁴ GSOVISK, *supra* note 246, at 382.

²⁵⁵ *Id.* at 383.

independent legal status.²⁵⁶ "They can conduct business affairs, enter into contracts with other enterprises or people, possess property, acquire rights, and incur obligations."²⁵⁷ Although the government owns the assets of these enterprises, the government is not liable for the enterprise.²⁵⁸ These enterprises may be controlled by the government entity that is responsible for the branch or industry in which the enterprise is involved.²⁵⁹ Earnings are distributed by the government in amounts based on the efficiency of each enterprise.²⁶⁰ The restrictions on Soviet legal personality reflect the Anglo-American tradition of *ultra vires*.²⁶¹ Legal entities are enacted by statutes or charters and are prohibited from acting outside of this mandate.²⁶²

The resulting ultra- or over-centralization of Stalinist organization led to certain widely understood deficiencies. First, the transformation of economic decisions to bureaucratic ones created incentives to economic behavior that were only bureaucratically rational.²⁶³ Second, centralization made it increasingly difficult to control the behavior of managers.²⁶⁴ The ultimate failing of the Soviet state was not its radicalism, but rather, its conservatism—its inability to flexibly meet challenges emerging from a changing global political and economic order. The assessment of the Stalinist legacy for the Soviet state might apply with equal force to the current political culture of the Cuban state apparatus:

The real obstacle to future reform in the Soviet Union is not this or that institution, group, faction, or leader, but the profound conservatism that seems to dominate them all, from the

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ GSOVISK, *supra* note 246, at 384.

²⁶⁰ *Id.* at 382-87.

²⁶¹ *Id.* at 388.

²⁶² *Id.* at 387-88.

²⁶³ Walder, *supra* note 225, at 217.

The resulting organizational syndrome has been well documented by such writers as Joseph Berliner and János Kornai. The setting of targets for the factory becomes the object of a subtle form of political bargaining. Managers are sure to overfulfill targets just enough to achieve maximum bonuses, but not so much as to provoke a substantial upward readjustment of the target for the next period. *Id.* (citing in part JOSEPH BERLINER, *FACTORY AND MANAGER IN THE USSR* (1957)); JANOS KORNAL, *OVERCENTRALIZATION IN ECONOMIC ADMINISTRATION: A CRITICAL ANALYSIS BASED ON EXPERIENCE IN HUNGARIAN LIGHT INDUSTRY* (1959).

²⁶⁴ Walder, *supra* note 223.

Khrushchev's denunciation of Stalinist rule at the Twentieth Party Congress in 1956 not only legitimized the critique of existing communist institutions, but jolted all of those faithfully following the Soviet path into a provoking reexamination of their form of political and economic administration. The universal diagnosis was that the administration of Soviet industry under Stalin suffered from overcentralization. *Id.* at 216.

ordinary family to the Politburo, from local authorities to the state *nachal'stvo*. It can be argued that the Soviet Union has become, both downstairs and upstairs, one of the most conservative countries in the world.²⁶⁵

Cuban success in the world that has emerged since 1959 will require it to acknowledge that the world no longer functions along the bipolar axis of economic conflict. Political, ethnic, religious, and cultural conflict within a world embracing variations of a singular economic form of organization marks the modern context in which states operate. The Chinese have understood this, and have purchased a space of relative freedom from outside interference in Chinese internal affairs by embracing the language of free enterprise entity-based bureaucratism.²⁶⁶ Cubans continue to invest corporatization with a criticism that sounds suspiciously like the criticism of Stalinism described above.²⁶⁷

The one area where Chinese Maoism and Cuban Stalinism find some compatibility is in the involvement of the armed forces in the economic life of the country.²⁶⁸ "Analysts liken the People's Liberation Army (PLA) to a large state-owned corporation. It has its own hospitals, schools, movie studios, TV production centers, publishing houses, opera troupes, textile factories, farms and hotels."²⁶⁹ In the first half of 2004, Chinese PLA officers visited their Cuban FAR (*Fuerzas Armadas Revolucionarias*) counterparts²⁷⁰ during a period in which FAR extended its holdings in the tourist sector.²⁷¹ For both China and Cuba, the

²⁶⁵ DALLIN & LAPIDUS, *supra* note 240, at 66 (the factors identified by Dallin and Lapidus as contributing to Soviet conservatism (and ossification) have a resonance with the situation in Cuba).

²⁶⁶ This breathing space has become both more recognized and more open to criticism by Western commentators. See, e.g., Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 179-86 (2001).

If free markets are the baseline for measuring globalization in the economic area, democracy and human rights are the pole stars for mapping globalization in the political sphere. Judged by those standards, globalization has had less impact, on the political order of China than it has had on economic reforms. *Id.* at 179.

²⁶⁷ For example, the government published with approval a short article describing the problems of corporatization for capitalization as centering on a bureaucratization of economic activity that would ultimately stifle worker creativity and economic efficiency. See EDUARDO JIMENEZ GARCIA, *EMPRESARIALISM VS. CAPITALISMO*, *Globalization* (2003), available at http://www.eleconomista.cubaweb.cu/2003/nr0191/191_414.html (last visited Sept. 27, 2004).

²⁶⁸ See Mora, *supra* note 23.

²⁶⁹ See Andrew Tanzer, *The People's Liberation Army, Inc.*, FORBES (March 24, 1997), at 44, available at 1997 WL 9058761.

²⁷⁰ CUBAN ARMED FORCES REVIEW, IN THE NEWS—2004, available at <http://www.cubapolidata.com/cafr/news/#1> (last visited Sept. 27, 2004) (sites distilling reports from internal Cuban sources).

²⁷¹ A February 12, 2004 Report stated that:

The Politburo of Cuba's Communist Party has proposed and the Council of State has decided to 'release' Ibrahim Ferradáz García from his functions as minister of tourism and appoint Manuel Marrero Cruz to that post. Marrero is the Executive President of the Gaviota Tourism Group (GTG) and for the past 10

military has proven to be one of the most dynamic forces in the economic reorientation of their respective countries.

D. Cuba Remains Isolated From Global Capital Flows

Cuba continues to resist integration into global patterns of capital. Cuba is not a member of the International Monetary Fund.²⁷² While the current regime loathes the IMF and the economic system it sustains,²⁷³ membership has some value in international commerce.²⁷⁴ Moreover, Cuba has a poor international credit rating.²⁷⁵ But poor credit has rarely prevented international financial

years has been responsible in the island's investment process, hotel management and the leadership of provincial organizations. GTC is a private corporate complex controlled by active officers and retired officers (Raúlitas) of the Revolutionary Armed Forces (FAR). Gaviota has grown, since its inception in 1988, from a mere 164 rooms to 7146, 85 percent four- and five-star category and all built with Cuban capital." *See id.*

²⁷² *See* IMF, at <http://www.imf.org/external/country/index.htm>. Fidel Castro has taken pride in this exclusion: "Somos uno de los pocos países del mundo que no pertenece ni quiere pertenecer al Fondo Monetario Internacional, convertido en celoso guardian de los intereses del imperio." CASTRO, *supra* note 217, at 133.

²⁷³ In a speech in 2000, Fidel Castro expressed his position on the IMF in strong language. "It is high time for the Third World to strongly demand the removal of an institution that neither provides stability to the world economy nor works to deliver preventive funds to the debtors to avoid their liquidity crises; it rather protects and rescues the creditors." Fidel Castro Ruz, Speech Given at the Opening of the South Summit, in Havana (Apr. 12, 2000).

²⁷⁴ It is well understood that membership in the IMF and the World Bank is especially important for small and poorer nations, especially those undergoing political or economic transformation.

One important issue that all new states confront is the right to succeed to the public assets and liabilities of the predecessor state. A country's decision whether to accept responsibility for its predecessor's foreign debt may affect its chances of recognition by the United States and the world community. The decision may also affect the state's access to capital, without which the states' newfound existence is rendered precarious. Finally, in cases of egregious non-economic misdeeds, the United States and the world community may use economic pressures to effectuate political changes in emerging states. These pressures can make membership in the IMF and the World Bank as important as formal U.S. recognition to the emerging state.

Carsten T. Ebenroth & Matthew J. Kemner, *The Enduring Political Nature of Questions of State Succession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 777 (1996).

²⁷⁵ The U.S. State Department reports that:

The Cuban Government defaulted on most of its international debt in 1986 and does not have access to credit from international financial institutions like the World Bank, which means Havana must rely heavily on short-term loans to finance imports, chiefly food and fuel. Because of its poor credit rating, an \$11 billion hard currency debt, and the risks associated with Cuban investment, interest rates have reportedly been as high as 22%. In 2002, citing chronic delinquencies and mounting short-term debts, Moody's lowered Cuba's credit rating to Caal—'speculative grade, very poor.' Dunn and Bradstreet rate Cuba as 'one of the riskiest economies in the world.'

U.S. DEPARTMENT OF STATE, *supra* note 7.

Of course this description is a bit disingenuous—the United States has worked hard to increase the cost of capital to Cuba, and thus increase the likelihood of default and poor credit. *See infra* notes 265-

organizations from making funds available. Cuba's poor credit rating is exacerbated, to some extent, by pressure from the United States on these institutions to make lending to Cuba much more troublesome. First, American law requires the Secretary of the Treasury to "instruct the United States executive director of each international financial institution to use the voice and vote of the United States to oppose the admission of Cuba."²⁷⁶ Second, the United States has aggressively pressured international lending institutions to avoid lending to Cuba.²⁷⁷ It would then follow that Cuba suffers from massive budget and trade deficits and is chronically short of funds.²⁷⁸ Taken together, these problems contribute to a difficult position for Cuba on the global economic stage.

Cuba may find it difficult to emulate China while it remains unable and unwilling to access global capital flows. Engagement would require a fundamental shift of thought regarding the value, necessity, and conditions under which Cuba would will itself to become dependant on global capital. Perhaps with good reason, the current government of Cuba argues publicly that engagement with international financial regimes would result in a loss of sovereignty and an increase in poverty and dependence for Cuba.²⁷⁹ But that willingness may be a condition precedent to engagement; the world economic community may view dependence on global capital as a form of insurance of Cuba's good behavior.

266. But the United States is not entirely to blame for Cuba's poor credit situation. Cuba's inability to resolve payment issues relating to its enormous debt to the successor to its previous Soviet mentor, as well as its aggressive ideologically based embrace of default as a justifiable strategy for interaction with international debtors has also contributed to its poor credit worthiness in the eyes of the international financial community.

²⁷⁶ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. § 69A), at 22 U.S.C. § 6034(a)(1) (2000).

²⁷⁷ In addition, U.S. law requires U.S. contributions to specific international organizations—International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency, and the Inter-American Development Bank—to be reduced to any amount granted by these institutions to Cuba. *Id.* at § 6034(b).

²⁷⁸ This state of affairs is common knowledge and often reported.

The Central Bank said the foreign debt at the end of 2001 was \$10.893 billion, similar to 2000. That does not include money owed to the Soviet Union and other former communist countries in Europe. Russia claims Cuba owes it \$20 billion. In 2000, Cuba's trade deficit rose 8.1 percent and the current account deficit 44 percent, after rising 7.4 percent and 16 percent, respectively, in 1999. Many Third World countries have big deficits and debts, but unlike Cuba, they have access to long-term funding to cover them. Because Cuba faces a U.S. embargo and regularly defaults on debt payments, it has very limited access to credits and aid to cover its deficits and keep developing.

Cuban GDP Grew 3 Pct in 2001, Recover Slows, MSNBC NEWS, July 6, 2002, available at <http://www.futurodecuba.org/notic-02-7-602eng.htm> (last visited Sept. 27, 2004).

²⁷⁹ In this respect, Fidel Castro has suggested that: "tres decenas de países desarrollados y ricos que monopolizan el poder económico, tecnológico y político, se reúnen aquí con nosotros para ofrecernos mas de las mosmas recetas que han servido sólo para hacernos cada vez más pobres, más explotados y más dependientes." CASTRO, *supra* note 217, at 161.

E. American Policy May Make Adoption of the Chinese Model Impossible

Fifth, and most perversely, the subjective and highly emotive special relationship between Cuba and the United States limits objective consideration of alternatives and constrains choice. At the time China opened to globalization, the world community, including the United States, was eager for the engagement. The West provided substantial encouragement to the Chinese. Except with respect to the grossest violations, the West tended to look the other way with respect to Chinese human rights issues or Chinese rejection of Western style democratic values. The West appears satisfied with mere formal engagement. In contrast, the West has shown a great tolerance for the deficiencies in real implementation of globalization, despite substantial criticism of the pace and character of that engagement. And the West has not sought actively to change the Chinese system of governance.

However, it is unlikely that Cuba will be able to enjoy the same treatment, and forbearance, as China enjoys. Even if Cuba were willing (a position that has never been unequivocally taken), the United States may make even Chinese style formal engagement impossible as long as the current system of governance remains in place.²⁸⁰ The U.S. government continues to insist that any comparison between China and Cuba is superficial.²⁸¹ The so-called "Initiative for a New Cuba" nicely summarized the U.S. position. The American President described its central feature as follows:

Full normalization of relations with Cuba—diplomatic recognition, open trade and a robust aid program—will only be possible when Cuba has a new government that is fully democratic, when the rule of law is respected, and when the human rights of all Cubans are fully protected. Yet under the Initiative for a New Cuba, the United States recognizes that freedom sometimes grows step by step—and we will encourage those steps.²⁸²

²⁸⁰ The position of the Clinton Administration has been typical of the last quarter century of engagement. See, e.g., Walt Vanderbrush & Patrick J. Haney, *Policy Toward Cuba in the Clinton Administration*, 114 POL. SCI. Q. 387 (1999).

²⁸¹ As an administration official recently noted:

The argument for treating Cuba like China is superficial. The Chinese have been following an economic reform model involving decentralization and the emergence of a vibrant entrepreneurial class. China has worked to create a legal and administrative framework conducive to foreign trade and investment, albeit a framework that the international community would like to see expanded. One result of these reforms is that independent entrepreneurs account for half of China's non-agricultural production. To date, Mr. Castro has rejected the Chinese economic reform model.

Daniel W. Fisk, U.S. Dept. of State, Initiative for a New Cuba, Address by Deputy Assistant Secretary Daniel W. Fisk before the National Summit on Cuba (Sept. 17, 2002), available at <http://www.state.gov/p/wha/ci/13525pf.htm> (last visited Sept. 27, 2004).

²⁸² Office of the Press Secretary, President Bush Announces an Initiative for a New Cuba (May 19, 2002), available at <http://www.state.gov/p/wha/rls/fs/10323pf.htm> (last visited Sept. 27, 2004).

Indeed, the American government continues to develop strategies for promoting fundamental changes in Cuban governance. For example, the recent report from the Commission For Assistance for a Free Cuba²⁸³ outlined a number of steps that could help hasten political change within Cuba. These steps included empowering Cuban civil society, breaking the Cuban government's information blockade, denying resources to the Cuban government, working to change Cuba's positive international image, encouraging diplomatic efforts to support Cuban civil society, and undermining Cuban efforts to establish a succession policy.²⁸⁴ The published goal of the United States Agency for International Development's (USAID) Cuba Program is to "promote rapid, peaceful transition to, democracy in Cuba, helping develop civil society."²⁸⁵ Its objective is to "increase the flow of information on democracy, human rights and free enterprise, to, from, and within Cuba."²⁸⁶

Cuba and its advocates share a different, and less benign, perspective of this policy. There is a fear that either Cuban independence will be threatened as Cuba is once again absorbed by its much larger neighbor, or, more importantly, that normalization will destroy the political consensus on which the post-Revolutionary Cuban political community has been built.²⁸⁷ The present regime's friends outside of Cuba have noted similar concerns:

Cuba's security is severely affected by the developments in Eastern Europe and the new configuration of international forces characterized by U.S. military and global hegemony. This new world order allows the United States to step up its policies of hostility toward Cuba in its search for a counterrevolutionary conclusion. The tightening of the U.S. economic embargo against Cuba, the ideological disinformation campaigns, and political pressures of every kind have been geared to fomenting domestic opposition on the island, the diplomatic isolation of Cuba, and

²⁸³ For the 458 page report, see REPORT TO THE PRESIDENT, *supra* note 13.

²⁸⁴ See *id.* The goals are nicely summarized in an Executive Summary produced by the State Department for its website. See COMMISSION FOR ASSISTANCE TO A FREE CUBA, EXECUTIVE SUMMARY: REPORT TO THE PRESIDENT FROM THE COMMISSION FOR ASSISTANCE TO A FREE CUBA (2004), available at <http://www.state.gov/p/wha/rls/32276.htm> (last visited Sept. 27, 2004).

²⁸⁵ USAID, USAID CUBA PROGRAM (May 2003), available at http://www.usaid.gov/locations/latin_america_caribbean/country/cuba/upd-cub.htm (last visited Sept. 27, 2004).

²⁸⁶ *Id.*

²⁸⁷ For example, noted Cuban writer Rafael Hernandez has explained:

El acercamiento con los Estados Unidos, aunque visto como necesario por muchos en Cuba en terminus puramente económicos, suscita preocupación en terminos políticos e ideológicos. Los sectores mas radicals del nacionalismo cubano podrían identificarse con esta política solo hasta cierto punto, en le medida en que contiene riesgos para la independendencia del pais. Esta resistencia podría dividir el consenso nacional, en un periodo en que a cohesion social y política tiene una importancia estratégica.

RAFAEL HERNÁNDEZ, MIRAR A CUBA: ENSAYOS SOBRE CULTURA Y SOCIEDAD CIVIL 162-63 (1999).

the subversion of the socialist regime in Cuba.²⁸⁸

The Cubans may be right. For the Americans, economic reform must be bundled with political reform. While this bundling was not necessary for China or Vietnam, it appears to be the rule for Cuba. As such, there is little incentive for economic reform since, as the Cubans rightly believe, economic reform will, in the unique case of Cuba, serve as little more than a cover to effect substantial political reform. American policy thus hinders any form of internal economic change. Ironically, the American position may also strengthen the hand of those within Cuba who would like to resist a Chinese approach to globalization.

Globalization may also be threatened by the need for resolution of a large number of property claims concerning Cuban assets. The United States and the Cuban Diaspora Community vigorously pursued these claims, made by both foreign individuals and entities.²⁸⁹ These claims, to the extent they might affect property or ownership interests in Cuban property, might serve to chill certain forms of foreign investment.²⁹⁰

F. Cuba May Not Yet Be Able to Compete in the Global Marketplace

Sixth, even in the absence of these serious problems, Cuba is in a poor position to compete globally. Cuba is smaller and has fewer resources than China. It does not have a history of even limited open engagement with the West in the production of goods for the global market. These differences may make emulation theoretically possible, but unrealistic in fact. The Cuban government's attempt to reorient the Cuban economy from a colonial producer of agricultural goods for its patron state—first the United States and then the Soviet Union—has been unsuccessful at best. It will be difficult to reorient the economic culture of the country from one that accepts requests from patrons to one that aggressively seeks opportunity. Indeed, one of the great dangers of Chinese-style engagement for Cuba is that it may push Cuba into a position of dependence on China (to avoid dependence on the United States) and thus replicate (again) the subordination to great powers that Cuba has sought to overcome since the colonial era.

This problem is exacerbated by Cuba's official culture. The government remains suspicious of outsiders and contamination from abroad. The rhetoric of

²⁸⁸ Juan Valdez Paz, *The Socialist Transition in Cuba: Continuity and Change*, 22 SOC. JUST. 92 (1995).

²⁸⁹ For a discussion, see, e.g., THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA, *supra* note 9, at 71-104; Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27(1) L. & POL'Y IN INT'L BUS. 137 (1995).

²⁹⁰ Those who argue this view base their opinion on the experiences of Eastern Europe in settling expropriation claims. See e.g., THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA, *supra* note 9, at 71. It is possible, however, that the same pattern would not hold in Cuba—especially if the United States, as a reward for Cuba's transition to a system more to the U.S.'s liking, would be willing to agree to a substantial reduction in the scope of claims and to a funding of payments on claims through grants and loans to the government.

resistance to globalization evokes images of a pre-1959 Cuban reality of a casino culture serendipitously exploited by a powerful neighbor and overlaid by a changed world order.

The existing world economic order constitutes a system of plundering and exploitation like no other in history. Thus, the peoples believe less and less in statements and promises. The prestige of the international financial institutions rates less than zero. The world economy is today a huge casino. Recent analyses indicate that for every dollar that goes into trade, over one hundred end up in speculative operations completely disconnected from the real economy.²⁹¹

Indeed, the current regime is right to fear globalization, with or without American-sanctioned regime change. Cuba's status as a small island country helped to provide political protection, but these features may become significant obstacles to efficient integration in the global economy on terms beneficial to Cuba.²⁹²

Cuba's most important global competitive advantage—its proximity to the U.S. market—is constrained by the U.S. trade and investment embargo imposed in the 1960s in a futile effort to topple the Communist regime of Fidel Castro. Moreover, the island's geographical blessing is also a curse. The sun and sea tempt the new Cuba to become a typical Caribbean economy, sustaining itself through tourism rather than more-productive activities—manufacturing, services, and specialty agriculture.²⁹³

As such, it is not clear that parallels to other globalizing Marxist-Leninist regimes more like Cuba, particularly Vietnam, may provide useful guides to Cuba's future.

There are significant similarities between Cuba today and Vietnam a decade or so ago. As Marifeli Perez Stable noted: "China and Vietnam . . . have three important points in common: the governments have survived the death of a

²⁹¹ Fidel Castro Ruz, Speech at The International Conference on Financing for Development (Mar. 21, 2002), available at <http://cuba.iccas.miami.edu/DOCS/CO2749.pdf> (last visited Sept. 27, 2004).

²⁹² See Frank B. Rampersad, *Coping With Globalization: A Suggested Policy Package for Small Countries*, 570 ANNALS AM. ACAD. OF POL. & SOC. SCI. 115 (2000). He noted that:

In trade, small countries should be given much longer periods to adjust their tariff levels. In finance, they should not be brought under the graduation rules that the multilateral lending agencies apply. In this group of small countries, small island economies (42 of the 49 small countries identified by the Joint Commonwealth Secretariat/World Bank Task Force on Small States [1999] are islands) face particularly intractable problems. They have to cope with long distances from their markets and with the full list of natural hazards—hurricanes, cyclones, sea-level rises, volcanoes, earthquakes, and tidal waves. Only the most unreasonable among the industrialized countries would fail to recognize this special category of countries. *Id.* at 124.

²⁹³ Stokes, *supra* note 18.

charismatic leader; the societies are at relatively low levels of modernization; and their regional context is one where political authoritarianism and economic progress have successfully coexisted.”²⁹⁴ And U.S. government organs have suggested a role for Cuba as a regional power in the Caribbean.²⁹⁵ But at least one commentator has already suggested that even the path to globalization taken by a country more similar to Cuba, like Vietnam, is unhelpful.²⁹⁶ Cuba will be playing catch-up by the time it engages, of its own free will or otherwise, in globalization. Unlike Japan in the nineteenth century, or China in the 1980s, or even Vietnam in the 1990s, Cuba will be starting to industrialize in a global economy in which many other equally placed states will be doing the same. The competition will not make industrialization or profitable engagement any easier. China and other early entrants into the global markets have absorbed large amounts of direct foreign investment, and there are many more goods and services traded now than even ten years ago. More developed states may be in a better position to fend off competition from a state which must still bear the transaction costs of development.²⁹⁷

²⁹⁴ Marifeli Perez Stable, *Political Change: Cuba in Perspective*, available at <http://www.soc.qc.edu/cuba/mariffwww.html> (last visited Sept. 27, 2004).

²⁹⁵ On the other hand, the U.S. Department of Agriculture has suggested that: “From the perspective of land area, population, and agricultural production, Cuba dominates the Caribbean. If Cuba chooses to join the global market economy, its economic influence could significantly increase.” Economic Research Service/USDA, *Cuba’s Agriculture: Collapse and Economic Reform*, AGRICULTURAL OUTLOOK (Oct. 1998), available at <http://www.ers.usda.gov/epubs/pdf/agout/oct98/ao255h.pdf> (last visited Sept. 27, 2004).

²⁹⁶ MELISSA JOHNS, FOREIGN INVESTMENT IN CUBA: ASSESSING THE LEGAL LANDSCAPE, 35 (2004). The author notes that:

Companies hoping that investing in Cuba during its transition towards a capitalist economy will be similar to investments into Vietnam are likely to be disappointed. To begin with, Cuba is product-poor, what it produces well, it also produces expensively. Vietnam has many high quality, low cost products with which to trade. . . . The high production costs for Cuba’s state-run facilities push its products out of the general global price range. *Id.* at 61.

Julie Bunck has identified several factors to explain the differences between Cuban and Vietnamese engagements with post-Soviet globalization:

Seven political factors may help to explain the differences in approach between the Vietnamese and Cuban transitions and the relative success of Hanoi: the degree of Cold War economic dependence, the reaction to the collapse of the Soviet empire, the extent of policymaking consistency, the characteristics of the leaderships, the nature of traditional culture, the nature and substance of regional relationships, and the degree of commitment to long-term economic reform.

Julie Marie Bunck, *Marxism and the Market: Vietnam and Cuba in Transition*, 6 CUBA IN TRANSITION 234 (1996) (proceedings of the Fifth Annual Meeting of the Association for the Study of the Cuban Economy (ASCE), held at University of Miami in Miami, Florida on Aug. 8-10, 1996), available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba6/32bunck.fm.pdf> (last visited Sept. 27, 2004).

²⁹⁷ See, e.g., YONGZHENG YANG, CHINA’S INTEGRATION INTO THE WORLD ECONOMY: IMPLICATIONS FOR DEVELOPING COUNTRIES (IMF Working Paper No. 03/245, 2003), available at <http://www.imf.org/external/pubs/ft/wp/2003/wp03245.pdf> (last visited Sept. 27, 2004).

V. GLOBALIZATION AT THE GATES

At the time of the Cuban Revolution, Fidel Castro could look at a world that appeared poised on the brink of the overthrow of the capitalist order.²⁹⁸ From Eastern Europe to Africa, to Asia and even Latin America, popular movements were gaining strength.²⁹⁹ Americans were about a decade or so from defeat at the hands of a combination of foreign and local communist cadres in Vietnam,³⁰⁰ and the world's intelligentsia appeared to embrace Marxist-Socialism and the dictatorship of the proletariat.³⁰¹ It appeared that the world would soon be shaped by the Marxist-Socialist vision of public and private ordering. By 2004, a Marxist vision was indeed being realized, but not the one that appeared to be embraced in 1959. It is capitalism, not Marxism, that today "compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what we call civilization into their midst, i.e. to become bourgeois themselves. In one word, it creates a world after its own image."³⁰² Notwithstanding Lenin's confident prediction, the proletariat is not at the vanguard of global convergence after all.³⁰³ Instead, the multinational corporation forms the vanguard of the anti-Marxist-Statist revolution that today sweeps the world under the "globalism" banner.³⁰⁴ And it is not a Cuban or even Chinese form of communal system self-interest that has carried the day—it is that of the United States.³⁰⁵

²⁹⁸ Even the Americans were afraid of the domino effect of communist revolution and on that basis sought to "contain" communism from the 1940s. See JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY* (1982) (for analysis on the development of the "domino effect" notion from out of the containment policies adopted in the late 1940s, see especially 130-32, 144). For a useful discussion of the "domino effect" see Robert Jervis, *Domino Beliefs and Strategic Behavior*, in 8 *DOMINOES AND BANDWAGONS: STRATEGIC BELIEFS AND GREAT POWER COMPETITION IN THE EURASIAN RIMLAND* 20 (Robert Jervis & Jack Snyder eds., 1991).

²⁹⁹ See, e.g., THOMAS C. WRIGHT, *LATIN AMERICA IN THE ERA OF THE CUBAN REVOLUTION* (1991); GÜNTER NOLLAU, *INTERNATIONAL COMMUNISM AND WORLD REVOLUTION: HISTORY AND METHODS* (1961); ROBERT PAYNE, *RED STORM OVER ASIA* (1951).

³⁰⁰ See, e.g., WILLIAM J. DUIKER, *THE COMMUNIST ROAD TO POWER IN VIETNAM* (1981).

³⁰¹ Hindsight has turned this anecdotal sense into a truth often drawn on in the popular press. See, e.g., Robert Conquest, *Academe and the Soviet Myth*, 31 *NAT'L INTEREST* 91 (1993).

³⁰² Karl Marx & Friedrich Engels, *The Communist Manifesto*, in *THE MARX-ENGELS READER* 338-39 (1972).

³⁰³ Lenin famously stated: "Even though the bourgeoisie are still raging, even though they may kill thousands more workers, victory will be ours, the victory of the worldwide Communist revolution is assured." Vladimir Ilyich Lenin, *Speech at the Opening Session of the Congress*, (March 2, 1919) (First published in 1920, in German, in the book *DER I. KONGRESS DER KOMMUNISTISCHEN INTERNATIONALE. PROTOKOLL* in Petrograd. First published in Russian in 1921 in the book *FIRST CONGRESS OF THE COMMUNIST INTERNATIONAL. MINUTES* in Petrograd), available at <http://www.marxists.org/archive/lenin/works/1919/mar/comintern.htm> (last visited Sept. 27, 2004).

³⁰⁴ On the convergence of legal systems within a regime of multi-national corporations, see, e.g., Wolfgang Wiegang, *The Reception of American Law in Europe*, 39 *AM. J. INT'L L.* 236 (1991).

³⁰⁵ Perhaps Joseph Stiglitz said it best:

In public policy debates, few argue openly in terms of their own self-interest.

Perhaps the greatest irony of all is that in some respects, the new fundamentals of economic globalization echo the spirit of Maoist Marxism, even as they reject the Stalinist gloss on Marxist-Leninist ideology. For China, this has been a boon, and made entry into the world economy feel like less of a betrayal of the fundamentals of Chinese state organization. For the Cubans, on the other hand, clinging to a Stalinist version of Marxist-Leninism can cement the presumption that Cuba's only alternative is resistance.³⁰⁶ Consider, for example, an often-quoted passage describing modern global capitalism:

Capitalism works by constantly shattering the old and replacing it with the new. Innovation replaces tradition. The present—or perhaps the future—replaces the past. Nothing matters so much as what will come next, and what will come next can only arrive if what is here now gets overturned. While this makes the system a terrific place for innovation, it makes it a difficult place to live, since most people prefer some measure of security about the future to a life lived in almost constant uncertainty. And it sets the values that the economic sphere emphasizes in opposition to the values that the social sphere, for the most part, emphasizes.³⁰⁷

There is more than a hint of this notion of revolution, of the inevitability of a constant revolutionary state, in the writing of Mao. The differences between the two are great, of course. The ideology of economic globalization focuses on

Everything is couched in terms of *general interest*. Assessing how a particular policy is likely to affect the general interest requires a model, a view of how the entire system works. Adam Smith provided one such model, arguing in favor of markets; Karl Marx, aware of the adverse effects that capitalism seemed to be having on workers of his time, provided an alternative model. Despite its many well-documented flaws, Marx's model has had enormous influence, especially in developing countries where for the billions of poor capitalism seemed not to be delivering on its promises. But with the collapse of the Soviet empire, its weaknesses have become all too evident. And with that collapse, and the global economic dominance of the United States, the market model has prevailed.

STIGLITZ, *supra* note 47, at 217. See also *On the Threshold of the Third Globalization: Why Liberal Capitalism Might Fail*, *supra* note.

³⁰⁶ For example, Fidel Castro has declared:

La Cuba que entra en el Nuevo milenio no es la Cuba de 1959, inexperta, desarmada y casi anafabeta de entonces. . . . Hemos aprendido a resistir y vencer en las mas inconcebibles circunstancias. No hay otro pueblo mas preparado, menos dependiente del comercio y las relaciones economicas con la nacion que se ha erigido en la mas rica e imprescindible potencia opara los demas paises del mundo; mas libre para exponer sus verdades y defender lor derechos de los pueblos explotados y pobres del mundo en todos los foros y tribunales internacionales.

Fidel Castro Ruz, *El actual orden mundial no puede garantizar una vida digna para la humanidad*, in CASTRO, *supra* note 217, at 179, 183.

³⁰⁷ James Surowiecki, *Rogue Missives: Decision in Time*, Jan. 6, 1997, available at <http://www.fool.com/Rogue/1997/Rogue970106.htm> (last visited Sept. 27, 2004), (reviewing ANDREW S. GROVE, *ONLY THE PARANOID SURVIVE: HOW TO IDENTIFY AND EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY BUSINESS* (1996)).

private actors and the exploitation of the means of production, from which everything else follows. Mao's ideology, on the other hand, focuses on public actors and the control of public institutions for the elimination of class struggle, from which everything else follows. But the patterns identified in both are surprisingly similar. Each describes a dynamic process from which there can be no rest. The measure of success in globalizing economic terms is wealth, from which power flows; the measure of success in globalizing Maoist terms is political, from which power flows.

But China's radical polycentricity³⁰⁸ can also inhibit the accommodation to the habits of global institutions. These institutions require a certain degree of stability and a confirmed hierarchy of law. They also require dispute resolution systems that are at least characterizable as nominally fair. In a sense, modern globalism requires a bit of Stalinist bureaucratization and centralization tied to the community to be benefited thereby. But the emerging pragmatic Maoist-Marxist-Leninism of a now globalized China is not yet completely suited to the task.

Cuba, on the other hand, suffers from an overabundance of Stalinist centralization and bureaucratization. Its vocabulary has become increasingly antiquated, even by Marxist-Leninist standards.³⁰⁹ Thus, the current leadership finds itself increasingly isolated even from the few ostensibly Marxist-Leninist states still operating; it is increasingly unable or unwilling to understand changes in other Marxist-Leninist states. Thus, despite great interest by the Cuban military in following the Chinese model of corporatism within a Marxist-Leninist framework, the Cuban leadership, at its highest levels, found the new direction taken by China incompatible with Cuba's more traditional notions of the appropriate relationship between the state and its economic operations.³¹⁰

Cuba, unlike China, may be overwhelmed by the crush of the global economic system now being built around it. It is not surprising, then, that Cuba's leader would proffer resistance as an alternative:

Rather than a "new financial architecture" for an old and obsolete system, what is called for is to demolish the established financial system down to its very foundations to set up another one that is truly reliable, democratic, equitable and humane conducive to eradicating poverty and saving the world.³¹¹

³⁰⁸ See Clarke, *supra* note 203.

³⁰⁹ On the ways in which Marxist-Leninism has been attempting to reinvent itself after the collapse of the Soviet Union, see, e.g., Harry R. Targ, *Imperialism in Transition: The Global Political Economy Moves Toward the Twenty-first Century*, in *MARXISM TODAY: ESSAYS ON CAPITALISM, SOCIALISM, AND STRATEGIES FOR SOCIAL CHANGE* 71 (Chronis Polychroniou & Harry R. Targ eds., 1996); James Peters & Chronis Polychroniou, *Capitalist Transformation: The Relevance of and Challenges to Marxism*, *id.* at 99; HOWARD J. SHERMAN, *REINVENTING MARXISM* (1995).

³¹⁰ See Domingo Amuchastegui, *FAR: Mastering Reforms*, in 10 *CUBA IN TRANSITION* (2000).

³¹¹ Fidel Castro Ruz, Address at the First Summit Between Heads of State and Government of Latin America and the Caribbean and the European Union (June 28-29, 1999), available at

In the absence of any move to embrace this alternative, it is also not surprising that Cuba might choose isolation to oblivion. Indeed, much of the official discourse from Cuba against privatizing economic globalization is couched in political and nationalist terms. In Castro's own words:

We are also encouraged by the certainty that while defending our independence, our right to development, the path freely chosen by our sovereign people we are also defending those same rights for every small nation of the Caribbean that could one day find themselves equally threatened by the arrogance of the empire³¹²

But Cuban opposition to globalization has a more pragmatic aspect as well:

The Free Trade Agreements have been mentioned, I already said, and it has already been very eloquently said here that all of those currently super-developed and super-rich nations developed without FTAs and without WTOs. They developed by protecting their industries and not by making them compete with those who had all the technology because they had universities, research centers, their own researchers. And a significant number of them developed by stealing the best minds from Third World countries where these did not have the smallest chance of having access to a laboratory. They offered them opportunities, not just economic, since people are not moved by economic motivations alone, people are also moved by a vocation or by the desire to do research, to work, to create.³¹³

More important is the fear that opening up to globalization will result in a significantly greater "brain drain" as Cuba's professional classes migrate abroad. Indeed, Cuba has long taken the position that migration policy has been used by

<http://www.cuba.cu/gobierno/discursos/1999/ing/f290699i.html> (last visited Sept. 27, 2004). This is an alternative with a Marxist face: "Moreover, a Marxist can never be a narrow national chauvinist. A Marxist can be a patriot, which is different, and love his or her homeland, which is different, too." Castro's Speech, First International Congress on Culture and Development, *supra* note 14.

³¹² Fidel Castro Ruz, Address to the Heads of State and Government of the Caribbean Community (July 2, 2003). Consider also another expression of the official Cuban vision of integration under the current global system:

Actually, there is a very close powerful neighbor who wants to integrate us into it. Of course, this is to have access to our natural resources and the cheap labor of hundreds of millions of Latin Americans producing jeans, shoes, T-shirts, handicrafts that are very labor-intensive. Meanwhile, they keep the cutting-edge industries and the brain drain continues. Right now, they are talking about hiring 200,000 highly qualified foreign workers for their electronic industries, preferably Latin Americans. And so, they take away those highly qualified people that you train in the universities, the most scientifically talented. They give visas to them all right. These do not need to become wetbacks or illegal immigrants.

Castro's Speech, First International Congress on Culture and Development, *supra* note 14.

³¹³ Fidel Castro Ruz, Address at the closing of the 4th International Economists Meeting (Feb. 15, 2002), available at <http://www.cuba.cu/gobierno/discursos/2002/ing/f150202i.html> (last visited Sept. 27, 2004).

the United States to destabilize Cuba and undermine its Revolution.³¹⁴

Resistance to globalization is the logical, and perhaps necessarily easy, choice for Cuba. However, since the collapse of the worldwide network of Marxist-Socialist states at the end of the twentieth century, globalization has become increasingly difficult to resist. Indeed, despite the rhetoric of the Cuban official class and their friends, the culture of modern and private economic globalization may now even be beyond the control of any nation, even the United States.³¹⁵ There is a certain amount of irony here. The corporation, as the engine of modern privatized economic globalization, has exceeded the boundaries set for it by the nation-states that created it. To some extent, the largest transnational corporations have come to own themselves,³¹⁶ and to play a quasi-independent

³¹⁴ The Cuban government has stated on its website that:

En el contexto de la guerra económica contra la Revolución Cubana, la política migratoria de los Estados Unidos ha constituido uno de los más importantes instrumentos de la hostilidad estadounidense hacia la isla, con el objetivo de desestabilizar la sociedad cubana, desacreditar su modelo político, drenar a Cuba de su capital humano y sentar las bases para la creación de movimientos contrarrevolucionarios encargados de realizar acciones terroristas y agresivas contra el pueblo cubano, empeñado en construir un nuevo país.

MINISTERIO DE RELACIONES EXTERIORES DE LA REPÚBLICA DE CUBA, ACERCA DE LA LEY DE AJUSTE CUBANO, available at http://www.cubaminrex.cu/Enfoques/lac_acerca%20de%20esta%20ley_tc.htm (last visited Sept. 27, 2004).

³¹⁵ Leslie Sklair's analysis of the rise of a transnational capitalist class unmoored to any nation, but singularly attached to its own community of interests, is worth careful consideration. See SKLAIR, *supra* note 56, at 5-6. He suggests four propositions: (1) "a transnational capitalist class based on the transnational corporation is emerging that is more or less in control of the processes of globalization;" (2) the transnational capitalist class "is beginning to act as a transnational dominant class in some spheres;" (3) "the globalization of the capitalist system reproduces itself through the profit-driven culture-ideology of consumerism;" and (4) "the transnational capitalist class is working consciously to resolve two central crises, namely (i) the simultaneous creation of increasing poverty and increasing wealth within and between communities and societies (the class polarization crisis) and (ii) the unsustainability of the system (the ecological crisis)." *Id.*

Moreover, it is not clear that any nation can use law as a direct instrument of corporate or economic control. Recent scholarship on mergers in the late nineteenth century suggests that "the 'law matters' thesis cannot account readily for the surge in investor confidence which contributed to the merger wave of 1897 to 1903." Brian R. Cheffins, *Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century*, 51 AM. J. COMP. L. 473, 489 (2003). Professor Cheffins, however, argues that law can have a contextual effect, that is, as contributing to the environment within which investment decisions are made. Thus, he notes that "[w]hile it would seem that corporate law did little to make investors 'comfortable' about owning shares in companies during the merger wave, the configuration of antitrust regulation apparently made an important if indirect contribution" by affecting the way mergers were created. *Id.* at 491. For the "law matters" school, see, e.g., John C. Coffee, *The Rise of Dispersed Ownership: The Roles of Law and State in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001); Mark Roe, *Corporate Law's Limits*, 31 J. LEGAL STUD. 233 (2002); Diane K. Denis & John J. McConnell, *International Corporate Governance*, 38 J. FIN. & QUANT. ANALYSIS 1, 4-5 (2003).

³¹⁶ Modern theorists, Japanese and German, but alas not American, recognize the power of a corporation to own itself, and, indeed, to mimic the state in form and self-consciousness. For a discussion of corporate self-ownership, see Iwai, *supra* note 79. For the development of the notion of corporate autonomy, see Teubner, *supra* note 79.

role in global economic and political development.³¹⁷ Even:

American multinationals are becoming less like national industrial champions, more like global assembly points. "The core corporation is no longer even American," wrote Robert Reich in 1991, before becoming Secretary of Labor in Washington: "It is increasingly a facade, behind which teems an array of decentralized groups and subgroups continuously contracting with similarly diffuse working units all over the world." And he summed up, "There is coming to be no such thing as an American corporation or an American industry. The American economy is but a region of the global economy."³¹⁸

A phenomenon beyond the power of the United States to contain, a phenomenon that is too difficult for China, the greatest Marxist-Leninist state in the world, is certainly well beyond the power of any small state to resist.³¹⁹

But the Cuban compromise has resulted in the production of a system that neither completely resists nor completely engages with globalizing economic, social, or political trade norms. From outside Cuba, the dissatisfaction with this form of Cuba's engagement and containment is usually measured by Cuba's failure to harmonize on the West's terms. From inside Cuba, the failure of either harmonization or resistance can best be understood in terms of the tensions between the normative framework of corporate economic organization and Marxist-Socialist state organization.³²⁰ The result is isolation and instability.

Isolation is disastrous—the histories of Japan in the nineteenth century, and China and Russia in the twentieth century, suggest the extent of the unhappy possibilities. Some have argued that the appropriate analogy for Cuba's position today is the Soviet Union in the years before its collapse.³²¹ I disagree. It

³¹⁷ See *supra* text accompanying notes 91-92.

³¹⁸ ANTHONY SAMPSON, *COMPANY MAN: THE RISE AND FALL OF CORPORATE LIFE* 306 (1995).

³¹⁹ Manuel Cereijo, *Yes Castro: Entrepreneurial Spirit and Globalization Are the Future for Cuba*, REVISTA GUARACABUYA, available at <http://www.amigospais-guaracabuya.org/oagmcl35.php> (last visited Sept. 27, 2004) (the Revista Guaracabuya is the official organ of the Sociedad económica de Amigos del País, a non-Cuban based successor to a Cuban NGO established well before 1959):

In an era of man-made brainpower industries, the global economy is a dynamic one always in transition. The classical theory of comparative advantage has disappeared. The whole distinction between capital/labor collapses. Skills and knowledge, human capital, are created by the same investment funds that create physical capital. Today knowledge and skills stand alone as the only source of comparative advantage. They have become the key ingredient in this century's location of economic activity.

³²⁰ See *supra* Part II.

³²¹ See, e.g., Pérez-López, *supra* note 22. Pérez-López argues that rather than follow China or Vietnam, Cuba chooses to follow proven-failure policies that led to the collapse of the Soviet Union. Cuban citizens face declining standards of living, levels of consumption, and quality of services. Cuban reforms resulted in "shock therapy," as experienced by Eastern European nations, but were unaccompanied by a transition to a market economy. *Id.* at 74-76.

is true enough that the Castro government stays close to its Stalinist ideological roots "with a Cuban face." However, I believe the better analogy for Cuba today is not twenty-first century China, nor the twentieth century Soviet Union, but rather early nineteenth century Japan—another proud and self-consciously isolated island nation. Like Japan during the first half of the nineteenth century,³²² Cuba is ruled by an ideologically united warrior caste that consolidated power among the various traditionally warring factions on the Island and brought a measure of peace and stability.³²³ Like the Shogunate after the seventeenth century,³²⁴ the Cuban ruling class is determined to preserve the Island from infection by the corrupt and dangerous outsiders.³²⁵ For the Shogunate, the dangerous outsiders were the European traders who had begun to carve up an increasingly weak China.³²⁶ For the modern Cubans, the enemy outsider is the United States as the vanguard of a hegemonic late capitalist market system.³²⁷ For the Shogunate, contact with the outside world for the

³²² This period marked the last decades of the political organization of the state known in the West as the Shogunate.

³²³ Marifeli Pérez-Stable, *The Invisible Crisis: The Exhaustion of Politics in 1990's Cuba*, in TOWARD A NEW CUBA? LEGACIES OF A REVOLUTION 25-7 (Miguel Angel Centeno & Mauricio Font, eds., 1997). Pérez-Stable argues that Cuba faces an invisible political crisis because it relies on a charismatic authority rather than strong economic institutions. Cuba relies on Castro, single party politics, and mass mobilizations for governance. Although Cuba refuses to change its political institutions, it has changed its economic policies. Internationally, single-party socialist states have failed. *Id.*

³²⁴ See W.G. Beasley, *The Foreign Threat and the Opening of the Ports*, in 5 THE CAMBRIDGE HISTORY OF JAPAN, THE NINETEENTH CENTURY 259, 259 (Marius B. Jansen ed., 1995) (discussing the Japanese policy of isolation known by the term "sakoku").

³²⁵ This is well understood. See Zamora, *supra* note 159, at 345, 348-49.

Cuba is a complicated subject because of the nature of its economic system, which is really two distinct systems operating side by side. One is the socialist peso economy which applies to most Cubans and provides them with free education, free health care, universal employment, unemployment compensation, disability and retirement benefits, and the basic necessities of life: food, housing, utilities and some entertainment at very low cost. The other is the free-market dollarized economy that operates in the tourist, international, and export sectors and in many ways sustains the socialist economy. The Cuban business enterprise system is one of the most important ways of sustaining this dual economy on the island.

³²⁶ "The Tokugawa Shogunate had adopted an isolationist policy since the seventeenth century, and it was shocked to witness the United Kingdom defeat China in the Opium War (1839-42), as well as the subsequent invasion of China by Western countries. The Opium War demonstrated the superior military power backed by Western countries' post-Industrial Revolution economic development." Hiroshi Iyori, *Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development*, 1 WASH. U. GLOBAL STUD. L. REV. 35, 36 (2002).

³²⁷ The United States remains the principal antagonist and bete noir of the Cuban state. Consider in this respect the Cuban version of its recent history as posted on its website:

La historia de Cuba con los Estados Unidos no terminó con esta hazaña, sino que al desaparecer el campo socialista en el este de Europa, y la URSS al borde de la desintegración, el Gobierno estadounidense entendió que había llegado el momento de iniciar, en 1990, una nueva fase del bloqueo económico contra Cuba. . . . A lo largo de todos estos años la batalla ha continuado. Cuba enfrenta atentados, sabotajes, guerra bacteriológica, un bloqueo económico terrible y cada

average citizen was severely controlled and mostly indirect.³²⁸ For Cuba, contact with the global economy comes through limited areas and tightly monitored investment regimes.³²⁹

The Shogunate was eventually unable to keep the world out. Its inability first to prevent the outside world from making contact, and imposing its rules on Japan through the "Unequal Treaties,"³³⁰ ultimately led to the Meiji Revolution and the overthrow of the Shogunate itself in favor of a regime more willing to embrace the nineteenth century norms of global economic and political powers.³³¹ It is unlikely that Cuba will be able to resist the globalization consensus for long. Global harmonization produces pressures that nations like Cuba may find difficult to resist.

Pressure takes three primary forms: normative pressure, isolation pressure, and structural pressure of the international system. "The first is normative pressure. The second may be termed the 'balloon theory.' . . . The third pressure, which follows directly from this, relates to the pressure that the United States is

vez más novedosas formas de agresión, incluyendo campañas contra el país a través de todos los medios. A pesar de este injusto y cruel ensañamiento por parte de la nación más poderosa de la Tierra, el gobierno revolucionario inició un programa socialista para el desarrollo nacional, a la vez que impulsó un profundo programa de desarrollo social que ha hecho de Cuba el país de mayores niveles de justicia social de todo el Tercer Mundo. Se destacan en este programa los altísimos logros de la salud pública en la que Cuba aspira a ser una potencia mundial; en la educación, gratuita a todos los niveles y obligatoria hasta la enseñanza media; en el deporte, donde obtiene los primeros lugares de los Juegos Panamericanos y en las Olimpiadas; y en la cultura, asequible a todos los cubanos y proclamada por nuestros artistas en todo el urbe.

MI PAÍS, RESEÑA HISTÓRICA, available at <http://mipais.cuba.cu/historia.php?subcat=2> (last visited Sept. 27, 2004).

³²⁸ See KENNETH B. PYLE, *THE MAKING OF MODERN JAPAN* 14-17, 19 (1978) (explaining how the Shogunate limited contact to Dutch traders into the port of Nagasaki from around 1600 to about 1858 and Commodore Perry's "opening of Japan to international trade as a means of avoiding Christianification, cultural subjugation and colonization").

³²⁹ See discussion *supra* Part V.

³³⁰ "In 1858, Japan signed treaties with the United States, Britain, France, Holland, and Russia. These treaties, collectively the Unequal Treaties, significantly eroded Japan's national sovereignty. After the Meiji Restoration in 1868, the elimination of the treaties became the overriding goal of the political process." Annen Junji, *Constitutionalism as a Political Culture*, 11 PAC. RIM L. & POL'Y J. 561, 570 & n. 22 (Lee H. Ruosso trans., 2002). "The 'National Goal' of Meiji Japan was to be seen with its shoulder placed against the advanced countries; Japan wished to become more than a second-rate country, but less than a first-rate one, that was all. In concrete terms, the goal for the time being was treaty revision." *Id.* at 570. See also WILHEM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 457 (Michael Byers trans. 2000) (describing the unequal treaties as instruments "by which the civilised nations reserved a special jurisdiction ('consular jurisdiction') over their own nationals, whom they did not wish to have subjected to the legal order and justice system of a half-civilised or uncivilised country."). The Chinese had been subjected to a harsher form of "unequal treaties" earlier in the nineteenth century, and ultimately could not avoid their effects until the establishment of the People's Republic. For a short summary, see, e.g., MICHAEL SCHALLER, *THE UNITED STATES AND CHINA IN THE TWENTIETH CENTURY* 7-15 (1979).

³³¹ See, e.g., HIROSHI ODA, *JAPANESE LAW* 24-32 (2d ed. 1999); see also CHITOSHI YANAGA, *JAPAN SINCE PERRY* 24-35 (1949).

exerting on other states with lax regulations to amend their laws."³³² Together, these forces are difficult to resist for states that are small, poor, and in a technologically inferior position. There is a sort of analogy of power between Commodore Perry's gunboats in nineteenth century Japan and the flows of globalized commerce, technology, culture, and people in the twenty-first century. These outside forces will prove as difficult to resist when the world comes calling more forcefully after the death of Fidel Castro.

Moreover, Cuba faces substantial internal pressures as well. Even within Marxist-Leninism, the centralizing, state-monopolistic, and bureaucratized form of Marxist-Leninism represented by Stalinist Cuba had been subject to sustained criticism. The most severe critics of a state-centered and bureaucratized Marxist-Leninism, as developed in Stalin's Soviet Union, included self-described "Left Opposition" Marxist-Leninists who remained loyal to a more internationalist (or globalizing) vision of the Communist International. These critics argued that:

The victory of socialism, especially the 'final, irrevocable' one, can only consist in this, that the average productivity of every member of the socialist society is higher, even substantially higher, than that of a capitalist worker. Even the most daring Comintern theoretician will not venture such an assertion with regard to the U.S.S.R. We hope to establish statistically in the near future the still very great backwardness of the Soviet Union with respect to both the national and individual incomes. Our present task requires no such proof. The fact that the Soviet government must needs hold fast to the monopoly of foreign trade, represents a sufficient confirmation of the existing backwardness despite all the successes of Soviet economy.³³³

³³² WIENER, *supra* note 73, at 142. Wiener reflects the view held by many that "[t]here is here a kind of structural power, in which one state is able to impose a framework that determines the method of managing pressures that will be adopted by other states." *Id.* (citing SUSAN STRANGE, *STATES AND MARKETS: AN INTRODUCTION TO INTERNATIONAL POLITICAL ECONOMY* (1988)).

³³³ Leon Trotsky, *On the Seventh Congress of The Comintern* 2 NEW INT'L 177-79 (New International, trans., 1935), available at <http://www.marxists.org/archive/trotsky/works/1935/1935-comintern.htm> (last visited Sept. 27, 2004). Leon Trotsky's polemic, even read with a grain of salt, suggests the limitations and dangers of the Stalinist position:

What is the "final, irrevocable victory of socialism in the land of the Soviets" supposed to mean? No official theoretician has tried to explain it to us. The resolution too spares itself the slightest hint of the criteria upon which this assertion is based. We must therefore call to mind all over again the A—C of Marxism. . . . For, if the costs of production in the country were lower than the capitalist costs, the monopoly of foreign trade would be superfluous. The latest reform of foreign trade, interpreted by many all-too-superficial observers as a surrender of the foreign trade monopoly, is in reality only technico-bureaucratic reform, which does not in the least infringe upon the basic pillars of the monopoly. Since, on the other hand, the Soviet bureaucracy bases itself upon the nationalized means of production since the introduction of the Five Year Plan and the collectivization, and on the other hand, the Soviet product is still much dearer than the capitalistic, the Soviet bureaucracy, for the sake of its own

There is a suggestion, within this criticism, of a vision of Marxist-Leninism that would embrace greater participation in the world, rather than greater isolation, less petulance, and more engagement, than the current Cuban government appears ready to accept:

On July 1991, when the first Summit was held in Guadalajara, I could not even imagine the further development of such event. I was a strange bird there, an intruder whose admission to that hall had the taste of forgiveness. . . . It was about that time that some pundits and wise people among those who foretell the future took up a well coordinated but still impossible mission, that of persuading Cuba to abandon the path of revolution and socialism as the only possible alternative for survival. There was a flow of advises from all directions but we felt otherwise and were determined to struggle.³³⁴

Whatever it does, Cuba will have to adopt a framework that speaks the *language* of the emerging international economic community. That approach, whatever its effects in practice, is the principal mark of Chinese success in global integration. Decentralizing the state as an instrumentality of commerce must form the centerpiece of any efforts to engage the international economic community. An abandonment of Stalinism may well be the first step in that direction.

VI. CHOOSING A MODEL FOR TRANSITION

To survive in a globalizing world, the Cuban government, like that of its Chinese Marxist-Socialist comrade, will have to abandon, or at least modify, the traditional vocabulary of Marxist-Socialist states and embrace that of the dominant global economic force. Abandonment of Marxist-Socialist vocabulary, however, need not also lead to an abandonment of the principles for which the Marxist-Socialist revolutions were undertaken. It will require an adjustment of perspective. The Chinese have begun to realize both the inevitability and benefits of this approach.³³⁵ Chinese Maoism is flexible enough to attempt an accommodation to the new ruling order. For the moment it has been able to finesse the fundamental contradiction of its engagement with globalism by adapting the state's obligation to own the means of production to global enterprise forms. It has started substituting indirect for direct ownership. It has discovered the ownership value of tight regulation of enterprises. Whether the experiment will be successful, that is, whether Chinese communism can survive

preservation, cannot abandon the foreign trade monopoly. This decisive fact—the low productivity of labor power in the Soviet Union—gives the key which puts us in a position to open up all the other secrets. *Id.*

³³⁴ Fidel Castro Ruz, Opening Speech at the Ninth Ibero-American Summit (November 16, 1999), available at <http://www.cuba.cu/gobierno/discursos/1999/ing/1161199i.html> (last visited Sept. 27, 2004).

³³⁵ See discussion *supra* Part V.

globalization, remains to be seen. It has, however, brought a measure of power, stability, and engagement with the rest of the world, which has reinforced rather than subverted Chinese sovereignty.

The Chinese have discovered the power of devolution of state enterprises. The West finds the socialist amalgamation of economic and political institutions to be difficult to deal with, and ultimately unacceptable and incompatible with the emerging global trade system. Yet when the state organizes its economic power in corporations and other entities, and vests majority control in those enterprises in state agencies or the military, then the West finds the resulting economic organization acceptable and compatible with global patterns of economic organization. In the latter case, economic power is organized under and speaks the language of corporations and property. In China, state enterprises, now organized as independent corporations, have been heralded as the vanguard of a free enterprise revolution.

The Chinese way is not necessarily open to Cuba. Cuban Stalinism is not Chinese Maoism. Chinese social patterns³³⁶ are not those of Cuba.³³⁷ The rest of the world was obligated to meet China halfway because of China's size and power. The great actors on the world's political stage can continue to ignore or use Cuba without regard to the interests or desires of Cuba. In a sense, the history of Cuba has always played against the desires of the great powers that have used it in the context high stakes politics. Spanish imperial ambition, American economic desire, Soviet expansionism, European love/hate of American dominance—these and related themes have been far more important to Cuba than anything indigenous to the island. It will continue to be so, whoever is permitted to lead the Republic next. Thus, the way forward for Cuba may, but also may not, lie in following the Chinese path.³³⁸

The Cuban military has started to emulate the Chinese success in this respect.³³⁹ Whether it will provide the nucleus for a devolution that permits the state to retain its preeminent place within the country's economic life remains to

³³⁶ See discussion *supra* Part IV.

³³⁷ See discussion *supra* Part II.

³³⁸ See discussion *supra* Part IV.

³³⁹ See CUBA TRANSITION PROJECT INSTITUTE FOR CUBAN AND CUBAN AMERICAN STUDIES, UNIVERSITY OF MIAMI, THE CUBAN MILITARY IN THE ECONOMY, Issue 46 (2003), available at http://ctp.iccas.miami.edu/FOCUS_Web/Issue46.htm (last visited Sept. 27, 2004). The Report notes:

The man behind the transformation of Cuba's Fuerzas Armadas Revolucionarias (FAR) into a major economic force is Gen. Raul Castro, Cuba's defense minister and designated successor to elder brother Fidel. Beginning in the late 1980s, as materiel and subsidies from Moscow progressively dwindled, Raul Castro introduced the "Sistema de perfeccionamiento empresarial (SPE)," or enterprise management improvement system, that streamlined the Cuban military's operations. With the disappearance of the Soviet bloc by 1991 and the ensuing severe economic crisis that threatened the regime's survival, the younger Castro went further and established state corporations like the Gaviota tourism group for joint ventures with foreign capital. Today, the military is not only a largely self-financing institution but a major player in the overall Cuban economy. *Id.*

be seen. At a minimum, it points to a way in which the state can emulate the language of global economic discourse without abandoning socialist ideals wholesale. But the space within which Cuba may navigate in the long run is small. As Alan Greenspan described:

The collapse of the Soviet empire, and with it central planning, has left market capitalism as the principal, but not universally revered, model of economic organization. Nevertheless, the vigorous debate on how economies should be organized in our increasingly globalized society and what rules should govern individuals' trading appears destined to continue.³⁴⁰

And transition, even within socialism, has its dangers.³⁴¹

But Cuba faces a number of obstacles, irrespective of its willingness to engage globalization. Whatever the state of Cuban corporate law, whatever the deficiencies of the foreign investment law, it is difficult to assess the effectiveness of the Cuban approach in light of difficulties Cuba faces on the international stage. Foremost among the external constraints are the post-expropriation claims that continue to be vigorously pursued by the United States and the Cuban diaspora community. These claims, to the extent they might affect property or ownership interests in Cuban property, might serve to chill certain forms of foreign investment. But even in the absence of this serious problem, Cuba is in a poor position to compete globally for a number of reasons. Cuba is not a member of the International Monetary Fund. While the current regime loathes the IMF and the economic system it sustains, membership has some value in international commerce. Moreover, Cuba has a poor international credit rating. Lastly, but quite important, Cuba suffers a massive budget deficit. Taken together, these problems contribute to a difficult position for Cuba on the global economic stage.

Many commentators considering Cuban economic reform, even those more sympathetic to the current ruling ideology in Cuba, may assume it necessary for Cuba to more fully embrace the global consensus of economic activity through a system of deregulated and open markets.³⁴² For example, one proposal suggests the necessity of a three-stage transition. Cuba must first, restore financial balance; second, transition to a market economy; and third, decentralize the economy. The government will continue to regulate the market. The goal of this restructuring is to fully utilize resources and to promote productivity. In order to

³⁴⁰ Remarks by Chairman Alan Greenspan Before the Bundesbank Lecture 2004, *supra* note 29.

³⁴¹ See Karen Halverson, *China's WTO Accession: Economic, Legal and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319 (2004). "While China has undergone dramatic economic and even legal changes in the process of joining the WTO, the CCP has endeavored to maintain rigid control over other spheres of Chinese society. While it is impossible to predict the future path of political reform in China, there are some encouraging signs that China's integration with the world market might, over time, lead to political and social liberalization as well." *Id.* at 363.

³⁴² See, e.g., Ernesto Hernández-Catá, *Adjustment and Reform in Cuba: A Critical Assessment*, in PERSPECTIVES ON CUBAN ECONOMIC REFORMS, *supra* note 22.

be successful, the public must support the reforms. Success can also be measured by the restructuring of state institutions and improvements in the external sector. The areas of reform include: "reform of state enterprises, integration of the non-state sector into the national economy; worker assistance programs; price and wage policies; exchange rate policies; national budget; foreign trade; banking, including monetary and credit policies; and investment by the state."³⁴³ The analysis does not include specific time frames because of the uncertainty of the time it may take to meet the objectives of each stage, and because the analysis is not detailed enough.³⁴⁴

The standard commentaries, which uniformly press for greater Cuban engagement to emerging global norms, do little to help understand the logic of Cuba's approach and the challenges that globalization poses for Marxist-Socialist states. For that reason alone, they do little to help Cuba constructively approach the problem of engagement. Both China's special form of engagement and Cuba's resistance and containment of globalism are significant for the light they shed on the basic normative framework of enterprises operating in corporate form and on the compatibility of this normative framework with Marxist-Socialist systems. Each may also contain the seeds for economic engagement, on the terms of the emerging international commercial economy, which may be compatible with a form of Marxist-Socialist state organization. Ironically enough, the language of modern free-enterprise capitalism, and of global corporate governance in particular, is eminently suitable to the preservation of the fundamental objectives of the Cuban (and any other Socialist) state.³⁴⁵ Cuba must embrace the corporate form and the ideology of corporate organization. It must communicate, within the economic sphere, with the common language of the global market. It need not lose its soul in the process. But does the Cuban government have the stomach for the task?³⁴⁶

³⁴³ Julio Carranza Valdés, et al., *Reforming the Cuban Economy: A Proposal*, in PERSPECTIVES ON CUBAN ECONOMIC REFORMS, *supra* note 22, at 110.

³⁴⁴ *Id.* at 107-11.

³⁴⁵ See, e.g., Gerald P. Neugebauer III, Note, *Indigenous Peoples as Stakeholders Influencing Resource Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227, 1230-31 (2003) (suggesting the embrace of the language of stake-holding to translate the cluster of rights of indigenous peoples in resource rich areas into a language that world corporate culture can understand).

³⁴⁶ The charge Leon Trotsky made in the 1930s against the emerging system of Soviet governance is worth considering by Cuban elites intent on preserving the Revolutionary system over the long term:

A guaranteed, an "irrevocably" rooted socialism cannot possibly require an omnipotent bureaucracy, with an absolute ruler on top of it, for the dictatorship in general is after all nothing but a state means of preserving and protecting the menaced and not the assured foundations of the socialist state. The intrepid attempt of many "theoreticians" to refer to external dangers, is much too absurd to be taken seriously. A society whose socialist structure is assured, whose internal relations thus repose upon the solidarity of the overwhelming mass, does not require an internal dictatorship for protection from external foes, but only a technico-military apparatus, just as it requires a technico-economic apparatus for its welfare.

Trotsky, *supra* note 333, at 177-17.

Many commentators are looking forward, with varying degrees of hopefulness, to the collapse of the Cuban Stalinist state and the resurrection of a full-blown free market economy (or at least the appearance of one) in newly liberated Cuba.³⁴⁷ I suggest that the future poses dangers not only for the purity of the Stalinist state created by the current regime, but also for the integration of Cuba into the global marketplace, whatever economic system is ultimately adopted on the island.

The Whitehall/Quai D'Orsay/Kremlin/American New Deal approach to reform still has some advocates in transition countries: good reformers, who are clever and well-informed, can be given wide political and legal discretion free from accountability because they will zealously promote the public or proletarian interest. The wreckage caused by this antithesis of the Rule of Law is visible worldwide and in secret Swiss bank accounts. Kenyatta's and Moi's Kenya, Nkrumah's Ghana, and Mugabe's Zimbabwe are examples of this phenomenon from recent African history.³⁴⁸

Moreover, I have suggested that unless Cuba creates an indigenous system of corporate organization true to the fundamental organization of the state and opens its doors, Cuba may find its doors opened for it, and a system, compatible with globalized norms but which would produce great changes in Cuba, may be imposed. For Cuba, however, reform may have to wait. Cuba's dynastic succession problems will likely put most significant reforms on hold. Should the current regime choose to embark on ambitious reform, it is possible that the elite will hold back on its implementation for fear of changes after a change of government. Should the current regime do nothing, many, both inside and outside the country, with political and economic ambition, will begin to put into play potentially incompatible plans. The end result, in either case, may be to increase the likelihood of instability and make outside intervention that much easier. However, there may be measures, which, though small, could provide a measure of stability. Retaining control through the mechanism of global economic organization—autonomous economic entities—may be the most viable solution for a socialist Cuba. Adoption of global forms of economic organization would help integrate Cuba into the global economy. Retention by the state of the power to regulate corporations (and other autonomous economic entities) along with large holdings of shares in these entities would ensure a significant degree of indirect control of those sectors of the economy formerly merged into the state apparatus itself. But this route requires a reassessment of the continued viability of the old-fashioned Stalinism that forms the heart of the political ideology of the state. There is nothing in the Cuban Constitution that forbids a shift of focus within socialism—Stalinism is not written into the Constitution. Failure to modify patterns of economic organization now may well permit others

³⁴⁷ Though some are less optimistic than others. See, e.g., FALCOFF, *supra* note 20 (speculating on a scramble for power after Castro's death).

³⁴⁸ Paul H. Brietzke, *The Politics of Legal Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 1, 35 (2004).

to force more drastic changes later.